STATE OF ILLINOIS) BEFORE THE ILLINOIS WORKERS' COMPENSATION
) SS COMMISSION
COUNTY OF COOK)

Michael Roche,
Petitioner,

vs. NO. 08WC41977
14IWCC0710

Martin Petersen Company,
Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Corrected Decision and Opinion on Review dated September 12, 2014, has been filed by Respondent herein. In its Corrected Decision and Opinion on Review dated September 12, 2014, the Commission addressed the parties' respective previous Petitions under Section 19(f) of the Act. Turning to Respondent's present Petition, the Commission is of the opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision and Opinion on Review dated September 12, 2014 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein.

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

DATED: OCT 24 2014
SM/sj
44

Stephen J. Mathis

08WC41977
14IWCC0710

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Roche,

Petitioner,

vs.

NO 08 WC 41977
14IWCC0710

Martin Petersen Company,

Respondent.

SECOND CORRECTED DECISION AND OPINION ON REVIEW

Timely petition for review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, benefit rates, temporary disability, maintenance and permanent disability/wage differential 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 further remands this case to the Arbitrator for further proceedings consistent with our decision.

Petitioner filed an application for benefits on September 23, 2008, which alleges that on June 23, 2008, he sustained an injury to his right knee at the jobsite. The evidence at trial showed that at the time of the accident Petitioner was nearing the end of his five year apprenticeship as a union plumber, with the expectation that he would become a journeyman union plumber in September of 2008. The parties stipulated that Petitioner's earnings during the year preceding the injury were $27,235.98 and his average weekly wage was $866.60. As a result of the injury, Petitioner underwent arthroscopic chondroplasties with microfractures of the lateral femoral condyle and chrondroplasty of the medial femoral condyle. On October 28, 2010, Dr. Trotter declared Petitioner at maximum medical improvement and permanently restricted Petitioner to medium-heavy work, "but he cannot do the full work place activities of a plumber, which involves bending and stooping, essentially without limit." Dr. Trotter opined Petitioner could only

occasionally bend or stoop and could stand or walk for no longer than 45 minutes at a time and no more than 4 hours a day. As a result of these restrictions Petitioner has not returned to his apprenticeship.

Petitioner conducted a job search and intermittently worked as a telemarketer, in the spring of 2011 and early spring of 2012. On or about April 30, 2012, Petitioner began working as an assistant technician for H-O-H Technologies performing preventative maintenance on commercial water treatment systems. At the time of the arbitration hearing, Petitioner was earning $16.25 an hour, corresponding to an average weekly wage of $650.00. Thus, Petitioner's current average weekly wage is $216.60 less than it was at the time of the accident. Furthermore, had Petitioner successfully completed his apprenticeship, he would be earning $45.00 an hour, corresponding to an average weekly wage of $1,800.00.

The Arbitrator awarded retroactive wage differential benefits based on the difference between what Petitioner would be earning as a journeyman union plumber and what he was earning as a telemarketer and then as an assistant maintenance technician before his most recent raise. Further, the Arbitrator awarded prospective wage differential benefits based on the difference between what Petitioner would be earning as a journeyman union plumber and what he was earning as an assistant maintenance technician at the time of the arbitration hearing.

Section 8(d)1 of the Act provides in pertinent part:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from his usual and customary line of employment, he shall, except in cases compensated under a specific schedule in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations of the maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount he would be able to earn in the full performance of his duties in the occupation in which he was engaged *at the time of the accident* and the amount which he is earning or able to earn in some suitable employment or business after the accident." (Emphasis added.)

We find that the Arbitrator erred in basing the wage differential on the average weekly wage of a journeyman union plumber, rather than the average weekly wage of apprentice union plumber. We note that a correct calculation of the wage differential yields significantly lower weekly sums. As we are not certain whether Petitioner would rather elect a loss of trade award pursuant to section 8(d)2 of the Act, we remand the matter to the Arbitrator for a determination of permanent disability award consistent with our decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the corrected decision of the Arbitrator filed July 22, 2013 is modified as stated herein and otherwise

affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $577.33 per week for a period of 108 1/7ths weeks, from 10/02/2008 through 10/28/2010, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $577.33 per week for a period of 69 6/7ths weeks, from 10/29/10 through 2/29/12, that being the period of maintenance benefits under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical bills in evidence pursuant to §§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.

IT IS FURTHER ORDERED BY THE COMMISSION that the matter is remanded to the Arbitrator for a determination of permanent disability award consistent with our decision, which is interlocutory and not immediately appealable.

DATED:
SM/msb OCT 2 4 2014
o-7/10/2014
44

Stephen Mathis

David L. Gore

Mario Basurto

14IWCC0710

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

ROCHE, MICHAEL
Employee/Petitioner

Case# 08WC041977

MARTIN PETERSEN CO INC
Employer/Respondent

On 7/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% 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:

4788 HETHERINGTON KARPEL BOBBER ET A
PETER BOBBER
161 N CLARK ST SUITE 2080
CHICAGO, IL 60601

0560 WIEDNER & MCAULIFFE LTD
MARGARET McGARRY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

14IWCC0710

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

MICHAEL ROCHE
Employee/Petitioner

v.

