STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

Before the Illinois Workers' Compensation Commission

WALTER KOZIOL,

Petitioner,

vs.

NO: 10 WC 22138
18 IWCC 654

TEMPEL STEEL,

Respondent.

ORDER

The Commission on its own Motion recalls the Decision and Opinion on Review of the Illinois Workers' Compensation Commission dated October 30, 2018, pursuant to Section 19(f) of the Act due to a clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated October 30, 2018 is hereby recalled and a Corrected Decision and Opinion on Review is hereby issued simultaneously. The parties should return their original decision to Commissioner Michael J. Brennan.

Dated: OCT 31 2018

Commissioner Michael J. Brennan

10/31/18
MJB/tdm
052

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

WALTER KOZIOL,

Petitioner,

vs.

NO: 10 WC 22138
18IWCC 654

TEMPEL STEEL,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, temporary total disability (TTD), and permanent partial disability (PPD), and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the clerical error on page 2 of the Decision of the Arbitrator. The Arbitrator awarded Petitioner $564.39 per week for 205 weeks, as the injury caused 100% loss of use of the left hand, as provided in Section 8(e) of the Act. As the amputation rate is equal to 60% of the average weekly wage (AWW), the Commission modifies the PPD rate to $507.95, representing 60% of the AWW of 846.59.

Next, the Commission agrees with the Arbitrator's award of 20% loss of use of the person-as-a-whole for his loss of occupation. However, the Commission finds that this award shall also compensate Petitioner for his mental and emotional injuries sustained as the result of the traumatic amputation of his left hand. Accordingly, the Commission awards Petitioner 20% loss of use of the person-as-a-whole for his loss of occupation and for his mental and emotional injuries resulting from the work accident.

Finally, Petitioner's attorney raised the issue of Attorney David Martay's Fee Petition in

his Statement of Exceptions and during oral argument. Arbitrator Bocanegra conducted a hearing regarding the issue of fees; however, the issue was taken under advisement and continued until the disposition of the case. As the Arbitrator has lost jurisdiction, this issue must now be handled at the Commission level. This issue will be set for hearing before Commissioner Michael J. Brennan at a later date and notices will be sent to the parties.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2018 is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $564.39 per week for a period of 87-1/7 weeks, June 6, 2010 through February 5, 2012, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent shall be given a credit of $44,385.28 for temporary total disability benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary partial disability benefits totaling $836.20 for the period of February 6, 2012 through February 19, 2012 and February 27, 2012 through March 11, 2012, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $836.20 for temporary partial disability benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $507.95 per week for a period of 205 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 100% loss of use of the left hand. Respondent is entitled to a credit of $104,129.75 for permanent partial disability benefits previously paid for the statutory loss.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $507.95 per week for a period of 100 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the 20% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,550.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $58,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 3 1 2018

MJB/tdm
O: 10/23/18
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

KOZIOL, WALTER
Employee/Petitioner

Case# **10WC022138**

16WC001043

TEMPEL STEEL
Employer/Respondent

18IWCC0654

On 2/14/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.78% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0320 LANNON LANNON & BARR LTD
MICHAEL S ROLENC
200 N LASALL ST SUITE 2820
CHICAGO, IL 60601

2461 NYHAN BAMBRICK KINZIE & LOWRY
DONALD R EGAN
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Walter Koziol
Employee/Petitioner

v.

Tempel Steel
Employer/Respondent

Case # **10 WC 22138**

Consolidated cases: **16 WC 1043**

18IWCC0654

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maria Bocanegra,** Arbitrator of the Commission, in the city of **Chicago,** on **9/20/2017 and 10/16/2017.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Martay Fee Petition**

18IWCC0654

CORRECTED FINDINGS

On 6-5-2010, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $44,022.68; the average weekly wage was $846.59.

On the date of accident, Petitioner was 55 years of age, ***married*** with 1 dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $44,385.28 for TTD, $836.20 for TPD, $0 for maintenance, and $104,129.7 for statutory amputation, for a total credit of $149,351.23.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act.

CORRECTED ORDER

Respondent shall pay Petitioner temporary partial disability benefits totaling $836.20 for the period 2/6/12 through 2/19/12 an 2/27/12 through 3/11/12, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $836.20 for tempora partial disability benefits previously paid.

Respondent shall pay Petitioner temporary total disability benefits of $564.39/week for 87-1/7th weeks, commencing 6/6/1 through 2/5/12, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $44,385.28 for temporary tot disability benefits previously paid.

Respondent shall pay to Petitioner reasonable and necessary medical services of $2,550.00, as provided in Section 8(a) of t Act.

As to *10 WC 22138*, Respondent shall pay Petitioner permanent partial disability benefits of $564.39/week for 205 weel because the injuries sustained caused the 100% loss of the left hand, as provided in Section 8(e) of the Act. Respondent sh be given a credit of $104,129.75 for permanent partial disability benefits previously paid for the statutory loss.

As to *10 WC 22138*, Respondent shall pay Petitioner permanent partial disability benefits of $507.95/week for 100 weel because the injuries sustained caused the loss of occupation to the extent of 20% loss of the person as a whole, as provided Section 8(d)2 of the Act.

18IWCC0654

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a revie in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE IF the Commission reviews this award, interest at the rate set forth on the *Notice of Decision o Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either n change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2-16-2018
Date

ICArbDec p. 2

FEB 14 2018

CORRECTED FINDINGS OF FACT

Petitioner testified he was hired by the Respondent in 1984 as a press operator. In June 2010, Petitioner's job title was that of a die setter. Petitioner testified on June 5, 2010, he had finished working on machine number 213 when the group leader sent him to machine number 211. While working on machine number 211, a part became stuck inside the machine so Petitioner turned off the machine and attempted to retrieve the jammed part. As he was pulling on the part to extricate it from the machine, the machine went on and the gate dropped down on Petitioner's left hand jamming it inside the machine. Petitioner testified he yelled for co-workers to come and help him but, apparently, everyone thought he was joking so no one came over. After approximately 40 minutes, with Petitioner feeling weak, he used his left knee and right hand to open the gate and pull his hand out.

Petitioner testified he then started running for help and passed out. He testified he was taken to St. Francis Hospital in Evanston where he underwent a left wrist disarticulation (amputation) by Dr. Klaud Miller. Px1. After he was discharged from the hospital, Petitioner continued under the care of Dr. Miller until July 8, 2010. Px2.

Petitioner testified Dr. Miller referred him to Dr. Kuiken of the Rehabilitation Institute of Chicago so that he could be fitted for a prosthetic. The RIC records also reflect that Petitioner was advised he would need a skin graft. Petitioner's medications were also changed. Px7.

Petitioner testified he was referred to Dr. Enrique Gonzalez, a psychologist. Px9. Petitioner saw Dr. Gonzalez from August 7, 2010 through February 14, 2013 and discussed the pain he was experiencing in his left arm, the problems he was having sleeping, his anxiety and suicidal thoughts. Dr. Gonzalez diagnosed Petitioner with adjustment disorder with anxiety and depressed mood. He recommended cognitive behavioral therapy and antidepressant and antianxiety medication if he did not respond.

Petitioner testified he came under the care of Dr. Charles Carroll who he initially saw on August 11, 2010. Px4. Dr. Carroll examined Petitioner and recommended occupational therapy. He also opined that Petitioner may need two additional operations
On August 19, 2010, Petitioner was seen by Dr. Robert Reff, a psychiatrist, at the referral of Dr. Gonzalez. Petitioner testified that he had 33 sessions through November 28, 2012 with Dr. Reff. Px10.

Petitioner testified that over the course of 2010 and 2011, he continued treating with Dr. Carroll, Dr. Kuiken, Dr. Gonzalez and Dr. Reff.

Petitioner testified that Dr. Carroll performed additional surgeries on his left arm on August 26, 2010 (debridement), on August 31, 2010 (debridement), on September 28, 2010 (revision amputation and neurectomy) and December 29, 2011 (resection of the median and radial nerves, ulnar neuromas and revision amputation).

In 2011, Petitioner was examined at the request of Respondent with Dr. Alexander Obolsky. Rx2. Dr. Obolsky found Petitioner to be malingering his reported symptoms of mental ill being and that Petitioner did not develop any condition of mental ill-being as a result of the work accident.

Petitioner testified that throughout 2010 and 2011, he continued noticing pain with his left limb. Throughout this period, Petitioner also testified he was having trouble sleeping and was depressed. Petitioner testified he was fitted for a prosthesis and brought it with him to court. He testified he rarely wears the prosthesis because it bothers his forearm and the area around his stump. He also testified that he wears a fitted sleeve over his forearm when he works.

Petitioner testified that in July 2011, he was notified by his former attorney, David Martay, that there was work available for him. He testified that he was told he would be able to volunteer in a nursing home. Petitioner testified he went to the nursing home along with Rhonda, the workers' compensation coordinator from Tempel. He also testified that an individual named Sonya was there. He testified that when he got there, there were people screaming and crying and emotionally, he was unable to handle it. He told them he would be unable to work there but he would be willing to return to work anywhere else.

Petitioner was subsequently notified of a position at Resurrection Hospital which he was able to perform. Petitioner testified he was sitting by a table and talking to people who were arriving in the hospital and directing them to different waiting areas. He also testified he was volunteering in the physical therapy department for a while. He was paid by the Respondent while he was volunteering at Resurrection Hospital.

Petitioner subsequently was advised that he could return to work for the Respondent. He testified he returned sometime in February 2012. When Petitioner returned to work, he was given a different job which involved pulling parts from one box and checking them for defects. If the part was not defective, he would place it in another box. If it was defective, he would throw it onto the scrapheap. Petitioner testified he used his right arm for this job and handled 4,000 parts per day. He performed this job on a full-time basis up until May 8, 2014.

