STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SZYMON OLEKSY,
Petitioner,

vs.

WK HEATING, INC.,
Respondent.

No. 22 IWCC 0121; 15 WC 002473

ORDER

This matter comes before the Commission on its own 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 March 30, 2022, is hereby recalled pursuant to Section 19(f) of the Act.

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

April 1, 2022

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

TJT/ahs
51

22IWCC0121

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

Szymon Oleksy,

Petitioner,

vs. NO: 22 IWCC 0121; 15 WC 002473

WK Heating, Inc.,

Respondent.

CORRECTED DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to a remand from the Appellate Court in *Oleksy v. Ill. Workers' Comp. Comm'n*, 2021 IL App (1st) 191929WC-U, entered February 5, 2021.

I. Procedural Background

Petitioner previously appealed the Decision and Opinion on Review of the Commission dated December 12, 2018, finding that he failed to prove the existence of an employer-employee relationship between himself and the Respondent on the date of the accident. On August 23, 2019, Judge Michael F. Otto of the Circuit Court of Cook County confirmed the Commission's Decision. On February 5, 2021, the Appellate Court of Illinois reversed the judgment of the Circuit Court of Cook County that confirmed the Commission's Decision, reversed the Commission Decision, and remanded the matter back to the Commission with directions to find that an employer-employee relationship existed between claimant and Respondent on the date of the accident.

In his Decision on October 26, 2017, the Arbitrator found that on January 9, 2015, Petitioner sustained an accident that arose out of and in the course of his employment and that timely notice of this accident was given to Respondent. The Arbitrator also found Petitioner's current condition of ill-being causally related to the accident. These issues were not reviewed.

II. Findings of Fact

The Commission hereby incorporates by reference the findings of fact contained in the Arbitration Decision to the extent it does not conflict with the Illinois Appellate Court's opinion dated February 5, 2021. The Commission also incorporates by reference the Illinois Appellate

Court's opinion, which delineates the relevant facts and analysis. Any additional findings of fact in this Decision and Opinion on Remand will be specifically identified in the discussion of particular issues.

III. Conclusions of Law

The Commission hereby finds that an employer-employee relationship existed between Petitioner and Respondent on January 9, 2015. The Commission now finds Petitioner is entitled to reasonable and necessary medical expenses, temporary total disability, and prospective medical care for the reasons stated herein, and 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

A. Temporary Total Disability Benefits (TTD)

Petitioner did not return to work for Respondent following his injury on January 9, 2015. Petitioner was released to return to work light duty on June 19, 2015. He began to work side jobs in carpentry and painting at this time. Petitioner subsequently underwent L4-S1 decompressive laminectomy, foraminotomy, discectomy, and facetectomy on February 2, 2016. On April 8, 2016, Dr. Sokolowski released him to light duty as of April 18, 2016. Accordingly, the Commission concludes that Petitioner was entitled to TTD benefits from January 10, 2015 through June 19, 2015 and from February 2, 2016 through April 17, 2016.

B. Reasonable and Necessary Medical Expenses

Petitioner submitted reasonable and necessary medical expenses detailed in PX1 through PX16, totaling $105,899.74.

C. Prospective Medical Care

After being released back to full duty work on May 13, 2016, Petitioner returned to Dr. Sokolowski with increased back pain on May 31, 2016. Petitioner's last visit with Dr. Sokolowski was November 14, 2016, with complaints of unbearable pain with activity. Dr. Sokolowski recommended future fusion surgery. Accordingly, the Commission finds Petitioner entitled to prospective medical care, as recommended by Dr. Sokolowski.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 26, 2017, is hereby reversed regarding employer-employee relationship, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $475.53/week for 32-3/7 weeks, commencing January 10, 2015 through June 19, 2015, and from February 2, 2016 through April 17, 2016, as provided in Section 8(b) of the

Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical expenses of $105,899.74, subject to §8(a)/§8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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.