MARTIN PETERSON CO., INC.
Employer/Respondent

Case # 08 WC 41977

Consolidated cases: n/a

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **June 11,2013**. 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?
☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **07/23/2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$27,235.98**; the average weekly wage was **$866.60**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$45,393.07** for TTD, **$0.00** for TPD, **$29,959.43** for maintenance, and **$0.00** for other benefits, for a total credit of **$75,352.50**.

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

ORDER

Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.
Respondent shall pay Petitioner temporary total disability benefits of **$577.33**/week for 108-1/7ths weeks, commencing **10/2/2008** through **10/28/2010**, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.
Respondent shall pay Petitioner maintenance benefits of **$577.73**/week for 69-6/7ths weeks, commencing **10/29/10** through **2/29/2012**, as provided in Section 8(a) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner permanent partial disability benefits as provided in Section 8(d)(1) of the Act as follows:

a. $966.72 per week from March 1, 2012 through April 29, 2012 totaling 8 4/7ths weeks;
b. $815.46 per week from April 30, 2012 through December 31, 2012 totaling 35 1/7th weeks; and
c. $766.67 per week from January 1, 2013 through June 11, 2013, the arbitration hearing date, totaling 23-1/7ths weeks and ongoing for the duration of petitioner's disability.

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.

Carolyn Doherty
Signature of Arbitrator

7/18/13
Date

JUL 22 2013

FINDINGS OF FACT

At the time of his July 23, 2008 work accident, petitioner was 39 years old with two children and he resides in Palatine with his wife. Petitioner completed eleventh grade but never obtained a diploma. Petitioner obtained a GED in 1989. Petitioner also underwent a five year apprenticeship program with Local 130 of Chicago Journeyman Plumbers Union. He was set to become a journeyman plumber two months after his work accident in September, 2008.

Petitioner suffered a right knee injury at work in 1999 which resulted in his medial collateral ligament being surgically repaired. Subsequent to that injury and related medical treatment, petitioner was returned to work full duty with no restrictions. He had no subsequent treatment or lost time from work with regard to his right knee from 2000 through his July 23, 2008 work accident. In order to be accepted into the plumber's apprenticeship program, petitioner had to undergo a physical which he passed.

In December 2007, petitioner commenced employment with respondent. His job title was apprentice plumber and his job duties included installing commercial plumbing at Lutheran General Hospital in Park Ridge, which mostly involved installation of cast iron pipe overhead and vertically. The parties stipulated to a work related accident on July 23, 2008. ARB EX 1. On that date, Petitioner was carrying a ten foot length of cast iron pipe weighing sixty to eighty pounds from the floor on which materials were being stored to a different floor where work was being performed. While walking in the corridor, he attempted to kick a piece of sheet metal out of his way with his right foot. While doing so, his right foot slipped causing him to twist his right knee, lose his balance and fall landing on his right knee while bended. Immediately following the occurrence, he noted pain inside the right knee cap. He attempted to continue working and noticed pain and throbbing about the knee as he did so.

The following day, July 24, 2008, petitioner was directed by respondent to obtain medical treatment at the Advocate Occupational Health Clinic. (P.Ex.1). There, he was diagnosed with a right knee strain, and the doctor ordered rest, ice, wrapping and medication. He was also restricted to light duty work. Thereafter, for several days, his employer provided light duty office work in Kenosha, Wisconsin.

On July 29, 2008, petitioner noted that his knee seemed improved and he was released to return to work. (P.Ex.1). As he attempted to get to work the following day, he noticed significant discomfort and pain about his knee and he could not work. He attempted to make an appointment in August of 2008 with Dr. Dicillo, but was unable to do so due to a lack of authorization from the workers' compensation insurance company. Then, petitioner remained off work and utilized his personal insurance to make an appointment with orthopedic surgeon Dr. Trotter. On October 2, 2008, Dr. Trotter took petitioner off work, ordered him a brace, medication, injections, physical therapy, and an MRI. (P.Ex.2).

The MRI took place on October 9, 2008 and revealed a rupture of the anterior cruciate ligament with knee joint effusion and a contusion of the posterior aspect of the lateral femoral condyle away from the articular surface and chondral degeneration and mild subchondral marrow reactive changes in the tibial femoral joint especially in the medical compartment. (P.Ex.3). Petitioner continued with conservative treatment for his knee through early 2009. Dr. Trotter fitted Petitioner for a knee brace which he received in November 2008. Petitioner testified that he remained active and that he walked without the knee brace. Petitioner continued with physical therapy and a home exercise program but advised the therapist that the exercises increased his knee soreness so he stopped the PT program. Petitioner testified that he was not wearing the knee brace at home and when active. Petitioner testified that his knee buckled at home but not at physical therapy.