Date of Accident May 8, 2014

On May 8, 2014, Petitioner testified he was performing his job and was told by a group leader to stop. He was told they have a "hot job" that needed to be done. Petitioner testified he went to a different area of the plant and using a stick, he would put several parts onto the stick and lift them out of a box. He would then have to separate the bad ones from the good ones and then he would throw the parts into another box. Petitioner demonstrated this by using his right arm in an underhanded motion. Petitioner testified that in front of him and near the box where he was throwing these parts were several skids. Petitioner testified that as he let go of the parts that were on the stick, he felt a sudden pain in his right shoulder and then he fell sideways onto the skid hitting his right shoulder and head on the skid.

Petitioner was sent immediately to Physicians Immediate Care where he gave a history of what happened to him. The records reflect that Petitioner's pain was worse with movement. Petitioner was diagnosed with a shoulder sprain and advised to return to restricted work. Px11. Petitioner followed up with the clinic on May 13, 2014 advising he was still having pain in his right shoulder and unable to lay on the right side of his bed. He was referred for an MRI and physical therapy. Petitioner returned on May 21, 2014 advising he was still having pain in his right shoulder. He was getting little relief from the physical therapy. He stated the pain radiates down his right arm. On May 27, 2014, Petitioner underwent a right shoulder MRI at Lincoln Imaging Center. The MRI revealed glenohumeral joint arthritis with possible underlying fibrillation/partial maceration of the labrum. He was also diagnosed with a possible biceps tendon tear, arthritis and degenerative joint disease in the AC joint.

On June 5, 2014, Petitioner came under the care of Dr. Roger Chams of Illinois Bone & Joint Institute. Petitioner informed Dr. Chams of the injury of May 8, 2014. Dr. Chams reviewed the MRI and opined that it was of poor quality so he ordered a repeat MRI. He also administered a Kenalog injection to Petitioner's right shoulder. Px12. Petitioner underwent the right shoulder MRI on June 12, 2014 at 3T Imaging. The MRI revealed a partial thickness tear of the rotator cuff and a full thickness tear of the long head of the biceps tendon. There was also an associated tear involving the superior, posterior-superior and anterior labrum. Petitioner returned to Dr. Chams on June 24, 2014 and was scheduled for surgery.

Petitioner underwent a right shoulder arthroscopy with debridement of the labrum and glenohumeral joint, a subacromial decompression, distal clavicle resection and Mumford procedure as well as rotator cuff repair on September 12, 2014 at Northwest Memorial Hospital. Px12.
Petitioner continued his post-op treatment with Dr. Chams. Dr. Chams ordered physical therapy for Petitioner which Petitioner began on September 29, 2014 at Accelerated Rehabilitation. Petitioner testified that his last visit with Dr. Chams was on July 23, 2015. At that time, Petitioner was still complaining of deltoid, biceps and triceps pain. Dr. Chams administered a third Kenalog injection and released Petitioner with permanent restrictions of no overhead lifting with his right arm and no lifting greater than 5 pounds. He further opined that Petitioner may need possible arthroscopic surgery in the future if his shoulder/arm conditions do not improve.

Petitioner testified that in 2016, he started noticing some additional problems and pain with his left arm so he returned to Dr. Carroll on May 27, 2016. Dr. Carroll noted that Petitioner was having variable cramping and pain along with cold sensitivity. He also noted that Petitioner's function had decreased. Dr. Carroll recommended a selected reinnervation of the median ulnar and radial nerve. Px4. Petitioner returned to Dr. Carroll on June 17, 2016 with the same complaints. Dr. Carroll recommended the aforementioned surgery and referred Petitioner to Dr. Gregory Dumanian. Petitioner saw Dr. Dumanian on July 20, 2016. Dr. Dumanian offered two options: a neuroma excision in burying in muscle. The other option was targeted innervation and nerve transfers after a neuroma excision. In a subsequent visit on August 24, 2016, Petitioner was advised by Dr. Dumanian that he would no be a good candidate for the randomized study that was previously recommended. He opined Petitioner would be an excellent case for the prosthetic control arm of the study. This is a procedure that would be done with Dr. Carroll. Petitioner then saw Dr. Carroll on September 23, 2016. With Petitioner voicing the same complaints, Dr. Carroll recommended the surgery again.

Petitioner testified he had a subsequent fall at home injuring his left elbow. He underwent surgery to the left elbow and he testified that the doctor had to move the nerves in his left forearm and by doing that, he actually reduced some of the pain that he was previously experiencing. Petitioner testified that due to the decreased pain, he elected not to undergo the surgical procedure recommended by Dr. Carroll. Petitioner testified, however, that if the pain in his left forearm should revert to where it was before he fell, he would consider undergoing the surgery if Dr. Carroll was stil recommending it.

Petitioner testified that he currently has different types of pain in his left forearm. He testified the stump is sensitive He also testified that he does have pain in the left forearm but it is not as severe or as sharp as it was before he fell. He testified that at work, the left forearm gets cold so he runs it under warm water. He also massages it to bring warmth to the forearm. He testified that he wakes up from his sleep because of the pain in his left forearm. He testified that sometimes when he rubs his forearm on the bed, he gets pain which causes him to wake up.

Petitioner testified that regarding his right shoulder, he has pain but not every day. He testified his current job involves checking gauges and if they have expired, then he has to replace them. He testified that this job requires hi to brush rust off different parts and that he has to use his right arm in a repetitive motion. He does this throughout th day and this will cause pain in the right shoulder.

Petitioner testified that his current job which involves working with the gauges is not the job that he was doing when he returned to work following his first accident. Petitioner further testified that he is making $21.42 an hour and the he intends to continue working there until retirement. On cross-examination, Petitioner testified he has not been given any reason by anyone at work that he would be fired. Also on cross-examination, Petitioner testified that he saw a Dr. Obolsky in 2011 at the request of the Respondent. He also testified to seeing a Dr. Vender and Dr. Wolin

18IWCC0654

CONCLUSIONS OF LAW

ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, causal connection was disputed as to both claims.

a. Date of Accident – June 5, 2010 – 10 WC 22138

Based on Petitioner's testimony and all of the medical records offered into evidence, the Arbitrator finds that Petitioner's current condition of ill-being involving his left arm is causally related to the accident of June 5, 2010. Here, there is no doubt Petitioner's work accident resulted in a traumatic amputation of the left hand. Due to ongoing pain and problems, Petitioner underwent (4) additional subsequent surgical procedures. Most recently, a December 5, 2016 medical report authored by Dr. Charles Carroll references a proposed reconstructive procedure which he and Dr. Dumainan believed was medically necessary for Petitioner. Dr. Carroll based this opinion on Petitioner's persistent neuroma pain of his median and ulnar nerve which was the direct result of the amputation on June 5, 2010. Dr. Carroll opined that Petitioner has ongoing residual pain in those nerves proximally where they were resected and buried in muscle. The pain limits his function and the use of the prosthesis as the cup attachment irritates the neuromas. The proposed surgery would resect the neuromas in routing the pain generating sensory fibers into a motor nerve, which would decrease the nerve pain and allow for better function of the prosthesis. Dr. Carroll further opined that he agreed with Respondent's IME doctor, Dr. Vender, regarding the one surgical procedure so he offered Petitioner this option so he could have a better life and work capability by using the prosthesis. The Arbitrator relies on this evidence in support of the conclusion that Petitioner's current condition of ill-being as it relates to the left hand amputation is ongoing and in fact causally related to his undisputed work accident of June 5, 2010.

The Arbitrator further finds that Petitioner's mental health condition is causally related to his June 5, 2010 work accident as a psychological sequelae of the traumatic hand injury Petitioner witnessed and experienced. Mental health records introduced into evidence diagnosed Petitioner was PTSD, depression and anxiety for which he underwent extensive mental health psychological and psychiatric care with Drs. Gonzalez and Reff. In reviewing the opinion of Dr. Obolsky, the Arbitrator notes that Dr. Obolsky found Petitioner to be malingering his reported symptoms of mental ill being and that Petitioner did not develop any condition of mental ill-being as a result of the work accident. The Arbitrator has carefully considered the entire record as well as the opinions of Drs. Gonzalez, Reff and Obolsky and the Arbitrator finds that Petitioner's treating doctors' opinions are entitled to more weight. Drs. Gonzalez and Reff documented Petitioner's flashbacks of the occurrence, ongoing depression, anxiety and general low self-esteem and morale following the traumatic work accident. There is no evidence Petitioner exhibited any of these conditions, diagnoses or symptoms at any time prior to the work accident. While Dr. Obolsky found Petitioner to be allegedly malingering his symptoms, the doctor did not explain what symptoms were being malingered, what test(s), if any, tended to demonstrate malingering and to what degree, if any, Petitioner was malingering. For example, the doctor noted Petitioner reported somatic symptoms and symptoms about the stomach and heart. However, the doctor did not account for Petitioner's unrelated health conditions, if any, and whether those were being considered in the overall assessment. The Arbitrator also notes that Dr. Obolsky's evaluation was in May and June of 2011 whereas the report was not completed until five months later, November 2011. By that time, Petitioner was already volunteering at Resurrection Hospital which contradicts his belief that Petitioner was malingering for financial gain.

