STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ISADORE MCKENNIE,

Petitioner,

vs.

NO: 12 WC 33432
20 IWCC 0254

CITY OF CHICAGO,

Respondent.

ORDER OF RECALL OF DECISION UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission, *sua sponte*, finds that due to a clerical error, the Decision and Opinion on Review dated May 1, 2020, in the above captioned matter, was issued without Respondent having waived oral argument.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated May 1, 2020 is hereby vacated and recalled pursuant to Section 19(f) due to a clerical error. The parties should return their original decisions to Commissioner Barbara N. Flores.

IT IS FURTHER ORDERED BY THE COMMISSION that the above captioned matter will be set for oral argument at a future date.

DATED: MAY 5 – 2020
d: 3/19/20
BNF/kcb
45

Barbara N. Flores

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ISADORE MCKENNIE,

Petitioner,

vs.

NO: 12 WC 38378
20 IWCC 0255

CITY OF CHICAGO,

Respondent.

ORDER OF RECALL OF DECISION UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission, *sua sponte*, finds that due to a clerical error, the Decision and Opinion on Review dated May 1, 2020, in the above captioned matter, was issued without Respondent having waived oral argument.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated May 1, 2020 is hereby vacated and recalled pursuant to Section 19(f) due to a clerical error. The parties should return their original decisions to Commissioner Barbara N. Flores.

IT IS FURTHER ORDERED BY THE COMMISSION that the above captioned matter will be set for oral argument at a future date.

DATED: MAY 5 - 2020
d: 3/19/20
BNF/kcb
45

Barbara N. Flores

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aracell Godinez,
Petitioner,

vs. No: 15 WC 24667,
20 IWCC 0225

McDonalds,
Respondent.

ORDER

Motion to Recall pursuant to Section 19(f) of the Act was filed by the Respondent on April 30, 2020. The Commission finds that clerical errors exist in its Decision and Opinion on Review dated April 17, 2020, in the above captioned.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated April 17, 2020, is hereby vacated and recalled pursuant to Section 19(f) for correction of clerical errors contained therein.

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

DATED: MAY 13 2020

Marc Parker

mp/wj
68

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aracell Godinez,
Petitioner,

vs. No. 15 WC 24667,
20 IWCC 0225

McDonalds,
Respondent.

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, causal connection, medical expenses, benefit rates, temporary disability and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Petitioner testified that on June 22, 2015, she had been employed at McDonalds for ten years as a sandwich assembler. She worked 40 hours per week, from 8:30 am to 1:30 pm. She prepared breakfast sandwiches, Big Macs, chicken sandwiches and fish fillet sandwiches. For many of the sandwiches she made, Petitioner used a heavy sauce pistol gun which, when the trigger was pulled, distributed sauce on the sandwiches. Some sandwiches required two squeezes of the trigger. On busy days, Petitioner estimated she would make up to 830 sandwiches. Petitioner also used both of her thumbs to press levers on containers to dispense ketchup and mustard onto burgers. She estimated she would dispense ketchup and mustard onto about 500 hamburgers a day. Most of the time, she prepared sandwiches by herself. Her hands got sore from performing those activities.

In January 2015, Petitioner noticed her hands were painful between her thumbs and index fingers. Her right hand was more painful than her left. In March 2015, Petitioner asked her bosses, Ben and Ron, for help on the assembly line, but they did not provide her with any. Petitioner stopped working on June 22, 2015 because of pain in her hands. The first treatment she received was on June 26, 2015 from Dr. Rajesh, who diagnosed her with hand joint pain and rheumatoid arthritis. Dr. Rajesh authorized Petitioner off work.

On June 29, 2015 Petitioner began treating with Grandview Health Partners. Doctors there diagnosed her with right carpal tunnel syndrome and wrist pain. They provided treatment consisting of myofascial releases, electrical stimulation, exercises, manipulation, a TENS unit and a carpal tunnel brace.

Petitioner saw Dr. Saldanha on July 8, 2015. At that time, Petitioner complained of right arm pain and pain in the right side of her neck, which radiated into her shoulder and down to her wrist and thenar eminence of her right hand. She reported difficulty grasping objects, and that repetitive activity made her pain worse. Dr. Saldanha kept Petitioner off work, and diagnosed her with likely carpal tunnel syndrome and cervicalgia from work-related overuse syndrome. On September 16, 2015, Dr. Saldanha reported Petitioner also had right lateral epicondylitis, and one week later he gave her an injection into her right wrist. By October 14, 2015, Dr. Saldanha reported that Petitioner's right lateral epicondylitis had resolved.

Petitioner testified that she returned to work on September 22, 2015 with restrictions that her employer was able to accommodate. On September 23, 2015, she underwent an EMG/NCV, which was suggestive of right carpal tunnel syndrome. Between September 22, 2015 and December 21, 2015, Petitioner was given reduced work schedule of 26 to 28 hours per week.

On October 30, 2015, Petitioner came under the care of orthopedic surgeon Dr. Gregory Primus. Petitioner reported a 4-month history of bilateral hand pain, right greater than left. Dr. Primus reported the precipitating event was Petitioner's repetitive work, and that the actual mechanism of her injury was wrist flexion and extension. He diagnosed Petitioner with right carpal tunnel syndrome and bilateral wrist sprains. Dr. Primus provided a steroid injection to Petitioner's right carpal tunnel on November 16, 2016, but it failed to provide lasting relief. Dr. Primus ultimately performed a right carpal tunnel release on December 21, 2015. Petitioner testified that when she returned to work with restrictions on January 14, 2016, her hours were reduced to between 12 to 16 hours per week. On April 12, 2016, Petitioner was released to work without restrictions.

Robert Freeman testified on behalf of Respondent that he owns a franchise from McDonalds, and that he hired Petitioner as a crew person in 2005. He testified that the store where Petitioner worked for the last month before her injury was not particularly busy, though it was busier during breakfast and lunch times. Mr. Freeman testified that Petitioner performed a variety of other tasks in addition to sandwich making, including setting up product, turning on grills, fryers and toasters, restocking food, cleaning, sweeping and mopping. He testified that three people worked on the grill making sandwiches in that store, and that no employee ever made 830 sandwiches a day. He testified that when Petitioner had restrictions, he tried to accommodate

them. On cross examination, Mr. Freeman admitted Petitioner had worked at his Homer Glen store, which was actually much busier, for 10 years until one month prior to her injury.