April 1, 2022

o: 02/15/2022
TJT/ahs
51

/s/ *Thomas J. Tyrrell*
Thomas J. Tyrrell

/s/ *Maria E. Portela*
Maria E. Portela

/s/ *Kathryn A. Doerries*
Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION 22IWCC0121
NOTICE OF 19(b) ARBITRATOR DECISION

OLEKSY, SZYMON
Employee/Petitioner

Case# **15WC002473**

WK HEATING INC
Employer/Respondent

On 10/26/2017, 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 1.24% 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:

2234 CHEPOV & SCOTT LLC
NATALIA OLEJARSKA
5440 N CUMBERLAND AVE STE 150
CHICAGO, IL 60656

0286 SMITH AMUNDSEN LLC
LESILE JOHNSON
150 N MICHIGAN AVE SUITE 3300
CHICAGO, IL 60601

S. Oleksy v. WK Heating, Inc. , 15 WC 02473

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
19(b)

Szymon Oleksy
Employee/Petitioner
v.
WK Heating Inc.
Employer/Respondent

Case # 15 WC 02473

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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **August 3, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Whether Petitioner elected out of the Act.**

S. Oleksy v. WK Heating, Inc. , 15 WC 02473

FINDINGS

On the date of accident, **January 9, 2015**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did not* exist between Petitioner and Respondent.

On this date, Petitioner sustained 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's average weekly wage was **$713.29**.

On the date of accident, Petitioner was **37** years of age, *married* with **3** dependent children.

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

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

ORDER

Claim for compensation denied. Petitioner failed to prove an employee-employer relationship existed between Respondent and him.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

October 26, 2017

Date

ICArbDec19(b)

OCT 26 2017

INTRODUCTION

This matter was tried as a §§19(b)/8(a) proceeding with the disputed issues being: Act/Employer-employee; Accident; Notice; Causal connection; Wages; Incurred and prospective medical expenses; TTD; and Whether Petitioner opted out of coverage under §1(a)3 of the Act.

Petitioner and a colleague of his, Pawel Cembala, testified on behalf of Petitioner. Wojtek Kowalczyk, the owner of the Respondent corporation, testified on behalf of Respondent. All witnesses testified via a Polish/English interpreter.

FINDINGS OF FACT

Petitioner is originally from Poland. He has lived in the United States for approximately 10 years. He attended high school and a technical school in Poland. When Petitioner first came to the U.S., he worked at Belmont Sausage Company in a shop in Elk Grove Village. He was employed as "a contractor and maintenance". He worked at Belmont for 6 or 7 years and then began a relationship with Respondent, WK Heating, Inc. ("Respondent" or "WK").

Petitioner began receiving checks from Respondent in May or June of 2014. The checks were made out to a business that Petitioner owned, "SO System, Inc." (PX 20; RX 5) SO System, Inc. (SO) was incorporated on September 11, 2013. (RX 5) Petitioner was the president of SO. (RX 1, RX 3) According to Petitioner, Respondent's business was "the same as I did, heating and cooling." According to the workers' compensation insurance policy issued by Liberty Mutual for SO System, Inc., on May 21, 2014, SO's business was: "Heating, ventilation, air conditioning and refrigeration systems-installation, service and repair." (RX 1)

The owner of Respondent was Wojtek Kowalczyk (Wojtek) Petitioner testified that he heard about work at Respondent through Wojtek's mother, who worked at Belmont. Petitioner contacted Wojtek and met with him at a job site. Wojtek said that he had a lot of jobs and needed a worker. Respondent's other workers, Pawel and Mercin, would show Petitioner what to do. Wojtek required Petitioner to form his own business and get workers' compensation insurance in order to work with WK. Petitioner already owned SO. Petitioner obtained workers' compensation insurance for SO System, Inc., for the policy period of 5/21/2014 to 5/21//2015. (RX 1) Petitioner elected to decline coverage for himself, as an officer of SO. (RX 1; RX 3) Petitioner first testified that Wojtek told him to buy his own insurance "and in case I have my own insurance, that it would cover any kind of accidents." "If I have my own worker he –he pays with checks. And on that base, and in case of accident, he has his own insurance to cover for it." Pawel and Mercin would do the main system and Petitioner would finish it. There was no written contract regarding the relationship between Petitioner, SO, and Respondent. Petitioner said that he started as a helper, and later did the same work that the other guys were doing. He would install the whole system, including duct work and vents.