Respondent had video surveillance conducted of petitioner on four occasions between January 19, 2009 through February 7, 2009. RX 3. The Arbitrator viewed the video in its entirety. The Arbitrator notes the video depicts petitioner entering and exiting a car on several occasions over the course of 4 different days. He is seen entering and exiting the car without apparent difficulty and is also seen walking at a quick pace and without pain behavior on several occasions. He is not wearing a knee brace. On 2/7/09, Petitioner is seen at a water park with his children. (R.Ex.3). At times in the water park he is seen slightly limping and favoring his right leg. He is specifically seen limping after sliding down a water slide and then on occasion walking with a slightly altered gait while in the water park. Petitioner does not appear in pain while at the water park. RX 3.

On April 7, 2009, Dr. Trotter performed surgery to the right knee at St. Alexius Medical Center consisting of arthroscopic chondroplasty with microfractures, lateral femoral condyloplasty of the medial femoral condyle as well as GPS autologous platelet constructor injection. (P.Ex.5). Post-operatively, petitioner noted that his right knee felt more stable and that the buckling stopped. However, he still had significant pain in the knee and became depressed as a result of his lack of improvement. PX 2. He then underwent further physical therapy. Petitioner admitted to spotty compliance with PT as reflected in the ATI records. Dr. Trotter's records in May 2009 note that Petitioner had to miss some therapy due to "some personal issues going on with his family" and that he was feeling depressed. PX 2. On June 18, 2009, Dr. Trotter noted that Petitioner was feeling "markedly better" and that he had less knee pain. Dr. Trotter noted that he would "like to see how he does returning to work in several days" but that "due to the nature of his work place related injury, he will have an indication for more treatments including medication, injections and surgery." Dr. Trotter stated that Petitioner was not at MMI and that he would "like to see how he does" Petitioner was to follow up in 6 to 8 weeks. PX 2. On July 23, 2009, Petitioner returned to Dr. Trotter with recurrent right knee pain and effusion. Dr. Trotter prescribed Supartz injections and took Petitioner off work again. Petitioner continued to treat with Dr. Trotter in 2009 and receive his injections in October and November 2009. PX 2, PX 4.

On July 31, 2009, Petitioner attended a Section 12 exam with Dr. Zoellick. Dr. Zoellick agreed that Petitioner's symptoms were related to the accident, that Petitioner's treatment had been

reasonable and that he was not yet at MMI. He agreed with the recommendation of additional injections. He further agreed with the work restrictions imposed including no repetitive bending or squatting and lifting up to 30 pounds. RX 1.

After the third injection in November 2009, Petitioner was arrested for possession of drugs. He was released from jail in November 2009 and returned to Dr. Trotter in December 2009. On 12/31/09, Dr. Trotter noted, "Although he does have achy discomfort, I think he is, perhaps, doing better than he would have had he not had the Visco supplementation. ... I will see him in follow up on an as needed based basis [sic] on how he is doing. Two days per week, full duty is appropriate for starters. We will see how he tolerates this. I would like to see him in follow up in about a two month period. If for some reason his employer will not take him back, then I would recommend two weeks of work conditioning four hours per day." PX 2.

Petitioner began work conditioning on 1/6/10 at 5 days per week 4 hours per day for 2 weeks. He was discharged on 1/19/10 for failure to attend.

On 2/2/10, Petitioner returned to Dr. Trotter and continued to complain of right knee problems which Dr. Trotter determined stemmed from posttraumatic degenerative joint disease that occurred from the injury and from the period of time in which his cartilage was rubbing together prior to surgery. He felt that the twisting trauma loading injury to the knee directly traumatized the cartilage and that he had resulting ongoing pain and recurrent swelling in his right knee. Dr. Trotter noted that Petitioner could work light duty but that no such duty was offered. He noted Petitioner could not return to work as a plumber and that he was too young for knee replacement surgery. Therefore, Dr. Trotter recommended vocational retraining. PX 2.

On April 5, 2010 respondent had petitioner evaluated again by Dr. Zoellick. Dr. Zoellick continued to agree that Petitioners' symptoms were related to the accident of July 23, 2008 and that his treatment up to that time was reasonable and necessary. He further determined that Petitioner had reached MMI and recommended a trial of regular work without restrictions. Dr. Zoellick further stated that if Petitioner was unable to perform his regular work Petitioner should obtain an FCE "with validity to determine whether or not he would need any permanent work restrictions." RX 1. Respondent's nurse case manager then arranged for petitioner to undergo a FCE at WCS on April 19, 2010. The FCE revealed petitioner's ability to perform at the very heavy physical demand level but the therapist was unable to make recommendations regarding restrictions due to "inconsistencies" present during the evaluation indicating less that maximum effort from Petitioner. RX 1, p. 41.

On July 29, 2010, Dr. Trotter ordered an "independent and nonbiased" FCE to determine a reasonable assessment of Petitioner's condition as he did not feel the prior FCE was valid. PX 2.

Petitioner testified that he spent August 2010 in jail on possession of illegal drug charges from July 2010. RX 2. Petitioner testified that he has been sober since September 2010 and is a member of a recovery program.