Dr. Michael Vender testified via deposition that at Respondent's request, he performed a Section 12 examination of Petitioner on January 25, 2016. Then, Petitioner complained of right hand and thumb numbness since her surgery, though she reported that her left hand numbness was gone. Dr. Vender diagnosed Petitioner with right carpal tunnel syndrome and probable hand and wrist tendonitis. He did not believe her work activities were related to those diagnoses, noting that she had other risk factors for developing carpal tunnel syndrome including her age, gender and increased BMI. Dr. Vender found Petitioner's carpal tunnel surgery had been reasonable and appropriate, but not her chiropractic care, post-operative occupational therapy, TENS unit, or the prescribed compound creams. Dr. Vender did not believe Petitioner had any clinically significant left carpal tunnel syndrome at his exam.

On cross examination, Dr. Vender admitted that certain job activities could contribute to carpal tunnel syndrome if they were forceful, exertional and performed on a regular and persistent basis. He admitted that he made assumptions without actually knowing some of the specific tasks Petitioner performed. He admitted he did not know the force which was needed to squeeze the sauce gun. Dr. Vender acknowledged that using one's thumb constantly or repetitively could cause trigger thumb, which he diagnosed Petitioner as having, along with right flexor carpi radialis tendonitis. He agreed that Petitioner's constant forceful pressing of levers on ketchup and mustard containers could have contributed to her trigger thumb.

The Arbitrator found that Petitioner failed to prove an accident because her initial treater, Dr. Rajesh, diagnosed her hand pain as rheumatoid arthritis. The Arbitrator, in finding Petitioner did not prove causation, believed Dr. Vender's opinions were more persuasive, credible and supported by the evidence than those of Petitioner's treating physicians. The Arbitrator found that Petitioner's work activities were not very forceful and did not occur on a regular and persistent basis; also, that she did not prepare as many sandwiches as she claimed.

The Commission views the evidence differently than the Arbitrator. The Commission finds Petitioner's testimony regarding her symptoms, and the timeline of when they developed, to be credible. She testified that her hands, thumbs and fingers became painful in January 2015. In March 2015, Petitioner asked her employer for help on the assembly line. Instead, Respondent reassigned Petitioner to work in one of its less busy stores. Petitioner testified that her hand pain continued and became so bad that she had to stop coming to work on June 22, 2015. The Commission finds that Petitioner proved she sustained a repetitive injury which arose out of and in the course of her employment with Respondent on June 22, 2015.

Petitioner testified she had to squeeze a "sauce gun" hundreds of times throughout her workday, primarily with her right hand. She used her thumbs hundreds of times a day to dispense ketchup and mustard out of containers. Although witness Robert Freeman testified that Petitioner made fewer sandwiches than what she claimed, he offered no records or statistics to support his testimony – despite his exclusive access to that information as the business owner. The failure of a party to produce testimony or physical evidence within his control creates a presumption that the evidence, if produced, would have been adverse to him. *Tonarelli v Gibbons,* 121 Ill.App. 3d

1042, 460 N.E.2d 464 (1st Dist., 1984). Regardless of the exact number of sandwiches Petitioner made each day, she used the sauce gun and condiment dispensers hundreds of times during a substantial part of her shift. The Commission finds Petitioner's testimony credible in establishing that she performed repetitive and forceful motions with her hands, thumbs and wrists, hundreds of times a day, for a period of over ten years prior to her accident.

The records of Petitioner's treating physicians also support a finding of causal connection between Petitioner's work activities and her right carpal tunnel syndrome and right trigger thumb. On June 29, 2015 Dr. Bodem reported that Petitioner felt that her hands had been weakening progressively over the past several weeks while she was at work. On September 16, 2015, Dr. Saldanha reported that Petitioner had, "likely carpal tunnel syndrome and cervicalgia from work related overuse syndrome." And on October 30, 2015, Dr. Primus wrote that the precipitating event causing Petitioner's hand pain was her repetitive work.

The Commission finds Dr. Vender's opinions less credible than those of Petitioner's treaters', for a number of reasons. First, Dr. Vender admitted he based his opinions on assumptions he made, many of which were incorrect, regarding Petitioner's duties. He assumed Petitioner cooked hamburgers and French fries, but Petitioner performed neither of those tasks. He assumed that the force needed to squeeze the trigger of the sauce gun was, "limited," without actually knowing the force that was required. He admitted he did not know the weight of the sauce gun, or whether using it on a forceful repetitive basis could cause carpal tunnel syndrome. He acknowledged that repetitive, forceful pushing of ketchup and mustard dispensers, hundreds of times per day, could contribute to trigger thumb.

The Commission finds that Petitioner proved the treatment she received was reasonable, necessary and causally related to her repetitive injuries. However, while so finding, the Commission declines to award Petitioner the transportation charges billed by her treaters, as those charges were not reasonable or necessary to treat Petitioner's conditions. The Commission also declines to award Petitioner prospective medical care. Dr. Primus found Petitioner to be at MMI on June 6, 2016, and he did not recommend Petitioner receive any treatment after that date.

The parties, in their Request for Hearing, stipulated to an average weekly wage of $406.25. That comes to $10.16 per hour for Petitioner's 40 hour week. Petitioner also stipulated that she was claiming temporary total disability benefits for the two following periods: June 29, 2015 through September 21, 2015, and December 21, 2015 through January 13, 2016. The Commission finds Petitioner proved entitlement to TTD for those two periods, based upon her testimony and her treating physicians' records. On June 6, 2016, Petitioner saw Dr. Primus. He noted that she had been doing well and was back working full duty. He released her from care at MMI. The Commission adopts Dr. Primus' conclusion that Petitioner was at MMI for her work related injuries as of June 6, 2016.