Petitioner was paid by check, every week or two weeks. He first testified that he was paid "either way", weekly or per hour. Petitioner testified on cross-examination that he was not paid on a per job basis; he thinks that he was paid on an hourly basis. He started at $14.00 per hour and made $20.00 per hour at the highest. His standard work week was 50 hours, working 7:00am to 5:00pm. The payment checks were made out to SO System, Inc. (PX 20) He received an IRS Form 1099 from Respondent at the end of the year. No taxes or social security was deducted from Petitioner's pay. (RX 4) Petitioner informed Wojtek regarding the hours that he worked via little pieces of paper and then in a notebook that Wojtek gave him. Neither Party submitted any copies of these documents. Petitioner thought that Wojtek was his employer. He would receive instructions

regarding a job from Wojtek over the phone or via text. Petitioner's Exhibit 18 documents several calls and texts from or to Respondent's phone number. Wojtek would tell Petitioner what time to report to a job site and what Petitioner was supposed to do.

Petitioner testified that Wojtek was often not on the job with him, but would stop by the job site, usually every day. Wojtek and Pawel would communicate regarding how the job should progress and Pawel would tell Petitioner what they were going to do and how to do it.

Petitioner testified that at some point in his relationship with Respondent he received T-shirts from Wojtek with Respondent's name and phone number on them. Petitioner testified that Wojtek gave him basic tools, like a screwdriver and scissors (tin snips?) because he had no tools when he started at WK. He then worked with these basic tools and WK furnished a welder, the leather, driller and hammer.

At various times, Petitioner would pick up materials and supplies from Munch Supply on behalf of Respondent. (PX 17)

When Respondent did not have work for him, Petitioner would work somewhere else. Petitioner testified that he worked with Pawel somewhere else during a slow period at WK.

On the date of accident, January 9, 2015, Petitioner was working at a job site on Campbell Street. He had been told by Wojtek to go with Marek (the General Foreman on the Campbell job) to Munch Supply and pick up a furnace. The job was to install the whole system in the building. Petitioner and Marek carried the furnace (weighing 140 to 150 pounds) up some stairs. Petitioner was on top, climbing backwards. He missed a step with his left foot and his foot slipped on the step. He felt pain in his low back. Petitioner and Marek put the furnace down. Marek was leading the job and he showed Petitioner how the system was supposed to look like. Petitioner picked up the furnace by himself and worked on the installation. When asked if he worked until the end of the shift that day, Petitioner replied that he worked till the end of the job, so it is assumed that Petitioner completed the installation. Midway through the job, the pain became more intense and Petitioner had to take a break and lay down. He had pain in his low back on the left side and down his left leg. Wojtek came by the job site and Petitioner told him that he could not walk. "My leg is hurting, I can't walk." Petitioner did not tell Wojtek how the injury occurred. He did not tell Marek that he was feeling pain. Neither Party called Marek to testify. Marek was not employed by Respondent; he appears to have been the General Foreman on the job.