The FCE ordered by Dr. Trotter was performed on September 8, 2010 at ATI. (See P.Ex.2). That FCE found petitioner able to function at a medium physical demand level capable of occasionally lifting 62 pounds with frequent lifting of 36 pounds. (P.Ex.6) That testing also was found to be a valid representation of petitioner's present physical capabilities. Thereafter, on October 28, 2010 Dr. Trotter, agreeing with the ATI FCE restrictions, released petitioner from care with permanent restrictions which he opined prevented petitioner from returning to work as a plumber. (P.Ex.2, P.Ex.7p.10).

Following the FCE and release, no offer was made by Respondent to accommodate the permanent restrictions or to provide vocational rehabilitation assistance. At the request of his counsel, petitioner underwent a vocational assessment performed by independent vocational rehabilitation counselor Edward Rascati on October 4, 2010. Mr. Rascati concluded petitioner could likely be placed in retail or customer service positions paying $9.00 to $12.00 per hour and that reeducation would not immediately increase his earning potential. (P.Ex.9).

Thereafter, petitioner commenced his self-directed job search which included performing in person contacts at businesses in his area; performing online research; filling out applications; making telephone inquiries; networking with friends and relatives; and stopping in local establishments to see if work was available. These establishments included Menards, Home Depot, Lowe's, various gas stations, Aldi, factories and restaurants. Petitioner testified to the self-directed job search efforts but did not keep track of his job search efforts in any formal way.

In early 2011, petitioner attempted a commission-based cologne sales job. Petitioner was briefly employed in this position as he determined he was not suited for a sales position. Petitioner next accepted a job selling Kirby vacuum cleaners. However, he had limited success with that job as well because his sales were not at a significant margin. Petitioner earned $125 during that period but lost money having spent $350 in gas.

On June 14, 2011, Petitioner was sentenced in connection with a 2010 drug possession charge to two years of probation, with the first year including home confinement with electronic monitoring. (R.Ex.2) Petitioner could seek a modification of that confinement in order to attend work or a job interview. Petitioner testified that while in house he continued to look for work daily on the computer. He looked for jobs he could do from home. Again, no job logs were kept documenting these efforts but Petitioner testified that he contacted Mr. Rascati by phone and advised that he was using the computer at home to find a job. Petitioner testified that in February 2012, he commenced work with G Incomes an internet-based earnings company affiliated with Amazon. Unfortunately, that venture was not successful and petitioner had no return on his investments that exceeded $450.00.

On March 1, 2012 through April 29, 2012, petitioner obtained employment performing telemarketing for a company named Outsource Marketing. That job paid him $10.00 per hour and he worked for twenty to twenty-eight hours per week selling various banking services and setting up appointments for individuals with various Canadian banks.

Ultimately, on April 30, 2012 petitioner started his present job as an assistant technician with H-O-H Water Technologies. After an interview with H-O-H, petitioner petitioned and was granted early release from his home confinement effective April 14, 2012. His job duties at H-O-H included performing preventative maintenance on commercial water treatment systems. Initially, he was paid a salary of $30,000.00 annually which equates to $14.42 per hour for a forty hour work week. Thereafter, effective January 1, 2013, his pay was increased to $16.25 an hour, equating to an annual salary of approximately $33,779.20.

Petitioner has obtained no other job offers and vocational counselor Rascati opined that the H-O-H Water Technology job is suitable for petitioner. He also opined that petitioner should be commended for finding such a well-paying job given his restrictions and limited transferable skills. (P.Ex.11). Petitioner testified that he continues to work as an assistant technician for H-O-H Water Technologies. Physically he is able to handle the demands of the job and he has performed it successfully for over one year. Petitioner's present employment is distinct from his job at Martin Peterson in that his present job requires no extended or extensive kneeling, no carrying of heavy materials down stairs or up or down ladders and no significant repetitive work. His physical job duties include lifting 50 pounds occasionally. Petitioner testified that had he continued working as a plumber, he would have been a journeyman plumber effective September of 2008 and his present earnings would have been $45.00 per hour. His union's website confirms this hourly rate. (P.Ex.14)

Presently, petitioner notices pain in his right knee daily. He elevates the knee and also treats it with ice, Ibuprofen and he takes fish oil and glucosamine to help his knee joint. In terms of his work activities, he is not able to work as a plumber because of the weights he would be required to lift as well as excessive walking, carrying, twisting, and kneeling for extended times. Presently, petitioner modifies his activities and avoids twisting his right knee, walks as short as distance possible. In terms of home activities, petitioner testified that as a result of his knee injury, he quit playing softball which he did three times a week prior to his accident. He significantly limits the duration and intensity in which he plays with his children in activities such as basketball, flag football, or Frisbee. Any activity he does engage in, he can no longer move as well as he used to and he limits the duration and intensity in which he performs the activities so as to minimize the pain about his knee.