The Commission finds that while Respondent tried to accommodate Petitioner during the two periods she had work restrictions, it provided Petitioner with fewer hours than her usual 40 hour work week. Between September 22, 2015 and December 20, 2015, Petitioner worked at most only 28 hours per week; and between January 14, 2016 and April 12, 2016, she worked at most, only 16 hours per week. The Commission finds Petitioner is entitled to: TPD at the rate of

$81.18/week[1] for the 12-6/7 week period between September 22, 2016 and December 20, 2016; and TPD at the rate of $162.46/week[2] for the 12-5/7 week period between January 14, 2016 and April 11, 2016.

On September 16, 2015 Dr. Saldanha reported a causal connection between Petitioner's work and her carpal tunnel syndrome and cervicalgia. However, neither he nor any other physician provided an opinion that Petitioner's right elbow lateral epicondylitis was causally related to her work. That condition was not diagnosed until more than 2½ months after Petitioner last worked for Respondent, and was successfully treated with only one injection. A few weeks after that, Petitioner's right lateral epicondylitis had resolved. The Commission finds Petitioner's right lateral epicondylitis was not proven to be causally related to her work accident.

In assessing the nature and extent of Petitioner's work-related injuries, the Commission has considered the five factors enumerated in §8.1b(b), and assigns the following weights to them:

(i) **Disability impairment rating:** *no weight,* because neither party offered into evidence an impairment rating from a qualified physician.

(ii) **Employee's occupation:** *minimal weight,* because Petitioner was released to full duty work without restrictions, and has found comparable work at another employer.

(iii) **Employee's age:** *moderate weight,* because at her age of 40, she is expected to work for over two more decades.

(iv) **Future earning capacity:** *no weight,* because Petitioner presented no evidence to show a diminution of her future earning capacity.

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because after months of unsuccessful conservative medical treatment for her conditions, Petitioner had to undergo a right carpal tunnel release on December 21, 2015. She testified that she still experiences pain and weakness in her right upper extremity and lesser pain in her left hand. Her right thumb still hurts, and she doesn't have the same strength as before her accident. Although Petitioner underwent an FCE on October 16, 2015 which found her able to work at a Light-Medium physical demand level, that test was performed prior to her carpal tunnel release surgery and is not relevant. Since undergoing that FCE, Petitioner was released to full duty work with no restrictions on April 12, 2016, and she has not seen any doctors for her related conditions since June 6, 2016.

Based upon the above, and all of the evidence of record, the Commission finds that Petitioner sustained no permanent partial disability to her neck and left upper extremity, but did sustain permanent partial disability to the extent of 15% loss of her (dominant) right hand, and 5% loss of use of her right thumb, pursuant §8(e) of the Act.

[1] 28 hrs. worked x $10.16/hr. = $284.48 earnings/week. $406.25 - $284.48 = $121.77. Two-thirds of that is $81.18.
[2] 16 hrs. worked x $10.16/hr. = $162.56 earnings/week. $406.25 - $162.56 = $243.69. Two-thirds of that is $162.46.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 16, 2018, is hereby vacated. The Commission finds Petitioner proved an accident arising out of and in the course of her employment with Respondent on June 22, 2015, and that she proved her bilateral hand and wrist conditions were causally related to that accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses related to Petitioner's cervical and upper extremity conditions, except for her right lateral epicondylitis, pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Act. The Commission does not require Respondent to pay any charges billed for transporting Petitioner to any medical providers for treatment. Respondent shall provide Petitioner with a hold harmless for all bills which have already been paid by others.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner for temporary total disability, the sum of $270.83 per week for a total period of 15-4/7 weeks, commencing June 29, 2015 through September 21, 2015, and then from December 21, 2015 through January 13, 2016, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner for temporary partial disability, the sum of $81.18 per week for a period of 12-6/7 weeks, commencing September 22, 2016 through December 20, 2016, as provided in §8(a) of the Act. Respondent shall also pay to Petitioner for temporary partial disability, the sum of $162.46 per week for a period of 12-5/7 weeks, commencing January 14, 2016 through April 11, 2016 as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $243.75 per week for a period of 32.3 weeks, as provided in §8(e) of the Act, for the reason that the injury caused the 15% percent loss of use of the right hand (28.5 weeks), and the 5% loss of use of the right thumb (3.8 weeks).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $64,200.00. 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: MAY 13 2020

Marc Parker

Barbara N. Flores

o-02/20/20
mp/mcp
68

DISSENT

I respectfully dissent from the Decision of the Majority. The Majority reversed the Decision of the Arbitrator who found Petitioner neither sustained her burden of proving she sustained a repetitive trauma accident nor that her conditions of ill-being of right carpal tunnel syndrome, elbow tendonitis, and right trigger thumb were causally related to her work activities and denied compensation. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

Petitioner testified that she worked for Respondent for 10 years as a sandwich assembler and that she had no other responsibilities. However, on cross she admitted that her job involved other responsibilities such as cleaning/mopping, grilling, stocking, toasting buns, and wrapping the sandwiches. She testified that during the lunch rush between 10:30 to 1:30 she made 830 sandwiches and 50 salads. She used a "sauce gun" for Big Macs, chicken sandwiches, and fish sandwiches and her right hand got sore with the use of the sauce gun. The Arbitrator examined the sauce gun and noted that it was like a caulk gun though larger. Petitioner testified that for quarter pounders, hamburgers, and cheeseburgers, she did not use the sauce gun but would use a thumb operated dispenser to dispense condiments.

The owner of the franchise at which Petitioner worked at the time of the alleged manifestation of her conditions of ill-being testified. He stated that he never had any employee make 830 sandwiches per shift and did not know how a line cook could make that many. He also testified that for an entire day, the restaurant would sell a total of 40-45 Big Macs, 120 chicken sandwiches, 225 cheeseburgers, and 125 hamburgers and that all sandwiches were prepared by the team of line cooks.

When Petitioner first sought treatment for right-hand pain, she was diagnosed with Rheumatoid Arthritis based on a previously ordered blood test and was referred to rheumatology. Respondent sent Petitioner for a Section 12 medical examination with Dr. Vender. He took a history of her work activities, reviewed a description of her job duties, and viewed photographs of the devices she used. He opined that Petitioner's conditions of ill-being were not casually related to her work activities. He noted that her work activities did not include any forceful use of her hands or arms and that she had various responsibilities which meant that she did not perform constant repetitive activities.