January 9, 2015 was a Friday. Petitioner did not work for Respondent after this date. He was not scheduled to work on Saturday and Sunday. He did not work on Monday, January 12, 2015, because his back hurt. Petitioner testified that he first sought medical treatment from Dr. Sabrina Indyk, on January 13, 2015. The history charted by Dr. Indyk was of a back injury on Friday. The pain started a few days ago - he thinks that he might have injured it at work because he was lifting something heavy and going up/down stairs - he is a contractor. He had seen another doctor before and received Saleto 600 mg, but has had no improvement. The pills helped initially, but wore off. The diagnosis was: sciatica, left; muscukloskeletal pain; gait abnormality; and back pain. Petitioner was given a Medrol dose pak and a shot of Toradol. Naproxyn and Flexerill were prescribed, along with Ativan for relaxation. The patient refused PT. An MRI was recommended if there was no improvement. Petitioner was instructed to go to the ER if the pain worsened. (PX 1) No evidence was adduced regarding the identity of the doctor who allegedly saw Petitioner first and who had prescribed the Saleto.

Petitioner testified that he had not injured his back prior to this event and was in good health on January 9, 2015.

Petitioner testified that within a week after the accident Wojtek came to his house and dropped off a check. At that time, Petitioner advised Wojtek that he had injured his back carrying a furnace. It looks like the last check to SO System from Respondent was dated January 20, 2015. (PX 20) The Arbitrator finds that the date of this conversation was January 20, 2015.

On January 17, 2015, Petitioner was taken from his house by ambulance to Northwest Community Hospital (NWCH) due to excruciating low back pain. The records of the paramedics reveal severe low back pain with sciatica for 1 week. There was no history of an injury, although it was charted that the patient was released from the hospital on 1/13/2015 with a diagnosis of sciatica. Petitioner was given fentanyl by the paramedics for pain management. The paramedics noted that the patient did not speak English and the history was given through a translator. (PX 2)

At NWCH, the patient presented with a history of sciatica. He had increasing pain over the last week. The NWCH records state that there was no language barrier for the patient, but then state that a translator was used. He was seen at Resurrection Hospital last week and was discharged with a rx for Naprosyn and Flexeril, which has not helped. Petitioner improved at NWCH and was discharged home to follow up with his PCP for an MRI. He was to continue with Naprosyn and take Valium as well. (PX 3) No records from Resurrection were submitted.

Petitioner followed up with Dr. Indyk on January 22, 2015. He had low back pain and left leg pain. Petitioner was given a script for PT, a script for an MRI and was excused from work for a month. (PX 1)

Petitioner began PT at Global Rehabilitation on January 19, 2015. He had therapy at Global from January 19, 2015 to April 2, 2015. The therapy consisted of therapeutic strengthening, stretching exercises, modalities, taping and manual therapy. Petitioner also had post-surgery therapy at Global from February 24, 2016 through May 6, 2016, utilizing e-stim, core strengthening, ultrasound, HEP and other modalities. (PX 6)

Petitioner began treatment with Dr. Mark Sokolowski, an orthopedic surgeon, on January 29, 2015. This was on a referral from Dr. Indyk. Petitioner gave a history of injuring his low back carrying a furnace at work. He has left sided low back pain, down the buttock and down the left leg. The physical exam was consistent with a herniated lumbar disc. Dr. Sokolowski reviewed a lumbar MRI of January 22, 2015 and thought that it showed a large annular tear at L4-5 and a very large disc herniation at L5-S1 with complete displacement of the thecal sac to the right. The Assessment/Plan was: 1.) L4-5 annular tear; 2.) Left L5-S1 very large disc herniation. The recommendation was to continue PT and undergo lumbar injections. Petitioner was excused off work. If therapy and injections were not successful, lumbar decompression from L4-S1 would be appropriate. Dr. Sokolowski communicated with the patient in Polish. (PX 7)

Petitioner had injections performed by Dr. Hussain at Global Rehab on February 2, 2015 and May 11, 2015. (PX 6) Petitioner followed up with Dr. Sokolowski on several occasions. On June 19, 2015, Petitioner was seen by Dr. Sokolowski and was released to modified work duty, with restrictions of 20 pounds lifting and frequent position changes. A home TENS unit and dendracin lotion was recommended. Full duty work was contemplated in 2 weeks. (PX 7)

Petitioner testified that he began doing carpentry work for "David" about six months after the accident. He installed baseboards on windows and floors. He had helpers to carry heavy materials. Petitioner then worked for "Vydas" doing painting and patching. Petitioner had helpers to carry heavy items. Petitioner had no injuries working for David or Vydas.

