STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BONNIE NELSON,

Petitioner,

vs. NO: 02 WC 16858

ST. JAMES HOSPITAL AND
HEALTH CENTERS,

Respondent,

ORDER

This matter comes before the Commission on Petitioner's Motion to Dismiss Review for Lack of Jurisdiction, which was filed on August 17, 2015. Respondent filed a Response on September 18, 2015. A hearing was held before Commissioner DeVriendt on April 29, 2016, and a record was made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) On October 22, 2012, this matter was dismissed for want of prosecution.

2) On January 25, 2013, Petitioner filed a Petition to Reinstate.

3) On March 1, 2013, a hearing on the Petition to Reinstate was held before Arbitrator Simpson and a record was made.

4) Over two years later, on April 14, 2015, the Chairman of the Commission issued an "Administrative Order for Reinstatement" that stated:

> This matter comes before the Chairman of the Commission upon an administrative inquiry. It appears that a motion to reinstate this matter was granted on 7-10-2013. Therefore, this matter is returned to the docket of Arbitrator Deborah Simpson for further proceedings. The status date is to be issued per the Arbitrator's schedule.

IT IS THEREFORE ORDERED that:

1) The case be reinstated "nunc pro tunc" to 7-10-13
2) The case be returned to Arbitrator Simpson's regular call.

5) On April 29, 2015, Respondent's then-attorney filed a Petition for Review of Chairman's Administrative Order, which included a request for the preparation of a transcript, including all exhibits, of the March 1, 2013 hearing.

6) On May 7, 2015, the court reporter e-mailed Petitioner's attorney and Respondent's then-attorney indicating that she was unable to locate the exhibits in the file and inquiring about recreating the exhibits for the transcript.

7) On June 23, 2015, Respondent's current counsel filed a Stipulation to Substitute Attorneys and Appearance in this matter.

8) On June 23, 2015, the court reporter sent an e-mail to Petitioner's counsel listing the exhibits that were missing. Petitioner's counsel replied the same day that he would look for the items and talk to Respondent's current attorney.

9) On August 7, 2015, Petitioner filed a Motion to Dismiss Review for Lack of Jurisdiction due to Respondent's failure to timely file a transcript or agreed statement of facts as required by Section 19(b) of the Act.

10) On September 16, 2015, the court reporter e-mailed Petitioner's attorney and Respondent's current attorney inquiring about the status of getting the exhibits recreated or whether she should proceed with file-stamping the transcript without the exhibits.

11) On September 18, 2015, Respondent filed a Response to Petitioner's Motion to Dismiss.

12) On September 23, 2015, the transcript, along with the exhibits, was filed with the Commission.

13) Petitioner's attorney authenticated the transcript on November 19, 2015, but specifically noted that, "By authenticating, we are not stipulating to the jurisdiction of the Commission to review this matter."

14) A hearing on the Motion to Dismiss was held before Commissioner DeVriendt on April 29, 2016, and a record was made.

Section 19(b) of the Act provides:

> Unless a petition for review is filed by either party within 30 days after the receipt by such party of the copy of the decision and notification of time when filed, and unless such party petitioning for a review shall within 35 days after the receipt by him of the copy of

> the decision, file with the Commission either an agreed statement of the facts appearing upon the hearing before the Arbitrator, or if such party shall so elect a correct transcript of evidence of the proceedings at such hearings, then the decision shall become the decision of the Commission and in the absence of fraud shall be conclusive. ... The Commission, or any member thereof, may grant further time not exceeding 30 days, in which to file such agreed statement or transcript of evidence.

It isn't clear from the record when Respondent received the "Administrative Order of Reinstatement," which was issued on April 14, 2015, but there is no question that Respondent timely filed its Petition for Review since that was filed on April 29, 2015, well within the 30 day deadline. However, Respondent was also required to file the transcript of evidence within 35 days from the time it received the "Administrative Order of Reinstatement" or 65 days if a 30-day extension was granted. The transcript was not filed until September 23, 2015, which is 163 days from the time the Order was issued and 148 days from the time the Petition for Review was filed. The question is whether the Commission retains jurisdiction to hear the Petition for Review.

Most of Respondent's Response brief addresses the issue of whether the Chairman's "Administrative Order for Reinstatement" and nunc pro tunc order is valid. However, these are arguments related to the Petition for Review, and not related to Petitioner's Motion to Dismiss Review for Lack of Jurisdiction. Respondent's only argument related to its failure to timely file the transcript on Review is that it had just discovered, on September 16, 2015, that the transcript was being held by the court reporter pending efforts to recreate the exhibits and that Petitioner's attorney had been aware for nearly five months that the exhibits were missing. Respondent cited no case law or precedent in its brief to address the timeliness issue.

At the hearing on the Motion to Dismiss, Respondent cited *Illinois Midland Coal Co. v. Industrial Board of Illinois*, 277 Ill. 333; 115 N.E. 527 (1917), for the proposition that the time period for the filing of a transcript on Review is discretionary; not jurisdictional. However, Respondent's reliance on *Illinois Midland Coal* is misplaced. That case involved a situation where a transcript was timely filed, within the time that was extended for that purpose, but it was not properly authenticated until afterwards. The Court held:

> Under the holdings of this court in *Bloomington, Decatur and Champaign Railroad Co. v. Industrial Board*, 276 Ill. 454, the filing of a properly authenticated stenographic report within the time fixed in the statute was not essential in order to give the Industrial Board jurisdiction to review the proceedings of the arbitration committee. If at any time before the hearing a properly authenticated stenographic report is filed with the Industrial Board this is all that is required by the statute. The date fixed by the statute as to the filing of such report is directory, -- not mandatory, -- and is not jurisdictional.

(*Illinois Midland Coal* at 335-6). Although it would appear that this language is clear and supports Respondent's argument, the Supreme Court clarified this holding in *Lumbermen's Mutual Casualty Co. v. IC*, 303 Ill. 364 (1922):

> It is not within the power of a petitioner for review to compel authentication of a transcript within the time specified in the statute, and if the statute had been so interpreted it would be impossible for either an applicant or an employer to obtain a review if the

> opposite party or arbitrator desired to prevent it. Not being able to obtain an authentication of the transcript, it appears that plaintiff in error procured a transcript from the official reporter of the commission, which was authenticated by the arbitrator but was materially defective, and when leave was asked to have it made complete, permission was denied. **While a transcript must be filed within the time limited by the statute, the law is that it may be authenticated afterward, so that a hearing before the commission shall be upon a correct transcript.** (*Bloomington, Decatur and Champaign Railroad Co.* v. *Industrial Board*, 276 Ill. 454; *Illinois Midland Coal Co.* v. *Industrial Board*, 277 id. 333; *People* v. *Andrus*, 299 id. 50.) A party seeking a review and acting in good faith complies with the law by filing a transcript within the time limited and cannot be prejudiced by the fact that there are disputes as to its correctness.

(Id. at 368-9, Emphasis added).

Respondent also cited the specially concurring opinion in *Ingrassia Interior Elements v. IWCC*, 981 N.E.2d 1143 (2nd Dist., 2012), to argue that the Commission "does not lose jurisdiction simply because the transcript was not filed within the time period required under the Act." (Id. at 1149). However, the issue in *Ingrassia*, was whether the statutory time period for filing the transcript can be waived based on a "stenographic stipulation" entered into by the parties that neither party would object to jurisdiction in the event the transcript was not timely filed. The court found in the affirmative and held that such a stipulation waiving this type of jurisdictional defect was binding at the time it was signed.

In the case at bar, there was no stenographic stipulation entered into at the time the Motion to Reinstate was heard so *Ingrassia* does not support Respondent's position. Interestingly, the *Ingrassia* court analyzed the waiver of jurisdiction issue in light of the holding in *Pocahontas Mining Co. v. IC*, 301 Ill. 462 (1922), in which the Supreme Court stated:

> We adhere to the ruling in the *Andrus case* as correctly laying down the law in every particular that was involved therein. It was sought in that case by *mandamus* proceedings to compel the commission to re-instate and hear a petition for review of the decision of the arbitrator. The commission had dismissed the case in question before it because the stenographic report was not filed until twenty-five days after notice of the decision of the arbitrator and without having obtained any extension of time for that purpose. **The commission had therefore lost jurisdiction of the case, as an objection had been made to the commission in apt time for the dismissal of the proceedings, and there was therefore no waiver of the objection to the commission's taking jurisdiction.** The commission could not, therefore, be *mandamused* to re-instate and hear the case, and that is the sum and substance of what the *Andrus case* decided. In the case now before us, as already shown, defendant in error did not raise any objection before the commission to its taking jurisdiction and deciding the case but appeared and participated in the contest until the commission had entered its final order. He therefore completely waived any right to raise the question that the commission had lost jurisdiction of the case, either in this court or in the circuit court.

(Id. at 478, Emphasis added). Therefore, although the issue of the timely filing of a transcript can be waived, it can also be the basis of an objection to prevent the Commission from taking jurisdiction. This was reiterated in the case of *Gould Const. Co. v. IC*, 311 Ill. 472 (1924):

> The filing of an agreed statement of facts or stenographic report within the time required by the statute is a condition essential to a party's right to a review by the Industrial Commission of the award of an arbitrator. (*People* v. *Andrus*, 299 Ill. 50.) The objection, however, was one which might have been waived by the plaintiff in error, and would have been waived if it had appeared and participated without objection in the hearing and the submission of the cause to the judgment of the commission on the merits. (*Pocahontas Mining Co.* v. *Industrial Com.* 301 Ill. 462.) In this case the plaintiff in error objected to proceeding because the stenographic report had not been filed in time, and its objection should have been sustained.

(Id. at 475.) The Court concluded that, "[t]he Industrial Commission was without authority to review the award of the arbitrator, over the plaintiff in error's objection, on account of the failure to file the stenographic report within fifty days of the hearing...." (Id. at 478-9).

In the case at bar, Petitioner did object, and continues to object, to Respondent's failure to timely file a transcript. There was no stenographic stipulation or other waiver by Petitioner. Although the timing of the substitution of Respondent's attorney and the problem the court reporter had in locating the exhibits may have contributed to an understandable delay in filing the transcript, the question before us is not whether Respondent was diligent, under the circumstances, in pursuing its review. The fact remains that, for whatever reason, the transcript was not timely filed. Based on the case law, which provides that Respondent's failure to timely file a transcript on Review deprives the Commission of jurisdiction when such failure was objected to and not waived by Petitioner, we feel compelled to grant Petitioner's Motion to Dismiss Review for Lack of Jurisdiction.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Motion to Dismiss Review for Lack of Jurisdiction is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter be returned to the docket of Arbitrator Simpson for further proceedings.

DATED: AUG 2 4 2016

Charles J. DeVriendt

Ruth W. White

CJD/se
49

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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tanya Woods,

Petitioner,

vs.

NO: 02 WC 23779
05 WC 12783

16IWCC0551

Bank of America,

Respondent.

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 reinstatement, withdrawal, petition to enforce settlement, and being advised of the facts and law, affirms and adopts the Notice of Motion and Order of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Notice of Motion and Order of the Arbitrator dated July 3, 2012, is hereby affirmed and adopted.

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

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

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: AUG 25 2016
TJT:yl
o 7/26/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

16IWCC0551

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF MOTION AND ORDER

ATTENTION. You must attach the motion to this notice. If the motion is not attached, this form may not be processed.
Upon filing of a motion before a Commissioner on review, the moving party is responsible for payment for preparation of the transcript.

Tanya Woods
Employee/Petitioner

v.
Bank of America
Employer/Respondent

Case # 02 WC 23799

05 WC 12783

TO: Bryce, Downey & Lenkiv, LLC, 200 N. LaSalle St., Ste. 2700, Chicago, IL 60601

Ms. Tanya Woods (~~Hand Delivery~~) ORAL MOTION ON 6-29-12

On **July 3, 2012**, at **2:00** PM, or as soon thereafter as possible, I shall appear before the Honorable **Arbitrator Carlson**, or any arbitrator or commissioner appearing in his or her place at **100 W. Randolph, Chicago**, Illinois, and present the attached motion for:

- ___ Change of venue (#3072)
- ___ Consolidation of cases (#3071) (list case#)
- ___ Dismissal of attorney (#3052)
- ___ Dismissal of review (#3085)
- ___ Fees under Section 16 (#1600)
- ___ Fees under Section 16a (#1645)
- ___ Hearing under Sect.19(b) (#1902)
- ___ Penalties under Sect. 19(k) (#1911)
- ___ Penalties under Sect. 19(l) (#1912)
- ✓ Reinstatement of case (#3074)
- ___ Request for hearing (#R33)
- ✓ Withdrawal of attorney (#3073)
- ___ Other (explain) _____

Signature Petitioner ___ Respondent ___

Robert A. Wilson -1354
Attorney's name and IC code # (please print)

Dranias, Harrington & Wilson
Name of law firm, if applicable

77 W. Washington St., Ste. 1020
Street address

Chicago, IL 60602
City, State, Zip code

(312) 641-3518 rwilson@dhwlawyers.com
Telephone number E-mail address

ORDER

The motion is set for hearing on _____

Signature of arbitrator or commissioner

Date

ORDER

The motion is ___ Granted ___ Withdrawn ___ Continued to _____
X Denied ___ Dismissed ___ Set for trial (date certain) on _____

Signature of arbitrator or commissioner

7-3-12
Date

PROOF OF SERVICE

If the person who signed the *Proof of Service* is not an attorney, this form must be notarized.

I, Robert A. Wilson, affirm that I delivered ✓ mailed with proper postage ____

in the city of Chicago a copy of this form

at _____ PM on July 3, 2012 to each party at the address(es) listed below.

Bryce, Downey & Lenkiv, LLC, 200 N. LaSalle St., Ste. 2700, Chicago, IL 60601

Ms. Tanya Woods (Hand Delivery)

Signature of person completing *Proof of Service*

Signed and sworn to before me on _____

Notary Public

[1] The Workers' Compensation Commission assigns code numbers to attorneys who regularly practice before it. To obtain or look up a code number, contact the Information Unit in Chicago or any of the downstate offices at the telephone numbers listed on this form.

16IWCC0551

ILLINOIS WORKERS COMPENSATION COMMISSION

TANYA WOODS Petitioner. v. BANK OF AMERICA Respondent.	)	Case No. 02 WC 23799 05 WC 12783

MOTION TO WITHDRAW AS ATTORNEYS

NOW COME attorneys, ROBERT A. WILSON and DRANIAS, HARRINGTON & WILSON, and move the Honorable Arbitrator and the Illinois Industrial Commission for leave to withdraw from this cause, as attorneys for TANYA WOODS, stating as follows:

1. That on Friday, June 29, 2012, Petitioner, Tanya Woods, appeared and stated she was dissatisfied with the representation of attorneys, Robert A. Wilson and Dranias, Harrington & Wilson. That Ms. Woods stated that she no longer wanted to accept an offer of $50.000.00 extended by Respondent.

2. That this cause had been dismissed for want of prosecution on February 8, 2011. That after a timely motion to vacate dismissal was filed, pretrial discussion resulted in Petitioner indicating agreement to settle for $50,000.00.

3. That Rule 1.16 as to professional conduct provides as follows:

> In Illinois, RPC 1.16 governs declining or terminating representation of a client, including motions to withdraw. The rule, which, along with the rest of the Illinois Rules of Professional Conduct 2010, was effective January 1, 2010, provides for mandatory withdrawal from representation in subsection (a):
>
> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in a violation of the Rules of Professional Conduct

or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
(3) the lawyer is discharged.

Subsection (b) sets forth a variety of circumstances under which it is permissible, though not required, for the lawyer to withdraw:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if;
(1) Withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

Subsections (c) and (d) place additional permissions, conditions and restrictions upon withdrawal:

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

4. That Petitioner's attorneys are presented with a dilemma if they are not permitted to withdraw, and the motion to vacate dismissal and reinstate is denied.

In order to protect Petitioner's interest, an appeal of the dismissal would need to be filed, but the discharge by Petitioner of the attorneys presents a dilemma.

5. That the interest of justice is served, with Petitioner having a clean slate; her case reinstated to pursue pro se, or with new attorneys of her choosing, and her prior attorneys granted leave to withdraw.

WHEREFORE, attorneys ROBERT A. WILSON and DRANIAS, HARRINGTON & WILSON, pray for an order granting them leave to withdraw, or in the alternative, for such other relief as the Honorable Arbitrator and Commission deem appropriate

Respectfully Submitted:

Robert A. Wilson

Dranias, Harrington & Wilson

DRANIAS, HARRINGTON & WILSON
77 WEST WASHINGTON STREET, SUITE 1020
CHICAGO, IL 60602
312-641-3518
04877

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

SONIA TORRES,

Petitioner,

16IWCC0518

vs.

NO: 03 WC 58861

ILLINOIS SECRETARY OF STATE,

Respondent.

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 accident, causal connection, medical expenses, TTD and the nature and extent of 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.

Arbitrator Gilberto Galicia, in his Arbitration Decision dated January 14, 2009, found Petitioner to have been rendered permanently and totally disabled as a result of the November 19, 2002, motor vehicle accident while performing her usual duties for Respondent. In support of his finding, he noted Petitioner's complaints of constant low back pain that radiated down into her right hip, through her right thigh and terminates at her right knee, constant right shoulder and arm pain well as constant cervical spine pain. He also found, as a consequence of these pains, Petitioner become depressed due to these pains significantly and negatively impacted her ability to care for her children. Arbitrator Galicia concluded the cumulative effect of Petitioner's pain and depression rendered her permanently and totally disabled. The Commission, in reviewing the evidence, finds Petitioner to permanently partially disabled, not permanently totally disabled.

Petitioner's initial medical records indicate she complained of injuries to her head, right shoulder, cervical spine and lumbar spine. Over time, her complaints evolved to include complaints of depression and fibromyalgia. No support is found in her medical records to support the contention that her more recent complaints are causally related to her November 19,

16IWCC0518

2002, accident.

Petitioner's treating physician, Dr. William Earman, on August 12, 2005, entered into Petitioner's treatment records notations indicating he no longer considered Petitioner to have any on-going injury and considered Petitioner to be at maximum medical improvement. He went on to write that he could not explain Petitioner's continuing complaints but noted those same complains involved symptom magnification. Dr. Earman ultimately concluded Petitioner's then-current pain complaints were consistent with fibromyalgia but opined that the pain complaints were unrelated to Petitioner's work injury.

Petitioner was examined by Dr. James Elmes on September 20, 2005, at the request of the State Employees' Retirement System of Illinois. Dr. Elmes concluded Petitioner was physically incapable of resuming her previously held position with Respondent.

Dr. Earman, on June 20, 2008, authored a letter addressed "To Whom It May Concern" in which he indicated Petitioner was totally disabled due to chronic fibromyalgia and low back pain. Petitioner's active medical treatment appears to have ceased at the time this letter was written as the letter is the most recent document contained in Petitioner's medical records.

Arbitrator Galicia's finding of permanent total disability relied heavily on Dr. Elmes' conclusion that Petitioner could not resume working as a Public Service Representative and Dr. Earman declaring Petitioner to be totally disabled. Arbitrator Galicia appears to have misconstrued Dr. Elmes' conclusion and Dr. Earman's June 20, 2008, letter to find that they endorse that Petitioner is permanently and totally disabled.

Dr. Elmes' opinion is noted to have been limited only to the question of whether or not Petitioner could return her former position with Respondent. He indicated that she could not. Dr. Elmes' written opinion was silent with respect Petitioner's ability to work in any other capacity for some other employer. That silence was broken on August 25, 2008, when Dr. Elmes testified during an evidence deposition to his opinion about Petitioner returning to work was really about Petitioner resuming her prior position and not about Petitioner's ability to do any other type of job.

Dr. Earman's June 20, 2008, letter is silent as to whether he believed Petitioner to be temporarily or permanently disabled. As written, it can only be concluded that Dr. Earman found Petitioner to have been totally disabled as of that date the letter was written. Petitioner's apparent abandonment of treating with Dr. Earman prevented him from reassessing her condition subsequent to June 20, 2008. No assumption can be made that he would continue to find Petitioner to be totally disabled.

Based upon the totality of the evidence, the Commission modifies the Arbitration Decision with respect to the nature and extent of Petitioner's permanent disability, finding Petitioner's injuries resulted in a 15% loss of use of the person as a whole as a result of her November 19, 2003, accident. Significant weight is placed upon Dr. Earman's declaration on August 12, 2005, of being unsure as to the reason for Petitioner's continued complaints of pain.

16IWCC0518

The Commission modifies the Arbitration Decision further by terminating Petitioner's entitlement to temporary total disability benefits effective January 28, 2008, based on the conclusion of Dr. Singh that Petitioner engaged in a hyper-exaggeration of symptoms and complained of pain found to be in a non-organic distribution. He found Petitioner demonstrated five positive Waddell signs. Dr. Singh, based upon his January 28, 2008, IME of Petitioner, concluded her then-expressed complaints were unrelated to her November 19, 2003. The Commission notes Dr. Singh's concluding Petitioner demonstrated non-organic complaints echoed similar concerns voiced by her treating physician, Dr. Earman, the OccuSport physical therapists who conducted the initial physical therapy evaluation as well as the November 2, 2004, functional capacity evaluation, and Dr. Elmes, the examining physician for the State Employees' Retirement System of Illinois.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $333.36 per week for a period of 210-4/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $300.02 per week for a period of 75 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 15% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner medical expenses under §8(a) of the Act through January 28, 2008.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $39,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 4 - 2016
KWL/mav
O: 04/11/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0518

TORRES, SONIA
Employee/Petitioner

Case# **03WC058861**

ILLINOIS SECRETARY OF STATE
Employer/Respondent

On 01/14/2009, 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 0.29% 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:

FIGLIOLI, DAVID
150 N MICHIGAN AVE
SUITE 1100
CHICAGO, IL 60601

1770 ASSISTANT ATTORNEY GENERAL
ROBERT VEGAS
100 W RANDOLPH ST - 13TH FL
CHICAGO, IL 60601

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794

0499 DEPT OF CENTRAL MGMT SERVICES
MGR WORKMENS COMP RISK MGMT
W G STRATTON BLDG
SUITE 604
SPRINGFIELD, IL 62706

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 14 2009

BERTHA E. PARKER, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)
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

16IWCC0518

SONIA TORRES
Employee/Petitioner

Case # 03 WC 58861

v.

ILLINOIS SECRETARY OF STATE
Employer/Respondent

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 GILBERTO GALICIA, arbitrator of the Commission, in the city of CHICAGO, on 9/3/08 AND 9/11/08. After reviewing all of the evidencepresented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was the 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 the petitioner's employment by the respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to the respondent?
F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?
G. ☒ What were the petitioner's earnings?
H. ☐ What was the petitioner's age at the time of the accident?
I. ☐ What was the petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?
K. ☒ What amount of compensation is due for temporary total disability?
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon the respondent?
N. ☐ Is the respondent due any credit?
O. ☐ Other ___

FINDINGS

16IWCC0518

- On 11/19/03, the respondent Illinois Secretary of State *was* operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
- On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident *was* given to the respondent.
- In the year preceding the injury, the petitioner earned $ 26,002.08; the average weekly wage was $ 500.04.
- At the time of injury, the petitioner was 40 years of age, *single* with 1 children under 18.
- Necessary medical services *have not* been provided by the respondent.
- To date, $ 53,813.62 has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ 333.36/week for 231 weeks, from 12/17/03 through 2/6/05 and 3/9/05 thru 6/19/08, which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $ 379.51/week for a further period of life ~~weeks~~, as provided in Section 8(f) of the Act, because the injuries sustained caused the complete disabiity of the petitioner rendering her wholely and permanently incapable of work.
- The respondent shall pay the petitioner compensation that has accrued from 11/19/03 through 9/11/08, and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $ 2,237.96 for necessary medical services, as provided in Section 8(a) of the Act.
- The respondent shall pay $ -0- in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ -0- in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ -0- in attorneys' fees, as provided in Section 16 of the Act.

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

1-14-09
Date

JAN 14 2009

FINDINGS OF FACT:

On November 19, 2003, the petitioner was employed by the respondent as a Public Service Representative. She had been working for the respondent for approximately six years. Her job duties consisted of giving driver license examinations, processing license applications, administering vision tests, conducting road tests and performing general cashier work. She had the option of either sitting on a stool or standing when performing her job duties within the building. When performing road tests, she would complete up to 32 individual tests each day. She would also have to lift and carry boxes of applications to her work station one to two times per day. These boxes of applications weighed approximately 10 to 15 pounds.

The petitioner next testified that her salary as a Public Service Representative was controlled by her union collective bargaining agreement. It was determined by the position you held and your seniority with the respondent. This salary was paid twice each month. The petitioner testified that as of July 1, 2002, she was paid $2,096.00 per month. Starting on February 1, 2003, she was paid a salary of $2,167.00 per month. Then beginning on July 1, 2003 until the date of her accident on November 19, 2003, she was paid a salary of $2,210.00 per month.

The petitioner further testified that she frequently lost time from work due to her young son's illness. Her son suffered from asthma and when he had an acute episode, she would have to take him for treatment or care for him. On these occasions she would obtain a note from her son's physician and submit it to her supervisors. She would then utilize her accrued sick and vacation days in order to receive her pay for those lost work days. However, when she exhausted all of her sick and vacation days, she would not be paid. She also testified that she did not lose any time from work for any other reasons.

The petitioner then testified that up to November 19, 2003, she was able to perform all of her job duties as a Public Service Representative for the respondent without difficulty. Additionally, she had never suffered any injuries to her neck, low back, right arm/shoulder and legs prior to November 19, 2003. She was involved in an automobile accident in 1990 wherein she suffered an injury to her left arm but recovered from that injury and did not have recurring problems with her left arm. She also did not recall that she had suffered an injury at work on January 9, 2002 wherein the accident report noted that she had injured her right arm, her right leg and her right side and back. (Respondent's Exhibit #3) However, according to records kept by Ms. Sarah Robinson, respondent's workers' compensation coordinator, the petitioner lost only three days from work as a result of this incident and submitted only two prescription bills totaling $20.00 and no other bill for treatment from a physician.

On November 19, 2003, the petitioner was administering road tests for driver's license applicants. As she was administering a road test to an applicant, the applicant accelerated suddenly and lost control of the vehicle causing it to strike and then jump a curb. The front of the vehicle then struck a tree. The petitioner testified that when the

first collision happened, (i.e. the car striking the curb) her body slid forward even though she was utilizing her seat belt and her hips were lifted off the seat. Prior to the second collision (i.e. striking the tree) she braced herself by placing her right arm against the dashboard in an attempt to stop her forward movement. Immediately after this accident, she began to feel pain in her right arm, her neck started hurting and her head felt like it "was being hit by a hammer." Later that day, she experienced increasing pain in her head, neck, right arm/shoulder and low back.

Respondent submitted into evidence the incident report completed by the petitioner on the day of this incident. It documents that petitioner was involved in an automobile accident at approximately 3:50 p.m. while performing a road test. In a description of the incident it states that the driver pressed on the gas causing the car to run over a curb and strike a tree. The petitioner listed injuries to her neck, back, left leg, right arm and head. (Respondent's Exhibit #2)

Respondent also presented Mr. Laurence Delicandro, petitioner's supervisor as a witness in this hearing. Mr. Delicandro testified that he was the assistant manager of petitioner's facility on November 19, 2003. He observed the petitioner immediately after the accident and she appeared to be "shaken." He did not observe her favoring any body part given that she was sitting at the time he saw her and she did not perform any other physical activities.

The petitioner initially sought treatment for her injuries from her family physician, Dr. Ericka Brown at Advocate Health Center. Dr. Brown prescribed medications, various diagnostic tests and physical therapy. The petitioner underwent an MRI of the low back on December 12, 2003 which showed a mild broad based herniation of the L3-4 disc without compression of the thecal sac or neural foramin and arthritic changes at the L4-5 and L5-S1 levels. She was then referred by Dr. Brown to Dr. Holly Carobene for further treatment. (Petitioner's Exhibit # 2)

The petitioner also testified that while treating with Dr. Brown she continued to work for the respondent. During this time, she continued to experience significant pain in her neck and low back and was unable to stand correctly. She also suffered headaches and felt numbness in her hands. On many occasions she would not be able to work the entire seven and one-half hours each day and would leave work early. She was then taken off work by Dr. Brown on December 17, 2003. (Petitioner's Exhibit #2)

The petitioner was then evaluated by Dr. Holly Carobene at Comprehensive Pain Care on January 13, 2004. She reviewed petitioner's lumbar spine MRI and noted that it showed a bulging disc at L3-4 and arthritic changes at the L4-5 and L5-S1 levels. She then recommended additional MRI tests of petitioner's cervical spine and right shoulder and epidural steroid injections to her low back. The MRI's performed on petitioner's cervical spine and right shoulder were negative and the petitioner underwent two epidural steroid injections to her low back on January 15, 2004 and February 19, 2004.

Dr. Carobene also referred the petitioner to a neurologist; Dr. Kevin Fagan for an evaluation which was performed on March 5, 2004. Dr. Fagan ordered additional tests including a thoracic MRI, brain scan and EMG. The petitioner was re-evaluated by Dr. Fagan on April 8, 2004 and he noted that all the diagnostic tests were negative. He then recommended that the petitioner be evaluated by an orthopedist to rule out a possible pelvic fracture. (Petitioner's Exhibit #3, Petitioner's Exhibit #6, pages 14-15)

Dr. Brown also referred the petitioner to Dr. George Miz for further treatment to her low back and to Dr. David Mehl for treatment to her right shoulder. Both physicians recommended continued physical therapy and medications. Dr. Miz also reviewed the MRI scan and commented that it showed disc degeneration at the L3-4 level and significant facet arthropathy at the L4-5 level. (Petitioner's Exhibits #4 & #5)

At the request of respondent's medical case manager, Judith McCormick, the petitioner was evaluated by Dr. William Earman, an orthopedic specialist on August 19, 2004. Dr. Earman also reviewed the medical records and diagnostic tests previously performed on the petitioner. His diagnosis after this initial evaluation was that the petitioner was suffering from coccydynia and recommended an MRI of the pelvis. He further opined that she was disabled from work due to her condition. (Petitioner's Exhibit #6, pages 54-56) The petitioner then chose to continue treating with Dr. Earman and underwent an MRI of the pelvis which was normal. Dr. Earman after reviewing this test recommended aquatic therapy, more physical therapy and various medications. He then offered a diagnosis that petitioner was suffering from fibromyalgia syndrome. (Petitioner's Exhibit #6, page 62)

The petitioner participated in the aquatic therapy and physical therapy and underwent functional capacity evaluations at Occusport Physical Therapy on November 2, 2004 and at HealthSouth on January 25, 2005. Although the initial FCE was deemed to be invalid, the second one performed at HealthSouth showed that the petitioner gave maximum effort and consistent performance in 15 out of 16 tests. It also determined that she was able to perform at the sedentary work level. (Respondent's Exhibits #16 & #17) She was then re-evaluated by Dr. Earman on February 4, 2005, and was released to return to light duty work with limited sitting and standing. (Petitioner's Exhibit #6, page 69)

The petitioner then returned to work in a light duty capacity for the respondent on February 7, 2005, and worked for approximately one month through March 8, 2005. The petitioner testified that her light duty job consisted of typing and correcting exams. She worked at a counter and had the option of sitting or standing. Nonetheless, she began to experience increasing pain in her hands, right shoulder, neck and low back. (Transcript from 9/3/08 hearing, pages 42-43) She returned to Dr. Earman on March 8, 2005, and he restricted her to only desk type work with no administering of road tests. (Petitioner's Exhibit #6, pages 75 & 185) The respondent then did not provide light duty work for her within this new restriction.