Edward Rascati testified in his capacity as a professional rehabilitation consultant. PX 12. Based on Petitioner's treatment records from Dr. Trotter and the results/restrictions of the September 2010 FCE, he opined that Petitioner could not return to work as a plumber. He determined that Petitioner had many transferable skills and that a job search in the areas of retail and customer service was appropriate. PX 12, p. 9. As of August 24, 2011, Petitioner's job search had continued at retail stores. Thereafter, he was aware Petitioner was under house arrest and that his job search continued on line at home and that Petitioner could obtain leave to attend an interview. PX 12, p. 14. His last conversation with Petitioner was in June 2012 at which time Petitioner advised he was working at HOH. He understood this job to be within Petitioner's physical restrictions and that Petitioner was earning $30,000 per year. PX 12, p. 16. Mr. Rascati opined that Petitioner's current job with HOH constitutes suitable employment. Finally, he

opined that Petitioner's job search was reasonable and appropriate. PX 12, p. 18. On cross, Mr. Rascati verified that he never received any job logs from Petitioner verifying a job search at home. PX 12, pp. 29-33.

CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

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

Prior to his July 23, 2008 work accident, petitioner underwent a right medial collateral ligament arthroscopic repair in 1999. There is no evidence rebutting petitioner's credible testimony that from 2000 through July 22, 2008, he underwent no medical care, missed no time from work, and had no further problems with his right knee. Further, petitioner testified at arbitration that when commencing his apprenticeship with the plumber's union, he had to undergo a physical which he passed.

On July 23, 2008, petitioner suffered injury to his right knee as a result of his work accident which involved him carrying a ten foot length of cast iron pipe weighing sixty to eighty pounds. He attempted to kick a piece of sheet metal out of his path with his right foot. As he did so, his foot slipped causing him to twist his right knee resulting in him losing his balance, falling, and landing directly on his right knee while it was bent. He noticed immediate pain but attempted to finish his work shift.

The following morning, July 24, 2008, his pain had not improved so respondent directed him to Advocate Occupational Health. There, he was diagnosed with a strain of the right knee and his examination revealed tenderness with palpation of the right knee. (P.Ex.1). He was instructed to utilize rest, ice, and an ACE wrap, as well as medication and to return to the clinic for further evaluation. Additionally, he was instructed to perform no climbing, squatting, or kneeling. Following rest and working light duty performing office work for respondent, petitioner returned to the Advocate Occupational Health Clinic on July 29, 2008, at which time he noted significant improvement with his right knee, his pain going from a seven out of ten down to two out of ten. (P.Ex.1). He was then released fully duty from the clinic and was told to return if needed.

Petitioner was scheduled to return to regular work the following day. However, his right knee pain increased and he was unable to do so. Next, he attempted to follow up with his personal doctor, Dr. Dicillo, however respondent would not authorize that appointment so petitioner's attempts to see Dr. Dicillo in August of 2008 were thwarted. Shortly thereafter, petitioner utilized his personal insurance and made an appointment to see orthopedic surgeon Dr. David Trotter. Petitioner was first able to be seen by Dr. Trotter on October 2, 2008. Then, Dr. Trotter noted a consistent history of accident and noted he was experiencing severe pain. (P.Ex.2). He immediately took petitioner off work and ordered an MRI which was performed on October 9, 2008. That MRI revealed a rupture of the ACL with a joint effusion as well as a rounded

contusion of the posterior aspect of the lateral femoral condyle away from the articular surface and condyle degeneration and mild subchondral marrow reactive changes in the tibial femoral joint especially in the medical compartment. (P.Ex.3). Thereafter, Dr. Trotter ordered an ACL brace as well as physical therapy noting that surgery including possible ACL construction and other procedures for the arthrosis of the knee, which could be considered chronically aggravated by the work place injury, might be indicated. (P.Ex.2).

On December 2, 2008, Dr. Trotter noted that there was an indication for surgical procedure consisting of ACL construction as well as interpositional knee disc, resurfacing procedures, partial replacement, complete replacement, or even of replacement surgery. (P.Ex.2). On January 27, 2009, Dr. Trotter opined that petitioner "aggravated his arthrosis, has developed post-traumatic arthritis of the knee since the knee has become clearly more unstable than it ever was in his life due to the work place injury." (P.Ex.2). Petitioner then underwent therapy at Athletico, during which there were multiple notations of petitioner's right knee giving out. (P.Ex.4). Petitioner reported that his knee would give out spontaneously, but especially when descending stairs.

Ultimately, Dr. Trotter performed right knee ACL repair as well as right knee arthroscopic chondroplasties with microfractures, lateral femoral condyle and condroplasty of the medial femoral condyle as well as a GPS autologous platelet construct injection at St. Alexius Medical Center on April 7, 2009. (P.Ex.5).

Postoperatively, petitioner initially noted decreased pain and increased stability. (P.Ex.2). Thereafter, petitioner testified that although the right knee remained stable and was not giving out, the pain persisted and he became depressed because he had hoped and expected the surgery to fix his knee. Specifically, on May 28, 2009, Dr. Trotter noted that petitioner missed some therapy visits due to personal issues going on with his family and he has been feeling depressed and he recommended petitioner follow up with his family doctor, Dr. Dicillo regarding the depression. (P.Ex.2).