In summary, the Arbitrator finds Dr. Obolsky's opinions are entitled to lesser weight than those of Drs. Gonzalez and Reff and that Petitioner's condition of mental health ill-being is causally related to his undisputed work accident of June 5, 2010.

b. Date of Accident – May 8, 2014 – 16 WC 1043

Based on Petitioner's testimony and all of the medical records offered into evidence, the Arbitrator finds that Petitioner's current condition of ill-being involving his right shoulder is causally related to the accident of May 8, 2014. Petitioner's unrebutted and credible testimony was that he injured his right shoulder when he went to toss a piece of material to the side. The Arbitrator finds this mechanism of injury to be a single acute traumatic event and unrelated to Petitioner's June 5, 2010 work accident as either a sequelae or repetitive/over-use traumatic injury. The Arbitrator finds that Petitioner's right shoulder was otherwise in a state of good health immediately prior to the May 8, 2014 work accident even in the face of Petitioner's ongoing left hand amputation injuries. In support of finding Petitioner's right shoulder causally related to the May 2014 work accident, the Arbitrator relies on the medical opinions of Drs. Chams and Wolin, both of whom referred to the shoulder condition as having resulted from a work accident. Further, Dr. Wolin opined that the right shoulder was in fact causally related to the work accident. The Arbitrator adopts the opinions and findings of both doctors as they relate to causation. These medical opinions were not challenged or contradicted in the record. Thus, the Arbitrator finds that Petitioner's current condition of ill-being involving his right shoulder is causally related to the accident of May 8, 2014.

ISSUE (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, liability for the unpaid medical charges of Dr. Gonzalez for the June 5, 2010 work accident were disputed. Ax1. Medical bills were not at issue in the second claim. Ax2. Having found in favor of Petitioner on the issue of causal connection in 10 WC 22138, the Arbitrator further concludes that Petitioner has proven that the medical and psychological services provided to him were both reasonable and necessary and that Respondent has not yet paid all appropriate charges for same. The record shows that there were 14 visits with Dr. Gonzalez which were not paid for by Respondent. These were not paid pursuant to Dr. Obolsky's opinion that Petitioner required no further mental health treatment. Those 14 visits all occurred after the examination with Dr. Obolsky. The total unpaid bill is $2,550.00.

The Arbitrator has reviewed the office notes of Dr. Gonzalez between October 18, 2012 and February 14, 2013. Those records are replete with complaints voiced by Petitioner which would be reasonable and expected following an injury of this nature. There is nothing in the records of Dr. Gonzalez which would suggest that Petitioner is exaggerating his complaints for any untoward purpose such as financial gain. The Arbitrator also notes that Petitioner testified he had never been under the care of a psychiatrist or a psychologist prior to this injury. The Arbitrator adopts the findings and opinions of Dr. Gonzalez and discounts those of Dr. Obolsky. The Arbitrator finds that Respondent is liable for payment of the medical bill of Dr. Gonzalez in the amount of $2,550.00 as the services Dr. Gonzalez provided were reasonable and necessary for Petitioner following his injury and that Respondent shall be liable for same, subject to Sections 8(a) and 8.2.

ISSUE (K) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, temporary total disability benefits for the June 5, 2010 work accident were disputed. Ax1. Such benefits were not at issue in the second claim. Ax2. The disputed period of TTD is from July 22, 2011 through

September 18, 2011. Respondent suspended TTD benefits based upon Petitioner allegedly failing to appear for work offered via CJE Senior Life for work offered. Rx1. The Arbitrator has reviewed all evidence, including Petitioner's testimony, and finds Petitioner is entitled to TTD for this time period. First, the medical records indicate that Petitioner was encouraged by the case manager to volunteer, in an effort to help cope with the emotional and mental trauma sustained following the work accident. The medical records clearly suggest that this was volunteer work contemplated in the context of Petitioner's ongoing mental health treatment. This was not presented as a bonafide job offer, detailing the wages to be earned, the work to be performed and the hours expected to work. The Arbitrator notes the specific medical records in support thereof:

On May 4, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor explained the possibility of patient ***volunteering*** for four hours a day at a local church or hospital. The doctor explained that it was the recommendation made by Dr. Kuiken and that he agreed with the idea which would get him out of the house in order to decrease isolation as well as improve his mood and self-esteem. (Emphasis added).

On May 11, 2011, Dr. Gonzalez noted that Petitioner's nurse case manager had arranged for Petitioner to do some ***volunteer*** work at resurrection hospital and that he would be receiving an application for that in the mail. (Emphasis added).

On June 1, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor noted that Petitioner brought with him to the appointment a letter from Resurrection Hospital stating that he was scheduled to attend orientation for ***volunteer*** services on August 16, 2011. Petitioner expressed frustration because of the delay in the scheduling of this orientation. (Emphasis added).

On June 29, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor noted Petitioner appeared upset due to having received a letter from his nurse case manager requesting that he attend an orientation meeting to ***volunteer*** at an adult day services center. (Emphasis added).

On July 6, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. Petitioner indicated he had recently attended a meeting at the adult day services and stated that the experience left him feeling overwhelmed. According to Petitioner, this would be further postponed until he was evaluated by Dr. Carroll on July 11.

On July 11, 2011, Dr. Charles Carroll indicated that Petitioner could return to work with no use of the left hand [sic]. Px3. On July 22, 2011, Petitioner followed up with Dr. Gonzalez for psychological follow up. Petitioner expressed anger in reaction to an overnight letter he received instruction him to attend a meeting at an adult aide services center to begin volunteering in today's time which conflicted with his appointment with Dr. Gonzalez on July 22.

On August 3, 2011, Dr. Reff wrote a letter indicating that Petitioners level of psychological recovery remain fragile. It was the doctor's opinion that in the best interest of Petitioners psychological and psychiatric health as well as the best interest of his overall recovery that he be permitted to volunteer at Resurrection Hospital and not be required to volunteer at a nursing home. The doctor expressed concern regarding the atmosphere in the nursing home as well as transportation issues getting to the nursing home.

On August 3, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. The doctor wrote a letter allowing Petitioner to volunteer at Resurrection Hospital and not at the nursing home as previously instructed. The doctor indicated his agreement with Dr. Reff regarding volunteering since this process had adversely affected Petitioner's progress.

On August 17, 2011, Patricia returned to Dr. Gonzalez for psychological follow up. Petitioner reported that he attended his orientation meeting at Resurrection Hospital.

On August 26, 2011, Petitioner returned to Dr. Gonzalez for psychological follow up. Petitioner reported that he had attended his second interview at resurrection hospital with the possibility of me getting volunteering in the next two weeks. The doctor recommended an evaluation for neuropathic pain and ongoing therapy. As of September 14, 2011, Petitioner reported that he was still awaiting a volunteer schedule with resurrection hospital. On September 21, 2011, Petitioner return it to Dr. Gonzalez for psychological follow up. He reported that he had attended his first day at the volunteer program and that he will know his schedule next Monday.

As evidenced by the above medical documentation, there is no doubt Petitioner was never given a light duty offer of employment but rather was arranged for volunteer work. Petitioner had a scheduling conflict with the July 22nd orientation date and given the short notice to attend volunteer orientation, the Arbitrator finds Petitioner's reasons wholly reasonable. Petitioner's unrebutted testimony was that he did eventually appear at the nursing home with Rhonda and Sonya. He testified that Rhonda was the work comp coordinator for Respondent. He testified that when he got to the nursing home and saw the people crying and hollering, he was emotionally unable to handle it. He said it brought back memories of his injury from June 2010. He testified that he would agree to other work but that he could not work in the nursing home.

The Arbitrator's conclusions are further supported by the fact that Petitioner was never paid for any of the volunteer work he eventually went on to complete, thereby further showing that this was volunteer work and not a true job offer. Because the Arbitrator assigns no weight to the alleged job offer(s) noted in Rx1, the Arbitrator need not consider the remainder of the contents of the letter. The Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of July 22, 2011through September 18, 2011.

ISSUE (L) What is the nature and extent of the injury?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, the nature and extent of Petitioner's injuries for both claims were disputed. Ax1, Ax2.

a. Date of Accident – June 5, 2010 – 10 WC 22138

As a result of the June 5, 2010 accident, Petitioner sustained a traumatic amputation of his left hand for which the Respondent paid 100% loss of the entire non-dominant left hand. In addition, Petitioner testified to mental and emotional issues with necessitated treatment with a psychologist and a psychiatrist. In reviewing the June 19, 2017 medical report of Dr. Carroll, he opined that Petitioner's work status was unchanged. When looking back to the September 20, 2016 office note of Dr. Carroll, Petitioner's work status was no use of the left extremity. The records show that, at most, doctors were able to recommend that that left arm be used as a functional assist. Further, records demonstrate that the injury resulted in an amputation, impaired motion and sensation, impaired sleep, restricted work a job change and psychological injury.

Petitioner testified that following this injury, he returned to work in a different job for the Respondent. The new job involved primarily use of his right hand and arm. While no significant loss in income was established, it is apparent that Petitioner's injury resulted in a job change for him. Petitioner's previous job was as an established press operator since 1984 for Respondent. As to *10 WC 22138*, the Arbitrator finds that Petitioner has sustained a **loss of occupation** and is awarded **20%** pursuant to Section 8(d)2.

b. Date of Accident – May 8, 2014 – 16 WC 1043

As a result of the May 8, 2014 accident, Petitioner underwent a right shoulder arthroscopy with debridement of the labrum and glenohumeral joint, a subacromial decompression, a distal clavicle resection and Mumford procedure as well as a rotator cuff repair. Following the surgery, Petitioner underwent two cortisone injections into his right shoulder. Dr. Chams released Petitioner to return to work with permanent restrictions of no overhead lifting with his right arm and no lifting greater than 5 pounds. Dr. Chams further opined Petitioner may need possible arthroscopic surgery in the future if his shoulder/arm conditions do not improve.

Petitioner received two post-op cortisone injections to his right shoulder as he was continuing to complain of deltoid, biceps and tricipital pain as of his July 23, 2015 visit with Dr. Chams. He was also complaining of pain with any repetitive use. He advised Dr. Chams that most of his pain was at the bicipital groove.