In follow-up visits in April, May and June of 2005, Dr. Earman recommended that the petitioner be evaluated for continued treatment by the Rehabilitation Institute of Chicago. He also took her off work completely after his June 3, 2005 evaluation. The petitioner was subsequently evaluated by various physicians at this facility on June 27, 2005. These physicians formulated a diagnosis that the petitioner was suffering from myofascial pain syndrome in the bilateral shoulder girdles and in the lumbar spine as well as an adjustment disorder associated with mixed anxiety and depressed mood. They did not, however, feel that she was a candidate for their chronic pain management program due to her poor sitting tolerance. (Petitioner's Exhibit #6, pages 86-99)

Dr. Earman evaluated the petitioner again in August, 2005. At the conclusion of that evaluation, he authored a letter to Mr. Justin Pripusich, another medical case manager. In that letter Dr. Earman stated the following; "At this time, I believe the patient's pain is probably related to her accident but her current ongoing complaint, at this time, appears to be having a great deal of symptom magnification." He further stated; "I have recommended that she seek a medical or rheumatology evaluation for possible fibromyalgia but I do not believe that this is related to her workmans' comp injury and have so advised her." Lastly, he stated; "She will be checking back in with me over the next month so we can continue to monitor her ongoing progress but at this time I do believe that she is probably resolved from her workman's compensation injury and I can find no ongoing injury at this time other than her pain complaint." (Petitioner's Exhibit #6, pages 100-101)

The petitioner, however, continued to see Dr. Earman on a regular basis through June of 2008. During this time, Dr. Earman continued to prescribe her various medications for her condition which he diagnosed as being either polymyositis or fibromyalgia. In a February, 2007 office visit, Dr. Earman reviewed the petitioner's job description and continued to keep her disabled from returning back to work. (Petitioner's Exhibit #6, page 126) In May, 2008, Dr. Earman reviewed an new MRI of petitioner's lumbar spine and commented that is shows some degeneration but no disc herniation. He then prescribed other medications and continued to authorize her off work. (Petitioner's Exhibit #6, page 148) Finally, after a June 13, 2008 visit, Dr. Earman authored a June 20, 2008 letter wherein he stated that the petitioner was totally disabled due to chronic fibromyalgia and low back pain. He also made reference to her November 19, 2003 work accident. (Petitioner's Exhibit #6, page 150)

At the request of the State Employee's Retirement System of Illinois, the petitioner was evaluated by Dr. James Elmes on September 20, 2005. In that evaluation, the petitioner provided Dr. Elmes with information relating to her November, 2003 work accident, her medical treatment up to that time and her continued symptoms and complaints. Dr. Elmes performed an extensive examination of the petitioner and rendered his diagnosis that she was suffering from a number of conditions including

nonspecific low back pain, nonspecific cervical and thoracic back pain, fibromyalgia and depressive and anxiety disorder. In his evidence deposition, Dr. Elmes then offered his opinion that the petitioner's conditions of cervical, thoracic and low back pain were causally related to the work accident she sustained in November, 2003. He further related that her depressive anxiety disorder could be related to her chronic, long standing pain problems. With respect to the condition of fibromyalgia, he opined that it could be caused by trauma but since no one knows exactly what causes it, he could not offer an opinion as to whether petitioner's fibromyalgia condition stemmed from the November, 2003 accident. (Petitioner's Exhibit #8, pages 15-17) Lastly, Dr. Elmes offered his opinion that the prognosis for petitioner's return to her position for the respondent was poor due to her failure to show improvement despite the treatment that had been provided to her. (Petitioner's Exhibit #8, pages 18-19)

At the request of the respondent, the petitioner was evaluated by Dr. Kern Singh on January 28, 2008. After evaluating the petitioner, Dr. Singh rendered his diagnosis that petitioner had sustained cervical and lumbar strain injuries as a result of the November 19, 2003 work accident which resolved approximately 4 weeks after the incident. He further rendered a diagnosis of clinical depression which he also did not causally relate to the November 19, 2003, work accident. Dr. Singh felt that the petitioner had reached maximum medical improvement as of the date of his evaluation and no further treatment for her was necessary. Lastly, he opined that the petitioner could return to work in her position as a public service representative for the respondent. (Respondent's Exhibit #18)

Dr. Singh also provided testimony during his evidence deposition taken on August 27, 2008. Dr. Singh testified that he has been a practicing orthopedic physician for approximately four years. As part of his practice he performs approximately 750 independent medical evaluations per year of which 80% are at the request of respondents. He charges from $450.00 to $1,250.00 for each examination excluding any records review. (Respondent's Exhibit #18, pages 23-26)

Dr. Singh also testified that he believes that the condition of fibromyaligia exists but not in a setting that involves medical/legal representation, secondary gain or work related issues. (Respondent's Exhibit #18, pages 29-30) Moreover, he admitted that he did not perform the proper test for fibromyaligia on the petitioner during his examination. (Respondent's Exhibit #18, pages 31-32) Additionally, Dr. Singh testified that the petitioner presented to him with a "blunted affect" and given this presentation along with her self reporting of depressive symptoms, he diagnosed her as having clinical depression. He offered no opinion, however, with respect to the causal relationship of her depression. (Respondent's Exhibit #18, pages 42-43) Lastly, Dr. Singh admitted that he solicited no information from the petitioner regarding what work activities she was required to perform as a public service representative for the respondent. (Respondent's Exhibit #18, pages 48-49)

With respect to her current condition, the petitioner testified that she continues to experience pain in her low back which radiates into her right hip and down her right leg to her knee on a daily basis. She also experiences a "twitching" sensation in her leg muscles. She also experiences constant pain in her right arm and right shoulder. At times her right elbow "locks up" and she is unable to straighten her arm. She also experiences numbness in her right hand. With respect to her neck, the petitioner stated that she experiences constant pain in the upper area of her neck and it sometimes causes a "jerking" motion. As a result of these symptoms, the petitioner testified that she is depressed because she is physically unable to take care of her children. When she is depressed, she takes more medication, isolates herself in her room and lies in bed, sometimes all day.

The petitioner further testified that she can only sit for approximately 15 to 20 minutes. She can stand for approximately 15 to 30 minutes and can only walk short distances. All of these activities cause an increase in her symptoms. With respect to lifting, the petitioner stated that the most she has lifted has been a gallon of milk and she carried that for a short distance to her car.

Lastly, the petitioner testified that her regular day consists of waking up in the morning and taking her medications. She can move around for approximately 45 minutes and then she has to lie down again for approximately 1 hour and 45 minutes. At times she takes her child to school but her neighbor also does this on occasion for her. The medications she takes are as follows; Gabetin, a seizure medication once in the morning followed by Motrin 800 milligrams and then Vicodin one hour later. She takes Zanex at mid-afternoon and again at night. She takes Flexeril every four hours throughout the day and another Vicodin also in the afternoon.

CONCLUSIONS OF LAW

C. Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

The Arbitrator concludes that the petitioner sustained an accident on November 19, 2003, that arose out of and in the course of her employment for the respondent. This conclusion is based upon the uncontroverted testimony of the petitioner that she suffered injuries to her neck, back, left leg, right arm and head in an automobile accident that occurred when she was administering a driving test to an applicant.

The Arbitrator notes that the documents submitted by the respondent, including the initial accident report are consistent with petitioner's testimony regarding this incident. (Respondent's Exhibit #2) Moreover, the witnesses called by the respondent to

testify in this matter, Sarah Robinson and Lawrence Delicandro, also provided testimony that supported petitioner's statements that she was injured in this work accident.

Lastly, all of the medical records from the various physicians who have treated or evaluated the petitioner from November 19, 2003 up to the present time, have documented a history that the petitioner sustained her injuries as a result of an automobile accident that occurred while administering a driving test to an applicant while in the employment for the respondent.

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

The Arbitrator further concludes that the petitioner's present condition of ill-being is causally related to the work accident she sustained on November 19, 2003.

It is unrebutted that the petitioner worked for the respondent for approximately six years and during that time, she performed all of her job duties as a Public Service Representative without difficulty. These duties included performing road tests for individuals applying for their driver's licenses. According to the petitioner, she would complete up to 32 tests each day which would require her to climb into and out of cars and trucks numerous times. She would also lift and carry boxes of applications that weighed 10 to 15 pounds a few times per day.

The petitioner further testified that she did not recall suffering any injuries to her neck, low back, right arm/shoulder and legs prior to November 19, 2003. She was involved in an automobile accident in 1990 wherein she suffered an injury to her left arm but recovered from that injury and did not have recurring problems with her left arm. Although the respondent presented into evidence an accident report that documented petitioner had suffered another injury at work on January 9, 2002, wherein she injured her right arm, right leg and her right side and back, Ms. Sarah Robinson, respondent's workers' compensation coordinator testified that the petitioner lost only three days from work and submitted only two prescription bills totaling $20.00 after this incident. (Respondent's Exhibit #3, Transcript from 9/11/08 hearing, pages 57-58)

It was not until the petitioner was involved in an automobile accident on November 19, 2003 while administering a driving test that she began to experience significant pain in her neck, right arm/shoulder, and low back that has not abated despite multiple treatment modalities up to the present time. Moreover, no evidence was presented that the petitioner had suffered any additional injuries or was involved in any other accidents from November 19, 2003 up to the present time.

The respondent's evaluating orthopedic physician who ultimately became the petitioner's primary treating physician, Dr. William Earman, diagnosed the petitioner as suffering from the conditions of low back pain, fibromyaligia and chronic pain syndrome. In a letter he authored in August, 2005, he stated that her pain is probably related to her accident but he did not feel that her fibromyaligia was related to the work injury. (Petitioner's Exhibit #6, pages 100-101. However, on August 16, 2005, Dr. Earman completed and signed a Medical Leave Certification for the petitioner wherein he listed his diagnoses as being low back pain and fibromyalgia. He then authorized her continued disability from work on this same document and answered the question "Date this serious health condition began?" as November 19, 2003. (Petitioner's Exhibit #6, pages 178-179) Moreover, in a letter dated June 20, 2008, Dr. Earman again stated that the petitioner was totally disabled due to chronic fibromyalgia and low back pain and specifically referenced her November 19, 2003 work accident. (Petitioner's Exhibit #6, page 150)

The Arbitrator also notes that Dr. James Elmes who evaluated the petitioner on behalf of the State Employee's Retirement System of Illinois, causally related petitioner's cervical, thoracic and low back pain to the November 19, 2003 work accident. He also opined that her depressive anxiety disorder could be related to her chronic, long standing pain problems that stemmed from this work accident. (Petitioner's Exhibit #8, pages 15-17)

The Arbitrator places greater weight on the opinions offered by Dr Earman and Dr. Elmes over those offered by Dr. Kern Singh, respondent's evaluating physician. Dr. Singh's bias is clearly apparent in that he admits he conducts approximately 750 independent medical examinations each year of which 80% are at the request of respondents. (Respondent's Exhibit #18, pages 23-26) He also testified that he believes that the condition of fibromyalgia exists but not in a setting that involves medical/legal representation, secondary gain or work related issues. (Respondent's Exhibit #18, pages 29-30)

Dr. Singh's opinions are also called into question given that he admitted he never conducted the proper examination on the petitioner to determine a diagnosis of fibromyalgia. (Respondent's Exhibit #18, pages 31-32) Lastly, although he rendered a diagnosis that the petitioner was suffering from clinical depression, he offered no opinion on what may have caused this depression. (Respondent's Exhibit #18, pages 42-43)

G. What were the petitioner's earnings?

The Arbitrator concludes that the petitioner's average weekly wage in the year preceding her work accident of November 19, 2003, was $500.04 which would yield a

temporary total disability rate of $333.36 per week. This conclusion is based upon the testimony of the petitioner which the Arbitrator finds credible and is supported by the documentary evidence submitted in this case. It is also corroborated by the testimony of respondent's witness; Sarah Robinson.

The petitioner testified that as a public service representative for the respondent, her salary was determined by her position and level of seniority as set forth in the collective bargaining agreement in effect in the year preceding her November 19, 2003 work accident. As set forth in this agreement, she was paid $2,096.00 per month from July 1, 2002 to February 1, 2003. She then received a raise to $2,167.00 per month which remained in effect until July 1, 2003. As of July 1, 2003 she received a salary of $2,210.00 per month. She remained at this salary level up to November 19, 2003.

The petitioner next testified that in the year preceding her November 19, 2003 work accident, she lost significant time from work in order to care for her young son who suffered from asthma. On many occasions she would obtain notes from her son's physician documenting the reason for this lost time and would submit them to her supervisors. She would then utilize her accrued sick days and vacation time in order to receive her pay for these lost work days. However, when her sick and vacation days were exhausted, she would not be paid. She also testified that she did not lose any time from work for any other reasons.

Ms. Sarah Robinson, the workers' compensation coordinator for the respondent, testified that some of the physician's notes excusing the petitioner from work due to her son's illness were forwarded to her. However, when an individual applies for time off under the Family and Medical Leave Act; FMLA and it is approved, there would be no need for the employee to continue to submit doctors notes for their days off for the following one year period of time. Ms. Robinson then confirmed that the petitioner applied for and was approved for FMLA as of July, 2003 for her son's asthma condition. Therefore, there was no need for her to continue to submit doctor's notes for her lost work days due to these circumstances. She also confirmed that the petitioner was absent from work numerous times due to family sickness after July, 2003.

The petitioner submitted into evidence her attendance records which are called "year at a glance" calendars for the years of 2002 and 2003. These calendars document the specific days the petitioner was off work and the codes used for those absences. (Petitioner's Exhibit #1) The Arbitrator notes that that the petitioner worked a total of 74 days or 10-4/7 weeks at the salary rate of $2,096.00 per month ($483.69/week), 150 days or 21-3/7 weeks at the salary rate of $2,167.00 per month ($500.08/week) and 141 days or 20-1/7 weeks at the salary rate of $2,210.00 per month ($510.00/week) in the year from November 19, 2002 up to the date of her accident on November 19, 2003.

Thus she worked only a total of 38 weeks and earned a gross salary of $19,001.43. Her average weekly wage in the year preceding her accident is therefore $500.04. This calculation is consistent with the Illinois Appellate Court's holding in Farris v. Industrial Commission, 357 Ill.App.3d 525, 829 N.E.2d 372 (4th Dist. 2005) In Farris, the claimant lost significant time from work due to the hospitalization of his critically ill infant daughter and also from layoff. The Commission subtracted all of these lost days when determining his average weekly wage under Section 10 of the Act. The Appellate Court confirmed this calculation stating that "the evidence is clear that the time lost was not due to the fault of the claimant" and under Section 10 of the Act, it should be subtracted when calculating average weekly wage. Farris, 829 N.E.2d at 375.

J. Were the medical services that were provided to petitioner reasonable and necessary?

The Arbitrator concludes that the medical treatment the petitioner received from Dr. William Earman and Dr. Ericka Brown and the prescription medications she obtained, are causally related to the work accident she sustained on November 19, 2003, and that the medical bills submitted as Petitioner's Exhibit #9, constitute reasonable and necessary medical treatment pursuant to Section 8(a) of the Act.

The Arbitrator therefore awards the following medical expenses; for the treatment rendered by Dr. Earman which occurred after February 1, 2006, $449.89 which is the amount allowed for under the Medical Fee Schedule; Section 8.2 of the Act, Advocate Health Centers/Dr. Brown; $60.00 and prescription medications purchased by the petitioner in the amount of $1,728.07.

K. What amount of compensation is due for temporary total disability?

The Arbitrator concludes that the petitioner is entitled to 231 weeks of temporary total disability benefits at the rate of $333.36 per week for the time periods commencing December 17, 2003 through February 6, 2005 and from March 9, 2005 through June 19, 2008.

The petitioner testified that subsequent to her November 19, 2003 work accident she continued to work for the respondent while receiving treatment from Dr. Ericka Brown, her family physician. During this time, she continued to experience significant pain in her neck and low back and was unable to stand correctly. She also suffered headaches and felt numbness in her hands. On many occasions she would not be able to work the entire day and would leave work early. She was ultimately taken off work by Dr. Brown on December 17, 2003. (Petitioner's Exhibit #2)

The petitioner then testified and the medical records confirm that she was advised to remain off work by the various other physicians she was referred to by Dr. Brown for treatment of her condition. These physicians included Dr. Holly Carobene, Dr. George Miz, and Dr. David Mehl. (Petitioner's Exhibits #3, #4 & #5) Dr. William Earman who initially evaluated the petitioner at the request of the respondent on August 19, 2004, also found that she was disabled from work activities due to her condition. When the petitioner chose to continue to treat with Dr. Earman, he advised her to remain off work until he released her to return to light duty work with limited sitting and standing on February 4, 2005. (Petitioner's Exhibit #6, page 69)

The petitioner returned to work for the respondent in a light duty capacity on February 7, 2005 and worked through March 8, 2005, when she returned to Dr. Earman for re-evaluation. On that March 8, 2005 re-evaluation, Dr. Earman restricted her to only desk type work with no administering road tests. (Petitioner's Exhibit #6, pages 75 & 185) The respondent was then unable to provide petitioner with continued light duty work within these restrictions.

The petitioner again testified and the medical records confirm that Dr. Earman continued to opine that she was disabled from returning to work activities as a result of her ongoing symptoms and physical condition up to June 13, 2008. After this last office visit on June 13, 2008, Dr. Earman authored a letter dated June 20, 2008, wherein he stated that the petitioner was totally disabled due to chronic fibromyaligia and low back pain. (Petitioner's Exhibit #6, page 150)

The Arbitrator further notes that Dr. James Elmes who evaluated the petitioner at the request of the State Employee's Retirement System of Illinois, did not release the petitioner to return to any type of work activities. Rather, he opined that the prognosis for petitioner's return to her position for the respondent was poor due to her failure to show improvement despite the treatment that had been provided to her. (Petitioner's Exhibit #8, pages 18-19)

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

The Arbitrator concludes the petitioner is permanently and totally disabled as provided for under Section 8(f) of the Act. The onset date of petitioner's permanent and total disability is June 20, 2008. This decision is supported by the testimony of the petitioner relating to her current physical condition and the medical evidence submitted in this case.

The petitioner testified that currently she continues to experience constant pain in her low back which radiates into her right hip and down her right leg to her knee. She experiences a "twitching" sensation in her leg muscles on a regular basis. She

experiences constant pain in her right arm and right shoulder. At times, her right elbow "locks up" and she is unable to straighten her arm. She also experiences numbness in her right hand. With respect to her neck, the petitioner testified that she experiences constant pain in the upper area of her neck and it sometimes causes a "jerking"motion. As a result of these symptoms, the petitioner stated that she is depressed because she is physically unable to take care of her children. When she is depressed, she takes more medication, isolates herself in her room and lies in bed, sometimes all day.

The petitioner further testified that she can only sit for approximately 15 to 20 minutes until her pain increases to the level that she cannot tolerate it. She can stand for approximately 15 to 30 minutes and can only walk short distances. All of these activities cause an increase in her pain level and symptoms. With respect to lifting, the petitioner stated that the most she has lifted has been a gallon of milk and she carried that for a short distance to her car.

Lastly, the petitioner testified that her regular day consists of waking up in the morning and taking her medications. She can move around for approximately 45 minutes and then she has to lie down again for approximately 1 hour and 45 minutes. At times, she takes her child to school but her neighbor also does this on occasion for her. (Transcript of 9/3/08 hearing, pages 63-65) The medications she takes are as follows; Gabetin, a seizure medication once in the morning followed by Motrin; 800 milligrams and then Vicodin one hour later. She takes Zanex at mid-afternoon and again at night. She also takes Flexeril every four hours throughout the day and another Vicodin also in the afternoon. These various medications make her tired and she is unable to function normally throughout the day which causes her to become more depressed.

Dr. William Earman who originally was respondent's evaluating physician and then became petitioner's treating physician, examined the petitioner on a regular basis since August, 2004. He has reviewed multiple diagnostic tests performed on petitioner and recommended various treatment modalities such as aqua therapy and regular physical therapy. He also continues to prescribe the medications the petitioner is currently taking. His diagnosis throughout the four years he has treated the petitioner has remained constant; she is suffering from chronic low back pain, fibromyalgia and depression. Furthermore, he has maintained that the petitioner is unable to perform work activities except for a brief period of time in early 2005. After his most recent evaluation of the petitioner on June 13, 2008, Dr. Earman authored a letter dated June 20, 2008 wherein he stated that the petitioner was totally disabled due to chronic low back pain and fibromyalgia. (Petitioner's Exhibit #6, page 150)

The Arbitrator further notes that Dr. James Elmes who evaluated the petitioner at the request of the State Employee's Retirement System of Illinois, also opined that the prognosis for petitioner's return to her position for the respondent was poor due to her

failure to show improvement despite the treatment that had been provided to her. (Petitioner's Exhibit #8, pages 18-19)

Based upon the above, the Arbitrator finds the petitioner to be permanently and totally disabled under the meaning of Section 8(f) of the Act and awards the petitioner the sum of $379.51 per week for life. (The petitioner's TTD rate is $333.36 per week but this amount is less than the statutory minimum in effect on November 19, 2003, for a PTD award.) The petitioner is entitled to receive such weekly benefits commencing June 20, 2008, which is the date of Dr. Earman's letter wherein he rendered his opinion that the petitioner was totally disabled due to chronic fibromyalgia and low back pain.

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)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
SANGAMON		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN HEISSINGER,

Petitioner,

vs. NO: 07 WC 23309

STANLEY RYAN TRUCKING,

Respondent,

16IWCC0516

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses, and "maintenance, entitlement to vocational rehabilitation," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes noted below. 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission generally affirms the Arbitrator's decision but strikes all injurious practice reasoning regarding his diabetes. We rely on the opinion of Respondent's Section 12 examiner, Dr. Schmidt, that Petitioner could return to his job if he was properly wearing his brace and ankle foot orthotic (AFO). (Rx5 at 9). We also find persuasive Dr. Schmidt's opinion that Petitioner's additional amputations are not related to the previous amputations and that it would not be possible for the AFO plate to have cut Petitioner's fifth toe as Petitioner claims. (Id. at 10, 12). We find that the opinion of Dr. Fletcher is not persuasive because the functional capacity evaluation was unreliable. Petitioner was not wearing his orthotic during the examination and we find that Petitioner's testimony lacks credibility.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the

16IWCC0516

Arbitrator filed July 6, 2015, is hereby affirmed and adopted with the changes noted above.

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.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 - 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 6/8/16
49

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

HEISSINGER, KEVIN
Employee/Petitioner

Case# **07WC023309**

08WC025351

STANLEY RYAN TRUCKING
Employer/Respondent

16IWCC0516

On 7/6/2015, 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 0.11% 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:

2427 KANOSKI BRESNEY
TOM EWICK
2730 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0560 WIEDNER & McAULIFFE LTD
MATTHEW ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0516

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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)

Kevin Heissinger
Employee/Petitioner

v.

Stanley Ryan Trucking
Employer/Respondent

Case # 07 WC 23309

Consolidated cases: 08 WC 25351

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on May 22, 2015. 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 Vocational Rehabilitation & Injurious Practices

FINDINGS

On the date of accident, May 18, 2007, 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.

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

In the year preceding the injury, Petitioner earned $42,267.21; the average weekly wage was $812.63.

On the date of accident, Petitioner was 43 years of age, married with 3 dependent child(ren).

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

Respondent shall be given a credit of $41,183.64 for TTD, $0.00 for TPD, $0.00 for maintenance, and $39,620.36 for other benefits, for a total credit of $80,804.00. Other benefits are payment of permanent partial disability for the amputations of the left great and second toes.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 31 for medical services provided to Petitioner from May 18, 2007, through October 20, 2008, exclusive of medical services for the right foot injury as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $541.75 per week for a period of 73 4/7 weeks commending May 23, 2007, through October 20, 2008, as provided in Section 8(b) of the Act.

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's claim for prospective medical care, maintenance and vocational rehabilitation is denied.

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.

William R. Gallagher, Arbitrator
ICArbDec19(b)

June 29, 2015
Date

JUL 6 - 2015

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged that Petitioner sustained accidental injuries arising out of and in the course of his employment for Respondent. In 08 WC 25351, the Application alleged that on January 31, 2007, Petitioner sustained an injury to his right shoulder when a semi truck jackknifed on a road during bad weather (Arbitrator's Exhibit 3). In 07 WC 23309, the Application alleged that on May 18, 2007, Petitioner sustained an injury to his "Left toe and foot" when a pallet fell on his left foot (Arbitrator's Exhibit 4). These two cases were previously consolidated for trial.

Case 07 WC 25351 was tried in a 19(b) proceeding and Petitioner sought an order for payment of temporary total disability benefits, maintenance, medical bills, prospective medical treatment and vocational rehabilitation services. Respondent disputed liability on the basis of causal relationship and that Petitioner had engaged in an "injurious practice" as provided in Section 19(c)d of the Act.

As noted herein, the accident of May 18, 2007, resulted in Petitioner undergoing surgical amputations of the left great and second toes and the parties stipulated that Respondent paid Petitioner permanent partial disability benefits owed for same. Petitioner subsequently had other toes surgically amputated for which Respondent disputed liability.

Petitioner worked for Respondent as a truck driver and he sustained a "crush" injury to his left foot on May 18, 2007, when a pallet fell on it. Petitioner was previously diagnosed with Type II diabetes in May, 2000. At that time, Petitioner weighed 296 pounds (Respondent's Exhibit 3).

Subsequent to the accident Petitioner continued to work; however, his left foot symptoms worsened and, on May 21, 2007, Petitioner went to the ER of Memorial Medical Center. At that time, Petitioner's left great toe was necrotic. It was noted in the medical record that Petitioner was taking "Glucophage" for his diabetes. While hospitalized, Petitioner was treated by Dr. Robert McLafferty who diagnosed Petitioner with left great toe necrosis/gangrene and he performed a surgical amputation of the left great toe on May 22, 2007. Subsequently, Dr. McLafferty performed a debridement of an abscess/ulcer on May 26, 2007, that had developed at the amputation site as a result of an infection (Petitioner's Exhibit 1).

Petitioner testified that he was initially prescribed insulin for control of his diabetes while hospitalized in May, 2007. Following his discharge, Petitioner continued to be treated by Dr. McLafferty. Dr. McLafferty noted that Petitioner had severe diabetes. In his office record of August 30, 2007, he noted that Petitioner had been dismissed from care because of Petitioner's behavioral and anger management problems (Petitioner's Exhibit 4; p 7).

Petitioner subsequently sought treatment from Dr. Lynn Barkmeier, a vascular surgeon with the Springfield Clinic, who initially saw Petitioner on November 13, 2007. Dr. Barkmeier diagnosed Petitioner with osteomyelitis of the left second toe and, on December 3, 2007, she performed a surgical amputation of it. In connection with her treatment of Petitioner, Dr. Barkmeier had Petitioner evaluated by Dr. Lynne Speck, an endocrinologist, who saw Petitioner on December 3, 2007. Dr. Speck noted that Petitioner's diabetes was out of control and she specifically

referenced the fact that Petitioner had not taken insulin for at least 10 days (Petitioner's Exhibit 5; pp 47, 109-110, 122-123 and Petitioner's Exhibit 9).

Subsequent to the surgery, Dr. Barkmeier referred Petitioner to Dr. Donald Graham, an infectious disease specialist, who treated Petitioner with IV antibiotics (Petitioner's Exhibit 6; pp 484-504). Petitioner continued to be seen and treated by Dr. Barkmeier, Dr. Graham and Dr. Speck. Dr. Barkmeier recommended that Petitioner obtain an orthotic device and, on January 17, 2008, Petitioner was seen at Orthotic and Prosthetic Associates for molding/fitting of such orthotic device (Petitioner's Exhibit 6; p 48 and Petitioner's Exhibit 13).

On April 8, 2008, Dr. Barkmeier recommended that Petitioner be seen by an occupational medicine specialist. On April 22, 2008, Petitioner was seen by Dr. David Kiel, primarily for his right shoulder injury and high blood pressure, but his diabetes was noted in the record (Petitioner's Exhibit 5; pp 44-46).

Petitioner received physical therapy at Midwest Occupational Health Associates from April 15, 2008, through May 28, 2008 (Petitioner's Exhibit 12). On April 29, 2008, Petitioner was evaluated by Dr. Marten Sikorski, a podiatrist, who noted that Petitioner had left foot instability but that Petitioner was still waiting to receive the orthotic device. He also noted that Petitioner had Type II diabetes with peripheral neuropathy (Petitioner's Exhibit 5; pp 40-41).

When Dr. Sikorski evaluated Petitioner on May 16, 2008, he noted that Petitioner had an antalgic gait and that Petitioner was in physical therapy but he expressed concern about Petitioner being at risk of sustaining a fall. Because he did not order the physical therapy, Dr. Sikorski recommended that the issue be discussed with the ordering physician (Petitioner's Exhibit 5; pp 32-33).

When Petitioner was seen in physical therapy on May 28, 2008, he became confrontational with the personnel there and he accused them of lying. Petitioner's physical therapy was discontinued at that time because of Petitioner's confrontational attitude and noncompliance with treatment (Petitioner's Exhibit 12; pp 8-9).

At the direction of Respondent, Petitioner was examined by Dr. Gary Schmidt, an orthopedic surgeon, on June 16, 2008. In connection with his examination of Petitioner, Dr. Schmidt reviewed medical records provided to him by Respondent. Dr. Schmidt opined that the crush injury to Petitioner's left foot was directly responsible for the amputations of the first and second toes. He further stated that Petitioner needed to be fitted with a foot orthoses with a full-length footplate and toe filler with a properly fitted appliance. Dr. Schmidt opined that upon being fitted for such a device Petitioner could return to work without restrictions and would be at MMI (Respondent's Exhibit 4; Deposition Exhibit 3).

On July 6, 2008, Petitioner sought medical treatment at the ER of Memorial Medical Center and advised that he had sustained an injury to his right foot when he fell at his home. At trial, Petitioner testified that he tripped on the floor where the carpeting met the linoleum. Petitioner was diagnosed with osteomyelitis of the right third toe and it was surgically amputated by Dr.

Rajesh Govindaiah on July 8, 2008 (Petitioner's Exhibit 5; pp 112-113). Petitioner did not claim that this right foot injury was related to the accident of May 18, 2007.

The Petitioner continued to be treated by Dr. Sikorski for his left foot condition. When Dr. Sikorski saw Petitioner on October 20, 2008, he noted that Petitioner had been fitted with an ankle/foot orthosis and had been using it for the preceding three to four weeks. He observed that Petitioner was tolerating the device without any great difficulty and opined that Petitioner had completely recovered from the amputation of the left great and second toes. He stated that Petitioner was at MMI, but did not believe Petitioner could return to work to his prior occupation. He directed Petitioner to maintain an appropriate blood sugar level as well as full time use of the orthosis (Petitioner's Exhibit 5; pp 16-17).

At the direction of his attorney, Petitioner was examined by Dr. David Fletcher, an occupational medicine specialist, on November 24, 2008. In connection with his examination of Petitioner, Dr. Fletcher reviewed medical records provided to him by Petitioner's counsel. As part of his evaluation of Petitioner, Dr. Fletcher ordered a functional capacity evaluation (FCE) be performed. Based on his examination and the FCE, Dr. Fletcher opined that Petitioner required permanent work restrictions of no ladder climbing, squatting, balancing, uneven surface walking, no pushing/pulling and occasional lifting not to exceed 20 pounds (Petitioner's Exhibit 22; Deposition Exhibit 2).

Dr. Sikorski continued to provide treatment to Petitioner. When he saw Petitioner on July 15, 2009, he noted that Petitioner had been having poor control of his diabetes and that Petitioner had poor hygiene. When he subsequently saw Petitioner on December 10, 2009, Petitioner's left foot condition was stable although Dr. Sikorski noted what he described as digital deformities of the third, fourth and fifth toes. He again noted Petitioner's poor hygiene practices (Petitioner's Exhibit 5; pp 7-10).

Dr. Sikorski again saw Petitioner on October 18, 2010, and, at that time, he observed that Petitioner had rigid contractures of the third, fourth and fifth toes of the left foot. He ordered a new ankle/foot orthosis with graphite foot plate (Petitioner's Exhibit 6; p 53).

Dr. Sikorski subsequently diagnosed Petitioner with osteomyelitis of the left fifth toe and contractures of the third and fourth toes. Dr. Sikorski performed surgical amputations of them on May 23, 2011 (Petitioner's Exhibit 17).

At the direction of Respondent, Petitioner was again examined by Dr. Gary Schmidt on November 14, 2011. In connection with his examination of Petitioner, Dr. Schmidt reviewed medical records provided to him by Respondent. When Petitioner was examined by Dr. Schmidt, he advised that the orthosis had broke down and rubbed against his foot and he subsequently had the third, fourth and fifth toes of his left foot amputated. Dr. Schmidt opined that with normal use of orthotics that it would be impossible for the plate to touch Petitioner's foot. He opined that Petitioner's recent left foot symptoms were due to poor diabetic control, dense diabetic neuropathy and Petitioner's noncompliance with the use of the orthotics (Respondent's Exhibit 5; Deposition Exhibit 2).

Petitioner subsequently moved to Murfreesboro, Tennessee. Petitioner has received treatment from Dr. John Cauthon, a podiatrist, and Matthew Walker Comprehensive Health Center (Petitioner's Exhibits 19 and 20).

At trial, Petitioner testified that he was unable to return to work for Respondent and has attempted to seek employment elsewhere. Petitioner tendered into evidence a job search log which was for a period commencing February 23, 2010, through October 31, 2012 (Petitioner's Exhibit 28). Petitioner testified that he continued to seek employment until shortly before November 20, 2012, at which time he was awarded Social Security Disability benefits.

Dr. Fletcher was deposed on July 29, 2009, and his deposition testimony was received into evidence at trial. Dr. Fletcher's testimony was consistent with his medical report of November 24, 2008, and he reaffirmed the opinions contained therein. On cross-examination, Dr. Fletcher agreed that Petitioner's obesity was a "major factor" in regard to his work restrictions. Dr. Fletcher further agreed that Petitioner's diabetes was "Grossly out of control" and that Petitioner's failure to control his diabetic condition was an injurious practice (Petitioner's Exhibit 22; pp 19, 51).

Dr. Sikorski was deposed on July 29, 2010, and his deposition testimony was received into evidence at trial. In regard to the conditions in Petitioner's left third, fourth and fifth toes, Dr. Sikorski opined that those problems could have developed even without the big toe being amputated; however, he also opined that the contractures of those toes were related, in part, to the loss of the big toe. He opined that because those toes took over the function of the big toe that had been amputated, the problems therein were related to the loss of the big toe (Petitioner's Exhibit 23; pp 13-14). While Dr. Sikorski used the term "contracture" when deposed, he did not actually make that diagnosis until the time he saw Petitioner on October 18, 2010.

In regard to Petitioner's diabetic condition, Dr. Sikorski agreed on cross-examination that it predated the accident and he also agreed that Petitioner had not been taking care of this condition. He also conceded that if Petitioner did not practice proper hygiene that this could hamper his recovery. He also agreed that when he saw Petitioner in October, 2008, that Petitioner was at MMI and that he did not impose any specific work restrictions (Petitioner's Exhibit 23; pp 39-45).

Dr. Schmidt was deposed twice, initially on August 18, 2010, and again on February 24, 2012. His deposition testimony (both depositions) was received into evidence at trial. Dr. Schmidt's testimony on August 18, 2010, was consistent with his medical report of June 19, 2008, and he reaffirmed the opinions contained therein. He stated that Petitioner would require an orthotic device, but once one had been properly fitted, Petitioner would be at MMI and could return to work without restrictions (Respondent's Exhibit 4; pp 21-23).