Later in the summer of 2009, Dr. Trotter maintained petitioner's off work status and ordered an injection as well as aspiration of the knee due to the effusion. (P.Ex.2) On July 23, 2009, although Dr. Trotter indicated he was keeping petitioner off work, petitioner had requested restricted duty and Dr. Trotter indicated he could perform work with limited walking, ambulating, bending, and stooping as tolerated. (P.Ex.2) Unfortunately, no light duty work was available for petitioner so he remained off work and he continued to treat and follow up with Dr. Trotter and his treatment included a series of injections of Euflexxa. (P.Ex.2). The final injection of Euflexxa occurred on November 10, 2009.

On February 2, 2010, Dr. Trotter noted that petitioner had ongoing pain and recurrent swelling in the right knee due to the work injury. (P.Ex.2). He also opined that it was unlikely petitioner could return to work as a plumber because of his injury and given his young age, a knee replacement or partial knee replacement would not be indicated. (P.Ex.2). Therefore, he recommended vocational retraining and also prescribed Flexor and lido-derm patches. (P.Ex.2).

In the Summer of 2010, Dr. Trotter performed three Supartz injections and aspirated the knee as well. On July 29, 2010, Dr. Trotter indicated the need for an independent and non-biased functional capacity evaluation to get a reasonable assessment of petitioner's current condition because he believed the prior FCE was invalid. (P.Ex.2).

Thereafter, on September 8, 2010, petitioner underwent a functional capacity evaluation at ATI which revealed petitioner could perform at the medium physical demand level with occasional lifting up to 62 and frequent lifting up to 36 pounds. (P.Ex.6). Further, it was noted that petitioner could perform bending, stooping, crouching, squatting and stair ambulation on an occasional basis only. It was also noted that this FCE was a valid representation of petitioner's capabilities based upon consistency testing performed throughout the evaluation. (P.Ex.6). The evaluator also indicated petitioner's work as a plumber requires abilities at the heavy physical demand level with occasional lifting up to one hundred pounds and petitioner's capabilities fell below that level. Lastly, additional work hardening was recommended. Dr. Trotter then adopted the FCE findings. (P.Ex.2, P.Ex.7p.19).

Petitioner attended ten work hardening visits from October 4, 2010 through October 10, 2010. (P.Ex.6). On October 28, 2010, Dr. Trotter opined that petitioner could lift up to about forty pounds occasionally and twenty pounds frequently on a permanent basis. He also indicated that petitioner could only bend and stoop occasionally and walk or stand for no more than 40 minutes at a time. (P.Ex.2, P.Ex.7pp.10-11). He also indicated that petitioner reached maximum medical improvement as his condition was unchanged. (P.Ex.2). Lastly, Dr. Trotter opined petitioner permanently disabled from his prior work place activities.

The only evidence offered by Respondent attempting to refute causal connection was the testimony and reports of its independent medical examiner Dr. Michael Zoellick, the investigative report and surveillance footage of petitioner and its argument that Petitioner's criminal conduct through the course of his treatment resulted in unnecessary treatment delays and non-compliance with treatment.

The Arbitrator notes that the video was taken prior to Petitioner's knee surgery. The surveillance does not show or depict petitioner working. The video depicts Petitioner walking seemingly without difficulty to and from his car on numerous occasions as well as seemingly limping and walking with altered gait on other points in the video. RX 3. Given that the surveillance took place prior to petitioner's surgery, which all doctors have indicated was reasonable, necessary, and appropriate; and that no doctor has offered any opinion that this surveillance film in any way impacts their causal connection opinion, the Arbitrator is not persuaded by the surveillance evidence offered by respondent insofar as it relates to a finding of causal connection.

Regarding Dr. Zoellick's causal connection opinion, the Arbitrator notes that initially, Dr. Zoellick opined in both reports that petitioner's ACL tear was causally related to the July 23, 2008 work accident as an aggravation of a pre-existing right ACL tear. (R.Ex1 ex.2). He further opined that all treatment received was reasonable and necessary. Dr. Zoellick was not shown the

video and had no opinion on Petitioner's condition based on a review of the reports of petitioner's treatment after April 25, 2010, including the valid FCE performed at ATI in September of 2010 and Dr. Trotter's final restrictions imposed in October 2010.

The Arbitrator finds that the evidence regarding Petitioner's criminal conduct and incarcerations does not sufficiently outweigh the medical evidence supporting a finding of causal connection for his continued condition of ill-being as presented by the medical records and opinions of his treating physician, Dr. Trotter. Dr. Trotter consistently related petitioner's complaints to his July 23, 2008 work place injury. Specifically, Dr. Trotter opined that the work place injury caused a partial tear of the ACL and aggravation of petitioner's arthrosis and degenerative arthritis in the right knee. (P.Ex.2). Similarly, petitioner's credible testimony as to his complaints and problems is consistent with Dr. Trotter's opinions and the results of the valid FCE performed at ATI on September 8, 2010. As such, the Arbitrator is persuaded by the treating physician Dr. Trotter and his opinions as to causal connection. Based on the above, the Arbitrator finds petitioner's present condition of ill-being involving his right knee is causally connected to his July 23, 2008 work 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?