In the final progress note of July 23, 2015, Dr. Chams noted positive tenderness to palpation of the right bursa but the left bursa finding was negative. There was positive impingement I on the right but negative on the left. The Speed's test was positive on the right but negative on the left. Elevation on the right was 3+ to 4/5, adduction was 3+ to 4/5 and external rotation was 4/5 whereas on the left, all were 5. As of Petitioner's last visit on July 20, 2015 at Athletico, there were still deficits noted in various range of motion measurements. For the purposes of this section, the Arbitrator finds Petitioner reached MMI on July 23, 2015.

The Arbitrator also notes in the April 5, 2016 report of Respondent's Section 12 examiner, Dr. Wolin, there was significant loss of range of motion on the right shoulder as compared to the left shoulder. In the muscle strength category, Dr. Wolin noted significant findings in the right shoulder as compared to the left. Dr. Wolin also noted positive albeit moderate findings on the Yergason's and Hawkins-Kennedy test on the right whereas both were negative on the left.

Pursuant to Section 8.1(b) of the Act, the following factors are to be considered in determining the level of permanent disability for accidental injuries occurring on or after September 1, 2011:

(i) The reported level of impairment;
(ii) The occupation of the injured employee;
(iii) Age of employee at the time of injury;
(iv) The employee's future earning capacity;
(v) Evidence of disability corroborated by the medical records.

With regard to Subsection (i) of Section 8.1b(b), the Arbitrator notes that there was a 9% extremity impairment which translated to a 5% whole person impairment rating. The Arbitrator notes that impairment does not equate to permanent partial disability under the Workers' Compensation Act. Dr. Wolin's diagnosis was that of osteoarthritis shoulder and he noted if there are multiple diagnoses, the most impairing one is used. In this respect, the doctor chose the correct diagnosis. Dr. Wolin arrived at a quick-dash score of 65.9 but did not include a copy of the Q-Dash with his impairment report so that the Arbitrator may review his findings. Dr. Wolin did not specifically include loss of range of motion or any other measurements that would establish the nature and extent of the impairment pursuant to Section 8.1(b). Dr. Wolin did not consider a grade modifier for clinical studies even though the surgical report could have been used in this way. The Arbitrator, therefore, gives little weight to this factor.

With regard to Subsection (ii) of Section 8.1b(b) of the Act, the occupation of the employee, the Arbitrator notes that the record reveals Petitioner was initially employed as a press operator and that as a result of the 2014

accident, he was given permanent restrictions which had him working as a gauge inspector. Petitioner continues to work in this accommodated capacity as a gauge inspector. The Arbitrator therefore, gives greater weight to this factor.

With regard to Subsection (iii) of Section 8.1b(b) of the Act, the Arbitrator notes that Petitioner was 58 years old at the time of the 2014 accident. His age indicates that he may feel the effects of his shoulder injury to a greater degree compared to a younger worker. His age also suggests that he may be nearing the end of his work life expectancy. Given the aforementioned, the Arbitrator give greater weight to this factor.

With regard to Subsection (iv) of Section 8.1b(b) of the Act, Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified he was earning the same as he was at the time of the accident. There is no evidence in record to suggest any loss of future earnings or possible loss of future earnings. The Arbitrator gives no weight to this factor.

With regard to Subsection (v) of Section 8.1b(b) of the Act, the evidence of disability corroborated by the treating medical records, the Arbitrator notes that in the final visit with Dr. Chams on July 23, 2015, Dr. Chams noted Petitioner's symptoms and clinical findings persisted as did limitations during his orthopedic examination. This was confirmed in the Section 12 report of Dr. Wolin. Dr. Chams also noted Petitioner may need a future surgery. The Arbitrator, therefore, gives greater weight to this factor.

Based upon the foregoing, as to ***16 WC 1043***, the Arbitrator finds that Petitioner sustained a **15%** loss of th man as a whole pursuant to **Section 8(d)2** of the Act as a result of the right shoulder injury.

ISSUE (O) ***Martay Fee / Attorney Fee Dispute***

Prior to Petitioner's testimony on September 20, 2017, Petitioner's attorney made an oral Motion to Dismi the Petition for Attorney's Fees filed on March 19, 2015 by Petitioner's former attorney, David W. Martay. This fe petition was filed on Case 10 WC 22138 only and was entered and continued to disposition by this Arbitrator on Jur 2, 2015. Px15. Petitioner's attorney stated on the record that he notified attorney Martay of today's hearing. Wi Martay having failed to appear, attorney Rolenc made an oral motion to dismiss Martay's fee petition. Attorn Rolenc also stated that the fee petition filed by Martay was a generic fee petition and did not itemize the time ar work performed on the file. Attorney Rolenc also offered into evidence Petitioner's Exhibit #14 which was a fax se to attorney Martay on September 8, 2017 advising him of today's trial date.

Subsequent to closing of proofs, Attorney Martay on September 26, 2017, filed a motion to re-open proc regarding his Fee Petition. By agreement of Petitioner's counsel, Respondent's counsel and Martay, proofs were r opened and the matter was set for hearing on October 16, 2017. Attorney Martay along with Attorney Rolenc a Attorney Egan were all present.

Martay offered his itemized Fee Petition into evidence with Rolenc stating that he had just received tl itemized Fee Petition that morning. In support of his Fee Petition, Martay argued that he had spent countless hours representing Petitioner, had received an offer of $40,000.00 and the balance of the Statutory Loss of the amputat left hand and had conversations with Petitioner regarding his second injury which Martay characterized as being overcompensation/repetitive trauma injury. It should be noted that Martay did not file an Application for Adjustm of Claim on Petitioner's second injury and, as such, did not have an Attorney Representation Agreement on file wh would have allowed him to represent Petitioner.

18IWCC0654

Rolenc argued that the settlement offer was unsolicited and that there was no indication that there were an settlement negotiations between Martay and William Lowry, Respondent's attorney at the time the offer was mad This was not refuted by Martay. Rolenc also argued that the statutory loss of the left hand was paid weekly. Roler also argued that Martay informed him he did not have any medical records when he began representing Petitioner i January 2015 as Martay had incurred no costs in the handling of this matter. It was Rolenc who filed the secon case for Petitioner's injury of May 8, 2014 which this Arbitrator, in the companion case, has found to be the result o direct trauma and not repetitive trauma. Petitioner's first accident in no way contributed to his second injury as ther was no overuse of Petitioner's right arm involved.

Having considered the arguments made by each attorney, the Arbitrator finds that Martay's fee petition wa properly filed and continued to disposition. However, because 2010 case has not fully come to disposition in that thi award is subject to further review, any award of attorney's fees by the Arbitrator is premature. However, th Arbitrator notes the arguments made and takes the matter under advisement should the Arbitrator need to enter a award for fees at disposition of the 2010 case.

Signature of Arbitrator

2-16-2018
Date

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTONIO THOMAS,

Petitioner,

No. 12 WC 007955

vs.

FEDERAL ENVELOPE COMPANY,

Respondent.

ORDER

This matter comes before the Commission on Respondent's Petition to Recall the Commission Order to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Order should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Order dated April 17, 2018, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Kevin W. Lamborn.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision shall be issued simultaneously with this Order.

Kevin W. Lamborn

DATED: OCT 2 6 2018
KWL/mav
042

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTONIO THOMAS,

Petitioner,

vs. NO: 12 WC 007955

CEASEFIRE/THE WOODLAWN ORGANIZATION,

Respondent.

CORRECTED ORDER

Respondent, through Counsel, filed a Motion to Vacate or For Other Relief, with the Commission on January 28, 2016, seeking to vacate a Commission Order entered on July 26, 2012. Pursuant to Respondent's Motion, a hearing was held on October 19, 2017, before Commissioner Kevin W. Lamborn. The Commission, having the opportunity to review the transcript of the hearing, including the tendered exhibits, and after being advised of the facts and law, grants Respondent's Motion.

The July 26, 2012, Order was the result of a hearing presided over by Commissioner Lamborn on May 17, 2012 and made findings of fact and conclusions of law that an employer-employee relationship existed between Respondent and Petitioner and also that Petitioner's sustained accidental injuries that arose out of and in the course of his employment on January 17, 2012. Respondent maintained in its Motion and again before Commissioner Lamborn on October 19, 2017, that it had not received notice of the May 17, 2012, hearing.

The July 26, 2012, Order makes reference to both parties being represented by counsel. Respondent contests this assertion, claiming that no attorney had entered an appearance on its behalf prior to September 9, 2015. The Commission's database corroborates this.

No transcript was taken of the May 17, 2012, proceedings. The only explanation for the July 26, 2012, Order making reference to both parties being represented by counsel is that said reference was the result of a scrivener's error.

Respondent maintains it had no agent at the time of the May 17, 2012, hearing who would have received notice and also that no officer within the organization received notice of the hearing. To that end, Respondent provided Commissioner Lamborn with an affidavit on October 19, 2017, signed by Georgette L. Greenlee, Respondent's former Executive Director.

It is noted that the May 17, 2012, hearing was the continuation of a hearing that occurred on April 19, 2012. Notice of the April 19, 2012, hearing was sent to Respondent by Petitioner, via Certified Mail, to 6040 S. Harper Avenue, #2, Chicago, Illinois 60637. Respondent's affidavit states that address was and is not its mailing address and, furthermore, that the Certified Mail received at 6040 S. Harper Avenue, #2, Chicago, Illinois 60637, was not received by anyone within the organization or anyone authorized by the organization to receive the same. The Commission cannot find any evidence that Respondent was made aware of the continuation of the April 19, 2012, hearing until May 17, 2012.