When Dr. Schmidt was deposed on February 24, 2012, his deposition testimony was consistent with his medical report of November 14, 2011. Dr. Schmidt opined that the amputations of Petitioner's left third, fourth and fifth toes were not causally related to Petitioner's prior amputations. In explaining the basis for his opinion, Dr. Schmidt noted that Petitioner had an ulcer on the tip of his fifth toe which was consistent with diabetic neuropathy and poorly

controlled diabetes. He also stated that it was physically impossible for the plate in the orthotic device to have caused Petitioner's injury. Finally, although Petitioner claimed to have his diabetes controlled, Dr. Schmidt observed that this was not supported by the medical records (Respondent's Exhibit 5; pp 12-14).

Dr. Lynne Speck was deposed on October 8, 2010, and her deposition testimony was received into evidence at trial. Dr. Speck testified that someone who has Type II diabetes will, at some point, require insulin because of the natural progression of the disease. Ultimately, Dr. Speck opined that Petitioner would likely have required insulin even without sustaining the May, 2007, injury (Petitioner's Exhibit 24; pp 26-27, 42-43).

Dr. John Cauthon was deposed on January 11, 2013, and his deposition testimony was received into evidence at trial. Dr. Cauthon opined that Petitioner was disabled from working as a truck driver; however, he did not opine as to causality (Petitioner's Exhibit 25).

Counsel for Petitioner and Respondent both obtained evaluations of vocational experts. Petitioner's counsel had Petitioner evaluated by Randall Harding and Respondent had Petitioner evaluated by Amy Portz. Harding was deposed on June 17, 2014, and Portz was deposed on March 14, 2013. Both depositions were received into evidence at trial.

At trial, Petitioner testified that he was unable to return to work for Respondent and since May, 2007, and up to and including the present, he has been unable to obtain employment. Petitioner wants vocational rehabilitation so that he may return to work. Petitioner further stated that his diabetes is under control and he presently gives himself insulin injections three times a day. Petitioner denied being noncompliant with treatment.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is, in part, related to the accident of May 18, 2007.

The Arbitrator concludes that the injury to the left great toe and second toe were related to the accident of May 18, 2007.

The Arbitrator concludes that the injury to Petitioner's left third, fourth and fifth toes and the injury to Petitioner's right third toe were not related to the accident of May 18, 2007.

In support of these conclusions the Arbitrator notes the following:

Respondent did not dispute liability in regard to the amputations of the left great and second toes.

Petitioner was found to be at MMI in regard to his left great and second toe injuries prior to having any symptoms in the left third, fourth and fifth toes.

It was undisputed that Petitioner had Type II diabetes prior to the accident of May 18, 2007. Petitioner did become insulin dependent thereafter; however, Dr. Speck, the endocrinologist, opined that it was likely that Petitioner would have become insulin dependent because of the natural progression of the disease irrespective of the accident of May 18, 2007.

Petitioner was noncompliant with the medical treatment provided to him. As is noted in the findings of fact, there were numerous instances in which Petitioner did not manage his diabetic condition, did not take his insulin, his diabetes was out of control, Petitioner did not use proper hygiene and he became confrontational with medical providers. Petitioner's Section 12 examiner, Dr. Fletcher, agreed that Petitioner's diabetic condition was "Grossly out of control."

Petitioner's testimony that he was compliant with medical treatment was contrary to the medical records. The Arbitrator finds the opinion of Dr. Gary Schmidt to be persuasive.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary; however, because of the Arbitrator's conclusions of law in disputed issue (F), Respondent's liability is limited to medical services provided to Petitioner from May 18, 2007, through October 20, 2008, exclusive of medical services provided for the right foot injury.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 31 for medical services provided to Petitioner from May 18, 2007, through October 20, 2008, exclusive of medical services for the right foot injury, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

Because of the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is not entitled to prospective medical care.

In regard to disputed issue (L) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 73 4/7 weeks commencing May 23, 2007, through October 20, 2008.

The Arbitrator concludes that Petitioner is not entitled to maintenance benefits.

In support of these conclusions the Arbitrator notes the following:

On June 16, 2008, Dr. Schmidt opined that once Petitioner was fitted with an orthotic device he would be at MMI and could return to work without restrictions. When Petitioner was subsequently seen by Dr. Sikorski on October 20, 2008, he had been fitted with an orthotic device and Dr. Sikorski opined that Petitioner was at MMI.

In regard to disputed issue (O) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusions of law in disputed issue (F) the Arbitrator concludes Petitioner is not entitled to vocational rehabilitation services and that Petitioner engaged in an injurious practice.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

James Neunaber,

Petitioner,

vs.

NO: 07 WC 38476

16IWCC0546

Monterey Coal Company,

Respondent.

DECISION AND OPINION ON §19(h) PETITION

Petitioner filed a Petition under §19(h) of the Workers' Compensation Act alleging a material increase in his disability since the Arbitrator's Decision dated March 1, 2013, in which Petitioner was found to be permanently disabled to the extent of 15% of the person as a whole under §8(d)2 of the Act. The issues of Review are whether Petitioner's permanent disability has materially changed since the last arbitration hearing. The Commission, after considering the entire record, grants Petitioner's §19(h) Petition finding that Petitioner's permanent disability has materially increased to the extent that he is now permanently disabled to the extent of 85% of the person as a whole under §8(d)2 of the Act for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner filed an Application for Adjustment of Claim on August 28, 2007 and alleged he sustained occupational disease injury to his lungs and/or heart resulting in shortness of breath and exercise intolerance from inhalation of coal mine dust including but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 35 years with last exposure on September 30, 2006. The claim was subsequently assigned to Arbitrator McCarthy.

2. Arbitration was held on February 4, 2013. In his Decision filed with the Commission on March 1, 2013, Arbitrator McCarthy found Petitioner sustained accidental injuries as a result of

16IWCC0546

exposure to an occupational disease arising out of and in the course of his employment on September 30, 2006. Arbitrator McCarthy found causal connection to Petitioner's occupational exposures. Petitioner was a coal worker/laborer/mine examiner who was 56 years old at the time of his last exposure. Petitioner had been in this occupation for 35 years with 34 years underground. He was continuously exposed to coal and silica dust, diesel fumes and roof bolting glue fumes. He retired when the mine was sold and did not work since. He was 62 years old at the time of arbitration.

Arbitrator McCarthy concluded that Petitioner has diagnosed pulmonary diseases. Petitioner's evaluator Dr. Paul opined he has coal worker's pneumoconiosis (CWP) and asthma or reactive airway disease. §12 Dr. Tueter opined Petitioner has chronic bronchitis and a minimal obstructive abnormality based on pulmonary function test results. Dr. Chopra, who had treated Petitioner since 1994, diagnosed moderate to severe chronic obstructive pulmonary disease, restrictive asthma and likely pneumoconiosis. Petitioner's B-reader Dr. Alexander opined he saw CWP on one x-ray. Respondent's B-reader Dr. Wiot opined he saw no CWP on another x-ray. Arbitrator McCarthy noted that most important to him on the issue of whether a disease(s) exited are the records of treating Dr. Chopra. Arbitrator McCarthy found that Dr. Chopra's records supported Petitioner's testimony that his problems have been long standing and consistent. Since 1994, Dr. Chopra has repeatedly diagnosed acute and chronic bronchitis and chronic pulmonary disease, based on Petitioner's symptoms of coughing and shortness of breath and his examination findings of bilateral crepitation, wheezing and rhonchi. Arbitrator McCarthy noted that Respondent pointed out Petitioner did not complain of shortness of breath on every visit. However, on most occasions, Dr. Chopra would diagnose the above. Since 1994, Petitioner has been on numerous medications for his conditions. Arbitrator McCarthy found that Petitioner's long history of treatment for his pulmonary disease distinguished this case from numerous cases before the Commission over the past several years dealing with simple CWP.

Based on the above, Arbitrator McCarthy found Petitioner suffers from CWP. The March 17, 2009 x-ray report noted mild interstitional fibrosis. The February 17, 2011 x-ray report noted mild fibrotic changes. Arbitrator McCarthy concluded these were consistent with CWP. Arbitrator McCarthy found Petitioner's experts and Dr. Chopra more credible. Arbitrator McCarthy found causal connection to Petitioner's mine exposures ("a" cause).

Regarding nature and extent of Petitioner's permanent disability, Dr. Chopra opined Petitioner could no longer work in the mine and should not perform work requiring manual labor. Dr. Paul opined Petitioner was mildly to moderately impaired and could perform light to medium work. Vocational expert Ms. Gonzalez opined Petitioner could perform unskilled sedentary work. Arbitrator McCarthy noted that Ms. Gonzalez did not explain her basis for assuming sedentary limits and believed that affected her opinion. Arbitrator McCarthy did not believe that the evidence was sufficient to support an award under §8(d)1 wage differential. Arbitrator McCarthy awarded permanent disability of 15% person as a whole, 75 weeks at $567.70 per week.

3. Petitioner reviewed on the issues of disease covered by the Occupational Diseases Act, causal connection and nature and extent of permanent disability. Respondent reviewed on the issues of disease arising out of and in the course of employment, causal connection and nature

and extent of permanent disability. In its Decision and Opinion on Review dated May 2, 2014, the Commission affirmed and adopted the Arbitrator's Decision. Neither party appealed to the Circuit Court and the Commission's Decision and Opinion on Review became final.

4. Petitioner filed a §19(h) Petition on September 5, 2014. Hearing was held on the §19(h) Petition before Commissioner Basurto on May 5, 2016.

5. At the May 5, 2016 §19(h) Petition hearing, Petitioner testified that a few years ago, he could still grocery shop and things like that (Tr 7). He still had his motorcycle and truck at that time, but he got to where he could not even get out to drive those. A couple years ago, he used to sit. Petitioner stated, "I haven't been out of the house in two years except to see doctors and this." (Tr 7). Two years ago, Petitioner would watch TV in his living room. For the last year, he has been in his bedroom sitting on the bed or laying down in bed (Tr 7). The bathroom is 15 feet from the bed. Petitioner gets winded just going to the bathroom and getting back into bed (Tr 7-8).

Petitioner had oxygen with him at this hearing. He has been taking oxygen since the February 4, 2013 arbitration hearing (Tr 8). At his home, there is an oxygen machine with a 37 foot tube on it so he can move around in his house (Tr 8). Petitioner does not ever take off his oxygen at his house (Tr 8). He has help doing things around his house like cooking and washing the dishes (Tr 8). He has help every day (Tr 9). His helper is Karen Berry, who has taken care of his household needs for the last year and a half (Tr 9). She moved into his house and has a room upstairs. For the last two years, Petitioner has not been upstairs in his house or in the basement (Tr 9). His hobbies consist of watching television (Tr 9). If Petitioner would have to walk from his bedroom to the living room with oxygen, he would be winded and gasping (Tr 10). He was in a Hoveround at this hearing, which he got maybe 6 months ago (Tr 10). He requires the Hoveround to get around his house (Tr 10). Petitioner stated that the people at Hoveround told him that the only way a person can get one now and have Social Security pay monthly for it is if a person's lungs are gone; he did not have any problems getting the Hoveround (Tr 10). Petitioner tried using a wheelchair and about 3 pushes in it was all he could do (Tr 11). Commissioner Basurto asked if Petitioner needed the oxygen at the time of arbitration (Tr 11). Petitioner's attorney responded that at the time of arbitration, Petitioner had been put on oxygen for a week or two (Tr 11).

On cross-examination, Petitioner testified he has not been out of his house in the last 2 years except to have help getting to a doctor (Tr 12). Someone drives him to the doctor (Tr 12). The Hoveround is heavy and he does not take it with him to the doctor; when someone takes him to the doctor, there are wheelchairs at the doctors' offices; he gets a wheelchair and someone pushes him in it (Tr 13).

6. Karen Berry testified that she has pretty much moved into Petitioner's home so she can help him day to day (Tr 14). She lives on the 2nd floor of his home (Tr 14). Ms. Berry testified that the tasks Petitioner could not do or that she has to do for him are: letting the dog out, cooking, cleaning, laundry and all the household stuff (Tr 14). Petitioner pretty much stays in his bedroom most of the day besides going to the bathroom or to the kitchen to get something to drink (Tr 15). She or John drive Petitioner to the doctor (Tr 15). Ms. Berry opined that if it were

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not for her help, Petitioner would not be able to live by himself at his home (Tr 15). Ms. Berry has known Petitioner for a little more than 10 years (Tr 15).

On cross-examination, Ms. Berry testified that she has grocery shopped for Petitioner for almost over 2 years. She moved into Petitioner's house a year to a year and a half ago (Tr 16).

7. John Horrell testified that he and Petitioner worked in the same coal mine. Mr. Horrell knew Petitioner the whole time he (Mr. Horrell) worked there, but Petitioner was on a different shift (Tr 17). During the last couple of years, Mr. Horrell had occasion to observe Petitioner (Tr 17). Petitioner gets around in his hover chair (Tr 18). When Mr. Horrell would go over and visit with him, Petitioner used to be in the front room of his home. Petitioner is not in the front room anymore and is always in his bedroom (Tr 18). When he would visit, they would not be watching TV; he would talk with Petitioner and see how he was doing (Tr 18). Mr. Horrell sees Petitioner maybe once a month, more or less; this has been so since 5 or 6 years ago when Mr. Horrell left the mine (Tr 18).

On cross-examination, Mr. Horrell testified that at the arbitration hearing, Petitioner spelled his last name Harl and mentioned John Harl as one of his friends (Tr 19). Mr. Horrell stated that Petitioner was referring to him (Tr 19).

8. The medical records from Carlinville Medical Clinic, Px11, indicate Petitioner saw Dr. Chopra on October 22, 2012 and complained of a lot of shortness of breath. It was noted that he continued to smoke. Petitioner had no complaints of chest pain or tightness and no dizziness or blurred vision. He was also snoring quite a bit. Dr. Chopra noted Petitioner's smoking history and coal mine employment of 35 years. On examination, Dr. Chopra found the heart normal with no murmurs and the lungs revealed bilateral wheezing. Dr. Chopra assessed sleep arousal disorder, COPD and hypoxemia. Dr. Chopra ordered a sleep study and prescribed medications. Petitioner followed-up with Dr. Chopra on November 6, 2012 regarding the sleep study. He complained of daytime somnolence and tiredness. On examination his lungs still revealed bilateral occasional wheeze. Dr. Chopra assessed obstructive sleep apnea and ordered a CPAP and prescribed medications. Dr. Chopra prescribed medications on December 26, 2012.

On January 10, 2013, Petitioner reported cough and cold symptoms. On examination his lungs revealed bilateral creps and ronchi. Dr. Chopra assessed obstructive chronic bronchitis and prescribed medications. Petitioner reported feeling better on January 16, 2013. He denied any chest pain, tightness or shortness of breath. On examination his lungs revealed bilateral creps and ronchi. Dr. Chopra assessed obstructive chronic bronchitis, improving. Medications were prescribed. On March 1, 2013, Petitioner reported cough and cold symptoms, feeling run down and had some sinus congestion. There was no frank shortness of breath or rigors. Dr. Chopra noted Petitioner was in moderate distress because of shortness of breath. Petitioner's examination revealed the same and the same was assessed. Medications were prescribed.

9. Carlinville Hospital medical records, Px10, indicate Petitioner underwent a chest x-ray on March 1, 2013 and the results were compared to the December 17, 2011 chest x-ray. The radiologist found no significant change. There was mild cardiomegaly with scattered interstitial markings. There was no consolidation, effusion or pneumothorax seen. The previous posterior

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thoracolumbar fixation was noted as not changed. The radiologist's impression was emphysema and cardiomegaly with scattered increased interstitial markings and no changes.

Another chest x-ray was taken on March 5, 2013 and compared to the March 1, 2013 chest x-ray. The radiologist noted emphyseama again and there was no cardiomegaly suspected at that time. There were zones of unexpanded lung felt to represent some scarring, but no definite evidence of active disease. There was demineralization of the dorsal spine with multiple chronic endplate infractions. The radiologist's impression was chronic changes of the spine and some scarring in the lungs. There was no evidence of active disease and the heart was not enlarged.

A chest x-ray was taken on March 8, 2013 and compared to the March 5, 2013 chest x-ray. The radiologist noted there were some chronic linear densities in the lung bases probably due to fibrosis or atelectasis. In reviewing previous studies, this had increased over the last several years, but the radiologist was not convinced of a true pneumonia at this time. The markings were somewhat more prominent projecting over the cardiac silhouette on the lateral view. However, this had actually diminished since the previous study suggesting there may have been some additional atelectasis or infiltrate in the right middle lobe or the lingola which had cleared since the last exam. There were no new findings. Heart size was at the upper limits of normal. There were thoracolumbar rods as before. The radiologist's impression was some chronic appearing changes in the lung bases again seen. There was some decrease in the degree of the markings seen over the cardiac silhouette on the lateral view suggesting a small amount of infiltrate or atelectasis cleared up from either the right middle lobe or the lingola. This was not as well seen on the frontal view. Heart size was within the upper range of normal and no congestive heart failure (CHF).

10. Petitioner saw Dr. Chopra on March 26, 2013 for a hospital follow-up and reported he was feeling better. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed COPD, coronary artery disease (CAD) and atrial flutter. Dr. Chopra referred Petitioner to a cardiologist and prescribed medications. (Px11).

In his April 1, 2013 St. John's Hospital Discharge Summary, Rx2, Dr. Zuck noted that after being seen in Dr. Chopra's office that day, Petitioner was admitted on March 26, 2013 with symptomatic atrial flutter with a rapid ventricular response. Dr. Zuck noted that Petitioner had probably been out of rhythm for about a week prior to seeing Dr. Chopra. Dr. Zuck noted Petitioner had a history of CAD with previous infarction and proxiamal LAD angioplasty/ stenting. There was no evidence for an acute myocardial infarction on admission. Cardioversion was performed on March 27, 2013 which was successful in restoring normal sinus rhythm. Diagnostic left heart catheterization was performed on March 28, 2013, which revealed a total occlusion of the right coronary artery and there was left to right collaterals present. LVEDP was severely elevated at about 35mm mercury, indicating severe diastolic dysfunction. Dr. Zuck opined, "This is a contributing source to his shortness of breath and heart failure symptoms." Angioplasty/Stenting of the right coronary artery was performed on March 29, 2013. Petitioner was discharged on March 30, 2013 with prescribed medications. Petitioner informed that he had quit smoking a month ago.

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11. Petitioner saw Dr. Chopra on April 11, 2013 and reported feeling better. He denied any chest pain, tightness or shortness of breath. There was no dizziness, double vision or blurred vision. He weighed 282 pounds. On examination his lungs revealed occasional wheeze. Dr. Chopra's assessment was COPD and he prescribed medications.

On April 26, 2013, Petitioner reported cough and cold symptoms, feeling run down and had some sinus congestion. There was no frank shortness of breath or rigors. On examination his lungs revealed bilateral creps and ronchi. Dr. Chopra assessed obstructive chronic bronchitis and prescribed medications. Petitioner reported feeling better on May 16, 2013. He denied any chest pain, tightness or shortness of breath. On examination his lungs were clear to auscultation and percussion. There was no hepatomegaly or splenemegaly present. Dr. Chopra assessed COPD and atrial flutter. Dr. Chopra noted Petitioner should be on Pradaxa and he was to check with Dr. Zuck. Medications were prescribed.

Petitioner complained of mid thoracic back pain to Dr. Chopra on July 15, 2013 and July 22, 2013. On August 9, 2013, Petitioner reported he had been short of breath and had swelling in his legs and hands. He denied any chest pain, but had dyspnea on exertion. On examination his lungs revealed bilateral creps and ronchi. Dr. Chopra assessed CHF. Sp02 95% 2 L nasal cannula was ordered and medications prescribed. (Px11).

A chest x-ray was performed at Carlinville Hospital on August 9, 2013, which was compared to the March 8, 2013 chest x-ray. The radiologist noted minimal bibasilar atelectasis, cardiomegaly and tortuous, ectatic thoracic aorta. Hardward rods were noted in the thoracolumbar spine. There was a new mild compression deformity of the lower thoracic spine, but the exact level was unable to be determined. The radiologist's impression was that the minimal bibasilar atelectasis was unchanged and there was a new mild compression deformity of the lower thoracic spine at the level of the superior aspect of the thoracic surgical rods. (Px10).

12. Dr. Chopra noted on September 20, 2013 that Petitioner continued to complain of shortness of breath. On examination the lungs revealed bilateral wheezing. Dr. Chopra assessed COPD, CHF and lumbosacral spondylolysis and prescribed medications. Petitioner complained of pain in back and going down left leg on October 10, 2013. On examination his lungs were clear to auscultation and percussion. He had painful lumbar range of motion restrictions and positive straight leg raises on the left at 20 degrees. Dr. Chopra assessed sciatica and ordered a lumbar CT scan and prescribed medications. Dr. Chopra noted on November 1, 2013 that Petitioner had an appointment with Dr. Van Fleet for November 6, 2013. Petitioner reported on December 2, 2013 that he continued to complain of pain in his back and it was hard getting around. Dr. Chopra noted Petitioner was seen by an orthopedic physician. Petitioner was walking with a walker and still smoking. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed lumbosacral spondylolysis, sciatica and CAD and prescribed medications, which were refilled on December 30, 2013.

Petitioner reported feeling better on February 13, 2014. He denied any chest pain or tightness, but shortness of breath persisted. Petitioner also complained of heart palpitations and stated his heart rate goes up to 200. He weighed 287 pounds. On examination his lungs revealed

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bilateral wheezing. Dr. Chopra assessed COPD, CAD, atrial flutter and palpitations. Medications were prescribed.

On March 3, 2014, Petitioner complained of a rash all over his body. He had used a new detergent. On examination his lungs were clear to auscultation and percussion. Dr. Chopra assessed contact dermatitis and he prescribed medications. Petitioner reported feeling better on March 27, 2014. He denied any chest pain, tightness or shortness of breath. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed COPD, CAD and hyperlipidemia and prescribed medications, which he refilled on April 23, 2014. On May 12, 2014, Petitioner felt better. He denied any chest pain, tightness or shortness of breath. He weighed 298 pounds. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed COPD, CAD and CHF. Medications were prescribed.

Petitioner saw Dr. Chopra for a follow-up on July 16, 2014. He denied any complaints and was doing well on medications. Dr. Chopra noted Petitioner continued to have shortness of breath and wheezing and continued to smoke. He denied any chest pain or tightness. He weighed 300 pounds. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed COPD, CHF and depressive disorder and prescribed medications. On September 11, 2014, Petitioner complained of cough and cold symptoms, feeling run down and had some sinus congestion. He also had shortness of breath. On examination his SpO2 was 78% and his lungs revealed bilateral creps and ronchi. Dr. Chopra assessed obstructive chronic bronchitis and respiratory failure. Petitioner was sent to ERP. (Px11).

13. A chest x-ray was taken at Carlinville Hospital on September 11, 2014 and was compared to the August 9, 2013 chest x-ray. The radiologist noted that Petitioner's heart was enlarged, but unchanged. Interstitial markings with reticulation appeared slightly increased especially in the lung bases. The radiologist opined this was likely due to a mild interstitial pulmonary edema. There was no alveolar edema or focal consolidation. No acute osseous abnormality, pleural effusion or pneumothorax was seen. The radiologist's impression was increased interstitial thickening likely due to mild interstitial edema. Unchanged cardiomegaly and there was no pleural effusion or alveolar edema.

Another chest x-ray was done on September 15, 2014 and was compared to the September 11, 2014 chest x-ray. The radiologist found that the heart was normal size. There was no evidence of interstitial pulmonary edema. There was pleural thickening bilaterally. The radiologist concluded that the lung fields were expanded and clear of an active process. (Px10).

Dr. Chopra saw Petitioner on September 26, 2014 and noted he was admitted the hospital with pneumonia and was now doing much better. He weighed 296 pounds. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed obstructive sleep apnea and prescribed medications. (Px11).

14. In his October 28, 2014 report, Px6, DepEx2 and Px7, Dr. Paul noted he had done a second evaluation of Petitioner for black lung on October 27, 2014. The first evaluation was done on February 19, 2008 and at that time Petitioner was diagnosed with CWP complicated by asthmatic bronchitis. Dr. Paul noted that Petitioner's symptoms of shortness of breath have

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worsened dramatically since he was last seen. Dr. Paul noted, "He gets short of breath on walking across the floor and he must use oxygen at all times." Since his last visit, Petitioner has had another stent placed in his heart. Petitioner continued to smoke. On examination, Dr. Paul found cardiovascular regular rate and rhythm, S1 & S2 without murmur, gallop or rubs, normal inspiratory and expiratory effort, no chest wall deformities, no dullness to percussion, auscultation revealed decreased breath sounds, some expiratory wheezes and rhonchi. Pulmonary function studies were done and revealed severe obstructive airway disease with a decreased carbon monoxide diffusing capacity. There was a positive Methacholine stimulation test with a fall of 21% of the FEV1 after 8 breaths of Methacholine, which improved with bronchodilators. The carbon monoxide diffusing capacity was 45% of predicted. Dr. Paul opined, "The patient has severe obstructive airway disease with a positive Methacholine test and a moderate to severe restrictive lung disease with a decreased carbon monoxide diffusing capacity. These pulmonary function studies were much worse than the ones on February 19, 2008." A chest x-ray was taken and showed maculopapular lesions throughout both lung fields, which was not too much different than the February 19, 2008 chest x-ray. Dr. Paul's impression was: 1) CWP complicated by asthmatic bronchitis and development of rather significant emphysema; 2) history of back surgery for disc; 3) history of nephrectomy for a damaged kidney secondary to an accident; 4) history of finger being cut off but had been reattached; 5) arteriosclerotic heart disease with stent placed in his heart and recently another stent placed in his heart; 6) hypercholesteremia; 7) depression.

15. In a November 6, 2014 letter to Dr. Chopra, Px9, Petitioner's attorney asked for his responses to questions posed. Petitioner's attorney noted Arbitrator McCarthy's finding that Petitioner has CWP, chronic bronchitis, COPD and asthma and that they are causally connected to his work as a coal miner. Petitioner's attorney noted Petitioner was awarded 15% disability and that Petitioner believed that his pulmonary problems have significantly worsened since the time of Dr. Chopra's April 12, 2012 deposition. He noted that the deposition of Dr. Paul was taken on February 15, 2010 and the deposition of §12 Dr. Tuteur was taken on March 10, 2011. Petitioner's attorney noted that the question in the §19(h) case is whether Petitioner's pulmonary condition has significantly worsened since that time. The following are the questions asked and Dr. Chopra's answers to those questions:

"1) Based on your treatment of Mr. Neunaber since the time of your deposition, and in light of his clinical presentation, has he suffered a significant worsening of his pulmonary status and impairment? Yes.
2) The following questions relate to his current state of disablement:
   a) Is he now on continuous supplemental oxygen? Yes.
   b) Is he limited in his ability to leave his home as a result of his worsening condition? Yes.
3) Does his pulmonary condition and his hypoxemia put an extra burden on the functioning of his heart? Yes.
   a) Does his pulmonary condition increase his risk for sudden cardiac events and make recovery from them more difficult? Yes.
4) Does his pulmonary condition render him more likely to suffer pulmonary infections, such as pneumonia, and make recovery from them more difficult? Yes.
5) Does his pulmonary condition make it more difficult for him to talk for more than short periods of time? Yes.

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6) Has his pulmonary condition caused him difficulty with his cognitive ability and his ability to concentrate? Yes.
7) In light of his pulmonary condition, is it true that it would be difficult if not impossible for him to travel to any work? Yes.
8) In light of your treatment of Mr. Neunaber and his clinical presentation, is Mr. Neunaber totally disabled from all work? Yes.
9) In light of Mr. Neunaber's pulmonary condition, what is his prognosis in terms of his mortality? Poor.

16. Petitioner saw Dr. Chopra on November 26, 2014 for a 2 month follow-up for his CHF/COPD. Petitioner reported he was doing well on his medications. He continued to complain of pain in his left hip. He denied any chest pain or tightness and had a history of shortness of breath. On examination Petitioner's heart was normal with no murmurs and his lungs revealed bilateral wheezing. Dr. Chopra assessed cor pulmonale, which is the first mention of this in the medical records, and osteoarthritis of left hip. Dr. Chopra discontinued some medications and refilled others. Dr. Chopra referred Petitioner to the Pain Clinic. (Px11).

17. In his January 12, 2015 deposition, Px6, Dr. Paul testified he is board certified in allergy, immunology and asthma. He is chief medical officer of a facility which treats pulmonary diseases and is chief of the respiratory department at St. John's. Dr. Paul recited from his October 28, 2014 report, already noted above. Dr. Paul testified Petitioner has severe pulmonary problems. For his breathing problems, Petitioner takes prescribed medications of DuoNebs, Prednisone, Singulair, ProAir and Symbicort. The pulmonary function test (PFT) results on October 28, 2014 were much worse than the PFT results on February 19, 2008. CWP can manifest in shortness of breath. Petitioner's shortness of breath and cough were much worse than on February 19, 2008 (Dp 17). Petitioner's chest x-ray was not too much different than the February 19, 2008 chest x-ray (Dp 18). Despite that finding, some of the increase in shortness of breath and cough could be related to his CWP worsening (Dp 18). Petitioner has CWP, asthmatic bronchitis (a combination of asthma and chronic bronchitis), emphysema and COPD. Dr. Paul opined that coal mine dust inhalation caused Petitioner's CWP (Dp 19). Dr. Paul opined that coal mine dust or the coal mine environment caused Petitioner's asthma. Dr. Paul opined that the coal mine environment caused Petitioner's chronic bronchitis and smoking could have contributed to that (Dp 19). Petitioner's emphysema was caused or aggravated by his coal mine work (Dp 19). His COPD was contributed to by his coal mine work (Dp 19-20). The lung problems Petitioner had when he left the mine that were due to inhalation of coal mine dust would still be there (Dp 20). Smoking does not cure disease caused by coal mining (Dp 20). Some coal mine dust will stay in Petitioner's lungs until he dies (Dp 20). Therefore, Petitioner would have continuing exposure to coal mine dust even though his active exposure as a coal miner had ended (Dp 20-21). That is the reason for the coal mine contributing to his worsening condition (Dp 21). Dr. Paul opined that Petitioner has suffered a significant worsening of his pulmonary status and impairment from February 19, 2008 to October 28, 2014 (Dp 21).

Dr. Paul testified that Petitioner is now on continuous supplemental oxygen and he is limited in his ability to leave his home as a result of his worsening condition (Dp 21). Petitioner's pulmonary condition and his hypoxemia that results in the use of continuous supplemental oxygen puts an extra burden on the functioning of his heart and increases his risk

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for a sudden cardiac event and makes recovery from those more difficult (Dp 21-22). His current pulmonary condition renders him more likely to suffer pulmonary infections such as pneumonia and makes recovery from those more difficult and that is worse than it was in 2008 (Dp 22). His pulmonary condition in 2014 makes it more difficult for Petitioner to talk for more than short periods of time and that is worse than it was in 2008 (Dp 22). Petitioner's pulmonary condition causes him difficulty with his cognitive ability and ability to concentrate and that is worse than in 2008 (Dp 22-23). Dr. Paul opined Petitioner does not have the ability to travel outside his home to work because of his pulmonary condition (Dp 23). Dr. Paul opined that based on Petitioner's current pulmonary condition, he is totally disabled from all work (Dp 23). Dr. Paul opined Petitioner's prognosis for mortality is probably 6 months to a year (Dp 23). Dr. Paul opined that based on his CWP, Petitioner could not have any further exposure to the environment of a coal mine without endangering his health and the same was true for his asthma, chronic bronchitis, emphysema, COPD, his obstructive disease, restrictive disease and his reduced diffusing capacity (Dp 24).

On cross-examination, Dr. Paul testified that he never treated Petitioner and did not see him at all between February 19, 2008 and October 28, 2014. Dr. Paul did not review any of Petitioner's medical records (Dp 25-26). Petitioner does travel outside of his home when he has to and takes his oxygen with him (Dp 26). Petitioner goes to his doctor regularly. He did see Dr. Paul on October 28, 2014 (Dp 26). Dr. Paul did not know when Petitioner was ordered on continuous oxygen (Dp 27). Dr. Paul opined Petitioner is worse to the point he could not breathe without oxygen (Dp 27). In his October 28, 2014 report, Dr. Paul noted Petitioner had decreased breath sounds that was from emphysema (Dp 28). Smoking is the number 1 cause of emphysema in the U.S. (Dp 28). Petitioner's wheezes and rhonchi are related to his asthma and bronchitis (Dp 28). The number 1 cause of chronic bronchitis in the U.S. is cigarette smoking (Dp 28-29). Cigarette smoking can aggravate asthma temporarily (Dp 29). Dr. Paul knew what Petitioner's condition was on February 19, 2008, but did not know his condition on the date of the arbitration hearing held on February 4, 2013 (Dp 29). Dr. Paul knows as of October 28, 2014 that Petitioner's condition had worsened significantly (Dp 29). The wheezing and rhonchi are findings that can be present one day and not present a month later (Dp 30). Petitioner gave a history of continuing to smoke after he saw Dr. Paul on February 19, 2008. Continuing to smoke put Petitioner at increased risk for emphysema either to develop or get worse if he already had it. Continuing to smoke also increased the risk for his chronic bronchitis to worsen. The same is true for COPD and obstructive lung condition as shown by the PFT to be worse (Dp 30). The number 1 cause of COPD in the U.S. is cigarette smoking (Dp 30).