Petitioner had an urgent visit with Dr. Sokolowski on September 8, 2015, due to intolerable back pain. Dr. Sokolowski recommended surgery. Petitioner underwent a L4-S1 decompressive laminectomy, foraminotomy, discectomy and facetectomy, by Dr. Sokolowski with the assistance of Dr. Ivankovich, at Westlake Hospital on February 2, 2016. (PX 11)

Petitioner was released by Dr. Sokolowski to modified duty work, on April 15, 2016. He was released to full duty work, as of May 13, 2016. Petitioner returned to Dr. Sokolowski on May 31, 2016 with increased back pain after returning to full duty work. Modified duty work was recommended. Another MRI was done on June 18, 2016 and Dr. Sokolowski thought that it showed desiccatory changes. The study was said to show satisfactory resection of the herniated discs. Continued modified duty, with the possibility of L4-S1 fusion was recommended. Petitioner's last visit with Dr. Sokolowski was on November 14, 2016. He complained of 2/10 pain at rest, but unbearable pain with activity. Dr. Sokolowski recommended HEP and modified duty work. If the back pain became intolerable, fusion surgery would be necessary. A provocative discogram should be performed before fusion surgery. If the symptoms continue, PRN. If there was a regression, Dr. Sokolowski would be happy to see the patient. (PX 7)

Petitioner denied any back injuries occurring after January 9, 2015.

Petitioner is awaiting approval for the proposed fusion surgery. He can't drive for a long distance. He doesn't play soccer or ride a bike. He can't jump. He doesn't go for long walks with his kids. He has to be careful when going down stairs. He has to change positions a lot. He has trouble sleeping. He does continue to work at modified duty. He has pain. He has numbness in his left leg and spasms. He would like to have the proposed surgery, but he cannot afford it.

Pawel Cembala (Cembala) testified at the request of Petitioner. He knows Petitioner from HVC work. Cembala thinks that he was employed by Respondent. When he worked at Respondent, Cembala was paid hourly on a weekly basis. Cembala would provide Respondent with little slips of paper to substantiate his claimed wages. He was paid by check or cash. He did not have a definite starting time, as that was coordinated with the other trades and the general contractor. The GC would contact Wojtek to schedule jobs. Cembala used some of his own tools and used Respondent's tools for specialized tasks. At the time of the accident, Cembala had not worked for Respondent for 2 to 3 months. Cembala did show Petitioner how to do the heating and cooling trade. Cembala also owned his own company.

Magdalana Bilski testified at the request of Respondent. She is the insurance agent who sold Petitioner the workers' compensation insurance policy for SO System, Inc. She explained the documents to Petitioner in Polish. Petitioner chose to exclude himself from coverage. He understood the effects of being excluded from coverage.

Wojtek Kowalczyk (Wojtek) testified at the request of Respondent. He is the sole owner of Respondent and has been so since 2008. WK's business is to install whole new systems, the furnaces, new construction. WK has no employees other than Wojtek. Basically, general contractors contract with WK and then WK hires subcontractors to do the work. Wojtek does not recall how he became involved with Petitioner. Typically, WK has written contracts with its subcontractors. Some agreements are verbal, not in writing. There was no written contract with Petitioner or SO. Everybody has to have insurance. Respondent is not responsible for them. WK does not withhold taxes from its payments to the subs. WK did not provide any benefits, such as paid time off, vacation, holiday pay or health insurance. Wojtek did not give ant T-shirts to sub-contractors. He did not require subs to wear WK T-shirts. WK required Petitioner to get insurance. Wojtek would advise Petitioner of