I agree with the Arbitrator's assessment of the relative persuasiveness of the causation opinion of Dr. Vender and her treating doctors. The Arbitrator described the treaters' causation opinions as "underwhelming." They appeared simply to ascribe causation based on Petitioner's pronouncements and that her symptoms were aggravated by work activities. Dr. Vender explained that the elicitation of symptoms by an activity does not mean that the activity accelerates a condition of ill-being. I also agree that simple repetitive motions without forceful gripping/grasping or vibration is not causative of neuropathic conditions such as carpal tunnel syndrome.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator who found Petitioner neither sustained her burden of proving she sustained a repetitive trauma accident nor that her conditions of ill-being of right carpal tunnel syndrome, elbow tendonitis, and right trigger thumb were causally related to her work activities and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

Deborah L. Simpson

Deborah L. Simpson

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWRENCE BOND, Petitioner,	)	
vs.	)	No. 13WC 26072 20IWCC0244
26th & AUSTIN CITGO, INC., and THE ILLINOIS STATE TREASURER as *ex officio* Custodian of the Injured Workers' Benefit Fund, Respondent.	)	

ORDER

This matter comes before the Commission on Petitioner's Petition to Recall the Commission Decision 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 Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated April 24, 2020, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Kathryn A. Doerries.

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

Kathryn A. Doerries

Kathryn A. Doerries

DATED: MAY 26 2020
KAD/jrc
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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWRENCE BOND,

Petitioner,

vs.

NO: 13 WC 26072
20 IWCC 0244

26TH & AUSTIN CITGO, INC., and
THE ILLINOIS STATE TREASURER as *ex officio*
Custodian Of the Injured Workers' Benefit Fund,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, employment relationship, medical expenses, causal connection, temporary total disability, and permanent disability, and being advised of the facts and 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 affirms and adopts the Arbitrator's Statement of Facts except the Commission strikes the introductory title "Respondent Illinois Injured Workers' Benefit Fund's Proposed Findings of Fact and Conclusions of Law." The Commission further affirms and adopts the Arbitrator's Findings/Analysis and Conclusions of Law except the Commission views the evidence differently than the Arbitrator with respect to the issues of (C) accident and (E) notice.

The Commission reverses the Arbitrator's Decision finding that Petitioner failed to prove beyond a preponderance of the evidence that an accident occurred that arose out of and in the course of Petitioner's employment and reverses the Arbitrator's Decision finding that Petitioner failed to give timely notice of his accident. Thus, the Commission vacates the Arbitrator's Findings/Analysis with respect to the issues of accident and notice in favor of the Conclusions of

Law detailed below.

Accident

With respect to the issue of accident, the Commission finds that an accident is compensable under the Act if Petitioner establishes that it both arises out of and in the course of employment.

> "In the course of" employment refers to the time, place, and circumstances under which the accident occurred, while "arise out of" employment means there is a causal connection between the accidental injury and some risk incidental to or connected with the activity an employee must do to fulfill her duties. *Caterpillar,* 129 Ill. 2d at 57-58, 541 N.E.2d at 667.
> "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Howell Tractor & Equipment Co. v. Industrial Comm'n* 78 Ill. 2d 567, 573, 403 N.E.2d 215, 217, (1980). A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar,* 129 Ill. 2d at 58, 541 N.E.2d at 667.
> "An injury is not compensable unless it is causally connected to the employment." *Caterpillar,* 129 Ill. 2d at 62, 541 N.E.2d at 669.

Metropolitan Water Reclamation Dist. v. Industrial Comm'n, 272 Ill. App. 3d 732, 735, 650 N.E.2d 671, 674, 1995 Ill. App. LEXIS 364, *5-6.

The Arbitrator found that the Petitioner's injury did not arise out of and in the course of his employment as it was a result of willful and wanton conduct which was not within the scope of his employment. The Arbitrator noted that, "negligent illegal conduct is not enough to take the accident out of the scope of employment; the conduct must rise to willful and wanton conduct in order for it to be found not compensable." *McKernin Exhibits Inc. v. Industrial Comm'n*, 361 Ill.App.3d 666, 838 N.E.2d 47 (1st Dist. 2005). The Arbitrator then went on to define willful and wanton conduct under Illinois law as "...a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Ill. Rev. Stat. 1989, ch. 85, par 1-210.

In *McKernin*, the Petitioner was a carpenter and his job duties included making deliveries. He rear-ended an 18-wheel semi-truck as the vehicles traveled southbound. A urinalysis test taken at the hospital on the date of the accident confirmed that Petitioner had cocaine is his system. Petitioner also admitted that he had been found guilty of three felony counts of delivery of cannabis and was on three-years felony probation at the time of the arbitration hearing. James McKernin testified Petitioner's wife called him and told him Petitioner did not come home the night before the accident. The Court, noting Petitioner's conduct was negligent, did not find his conduct intentional or rising to the level of willful and wanton, and held:

> However negligent the claimant might have been in the operation of the vehicle he was driving, that negligence did not remove him from the scope of his employment or the protections of the Act. *Stembridge Builders, Inc. v. Industrial Comm'n*, 263 Ill. App. 3d 878, 880, 636 N.E.2d 1088, (1994). In order to remove the claimant from the protection of the Act, his actions must have been committed intentionally, with knowledge that they were likely to result in serious injury, or with a wanton disregard of the probable consequences. *Stembridge Builders, Inc.*, 263 Ill. App. 3d at 881-82. There is no evidence in this case that the manner in which the claimant was driving was either intentional or rose to the level of willful and wanton conduct.

McKernin Exhibits Inc. v. Industrial Comm'n, 361 Ill.App.3d 666, 838 N.E.2d 47 (1st Dist. 2005).

McKernin demonstrates that willful and wanton behavior must be intentional, or with a wanton disregard of the probable consequences. In the instant case, Petitioner's unrebutted testimony was that he was instructed by the owner of the gas station, that in the event of an altercation between a customer and the store's clerk, Ali, he was to handcuff the customer and call the police. (T, p. 16) Petitioner followed these specific instructions in the performance of his duties as overnight security guard and when the store clerk, Ali, and a customer got into an altercation on July 26, 2013.