The first time Dr. Paul evaluated Petitioner on February 19, 2008, with 8 breaths of Methacholine he dropped his FEV1 19% and then a second time dropped to 21%, virtually identical. The reactivity of Petitioner's airways had not gotten worse. If asthma was described that way, then it did not get worse, but that is not what asthma means (Dp 31). At the time of his February 19, 2008 report, Petitioner was 5'7" and weighed 210 pounds. At the time of his October 28, 2014 report, Petitioner was 5'6" and weighed 300 pounds and was morbidly obese (Dp 31). Petitioner was 140 to 150 pounds overweight on October 28, 2014. Petitioner is essentially inactive. Being that much overweight can partially be causing a reduction in Petitioner's pulmonary function results and reflect a restrictive abnormality, but how much Dr. Paul could not tell (Dp 32). Dr. Paul has had patients who have smoked cigarettes to the point

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that their lungs were bad enough that they needed oxygen (Dp 32). Pulmonary function values are expected to fall a little bit each year as we age (Dp 33). By continuing to smoke, Petitioner runs the risk that those pulmonary function results would fall more or more quickly than just the age related amount (Dp 33). Petitioner's continuing to smoke runs the risk of his shortness of breath worsening and make his cough worse (Dp 33). Troubles with Petitioner's cognitive ability and his ability to concentrate are related to him not getting enough oxygen to his brain (Dp 33-34).

On re-direct examination, Dr. Paul opined that the worsening of Petitioner's shortness of breath and cough has been due to both his coal mining exposures and his smoking (Dp 34). Petitioner weighed 210 pounds on February 19, 2008. Dr. Paul opined that the fact that Petitioner has been on oxygen for some time and his serious pulmonary condition could absolutely add to a sedentary lifestyle and therefore be partly contributing to his increase in weight (Dp 34). A person with asthma or reactive airways disease is subject to asthma attacks and bronchospasms (Dp 35). Asthma is a disease characterized by acute attacks and Petitioner had the disease all the time (Dp 36). The existence of the other diseases, emphysema, chronic bronchitis, COPD and CWP affect the number of asthma attacks Petitioner may have to the point where they would be more and more severe (Dp 36). The existence of each one of those diseases makes the presence of the others more troublesome from a medical standpoint (Dp 36). Based on the number of coal miners compared to total population in the U.S., if every coal miner developed emphysema, chronic bronchitis and COPD solely from their coal mine work, it would not change the statistic that smoking is the number one cause of those diseases in the U.S. (Dp 37).

On re-cross examination, Dr. Paul was asked to assume that Petitioner did not lose any weight in between his two evaluations (Dp 37). At the time of §12 Dr. Tuteur's October 14, 2010 evaluation, Petitioner weighed 286 pounds and had gained 76 pounds after Dr. Paul's February 19, 2008 evaluation (Dp 37). Petitioner gained an additional 14 pounds when Dr. Paul saw him on October 28, 2014 (Dp 38). So if Petitioner did not get oxygen until after he saw §12 Dr. Tuteur and his report said nothing about oxygen, then him being on oxygen did not cause a significant increase in his weight as he had already gained the weight; on the surface that would be accurate (Dp 38). More than one of the prescribed medications Petitioner is on for breathing issues are supposed to help him out with bronchospasms (Dp 38). The point of having Petitioner on all those medications is for him to avoid, if at all possible, developing bronchospasms (Dp 38). Regarding the PFT from October 28, 2014, on the 8th breath of methacholine it shows a FEV1 value that is higher than the best recorded one for the test and Dr. Paul did not know why this was so (Dp 39-41). The PFT from 2008 and 2014 are virtually identical in that respect (Dp 42).

On re-direct examination, Dr. Paul testified that if a person has asthma, he would expect a waxing and waning of pulmonary capacity and pulmonary abilities and reactivity (Dp 42). The numbers on this specific day that he obtained could change a week later, depending on his reactivity (Dp 43). Petitioner weighed 286 pounds on October 14, 2010 and he weighed only 14 pounds more at 300 pounds four years later at the time of Dr. Paul's second evaluation on October 28, 2014. Dr. Paul explained that Petitioner gained a lot of weight when he became sedentary, but when he got so severe that his oxygen was so low, his body quit gaining weight;

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the body won't support that much weight, so the appetite falls off and therefore, Petitioner gained only 14 pounds over a four year period (Dp 43-44). A 14 pound weight gain between October 2010 and October 2014 would not have much effect on Petitioner's pulmonary function (Dp 44-45).

18. In his January 13, 2015 deposition, Px8, Dr. Chopra testified he is an internist in family practice. Dr. Chopra has been treating Petitioner for about 20 years. Petitioner has been on continuous oxygen for over 5 years (Dp 7). Dr. Chopra recited from the November 6, 2014 Letter, noted above. Since his last deposition, Petitioner's shortness of breath and COPD have gotten worse. Petitioner did mention to him that he wanted to be put into hospice, but Dr. Chopra did not think he was quite ready for that yet (Dp 7). Dr. Chopra stated Petitioner cannot walk more than 20 yards without becoming short of breath. When Petitioner comes into his office, by the time he reaches the examination room, he is out of breath (Dp 8). With a man who worked as many years in a coal mine as Petitioner did, when he leaves the coal mine, he is not able to evacuate all the coal dust in his lungs and coal dust stays there for the rest of his life (Dp 11). Dr. Chopra opined that quitting smoking could have helped Petitioner out quite a bit; Dr. Chopra had counseled him on that several times (Dp 11). Smoking gives Petitioner pleasure, so he is not going to quit (Dp 11). Dr. Chopra was informed that Petitioner weighed 300 pounds when Dr. Paul evaluated him in 2014 and that when §12 Dr. Tuteur evaluated him on October 14, 2010, he weighed 286 pounds. Dr. Chopra was asked if the 14 pound weight gain between §12 Dr. Tuteur's October 14, 2010 evaluation and Dr. Paul's 2014 evaluation would not have had a significant effect on Petitioner's pulmonary condition (Dp 12). Dr. Chopra explained that gaining weight will definitely have an effect on the pulmonary conditions; the body needs oxygen and he counseled Petitioner on several occasions to lose that weight, but it was no go (Dp 12). Even 5 pounds weight would be too much for Petitioner, who is about 100 + pounds overweight (Dp 13). Dr. Chopra opined Petitioner's sedentary lifestyle caused by his pulmonary disease was a contributor to his putting on weight (Dp 13). Since 2010 when §12 Dr. Tuteur saw him and since Dr. Chopra's last deposition in 2012, Petitioner has had a significant worsening of his pulmonary health (Dp 13). Dr. Chopra has Petitioner on a number of breathing medications (Dp 14). Petitioner is taking everything that can be given and he is just about maxed out (Dp 14).

On cross-examination, Dr. Chopra testified that the reason for Petitioner needing oxygen 24/7 is his hypoxemia (Dp 15). In his last deposition, Dr. Chopra indicated that Petitioner had severe COPD (Dp 15). In view of his severe COPD, Petitioner was prescribed oxygen (Dp 15). Petitioner continued to smoke since Dr. Chopra's last deposition, even though he has been prescribed oxygen (Dp 15). COPD by itself is going to put an extra burden on Petitioner's heart and is going to increase the risk for sudden cardiac events and make recovery difficult. The same is going to make Petitioner more likely to suffer from pulmonary infections and make recovery from them more difficult (Dp 16). Dr. Chopra had opined in his last deposition 3 years ago that Petitioner was totally disabled and was not able to do any labor at that time (Dp 16). Dr. Chopra did not believe that Petitioner was able to travel and did not believe that he was in any shape to work in any meaningful way (Dp 16-17). Dr. Chopra opined that Petitioner's having some difficulty with cognitive ability and his ability to concentrate is from oxygen deprivation to his brain (Dp 17). These people get very nervous and the harder it becomes to breath, they hyperventilate, which also causes cognitive impairment (Dp 17). Petitioner was

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hospitalized in the fall of 2014 and pneumonia was diagnosed (Dp 18). Petitioner did get better and returned to baseline after that pneumonia (Dp 18). Petitioner is morbidly obese at 100 pounds overweight. Dr. Chopra opined that level of obesity would absolutely affect Petitioner's breathing and cause him to feel short of breath with activity and it could affect his pulmonary function results (Dp 19). Smoking cigarettes puts Petitioner at increased risk for having the pulmonary function results decrease and put him at increased risk for feeling more short of breath and having a worsening cough (Dp 19). It is maybe 20 yards to his examining room (Dp 20).

On re-direct examination, Dr. Chopra testified that Petitioner has multiple pulmonary diseases and his presentation is the sum total of the contribution of all of those (Dp 20-21). It is a fair statement to say that in his first deposition the problem was Petitioner's inability to labor and today Petitioner's problem is his inability to breathe and perhaps continue living (Dp 21). That significant drop in his condition is both from his coal mine related disease and his smoking habit (Dp 21). Combine that with his weight, CAD, osteoarthritis and sleep apnea and there are too many things there (Dp 21).

On re-cross examination, Dr. Chopra testified that he did not think Petitioner would have had a poor prognosis when he was put on oxygen 24/7 (Dp 21). Dr. Chopra opined that Petitioner's smoking has done a lot of damage to his lungs (Dp 22).

19. Petitioner saw Dr. Chopra on March 10, 2015 for follow-up for CHF/COPD. Petitioner reported he was doing well on his medications. Petitioner continued to complain of shortness of breath and was having a lot of left leg pain. He denied chest pain/tightness. He weighed 295 pounds. Petitioner's examination findings were the same. Dr. Chopra assessed cor pulmonale, atrial flutter, COPD and lumbago with sciatica. Petitioner was to see Dr. Wilson for an epidural block. Medications were prescribed. (Px11).

20. In his April 23, 2015 report, Rx1, DepExRx2, §12 Dr. Tuteur noted that he had evaluated Petitioner a second time on this date. Dr. Tuteur noted his October 14, 2010 first evaluation report. Petitioner worked in the coal mine industry for most of his adult life during which time he was exposed to sufficient amounts of coal mine dust to produce a coal mine dust induced lung disease in a susceptible host. Such lung diseases include medical and legal CWP. Petitioner discontinued coal mine activity in September 2007. Dr. Tuteur noted that in addition, Petitioner smoked cigarettes from age 16 to the present mostly at a rate of 1 to 1½ packs per day. Recently he has reduced that activity, but his last cigarette was the day before this evaluation. Petitioner also chewed tobacco. During his youth, Petitioner was exposed to second-hand smoke of his father in the residence. Dr. Tuteur opined, "The second hand smoke exposure increases his risk over and above that of directly smoking cigarettes for conditions including chronic obstructive pulmonary disease (chronic bronchitis/emphysema), arteriosclerotic heart disease and/or lung cancer." When seen on October 14, 2010, Petitioner reported being able to walk three-quarters of a mile and climb 2-3 flights of stairs. Dr. Tuteur noted that though history of degrees of breathlessness varied throughout the medical records from Dr. Chopra, currently Petitioner reported he is able to walk a short city block and climb no stairs. Petitioner reported he had not climbed a flight of stairs in his home (basement and 2nd story) for 2 years. He currently coughs daily as he did before, typically expectorating small amounts of white sputum. Petitioner

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continued to wheeze at night. Chest tightness occurred only once a month sufficiently to initiate the use of the nitroglycerin, which produced relief. Current pulmonary medications included Prednisone 5mg twice daily, Albuterol via meter dose inhaler, Singulair and Symbicort. Supplemental oxygen on a continuous basis was initiated in December 2012. Dr. Tuteur noted that in 2005, CAD was identified by cardiac catheterization and stent was placed. Outpatient records since then have noted intermittent episodes of congestive heart failure. Petitioner believed that in 2013 he was admitted to Springfield St. John's Hospital for rapid heart rate, which prompted further evaluation and placement of 2 additional coronary artery stents. Medications were changed to control the fast heart rate. Petitioner currently takes Metoprolol (a beta-blocker), Plavix and nitroglycerin for CAD. Petitioner continued to gain weight and is currently 292 pounds, up from 286 pounds when last seen. Dr. Tuteur noted that though Petitioner was prescribed oxygen for continuous use, he regularly will walk from his chair 25 feet into the kitchen to obtain a beverage and return having removed the oxygen canula for convenience. Dr. Tuteur noted other health problems of sleep apnea for which he uses CPAP, regular experiences with gastroesophageal reflux and heartburn.

On examination, Dr. Tuteur found Petitioner well-developed, morbidly obese, oxygen using and wheelchair bound. There was no acute respiratory distress; heart rate was 73 beats per minute and irregular; BP 128/71 at baseline; respirations 20; chest: decreased lung expansion, decreased intensity of breath sounds and no adventitious sounds. The remainder of the examination was essentially within normal limits. Dr. Tuteur reviewed chest x-rays taken this day and compared them to previous x-rays taken October 14, 2010. Dr. Tuteur found persistent pleural density most consistent with subpleural fat, but noted one must consider noncalcified pleural plaquing such as may occur following asbestos exposure. These densities seemed to be more prominent on the contemporary study. Otherwise the lung parenchyma was free of other changes. Dr. Tuteur opined there were no abnormalities consistent with medical CWP. Dr. Tuteur noted that he recommended a CT scan of the thorax, but Petitioner declined on the advice of his attorney.

Dr. Tuteur reviewed the pulmonary function studies that were performed this day and found a mild restrictive abnormality without obstructive component. There was no impairment of oxygen gas exchange at rest. Dr. Tuteur noted that compared to previous pulmonary function studies dated October 14, 2010, the restrictive abnormality is a new development. Interestingly there was no change in the DA-aO2 gradient and thus no change from the normal baseline efficiency of oxygen gas exchange. The difference PaO2 was the reflection of the lack of hyperventilation present on the earlier studies in the face of further increased body weight. An O2 Assessment/6 minute walk was performed this day and Petitioner was able to walk 450 feet in 6 minutes and this was associated with adequate oxygen saturation throughout. The FEV1 remained stable; there was a slightly exaggerated blood pressure increase with this exercise. Electrocardiogram was performed this day, 12-lead with rhythm strip: striking was the baseline background normal sinus rhythm associated with premature atrial contraction approximately every 5th beat; this accounted for the irregular rhythm appreciated on physical examination. Dr. Tuteur noted, "Comment: Clearly from a historical standpoint there has been worsening of exercise tolerance in the interim since 2010 that seems to be progressive through the period of 2012 and early 2013 as well. Though there has been no change from the normal efficiency of oxygen gas exchange at rest and persistence of adequate oxygenation during exercise even while

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breathing room air, there has been the interval development of a restrictive abnormality (not necessarily restrictive lung disease). This is accompanied by repeated procedural and medication modification for coronary artery disease and dysrhythmias (coronary artery stents and rate limiting medication for an apparent diagnosis told to him of atrial flutter/fibrillation). Also obstructive sleep apnea was diagnosed clinically and treated with constant positive airway pressure at night (CPAP). Striking is the morbid obesity approaching an excess of 120 pounds over baseline. This alone would account for the severe exercise limitation he experiences but very well may be contributed to by congestive heart failure." Dr. Tuteur noted Petitioner also reported hospitalizations in 2013 and 2014 for "pneumonia" at Carlinville Hospital. Dr. Tuteur noted that it is unclear from Petitioner's description whether this represented congestive heart failure or in fact a pneumonia. Dr. Tuteur recommended the hospital records be reviewed as well as those from Springfield St. John's Hospital regarding cardiac care and catheterization.

Dr. Tuteur opined that the "pleural process" seen on chest x-ray that appeared to be worse almost certainly represented subpleural fat. Dr. Tuteur opined, "If in fact this represents pleural plaquing such as seen in asbestos exposure, this would not represent simple or legal coal workers' pneumoconiosis progression since it is unrelated to those two conditions." "Based on the available data, though Mr. Neunaber has experienced clinical deterioration. Almost certainly this is due to a combination of morbid obesity, progressive coronary artery disease and dysrhythmias, the intermittent development of congestive heart failure, with possible contribution by uncontrolled gastroesophageal reflux. None of these conditions are related to, aggravated by or caused by inhalation of coal mine dust or the development of coal workers' pneumoconiosis."

The April 23, 2015 Pulmonary Function Report indicated that the FEV-1 and FVC are reduced in a pattern of a restrictive abnormality. There was no significant improvement after inhaling a single dose of albuterol. The impression was noted that there was a mild restrictive ventilatory defect. There was no significant improvement after the administration of aerosolized bronchodilator. Overweight status may be the cause of the decreased ERV.

21. Dr. Chopra saw Petitioner on May 18, 2015 for complaints of swelling in his hands and feet. He denied chest pain/tightness. He weighed 285 pounds. On examination his lungs were clear to auscultation and percussion. Petitioner had a rash over the arms and legs. Dr. Chopra assessed contact dermatitis and prescribed medications. (Px11).

22. In a June 19, 2015 letter to Respondent's attorney, Rx1, DepExRx2, §12 Dr. Tuteur noted that he had received his June 5, 2015 letter and attachments of procedural testing performed at Carlinville Hospital and records of two hospitalizations at St. John's Hospital in Springfield. Dr. Tuteur noted that he also reviewed October 14, 2010 report and testing done at that time. Dr. Tuteur noted that at the time of the April 23, 2015 evaluation, a new restrictive ventilator abnormality and worsening of efficiency of oxygen gas exchange at rest was identified. Dr. Tuteur noted his interpretation of the chest x-ray at that time indicated no changes consistent with CWP. Dr. Tuteur summarized the pulmonary function study data from that date. Dr. Tuteur noted, "Again, clearly there is an interval reduction of both FEV and TLC indicative of an interval development of a restrictive abnormality between 2010 and 2015. There is no apparent radiographic change." Dr. Tuteur noted that the review of the newly submitted records deal

almost exclusively of documentation of progressive CAD and worsening of cardiac function. Dr. Tuteur opined, "Obviously, congestive heart failure is present, which increases lung water, decreases lung compliance, and results in the restrictive ventilator abnormality. Thus, the newly available data rigorously support the proposed etiology of the interval development of a restrictive abnormality (lower TLC) as due to progressive coronary artery disease and left ventricular dysfunction of both a systolic and diastolic nature." Dr. Tuteur opined that this in no way is associated with the inhalation of coal mine dust or development of CWP.

23. Dr. Chopra saw Petitioner on June 24, 2015 for a power chair examination. Dr. Chopra noted Petitioner had been complaining of a lot of back pain and left hip pain. Petitioner also complained of difficulty walking as he has severe COPD. Petitioner reported he was having difficulty moving around at home and he was getting more short of breath using a walker. He denied chest pain/tightness. He had a history of shortness of breath. He weighed 285 pounds. On examination Dr. Chopra found Petitioner in mild respiratory distress; his lungs revealed bilateral wheezing; movements of the lumbar spine were severely restricted because of pain and Petitioner was using a walker to get around; he was also morbidly obese; pulse ox was 94 on 3 liters of oxygen. Dr. Chopra assessed cor pulmonale, lumbago with sciatica, CAD, COPD and obesity. Medications were prescribed. Dr. Chopra opined that Petitioner would greatly benefit from a power wheelchair as he can take only a few steps before he gets greatly short of breath and becomes weak due to his deteriorating lung disease and cardiac cor pulmonale. He needs help going to the bathroom, getting in and out of bed, cooking his meals and most other activities of daily living. Dr. Chopra opined that due to his severe lung condition, Petitioner would not be able to propel a manual wheelchair without becoming extremely short of breath and weak. A power scooter would not be a good option for him as he would not be able to maneuver himself and his legs would straddle the scooter. Petitioner was physically and mentally able to operate a power chair. He was on oxygen 24 hours daily.

Petitioner saw Dr. Chopra on October 9, 2015 for follow-up of COPD. Dr. Chopra noted that Petitioner continued to smoke and was home bound all the time. He denied chest pain and tightness. On examination his lungs revealed bilateral wheezing. Dr. Chopra assessed COPD, lumbosacral spondylolysis and obstructive sleep apnea. Dr. Chopra ordered C-Pap titration and prescribed medications. (Px11).

24. In his November 5, 2015 deposition, Rx1, §12 Dr. Tuteur testified he is board certified in internal medicine and pulmonary diseases. On April 23, 2015, Dr. Tuteur evaluated Petitioner, took a chest x-ray and he performed a pulmonary function test. Dr. Tuteur recited from his April 23, 2015 report and June 19, 2015 letter, both noted above. Petitioner had not worked between when Dr. Tuteur saw him in 2010 and April 23, 2015 and therefore, Petitioner had no additional coal dust exposures during that period. Petitioner continued smoking during that period. During that period, Petitioner had very significant issues with his heart. In 2010, Petitioner was able to walk 3/4ths of a mile and climb up 3 flights of stairs, but five years later, Petitioner was able to walk a maximum of one city block and could not climb stairs at all. During that period, P had gained 6 pounds to 292 pounds. Dr. Tuteur opined that Petitioner's morbid obesity demonstrated the continued adverse effect or strain on his cardiovascular system persisted through that period of time. Petitioner was put on 24/7 oxygen in December 2012. Having both systolic and diastolic problems is really bad. Dr. Tuteur opined that Petitioner's

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cardiac problems were responsible for the decreased pulmonary function study values that he had (Dp 12). Because of the congestion, there is further impairment of oxygen gas exchange. Dr. Tuteur opined Petitioner's CAD is likely to progress (Dp 12). Dr. Tuteur opined that the interval deterioration of Petitioner's clinical state was uniquely due to the progression of CAD, its sequelae and treatment (Dp 13). That was Dr. Tuteur's conclusion on April 23, 2015 and the medical records he received after that date totally supported his conclusions, as he noted in his June 19, 2015 letter to Respondent's attorney (Dp 13).

On cross-examination, Dr. Tuteur agreed that at this time, based on Petitioner's total presentation, he is totally disabled from all work (Dp 13-14). Dr. Tuteur opined Petitioner did not have CWP (Dp 14). Dr. Tuteur opined Petitioner did not have asthma and noted he underwent a methacholine challenge test in 2008 which was negative and he had no clinical manifestations of asthma; Petitioner has no bronchial reactivity of significance and therefore, under that definition, he does not have asthma (Dp 14). Dr. Tuteur opined Petitioner does have COPD and he does have chronic bronchitis (Dp 14). Both can be progressive (Dp 15). CWP can be progressive (Dp 15). In persons who have documented CWP at the time they leave the mine, their CWP progresses approximately 50% of the time (Dp 15). Typically that documentation is a chest x-ray consistent with CWP, which Petitioner does not have (Dp 15).

Dr. Tuteur testified Petitioner had abnormal pulmonary function study results in 2010 and 2015 (Dp 15). In 2010, Petitioner's FVC was 3.43 or 95% of predicted, but in 2015 his FVC dropped to 2.13 or 62% of predicted, a significant drop (Dp 16). In 2010, Petitioner's FEV1 was 2.52 or 87% of predicted, but in 2015 his FEV1 dropped to 1.67 or 61% of predicted. There was reduction in total lung capacity from 5.46 in 2010 to 4.32 in 2015. There was development of a mild restrictive abnormality between October 14, 2010 and April 23, 2015 (Dp 16). Both FEV1 and FVC dropped similarly, by about 1/3rd, between those dates (Dp 17). FVC dropped by 38% and FEV1 dropped by 33%. The greater FVC drop than the FEV1 drop reflects the interval development of a restrictive abnormality (Dp 18). The FEV1/FVC ratio on the 2015 study was 78% relative to the predicted mean value of 80% and the official interpretation of that is that there is no obstructive abnormality. Dr. Tuteur asked: how can you go from an obstructive abnormality at a minimal level on October 2010 to no longer present as the spirometry worsens. The answer is very simple: there is congestive heart failure with increased lung water, stiffer lungs and with stiffer lungs, the elastic recoil of the lung is greater, thus producing, with a given level of resistance, a reduced time constant and the obliteration of what appears to have been earlier an obstructive abnormality (Dp 18). Dr. Tuteur opined it was due to one problem, the worsening of heart function because of progression of CAD, its treatment and sequelae (Dp 19). It is conceivable that Petitioner's chronic bronchitis from an inflammatory standpoint was improved, thus eliminating the evidence for an obstructive abnormality on the 2015 study. Dr. Tuteur chose to say that it is the stiffness of the lung caused by the cardiac dysfunction of a greater magnitude that gave a pseudo-improvement of obstruction because of the improved elastic recoil (Dp 19). The reason that it is classified as restriction rather than obstructive is because the FVC fell so much; if only the FEV1 had fallen, it would not be restricted (Dp 19). Total lung capacity dropped from 88% in 2010 to 69% in 2015 (Dp 20). The heart has an effect on the diffusing capacity (Dp 20). The diffusing capacity dropped from 44% of predicted to 25% of predicted, a statistically and mathematically significant drop (Dp 20). The blood gasses, the CO2, was 77 millimeters of mercury in 2010 and dropped to 69 millimeters of mercury in

2015, a significant drop (Dp 21). Petitioner's oxygen saturation increased from 90.8 in 2010 to 92.5 in 2015 (Dp 21). Diffusing capacity was called "decreased" in 2010 and was called "severely decreased" in 2015 (Dp 22). It was noted that a problem with DLCO can be associated with increased body mass index (BMI), however, Petitioner's BMI during the period from 2010 to 2015 remained about the same; the increased BMI gives a falsely high predicted diffusing capacity; therefore, when one assigns a qualitative degree of severity of the reduced quanitative value, that qualitative value reflects diffusing capacity far more severe than it really is – severely depressed more than it is, because the predicted value is falsely high because of the increased BMI (Dp 22-23). The 6 pound weight increase was insignificant (Dp 23). Arterial blood gasses: in 2010, the pO2 was normal at rest and below normal in 2015, but the A-a gradient was the same (Dp 23).

Dr. Tuteur testified that chronic lung disease can place an extra burden on the functioning of the heart (Dp 23). There is no question that the pulmonary function test numbers that Petitioner's attorney selected to discuss reflect worse impairment or the development of impairment compared to the 2010 study (Dp 24). Dr. Tuteur opined that Petitioner obviously has a reduction in his ability to do work; it is similarly obvious that that reduction is not a function of oxygen getting into the arterial system (Dp 25-26). During his exercise stress test, Petitioner walked a total of 450 feet or 150 yards; this is exactly what Petitioner told Dr. Tuteur, that he was maximally able to walk a city block; Petitioner's history throughout every attempt to confirm items were quite accurate and Dr. Tuteur found no discrepancies in his history (Dp 29). Dr. Tuteur opined Petitioner's pulmonary function study was valid (Dp 29). Not taking into consideration causation, Petitioner had severe exercise limitations (Dp 30).

Dr. Tuteur did not have Dr. Chopra's November 6, 2014 letter or Dr. Paul's October 28, 2014 report or January 2015 deposition (Dp 30-31). The persistent pleural density seen on the April 23, 2015 chest x-ray was most consistent with subpleural fat; noncalcified pleural plaquing may occur following asbestos exposure, but Petitioner refused a CT scan to allow for one to differentiate between those two possibilities (Dp 32). Asbestos can be found in the environment of a coal mine (Dp 32). If a person has pleural plaquing, that is a marker indicating that there was exposure to asbestos (Dp 33). It appears that Petitioner's pleural process seen on the standard chest radiograph was worse than in 2010 (Dp 33). Dr. Tuteur related that worsening to subpleural fat, which Petitioner has at 292 pounds at 5'6" tall (Dp 33). If a person has CWP, asthma, COPD, chronic bronchitis, an obstructive ventilator defect and a restrictive ventilator defect, those are all conditions or problems that could be part of a presentation such as Petitioner had physiologically (Dp 35). Dr. Tuteur is not a cardiologist (Dp 35). Dr. Tuteur opined if Petitioner did have CWP when he left the coal mine, he would be considered a person susceptible to the coal mine dust (Dp 37). Dr. Tuteur agreed Petitioner is disabled (Dp 38).

Dr. Tuteur opined that it is possible that 1% of the minimal obstructive abnormality seen on the pulmonary function study in 2010 could have been due to coal mine dust; the minimal obstruction is trivial (Dp 38). Dr. Tuteur opined that no percent of Petitioner's disability and impairment was significantly contributed to by the inhalation of coal mine dust (Dp 38). One percent of the reduction in the numbers on the pulmonary function study could not be due to pulmonary causes, pulmonary disease (Dp 38-39). Dr. Tuteur opined that no primary pulmonary problem of any etiology contributed to the interval decrement between October 2010 and April

2015 (Dp 40-41). Dr. Tuteur believed Petitioner has chronic obstructive pulmonary disease with combined emphysema and bronchitis to a physiologically minimal degree (Dp 41). Dr. Tuteur opined Petitioner did not require oxygen as a treatment modality (Dp 42). CWP that is physiologically significant can cause a restrictive ventilator defect (Dp 43). There is no evidence to support the presence of medical CWP in Petitioner. All the changes in the interval development of a mild restrictive abnormality are fully explained by and expected from the deteriorating cardiac function (Dp 43). Inhalation of coal mine dust can result in shortness of breath and result in cough (Dp 50). It is possible for a person to have radiographically significant CWP and still have normal pulmonary function study, spirometry and blood gases; in fact, it is the rule (Dp 53). It is possible for a person to have CWP that is radiographically significant and have no symptoms or complaints (Dp 53). For those who have symptoms due to CWP, the quintessential clinical feature is that of exercise intolerance of breathlessness (Dp 54). If Petitioner in fact had 1/0 simple CWP, the most likely scenario would be he would not experience any symptoms that would cause him to go to his physician and complain about them (Dp 54). Emphysema in any of its forms, if significant enough to cause a ventilator defect, will result in an obstructive defect (Dp 59). Inhalation of coal mine dust can cause emphysema (Dp 67). Chronic inhalation of coal mine dust may produce a clinical picture indistinguishable from cigarette smoke induced COPD (Dp 67). Exposure to the glues used in a roof bolting process can cause reactive airways disease (Dp 77). Dr. Tuteur took the B-Reader test, but did not pass it (Dp 77).

On re-direct examination, Dr. Tuteur testified that the number one cause of COPD, chronic bronchitis and emphysema in the US is cigarette smoking (Dp 79). It is possible that any COPD, chronic bronchitis and emphysema that Petitioner might have could progress with continued cigarette smoking and this is likely (Dp 79-80). Dr. Tuteur opined that the numerical changes on the 2015 pulmonary function study were a result of worsening cardiac disease resulting in worsening cardiac function, causing congestion in the lungs, resulting in stiffer lungs or more poorly complaint lungs, which reduced the total lung capacity and eliminated the physiologic testing manifestations of the minimal obstructive abnormality present earlier (Dp 80).

25. Dr. Chopra saw Petitioner on February 15, 2016 for a follow-up of his COPD. Dr. Chopra noted Petitioner complained of occasional shortness of breath and was coughing quite a bit in the morning and was spitting up whitish phlegm. Dr. Chopra noted Petitioner was still smoking and had been able to talk. He denied chest pain and tightness. On examination his lungs were clear to auscultation and percussion. Dr. Chopra assessed cor pulmonale, atrial flutter, CAD and obesity. Medications were prescribed. (Px11).

Based on the record as a whole, the Commission grants Petitioner's §19(h) Petition finding that Petitioner's permanent disability has materially increased to the extent that he is now permanently disabled to the extent of 85% of the person as a whole under §8(d)2 of the Act. The Commission finds the medical evidence shows that there has been a material increase in Petitioner's disability since arbitration.

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§12 Dr. Tuteur opined Petitioner is totally disabled from all work. Dr. Tuteur opined Petitioner does have COPD and he does have chronic bronchitis. Dr. Tuteur opined that Petitioner's deteriorating condition was attributable to his CAD. Dr. Paul opined Petitioner has CWP, asthmatic bronchitis (a combination of asthma and chronic bronchitis), emphysema and COPD. Dr. Paul opined causal connection for Petitioner's pulmonary condition, all attributable to inhalation of coal mine dust. Dr. Paul opined that based on Petitioner's current pulmonary condition he is totally disabled from all work. Both Dr. Paul and §12 Dr. Tuteur opined that Petitioner's pulmonary condition has worsened since last seen prior to the February 4, 2013 arbitration hearing. Treating Dr. Chopra opined that Petitioner is totally disabled from all work. Dr. Chopra noted Petitioner can take only a few steps before he gets greatly short of breath and becomes weak due to his deteriorating lung disease and cardiac cor pulmonale. Based on the opinions of Dr. Chopra, Dr. Paul and §12 Dr. Tuteur, Petitioner is medically permanently totally disabled. Based on Petitioner's testimony and the post-arbitration medical records, the Commission finds Petitioner is now permanently disabled to the extent of 85% of the person as a whole under §8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §19(h) Petition is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $567.70 per week for a period of 425 weeks, as provided in §8(d)2 of the Act, for the reason that Petitioner sustained a material increase in his disability to the extent of 85% person as a whole.

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

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

DATED: AUG 19 2016
MB/maw
o07/14/16
43

Mario Basurto

Stephen J. Mathis

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ 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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Neece,

Petitioner,

vs.

NO: 08 WC 4793

16IWCC0519

Freeman United Coal Company,

Respondent.

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 occupational disease, permanent partial disability, evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 28, 2015, is hereby affirmed and adopted.

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

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

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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: AUG 4 - 2016
TJT:yl
o 6/7/16
51

Kevin W. Lamborn

Michael J. Brennan

DISSENT

I respectfully dissent from the majority decision. For the reasons that follow, I would reverse the Decision of the Arbitrator and find that Petitioner sustained the occupational diseases' coal workers' pneumoconiosis and chronic bronchitis, which arose out of and in the course of his employment on August 29, 2007. Accordingly, I would award the Petitioner workers' compensation benefits for his condition.

There are more than sufficient facts to find that Petitioner suffered from not only coal workers' pneumoconiosis ("CWP"), but from chronic bronchitis as well. The Petitioner was a coal miner who worked underground for twenty-eight years. Aside from his constant exposure to coal dust, he was exposed to silica dust, roof bolting glues, diesel fumes, and smoke from coal fires. Notably, the Petitioner testified that he never smoked cigarettes.