Petitioner tendered into evidence a copy of a voucher addressed to him and purportedly provided to him by Respondent. The voucher indicates Respondent is located at 6040 S. Harper Avenue, Chicago, Illinois 60637. The Commission notes the address on the voucher does not include a unit number. The Commission cannot presume despite the voucher and the Certified Mail being mailed to the same street address that Respondent received any mail addressed to Unit 2 at that address and, therefore, would have been aware of the pending proceedings.

The lack of any evidence to the contrary compels the Commission to conclude Respondent received no notice of the April 19, 2012, hearing or the subsequent May 17, 2012, hearing and, therefore, was not provided with the opportunity to address Petitioner's claims.

IT IS THEREFORE ORDERED BY THE COMMISSION that the July 26, 2012, Order of the Commission is hereby vacated and has no legal effect.

IT IS FURTHER ORDERED BY THE COMMISSION that a Preliminary Hearing Pursuant to Section 4(d) shall be held at a time and date convenient to the Commission and both parties; absent any such agreement as to the time and date for the hearing, either party can file the appropriate motion with the Commission and set forth a time and date for the hearing.

No bond for removal of this cause to the Circuit Court by Respondent is required as the Commission has not entered an award for the payment of money. The party commencing the

proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 2 6 2018
KWL/mav
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ireneusz Grzelak,

Petitioner,

vs. NO: 11 WC 19322

Unlimited Maintenance,

Respondent.

CORRECTED ORDER

A Motion for Recusal having been filed by Petitioner's counsel, Ursula B. Babicz ("Babicz"), due notice having been given, this cause is set before Commissioner Thomas J. Tyrrell for hearing on October 25, 2018, in Chicago, Illinois. For the following reasons, the Commission continues the current pending motion as well as the underlying ongoing Fee Petition dispute:

1. On August 28, 2018, William B. Meyers (Meyers), former counsel for Petitioner, filed a motion seeking a date certain for a final hearing on the ongoing fee dispute between Babicz and Meyers. Meyers set the motion for hearing on Commissioner Tyrrell's September 5, 2018, Chicago Review Call.

2. On September 5, 2018, the matter was continued to Commissioner Tyrrell's October 25, 2018, Chicago Review Call.

3. On October 10, 2018, Babicz filed the pending Motion for Recusal. Babicz set the motion for hearing on Commissioner Tyrrell's October 25, 2018, Chicago Review Call.

4. Due to the seriousness of the allegations in the pending motion and the short amount of time available for this Commission to carefully review and consider the motion, the Commission will continue this matter for hearing on Commissioner Tyrrell's **November 15, 2018**, Chicago Review Call. The hearing will take place at **11:30 a.m.** on that date.

IT IS THEREFORE ORDERED BY THE COMMISSION that Ursula B. Babicz's Motion for Recusal is hereby continued for hearing on November 15, 2018, at 11:30 a.m.

IT IS FURTHER ORDERED that William B. Meyers' September 5, 2018. Motion is also continued for hearing on November 15, 2018, at 11:30 a.m.

IT IS FURTHER ORDERED that both Ursula B. Babicz and William B. Meyers attend the hearing.

DATED: OCT 19 2018

/ Thomas J. Tyrrell

Thomas J. Tyrrell

r-10/25/2018
TJT/jds
51

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ireneusz Grzelak,

Petitioner,

vs. NO: 11 WC 19322

Unlimited Maintenance,

Respondent.

ORDER

A Motion for Recusal having been filed by Petitioner's counsel, Ursula B. Babicz, due notice having been given, this cause came before Commissioner Thomas J. Tyrrell for hearing on October 25, 2018, in Chicago, Illinois. For the following reasons, the Commission has continued the current pending motion as well as the underlying ongoing Fee Petition dispute :

1. Petitioner initially hired Chepov & Scott, LLC to represent him in the underlying workers' compensation case. The firm filed an Application for Adjustment of Claim on December 10, 2014, on Petitioner's behalf.

2. Chepov & Scott, LLC obtained a settlement offer totaling $88,890.07 from Respondent Employer in 2016. Petitioner rejected this offer.

3. Petitioner hired Parad Law Offices, P.C. to represent him in the underlying case in February 2017.

4. On April 10, 2018, Arbitrator Ory approved a Settlement Contract in the underlying case. The total amount of the settlement was $150,000.00. The statutory attorney's fees is $30,000.00.

IT IS THEREFORE ORDERED BY THE COMMISSION that Chepov & Scott, LLC's Petition to Set Fees is hereby granted.

IT IS FURTHER ORDERED that Chepov & Scott, LLC is entitled to $2,000.00 in attorney's fees for work the firm performed on behalf of Petitioner from December 2014 through February 2017.

IT IS FURTHER ORDERED that Barad Law Offices, P.C. is entitled to attorney's fees in the amount of $28,000.00.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 19 2018

Thomas J. Tyrrell

r-7/18/18
TJT/jds
51

STATE OF ILLINOIS)
) SS
COUNTY OF MCHENRY)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY CASSENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 16 WC 13153
	)	18 IWCC 0408
TCH CONSTRUCTION,	)	
	)	
Respondent.	)	

ORDER

This matter comes before the Commission on Respondent's August 6, 2018, Petition to Recall the Corrected Commission Decision to correct a clerical error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Corrected Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Commission Decision dated June 29, 2018, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original corrected decisions to Commissioner Kevin W. Lamborn.

IT IS FURTHER ORDERED BY THE COMMISSION that a revised Corrected Decision shall be issued simultaneously with this Order.

Kevin W. Lamborn

DATED: OCT 10 2018
KWL/mav
42

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY CASSENS,

Petitioner,

vs.

NO: 16 WC 13153
18 IWCC 0408

TCH CONSTRUCTION, INC.,

Respondent.

SECOND CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, incurred medical expenses, TTD, and PPD, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

Petitioner and a coworker, Jose Sandoval ("Sandoval"), on January 21, 2016, were employed by Respondent as carpenters and were tasked to perform work at the residence of Respondent's Vice President, Mark Walker ("Walker"). Petitioner claims to have slipped on the ice at the worksite while walking to a boathouse where construction materials were stored and fell onto his right elbow. Petitioner testified that it was his intention to lock the boathouse.

The presiding Arbitrator found Petitioner failed to prove by a preponderance of the evidence that he sustained injuries that arose out of and in the course of his employment with Respondent on January 21, 2016. In so finding, the Arbitrator concluded "the sheer volume of the Petitioner's varied and inconsistent histories of the January 21, 2016, incident coupled with

the contradictory testimony and documents undermine his claim that he suffered accidental injuries arising out of and in the course of his employment." The Commission acknowledges Petitioner's medical records conflict with the history Petitioner presented at his arbitration hearing but finds Petitioner's testimony credible and reconciles to the Commission's satisfaction any discrepancy between the history Petitioner proffered and the histories contained in Petitioner's medical record.

Petitioner testified to slipping and falling while on the worksite. Sandoval, Respondent's only other employee at the worksite, did not contradict this testimony. Sandoval testified that he did not see Petitioner slip and fall and stated that he did not have his eyes on Petitioner all day. No witnesses were produced to contradict Petitioner's testimony.

Petitioner and Sandoval both testified that they spoke to each while working at the worksite that day, though their testimony diverged with respect to whether Petitioner slipping and falling was discussed. Petitioner testified that he told Mr. Sandoval about his fall. Sandoval testified that Petitioner did not say anything to him about falling on ice.

Petitioner testified that he reported the incident to Walker at 4:29pm on the day of the incident. Mr. Walker testified to speaking with Petitioner at that time and to the conversation being about Petitioner slipping and falling. Petitioner and Walker both testified to having a conversation earlier that day at about 2:56pm that did not touch upon Petitioner slipping and falling. Petitioner testified that he didn't inform Walker of his slipping and falling because his mind at that time was on what the HVAC workers who were working on the house found in the house.

The Arbitrator noted Petitioner's testimony and his medical records both made mention of a driveway. The Arbitrator also noted the medical records indicated that Petitioner fell in his own driveway. Petitioner testified that he told his medical providers that he fell on "the" driveway and it was subsequently interpreted that he was speaking of his own driveway. Julie Cassens ("Cassens"), Petitioner's wife, testified that Petitioner never fell in their own driveway.

The Commission finds Petitioner to be credible and finds, further, the discrepancies between Petitioner's testimony and his medical records and the testimony of both Walker and Sandoval to be not so significant as to find Petitioner otherwise. Accordingly, the Commission finds Petitioner satisfied his burden of proving that the accident he experienced on January 21, 2016, and the resultant injury to his right upper extremity arose out of and in the course of his employment with Respondent.

The injury to Petitioner's right shoulder resulted in him presenting to Mercy Harvard Hospital on the day of the accident. There, he was examined, underwent x-rays, and was discharged with a referral for him to his primary care physician. The following day, on January 22, 2016, he presented to the offices of his primary care physician, Family Medicine for McHenry County. He was seen by Katherine Galias, DNP, as his primary care physician was

unavailable. She ordered Petitioner to undergo an MRI with an additional instruction for him to see Dr. Rolando Izquierdo, Jr., if the MRI revealed any damage to his right shoulder. The MRI was undertaken on January 26, 2016, and revealed multiple injuries to Petitioner's right shoulder. Per the instruction given to him, he presented to Dr. Izquierdo on January 28, 2016.