The Petitioner's contemporaneous statement to the police recounted that there was a hostile verbal exchange between the customer and the store clerk. (PX5 Supplemental Form 7/26/13 Time 0100 hours) There is no evidence that Petitioner intentionally harmed the customer or that his behavior demonstrated a wanton disregard for the customer. On the contrary, Petitioner did what he was told to do in a quickly escalating situation as evidenced by the contemporaneous witnesses' accounts; Petitioner handcuffed the customer and then called the police. (PX5) During the escalation, Petitioner tried to calm both the customer and the store clerk, evidence that he was, in fact, attempting to de-escalate the situation. (See PX5 Supplemental Form Witness Statement of James Porter "Bond was telling Ali to relax and Hester (customer) to chill out.")

The police arrested Ali and after interviewing Petitioner and the witnesses, did not arrest Petitioner. The Commission finds Petitioner's conduct cannot be considered willful and wanton, warranting a finding that he suffered an accident which arose out of and in the course of his employment for Respondent. Thus, the Commission reverses the Arbitrator's findings and conclusions of law regarding accident and finds Petitioner sustained his burden of proving he sustained a work-related accident that arose out of and in the course of his employment with Respondent.

Notice

With respect to notice, the Commission finds that the Petitioner's unrebutted testimony supports a finding that he reported the incident to the owner telephonically on the night it occurred. Petitioner also filed an Application for Adjustment of Claim within the 45 day statutory notice window afforded by the Act and the Commission infers that a copy of same was simultaneously served upon the Respondent in the absence of any objection in this regard. *820 ILCS 305/6(c)* Thus, the Commission reverses the Arbitrator's findings and conclusions of law regarding notice

and finds Petitioner sustained his burden of proving he provided timely notice of the accident to the Respondent.

Causal Connection and Medical

The Petitioner alleges that in the process of handcuffing the customer, who was trying to defend himself, Petitioner injured his back when he twisted his body, and he injured his right hand when he was struck by a bat wielded by the store clerk, Ali, and he also alleged that he was sprayed with mace when Ali sprayed the customer which exacerbated his asthma. (T, pp. 17-19) The Commission notes that Petitioner did not call an ambulance until six hours after the incident, and that after complaining of mild back pain he was diagnosed with a urinary tract infection (UTI) at the emergency room. Petitioner sought no further medical care until after he was involved in a motor vehicle accident six weeks later. The Commission further notes that the emergency room visit on the date of accident makes no mention of the alleged mace exposure or exacerbation of Petitioner's asthma condition, thereby tarnishing Petitioner's credibility. (PX7) Further, the Petitioner testified that the he hurt his back as a result of the motor vehicle accident. (T, p. 22) Thus, the Commission is not persuaded that the medical evidence after July 26, 2013 is causally related to the work accident.

The Commission finds Petitioner sustained his burden of proving accident, he provided timely notice to Respondent, and the Commission awards medical benefits subject to Section 8.2 of the Act for the Vanguard MacNeal Hospital bill for date of service July 26, 2013, less the cost of the urinalysis related to Petitioner's diagnosis of UTI. All other medical bills, including but not limited to medical bills in Petitioner's Exhibits eight and nine, for treatment sought six weeks after the work-accident, and following the Petitioner's motor vehicle accident, are properly denied.

Permanent disability

The Commission further finds that Petitioner sustained a right hand contusion on the date of accident and no permanent partial disability attaches to Petitioner's condition of ill-being as a result of the work accident. In so finding, the Commission relies upon the emergency room records from MacNeal Hospital on the date of accident wherein Petitioner was diagnosed with a right hand contusion, Petitioner reported he was hit in the upper back, he complained of rib pain, but he was also diagnosed and treated for an unrelated UTI. (PX7) The Commission notes the diagnostics taken at the hospital on the date of accident of Petitioner's lumbar spine and right hand were negative for acute fracture-dislocation. The Commission finds that there is no compelling evidence that Petitioner sustained injury to his ribs or back and that the medical reports authored by Dr. Dzielawski more than six weeks later and after Petitioner was involved in a motor vehicle accident are not persuasive, no more than a litany of the events prepared in anticipation of litigation, and confusingly interchange references to Petitioner's left hand and right hand complaints. The Commission specifically finds that all medical treatment sought after July 26, 2013, is not causally related to the instant work-accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 30, 2018, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator regarding the issues of accident and notice is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses for services rendered at MacNeal Hospital for medical treatment on the date of service on July 26, 2013, less the cost of the urinalysis, pursuant to the provisions of §8(a) and §8.2 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.

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,750.00. 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: MAY 26 2020
KAD/bsd
O022720
42

Kathryn A. Doerries

Maria E. Portela

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOND, LAWRENCE
Employee/Petitioner

Case# **13WC026072**

26TH & AUSTIN CITGO AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE IWBF
Employer/Respondent

20IWCC0244

On 1/30/2018, 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 1.62% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0000 CITGO
5946 S 26TH ST
CICERO, IL 60804

0000 26
7000 W 111TH ST, #102
WORTH, IL 60482

5946 ASSISTANT ATTORNEY GENERAL
HELEN LOZANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20 IWCC0244

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
ARBITRATION DECISION

Lawrence Bond
Employee/Petitioner
v.
26th & Austin Citgo and the Illinois State Treasurer as *ex-officio* custodian of the IWBF
Employer/Respondent

Case # 13 WC 26072

Consolidated cases: _____

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **chicago**, on **December 14, 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 **1) Notice to Respondent-employer of hearing date and 2) liability of IWBF**

FINDINGS

On **07/26/2013**, 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 not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$15,912.00**; the average weekly wage was **$306.00**.

On the date of accident, Petitioner was **40** years of age, ***single*** 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 **$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

THE ARBITRATOR FINDS THAT PETITIONER FAILED TO PROVE BEYOND A PREPONDERANCE OF THE EVIDENCE THAT AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT, THAT HE GAVE TIMELY NOTICE OF HIS ACCIDENT TO HIS EMPLOYER AND THAT HIS CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY. PETITIONER'S CLAIM FOR COMPENSATION IS DENIED. ALL OTHER ISSUES ARE MOOT.