the job site location and meet Petitioner at the site and he should show Petitioner what to do. He would show Petitioner the plans. Wojtek would not stay at the job and watch Petitioner work. WK provided materials. Wojtek would tell the subs the way to install the HVAC, based on the blueprints. Wojtek testified that Petitioner had back pain before the accident date. Wojtek did not tell Petitioner that WK's wc insurance would pay for Petitioner. WK did not give Petitioner any tools. Petitioner's job was to install furnaces. He was not paid hourly. He was paid per unit. Petitioner's actions at the Campbell project were part of the regular course of business for Respondent. Petitioner's actions benefitted WK. Wojtek did not bring a copy of WK's IC agreement with him to the hearing. Wojtek believes that Petitioner had prior HVAC experience before working with WK. Wojtek does not recall Petitioner using Respondent's tools. Wojtek would tell Petitioner what to do on the job. He would show Petitioner where to install the furnace and then Petitioner was left to do it. Wojtek would rely on Petitioner to see to the details of the installation.

Petitioner testified in rebuttal that his prior experience in HVAC was watching others do it in the maintenance shop (at Belmont ?). He never had tools that could be used to install heating and cooling systems. Wojtek got them for Petitioner, even the basic ones. Wojtek brought the ladders and the concrete drills. Petitioner got 10 shirts from Respondent. He was paid hourly, not $500.00 per job.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set for the below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980) Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

The Arbitrator was not impressed with the credibility of the testimony of both Petitioner and Wojtek Kowalczyk. They both knew the consequences of the subcontractor/contractor relationship that they entered into. They both were trying to avoid the expenses of payroll taxes, unemployment taxes and wage and hour laws, along with workers' compensation insurance premiums in structuring their relationship as they did. Petitioner and Kowalczyk do have a level of sophistication regarding construction business relationships and that persuades the Arbitrator that neither took advantage of the other in their relationship. Shame on them both for not defining the relationship in a written agreement.

WITH RESPECT TO ISSUE (A), WAS THE RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS AS FOLLOWS:

Respondent's business was to install and work on HVAC systems. Thus, coverage under the Act is "Automatic", pursuant to §3(2) of the Act.

WITH RESPECT TO ISSUE (B), WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR FINDS AS FOLLOWS:

According to the Supreme Court, an employment relationship is a prerequisite for an award of benefits under the Act. A fact specific inquiry is required to determine whether an employment relationship exists. The Parties designation of their relationship is not controlling, but may be considered, along with the following other factors: 1.) Respondent's right to control the manner in which Petitioner performs the work; 2.) Does Respondent dictate Petitioner's schedule? ; 3.) Is Petitioner paid hourly, or on a per job basis? ; 4.) Are taxes and social security withheld from the payments to Petitioner? ; 5.) Does Respondent's business encompass Petitioner's work? 6.) Can Petitioner be discharged at will? . Roberson v. The Industrial Commission, 225 Ill. 2d 159 (2007)

After considering all of the evidence adduced and the above factors, the Arbitrator finds that Petitioner failed to prove that he had an employee/employer relationship with Respondent.

First, Petitioner's testimony regarding his novice status in the HVAC industry prior to working with WK is not believable. Petitioner formed SO System, Inc. before a relationship with Respondent was even contemplated. The primary business of SO was said to be HVAC and refrigeration systems – installation, service and repair. Petitioner formed SO to get subcontractor jobs in the HVAC field. He would not have incorporated a business if he did not know the trade. Further, Petitioner's testimony that he had no tools when he started with WK is not believable. He had incorporated a business in a trade and he had no tools? Wojtek gave him a screwdriver and scissors and he used WK's tools for the rest of a furnace installation? Would other tradesmen freely let Petitioner use their tools? – No. Common sense and experience lead the Arbitrator to conclude that Petitioner did not show up at a job site with no tools. The Arbitrator finds that Petitioner had HVAC experience before he became involved with WK. He used some of his own tools on the job. He would not have been hired if he did not demonstrate knowledge in the trade.