Dr. Izquierdo examined Petitioner on January 28, 2016, and diagnosed him as having an either an unspecified tear of the rotator cuff or rupture of the right shoulder as well as a supraspinatus tear with retraction, also in the right shoulder. Dr. Izquierdo recommended Petitioner undergo a right shoulder arthroscopy with possible biceps tenodesis. That surgery was performed on March 18, 2018, and resulted in findings of a right shoulder large full-thickness rotator cuff tear, right shoulder subacromial impingement, and right shoulder bicipital tendinosis, partial thickness tearing and instability. These findings were treated with a right shoulder arthroscopic repair of the large full-thickness rotator cuff, right shoulder arthroscopic biceps tenodesis, and right shoulder arthroscopic subacromial decompression with anterior acromioplasty.

Postoperatively, Petitioner continued to treat with Dr. Izquierdo and concurrently underwent physical therapy at Poplar Grove Physical Therapy. Both Dr. Izquierdo's records and the physical therapy records revealed the steady improvement of Petitioner's right shoulder. By August 9, 2016, Petitioner no longer took pain medication and, by September 12, 2016, had 0/10 pain at rest and 3/10 pain with activity. As of September 12, 2016, Dr. Izquierdo recommended Petitioner continue with a home exercise program, gradually resume activities, and take a NSAID as necessary. Dr. Izquierdo released Petitioner from his care that day, offering to reevaluate Petitioner at Petitioner's convenience.

An element of Dr. Izquierdo's regimen for treating Petitioner was to preclude Petitioner from resuming his normal and usual work activities. From January 28, 2016, the day Petitioner was first seen by Dr. Izquierdo, through August 9, 2016, Petitioner was found capable of working only at a light duty physical demand level. Respondent was unable to accommodate Petitioner's limited capacity to work. Dr. Izquiedro released Petitioner to resume his normal and usual work activities without restrictions on August 9, 2016. Petitioner did not return to work for Respondent and, instead, opted to work as a carpenter for another employer.

Petitioner, as of the time of the arbitration hearing, had been working as a carpenter for another employer for a month-and-a-half. He testified to having a pain in his neck that he believes will be permanent and to having pain in his right shoulder when he awakens in the morning. He testified further that his shoulder will be very, very sore from using it all day. He treats this soreness with Ibuprofen and has not sought medical care for his shoulder since September 12, 2016.

The Commission, in addition to finding Petitioner's January 21, 2016, accident resulted in the injury to Petitioner's right shoulder, also finds the same accident resulted in Petitioner requiring the medical treatment as described above as well as being temporarily totally disabled

from January 28, 2016, until August 9, 2016, also as described above. The Commission finds further Petitioner has residual symptomology that is construed to a permanent partial disability affecting Petitioner as a whole.

In reversing the Arbitrator with respect to accident and resultingly awarding Petitioner a benefit under Section 8(d)2 of the Act, the Commission determines Petitioner's level of disability by employing the factors as enumerated in Section 8.1(b) of the Act:

Section 8.1(b)(i) (Impairment Rating): As neither party submitted an impairment rating pursuant to Section 8.1(a) of the Act, the Commission places no weight on this factor.

Section 8.1(b)(ii) (Occupation of the Injured Employee): Petitioner was a foreman for Respondent but also performed the work duties of a carpenter for Respondent. Petitioner was working as a carpenter for Respondent at the time of his accident. Petitioner, upon being released to full work duty on August 9, 2016, elected to not return to work for Respondent but to work for another employer as a carpenter. Because Petitioner, in testifying at his arbitration hearing, failed to delineate how much time was spent in a supervisory capacity as a foreman versus how much time was spent as strictly a carpenter, the Commission cannot determine the physical impact Petitioner experiences working strictly as a carpenter as opposed to his former hybrid position as a foreman/carpenter. The Commission does, however, take into consideration Petitioner's abandonment of his position with Respondent in favor of a carpenter position for another employer for reasons not explained. Accordingly, the Commission places some weight on Petitioner's modestly changed job descriptions.

Section 8.1(b)(iii) (Age of the Injured Employee): Petitioner was 51-years old at the time of his accident. No testimony was offered as to how long Petitioner intended to work. The Commission is, therefore, unable to determine how long Petitioner will work with his permanent partial disability. The Commission, based on Petitioner's age at the time of his accident, presumes Petitioner will work another 10 to 15 years with his permanent partial disability weight. The Commission places some weight on this.

Section 8.1(b)(iv) (Future Earning Capacity): Petitioner suffered no diminution of his earning capacity as result of his permanent partial disability. His present and future earning capacity is controlled by the current union pay scale. The Commission places little weight on the factor.

Section 8.1(b)(iv) (Evidence of Disability Corroborated by Medical Records): The Commission does not conflate any testimony concerning any disability with the medical records. The Act requires the Commission to look to the medical records alone. Petitioner had completed physical therapy on August 4, 2016, and had been returned full duty work effective August 9, 2016. Petitioner's last medical record, dated September 12, 2016, note him experiencing 0/10 pain at rest and 3/10 pain with activity in his right shoulder

and popping in the same. That record, and the August 9, 2016, record before it, noted that he took no pain medication. The physical examination recorded Petitioner's right upper extremity strength to be 5/5 on a 0-5/5 scale with no impairment of range of motion noted. The recommendation for Petitioner was for him to continue with the home exercise program and gradually progress with activities. The Commission places great weight on Petitioner's medical records.

Reconciling Petitioner's as-testified-to current condition with his medical records, the Commission finds Petitioner testimony revealed some degree of embellishment as to his current condition. He testified to experiencing pain in his neck that he believed would be permanent. Dr. Izquierdo's record from August 9, 2016, had noted Petitioner indicated and/or found Petitioner had no neck pain and full range of motion of the cervical spine. The physical examination that was performed on September 12, 2016, recording findings of no neck pain and a neck that demonstrated full range of motion. This divergence between Petitioner's testimony and his medical records calls into question Petitioner's claim to waking up with pain in his shoulder and to his shoulder "being very, very sore" after a day's work, particularly as he told Dr. Izquiedro that he experienced on 3/10 pain with activity. That Petitioner, despite his as-testified-to current complaints, has not sought medical care after September 12, 2016, calls into question the actual extent of his permanent disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,091.21 per week for a period of 27-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $755.22 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 7.5% loss of the person as a whole

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services billed in the total amount of $72,211.96, though reduced pursuant to §8(a) and §8.2 of the Act, if applicable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 10 2018
KWL/mav
O:05/01/18
42

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully disagree with the decision of the majority and agree with the Arbitrator that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment on January 21, 2016. Accordingly, I would affirm and adopt the Arbitration Decision filed with the Commission on December 14, 2016.

The testimony of Sandoval and Walker is found to be more credible than the testimony of Petitioner and his wife, Cassens. Sandoval testified to having worked with Petitioner on the date of the claimed accident and was, at no time, told by Petitioner about any fall that he had experienced while working that day. He testified that he and Petitioner hung drywall after the time Petitioner purportedly hurt himself. He didn't notice Petitioner to be in any pain while hanging the drywall. He testified to learning that Petitioner's claimed workplace injury from Mark Walker, his and Petitioner's supervisor, almost two hours after he and Petitioner left the worksite for the day. Walker testified he spoke with Petitioner a few minutes before the end of the workday, at 2:56pm, but was not told of any accident or injury befalling. He testified of learning about the claimed accident and injury from Petitioner at 4:29pm on the day of the claimed accident. Neither Sandoval nor Walker were subjected to cross-examination.

Petitioner's testimony followed the testimony of Sandoval and Walker and, in part, only contradicted but did not refute the testimony of Sandoval. He testified that he told Sandoval about his fall after he returned from locking the boathouse. He testified that he could not raise his right arm after returning from the boathouse. Absent from the testimony was a claim that he informed Sandoval that he had, in fact, hurt himself in the fall and a denial that he helped Sandoval hang drywall after the time of the claimed fall. His testimony about what he told Walker did not contradict what Walker testified to but it was, in part, internally inconsistent. On direct examination, he testified that he did not tell Walker about his fall earlier in the day when they spoke at 2:56pm that day because he was thinking about what the HVAC workers had found on the jobsite. On cross-examination, however, he testified that he didn't tell Walker of his fall and injury because doing so would have put a "x" on his back. It was not elicited why he felt, after working for Respondent for over twelve (12) years, that reporting an injury would have been met with hostility. More significantly, uncertainty exists as to why he felt more comfortable telling Walker about the claimed fall and injury 4:29pm on the day of the claimed accident and injury than he did when he spoke to him only ninety (90) minutes earlier. He offered no

explanation to explain why was less at risk of having the "x" on his back at 4:29pm than at 2:56pm.

Petitioner's testimony, in part, also contradicted that of Cassens. He testified that he fell while walking to the boathouse. Cassens, however, testified, on direct examination, that Petitioner told her that he had fallen while walking from the boathouse. On cross-examination, Cassens testified that it was her testimony that Petitioner had told him that he fallen while walking away from the boathouse. No attempt was made to reconcile the conflicting history in their respective testimony.

Recognizing the possible conflict of interest of all those who testified, the most credible evidence in this case are the medical records. In no instance does Petitioner relate his symptoms to anything related to work. He presented to Mercy Harvard Hospital approximately four hours after the claimed injury where it was reported that he slipped on ice in his driveway. The following day, on January 22, 2016, he presented to both OrthoIllinois and to Family Medicine for McHenry County. At both, he was recorded as falling in his driveway. When asked about these histories at the arbitration hearing, Petitioner testified that he told the personnel at Mercy Harvard Hospital and Dr. Izquierdo simply that he fell in simply "the" driveway. Credulity is presumed with that claim.