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.

KSSteffen — January 25, 2018

Signature of Arbitrator Ketki Shroff Steffen — Date

JAN 30 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Lawrence Bond,	)	
	)	
Employee/Petitioner,	)	Case No. 13 WC 26072
v.	)	
	)	
26th & Austin Citgo, and the Illinois State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund	)	
	)	**Chicago, IL**
Employer/Respondent.	)	

Respondent Illinois Injured Workers' Benefit Fund's Proposed Findings of Facts and Conclusions of Law

Petitioner, Lawrence Bond, pursued this action under the Illinois Workers' Compensation Act and sought relief from Respondent-Employer, 26th & Austin Citgo. This action also sought relief from the Illinois Injured Workers' Benefit Fund (IWBF) as the employer did not maintain workers' compensation insurance coverage on the claimed date of injury. PX 2. A hearing was held before Arbitrator Ketki Steffen on December 14, 2017. Petitioner notified the employer of the hearing date by certified mail. PX 1. The employer did not appear for any of the arbitration proceedings and was not represented by an attorney. The Office of the Illinois Attorney General appeared on behalf of the Illinois State Treasurer, as *ex officio* custodian of the IWBF, and participated in the arbitration hearing. All issues, including liability of the IWBF and notice of hearing date to Respondent-employer, are in dispute.

Factual History

Petitioner testified that his date of birth is November 12, 1972 and that he was single with one dependent minor child on July 26, 2013. He began working at 26th & Austin Citgo, a gas

station and convenience store, in April of 2013. Petitioner learned about the job through a window advertisement displayed on Respondent-employer's premises. This advertisement prompted the Petitioner to speak with Respondent's owner, Mohammed, who offered Petitioner employment as an unarmed overnight security guard. Petitioner accepted the position and agreed to be paid a $306.00 weekly cash salary. Income taxes were not withheld. He was regularly scheduled to work 10 p.m. to 6 a.m., five days per week, and was off on Mondays and Tuesdays.

His duties included stocking shelves, cleaning, and monitoring security mirrors inside the convenience store. Respondent-employer provided him with a uniform which consisted of a shirt and badge that read "security". Petitioner supplied his own handcuffs that he took home every night. Per Petitioner, Mohammed instructed him that in the event of an incident involving a customer, he was to handcuff the customer and call the police. No documentary outlining his duties or job description was provided.

Petitioner testified that on July 26, 2013, he was at 26th & Austin Citgo when a customer and his girlfriend entered the store. Ali, the store clerk, was also present in the store behind the counter. The customer and his girlfriend were at a self-serving coffee station, when Ali exclaimed to the customer that he was using too much sugar in his coffee. A verbal altercation ensued which then escalated when Ali began hitting the customer with a baseball bat. The Petitioner intervened in this altercation. He wrestled the customer to the ground where he twisted his body while handcuffing the customer. Ali continued swinging the baseball bat and striking the handcuffed customer. Additionally, Ali sprayed mace on the customer and Petitioner. Petitioner then called the police. Upon investigation, Ali was arrested for felony aggravated battery and the injured male customer was taken via ambulance for treatment. Petitioner experienced pain in his back, right hand, and asthma symptoms. He called Mohammed, the owner, and reported the incident to him. In response, Mohammed directed the Petitioner to close

and lock the store. Petitioner's did not state that he specifically advised Mohammed of any of this injuries.

The Cicero Police Department was dispatched and arrived at 26th & Austin Citgo approximately at 1:00 a.m., located at 5946 W. 26th Street, following the above incident. PX 5. Petitioner stated that he recalled speaking to responding officers and that his testimony was the same as he reported to the responding officers.

The police reports, introduced into evidence, do not show that the Petitioner reported that he was injured in any way. PX5

At 6:40 a.m., Petitioner was transported to McNeal Hospital via ambulance. He presented complaints of back and hand pain as the result of battery. PX 7. The medical records reflect that he arrived via ambulance at 6:40 a.m. *Id.* However, no records from the ambulance provider were submitted into evidence. The submitted medical records that do not include the ambulance report do not show where the Petitioner was picked up for his trip to McNeal hospital. At McNeal, Petitioner underwent x-rays to the chest, right hand, and lumbar spine, which were negative for acute fracture-dislocation. *Id.* He was discharged the same day, advised to follow up as needed, and was diagnosed with a back ache, rib pain, urinary tract infection, and contusion of hand. *Id.*

Petitioner did not seek medical care again until September 4, 2013, following a motor vehicle accident the day prior. PX 7. He presented to McNeil Hospital with complaints of back, right knee, and left wrist pain subsequent to a motor vehicle accident on September 3, 2013. *Id.* He underwent an x-ray to the lumbar back which revealed mild lumbar spondylosis with mild vertebral disc space narrowing at L5-S1 and no evidence of a fracture. *Id.* He was discharged the same day with a diagnosis of knee contusion, lumbar sprain, and was advised to follow up as needed. *Id.* Upon further questioning, Petitioner stated he did not remember whether he had

received medical treatment between July 26, 2013 and September 4, 2013 for the injury in question.

On September 26, 2013, he presented to MidCity Spine and Ortho Rehabilitation for physical therapy and reported complaints of pain in the left hand and that he was not taking medications for this pain. PX 9. A referral note to MidCity Spine is not included in Petitioner's medical records. He additionally described an injury to his right hand as a work-related accident. *Id.* He then underwent an MRI of the right hand on September 27, 2013, which revealed no definite ligamentous or bony pathology. *Id.* Petitioner testified that this MRI report is incorrect.

He presented again to MidCity Spine on September 30, October 2, and October 3, 2013, with complaints of pain in the low back, left shoulder, and right knee. PX 9. No complaints of the right hand were recorded for these dates. *Id.* On October 9 and 11, 2013, he presented complaints of pain in the left hand. *Id.* No complaints of the right hand were recorded for these dates. *Id.* Petitioner's last recorded treatment date with MidCity Spine was on December 19, 2013, where he presented low back pain after a motor vehicle accident on September 3, 2013 and improved pain in the neck and right knee. *Id.* It was recommended he undergo an MRI of the lumbar spine before continuing with additional physical therapy. *Id.* Petitioner's medical records do not reflect he underwent this recommended diagnostic or additional treatment. *Id.* However, Petitioner testified that he underwent additional treatment after his last recorded December 3, 2013 visit.