Three B-reader certified physicians interpreted one or more of Petitioner's x-rays as positive for CWP. One of the three physicians was Dr. Robert Cohen, the senior attending medical doctor at Stroger Hospital of Cook County in the Pulmonology, Physiology, and Rehabilitation section, and the medical director of the Black Lung Clinic at Stroger Hospital and the National Coalition of Black Lung Respiratory Disease Clinics. Dr. Cohen diagnosed the Petitioner with CWP based on Dr. Cohen's interpretation of the Petitioner's December 12, 2007 x-ray, and the Petitioner's twenty-eight year history of exposure to coal dust. Dr. Cohen also diagnosed the Petitioner with chronic bronchitis, which was based on the Petitioner's provided history of cough and sputum frequency.

Dr. Cohen testified that CWP is a progressive disease of which there is no known cure. He also testified that in addition to the coal dust, the diesel exhaust fumes that the Petitioner was exposed to were a significant respiratory hazard and pulmonary carcinogen. Dr. Cohen further testified that a person can still have radiographically apparent CWP and still have a normal pulmonary function test, normal blood gases, a normal physical exam of the chest, and no complaints or symptoms.

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There were notations in the Petitioner's medical records that were admitted at trial of varying lung-related issues, including the following: bronchitis in 1996 and 1997, a 2009 notation that his breath sounds were diminished throughout all of his lung fields, and a 2010 x-ray impression that suggested fibrosis.

Furthermore, the Petitioner testified that all of his twenty-eight years working as a miner were underground in positions such as laborer, shuttle car operator, shoveling coal onto the belt, and repairman electrician. As a repairman he would work on the diesel-run machinery which exposed him to their emanating diesel fumes. The machinery was not taken out of the mine to be repaired. The Petitioner further testified that his breathing problems started while he worked for the mine, and that they continued to worsen after he left mining in August of 2007. He testified that the shortness of breath that he experiences affects many facets of his life, including playing with his grandchildren and mowing his lawn.

A claimant has the burden of proving all of the elements of his case in order to recover benefits under the Workers' Compensation Act. This burden of proof must be met by a preponderance of the evidence. *Illinois Bell Tel. Co. v. Industrial Comm'n*, 265 Ill. App. 3d 681, 685 (Ill. App. Ct. 1st Dist. 1994). Given the medical evidence adduced and Petitioner's credible testimony in this case, he has patently met his burden of proof.

For the aforementioned reasons, I would reverse the Arbitrator's decision and find that Petitioner proved that he sustained the occupational diseases, CWP and chronic bronchitis, which arose out of and in the course of his employment while working for Respondent on August 29, 2007. Consequently, I would award Petitioner his entitled workers' compensation benefits.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

NEECE, MICHAEL
Employee/Petitioner

Case# **08WC004793**

FREEMAN UNITED COAL MINING COMPANY
Employer/Respondent

16IWCC0519

On 7/28/2015, 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 0.14% 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:

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

16IWCC0519

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

Michael Neece
Employee/Petitioner

v.

Freeman United Coal Mining Company
Employer/Respondent

Case # 08 WC 04793

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on May 28, 2015. 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 Sections 1(d)-(f) of the Occupational Diseases Act

16IWCC0519

FINDINGS

On August 29, 2007, 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 occupational disease 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 not causally related to the alleged occupational disease.

In the year preceding the injury, Petitioner earned $64,208.32; the average weekly wage was $1,245.23.

On the date of accident, Petitioner was 56 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

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

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

July 20, 2015
Date

JUL 28 2015

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an occupational disease to his lungs and/or heart arising out of and in the course of his employment for Respondent. The Application alleged a date of last exposure of August 29, 2007, and that Petitioner sustained the occupational disease as a result of inhalation of coal mine dust including, but not limited to, coal dust, rock dust, fumes and vapors for a period in excess of 25 years.

At the time of trial, Petitioner lived in Clarksdale, Illinois, and was 64 years old. Petitioner graduated from high school in West Virginia. He served in the Army and spent seven months in Vietnam. Petitioner worked 28 years in the coal mine with all of them being underground. Petitioner testified that in addition to coal dust, he was regularly exposed to and breathed silica dust, roof bolting glue fumes, diesel fumes and smoke from coal fires.

Petitioner's last day of work in the coal mine was August 29, 2007, at Respondent's Crown II mine. He was 56 years old and was working as a repairman electrician. Petitioner testified that he was exposed to coal dust on that last day of employment. He testified that the mine shut down on that day. Petitioner testified that he did not continue his coal mining career because he was not up to it. He testified that because of his lungs and arthritis he could not do the work anymore. After he left the coal mine, he worked for Wal-Mart for about six months in 2009 in maintenance. He worked 40 hours a week at $8.25 per hour. He did not look for any other work between 2007 and 2009. He left that job because he did not like working the swing shift. He did not look for any other work after leaving Wal-Mart.

Petitioner's first job after he returned from Vietnam was at Firestone as a fork truck driver. He was there for about six months and then went to coal mine school. His first job in the mines was with Peabody as a laborer. After six months there he went to West Virginia and worked in the coal mines for another six months. He then came back to Illinois and started working for Respondent in 1977. He started as a laborer which included shoveling and setting props and timbers. He then became a shuttle car operator transporting the coal from the face of the mine to the belts. He testified that was a pretty dusty job because he was right where the coal comes out of the mine. His next job was shoveling the belt which was another dusty job. His next job was as a repairman electrician. In this job he repaired all the equipment including the diesel machinery at the face as well as the belts. Petitioner also worked as a rock duster. In that job he was using a machine to spray dust which in case of a fire is supposed to keep the fire down. He testified that dust would come back on him and he would be covered with it.

Petitioner testified that he first noticed breathing problems when he was shoveling on the belt and would have to walk up the slope. He guessed he noticed those changes in about 1998. He testified that from the time he first noticed the breathing problems until the time he left the mine, the breathing problems got worse. He testified that his breathing problems have gotten worse since leaving the mine. He testified that he gets up early to do his mowing and other work because once it gets hot he has to go in and cannot do anything. He testified that he can walk a quarter mile on level ground at regular pace without becoming short of breath. He testified that he could maybe climb 15 stairs before having to stop to rest.

The Petitioner was not taking any breathing medications at the time of trial. He testified that because of his breathing he cannot play ball with his grandkids when it is hot. He testified that he uses a riding mower as much as he can because he gets too tired if he has to push mow. He testified that he cannot hunt any more.

Petitioner testified that Dr. Richard Del Valle is his treating doctor. He testified that he talked to Dr. Del Valle about his breathing problems. Petitioner also receives treatment at the VA. Petitioner has never smoked.

Petitioner testified that had the mine not closed on August 29, 2007, he would have reported for his next shift. Petitioner testified that he had a CDL which allowed him to drive a semi. He drove a semi for JB Hunt from 1987 to 1989 when he was laid off by Respondent. He drove both long haul and short haul. It was mostly drop and hook. He left JB Hunt to work for Georgia Pacific Paper Mill. In that job he loaded trucks using a forklift. He was called back to the mine in 1993. Petitioner testified that when he was laid off in 2007 he still had his CDL. Petitioner testified that subsequent to leaving the mine he lost his CDL.

Petitioner saw Dr. Robert Cohen on May 1, 2009. (Petitioner's Exhibit No. 1, Deposition Exhibit No. 2). Dr. Cohen is a senior attending physician at Stroger Hospital of Cook County in the Pulmonology Physiology and Rehabilitation Section. He is also the Medical Director of the Black Lung Clinic at Stroger Hospital and the National Coalition of Black Lung Respiratory Disease Clinics. (Petitioner's Exhibit No. 1, p. 5). Dr. Cohen has been a B-reader since 1998. (Petitioner's Exhibit No. 1, p. 6).

Petitioner reported to Dr. Cohen that he began experiencing shortness of breath when he was 40 years old. It progressed gradually over the years to the point that when Dr. Cohen saw him he complained of shortness of breath climbing one flight of stairs and riding his bike more than a quarter of a mile. Petitioner told Dr. Cohen that when he was still coal mining he was short of breath while shoveling or roof bolting. Petitioner also told Dr. Cohen that he had coughed since the age of 40 and that same had gradually gotten worse. Petitioner reported that his cough was productive with yellow sputum in the mornings for the last several years. (Petitioner's Exhibit No. 1, pp. 25-26). Petitioner also complained of wheezing. Dr. Cohen testified that the wheezing was more likely than not related to Petitioner's coal mine dust exposure. (Petitioner's Exhibit No. 1, pp. 26-27).

Dr. Cohen testified that Petitioner's wheezing, sputum production, cough and dyspnea are abnormal findings. He testified that Petitioner met the criteria for chronic bronchitis in that he coughed most days of the week producing sputum for several years. Dr. Cohen testified that when one leaves mining the dust is often still retained in the lungs and a significant percentage of miners continue to have symptoms. (Petitioner's Exhibit No. 1, p. 30). Dr. Cohen found Petitioner's physical examination of the chest to be within normal limits. His pulmonary function testing was also normal. Dr. Cohen testified that based on the exercise test, Petitioner was capable of normal work capacity. Petitioner's lung volumes were also within normal limits. Dr. Cohen testified that a person can have chronic bronchitis and still have those various testing procedures be normal. (Petitioner's Exhibit No. 1, p. 32).

Dr. Cohen testified that when he reviewed the information he had, including the chest x-ray, he found that Petitioner had coal workers' pneumoconiosis and chronic bronchitis caused by his years of exposure to coal mine dust. (Petitioner's Exhibit No. 1, p. 34). Dr. Cohen interpreted the chest x-ray of December 12, 2007, as positive for pneumoconiosis, profusion 1/0 with P/Q opacities in the bilateral upper and middle lung zones. (Petitioner's Exhibit No. 4). Dr. Cohen testified that there was no lower profusion the film could have been given and be considered positive for pneumoconiosis. He graded the film as quality 2. (Petitioner's Exhibit No. 1, p. 49). Dr. Cohen testified that in light of his diagnoses of coal workers' pneumoconiosis and chronic bronchitis, Petitioner could not have any further exposure to the environment of a coal mine without endangering his health. (Petitioner's Exhibit No. 1, pp. 35-36). Dr. Cohen testified that there was no data to support the old contention that coal workers' pneumoconiosis starts in the right upper lobe and has round opacities. (Petitioner's Exhibit No. 1, p. 39).

Dr. Cohen saw Petitioner on one occasion at the request of his counsel. He has performed many exams at the request of Petitioner's counsel. (Petitioner's Exhibit No. 1, p. 45). Dr. Cohen did not review any treatment records regarding Petitioner. He testified that treatment records can be valuable in evaluating a patient for the presence of an occupational disease and, if present, its progression. Dr. Cohen testified that he believed the history he obtained from Petitioner was complete and accurately recorded in his report. (Petitioner's Exhibit No. 1, pp. 46-47).

Petitioner did not relate to Dr. Cohen ever having taken medication for pulmonary problems. Dr. Cohen testified that dyspnea on exertion is a non-specific complaint and can be due to many different things. He testified that deconditioning is one of the most common causes of dyspnea on exertion. (Petitioner's Exhibit No. 1, p. 48). Dr. Cohen testified that his physical examination of the chest failed to reveal any wheezing. He testified that the wheezing he had referred to in his report was what Petitioner told him, not something that he observed. Petitioner did not tell Dr. Cohen that he left mining when he did because of a pulmonary problem or concern or that he left mining on the advice of a physician. (Petitioner's Exhibit No. 1, p. 52). Dr. Cohen testified that in Illinois three percent of coal miners in the Coal Workers' Health Surveillance Program have chest x-rays interpreted as positive for black lung. (Petitioner's Exhibit No. 1, p. 51). Dr. Cohen testified that more likely than not coal workers' pneumoconiosis will not progress once the exposure ceases. Dr. Cohen could not say whether the coal workers' pneumoconiosis was progressing in Petitioner absent review of previous x-rays. (Petitioner's Exhibit No. 1, pp. 52-53).

Dr. Cohen testified that the testing he performed on Petitioner was complete and valid. He testified that the results were accurately recorded in his report, and he did not see any need to repeat the testing. The testing was normal. It did not reveal an obstruction or evidence of a restriction in Petitioner. (Petitioner's Exhibit No. 1, pp. 53-54). Dr. Cohen testified that Petitioner's exercise testing was maximal and revealed normal work capacity. His breathing reserve was noted to be high when the testing was stopped due to leg fatigue. Dr. Cohen testified that meant that Petitioner, from a ventilatory standpoint, had the ability to go further in exercise. (Petitioner's Exhibit No. 1, p. 56). Dr. Cohen testified that the testing failed to point to a ventilatory cause for Petitioner's complaint of shortness of breath. From a strictly pulmonary standpoint, he was capable of heavy manual labor. (Petitioner's Exhibit No. 1, pp. 57-58).

Dr. Cohen testified that he made two diagnoses in Petitioner, coal workers' pneumoconiosis and chronic bronchitis. The diagnosis of coal workers' pneumoconiosis was based upon his interpretation of the December 12, 2007, chest x-ray coupled with Petitioner's history of exposure to coal dust. He testified that if either of these were missing he would not have made that diagnosis. In regard to the chronic bronchitis, that diagnosis was based upon the history Petitioner related of cough with sputum of certain frequency. Dr. Cohen testified that if that history were different, his opinion might be different as to whether Petitioner has chronic bronchitis. (Petitioner's Exhibit No. 1, p. 65).

Dr. Henry K. Smith is a board certified radiologist and B-reader. Dr. Smith interpreted Petitioner's chest x-ray of May 29, 1998, as positive for pneumoconiosis, profusion 1/1 with P/S opacities in all lung zones. Dr. Cohen made an identical interpretation of the chest x-ray dated September 7, 2004. Dr. Smith found the chest x-ray of December 12, 2007, to be quality 2 due to artifacts and poor processing. Dr. Smith interpreted that chest x-ray as positive for pneumoconiosis, profusion 1/0 with P/P opacities in the bilateral middle and lower lung zones. Dr. Smith made an identical interpretation of the chest x-ray dated March 13, 2010. (Petitioner's Exhibit No. 2).

Dr. Michael Alexander, a board certified radiologist and B-reader, interpreted the chest x-ray of May 29, 1998, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. Dr. Alexander made an identical interpretation of the chest x-rays dated September 7, 2004, and March 13, 2010. (Petitioner's Exhibit No. 3).

Records from NIOSH were admitted into evidence. Petitioner underwent chest x-rays pursuant to the Occupational Safety and Health, Coal Workers' Health Surveillance Program dating back to 1974. The most recent chest x-ray taken on May 29, 1998, was interpreted by two B-readers as completely negative. (Respondent's Exhibit No. 3).

At the request of counsel for Respondent, Dr. Cristopher A. Meyer reviewed chest x-rays of Petitioner dated May 29, 1998, September 7, 2004, December 12, 2007, and March 13, 2010. Dr. Meyer testified that the films were of variable quality. He testified that the film of December 12, 2007, was unreadable. It was poorly processed. He testified that the film was not adequately fixed, and so it turned out sort of brownish-yellow making it impossible to really fully evaluate the lungs. Dr. Meyer found the other examinations to be quality 2 which meant that they were interpretable for B-reading. (Respondent's Exhibit No. 1, pp. 40-41). Dr. Meyer testified that those examinations demonstrated no radiographic finding of coal workers' pneumoconiosis. Dr. Meyer testified that it is of benefit to have serial films for interpretation. This allows him to make the distinction between disease processes that come and go, like pneumonia or edema, from chronic interstitial lung diseases such as coal workers' pneumoconiosis. (Respondent's Exhibit No. 1, pp. 41-42).

Dr. Meyer has been board certified in radiology since 1992. (Respondent's Exhibit No. 1, p. 7). Dr. Meyer has been a B-reader since 1999 (Respondent's Exhibit No. 1, p. 19). Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot. (Respondent's Exhibit No. 1, pp. 19-20). Dr. Wiot was on the original committee that designed the training course which is called the B-reader program. (Respondent's Exhibit No. 1, p. 21). Dr. Meyer has recently been asked to

have a more active academic role with the B-reader course. (Respondent's Exhibit No. 1, p. 32). Dr. Meyer testified that radiologists have a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion radiologists have a better sense of what the variation of normal is. (Respondent's Exhibit No. 1, p. 34).

Dr. Meyer testified that the B-reader looks at the films of the lung to decide whether there are any small nodular opacities or any linear opacities and based on the size and appearance of those small opacities, they are given a letter score. (Respondent's Exhibit No. 1, p. 22). Dr. Meyer testified that specific occupational lung diseases are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities. (Respondent's Exhibit No. 1, pp. 28-29). The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process. (Respondent's Exhibit No. 1, pp. 22-23). The last component of the interpretation is the extent of the lung involvement or the so-called profusion. (Respondent's Exhibit No. 1, p. 23). Dr. Meyer testified that the profusion defines the density of the small opacities in the lung. (Respondent's Exhibit No. 1, p. 30).

At the request of Respondent's counsel, Dr. James R. Castle reviewed medical records and films regarding Petitioner. (Respondent's Exhibit No. 2, p. 21). Dr. Castle is a pulmonologist and is board certified in internal medicine and in the subspecialty of pulmonary disease. (Respondent's Exhibit No. 2, p. 4). Dr. Castle practiced in Roanoke, Virginia, for 30 years. His practice was limited to pulmonary disease and chest disease which encompassed critical care medicine. (Respondent's Exhibit No. 2, p. 7). Dr. Castle's practice included treating patients with occupational lung disease. He had some patients in his practice that had coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 8). Dr. Castle has been certified as a B-reader since 1985. (Respondent's Exhibit No. 2, pp. 12-13). Two of Dr. Castle's instructors at West Virginia University School of Medicine were Dr. Keith Morgan and Dr. Lee Lapp. Dr. Morgan was one of the early individuals in the country who started looking at coal workers' pneumoconiosis to determine the extent of the disease and its effect on the individual. (Respondent's Exhibit No. 2, pp. 13-14).

Dr. Castle reviewed chest x-rays dated May 29, 1998, September 7, 2004 and December 12, 2007. Dr. Castle testified that there were no parenchymal abnormalities consistent with pneumoconiosis on the chest x-rays dated May 29, 1998, and September 7, 2004. Dr. Castle testified that the film of December 12, 2007, was unreadable because of poor processing, poor color and artifacts. This film could not be classified for pneumoconiosis although Dr. Castle saw no evidence of pneumoconiosis on the film. (Respondent's Exhibit No. 2, p. 32). Dr. Castle also reviewed a chest x-ray dated March 13, 2010, on CD-rom. He testified that on that film there was evidence of poor inspiration and crowding of the lower lung zone structures. Otherwise, the film was negative and the lung fields were clear. Dr. Castle did not see any evidence of pneumoconiosis. (Respondent's Exhibit No. 2, p. 33). Dr. Castle testified that when an individual develops radiographic evidence of coal workers' pneumoconiosis, the profusion should not decline over time. He testified that when one has lung zones involved with pneumoconiosis, that condition will not regrade over time and disappear from lung zones after it has been present there. He testified that pneumoconiosis is irreversible and once the x-ray is positive, it is going to remain positive. (Respondent's Exhibit No. 2, p. 35).

Dr. Castle testified that based upon a thorough review of the medical records and films, he concluded that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure. (Respondent's Exhibit No. 2, p. 38). Dr. Castle testified that the physiologic studies that were done were entirely normal and did not demonstrate any obstruction, restriction or diffusion abnormality. He testified that Petitioner did not demonstrate a disabling abnormality of ventilatory function from any cause including coal dust exposure and coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 39). Dr. Castle testified that Petitioner's arterial blood gas studies were entirely normal at rest and he had a normal blood gas response to exercise. Petitioner had no evidence of any cardiopulmonary limitation to exercise. Petitioner retained the respiratory capacity to perform his previous coal mining employment duties. Petitioner did not have any evidence of coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 40). Dr. Castle agreed with Dr. Cohen's testimony that the objective testing he performed on Petitioner failed to reveal a ventiltaory cause for his complaint of shortness of breath. (Respondent's Exhibit No. 2, pp. 123-124). Dr. Castle agreed with the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible exposure levels until he reaches retirement age. (Respondent's Exhibit No. 3, pp. 36-37). Dr. Castle noted that in the Taylorville Medical Associates' records, the interpretation of the March 13, 2010, chest x-ray noted mild bibasilar interstitial prominence suggesting fibrosis. Dr. Castle testified those abnormalities could be consistent with the abnormalities of coal workers' pneumoconiosis, but they are certainly not typical. He testified that coal workers' pneumoconiosis would be expected to have round-type opacities in the upper lung zones rather than mild bibasilar changes. (Respondent's Exhibit No. 2, pp. 48-49).

Dr. Castle testified that it would be extraordinarily unlikely, under the dust standards at that time, that coal workers' pneumoconiosis could manifest itself in Petitioner between 2004 and the end of his coal mining career three years later. (Respondent's Exhibit No. 2, p. 54). Dr. Castle testified that the abnormality of coal workers' pneumoconiosis is basically trapped coal dust in a part of the lung which ends up wrapped in scar tissue and can be accompanied by emphysema around it. He testified that the tissue which is affected by the scarring and emphysema cannot perform the function of normal healthy lung tissue. By definition, if a person has coal workers' pneumoconiosis, he would have an impairment in the function of his lungs at the site of the scarring and emphysema. (Respondent's Exhibit No. 2, pp. 80-81). Dr. Castle testified that coal workers' pneumoconiosis can progress after cessation of coal mining, but it is very uncommon. (Respondent's Exhibit No. 2, p. 84).

Dr. Castle testified that chronic bronchitis is not just a cough but requires the presence of sputum production over a finite period of time for two years. (Respondent's Exhibit No. 2, p. 101). Dr. Castle testified that it is extremely unlikely that chronic bronchitis caused by coal mining will continue after the exposure has ceased. (Respondent's Exhibit No. 2, p. 53).

Dr. Castle testified that Dr. Alexander interpreted the May 29, 1998, chest x-ray and the March 13, 2010, chest x-ray as revealing a 1/0 profusion with P/P opacities in all lung zones. Dr. Castle testified that told him that whatever Dr. Alexander saw on the May 29, 1998, film, he saw the exact same thing on March 13, 2010, film. (Respondent's Exhibit No. 2, p. 122-123).

The medical records of Taylorville Associates/Dr. Del Valle were admitted into evidence. As a point of clarification, apparently Petitioner was examined by both Dr. I. Del Valle and Dr. Richard Del Valle. Records from both are included. Petitioner was seen on December 11, 1974, at the request of Peabody Coal Company to perform a physical examination. A chest x-ray performed on that same date was read as showing no evidence of infiltration or consolidation and was given an ILO classification for pneumoconiosis of 0. On that date, Petitioner related no lung disease, shortness of breath, productive morning cough, pneumoconiosis, asthma or wheezing. (Respondent's Exhibit No. 4, pp. 170-173). On August 30, 1989, Petitioner underwent a pre-employment physical for Georgia Pacific. On that date he had no history of shortness of breath and his physical exam was normal. (Respondent's Exhibit No. 4, p. 169). Petitioner was seen on September 21, 1994. He noted a history of suffering a collapsed lung on the right requiring a chest tube in a car accident 10 years prior. (Respondent's Exhibit No. 4, pp. 165-166). Petitioner was seen on March 25, 1996, complaining of a head cold for the past week. On examination his lungs were clear. Dr. Del Valle's assessment was bronchitis. (Respondent's Exhibit No. 4, p. 162). On August 12, 1998, Petitioner underwent a chest x-ray. There was some atelectatic or infiltrative changes at both bases which may be in part related to the inspiratory effort. The upper lung fields were clear. The doctor found that shallow degree of inspiration raised the question of some restrictive lung disease. The radiologist also noted bibasilar atelectasis infiltrate. (Respondent's Exhibit No. 4, p. 148). Petitioner was seen on December 22, 1999, with symptoms of fever, chills, cough productive of thick yellow mucous, clear nasal secretions, sore throat and sensation of his ears being full of fluid. Air entry was equal throughout all lung fields with no true adventitious sounds heard throughout. The breath sounds, however, were somewhat harsh throughout. His cough was dry and non-productive sounding. The assessment was bronchitis. (Respondent's Exhibit No. 4, p. 140).

Petitioner was seen on October 29, 2004, for a general follow up. It was noted he recently had a Freeman Coal exam and the chest x-ray showed some scarring in the bases. His lungs were clear on that date. (Respondent's Exhibit No. 4, p. 110). When the Petitioner was seen on May 10, 2005, he had no chest pain or shortness of breath with exertion. On examination his lungs were clear. (Respondent's Exhibit No. 4, p. 109). Petitioner was seen on November 15, 2005, with complaint of sore throat and occasional cough. On examination his lungs were clear bilaterally. The assessment was sinusitis. (Respondent's Exhibit No. 4, p. 104). Petitioner was seen on August 18, 2006, complaining of left ear discomfort. He denied cough. (Respondent's Exhibit No. 4, p. 99). Petitioner was seen on January 22, 2008, for a routine visit. He reported that he had retired from the coal mine and was getting ready to drive a semi truck. He was feeling well with no complaints. On that date his lungs were clear. (Respondent's Exhibit No. 4, pp. 79-80). Petitioner's lungs were clear when examined on July 9, 2008, October 16, 2008, February 3, 2009, and August 4, 2009. (Respondent's Exhibit No. 4, pp. 30-37). Petitioner was seen on March 13, 2010, with complaint of sore throat and cough for two weeks duration. The cough was productive of white brownish sputum. The impression was acute bronchitis. Chest x-ray was performed on that same date. The impression of Dr. Robert A. K. Haag was no acute pulmonary process with mild bibasilar interstitial prominence suggesting fibrosis. In the Nursing Assessment it was noted that Petitioner had cough and sputum, but shortness of breath was not checked. (Respondent's Exhibit No. 4, pp. 7-11).

Medical records of the VA Medical Center were admitted into evidence. Petitioner was seen on December 8, 2009, to establish care at the VA Medical Center. Review of systems was negative for any chronic cough or shortness of breath. Physical examination respiratory showed that the lungs were clear to auscultation bilaterally. (Petitioner's Exhibit No. 6, pp. 46-48). Petitioner was seen for annual follow up on December 13, 2010. On that date physical examination showed that the lungs were clear to auscultation. (Petitioner's Exhibit No. 6, pp. 32-33). Petitioner was seen on July 9, 2012. Review of systems revealed that he denied cough, sputum, dyspnea and wheezing. Physical examination of the chest showed excellent aeration. The chest was clear to auscultation and percussion. There was no forced expiratory wheezing or coughing. (Petitioner's Exhibit No. 6, pp. 16-18).

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner did not sustain an occupational disease arising out of and in the course of his employment for Respondent that manifested itself on August 29, 2007.

In support of this conclusion the Arbitrator notes the following:

Dr. Cohen testified that his physical examination of Petitioner's chest was normal. He testified that Petitioner's spirometry was normal. Petitioner did not have any evidence of obstruction or restriction. Petitioner's exercise testing performed by Dr. Cohen revealed a normal work capacity. Dr. Cohen testified that the Petitioner's testing failed to point to a ventilatory cause for his complaint of shortness of breath. Petitioner reported to Dr. Cohen a history of wheezing, but Dr. Cohen did not note same on his physical examination of Petitioner. Dr. Cohen diagnosed Petitioner with chronic bronchitis related to his coal mine dust exposure. Dr. Cohen testified that the diagnosis of chronic bronchitis was based on the history provided by Petitioner of cough and sputum over a defined period of time. Petitioner did not describe a cough at the time of trial. He did not describe chronic cough to his treating physicians. Dr. Castle testified that Petitioner does not suffer from any pulmonary disease or impairment as a result of his occupational exposure. Dr. Castle testified that it would be extremely unlikely that chronic bronchitis caused by coal mining would continue after the exposure has ceased.

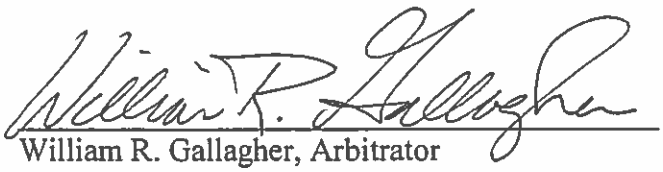
Dr. Smith interpreted chest x-ray of May 29, 1998, as positive for pneumoconiosis, profusion 1/1 with P/S opacities in all lung zones. He made an identical interpretation of the chest x-ray dated September 7, 2004. On the chest x-rays of December 12, 2007, and March 13, 2010, Dr. Smith noted profusion of 1/0 with opacities in the bilateral mid and lower lung zones. Dr. Alexander interpreted the chest x-rays of September 7, 2004, May 29, 2008, and March 13, 2010, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. Dr. Cohen's interpretation of the December 12, 2007, chest x-ray was identical to Dr. Alexander's interpretations. Dr. Meyer and Dr. Castle interpreted all of the chest x-rays as negative. The NIOSH B-readers interpreted the May 29, 1998, chest x-ray as negative. Dr. Smith's interpretations are not consistent with the findings of pneumoconiosis. Dr. Castle testified that when one has lung zones involving pneumoconiosis those changes will not disappear from those lung zones after it has been present there. Pneumoconiosis is irreversible and once the x-ray is

positive, it is going to remain positive. Dr. Alexander made identical interpretations of the chest x-rays from May, 1998 and March, 2010. This indicates that he was seeing the same thing on those films. The NISOH B-readers were the only independent readers of chest x-rays in this matter. The NIOSH readings of the 1998 chest x-ray confirm that Petitioner did not have coal workers' pneumoconiosis as of May 29, 1998.

The Arbitrator finds the NIOSH B-readings to be more credible as NIOSH is concerned with making sure the B-reading is accurate and the employee's rights to move to a less dusty job are dependent on the interpretations. The Arbitrator finds the B-readings by Dr. Meyer, Dr. Castle and NIOSH to be more persuasive and credible than those of Dr. Cohen, Dr. Smith and Dr. Alexander.

Further, Petitioner testified that he first noticed his breathing problems in about 1998. He testified that he had problems when he had to shovel on the belt and walk up the slope. Petitioner testified that his breathing problems got worse from the time he first noticed them until his last day of employment in the mine. He testified that they continued to worsen after leaving coal mining. Petitioner was performing his job duties in the coal mine up until the mine closed and he was laid off. He testified that but for the mine closing, he would have reported for his next shift. Dr. Cohen testified that based on the testing he performed, from a pulmonary standpoint, Petitioner was capable of heavy manual labor. Dr. Castle agreed with Dr. Cohen's testimony that objective testing performed on Petitioner failed to reveal a ventilatory cause for his complaint of shortness of breath. The medical records submitted into evidence do not contain any history of shortness of breath. The records do contain entries of cough which were associated with diagnoses of acute bronchitis and acute sinusitis. Dr. Castle testified that it is the position of the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk for working in currently permissible exposure levels until he reaches retirement age.

In regard to disputed issues (L) and (O) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issues (C) and (F).



William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Lois Shropshire,
Petitioner,
vs.

NO: 08 WC 09813

Caterpillar, Inc.
Respondent,

16IWCC0529

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 medical, causal connection, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 21, 2016, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $5,400.00. 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: AUG 10 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SHROPSHIRE, LOIS
Employee/Petitioner

Case# **08WC009813**

CATERPILLAR INC
Employer/Respondent

16IWCC0529

On 1/21/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.37% 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:

1824 STRONG LAW OFFICES
MICHAEL K BRANDOW
3100 N KNOXVILLE AVE
PEORIA, IL 61603

5411 CATERPILLAR INC
AMANDA WATSON
100 N E ADAMS ST
PEORIA, IL 61629

16IWCC0529

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ 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

Lois Shropshire
Employee/Petitioner
v.

Caterpillar, Inc.
Employer/Respondent

Case # **08** WC **9813**

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Peoria**, on **November 17, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 26, 2007**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$30,394.06**; the average weekly wage was **$585.50**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$5,789.53** for TTD, **$0** for TPD, **$0** for maintenance, and **$38,110.72** for other benefits, for a total credit of **$43,900.24**.

Respondent is entitled to a credit of **$8,191.90** under Section 8(j) of the Act.

ORDER

Respondent shall pay petitioner permanent partial disability benefits of **$350.70** week for a further period of **15** weeks, as provided in Section **8(d)(2)** of the Act, because the injury of July 26, 2007 caused Petitioner to be permanently partially disabled to the extent of **3% loss of the person as a whole.**

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.

Arbitrator Anthony C. Erbacci

January 14, 2016
Date

JAN 2 1 2016

FACTS:

On July 26, 2007 the Petitioner was employed by the Respondent, having been hired by Respondent on October 17, 2005 to work in Respondent's East Peoria facility. On July 3, 2007, the Petitioner began a new job in Respondent's Building SS at station 3 on the main line. The Petitioner described that the job required her to work in a bent over position inside a tractor and to use various power tools to complete her job. On July 26, 2007, the Petitioner filled out an employee incident report alleging that since her first day at the "hole out" job in July her low back had been sore. She indicated that she initially believed the pain might go away on its own, but it actually got worse which led her to go to the Respondent's medical department on July 26, 2007.

At the Respondent's Medical Department, the Petitioner was seen by Dr. Miller on July 26, 2007. Dr. Miller noted the Petitioner's lumbar pain and believed she possibly suffered a lumbar strain. Dr. Miller placed the Petitioner on restricted work and when the Petitioner's complaints did not improve, Dr. Miller ordered an MRI. The MRI was performed on August 18, 2007 and was reported to be normal. The Petitioner continued to work light duty but no accommodated work remained available for the Petitioner after August 27, 2007 and she was placed on temporary total disability.