Petitioner's medical records all imply that he fell in his own driveway. Petitioner counters the history recorded in the medical records with only his testimony and that of his wife. Petitioner testified that he told his medical providers that he fell on "the" driveway. It is found unusual that Petitioner did not provide a more specific description or location of the driveway on which claimed to have fallen on given the proximity in time between the claimed fall and the reporting said fall. Cassens, Petitioner's wife, testimony as to the claimed fall was simply a recitation as to what her husband purportedly told her. Her testimony that Petitioner did not fall on their driveway leaves open the possibility that Petitioner fell at a location other than in his own driveway.

Given Petitioner's failure to report any fall to Walker when they spoke at 2:56pm on January 21, 2016, and Sandoval's being unaware that Petitioner had been injured at any time prior to 4:45pm that day despite them working together from 7:00am until 3:00pm on January 21, 2016, it appears more likely than not, that if Petitioner fell on January 21, 2016, he did so away from the jobsite. This would explain why Petitioner did not tell Walker about being injured when they spoke at 2:56pm or why Sandoval wasn't aware that Petitioner was injured when they parted company. It would explain why Petitioner offered the testimony that he told his medical providers of falling simply onto "the" driveway. It would be consistent with Cassens' testimony that Petitioner did not fall onto their driveway.

More significant than the discrepancies between Petitioner's testimony and those of Sandoval and Walker is the discrepancy between Petitioner's testimony about the current condition and Dr. Izquierdo's medical records. Before the Arbitrator, as noted by the majority,

Petitioner complained of having permanent neck pain. Dr. Izquierdo's medical records, from his April 21, 2016, examination of Petitioner through his final examination of Petitioner on September 12, 2016, there were no complaints of or finding by Dr. Izquierdo of neck pain. Quite simply, Petitioner is found to have misrepresented the existence of neck pain before the Arbitrator for no apparent reason. If Petitioner is so inclined to make that misrepresentation, it is not inconceivable Petitioner would also misrepresent how he came to injure his right shoulder for secondary gain.

Taken as a whole, the evidence does not support a finding in favor of Petitioner. As the Arbitrator concluded, "the sheer volume of the Petitioner's varied and inconsistent histories of the January 21, 2016, incident coupled with the contradictory testimony and documents undermine his claim that he suffered accidental injuries arising out of and in the course of his employment." I agree with the Arbitrator's conclusion and, for that reason, respectfully dissent with the opinion of the majority.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CASSENS, TIMOTHY
Employee/Petitioner

Case# **16WC013153**

TCH CONSTRUCTION INC
Employer/Respondent

18IWCC0408

On 12/14/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.64% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0247 HANNIGAN & BOTHA LTD
KEVIN S BOTHA
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

0560 WIEDNER & McAULIFFE LTD
KENDRA G GARSTKA
ONE N FRAKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF McHenry)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Timothy Cassens
Employee/Petitioner

v.

TCH Construction Inc.
Employer/Respondent

Case # 16 WC 13153

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Woodstock**, on **November 4, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **January 21, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

In the year preceding the injury, Petitioner earned **$85,110.24**; the average weekly wage was **$1636.74.**

On the date of accident, Petitioner was **51** years of age, *married* with **0** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$0.00.**

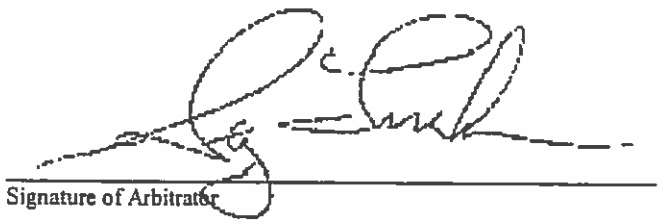
Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

BECAUSE THE ARBITRATOR FINDS THAT PETITIONER FAILED TO PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT HE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH RESPONDENT ON JANUARY 21, 2016, THE CLAIM FOR COMPENSATION IS HEREBY DENIED.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

December 14, 2016
Date

DEC 14 2016

Statement of Facts

Petitioner Timothy Cassens testified that he had been a carpenter for 30 years. He had worked for Respondent for 12 1/2 to 13 years. On January 21, 2016, he was working at Respondent's owner, Mark Walker's residence in Delavan, Wisconsin from 7:00 AM to 3:00 PM. He testified that at about 1:30 PM, he was going to lock the boat house where the materials were stored. He went to retrieve a tool from his truck that was parked in the driveway of Walker's residence, when he slipped and fell on ice. Petitioner testified that the temperature was very cold and there had been snow the night before and it was very icy. The ice on the driveway was hard. Petitioner testified that he pulled himself up, locked up the boat house, and went back to the house. Petitioner testified that he told his fellow employee Jose Sandoval that he could not raise his arm while working on a piece of drywall on the ceiling. He testified he told Jose that he fell on the ice.

Jose Sandoval testified that he has been employed by Respondent as a carpenter for 12 years. He was working on Mr. Walker's house in Delevan on January 21, 2016. On that day, he was working with Petitioner. There was also someone from another company there, but no other employees of Respondent. He finished work that day at 3:00 PM. He testified that Petitioner did not mention anything about a slip and fall on ice. He did not see Petitioner slip and fall. He testified that there was a boat house on the premises where they kept some materials. Petitioner was not in his vision all day. He testified that there was snow on the ground. He testified that he worked with Petitioner that afternoon. Petitioner did not mention he was having problems with his shoulder or needed assistance. Mr. Sandoval never offered to finish the drywall or assist Petitioner.

Petitioner testified he spoke with Mark Walker multiple times on the morning of January 21, 2016 to discuss the job. He testified to a telephone conversation with Mark Walker at 2:56 PM. Petitioner testified that he never mentioned anything about the slip and fall. He testified that his mind was on the HVAC issues. He testified that he was getting ready to go home and thought by icing his shoulder that night, he would be better the next morning. He testified to slip and falls and injuries on the job all the time as a carpenter. He had never filed a Worker's Compensation claim before. He testified that the reason he did not mention the injury to Mark Walker during the phone call was because it was his belief that any time you have a Workers' Compensation claim you get an "X" on your back.

Petitioner testified that after he left the job site, he drove to his wife's office in Poplar Grove. That was his daily routine during tax season, to pick up his 6 year old grandson. He also testified that because his shoulder was hurting, he wanted his wife to have a look at it. He testified that he arrived at his wife's office at approximately 4 PM. The drive from Delavan, WI to Poplar Grove, IL took 45 minutes to an hour. He testified that he called Mark Walker at 4:29 PM and told him that he slipped and fell on the ice at Walker's residence and hurt his shoulder and was going to get it checked out because of the intensity of the pain. He testified that Mr. Walker told him to keep him informed. He testified from there he went to the emergency room at Mercy Harvard Hospital.

Mark Walker testified that he is the vice-president of Respondent. Petitioner was working a job for Respondent as his personal residence in Delevan, WI on January 21, 2016. He was working with Jose Sandoval finishing up some flooring and a little bit of drywall. He testified to 4 telephone conversations with Petitioner on that morning about job related issues. He testified he spoke with Petitioner at 2:56 PM about the job. Petitioner did not mention anything about an injury. He spoke with Petitioner at 4:29 PM. Petitioner told him he slipped and fell at work and was going to get checked out. Mr. Walker testified he asked Petitioner why he did not tell him about this at 3:00 PM and why he didn't tell the guy he was working with. He testified that Petitioner did not

respond. Mr. Walker testified he reported the injury to his insurance carrier the next day, stating the accident was in question.

Jose Sandoval testified that he received a call from Mr. Walker at 4:45 PM. Mr. Walker told him that Petitioner called and told him he has fallen. Mr. Sandoval told Mr. Walker he did not know anything about it because Petitioner had not commented about anything to him.

Julie Cassens testified that Petitioner is her husband. She owns an H & R Block tax office in Poplar Grove, Illinois. During January, her daughter works with her, so her 6 year old grandson comes to the office after school. She testified that Petitioner would come over after work to see if he needed to take her grandson out or home. On January 21, 2016, Petitioner arrived at 4:00 PM. She could see he was in pain. She testified that Petitioner told her he fell on the ice walking up the hill from the boathouse. After work, they dropped off his truck and went to the emergency room. She testified that he got out of his truck and got into her car. He did not slip and fall on the ice on their driveway. She drove him to the emergency room.

Petitioner was seen in the emergency room at Mercy Harvard Hospital on January 21, 2016 (PX 1). He arrived at 4:57 PM (PX 1, p 15). His chief complaint was right shoulder pain post fall. The record notes patient reported that he slipped on ice in his driveway just prior to arrival to the emergency department (PX 1, p 17). Petitioner testified he told them he fell in the driveway. X-rays were negative for fracture or dislocation. Petitioner was released in a sling and advised to see his primary care physician for an MRI and informed that he may have a rotator cuff injury (PX 1, p 19). Petitioner left the ER at 5:32 PM (PX 1, p 15). Petitioner testified he was discharged and called Mark Walker at 5:29 PM. He testified he told Mr. Walker that he had to see his primary care doctor.

Petitioner's cell phone records (PX 7) confirm the calls with Mr. Walker on January 21, 2016. Petitioner also called his wife's office at 3:25 PM. He made a call originating from Poplar Grove at 4:16 PM. He made calls to his wife's cell phone at 4:27 PM and 4:31 PM, just before and after the 4:29 PM call to Mr. Walker, both originating in Poplar Grove.

Petitioner saw his family doctor Dr. Lesser on January 22, 2016 (PX 2, p 22-25). The history recorded is patient was in his driveway yesterday, slipped on ice and hurt his right shoulder. An MRI was ordered and Petitioner was to see Dr. Izquierdo if not 100%. The MRI performed January 26, 2016 found impingement and a complete tear of the supraspinatus and partial tear of the bursal surface of the infraspinatus (PX 2, p 21).