After the July 26, 2013 incident, Petitioner did not return to work for Respondent-employer. Petitioner understood that he was fired because Ali, the store clerk, was taken into custody and he was not. Today, Petitioner reports experiencing pain and problems with gripping with his right hand. As to his back, he reports spasms, experiences pain while sitting, lifting heavy items, and walking up stairs. For his symptoms, he takes over the counter pain

medications such as Advil and ibuprofen. Petitioner is not currently treating for his symptoms and does not have any pending appointment.

Findings/Analysis

The Arbitrator notes that the Petitioner has the burden of proving his case by a preponderance of the evidence. *Chicago Rotoprint v. Industrial Comm'n*, 157 Ill.App.3d 996, 1000 (1987). Liability cannot rest upon imagination, speculation or conjecture. See *United Airlines v. Comm'n*, 991 N.E.2d 458, 463 (2013). The Arbitrator relies on Petitioner's testimony and the exhibits entered into evidence in making the following conclusions of law:

A. Was Respondent-Employer operating under and subject to the Illinois Workers' Compensation Act on July 26, 2013?

Based on Petitioner's testimony, the Arbitrator finds that 26th & Austin Citgo was operating under and subject to the Illinois Workers' Compensation Act. Petitioner testified that his injury occurred while working for an establishment that stores and sells gasoline and in which goods, wares, or merchandise are sold or in which services are rendered to the public at large. These facts trigger application of Section 3.7 and 3.17(a) of the Act. 820 ILCS 305/3.7, 3.17(a).

B. Was there an employer-employee relationship?

"No rigid rule of law exists regarding whether a worker is an employee or an independent contractor." *Ware v. Industrial Comm'n*, 318 Ill.App.3d 1117 at 1122 (1st Dist. 2000). There are multiple factors to consider in assessing the nature of the relationship between the parties. *Id.* These factors include: 1) Whether the employer may control the manner in which the person performs the work; 2) Whether the employer dictates the person's schedule; 3) Whether the employer pays the person hourly; 4) Whether the employer withholds income and Social Security taxes from the person's compensation; 5) Whether the employer may discharge the

person at will; 6) Whether the employer supplies the person with the needed instrumentalities; and 7) Whether the employer's general business encompasses the person's work. *Roberson v. Industrial Comm'n*, 225 Ill.2d 159, 175 (2000).

Based on Petitioner's testimony, the Arbitrator finds that an employee-employer relationship existed between Petitioner and 26th & Austin Citgo on July 26, 2013. Although Petitioner testified that he provided some tools to engage in his work with Respondent-employer and taxes were not withheld from weekly salary, he was scheduled to work by Respondent-employer and he wore a uniform provided by Respondent-employer. These factors, when taken in totality, weigh in favor of the conclusion that there was an employer-employee relationship.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent-Employer?

The Arbitrator finds that Petitioner's July 26, 2013 injury did not arise out of and in the course of his employment as it was a result of willful and wanton conduct which was not within the scope of his employment.

1. Petitioner's injury is a result of willful and wanton conduct and is thus not compensable under the Act.

An accident is compensable under the Act if Petitioner establishes that it both arises out and in the course of employment. *Hannibal, Inc. v. Industrial Comm'n*, 38 Ill.2d 473 (1967). If the accident is the result of Petitioner's illegal conduct, it is not automatically disqualified from the recovery of benefits. *Stembridge Builders Inc. v. Industrial Comm'n*, 263 Ill. App.3d 878 (2d Dist. 1994). Negligent illegal conduct is not enough to take the accident out of the scope of employment; the conduct must rise to willful and wanton conduct in order for it to be found not compensable. *McKernin Exhbits Inc. v. Industrial Comm'n.* 361 Ill. App.3d 666 (1st Dist. 2005).

In Illinois, willful and wanton is defined as "... a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Ill. Rev. Stat. 1989, ch. 85, par 1-210.

Essentially, the Petitioner claims that the got injured while trying to handcuff a customer. His injury arose because a fellow employee, Ali, was repeatedly hitting a customer (who was down on the ground being handcuffed) with a baseball bat. Sadly, the customer, per Petitioner's testimony had done no wrong. Per Petitioner's testimony, the customer and his girlfriend had entered the store and the women was getting a cup of coffee for purchase. Petitioner's fellow employee, Ali, was working the cash register while Petitioner was working as a security guard/stockperson. Ali (who is behind the counter) becomes extremely aggravated and angry because the young lady was (according to Petitioner) using up too much sugar for her coffee. Ali became irate at the young lady and yelled at her (apparently about her sugar use). The boyfriend/customer pleaded on her behalf and told Ali that he should not talk disrespectfully to his girlfriend. In response, Ali reached behind his cash register and counter and grabbed a baseball bat, came out from behind the enclosure and into the open store area. Ali then proceeded to hit the male customer continuously (without any provocation) with the baseball bat. The victim is hit several times on or about his head and body and falls to the ground. The Petitioner, whose job included security, does nothing to help the innocent customer against Ali's violent attack. Petitioner does not stop Ali or help the customer, Instead, he effectively helps Ali cause additional harm and injury to the customer. In fact, the Petitioner, by his own clear admission, decides to handcuff the male customer who is the victim of Ali's attack. Petitioner testified that he did so for Ali's safety and because his employer had directed him to do so in the event of any incident. Petitioner had some difficulty handcuffing the victim/customer because the customer

was trying to use his arms to ward off Ali's baseball bat hits. Finally, per the Petitioner, he successfully handcuffs the customer and Ali continues to hit him and kick him. After Petitioner subdues the injured customer, Ali returns with pepper spray and sprays the customer/victim who is now on the ground. Petitioner injures his arm and gets some pepper spray on himself during this period.