On September 25, 2007, Dr. Miller saw the Petitioner again and noted that there was no evidence of tissue injury and no objective evidence which supported the Petitioner's continued complaints of pain and decreased function. Dr. Miller noted discrepancies on the Petitioner's exam, with possible symptom magnification, and a functional capacity evaluation was ordered. This functional capacity evaluation took place on October 17, 2007 and it was indicated that the Petitioner did not give maximum and consistent effort. After another examination on October 30, 2007, and a review of the functional capacity evaluation report, Dr. Miller again concluded that the Petitioner had subjective complaints of low back pain with no objective basis to explain it. He noted inconsistencies existed with the functional capacity evaluation and isokinetic evaluations. At the request of the Respondent, an examination was scheduled with Dr. Stephen Weiss in November 2007, but, as of October 30, 2007 the Petitioner remained off of work as she did not meet return to work requirements per her own tolerances.

On November 14, 2007, the Petitioner underwent an evaluation by Dr. Stephen Weiss at the request of the Respondent. After examination of the Petitioner as well as a review of the medical records to date, including Petitioner's MRI, Dr. Weiss concluded that the Petitioner had suffered a possible muscle strain in July 2007. While the Petitioner complained of low back pain influenced by activity, Dr. Weiss concluded there were no objective findings to support such pain, only findings of symptom magnification. Dr. Weiss concluded that the Petitioner could return to work full duty and opined that the Petitioner had likely reached MMI for any alleged muscle strain suffered in July 2007 as of the date of the August 18, 2007 normal MRI. At the time of his January 17, 2013 deposition, Dr. Weiss indicated that the Petitioner's August 18, 2007 MRI was completely normal with no herniation, stenosis or nerve root compression. Dr. Weiss also testified that the Petitioner exhibited four positive Waddell's signs allowing him to say with at least 75% certainty that at least some of the Petitioner's complaints, and possibly all of her complaints, were not physiologically based. At the time of his deposition, Dr. Weiss restated his opinion that the Petitioner showed no abnormalities on her physical exam, showed no abnormalities on her MRI, and was capable of returning to work full duty.

The Petitioner returned to work as of December 10, 2007 in accordance with her subjective tolerances. The Petitioner testified at the time of trial that she continued to work for the Respondent, with no alleged change in her wage, until being laid off in a general economic reduction in force on or about April 9, 2009.

In February of 2008, the Petitioner sought medical treatment with Dr. Hoffman. The Petitioner treated with Dr. Hoffman from February 25, 2008 to September 7, 2012. After his initial examination of the Petitioner and a diagnosis of lumbar spine strain/sciatica, Dr. Hoffman referred the Petitioner to Central Illinois Pain Center for possible injections and therapy.

The Petitioner saw Dr. Cory of Central Illinois Pain Center on March 3, 2008. Dr. Cory noted that the Petitioner had "somewhat of an atypical presentation, particularly in light of a normal MRI scan." Dr. Cory also noted that the scheduled EMG would be helpful in ruling out radiculopathies, but that it was "not high on my differential". In his exam note, Dr. Cory noted that the Petitioner did not describe symptoms of radicular pain down the right leg nor did she have numbness, weakness or tingling. Dr. Cory sent the Petitioner for physical therapy, which began on April 7, 2008.

The Petitioner also underwent an EMG study with Dr. Trudeau. The EMG report noted the Petitioner's complaints of radiculopathy, and Dr. Trudeau's interpretation of the EMG indicated mild L5 radiculopathy.

On June 3, 2008, Dr. Cory indicated that the MRI and EMG results were conflicting. As such, he recommended a series of injections for both diagnostic and therapeutic purposes. On September 8, 2008 it was noted that the Petitioner's pain was not reproducible on exam and that the Petitioner did not have significant radicular pain with either injection he performed by that date. Dr. Cory indicated that the exact etiology of the Petitioner's low back pain continued to be difficult to ascertain. As of October 15, 2008, Dr. Cory questioned the necessity of another injection.

On February 9, 2009, the Petitioner saw Dr. Kube, a spine surgeon, on referral from Dr. Hoffman. Dr. Kube noted the Petitioner's treatment to date and noted that the Petitioner had reasonable range of motion on examination. He also noted that he was unable to elicit S1 joint pain and was further not able to elicit the pain pattern that seemed to radiate around the Petitioner's leg and down the medial aspect of her foot and the sole of her foot. Based on the exam and previous EMG report, Dr. Kube ordered a CT myelogram which was performed on March 6, 2009 and was reported to show normal discs of the lumbar spine.

The Petitioner returned to Dr. Kube on March 12, 2009, and Dr. Kube reported that he did not see any specific neurocompressive lesions on the CT that would explain the radiating pain down the Petitioner's leg. Dr. Kube further stated that the CT "would explain the positive results that she has on EMG. The radiologist's report concurs with this." Dr. Kube also explained that he did identify a clear, absolute pain generator for the Petitioner that could be successfully treated with surgical intervention, and he indicated that she might be suffering from some sort of arthritic change. He had nothing further for her on this date and suggested the possibility of further pain management.

On April 30, 2009, the Petitioner began treatment with Benningfield Chiropractic on referral from Dr. Hoffman. This chiropractic treatment occurred multiple times a week through December 14,

2009. During the course of her treatment with Dr. Benningfield, the Petitioner continued near monthly visits with Dr. Hoffman. Despite the regular checkups with Dr. Hoffman and continued use of a narcotic pain medication, there was very little improvement in the Petitioner's lumbar spine complaints through the Petitioner's last noted exam with Dr. Hoffman on September 7, 2012. While there is a script from April 29, 2009 ordering a functional capacity evaluation at IPMR, no functional capacity evaluation report from IPMR was submitted into the record. It is also noted that the Petitioner's last medical record from Dr. Hoffman mentioning light duty is from November 9, 2011.

At the time of hearing, the Petitioner testified that she had not worked since being laid off by the Respondent on April 9, 2009 and that she continues to have pain complaints and functional limitation in her activities of daily living. The Arbitrator notes that the Petitioner has made no claim for Temporary Total Disability benefits beyond what the Respondent has already paid for the period from August 28, 2007 to December 9, 2007. The Petitioner also acknowledged that she has not sought any medical treatment for her alleged condition since her last visit with Dr. Hoffman.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The parties do not dispute that an accident which arose out of and in the course of Petitioner's employment by Respondent occurred on or about July 26, 2007. Immediately after that date, the Petitioner received care from the Respondent's medical department and within only a couple of weeks of her alleged injury, she was referred for an MRI of her lumbar spine. The MRI proved to be completely normal and it was reported that there was no evidence to objectively support the Petitioner's pain and decrease in function. The Petitioner was then sent for a functional capacity evaluation which was reported to show multiple discrepancies and to demonstrate that the Petitioner did not give full effort during the exam. After another exam with the Respondent's medical department on October 30, 2007, and given the failure to find any objective basis for the Petitioner's continuing complaints, the Respondent scheduled an examination of the Petitioner with Dr. Stephen Weiss.

When Dr. Weiss examined the Petitioner on November 14, 2007, he noted that no objective findings could be found to support the Petitioner's continuing subjective complaints or decrease in function. Dr. Weiss declared the Petitioner to be at maximum medical improvement as of the date of the August 18, 2007 MRI and he opined that the Petitioner could return to work full duty. Dr. Weiss indicated in his report and at the time of his deposition that the Petitioner displayed multiple Waddell's signs and symptom magnification. After the examination by Dr. Weiss, the Petitioner returned to work on December 10, 2007 and continued to work until an economic layoff occurred on April 9, 2009.

After her return to work in December 2007, the Petitioner started on her own lengthy course of treatment with Dr. Hoffman, Dr. Cory, Dr. Kube and Dr. Benningfield. During this treatment, however, no physician could objectively find a specific diagnosis to explain the Petitioner's continuing subjective complaints. Dr. Cory performed injections, but was never able to reproduce the

Petitioner's pain and the injections were generally unhelpful to the Petitioner. Dr. Cory indicated near the conclusion of his treatment that the exact etiology of the Petitioner's low back pain continued to be difficult to ascertain, but he did not recommend further injections. Dr. Kube later saw the Petitioner and also had difficulty pinpointing a cause of the Petitioner's complaints. He ordered a CT myelogram that he later noted to have unremarkable results. Although he noted the EMG showed mild L5 radiculopathy, he did not believe the CT results supported any surgical intervention. He mentioned the possibility that Petitioner was dealing with arthritic changes.

The Arbitrator notes that in addition to a lack of specific findings which would objectively support the Petitioner's complaints, the Petitioner also failed to present a causal relation opinion to a reasonable degree of medical certainty from any of her treating physicians. While Dr. Kube wrote that, "there can be an aggravation of that arthritis by the maneuver she performed", he does not say her ongoing complaints are causally related to her work incident to a reasonable degree of medical certainty, as it does not appear he could make a diagnosis of any kind to a reasonable degree of medical certainty. The Petitioner agreed at the time of trial that she had not treated for her alleged condition since her last visit with Dr. Hoffman, which is indicated in the medical records to be September 7, 2012. The diagnosis of a lumbar spine strain and sciatica remained the same throughout the Petitioner's treatment, despite no objective testing supporting same.

Based on the above, the Arbitrator finds that the Petitioner reached maximum medical improvement by the date of her independent medical examination with Dr. Weiss on November 14, 2007. At that time, no objective evidence supported the alleged continuing symptoms complained of by the Petitioner. In fact, after the examination by Dr. Weiss, the Petitioner returned to work for over a year, and only stopped working upon economic layoff. Furthermore, all objective testing after November 14, 2007, continued to support the conclusion of Dr. Weiss that there were no objective findings to support the Petitioner's continuing complaints. The Arbitrator finds, therefore, that the Petitioner's current condition of ill-being is not causally related to the alleged July 26, 2007 work incident.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Arbitrator has found that the Petitioner reached maximum medical improvement from her work injury by the date of her examination with Dr. Weiss on November 14, 2007. The Respondent introduced into the record a medical bill payment history which indicating payments of $8,191.90 in medical bills through 2007 and portions of 2008. As such, the Arbitrator finds that the Respondent has paid all reasonable and necessary medical services given the findings under issue (F) above.

Additionally, the Arbitrator finds that the Petitioner also failed to prove the reasonableness and necessity of her medical treatment after November 14, 2007, regardless of the issue of causal relation. The Petitioner underwent lengthy treatment with Dr. Hoffman, Dr. Cory, Dr. Kube and Dr. Benningfield, none of which appeared to help Petitioner or to ascertain the root of the Petitioner's continuing complaints. While none of those doctors could find a specific objective cause for the

Petitioner's subjective symptoms, lengthy pain management, physical therapy and chiropractic treatment continued. During the course of that treatment, the Respondent obtained three utilization reviews addressing the treatment of Dr. Cory, Dr. Hoffman and Dr. Benningfield.

A July 10, 2012 utilization review report of Dr. Skaredoff certified only 10 physical therapy visits between April 1, 2008 and November 13, 2008, and indicated injections of June 3, 2008, June 30, 2008, July 21, 2008 and September 8, 2008 were not medically necessary.

A July 10, 2012 utilization review report of Dr. Moorhead addressed Dr. Hoffman's orders of physical therapy and aqua therapy that took place between November 8, 2008 and April 29, 2009. Dr. Moorhead found that only the 10 physical therapy visits from April 1, 2008 to November 13, 2008 at Central Illinois Pain Center would be medically necessary, in line with the conclusions of Dr. Skaredoff. Dr. Moorhead specifically stated that the aquatic therapy and land therapy, that began on November 18, 2008 at OSF and Illinois Neurological Institute, was not medically necessary.

A utilization review from Dr. Janisse-McCarty, D.C. addressed the lengthy chiropractic treatment of Dr. Bennningfield and indicated that only a six visit trial for the Petitioner would have been medically reasonable and necessary rather than the 63 visits that began on April 30, 2009 and continued to December 18, 2009. Specifically, she stated "treatment was extremely excessive with no noted clinically significant objective improvement or functional improvement to support any treatment beyond a 6 visit trial."

Based on the lack of objective findings showing any diagnosis to a reasonable degree of medical certainty to support the Petitioner's continuing subjective complaints and treatment, as well as the medical opinion of Dr. Weiss indicating that no further medical treatment was necessary for the Petitioner's alleged injury after November 14, 2007, in addition to the undisputed utilization reviews obtained by the Respondent, the Arbitrator finds that the medical care and treatment rendered to the Petitioner after November 14, 2007 was not reasonable or necessary or causally related to the Petitioner's work injury.

In Support of the Arbitrator's Decision relating to (L.), What is the nature and extent of the injury, the Arbitrator finds and concludes as follows:

Based on the established diagnosis of a lumbar spine strain for the Petitioner's July 26, 2007 date of injury, as well as the lack of objective findings of any diagnostic test to show more extensive injury, the Arbitrator finds that the Petitioner suffered a lumbar spine strain from which she reached maximum medical improvement by November 14, 2007, leaving the Petitioner able to return to her regular work thereafter. As such, the Arbitrator finds that the Petitioner suffered permanent partial disability in the amount of 3% loss of the person as a whole pursuant to Section 8(d)(2) of the Illinois Workers' Compensation Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ 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

Michael Reiniesch,
Petitioner,
vs.

NO: 08WC 13116

Monterey Coal Company,
Respondent,

16IWCC0556

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 occupational disease, causal connection, nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 19, 2015, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $100.00. 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: AUG 25 2016
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CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REINIESCH, MICHAEL
Employee/Petitioner

Case# **08WC013116**

MONTEREY COAL COMPANY
Employer/Respondent

16IWCC0556

On 5/19/2015, 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 0.08% 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:

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

0332 LIVINGSTONE MUELLER ET AL
L ROBERT MUELLER
PO BOX 335
SPRINGFIELD, IL 62705

16IWCC0556

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

MICHAEL REINIESCH
Employee/Petitioner

Case # **08** WC **13116**

v.

Consolidated cases: _____

MONTEREY COAL COMPANY
Employer/Respondent

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 Molly Dearing**, Arbitrator of the Commission, in the city of **Springfield**, on **March 18,2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 30, 2007**, 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 occupational disease that arose out of and in the course of the exposures of his employment.

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

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

In the year preceding the injury, Petitioner earned **$57,783.46**; the average weekly wage was **$1,111.22**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** 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

Because Petitioner failed to prove that he sustained an occupational disease arising out of and in the course of the exposures of his employment, and that his current condition of ill-being is causally related to the exposures, all benefits are denied.

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

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

Arbitrator Molly Dearing

May 15, 2015
Date

MAY 19 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL REINIESCH
Employee/Petitioner

v.

Case # 08 WC 13116

MONTEREY COAL COMPANY
Employer/Respondent

16IWCC0556

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On his date of accident, Petitioner was fifty six years of age and employed by Respondent as a coal miner at its Monterey No. 1 mine. He had been so employed for thirty four years, all of which were spent working underground. During his employment for Respondent, Petitioner testified that he was regularly exposed to coal dust, silica dust, roof bolting glue fumes, diesel fumes and trowel, an epoxy-type glue.

Prior to working for Respondent, Petitioner graduated from Gillespie High School and went into the Marines for four years. After spending a summer in Arkansas riding bulls, he returned to Illinois and began working for Respondent. Petitioner was hired by Respondent in 1974 as a laborer performing odd jobs, shoveling, and building stoppings. Approximately one year later, he bid into a shuttle car operator position, where he was exposed to coal dust from the miner. Petitioner then became a scoop tractor operator, which involves cleaning up and dusting with rock dust. In that position, he also spent a year roof bolting. At that time, roof bolting did not involve the utilization of glue bolts, though Petitioner testified that he was exposed to silica dust while drilling through rock. In 1979, Petitioner bid into a continuous miner operator position, which directly exposed him to coal dust while cutting coal from the face. In 1994, Petitioner bid into a long wall position as a shearer operator, where he remotely operated a machine from ten feet from the face that, like the continuous miner, cuts coal away from the face and involves direct exposure to coal dust. Petitioner worked in that position for approximately seven years until 2001 before returning to a continuous miner operator position, where he continued to work until his last date of work on December 30, 2007.

Petitioner's last date of work mining coal was on December 30, 2007 because Respondent's mine closed. On that date, he was exposed to coal dust. Petitioner testified that he did not pursue a coal mining career thereafter due to his age and because he lost his benefits with the mine closure. Petitioner testified that he was experiencing breathing difficulties and knee problems at that time. He sought work after Respondent's mine closed, but he was ultimately unable to find employment. Petitioner testified that he has not worked since the mine closure.

Petitioner testified that he first noticed breathing problems during the last eight to ten years of his employment for Respondent. He noticed that he could not stay in the field for long periods of time with his dogs while hunting as he could before, and going up and downhill bothered him. While in the mine, Petitioner could not travel from one place to the next walking quite as fast as he

did when he was younger because of the breathing difficulties and his knees problems. He was able to perform the same duties at a slower pace. Petitioner testified that his breathing problems remained constant once he noticed them, but he testified that they have worsened since he left the mine and they have presently gradually deteriorated to his current condition.

Petitioner testified that his breathing difficulties affect his activities of daily living. He can walk eight blocks, and ascend and descend one flight of stairs before becoming short of breath. Petitioner testified that he must utilize a riding lawn mower rather than a push mower, and he has difficulty participating in athletic activities with his grandson as he had before. He is unable to follow his coon dogs in part due to his breathing problems and he is unable to hunt mushrooms as he previously could. Petitioner utilizes an inhaler prescribed by his primary physician, Dr. Weber, almost daily and he takes a low dose aspirin daily as well as medication to manage his cholesterol. Petitioner smokes over a pack of cigarettes per day and he has smoked since his mid to late teens. He has a small leak in one of his heart valves and he has had operations on both of his knees. Petitioner testified that his knees are not bothersome ascending or descending stairs, but acknowledges difficulty in both knees upon waking in the morning or when getting up from the floor.

Dr. Glennon Paul evaluated Petitioner on June 12, 2008 on behalf of his attorney and Dr. Paul testified by way of evidence deposition on January 24, 2012. Dr. Paul is board certified in internal medicine, and asthma, allergy, and immunology. He is the medical director of St. John's respiratory therapy program and a Clinical Assistant Professor of Medicine at SIU Medical School. Dr. Paul is also the senior physician at the Central Illinois Allergy and Respiratory Clinic. On June 12, 2008, Dr. Paul performed a physical examination of Petitioner, conducted a patient history, performed pulmonary function studies and a CBC, and interpreted a chest x-ray. Dr. Paul found Petitioner's physical examination to be normal, as was his baseline pulmonary function testing. On the methacholine challenge test, Petitioner's FEV1 fell 17%. For the test to be positive, Dr. Paul indicated a 20% fall in the FEV1 is required, but stated that "[t]here's two standard deviations away from every end point and so I consider patients above 15 percent as being suspect." Based upon Petitioner's methacholine challenge test, Dr. Paul placed Petitioner within the asthmatic bronchitic range. Dr. Paul stated that, "[t]he only thing that makes me say that he could have bronchitis instead of asthma is the smoking history. So I can't tell for sure whether his bronchitis is all asthmatic bronchitis or smoking and just bronchitis. Probably a mixture of both." Dr. Paul felt that coal mine exposures were a causative factor in aggravating Petitioner's asthmatic bronchitis and he opined that Petitioner has coal workers' pneumoconiosis caused by exposure to coal dust. The mild decrease in Petitioner's diffusing capacity could be mild emphysema or coal workers' pneumoconiosis, though Dr. Paul did not diagnose emphysema. PX 1.

Dr. Paul explained that coal workers' pneumoconiosis is a tissue reaction to the deposition of coal mine dust in the lungs called scarring or fibrosis. The scarring of pneumoconiosis cannot perform the function of health lung tissue and it is permanent in nature. By definition, Dr. Paul testified, an individual with coal workers' pneumoconiosis necessarily has some impairment in the function of the lung at the site of the scarring regardless of whether it can be measured by spirometry. Dr. Paul testified that it is possible to have injury or disease to the lungs despite having normal pulmonary function testing, and an individual can have a lob of a lung surgically removed and still have pulmonary function tests within the normal range. He further testified that an individually may have radiographically significant coal workers' pneumoconiosis without symptoms

and with normal pulmonary function testing, normal blood gases, and normal physical examinations of the chest. PX 1.

Dr. Paul testified that Petitioner had clinically significant pulmonary impairment due to coal dust exposure and cigarette smoking, which he acknowledged was a significant history of two packs per day for most of his life. He also testified that Petitioner had physiologically significant pulmonary impairment caused by coal dust and cigarette smoking. In light of the diagnoses made, Dr. Paul did not think Petitioner could have further exposure to the environment of a coal mine without endangering his health and he opined that Petitioner was permanently and totally disabled from working as a coal miner, as further exposure to a coal mine environment placed him at risk for progression of his pneumoconiosis and asthmatic bronchitis. Dr. Paul opined that Petitioner's pulmonary function results as of June 12, 2008 would have been similar to that of his last date of work, though he indicated that results of a pulmonary function test can wax and wain in people suffering from asthmatic bronchitis as can their symptoms. Dr. Paul would not place any restrictions on Petitioner based upon his baseline pulmonary function studies and Petitioner advised Dr. Paul that he had no prior treatment for any lung disease. PX 1.

Dr. Peter Tuteur evaluated Petitioner on February 14, 2013 on behalf of Respondent's counsel and he testified by way of evidence deposition on October 3, 2013. Dr. Tuteur is board certified in internal medicine and pulmonary disease, and practices and teaches at Washington University School of Medicine and Barnes-Jewish Hospital. On February 14, 2013, Dr. Tuteur performed a physical examination of Petitioner, took a history from him, and reviewed his pulmonary function studies and x-ray films. Dr. Tuteur indicated that Petitioner's history of cigarette smoking was significant. He explained that Petitioner's carboxyhemoglobin levels that measure the inhalation of cigarettes or other products of combustion was "distinctly abnormally-high" and that typically individuals who smoke one to two packages of cigarettes per day will fall within this range. Dr. Tutuer further indicated that Petitioner's radiographic films reflected unilateral left pleural thickening that was the result of postinflammatory process from the healed pneumonia he experienced in 2011. Dr. Tueur found no evidence of coal workers' pneumoconiosis. Petitioner's oxygen saturation level was normal at rest and stable and normal with exercise. The physical examination of Petitioner's chest revealed a slight prolongation of expiration, suggestive of a mild airflow obstruction, which was confirmed by the pulmonary function studies, though the studies did not reveal evidence of a restrictive problem. Petitioner has no significant improvement on the pulmonary function study with the administration of the bronchodilator albuterol and Petitioner had a mildly reduced diffusing capacity. Dr. Tuteur noted that Petitioner's pulmonary function results, specifically the FEV1 value, were reduced compared to the results from Dr. Paul's evaluation, which Dr. Tuteur related to Petitioner's diagnosis of pneumonia in 2011. Dr. Tuteur explained that on average, one may expect a 50 cc fall of FEV1 per year in a smoker. Petitioner's fall was considerably more than anticipated, which Dr. Tuteur related to Petitioner's diagnosis of pneumonia in 2011. Dr. Tuteur testified that Petitioner's history suggests a chronic bronchitis and that the findings on his x-ray could be evidence of emphysema. Dr. Tuteur indicated that Petitioner's chronic obstructive pulmonary disease, namely chronic bronchitis and emphysema, was due to his smoking history. Dr. Tuteur described his chronic obstructive pulmonary disease as physiologically mild, causing no disability in Petitioner, and that Petitioner could continue to work as a coal miner or in a job requiring similar effort from a pulmonary standpoint. At the time Dr. Tuteur evaluated Petitioner, Petitioner was not taking any medication for a breathing problem and he was not under any treatment for a lung problem. RX 1.

Dr. Tuteur testified that inhalation of coal mine dust and silica dust can result in chronic bronchitis, and the inhalation of roof-bolting glues and adhesives can aggravate and exacerbate chronic bronchitis. He testified that at the cells destroyed by emphysema can no longer function as normal healthy lung tissue. Dr. Tuteur acknowledged that coal workers' pneumoconiosis is a tissue reaction in the lungs to dust deposits resulting in fibrosis or scarring. Dr. Tuteur stated that the scarring of coal workers' pneumoconiosis is permanent and that the scar tissue per se cannot perform the function of normal healthy lung tissue, though he noted that a lung which is scarred may perform normally. He testified that if an individual has radiographically significant coal workers' pneumoconiosis, he recommends that the individual have no further exposure to coal mine dust. Dr. Tutuer testified that "it is the rule" that an individual with radiographically significant coal workers' pneumoconiosis will still have normal pulmonary function testing, and he indicated it was possible to have an abnormal chest radiograph and a normal physical examination of the chest and be asymptomatic. Dr. Tuteur acknowledged that a person can have a lobe of a lung surgically removed and still have a pulmonary function testing with the normal range, and he further acknowledged that an individual can lose up to a third of their breathing capacity due to damage or injury and still be within the range of normal on pulmonary function testing. He explained that a pulmonary function testing within the range of normal only indicates that the physiological function as measured by the test performed are within normal limits, and does not mean that the lungs are free from any damage, disease or injury. Dr. Tuteur testified that he never speaks to the radiologist before they dictate their findings, though he acknowledged that he spoke with Dr. Semenkovich at 4:40 p.m. in this case prior to her dictating her findings. He explained that Dr. Semenkovich called him to notify him of the pleural process revealed on the x-ray and she inquired as to what Dr. Tuteur believed it was. Dr. Tuteur provided her the additional history of Petitioner's bout with pneumonia in 2011 and she finalized her report thereafter. Dr. Tuteur testified that he finalized his report and dictated his conclusions prior to speaking with Dr. Semenkovich. RX 1.

Dr. Henry Smith, board certified radiologist and certified B-reader, reviewed chest x-ray films taken on January 21, 2008, March 2, 2011 and March 4, 2011 as all positive for coal workers' pneumoconiosis with a profusion of 1/1. PX 3.

Dr. Cristopher Meyer, Dr. Ralph Shipley, and Dr. Robert Tarver, all board certified radiologists and certified B-readers, reviewed Petitioner's x-ray films of February 14, 2013 and all three physicians found it to negative for coal workers' pneumoconiosis. RX 2, 3, 4. Drs. Meyer and Shipley both noted left pleural effusion inconsistent with a manifestation of coal dust exposure. RX 2, 4.

Dr. Bruce Weber testified by way of evidence deposition on May 30, 2014. Dr. Weber is Petitioner's family physician, and he testified that he has been treating Petitioner and his family since 1985. In the last several years, Dr. Weber has treated Petitioner approximately three times per year. Dr. Weber opined that Petitioner suffers from chronic obstructive pulmonary disease, including chronic bronchitis, emphysema and hyperactive airways disease, and coal workers' pneumoconiosis, which were caused in part, aggravated or exacerbated by his thirty years of coal mine work. Dr. Weber further opined that Petitioner cannot have any further exposure in the environment of a coal mine without the risk of progression of his conditions. Dr. Weber diagnosed Petitioner with chronic bronchitis based upon his history of a morning cough with production of a significant amount of sputum. Dr. Weber acknowledged that his diagnosis of chronic obstructive pulmonary disease was indifferent to his other diagnoses of chronic bronchitis, emphysema and reactive airways

disease. Dr. Weber also testified that Petitioner has coal workers' pneumoconiosis, though he conceded that he had not reviewed an x-ray interpreted by a B-reader. He explained that he came to that diagnosis based upon the presence of a restriction on a pulmonary function study coupled with Petitioner's known exposure. Dr. Weber was unsure as to the origin of his diagnosis of emphysema, and stated that "I don't remember what constellation of things that I've looked at, but they have a prolonged expiratory phase." He also stated that his diagnosis of Petitioner with hyperreactive airway disease was likely due to "at some point on an exam or his history of having wheezing and responding to a bronchodialator because I don't believe - - I don't recall seeing a test with a methacholine challenge at any point." Dr. Weber most recently treated Petitioner on February 4, 2014, at which time his physical examination of Petitioner's chest was normal. Petitioner was smoking two and a half packs of cigarettes on that date and Dr. Weber acknowledged that cigarette smoking was the number one cause in the United States of chronic bronchitis and emphysema. Dr. Weber noted that Petitioner's pulmonary function study of April 17, 2013 showed a moderate restriction while a subsequent pulmonary function study of November 12, 2013 was interpreted as normal. He testified that if there was a restrictive problem from coal workers' pneumoconiosis, the restriction should have been evident on the second study, given that pneumoconiosis is irreversible. PX 2.

The medical records of Dr. Weber were admitted into evidence as Petitioner's Exhibit 4. On November 17, 2009, Petitioner presented to Dr. Weber with cold symptoms, including nasal congestion, chest congestion, and a cough. Petitioner was diagnosed with acute bronchitis with tracheitis and prescribed Zithromax. On March 2, 2011, Petitioner presented to the Emergency Department of St. Francis Hospital complaining of a cough for three to four weeks with associated dyspnea. He had previously completed a Z-Pak, but did not experience improvement. A chest x-ray revealed old granulomatous disease, but no evidence of active cardiac or pulmonary disease. Petitioner was assessed with pneumonia and given antibiotics. Thereafter, he again presented to the Emergency Department on March 4, 2011 for a re-evaluation and was admitted with a clinical diagnosis of pneumonia. A physical examination demonstrated crackles in the right lung base posteriorly. A chest x-ray of March 4, 2011 revealed a calcified granuloma in the left lower lung, but was otherwise clear. No evidence of pneumonia or consolidation was demonstrated, and no pleural effusions were seen. He was discharged from the hospital on March 5, 2011. On April 5, 2011, Petitioner presented to Dr. Weber for a recheck of his upper respiratory infection with an associated headache that Petitioner reported to be improving. Petitioner denied difficulty breathing and chest pain, and a physical examination of the chest revealed normal breath sounds on auscultation, no adventitious sounds, and normal vocal resonance. On February 15, 2012, Petitioner presented to the Emergency Department at St. Francis Hospital complaining of cold/flu symptoms, including shortness of breath, a nonproductive cough, and a fever for one week. Petitioner was diagnosed with asthmatic bronchitis, prescribed Albuterol and Azithromycin Z-Pak, and ordered to follow up with Dr. Weber. On April 16, 2013, Petitioner presented to Dr. Weber for a recheck of his hypertension, at which time Petitioner complaints of a chronic cough with sputum production, but denied difficulty breathing. A physical examination revealed normal breath sounds on auscultation, no adventitious sounds and normal vocal resonance. Dr. Weber's assessment was chronic bronchitis and he ordered spirometry testing. On April 17, 2013, Petitioner underwent a pulmonary function testing and revealed a moderate restriction, which a physician noted was "consistent with black lung disease". On May 9, 2013, Petitioner presented to Dr. Weber for a discussion regarding the results of his skin lesion pathology and to have stitches removed. Petitioner denied a cough or difficulty breathing, and a physical examination of Petitioner's chest was normal. PX 4.

CONCLUSIONS OF LAW

In regard to disputed issues of disease and causal connection, to recover compensation under the Workers' Occupational Diseases Act, a claimant must prove that he suffers from an occupational disease and that a causal connection exists between the disease and his employment. An occupational exposure need not be the sole or principal causative factor so long as it was a causative factor in the condition of ill-being. *Bernardoni v. Indus. Comm'n*, 362 Ill. App. 3d 582, 596 (2005).

The Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that he suffers from coal workers' pneumoconiosis. In so finding, the Arbitrator relies upon the opinions of Drs. Meyer, Shipley and Tarver, all of whom interpreted Petitioner's x-ray of February 13, 2013 as negative for coal workers' pneumoconiosis. RX 2, 3, 4. The Arbitrator finds the reverberation of opinions amongst the three B-readers convincing, and notes that the three B-readers' opinions outweigh the positive B-reading opinions of Dr. Smith proffered by Petitioner. The Arbitrator further notes that while Petitioner's treating primary physician, Dr. Weber, opined that Petitioner has coal workers' pneumoconiosis, he acknowledged that he had not reviewed an x-ray interpreted by a B-reader and came to that diagnosis based upon the presence of a restriction on Petitioner's pulmonary function study of April 17, 2013 coupled with Petitioner's known occupational exposures. PX 2. The Arbitrator is unconvinced by Dr. Weber's opinion, given that he did not review any B-readings in formulating his opinion and the moderate restriction on the pulmonary function test of April 17, 2013 that formed the basis of his opinion is undermined by a subsequent normal pulmonary function study of November 12, 2013. Dr. Weber acknowledged that if Petitioner had a pulmonary restriction resultant from coal workers' pneumoconiosis, the restriction should have been evident on the second study given that the condition is irreversible. PX 2.

The Arbitrator further finds that Petitioner failed to prove by a preponderance of the evidence that he suffers from chronic obstructive pulmonary disease, including asthmatic bronchitis, chronic bronchitis, emphysema or hyperreactive airways disease, causally related to the exposures of his coal mining employment. In so concluding, the Arbitrator notes the normal physical examination, normal baseline pulmonary function testing, and negative methacholine challenge test performed by Petitioner's pulmonary expert, Dr. Paul. PX 1. While Dr. Paul touted Petitioner's 17% fall on methacholine challenge as being "suspect" for asthma, the Arbitrator is unpersuaded, given the normal findings on physical examination and normal baseline testing performed by Dr. Paul (PX 1), the normal pulmonary function test of November 12, 2013, the normal findings on chest examinations by Dr. Weber, and the lack of persistent and/or frequent reports of symptomatology or treatment relative to asthmatic bronchitis with Dr. Weber. PX 2. Dr. Weber's basis for his diagnosis of emphysema and hyperreactive airways disease was equivocal, as was his opinion as to when Petitioner developed those conditions, and the Arbitrator notes that no such diagnoses appear in his treating records. PX 2. The Arbitrator also notes that Petitioner's treating medical records indicate that Dr. Weber formulated a diagnosis of chronic bronchitis in 2013 (PX 2), more than five years after Petitioner ceased working for Respondent. The Arbitrator finds this temporal disparity, coupled with Petitioner's general pulmonary normalcy as demonstrated in the record, undermines the suggestion of a causal relationship between any symptomatology consistent with that condition or any chronic obstructive pulmonary disease and his employment.