Petitioner testified that he called to make an appointment on January 22, 2016. The Telephone Encounter includes a history that Petitioner slipped and fell on ice in his driveway (PX 3, p 34). He saw Dr. Izquierdo on January 28, 2016 providing the same history and advancing complaints of pain in the right shoulder. After examination and review of the MRI, Dr. Izquierdo's assessment was unspecified rotator cuff tear or rupture of right shoulder, not specified as traumatic. He recommended arthroscopic surgery (PX 3, p 30-32). Petitioner testified he did not return to work for Respondent after the January 28, 2016 visit. He had a conversation with Mr. Walker on January 31, 2016. Petitioner testified that Mr. Walker said "Darn it, Tim, you fell on ice. I could understand if you fell off a ladder." Petitioner testified that Mr. Walker told him he should have told him earlier. Mr. Walker testified he did not recall a conversation on January 31, 2016. The phone records (PX 7 and RX 5) confirm calls made on that date.

Petitioner's Workers' Compensation claim was denied on February 17, 2016. Petitioner decided to proceed through his group insurance (PX 3, p 27). Petitioner presented a claim for benefits through the Carpenters Welfare Fund on February 23, 2016 (PX 10). Petitioner stated that the injury occurred when he fell on ice at job site. He stated it occurred towards the end of the workday when he went to lock up building where materials were stored. Dr. Izquierdo completed the second page of the form with the injury described as slipped and fell on ice in his driveway. In response to the question, "is the condition due to injury arising out of the patient's employment," he responded "No."

Petitioner had a pre-operative clearance appointment with Dr. Lesser on March 8, 2016 (PX 2, p 10-15). He underwent surgery on March 18, 2016. Dr. Izquierdo performed right shoulder arthroscopic repair of a large full thickness rotator cuff tear involving tears of the subscapularis, supraspinatus and infraspinatus tendons, an arthroscopic biceps tenodesis and subacromial decompression with anterior acromioplasty. The postoperative diagnosis was a right shoulder large full-thickness rotator cuff tear involving 3 tendons, right shoulder subacromial impingement and right shoulder bicipital tendinosis with partial-thickness tearing and instability (PX 3, p 38-40).

Petitioner followed up with Dr. Izquierdo post operatively on March 21, 2016. He was not to perform any lifting more than 1-2 pounds for 8 weeks to protect the integrity of the biceps tenodesis (PX 3, p 19). Petitioner began physical therapy at Poplar Grove Physical Therapy on April 8, 2016. The progress notes indicate a date of onset of 1/26/2016 and the description was that patient slipped and fell onto his right elbow at his boss's house. He stated that he was building a closet underneath the stairs at his boss's house. The materials he was using were stored in the boat house. He was walking to the boat house to lock it and keep the materials safe when he slipped on ice and fell onto his right elbow. The onset was due to an on-the-job injury (PX 4).

On April 21, 2016, Dr. Izquierdo advised Petitioner not to lift more than 1-2 pounds for the next 8 weeks (PX 3, p 15-16). He saw Dr. Izquierdo on May 19, 2016, June 16, 2016 and July 12, 2016 (PX 3). Petitioner continued in physical therapy through his discharge on August 4, 2016 (PX 4). On August 9, 2016, Dr. Izquierdo released him to full duty work. He was to gradually progress activities and work on stretching and strengthening of the right shoulder through his home exercise program (PX 3, p 2). On September 12, 2016, Petitioner complained of pain and popping in the right shoulder. His pain with activity was 3/10, there was no numbness or tingling or dislocation. Dr. Izquierdo opined that he should continue his home exercise program and use anti-inflammatories as necessary for discomfort. He placed the Petitioner at maximum medical improvement (PX 3, p 4).

Petitioner submitted bills from Poplar Grove Physical Therapy (PX 6) and Family Medicine for McHenry (PX 8). These bills indicate the patient's condition is not related to employment.

Petitioner testified that, upon his release to return to work, he did not contact the Respondent because it was his impression that once you are hurt, "you're going to get the crap jobs." Instead of causing friction and aggravation, he looked for employment elsewhere. Petitioner accepted a job as a carpenter at Maman Corporation at Union scale of $45.35 per hour around September 28, 2016. He testified that he is right-hand dominant. When he uses his right shoulder during work up high using a screw gun, he does not have the pressure like he used to. His right shoulder hurts him when he wakes up in the morning. He feels a pricking sensation in his shoulder and he has to move it around before it goes away. His right shoulder gets very sore after work from using it all day. He takes ibuprofen but no prescription medication.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident, the Arbitrator finds as follows:

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. Included within that burden, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment.

Petitioner testified that at about 1:30 PM on January 21, 2016, while working for Respondent at Mark Walker's residence in Delavan, Wisconsin, he was going to lock the boat house where the materials were stored, and when he went to retrieve a tool from his truck that was parked in the driveway; he slipped and fell on ice. Petitioner testified that he told his fellow employee Jose Sandoval that he could not raise his arm while working on a piece of drywall on the ceiling. He testified he told Jose that he fell on the ice. Petitioner testified he spoke with Mark Walker at 2:56 PM. Petitioner never mentioned anything about the slip and fall. Petitioner testified that after he left the job site, he drove to his wife's office in Poplar Grove. He testified that he arrived at his wife's office at approximately 4 PM. The drive from Delavan, WI to Poplar Grove, IL took 45 minutes to an hour. He testified that he called Mark Walker at 4:29 PM and told him that he slipped and fell on the ice at Walker's residence and hurt his shoulder and was going to get it checked out because of the intensity of the pain. He testified from there he went to the emergency room at Mercy Harvard Hospital.

It is undisputed that Petitioner did not report any injury to Mr. Walker in the 2:56 PM telephone conference, and thereafter, did so at 4:29 PM. But the remainder of Petitioner's testimony, including the details of his accident, work day and activities thereafter, has many inconsistencies and is contradictory with the much of the remainder of the evidence presented.

The Mercy Harvard Hospital emergency room history, taken at about 5:00 PM on the day of the injury, states that Petitioner slipped on ice in his driveway (not the work site) just prior to arrival. The insurance information lists Blue Cross, not Workers' Compensation. The medical history of the fall in his driveway in repeated in the records of Dr. Lessor and Dr. Izquierdo. Even on the Union benefit application filed in February, 2016, Dr. Izquierdo continues to state that the fall occurred when Petitioner slipped and fell on ice in his driveway. In response to the question, "is the condition due to injury arising out of the patient's employment," he responded "No." Dr. Lessor and Poplar Grove Physical Therapy submitted billing forms listing the charges as unrelated to Petitioner employment. Petitioner's explanation of the initial emergency room mistake is unpersuasive since he was already aware of Mr. Walker's questioning his story before he went to the emergency room and he not only did not make sure the history was correct, but did not correct this in the following multiple visits with other providers. His testimony of his opinions of the negative consequences of pursuing Workers' Compensation are similarly unpersuasive given that he had already reported the injury by 4:29 PM and his insistence of claiming an on the job injury in February, 2016 on the Union welfare fund application.

Even in the evidence including the work related history, the exact details of the fall vary. Petitioner testified that he fell on the driveway before going to the boathouse to lock it up. Mrs. Cassens testified that he told her he fell on the ice walking up the hill from the boathouse. On the Union benefit form, Petitioner stated that the injury occurred when he fell on ice at job site. He stated it occurred towards the end of the workday when he went to lock up building where materials were stored. The physical therapy records state that he was walking

to the boat house to lock it when he slipped on ice and fell onto his right elbow. The only mention of a driveway is in his testimony at trial, and the medical records noting he fell in his driveway.

Petitioner's testimony and timeline are also contradicted by other evidence. Petitioner testified that the injury occurred at 1:30 PM and he was in such pain that he needed help to complete his work duties. Yet Jose Sandoval testified that he was unaware of any injury to Petitioner and did not need to assist him in completing the drywall. He also contradicts Petitioner's testimony that he was told of the accident before the end of the workday. Petitioner's explanation for not mentioning the accident at 2:56 is not persuasive if he was in fact having as much pain as he testified to.

Petitioner and his witnesses testified to a general timeline of his activities between leaving work in Delavan and ultimately arriving in the Mercy Harvard Hospital emergency room, but some inconsistencies are not explained. The telephone records do document his call to his wife's office at 3:25 from Lake Geneva, although Arbitrator notes that Lake Geneva is not on a direct route to Poplar Grove from Delavan. Petitioner did not testify to his route. He testified that he arrived at the H & R Block office at about 4:00 PM. His testimony and that of Mrs. Cassens imply that they were together until after he called Mr. Walker at 4:29 PM and they left to drop off his truck and go to the hospital. Yet the Petitioner's telephone records show that he and Mrs. Cassens exchanged cell phone calls at that time without an explanation of the need if they were both still in the office. And the 4:31 PM call indicates that Mrs. Cassens was in Woodstock.

It is the Commission's function to judge the credibility of the witnesses, determine the weight to be given their testimony, and resolve conflicting medical evidence. *Tower Automotive v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 427, 435, 943 N.E.2d 153, 161, 347 Ill. Dec. 863 (2011)*. The weight given to the evidence is determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the witness and the nature of the case and its facts. While any one of the discrepancies in the evidence may have a plausible explanation, the sheer volume of the Petitioner's varied and inconsistent histories of the January 21, 2016 incident coupled with the contradictory testimony and documents undermine his claim that he suffered accidental injuries arising out of and in the course of his employment,

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on January 21, 2016.

In support of the Arbitrator's decision with respect to (F) Causal Connection, (J) Medical, (K) Temporary Compensation, (L) Nature and Extent, and (M) Penalties, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Accident, the remaining issues of Causal Connection, Medical, Temporary Compensation, Nature and Extent, and Penalties are moot. Petitioner's claim for compensation is denied.