Based on the Arbitrator's findings of the issue of causal connection as stated above, the Arbitrator further finds that Petitioner's treatment received to date has been reasonable and necessary. Respondent's objection was based on liability. ARB EX 1. Respondent is to pay Petitioner's reasonable and necessary medical expenses incurred in connection with that treatment pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

K. What temporary benefits are in dispute? TTD/Maintenance/TPD, L. What is the nature and extent of the injury?

Respondent alleges TTD should be awarded only through April 5, 2010 based upon its IME's opinion that as of that date petitioner reached MMI. (R.Ex.1 Exhibit 4). Based on the findings regarding causal connection as stated above, the Arbitrator further finds that Petitioner was not at MMI on April 5, 2010 per Dr. Zoellick and that he continued to treat with Dr. Trotter thereafter until he was found at MMI with permanent restrictions on 10/28/10. Accordingly, the Arbitrator finds that Petitioner was temporarily and totally disabled for a period of 111-3/7 weeks commencing 10/2/08 through 10/28/10.

The Arbitrator notes Petitioner's request for maintenance benefits thereafter during the period he looked for work in a self-directed job search after Dr. Trotter's MMI finding on 10/28/10. Petitioner requests maintenance for the period of 10/29/10 through 4/30/12 which covers his self-directed job search until he found his current job with HOH. The Arbitrator notes those efforts are completely without documentation in the form of job logs and are based on the testimony of

Petitioner. The Arbitrator notes that Petitioner's job search efforts are reported to Mr. Rascati on 12/27/10, 8/24/11 and 6/18/12. In his reports, Mr. Rascati notes that Petitioner was looking for work within his restrictions but without success. Petitioner's 2011 jobs selling cologne and vacuums were short lived and did not produce income. Petitioner's February 2012 "online store front" job was equally short and unproductive. Mr. Rascati also noted in each report that Petitioner's efforts were performed completely without vocational assistance. Petitioner testified without rebuttal that respondent never offered him light duty work or vocational rehabilitation assistance. In January 2011, Petitioner's counsel demanded vocational rehabilitation assistance but none was provided by respondent. (P.Ex.16). During the period of requested maintenance, Petitioner was sentenced to home confinement for 12 months beginning in June 2011 through April 14, 2012. Again, Petitioner testified that he continued to look for jobs while confined at home and found the above mentioned jobs in 2011 and 2012. Mr. Rascati documents his reported efforts during that period.

On or about March 1, 2012, through his self-directed job search efforts, Petitioner started a job with Outsource Marketing. This job was a telemarketing job involving calling people in Canada and setting up banking appointments. Petitioner testified that he earned $10.00 an hour for this job and averaged twenty-four hours per week.

On April 14, 2012, petitioner was granted early release from his home confinement based upon his petition to the court. Shortly thereafter, following his interview, he commenced employment on April 30, 2012 with H-O-H Water Technology as an assistant technician.

Based on petitioner's credible testimony as to the efforts he made looking for, and ultimately securing various alternative employment opportunities; that petitioner ultimately secured stable, well-paying alternative employment with H-O-H Water Technologies; given certified vocational rehabilitation counselor Rascati's opinions as to the diligence and reasonableness of petitioner's job search; and the lack of any evidence to the contrary, the Arbitrator finds that petitioner conducted a reasonably diligent job search and ultimately was successful in securing alternative employment. There is no persuasive evidence to find that Petitioner's home confinement adversely impacted the effectiveness of his job search. Further, the Arbitrator notes that petitioner attempted at least four other employment opportunities during his period of vocational rehabilitation and he continued to look for better occupations that would generate more income, ultimately securing employment with a $30,000.00 per year salary.

Accordingly, the Arbitrator finds petitioner is entitled to maintenance from October 29, 2012, the day after which Dr. Trotter deemed him at MMI and released him with permanent restrictions, through February 29, 2012, the day prior to when he commenced employment earning an hourly wage performing the telemarketing job.

Thus, the Arbitrator orders Respondent to pay petitioner temporary total disability benefits from October 2, 2008 through October 28, 2010, representing 108-1/7ths weeks, and maintenance pursuant to Section 8(a) paid at the TTD rate from October 29, 2010 through February 29, 2012 totaling 69-6/7ths weeks.

L. What is the nature and extent of the injury?

The record at trial supports a finding that Petitioner is partially incapacitated from pursuing his usual and customary line of employment as a plumber. Dr. Trotter clearly opined that Petitioner could not return to work as a plumber given his restrictions. The September 8, 2010 FCE performed at ATI physical therapy at Dr. Trotter's behest was deemed a valid representation of petitioner's present physical capabilities based upon consistency testing performed as part of the FCE. (P.Ex.6). Specifically, that testing demonstrated petitioner's functional capabilities at the medium physical demand level with lifting capabilities including occasional lifting up to 62 pounds with frequent lifting of 36 pounds. Further, the evaluator noted that bending, stooping, crouching, squatting, and stair ambulation would be recommended on an occasional basis only. Lastly, the evaluator noted that petitioner's work as a plumber is considered in the heavy physical demand level requiring occasional lifting of up to one hundred pounds and that petitioner's present capabilities fall below that level. (P.Ex.6).