Based upon the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that he suffers an occupational disease that arose out of and in the course of the exposures of his coal mine employment, and that his alleged current condition of ill-being is causally related to that exposure. In light of the Arbitrator's foregoing conclusions concerning disease and causal connection, the remaining issue of nature and extent is moot and the Arbitrator makes no conclusions as to that issue.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☐ 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KEVIN HEISSINGER,

Petitioner,

vs.

NO: 08 WC 25351

STANLEY RYAN TRUCKING,

Respondent,

16IWCC0517

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, and nature and extent, 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 finds that Petitioner reached maximum medical improvement from his right shoulder pain shortly after his visit to the emergency room on February 4, 2007. At that time, Petitioner was advised to take Naprosyn and do range of motion exercises for a diagnosis of tendinitis. He was returned to full duty and told to follow up with Dr. McClintock if his symptoms worsened. Although Petitioner testified that his pain never went away, we don't find this credible. Petitioner never returned for treatment prior to his left toe accident on May 18, 2007, and there was no treatment for shoulder pain until he saw his family physician, Dr. Kiel, on April 22, 2008. We do not find the opinion of Dr. Kiel and Dr. Wolters persuasive on the issue of causation.

We hereby vacate the award for any medical expenses incurred after February 4, 2007. Based on our finding that Petitioner sustained only temporary tendinitis after his work injury and that he reached maximum medical improvement shortly afterwards, we reduce the permanent partial disability award to 2% of the person as a whole.

All else is affirmed and adopted.

16IWCC0517

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is not entitled to any further medical expenses after February 4, 2007.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $487.70 per week for a period of 10 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 2% of the person as a whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 3 - 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 6/8/16
49

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

HEISSINGER, KEVIN
Employee/Petitioner

Case# **08WC025351**

07WC023309

STANLEY RYAN TRUCKING
Employer/Respondent

16IWCC0517

On 7/6/2015, 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 0.11% 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:

2427 KANOSKI BRESNEY
TOM EWICK
2720 S MacARTHUR BLVD
SPRINGFIELD, IL 62704

0560 WIEDNER & McAULIFFE LTD
MATTHEW ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0517

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

Kevin Heissinger
Employee/Petitioner

v.

Stanley Ryan Trucking
Employer/Respondent

Case # 08 WC 25351

Consolidated cases: 07 WC 23309

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on May 22, 2015. 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 _____

16IWCC0517

FINDINGS

On January 31, 2007, 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 $42,642.81; the average weekly wage was $812.83.

On the date of accident, Petitioner was 42 years of age, married with 3 dependent child(ren).

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

Respondent shall pay reasonable and necessary medical services relating to Petitioner's right shoulder as identified in Petitioner's Exhibit 31, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner permanent partial disability benefits of $487.70 per week for 25 weeks because the injuries sustained caused the five percent (5%) loss of use of the body as a whole, as provided in Section 8(d)2 of the Act.

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.

William R. Gallagher, Arbitrator

June 29, 2015
Date

JUL 6 - 2015

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged that Petitioner sustained accidental injuries arising out of and in the course of his employment for Respondent. In 08 WC 25351, the Application alleged that on January 31, 2007, Petitioner sustained an injury to his right shoulder when a semi truck jackknifed on a road during bad weather (Arbitrator's Exhibit 3). In 07 WC 23309, the Application alleged that on May 18, 2007, Petitioner sustained an injury to his "left toe and foot" when a pallet fell on his left foot (Arbitrator's Exhibit 4). These two cases were previously consolidated for trial.

In 08 WC 25351, the parties stipulated that Petitioner sustained a work-related accident as alleged in the Application. However, Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

Petitioner testified that he worked for Respondent as a truck driver and that, on January 31, 2007, he was driving a semi truck on an Interstate, the trailer jackknifed and Petitioner sustained an injury to his right shoulder.

Petitioner went to the ER of Taylorville Memorial Hospital on February 4, 2007. At that time, Petitioner had pain over the acromial process as well as with movement of the shoulder. He was diagnosed with tendinitis, given pain medication and authorized her return to work (Petitioner's Exhibit 29).

Petitioner testified that he returned to work even though he still experienced some right shoulder pain. Petitioner continued to work for Respondent until he sustained an injury to his left foot on May 18, 2007. As noted herein, this was also a work-related accident. Subsequent to the accident of May 18, 2007, Petitioner received a significant amount of medical treatment which is noted in the Decision being filed in the 07 WC 23309 case.

Petitioner did not seek any further medical treatment for his right shoulder symptoms until April 22, 2008, when he was seen by Dr. David Kiel, his family physician. Dr. Kiel opined that Petitioner had sustained a shoulder strain and recommended Petitioner be evaluated by an orthopedic specialist (Petitioner's Exhibit 5; pp 44-45).

On May 13, 2008, Petitioner was seen by Dr. Brett Wolters, an orthopedic surgeon. At that time, Petitioner informed Dr. Wolters that he had injured his right shoulder on January 30, 2007, and subsequently had a foot injury. Petitioner still had right shoulder complaints and Dr. Wolters opined that Petitioner had impingement syndrome of the right shoulder. He ordered an MRI scan (Petitioner's Exhibit 5; pp 34-35). An MRI was performed on June 19, 2008, which was negative for rotator cuff tear, but did reveal a possible large loose body and AC osteoarthritic changes (Petitioner's Exhibit 30).

Petitioner was seen by Dr. Wolters on August 4, 2008, and, in regard to his right shoulder, Dr. Wolters reviewed the MRI and opined that Petitioner had impingement syndrome, adhesive capsulitis and AC joint arthrosis. He recommended Petitioner have physical therapy (Petitioner's Exhibit 5; pp 23-24).

Petitioner was again seen by Dr. Wolters on July 2, 2010, and Dr. Wolters opined that Petitioner had adhesive capsulitis secondary to diabetes. He renewed his recommendation that Petitioner have physical therapy for his right shoulder (Petitioner's Exhibit 6; pp 70-71).

At trial, Petitioner testified that his right shoulder is still sore and he continues to experience a burning sensation. Petitioner stated that these symptoms limit some of his activities of daily living.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being in regard to his right shoulder is causally related to the accident of January 31, 2007.

In support of this conclusion the Arbitrator notes the following:

Respondent stipulated that Petitioner sustained a work-related accident on January 31, 2007, that resulted in an injury to Petitioner's right shoulder.

While Petitioner sought no further medical treatment for his right shoulder from February 4, 2007, until April 22, 2008, was not an unreasonable delay given Petitioner's subsequent injury he sustained to his left foot on May 18, 2007, and the extensive medical treatment he received thereafter.

Even though Dr. Wolters stated in his medical record of July 2, 2010, that Petitioner had adhesive capsulitis secondary to diabetes, Petitioner was diagnosed with tendinitis on February 4, 2007 (four days post accident) and Dr. Wolters also diagnosed Petitioner with impingement syndrome and AC arthrosis.

There was no evidence that Petitioner sustained any type of right shoulder injury or had any right shoulder symptoms prior to the accident of January 31, 2007.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner for treatment in regard to his right shoulder was reasonable and necessary and that Respondent is liable for payment of same.

Respondent shall pay reasonable and necessary medical services relating to Petitioner's right shoulder as identified in Petitioner's Exhibit 31 as provided in Sections 8(a) and 8.2 of the Act subject to the fee schedule.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of five percent (5%) loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner was diagnosed with right shoulder tendinitis, impingement syndrome, adhesive capsulitis and AC joint arthrosis. Petitioner still has complaints consistent with said diagnosis.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☒ 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

Cheryl Culen,
Petitioner,
vs.

NO: 08 WC 38561

16IWCC0565

Wexford Health Sources Inc,
Respondent,

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, temporary total disability, causal connection, medical, prospective medical, penalties, fees, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2016, is hereby affirmed and adopted.

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

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

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: AUG 30 2016
o082516
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

IBIMCC0999

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

CULEN, CHERYL
Employee/Petitioner

Case# **08WC038561**

16IWCC0565

WEXFORD HEALTH SOURCES INC
Employer/Respondent

On 2/4/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.46% 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:

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STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

☐ 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

Cheryl Culen
Employee/Petitioner

v.

Wexford Health Sources, Inc.
Employer/Respondent

Case # **08 WC 38561**

16IWCC0565

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 **Gerald Granada**, Arbitrator of the Commission, in the village of **New Lenox,** on **November 9, 2015 and then in Ottawa on November 25, 2015** . 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 Vocational Rehabilitation including degree from Southern Alabama University and related expenses

08 WC 38561

FINDINGS

On the date of accident, August 12, 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned ***$98,798.40***; the average weekly wage was ***$1,894.20.***

On the date of accident, Petitioner was ***45*** years old, ***single***, with ***1*** dependent child.

Respondent has paid $220,788.41 in medical charges.

Respondent has paid $322,960.21 for TTD.

Respondent has paid TTD for the period from August 14, 2008 through September 1, 2008; September 17, 2008 through January 10, 2013; and January 17, 2015 through October 23, 2015; representing 267 & 6/7 weeks.

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

ORDER

Petitioner failed to meet her burden of proving accident under the Illinois Workers' Compensation Act. All remaining disputed issues are moot. Compensation is denied.

Respondent is entitled to a credit for the medical charges it has paid, in the amount of $220,788.41.

Respondent is entitled to a credit for the TTD benefits it has paid, in the amount of as well as the temporary total disability benefits in the amount of $322,960.21.

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

1/25/16
Date

FEB 4 - 2016

16IWCC0565

FINDINGS OF FACT

This claim involves a Petitioner alleging she sustained an accident on August 12, 2008 while working for the Respondent. (Arb. Exh. 2) The arbitration hearing began on November 9, 2015 in New Lenox and proofs were closed on November 25, 2015 in Ottawa. In dispute are the following issues: 1) accident, 2) causation, 3) medical expenses (including vocational rehabilitation), 4) TTD, 5) nature and extent, and 6) penalties and attorney fees. (Arb. Exh. 1)

Testimony of Petitioner, Cheryl Culen, on Direct Examination

Petitioner, Cheryl Culen, testified that she sustained an accident on August 12, 2008, at Stateville prison, while she was employed by Respondent, Wexford Health Sources, Inc. Transcript on Arbitration (hereinafter "T" at 21). Petitioner worked as a nurse practitioner for Respondent, seeing patients and prescribing medications for them (T. at 21). Petitioner has a Masters from DePaul University in 1995 and a Masters from Western University in California in 2003 (T. at 22). Prior to her two Master's degrees, she obtained a Bachelor's of Science degree from Lewis University in 1991 (T. at 22).

Petitioner testified that her job duties required her to be on her feet ninety percent (90%) of the time (T. at 23). Petitioner would have to appear at the scene of a hanging (T. at 25). Petitioner would occasionally have to lift a nebulizer weighing ten (10) pounds and oxygen tanks weighing forty (40) to fifty (50) pounds (T. at 25).
At the time of the incident on August 12, 2008, Petitioner was working a second job at The Minute Clinic (T. at 25). She saw patients there for such things as ear infections and strep throat (T. at 25). Petitioner testified that it was an easy job and the duties included standing half the time and sitting half the time (T. at 25). Petitioner had a DEA number, which is a license that allowed her to prescribe medications (T. 26-27).
Petitioner's prior medical treatment included a hysterectomy performed in 1995, which eliminated migraines (T. at 27). Petitioner was not under any care for her left foot prior to August of 2008 (T. at 27). Prior to August 2008, Petitioner testified she was not under psychological care (T. at 28).

Incident on August 12, 2008

Petitioner's incident on August 12, 2008 occurred at Stateville in a psych cell (T. at 28). A psych cell is a cell where you put a person in who is unable to care for himself and will harm himself or someone else (T. at 28). The bed is encased into the floor (T. at 29). Petitioner was in the psych cell that day to see regularly scheduled inmates with no psychiatric conditions (T. at 29). Petitioner described the psych cell has having a "banquet table and a plastic chair right in front of the door, a banquet table and a rolling chair with arms there. Right next to that was a sink and a toilet. And in the back of me was a tiled shower…they put another like bench and that's where you took the inmate from plastic chair to the bench (T. at 30)."

At trial, Petitioner testified that an inmate came in and he sat down and started saying he needed his Phenobarb (T. at 31). Petitioner testified that she told the inmate he would not get his Phenobarb that day (T. at 31). Petitioner testified that the inmate took the banquet table and started to lift it up and Petitioner jumped up and the next thing she remembered was a Dr. Kurana taking the chair off of her (T. at 32).
Petitioner filled out a Form 434, which is a written documentation detailing what exactly happened during the incident (T. at 32) (Res. Exh. No. 14). The Form 434 was filled out at 3:55 p.m. on August 12, 2008 by Petitioner, who wrote:

> On the above date and approx time this writer was charting an inmate in the HCU when she went to stand up, the chair rolled towards the shower drain in the cell and caught this writers left foot. This writer fell down, with the chair overturned. Dr. Khurana, CO Clayton, helped this writer up. This writer able to ambulate with L ankle edematous. Nursing supervisor Joe Spenfuma notified. EOR. (Res. Exh. No. 14).

After the incident in the psych cell, an officer told Petitioner that she mopped the cell (T. at 31).
On August 14, 2008 a Workers' Compensation – First Report of Injury or Illness was filled out by manager Valerie Christensen, who wrote that "Emp fell from chair / left ankle / left knee / swelling / bruised unk toes (Res. Exh. 11).

Petitioner's Medical Treatment

On August 14, 2008, Petitioner visited Dr. Semba and was diagnosed with a left ankle injury (T. at 33). On August 28, 2008, Petitioner's physical therapy record mentioned Petitioner was having terrible headaches (T. at 34). On September 9, 2008, Dr. Semba diagnosed Petitioner with sympathetic dystrophy in the left ankle (T. at 34).
On September 18, 2008, Dr. Pandya, a neurologist at Silver Cross Hospital, diagnosed Petitioner with reflex sympathetic dystrophy and migraine headaches (T. at 34).

Petitioner started treatment with Dr. Timothy Lubenow in January of 2009 (T. at 37).

Petitioner then sought treatment with Dr. Cerullo for neck and back pain in 2009 (T. at 40).
In August of 2009 Petitioner underwent a bier block (T. at 41). She then started taking Fioricet for migraines (T. at 41).

Petitioner was treated at Diamond Headache Clinic in the Fall of 2009 for migraines and headaches (T. at 42). In the Fall of 2009, Petitioner underwent more MRIs of her head, a CT angiogram of her head and neck, and a cardiology consult (T. at 42). She was discharged with intractable migraine headache pain (T. at 42).

As of October 2009, Dr. Lubenow placed Petitioner at permanent sedentary duty (T. at 42). Petitioner couldn't tolerate anything on her left foot; neither a sock nor a shoe (T. at 43). Petitioner stated that Respondent told her that she could not enter Stateville without a closed-toe shoe (T. at 43). The Minute Clinic could not take Petitioner back to work (T. at 44).

Petitioner sought treatment in May of 2010 with Dr. Rosensen, after being referred to him by a Dr. Sullivan, following a thirty-five (35) pound weight loss (T. at 48). When Petitioner had the incident in August of 2008, she weighed two hundred sixteen (216) pounds (T. at 54). In November of 2011, petitioner weighed 155 one hundred fifty-five pounds (T. at 54).

In October of 2011, Dr. Lubenow noted that Petitioner had left shoulder burning and pain (T. at 49).
Petitioner then started seeing Dr. Patty Merriman, a pain psychologist at RUSH in January of 2009 after being referred by Dr. Lubenow. (T. at 50). Dr. Merriman works with Dr. Lubenow (T. at 51). Petitioner was administered Ketamine, an animal tranquilizer, as a treatment for Complex Regional Pain Syndrome on November 14, 2011 (T. at 52). As a result of the Ketamine, Petitioner had hallucinations, paranoid ideation,

and suicidal thinking (T. at 53). Petitioner testified that she became completely psychotic (T. at 53).

During the 2011 and 2012, Petitioner was trying to complete a residency to become a psychiatric nurse practitioner (T. at 56). Petitioner started the University of Southern Alabama in the Fall of 2009 (T. at 57). Classes were online, but she had to fly to Alabama for the first meeting (T. at 57). She had to take the test online and then take a weekly test at Sylvan Learning Center (T. at 57). Petitioner paid for this program with student loans (T. at 57). Petitioner paid $54,467.89, which was inclusive of school costs, licenses, travel to Alabama, and incidentals, to obtain her degree (T. at 59). Petitioner obtained her diploma as a psychiatric nurse practitioner in December of 2011 (T. at 60). Petitioner then completed a residency at Silver Cross Hospital and shadowed Dr. Luzano and Amanda Twait (T. at 61). She was not paid for this (T. at 61).

At the end of 2012, Dr. Lubenow prescribed Percocet, a narcotic for Petitioner (T. at 63). Petitioner found a company in Yuma, Arizona called Community Intervention Associates (hereinafter "CIA") where she could complete a residency and get paid (T. at 63). Petitioner started working for CIA on January 11, 2013 (T. at 64). Her job consisted of giving second opinions whether inmates should be remanded into a psychiatric facility or put on permanent injection (T. at 65). Petitioner's job title was Psychiatric Nurse Practitioner (T. at 119). Petitioner took the job with CIA because Dr. Martin, the nurse practitioner preceptor at the University of Arizona, was very sympathetic to what she had been through (T. at 65). Working at CIA, Petitioner could wear a flip flop shoe on her left foot and sit at a desk (T. at 66). While working in Arizona, Petitioner would continue to fly back to Chicago in order to continue treatment with Dr. Lubenow (T. at 66). Petitioner earned $163,579.76 in 2013 while working for CIA (T. at 67).

Petitioner moved back to Joliet in 2014 because she was taking Percocet more often and testified that the pain was going to cause an impairment in her job (T. at 68). Petitioner continued to work for CIA while living at home in Joliet, by way of telepsych (T. at 68). Telepsych allows one to use a computer to communicate with a doctor or patient, and it looks like you're sitting in the room (T. at 69). CIA sent Petitioner the equipment to set up telepsych, and Petitioner converted her back bedroom into an office (T. at 69). Petitioner performed her job via a computer (T. at 70). Petitioner's W-2 for 2014 showed she earned $167,458.31 (T. at 70). Petitioner testified she moved back to the Chicago area to be closer to Dr. Lubenow (T. at 70).

Petitioner started seeing Dr. John Jauch, a licensed clinical professional counselor, in October of 2014 (T. at 71, 72). He is her therapist and he recommended treatment for cognitive behavioral therapy for pain management (T. at 71).

The last day Petitioner worked for CIA was January 16, 2015 (T. at 72). Petitioner testified "They fired me....It was too much sick time..The pain was out of control (T. at 72)." Petitioner testified that it was her opinion she could not work as a psychiatric nurse practitioner due to her constant pain and taking more and more pain medication (T. at 74). Petitioner continues to take Percocet (T. at 75). Petitioner also blames her Ketamine incident for her continued weight loss and only talks about the Ketamine incident with her therapist (T. at 77).

Petitioner testified that as part of her daily routine, her mom comes and gets her and she spends most of the day at her mother's house (T. at 77). Petitioner testifies that if she walks more than ten (10) to fifteen (15) minutes, the pain is excruciating in her left foot (T. at 77). Petitioner has never worn a sock on her left foot, and has never worn a shoe on her left foot since the incident in August of 2008 (T. at 78). Petitioner has pain symptoms on the left side of her body and sometimes on her right foot (T. at 84). Since August 12, 2008 incident, Petitioner has been treated for depression (T. at 85).

Medications Ingested by Petitioner

Petitioner is on Propranolol for migraines twice a day for her daily headaches (T. at 89). Petitioner ingests Calcitonin for Chronic Regional Pain Syndrome (T. at 90). Petitioner takes Percocet daily (T. at 90). Petitioner takes Sabella, an anti-depressant for her neuropathic pain (T. at 90). Seroquel is an anti-psychotic which she takes at night (T. at 90). Dr. Lubenow prescribed Remeron to stimulate her appetite (T. at 84). Before the accident Petitioner testified she "would have paid a million dollars to lose weight I was a size 16. I was huge (T. at 84)." Petitioner is now a size 2-4 (T. at 84). Petitioner takes Mobic as an anti-inflammatory (T. at 91). Petitioner takes Fiorcet daily for migraines (T. at 91). Petitioner ingests Anaflex for neuropathic pain and Xanax for anxiety (T. at 91). Petitioner also takes Inderol for her headaches (T. at 122). Petitioner testified that she is in severe pain in her left leg, left foot, her arm, and she has a headache and her blood pressure is "all over the place (T. at 92)."

Testimony of Petitioner, Cheryl Culen, on Cross-Examination

When asked about her job lifting duties working at Stateville Correctional Facility in Joliet, Petitioner stated that there would be orderlies or staff that could help her lift oxygen tanks, but there were days she waited and no staff arrived (T. at 94).

When Petitioner appeared at the scene of a hanging, she was with a med tech who would help her with the body (T. at 95-96).

When Petitioner first saw Dr. Semba on August 14, 2008, the report states "Employee fell from chair, left ankle, left knee swelling, bruised on something (T. at 101). The report specifically states "Ms. Culen is a 46-year-old female patient who had an injury where she fell on the floor after a chair gave out under her. She landed on the anterior aspect of her right knee and inverted her left ankle (Res. Exh. No. 9).

In a Parkview Musculoskeletal Institute report dated August 14, 2008, Petitioner wrote "Seeing inmate in psych cell went to stand up and chair rolled to drain catching my feet. I landed on the floor with the chair on top of my right knee (T. at 104, Pet. Exh. No. 29).

When Petitioner first visited PMI Sports Medicine on August 28, 2008 for Dr. Semba, under history and complaints, Petitioner testified that the report stated "the patient states she injured her left ankle when a chair gave out under her at work. She landed on the left anterior aspect of her right knee and inverted her left ankle and was in a cast for approximately 2 weeks (T. at 102) (Res. Exh. No. 10).

A Silver Cross Hospital report dated September 18, 2008 stated, "The patient herself is a nurse practitioner practicing at the prison and apparently was seeing a patient who got upset and apparently upturned her desk and apparently she was thrown to the floor and the desk fell on her left foot (T. at 103) (Res. Exh. No. 12)."

Petitioner testified that following the August 12, 2008 incident, her condition did not worsen until about thirty (30) days following the incident (T. at 104).
Incidents Prior to August 12, 2008

When asked about an incident on or about July 11, 1998, Petitioner could not remember filing a claim with St. Paul Insurance relating to a car accident alleging injuries to her knees, head, neck, and back following a car accident (T. at 109).

During her time working in Yuma, Arizona, Petitioner was in a car accident in 2014 where she drove her BMW in to a canal and couldn't get the car out (T. at 110). Petitioner testified that she did was not injured (T. at 110).
Petitioner's Educational Background

Petitioner testified that she completed her undergraduate degree from Lewis University in 1991 (T. at 111). Petitioner then obtained an MSN degree in education from DePaul University in 1995 (T. at 111). Petitioner completed an FMN certification from Western University in Pomona, California in 2003 (T. at 112). When Petitioner applied for a position with Respondent, she was already working for Stateville Correction Facility as a nurse practitioner (T. at 112). She was Stateville's public service administrator (T. at 113). It was a supervisory position (T. at 113). Petitioner also had prior employment with a company called Addus, which was also located at Stateville, and she held a position as an RN supervisor (nurse's supervisor) (T. at 113). Prior to Addus, Petitioner worked from 1991 to 2003 at a place called Allergy and Asthma part time for a Dr. Mohiuddin, while she was a manager for neurosurgery at Loyola (T. at 114).

Petitioner could not remember whether she saw Susan Entenberg in October or November of 2009 (T. at 115). Petitioner was given her permanent sedentary restriction on October 22, 2009 (T. at 116).

During a period of six weeks when Petitioner was working for CIA in Yuma, Arizona, she was also receiving temporary total disability benefits, which have been recuperated by Respondent (T. at 119). Petitioner obtained the job in Yuma, Arizona after she had a reaction to her Ketamine treatment (T. at 121).

Petitioner flew from Yuma, Arizona to Chicago, Illinois every three (3) to six (6) months to see Dr. Lubenow (T. at 120).

When asked whether Petitioner was trying to wean or lower her medication intake, Petitioner stated that she has been trying to do homeopathic medications and vitamins (T. at 124).

Petitioner testified that since leaving CIA in Yuma, Arizona, she has contacted numerous head hunters, but did not have proof of a job search with her at trial (T. at 126).

Petitioner testified that she believed that CIA terminated her for excessive sick time (T. at 126).

Petitioner testified that in October of 2014, she told her therapist, John Jauch, that CIA is "putting me in bad situations and ask me to do unethical things....I keep telling them but they continually piling the work on (T. at 127)." Petitioner acknowledged during testimony that on November 13, 2014, Mr. Jauch wrote that "patient very stressed out and worrying about ongoing unethical behavior at work, still not willing to leave open to finding new job but has been having trouble finding one, continue to work on boundaries, co-dependent issues, coping skills, anger management, assertive skills (T. at 127)."

Petitioner testified that on August 12, 2008, she injured her left ankle and her right knee (T. at 128). Petitioner's left ankle diagnosis was an ankle sprain (T. at 128). Petitioner's left ankle was not broken (T. at 128). Petitioner has never had surgery on her left ankle (T. at 128). Petitioner never had surgery on her right knee (T. at 128). Petitioner's right knee was not fractured or broken (T. at 129).

Testimony of Petitioner, Cheryl Culen, after questioned by Arbitrator

Petitioner testified that with regard to the incident, she recalled "what led up to it...being afraid...it's confusing to me because I know that when I went to stand up, my chair rails caught on the table when he was lifting the

table up....So he was angry...I just remember Dr. Kurana coming in with....him and an officer taking a chair off of me...So I know for sure I made contact with the chair....I was terrified (T. at 137).

Petitioner did not lose consciousness (T. at 137).

Petitioner testified that Dr. Lubenow prescribed the Ketamine (T. at 137).

Independent Medical Examinations

Petitioner was examined by Dr. Samir Sharma on May 28, 2009 (Res. Exh. No. 5). Dr. Sharma took a history from Petitioner that at the time of her injury, a patient being evaluated became "disgruntled and flipped the examination table backwards which had caused Ms. Culen to fall backwards on her chair with the table subsequently landing on her left lower extremity (Res. Exh. No. 5)." At the end of his examination, Dr. Sharma concluded that Petitioner has a diagnosis consistent with CRPS type I or complex regional pain syndrome type I (Res. Exh. No. 5).

On November 10, 2010, Dr. George Holmes examined Petitioner (Res. Exh. No. 4). Dr. Holmes took a history that Petitioner sustained a left ankle injury on August 12, 2008 when "her chair at work went out from under her. She landed on the floor twisting her left ankle...Also a patient apparently slammed a table down and landed on the arm of the chair (Res. Exh. No. 4). After his examination, Dr. Holmes concluded that Petitioner had RSD or Complex Regional Pain Syndrome but from an orthopedic standpoint, there was no bony, ligamentous, or musculoskeletal issues that would stop her from returning to her regular work duty (Res. Exh. No. 4). From an orthopedic standpoint, Dr. Holmes concluded that Petitioner's prognosis was excellent (Res. Exh. No. 4).

Petitioner visited Dr. Robert Noren at the request of Respondent on January 21, 2015 (Res. Exh. No. 1). Petitioner informed Dr. Noren that in August of 2008 she was working as a nurse at Stateville Prison and a prisoner pushed a table at her, and she fell off a chair, falling on her leg (Res. Exh. No. 1). Dr. Noren could not find any visible findings of Chronic Regional Pain Syndrome (Res. Exh. No. 1). Dr. Noren concluded that Petitioner has a neuropathic pain syndrome, and recommended a rheumatological evaluation (Res. Exh. No. 1). In Dr. Noren's report from August of 2015, he reviewed a report from Dr. Bello regarding a possible rheumatological cause (Res. Exh. No. 2). Dr. Noren concluded that Petitioner was at maximum medical improvement and that Petitioner's neuropathic pain syndrome is exacerbated by underlying depression and anxiety (Res. Exh. No. 2). Dr. Noren concluded that Petitioner should be weaned off the multiple redundant medications for her subjective pain syndroms (Res. Exh No. 2). Dr. Noren released Petitioner back to work at a sedentary level of function (Res. Exh. No. 2).

At the recommendation of Dr. Noren, Petitioner underwent an evaluation by Dr. Alfonso Bello on May 7, 2015 (Res. Exh. No. 3). Dr. Bello took a history from Petitioner that a psych patient flipped a table that was being used in the exam room, which resulted in her falling out of a chair and landing on her anterior aspect of the knee and inverting her ankle (Res. Exh. No. 3). Dr. Bellow as in agreement that Petitioner has Chronic Regional Pain Syndrome type 1 in her left lower extremity (Res. Exh. No. 3). Dr. Bello concluded that there was no evidence of a rheumatologic disorder at the present time (Res. Exh. No. 3).

Petitioner's Vocational Expert Susan Entenberg

The deposition of Petitioner's vocational expert, Ms. Susan Entenberg, was taken on February 16, 2015 (Pet. Exh. No. 21). Ms. Entenberg was referred to see Petitioner by Dr. Lubenow (Pet. Exh. No. 21, pg. 6). Ms. Entenberg initially met with Petitioner in November of 2009 (Pet. Exh. No. 21, pg. 6). At the time that Ms.

Entenberg met with Petitioner, she already had two master's degrees (Pet. Exh. No. 21, pg. 6). In addition, Ms. Entenberg testified that at the time she first met with Petitioner, Petitioner was already enrolled in Southern Alabama University to obtain a third master's degree (Pet. Exh. No. 21, pg. 13). Ms. Entenberg does not know anything about Petitioner's accident, as Ms. Entenberg testified during her deposition that "I never get into the details of the accident, so I don't know (Pet. Exh. No. 21, pg. 33)."

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. In support of this finding the Arbitrator relies on the Petitioner's testimony and the documents put into evidence. Specifically, the Arbitrator finds that the Petitioner's description of what transpired on her alleged date of accident lacks credibility in light of the various accounts presented. Following is a list of the various descriptions provided by Petitioner of what allegedly happened on the date in question.

- August 12, 2008 accident report completed by Petitioner herself indicates Petitioner was charting an inmate in the HCU when she went to stand up, the chair rolled towards the shower drain in the cell and caught her left foot, after which she fell down, with the chair overturned, and was subsequently assisted by Dr. Khurana, and CO Clayton; she was able to ambulate with L ankle edematous. (Res. Exh. No. 14)

- August 14, 2008 Form 41 report filled out by manager Valerie Christensen, which contained Petitioner's description of the incident: Emp fell from chair / left ankle / left knee / swelling / bruised unk toes (Res. Exh. 11).

- August 14, 2008 Dr. Semba report: Employee fell from chair, left ankle, left knee swelling, bruised on something (T. at 101). The report specifically states Petitioner had an injury where she fell on the floor after a chair gave out under her. She landed on the anterior aspect of her right knee and inverted her left ankle (Res. Exh. No. 9).

- In a Parkview Musculoskeletal Institute report dated August 14, 2008, Petitioner wrote: "Seeing inmate in psych cell went to stand up and chair rolled to drain catching my feet. I landed on the floor with the chair on top of my right knee." (T. at 104, Pet. Exh. No. 29)

- PMI Sports Medicine on August 28, 2008 for Dr. Semba: The patient states she injured her left ankle when a chair gave out under her at work. She landed on the left anterior aspect of her right knee and inverted her left ankle and was in a cast for approximately 2 weeks (T. at 102) (Res. Exh. No. 10).

- A Silver Cross Hospital report dated September 18, 2008: Petitioner was seeing a patient who got upset and apparently upturned her desk and apparently she was thrown to the floor and the desk fell on her left foot (T. at 103) (Res. Exh. No. 12).

- Dr. Samir Sharma on May 28, 2009: A patient being evaluated became disgruntled and flipped the examination table backwards which had caused Petitioner to fall backwards on her chair with the table subsequently landing on her left lower extremity (Res. Exh. No. 5)."

- Dr. George Holmes on November 10, 2010: Her chair at work went out from under her. She landed on the floor twisting her left ankle…Also a patient apparently slammed a table down and landed on the arm of the chair (Res. Exh. No. 4). 7

- Dr. Robert Noren on January 21, 2015: In August of 2008 she was working as a nurse at Stateville Prison and a prisoner pushed a table at her, and she fell off a chair, falling on her leg (Res. Exh. No. 1).

- Dr. Alfonso Bello on May 7, 2015: A psych patient flipped a table, which resulted in her falling out of a chair and landing on her anterior aspect of the knee and inverting her ankle (Res. Exh. No. 3).

- During testimony on November 25, 2015: Petitioner testified that an inmate took the banquet table and started to lift it up and Petitioner jumped up and the next thing she remembered was a Dr. Kurana taking the chair off of her (T. at 32).

Petitioner's story has evolved over time. The facts have changed from the history given on the date of incident and the few days following the incident. Petitioner's immediate and subsequent histories given about the incident on August 12, 2008, fail to mention an assault by a prisoner in the psych cell, despite Petitioner's testimony that she was "terrified" when describing the incident in question. Furthermore, they fail to mention any defect in the chair that Petitioner either fell from or had come into contact with her left foot. In just relying on the Petitioner's initial report of accident, it is not clear what happened to the Petitioner as she describes getting up from a chair, the chair rolling and contacting her left foot, followed by the Petitioner falling. When offered the chance to explain what happened, the Petitioner could not convincingly describe to the Arbitrator what actually happened on the alleged accident date - she was only able to recall having to get up from a chair, which got caught on something and then having an officer taking a chair off of her. The facts are further confounded by the medical records, which provide histories of a table being slammed down, Petitioner's chair giving out, her chair being thrown backwards, a chair landing on her right leg, a chair landing on her left foot, a chair rolling onto her left foot, and so on. Furthermore, given that Petitioner, as a member of the medical profession who could prescribe medication, should know the importance of providing an accurate history in the care of a patient, the Arbitrator finds it suspect that Petitioner's initial and subsequent histories are quite inconsistent. Given all the inconsistencies as to how the Petitioner may have been injured, the Arbitrator concludes that the Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment with the Respondent on August 12, 2008. Accordingly, her claim for benefits is denied.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

FOIMCC0292

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Shelton J. Kellum,

Petitioner,

vs.