Petitioner testified that he wrestled a customer to the ground to handcuff and detain him while Ali continued to strike the handcuffed customer with a baseball bat. Petitioner kept the defenseless customer in handcuffs while Ali sprayed mace at the customer. These handcuffs were not provided by Respondent-employer, rather Petitioner purchased and maintained control of the handcuffs. Petitioner gives no testimony or evidence to further explain his conduct which was not merely unreasonable but willful and wanton. Although the Petitioner does not directly say so, in the Arbitrator's opinion, he was for all intent and purpose aiding Ali by subduing the customer so Ali could continue to batter him. Petitioner's testimony does not absolve him of the logical conclusion of his actions.

In restraining the customer's ability to defend and remove himself from the danger he faced, Petitioner suffered injuries to his low back and right hand. Thus, Petitioner's injury is a direct result of his own willful and wanton conduct. Petitioner engaged in the utter indifference for the safety of the customer when he handcuffed and restrained him as the customer endured an aggravated battery. Petitioner's contention that he was directed by his employer to handcuff individuals is unsupported and defies logic. Petitioner's actions do not further the employer's lawful business but rather opened the employer to additional liability, Additionally, Petitioner did not introduce any credible evidence or testimony that he was acting with the scope of his employment. There is no job description that provides for a security guard handcuffing a customer because over the alleged sugar use.

Petitioner has provided no testimony that supports his conduct or places such conduct within even a loose or expanded definition of his employment duties. Petitioner's testimony regarding the employer directing him to use the handcuffs is wholly without support or credibility in the Arbitrator's opinion. If the employer truly required his employees to use handcuffs (even if such actions by a private citizen were legal), he would have provided them. In the Arbitrator's opinion Ali took it upon himself to get the handcuffs and used the handcuffs of his own volition in furtherance of felony battery upon the victim/customer. Per the submitted police reports, the victim/customer was severely injured, transported to the hospital and Ali was arrested for felony Aggravated Battery.

Assuming arguendo that the employer directed Ali to use handcuffs, can Ali's conduct be considered as arising from his employment, as part of this employment duties? Such a finding would sanction employers giving illegal/felonious directives to their employees and would validate/absolve an employee of the legal and ethical obligation to not commit criminal acts on behalf or at the behest of their employer. The Arbitrator finds that there was no directive to use the handcuffs, that any directive to handcuff a customer (who had not done anything wrong) so that a fellow employee can continue to do serious bodily harm to the customer is, in and of itself, a willful and wonton disregard for the safety of others. Such an act was not and cannot be arising out of and in the course of employment. Rather, Petitioner's conduct falls squarely within the definition of willful and wanton. Even if his initial intention was to merely separate the customer from Ali, his act of handcuffing the customer knowing full well that it left the customer defenseless against Ali's rage and baseball bat is a classic "...course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Ill. Rev. Stat. 1989, ch. 85, par 1-210.

In making this finding, the Arbitrator notes her finding that Petitioner wholly lacks credibility (not just in regards to the directive to use handcuffs) but also in regards to his late outcry of back injury. As discussed below, Petitioner's injuries seem to resurface after a subsequent motor vehicle accident. There is a long delay between the incident and Petitioner reporting, via ambulance, for a UT infection to McNeal hospital. Additionally, it should be noted that neither side presented the testimony of Muhammed (the employer).

2. Petitioner did not satisfy his burden that he acted within his scope of employment and thus his injury is not compensable under the Act.

Injuries outside of the Petitioner's scope of employment are not compensable under the Act. *Pub. Serv. Co. of N. Ill. v. Industrial Comm'n*, 395 Ill. 238 (1946). Here, Petitioner testified that Mohammed instructed him that in the event of an incident involving a customer, he was to handcuff the customer and call the police. No additional supporting or documentary evidence was provided that reflected this reported directive or Petitioner's full job duties. There was no testimony or evidence that handcuffing an innocent customer is within the scope of a security guard's employment.

Petitioner's statement, that he was instructed to handcuff customers by is employer, is not supported by any additional evidence. Petitioner testimony, in this regard, is not credible. Additionally, Petitioner's lack of credibility is also evident from his other testimony, including unexplained testimony of how he ended up coming to the hospital via ambulance almost 4 hours after the incident. Petitioner did not report that he was injured to the police, he did not testify that he told his employer of his injuries on the initial phone call and he did not introduce the ambulance report into evidence. Lastly, there are long and unexplained gaps in treatment that create doubt in the Arbitrators mind regarding Petitioner's entire testimony.

Based on the foregoing, the Arbitrator finds that Petitioner's July 26, 2013 injury did not arise out of and in the course of Petitioner's employment and was not within the scope of employment with Respondent-employer.

D. What was the date of the accident?

Petitioner testified that the accident occurred on July 26, 2013. Additionally, Petitioner's medical records presented at hearing reflect an injury occurred on July 26, 2013. Thus, the Arbitrator finds that the Petitioner's date of injury is July 26, 2013.

E. Was timely notice of the accident given to Respondent-Employer?

Petitioner testified that he called Mohammed, the owner, and reported the incident to him. In response, Mohammed directed the Petitioner to close and lock the store. However, from Petitioner's testimony, it is unclear whether he also advised Mohammed of his injuries. The Police report does not indicate that Petitioner had been injured or claimed to be injured. Petitioner does not report to the hospital after the incident but comes to the hospital, via ambulance, several hours later. Petitioner has a UT infection and claims then that his back and hand hurt. Based on this, the Arbitrator finds that Petitioner did not provide timely notice of the accident to Respondent-Employer.

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

The Arbitrator notes that no specific medical testimony or opinion was offered into the record. The Arbitrator further notes that Petitioner did not present for additional treatment after July 26, 2013, that Petitioner suffered injuries in a motor vehicle accident on September 4, 2013 for which he subsequently underwent physical therapy to his lower back and right hand, and underwent an MRI to the right hand with normal findings. Petitioner's testimony, without supporting medical evidence, that his current condition of ill being is because work accident and not the subsequent motor vehicle accident of September 3, 2013 is not persuasive. Thus, the

Arbitrator finds that Petitioner's current condition of ill- being is not causally related to his July 26, 2013 injury.

Based on the foregoing, benefits to Petitioner under the Workers' Compensation Act are denied. All other issues are moot.