On September 30, 2010, Dr. Trotter agreed with the restrictions per the FCE. (P.Ex.2). He also ordered some further work conditioning which petitioner underwent in early October 2010 at ATI. (P.Ex.2). Thereafter, on October 28, 2010, Dr. Trotter indicated petitioner reached maximum medical improvement and in his work status report indicated petitioner had restrictions at the medium physical demand level of work per the FCE. (P.Ex.2). Dr. Trotter testified that he agreed with the findings of the FCE at ATI and adopted those findings as petitioner's permanent restrictions. (P.Ex.7p.10). Further, in his October 28, 2010 office note, Dr. Trotter again opined that petitioner could not perform the full work place activities as a plumber and that he will require additional treatment in the future, however, presently there is no indication for surgery. (P.Ex.2). Dr. Trotter went on to note that petitioner has an indication for intermittent use of NSAIDs, either a topical gel or Pennsaid as prescribed. Lastly, Dr. Trotter noted that vocational rehabilitation could be a consideration provided it was within petitioner's limitations. In finding that Petitioner could not return to work as a full duty plumber, the Arbitrator finds the FCE of September 2010 more persuasive than the results of the earlier April 2010 FCE.

The Arbitrator notes Petitioner's request for a wage differential pursuant to Section 8(d)(1) of the Act based in part on his inability to return to work as a plumber discussed above. The Arbitrator finds that Petitioner has established the ability to earn $10 in the suitable employment for Outsource Marketing for the period of March 1, 2012 through April 29, 2012. On April 30, 2012, Petitioner obtained a job with HOH earning approximately $14.42 per hour or $577.50 per week. Then, effective January 1, 2013, his pay increased to $16.25 an hour or $650.00 per week. Petitioner Petitioner's Exhibit 16 as being copies of his first and most recent pay stubs as well as payment summary of all of his earnings at H-O-H provided by the payroll service. (P.Ex.15). Mr. Rascati opined that given petitioner's work history and limited education, that petitioner's alternative employment in these jobs was suitable. (P.Ex.11).

Given the Arbitrator's findings as to maintenance and reasonableness of his job search noted above; the opinions of certified vocational counselor, Edward Rascati; the absence of any

vocational evidence to the contrary; and petitioner's credible testimony, the Arbitrator finds that petitioner's work at Outsource Marketing from approximately March 1, 2012 through April 29, 2012 earning $10.00 an hour and averaging 24 hours per week, and his subsequent fulltime employment at H-O-H Water Technology commencing on April 30, 2012 and earning approximately $14.42 per hour or $576.92 per week through December 31, 2012 and getting an pay increase to $16.25 per hour and $650.00 per week from January 1, 2013 continuing through, the date of arbitration, constitutes the average amount he was earning and was able to earn in suitable alternative employment following his July 23, 2008 work accident.

Finally, based on Petitioner's testimony and on PX 14, the Arbitrator finds that Petitioner would be able to earn $45 per hour in the full performance of his duties in the occupation in which he was engaged at the time of the accident. Respondent offered no evidence rebutting petitioner's testimony, Mr. Rascati's testimony, or Petitioner's Exhibit 14 regarding what petitioner would currently be earning working for respondent as a union journeyman plumber. Accordingly, the Arbitrator finds that as of June 11, 2013, the date for the arbitration hearing, petitioner would be able to earn $1,800.00 ($45.00 x 40 hours) per week in the full performance of his duties of his occupation as a journeyman plumber. As noted in the 8(d)(1) calculations below, the Arbitrator notes the application of the Wage Differential Maximum mandated by Sections 8(d)(1) and 8(b)(4) of the Act.

The Arbitrator hereby orders respondent to pay petitioner benefits pursuant to Section 8(d)(1) as follows:

a. $966.72 per week (wage differential maximum applied) from March 1, 2012 through April 29, 2012 totaling 8 4/7ths weeks, representing 66-2/3% of the difference between the $1,800.00 per week petitioner would earn in the full performance of his occupation as a journeyman plumber and the average of $240.00 he earned performing telemarketing for Out Source Marketing; the calculated differential is $1,040.00 per week but the statutory maximum is applied capping the weekly rate at $966.72 pursuant to Sections 8(d)(1) and 8(b)(4) of the Act.

b. $815.46 per week from April 30, 2012 through December 31, 2012 totaling 35 1/7 weeks, representing 66-2/3% of the difference between the $1,800.00 per week petitioner would earn in the full performance of his occupation as a journeyman plumber and the average of $576.80 he actually earned working as an assistant technician at H-O-H Water Technology, Inc.; and

c. $766.67 per week from January 1, 2013 through June 11, 2013, the arbitration hearing date, totaling 23 1/7ths weeks and ongoing for the duration of petitioner's disability, representing 66-2/3% of the difference between the $1,800.00 per week petitioner would earn in the full performance of his occupation as a journeyman plumber and the average of $650.00 per week he actually earns at his suitable alternative employment as an assistant technician at H-O-H Water Technology, Inc.