Regarding the issue of control of the manner of the work, Wojtek told Petitioner where to place a furnace, based on the blueprints or the contractor's plans. The proofs do not show that Wojtek dictated or controlled the manner in which Petitioner installed a furnace – he did not direct that Petitioner use a certain fitting on a certain pipe, for example. While Respondent supplied job materials, this is more a function of complying with Codes and the requirements specified by the General Contractor. Wojtek was clearly not monitoring Petitioner's work in a detailed manner. Respondent's level of control over Petitioner's work does not persuade the Arbitrator that Petitioner was an employee of Respondent.

Petitioner's schedule is dictated by when the General Contractor has the job site open and when the other trades are on site. This factor does not support an employment relationship.

Petitioner and Wojtek disagreed on whether Petitioner was paid hourly, or per job. Even considering Cembala's testimony that he was paid hourly (sometimes in cash, albeit at a time prior to the accident), the Arbitrator cannot conclude that Petitioner was paid on an hourly basis, given the evidence adduced.

Petitioner and Wojtek agreed that SO System received a Form 1099 from Respondent at the end of the year and that no taxes or Social security was deducted from payments to it. Petitioner received no employee benefits such as paid time off, vacation or health insurance from Respondent. The checks were made out to SO System, Inc. This factor implies that there was no employment relationship.

Respondent's business certainly encompasses Petitioner's work, but SO's business was said to include HVAC work as well. This factor is not persuasive on the issue of employee/employer, given the remainder of the evidence.

There was no evidence on the issue of whether Petitioner could be discharged at will. This should have been addressed in a written agreement. Given the lack of evidence, this factor is given no weight on the issue of employment relationship.

Petitioner was able to work elsewhere when there was no work from WK. This weighs against the existance of an employee/employer relationship.

Petitioner testified that he believed that he was an employee of Respondent. Wojtek's testimony was that Petitioner was a subcontractor. Of course, these conflicting opinions are regarding a legal conclusion and do not provide persuasive weight on the ultimate issue of employment. Further, SO System, Inc. obtained workers' compensation insurance and appears to have had a bank account (as evidenced by the endorsements on the checks in PX 20, albeit six of the checks having been signed by Petitioner's wife), thus implying that it was a distinct entity from Petitioner and actually negating any employee/employer relationship with Respondent.

Petitioner has the burden of proof on the issue of employee/employer relationship and the Arbitrator finds that the preponderance of the evidence does not support a finding that such a relationship existed.

The claim for compensation is, therefore, denied.

REMAINING ISSUES

As the Arbitrator has found that Petitioner failed to prove that an employee/employer relationship existed between him and Respondent, the Arbitrator needs not decide the remaining issues of: Accident; Notice; Causal Connection; Wages; Incurred and prospective medical expenses; and TTD.

Regarding the issue of Average Weekly Wage, the Arbitrator calculated the AWW based upon Petitioner's Exhibit 20. Petitioner's testimony regarding the AWW is deficient, in that he testified that he started with Respondent making $14.00 per hour and was making $20.00 per hour at the time of the accident, working 50 hours a week. This does not explain what the actual earnings of the Petitioner were in the employment during the 52 weeks preceding the date of accident. Therefore, the Arbitrator calculated that the checks in PX 20 total $12,228.00 and the covered time period was 8/27/2014 to 1/8/2015 (17-1/7 weeks), yielding an AWW of $713.29.

As to the issue of whether Petitioner elected out of coverage for himself under the Act, the Arbitrator finds that Petitioner voluntarily and knowingly excluded himself from coverage under SO System, Inc.'s workers' compensation insurance policy, based upon the unrebutted and credible testimony of Bilski and Respondent's Exhibit 3. This finding, of course, has no effect on the other disputed issues.