NO: 09 WC 5009

Illinois Department of Human Services,

16IWCC0511

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, 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 finds that the medical bills pertaining to the Petitioner's chest strain from April 5, 2008 through October 15, 2008 are related to his injury on the date of accident. However, all the bills submitted by the Petitioner pertaining to alleged treatment after that date are not related and not the responsibility of the Respondent. The medical bills for September 7, 2008 and September 9, 2008 are not related to this accident but were the result of Petitioner's abdominal pain. The bill dated September 16, 2008 was related to Petitioner's gastritis and not related to any injury to his chest. In addition the bills dated November 9, 2008 and November 18, 2008 were also unrelated to Petitioner's chest injury on April 5, 2008 but were the result of Petitioner's shortness of breath and asthma.

The Commission further finds that the Petitioner sustained a chest strain and is entitled to 1% of a person as a whole.

All else is affirmed.

16IWCC0511

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $200.00 per week for a period of 5 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use to the Petitioner to the extent of 1% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses under §8(a) of the Act and 8-2 as they pertain to the medical bills for treatment to the chest strain only from April 5, 2008 through October 15, 2008.

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.

DATED: AUG 2 - 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 6/22/16
049

[illegible]

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KELLUM, SHELTON
Employee/Petitioner

Case# **09WC005009**

IL DEPT OF HUMAN SERVICES-HOME SERVICES PROGRAM
Employer/Respondent

16IWCC0511

On 4/27/2015, 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 0.09% 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:

0276 BURNETT & CARON LTD
ADAM BURNETT
1776 LEGACY CIR SUITE 116
NAPERVILLE, IL 60563

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 CMS - RISK MANAGEMENT
801 S SEVENTH ST 8M
P O BOX 19208
SPRINGFIELD, IL 62794-9288

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

APR 27 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0511

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

Shelton Kellum
Employee/Petitioner
v.
Illinois Department of Human Services - Home Services Program
Employer/Respondent

Case # **09** WC **5009**

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **February 18, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **April 5, 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 $**1,505.35**; the average weekly wage was $**292.87**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **no** 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** 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

Respondent shall pay $**2,387.51** for medical services, as provided in Section 8(a) of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement for payments made through Medicare and Medicaid and shall provide payment information to Petitioner relative to any credit issue. Respondent is to pay Medicare and Medicaid directly for payments made by Medicare and Medicaid. Respondent shall pay the related medical expenses according to the Medicare and Medicaid negotiated rates and shall provide documentation with regard to said calculations to Petitioner.

Respondent shall pay Petitioner permanent partial disability benefits of $**200.00**/week for **15** weeks, because the injuries sustained caused the **3%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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.

Milton Black

Signature of Arbitrator

April 24, 2015

Date

APR 27 2015

FACTS

Petitioner testified that he was injured on April 5, 2008, while performing work for Respondent, Illinois Department of Human Services - Home Services Program, where he had worked for several months. He was employed as an in home care provider for Respondent's client, a quadriplegic man. Petitioner would perform housekeeping duties, shopping, cooking, changing the man, and moving the man in and out of a wheel chair.

Petitioner testified that on April 5, 2008, he attempted to lift the client out of bed and felt immediate pain around his heart. Petitioner testified that the client weighed approximately 300 pounds and was six feet eight inches in height. Petitioner testified that he weighed approximately 160 or 165 pounds on April 5, 2008. Petitioner testified that he could not breathe and that he had no chest pain prior to the accident date.

Petitioner testified that he had a prior work related back injury for which he had received permanent restrictions of no truck driving.

Petitioner went to Rush University Medical Center on April 6, 2008. His chief complaint was "lifting large patient at work, thinks pulled chest muscle yesterday" (PX1, p9). A chest X-ray was performed, and there were no significant changes from a previous exam that had been on performed December 12, 2007. Petitioner was prescribed Norco (PX1, p16)

Petitioner testified that on April 7, 2008 he followed up with his primary care physician, Dr. Doshi (See PX2, p2). Petitioner testified that Dr. Doshi provided work restrictions of no lifting, no pushing, and no pulling of more than ten pounds (See RX1, p43). Petitioner testified that he reported the injury to his employer and that his restrictions were not accommodated.

On April 10, 2008, Petitioner returned to Rush University Medical Center emergency room with complaints of pain to the left rib and chest area. Petitioner reported pain with exertion and movement (PX1, p29). A chest x-ray was performed. Dr. Whitehouse found a normal rib cage and no fractures (PX1, p37).

On April 21, 2008, Petitioner returned to Rush University Medical Center with complaints of continued left sided chest pain. Petitioner complained of pain with movement, difficulty sleeping, and inability to lay on his left side. He reported pain under the left breast (PX1, p49).

On April 24, 2008, Petitioner was examined at Rush University Internists, and he was instructed to avoid lifting (RX1, p45).

Petitioner testified that on June 18, 2008 he was seen at Rush University Internists and that he he was instructed to take it easy.

Petitioner began physical therapy at Rush Outpatient Physical Therapy on August 20, 2008 (PX3, p18). Petitioner completed 6 sessions through October 15, 2008 (PX3, p10). Petitioner followed up at Rush University Internists on October 7, 2008 for his muscle strain. He reported that his pain was aggravated by motion and that it was relieved by rest and Tylenol #3. He was instructed to be compliant with physical therapy (PX2, p16).

Petitioner testified that his employer did not provide work within his restrictions during the course of his treatment. He further testified that he did not turn in any lost time slips to his employer. He further testified that he was receiving Social Security disability payments from a previous truck driving accident. He further testified that that he used Medicare and Medicaid to pay for his medical treatment.

Petitioner testified that he is not worked since the date of the accident. Petitioner testified that he still feels chest pain.

CAUSATION

Petitioner testified that his chest wall pain began when he was lifting a heavy patient. His testimony is corroborated by the medical records and is consistent with the sequence of events.

Therefore, the Arbitrator finds that Petitioner's current condition of ill being is causally related to the accident.

MEDICAL

Petitioner attached a Medical Expense Summary to the Request for Hearing (AX1). Petitioner submitted numerous bills from Rush University Medical Center (PX4). Petitioner now claims payment for only those medical bills that are included in the medical expense summary. Petitioner testified that Medicare and Medicaid paid for his work related medical treatment. The total payments are $2387.51, which are the negotiated Medicare and Medicaid rates (AX1).

Based upon the finding regarding causation, the Arbitrator finds that Respondent is liable for these medical bills paid through Medicare and Medicaid.

TEMPORARY TOTAL DISABILITY

Petitioner testified that his restrictions were not accommodated, but he did not testify to the identity of the person to whom he allegedly spoke. Petitioner never presented any lost time slips to his employer. Petitioner gave no valid reason for failing to do so. Petitioner's failure to ever submit lost time slips precluding any possibility for temporary work accommodation.

The Arbitrator finds that Petitioner has not carried the burden of proof on this issue. Therefore, the claim for temporary total disability benefits is denied.

NATURE AND EXTENT

Petitioner sustained a chest wall strain.

Based upon the testimonial and medical evidence in this case, the Arbitrator finds that Petitioner has sustained a 3% loss of the person as a whole.

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)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
WILLIAMSON		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Edward Burnett,
Petitioner,
vs.

NO: 09WC 15258

16IWCC0557

Cook Coal Terminal - American Electric Power,
Respondent,

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, statute of limitations, causal connection, occupational disease, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2015, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $100.00. 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: AUG 25 2016
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CJD/jrc
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Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURNETT, EDWARD
Employee/Petitioner

Case# **09WC015258**

COOK COAL TERMINAL-AMERICAN ELECTRIC POWER
Employer/Respondent

16IWCC0557

On 4/2/2015, 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 0.13% 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:

2546 CULLEY FEIST KUPPART & TAYLOR
ROMAN KUPPART
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

0693 FEIRICH MAGER GREEN RYAN
CHERYL L INTRAVAIA
2001 W MAIN ST PO BOX 1570
CARBONDALE, IL 62903

16IWCC0557

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ 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

Edward Burnett
Employee/Petitioner

v.

Cook Coal Terminal - American Electric Power
Employer/Respondent

Case # **09 WC 15258**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin, Illinois**, on **February 11, 2015**. 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 Petitioner incur an occupational disease that arose out of and in the course of employment with Respondent?
D. ☐ What was the last date of exposure?
E. ☒ Was timely notice of the occupational disease given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the exposure?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the last date of exposure?
I. ☐ What was Petitioner's marital status at the time of the last date of exposure?
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 from the occupational disease?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Occupational disease, exposure, notice, causation, disablement, statute of limitations at 6(c), 1(f) and 19(d).**

FINDINGS

On **June 21, 2005**, 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 was last exposed to coal dust and fumes arising out of and in the course of employment.

Timely notice of Petitioner's claim of injury *was not* given to Respondent.

On the last date of exposure, Petitioner was **53** years of age, ***single*** with **1** dependent child.

In the year preceding the last date of exposure, Petitioner earned **$41,953.63**; the average weekly wage was **$806.45**.

Petitioner's current condition of ill-being *is not* causally related to his employment with Respondent.

ORDER

Petitioner's claim was filed four years after his last date of exposure and therefore, an award for any occupational disease other than coal workers' pneumoconiosis is untimely pursuant to Section 6(c). Petitioner failed to prove he was disabled from pneumoconiosis or that he was disabled by the disease within two years of his last date of exposure as required by Section 1(f). Therefore, Petitioner's claim for compensation is denied and no benefits are awarded.

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

3/30/15
Date

APR 2 - 2015

Findings of Fact:

Petitioner, Edward Burnett was born on February 1, 1952 and was 63 years old at the time of the hearing. He worked at Cook Coal Terminal from November 4, 1984 to June 21, 2005 and stated he was exposed to coal dust, methane, cleaning solvents and smoke from coal dust fires during his employment. Petitioner last worked at Cook Coal on June 21, 2005 when he injured his back while working as a railcar repairman. He explained that he would also work in maintenance and as a deck hand on a tow boat if extra help was needed, but his main job was as a railcar repairman. He further explained that Cook Coal Terminal was not a coal mine; it was a terminal where coal was dropped off by rail and transferred to a barge on the Ohio River.

Petitioner stated he would become short of breath when he worked at Cook Coal. Climbing a flight of stairs, or going up the conveyor, would make him short of breath. He could not get to the top before he would have to stop and get a breath. When he worked on the tow boats, moving large cable lines would also cause him problems. He would have to stop and take breaks because of his breathing.

At the hearing, Petitioner complained of breathing problems and took breathing medication prescribed by Dr. Fischer. He stated there was a big difference in his breathing from his first day at Cook Coal to the present and his breathing was definitely worse. He used to play sports in high school and had a good set of lungs; now he could hardly play with his grandson without getting exhausted. Petitioner stated that if he went outside on the street and walked at a normal pace, he could only walk a block before he became short of breath. He estimated that he could only climb seven or eight steps before he needed to catch his breath.

Mr. Burnett never had a desk job and never worked anything other than a manual labor job. He did not think he would be able to work his last job at Cook Coal. His physical condition would not let him and that was due to his back injury. He thought his breathing also played a role. Petitioner no longer smoked. He stated he smoked for two years when he was in the Army from 1974 to 1976. He had been using an inhaler for about ten years that he began to use right after he left Cook Coal. He used the inhaler once a day and it would open up his lungs a little bit to where it felt like he could breathe a little bit better. He saw Dr. Mae Fischer for breathing about twice a year. She was his general doctor. In addition to receiving treatment for his breathing problems, Petitioner also received treatment for his back problems, Hepatitis C, high blood pressure and cholesterol problems. Petitioner was not currently treating with a pulmonologist; he only treated with Dr. Fischer.

Following his departure from Cook Coal on June 21, 2005, Petitioner filed for Social Security Disability due to his low back problems and Hepatitis C. He did not know if his breathing problems were included. Petitioner disagreed with his medical records that stated he was smoking in 2006. He stated he quit in 1976 and only smoked from 1974 to 1976 when he was in Germany. *Id.*

Petitioner had a sleep apnea study performed in 2008. After that he told Dr. Fischer that he thought he had lung damage from his job. Dr. Fischer sent Petitioner to Dr. Keith Kelly for a black lung exam in 2008. Petitioner was examined by Dr. Houser in 2011 and Petitioner told Dr. Houser he worked in tunnels. The tunnels were the conveyors. The conveyors were not running most of the time when he was fixing them. Cook Coal also had a procedure that washed down the structures before he would start to work on them but Petitioner stated Cook Coal did not do it all the time. Cook Coal also used dust collectors after the train explosion.

Cook Coal's dust exposure records were placed into evidence. (RE10). OSHA's permissible exposure limit (PEL) for respirable coal dust was 2.00 mg/m^3. (RE10 at 1). OSHA's PEL for silica was 0.05 mg/m^3. *Id.* All of Cook Coal's testing revealed values well below the OSHA allowable limits. (RE10). For example, the testing from April 2000, which included employees working as deckhand, conveyorman, electrician/mechanic, mechanic and railcar mechanic, revealed coal dust levels between 0.162 mg/m^3 and 0.557 mg/m^3. (RE10 at 2,4). The April 2000 values for silica were between 0.005 mg/m^3 and 0.007 mg/m^3. (RE10 at 2).

Petitioner's medical records from Lourdes Hospital (PE6), Dr. Mae Fischer (PE8), Western Baptist Hospital (EX5), Internal Medicine Group (EX6) and the Respiratory Disease Clinic (EX7) were placed into evidence along with the examination reports and deposition testimonies of Dr. Tuteur (EX5; EX12) and Dr. Houser (PE1) as well as B-readings and curriculum vitae from Dr. Wiot, Dr. Meyer, Dr. Alexander, Dr. Cohen, Dr. Shipley and Dr. Seaman. (EX1, PE2, PE3, PE4, PE5, EX2, EX3, EX9). The records, reports, and testimonies revealed the following:

Petitioner's medical records contained a chest x-ray taken on June 21, 1989 that found the chest was normal. (EX6 at 568). Both lungs were fully expanded and clear and free of active or metastatic disease. *Id.* On April 18, 2000, a chest x-ray taken at Western Baptist Hospital found the lungs were clear. (EX6 at 497). A chest x-ray taken November 5, 2003 was "unremarkable." (EX6 at 455). The impression stated, "essentially negative chest for active and/or metastatic disease." *Id.*

On August 7, 2007, Employee had a chest film taken at Western Baptist that had a final impression of "normal chest." (EX5 at 3). Dr. Wiot[1] reviewed the film at Employer's request and found no evidence of coal workers' pneumoconiosis stating the chest was within normal limits. (EX1 at 5).

A chest x-ray was taken on September 23, 2008 at Internal Medical Group that found "no evidence of acute cardiopulmonary disease" and had a final impression of "no acute disease." (PE8 at 9; RE5 at 2; RE6 at 250). Dr. Wiot found no evidence of coal workers' pneumoconiosis. (EX1 at 3-4). Dr. Alexander[2] and Dr. Cohen[3] read the film at Petitioner's request and found it positive for coal workers' pneumoconiosis. (PE2; PE4).

A chest x-ray was taken on March 3, 2009. Dr. Wiot found no evidence of coal workers' pneumoconiosis and stated the chest was within normal limits. (EX1 at 1). Dr. Alexander read the film as positive at a 1/0 ILO classification level. (PE2). Dr. Meyer[4] and Dr. Seaman[5] read the film at Employer's request and found the film negative for coal workers' pneumoconiosis. (RE2 at 1-2; RE9 at 1-2).

A chest x-ray taken on July 11, 2011 had a final impression of "no clear interstitial lung disease." (PE6 at 590). Dr. Cohen and Dr. Alexander read the film as positive for pneumoconiosis. (PE4; PE2). Dr. Meyer found no evidence of pneumoconiosis. (RE2 at 5-6). Dr. Shipley[6] read the film at Employer's request and found the lungs clear with no findings consistent with coal workers' pneumoconiosis. (RE3 at 1-2).

A chest x-ray taken at Lourdes Hospital on April 8, 2013, found Petitioner's "lungs were clear" and had a final impression that read "no acute disease." (PE6 at 390).

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[1] Dr. Wiot is a B-reader, board certified radiologist and professor of radiology. (EX1).

[2] Dr. Alexander is a B-reader and board certified radiologist. (PE3).

[3] Dr. Cohen is a B-reader. (PE5).

[4] Dr. Meyer is a B-reader, board certified radiologist and professor of radiology. (RE2).

[5] Dr. Seaman is a B-reader, board certified radiologist and instructor of thoracic and cardiovascular imaging at Duke University Medical Center. (RE9 at 3-7).

[6] Dr. Shipley is a B-reader, board certified radiologist and professor of radiology. (RE3).

On September 23, 2008, Petitioner presented to Dr. Fischer for treatment of his blood pressure. (PE8 at 3). Petitioner stated he thought he had lung damage through his work and Dr. Fischer recommended a pulmonary evaluation and a chest x-ray. (PE8 at 5). Dr. Fischer referred Petitioner to Dr. Keith Kelly for the pulmonary exam. (EX6 at 247). Petitioner was advised to take the September 23, 2008 chest film with him. *Id.*

Petitioner presented to Dr. Keith Kelly[7] at the Respiratory Disease Clinic on October 16, 2008. (EX7 at 2-5). Petitioner reported prior employment at Cook Coal with exposure to coal dust and welding and complained of coughing up black mucus despite wearing a mask. *Id.* He advised that he was seeking black lung benefits and complained of shortness of breath doing any sort of work, walking an incline or walking 200 feet on a flat surface. *Id.* He also complained of wheezing. *Id.* The exam revealed slightly diminished breath sounds. *Id.*

Dr. Kelly's pulmonary function testing revealed an FEV1 of 132% predicted and an FVC of 120% of predicted. (RE7 at 3). The total lung capacity was 110% of predicted and the diffusion capacity was 98% of predicted. *Id.* Dr. Kelly viewed the September 23, 2008 chest film and found "no acute process, no effusions, and no opacities." *Id.* Arterial blood gas testing showed mildly elevated AA gradient with a pH of 7.45, pCO2 of 34 and pO2 of 70. *Id.* Upon review of the testing, Dr. Kelly diagnosed possible asthma. *Id.* Dr. Kelly did not believe Petitioner had coal workers' pneumoconiosis due to the normal pulmonary function testing and the absence of opacities on the chest x-ray. *Id.* He stated the elevated AA gradient could be related to some underlying lung disease but was more likely intrapulmonary shunting related to Petitioner's underlying liver disease. *Id.*

Petitioner was examined by Dr. Peter Tuteur, at the request of Employer on October 28, 2010. (EX4). Dr. Tuteur is a professor of medicine at Washington University School of Medicine, the director of the pulmonary function laboratory at Washington University School of Medicine in Barnes Jewish Hospital and is board certified in internal medical and pulmonary disease. (EX4 at 21-23). Mr. Burnett provided his employment history from 1968 to 2005 advising that he left Cook Coal when he became disabled from a back injury. (EX4 at 1). He provided a two year smoking history while in the military. *Id.* He stated he was able to walk a ½ mile and climb two flights of stairs before breathlessness required him to stop. *Id.* He provided a medical history of breathlessness, coughing, wheezing, hepatitis C, GERD, obesity, and sleep apnea. *Id.* On examination, the chest revealed full, equal and synchronous expansion. (EX4 at 2). The breath sounds were normal. *Id.* There was no prolongation of expiration or adventitious sounds or late inspiratory crackles present. *Id.*

Dr. Tuteur examined Petitioner, took compete pulmonary function testing, and obtained a chest x-ray and a CT scan. (EX12 at 6). Although Dr. Tuteur was not a B-reader, he explained that part of his training to be a board certified pulmonologist included training on how to read chest x-rays. (EX12 at 6-7). Dr. Tuteur read the chest film as negative for pneumoconiosis at a 0/0 ILO classification level. (EX12 at 7). In addition to Dr. Tuteur's reading, the film was reviewed by Dr. Sonavane and Dr. Friedman at Washington University. (EX4 at 8). Neither physician diagnosed coal workers' pneumoconiosis. (EX4 at 8). Dr. Cohen reviewed the film and found it positive for pneumoconiosis at a 1/0 ILO classification level. (PE4). Dr. Meyer read the film and found no evidence of pneumoconiosis. (RE2 at 3-4).

Dr. Tuteur also obtained a CT scan explaining that the CT scan had greater resolution and could give more information concerning the lung parenchyma, which was the point in question. (EX12 at 8). He personally reviewed the CT scan felt there were no parenchymal abnormalities (EX12 at 8-9) and found no changes consistent with coal workers' pneumoconiosis. (EX4 at 10). Dr. Bhalla, who is a board certified radiologist and head of the chest section at the Mallinckrodt Institute of Radiology at Barnes Jewish (EX12 at 9) reviewed the

[7] According to the American Board of Medical Specialities website, Dr. Kelly is board certified in internal medicine, critical care medicine and pulmonary disease.

film and, after comparing it with the x-ray, found no evidence of interstitial lung disease or changes of coal workers' pneumoconiosis or silicosis. (EX4 at 10-11).

Dr. Tuteur explained that normal spirometry was between 80 - 120% of predicted. (EX12 at 11). Petitioner's spirometry was better than normal. (EX4 at 2). The MVV and other assessments of ventilatory function were normal. *Id.* The lung volumes were normal. *Id.* There was no significant improvement following bronchodilator, however, the pre-bronchodilator values had an FEV1 of 137% of predicted and an FVC of 115% of predicted. (EX4 at 2-3). Post-bronchodilator values found the FEV1 at 141% of predicted and the FVC at 130% of predicted. (EX4 at 14). At rest there was mild impairment of oxygen gas exchange, however, during exercise the arterial oxygen tension improved to 84. (EX4 at 3). This was a normal response and a normal value. *Id.* Petitioner's spirometry was better than normal because Petitioner's FEV1 was 137% of predicted. (EX12 at 11). The only abnormality found was consistent with obesity and was not consistent with pneumoconiosis which was an irreversible process. *Id.*

Dr. Tuteur opined that with reasonable medical certainty, Mr. Burnett did not have coal workers' pneumoconiosis or any other coal mine environment or dust-related disease process of the lung. (EX12 at 12). Petitioner had no significant impairment of pulmonary function. *Id.* Mr. Burnett did not have any occupational disease related to coal dust exposure. (EX12 at 12-13). Based on the pulmonary function studies and the totality of available medical data, Petitioner had the pulmonary capability to return to his previous job as a mechanic at Cook Coal Terminal. (EX12 at 13). He had no pulmonary disability that would prevent him from returning to employment as a mechanic at the facility. *Id.*

Mr. Burnett left the mine in 2005; five years later he had no radiographic or physiologic evidence to suggest the presence of coal workers' pneumoconiosis. *Id.* Therefore, with reasonable medical certainty, the absence of CWP noted in 2005 would be expected to remain as such in 2010 and beyond. (EX12 at 28-29). If a coal miner had no radiographic evidence of CWP on his last day he worked in the mine and did have evidence consistent with a CT scan taken five years later, more likely than not he would have radiographic evidence two years after he left the mine. (EX12 at 29). Neither Dr. Tuteur, nor Dr. Bhalla found evidence of coal workers' pneumoconiosis on the CT scan taken five years after Petitioner's last date of exposure. Dr. Cristopher Meyer reviewed the October 28, 2010 CT scan at Employer's request and found the film negative for coal workers' pneumoconiosis. (RE2 at 7-8).

Petitioner was examined by Dr. William Houser at the request of his attorney on May 3, 2011. (PE1 at 41). Dr. Houser is board certified in internal medicine, pulmonary disease and critical care medicine and was the Medical Director of the Respiratory Care Department at Deaconess Hospital. (PE1 at 38-39). Petitioner complained of shortness of breath and exertional dyspnea and advised that he was only able to walk about two blocks. (PE1 at 41). He also complained of occasional cough and sputum production. *Id.* He stated his symptoms were aggravated by exposure to cold air and dust caused him to cough. *Id.* He advised of a smoking history of 2 years from age 22 to 24. *Id.* Petitioner provided an occupational history including his employment for American Electric Power advising that he performed maintenance and welding where he worked in the tunnels and was regularly exposed to coal dust. *Id.*

During Dr. Houser's examination, Petitioner's chest was clear to percussion. (PE1 at 42). Auscultation of the chest was clear with no rales, wheezing, rhonchi, pleural rub or bronchial breath sounds noted. *Id.* Dr. Houser performed spirometry which he interpreted as normal. *Id.* The FEV1 was 107% of predicted and the FVC was 98% of predicted. (PE1 at 43). Dr. Houser was also provided with Dr. Alexander's reports for the films dated March 15, 2009 and June 1, 2011. (PE1 at 42). Dr. Houser diagnosed CWP, hypertension, hyperlipidemia, obesity, and gastroesophageal reflux. *Id.* He recommended Petitioner avoid additional exposures to coal dust, rock dust and welding fumes. *Id.*

Dr. Houser did not take a chest x-ray as part of his examination and did not personally review either the 2009 or 2011 chest film. (PE1 at 20). His diagnosis of pneumoconiosis was based on Dr. Alexander's interpretation of the films and Mr. Burnett's 26 years of exposure. *Id.* Dr. Houser was not provided with copies of any other readings of the 2009 or 2011 films. *Id.* He stated that if four other dually-qualified B-readers and board certified radiologists read the film as negative for CWP, it would not change his opinion because he already made his opinion. (PE1 at 20-21). Dr. Houser agreed there were times in the past that he personally reviewed chest films read by Dr. Alexander and Dr. Houser's review of the film was different from that of Dr. Alexander. (PE1 at 21). Petitioner's spirometry was well within the range of normal. (PE1 at 21). Strictly from a respiratory standpoint, Petitioner had the pulmonary capability to work as a coal miner. (PE1 at 21-22). The only reason Dr. Houser recommended Petitioner refrain from exposure to coal dust was the diagnosis of pneumoconiosis. (PE1 at 22).

Dr. Houser did not review any of Petitioner's medical records. (PE1 at 22). Dr. Houser stated that even the so-called "safe dust standards" did not prevent disease in all cases and there was really no answer as to what level of respirable coal dust was necessary to cause CWP. *Id.* The current estimate of an acceptable level was 2 milligrams per cubic meter. (PE1 at 23). If a mine had a level substantially lower than 2 milligrams it would lower the risk of developing CWP. *Id.* Dr. Houser was not familiar with Cook Coal Terminal and never visited the facility. (PE1 at 24). His report stated that Mr. Burnett worked in the tunnels and was regularly exposed to coal dust but Dr. Houser was not sure he could give a definite answer as to what the tunnels were. (PE1 at 24-25). He did know that the coal terminal was basically a storage facility where coal was loaded onto barges and sent down the Ohio River. (PE1 at 25). He stated that Petitioner worked in maintenance. (PE1 at 25). Dr. Houser agreed that if a conveyor was not operating when it was being fixed, it would lower Petitioner's exposure to coal dust. *Id.* If the area was watered down before maintenance was started, it would also temporarily lower the exposure to coal dust. *Id.* Dr. Houser agreed that none of the testing conclusively showed Petitioner experienced a loss of lung function due to coal dust exposure. *Id.*

Conclusions of Law:

Section 6(c): The Occupational Disease Act requires an employee to file a claim for benefits within three years of the last date of exposure. 820 ILCS 310/6(c). Claims for pneumoconiosis must be filed within five years of Employee's last date of exposure. *Id.* Petitioner's last date of exposure was on June 21, 2005. Petitioner's claim was filed on April 6, 2009. Petitioner's claim is only valid for coal workers' pneumoconiosis. See, *Carter v. Old Ben Coal Company*, 11-IWCC-0469 (May 11, 2011) and *Holder v. Consolidation Coal Company*, 07-IWCC-1413 (Oct. 1, 2007).

Sections 1(e) and 1(f): The Occupational Disease Act requires the employee to prove he was disabled within two years of his last date of exposure. 820 ILCS 310/1(f). Disablement is defined under the Act as an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment. 820 ILCS 310/1(e). Petitioner's last date of exposure was June 21, 2005. Therefore, pursuant to Sections 1(e), and 1(f), Petitioner must show that he was disabled from coal workers' pneumoconiosis prior to June 21, 2007.

There is no evidence in the record supporting a diagnosis of coal workers' pneumoconiosis prior to June 21, 2007. The arbitrator resolves the conflicting evidence from 2008 to 2011 in favor of Employer. While Dr. Alexander and Dr. Cohen read chest films from 2008 to 2011 as positive for coal workers' pneumoconiosis, the chest film interpretations from Petitioner's medical records for that same period had findings of clear lungs which were consistent with the findings of Employer's radiological experts, who were similarly or higher

qualified as professors of radiology, than Dr. Cohen or Dr. Alexander. Further, none of the interpretations for the October 28, 2010 CT scan found evidence of coal workers' pneumoconiosis.

While Dr. Houser diagnosed pneumoconiosis following his 2011 examination, Dr. Houser never personally reviewed any chest film and only diagnosed coal workers' pneumoconiosis based on Dr. Alexander's reports. Dr. Houser conceded that he had, in the past, disagreed with Dr. Alexander's findings. Therefore, Dr. Houser's continued reliance on Dr. Alexander's interpretation, in light of four other readings with contrary results, without ever personally reviewing the film or even reviewing Petitioner's medical records, which contained numerous, unbiased chest x-ray interpretations, was unreasonable.

Dr. Houser's opinion was further undermined by the findings of Dr. Keith Kelly who examined Petitioner on October 16, 2009 at the request of Petitioner's treating physician, Dr. Mae Fischer. Dr. Kelly reviewed the chest film, pulmonary function testing and arterial blood gas testing and found Petitioner did not have coal workers' pneumoconiosis. Dr. Kelly's opinion was supported by the findings of Dr. Tuteur as well as the reports of Dr. Wiot, Dr. Meyer, Dr. Shipley, Dr. Seaman, Dr. Sonavane, Dr. Friedman and Dr. Bhalla. Dr. Kelly's opinion was further supported by the chest x-ray interpretations found in Petitioner's medical records that ranged from 1989 to 2013, and found no evidence of coal workers' pneumoconiosis.

The preponderance of the evidence fails to support a finding that Petitioner has pneumoconiosis or that he was disabled by the condition within two years of his last date of exposure. Therefore, benefits are denied and the remaining issues are moot.

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

Robert Pevril,
Petitioner,
vs.
John H Stroger Jr Hospital,
Respondent,

NO: 09WC52079

16IWCC0500

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the respondent & petitioner, herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 5, 2015, is hereby affirmed and adopted.

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

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

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: JUL 29 2016
MJB/bm
o-7/26/16
052

Michael J. Brennan

Kevin W. Lamborn

David Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PEVRIL, ROBERT
Employee/Petitioner

Case# **09WC052079**

JOHN H STROGER JR HOSPITAL OF COOK COUNTY
Employer/Respondent

16IWCC0500

On 11/5/2015, 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 0.28% 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:

0533 ROSS TYRRELL LTD
111 W WASHINGTON ST
SUITE 1120
CHICAGO, IL 60602

0132 STATES ATTORNEY OF COOK COUNTY
STEPHEN L GARCIA
500 RICHARD J DALEY CENTER
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
REVISED ARBITRATION DECISION BASED ON COMMISSION REMAND ORDER

Robert Pevril
Employee/Petitioner

v.

John H. Stroger, Jr. Hospital of Cook County
Employer/Respondent

Case # **09** WC **52079**

Consolidated cases: **D/N/A**

16IWCC0500

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **12/04/2012**. The Arbitrator previously issued a decision in this case on December 27, 2012, with the Commission affirming and adopting the decision on December 11, 2013. Petitioner filed a Circuit Court review thereafter, with the Circuit Court reversing the Commission and remanding. On May 28, 2015, the Commission reversed its previous decision and remanded the case to the Arbitrator with directions. The Arbitrator has taken no additional evidence, noting the Commission's finding as to the adequacy of the existing arbitration record. The Arbitrator adopts the Commission's implied findings as to credibility and accident and makes additional findings as directed by the Commission. Those findings are attached hereto.

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 _____

16IWCC0500

FINDINGS

On **10/22/2009**, 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 the claimed accident *was* given to Respondent. Arb Exh 1.

In the year preceding the injury, Petitioner earned $**61,127.56**; the average weekly wage was $**1,175.23**.

On the date of the claimed accident, Petitioner was **39** years of age, ***married*** with **1** dependent child.

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

The Arbitrator adopts the Commission's implied findings that Petitioner was credible and sustained an accident arising out of and in the course of his employment on October 22, 2009.

The Arbitrator finds that the accident resulted in a temporary aggravation of a significant, pre-existing spinal condition of ill-being, with that aggravation resolving as of April 17, 2010. The Arbitrator finds that Petitioner was temporarily totally disabled from October 23, 2009 through April 17, 2010, a period of 25 2/7weeks, and awards temporary total disability benefits at the rate of $783.48 per week during that period. The Arbitrator further awards any claimed medical expenses for treatment rendered from October 22, 2009 through April 17, 2010 (PX 1), subject to the fee schedule. The Arbitrator awards no permanency benefits.

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.

Molly C Mason

Signature of Arbitrator

11/5/15
Date

NOV 5 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Pevril,

Petitioner,

vs.

No. 09 WC 52079

John H. Stroger, Jr. Hospital of Cook County,

Respondent.

16IWCC0500

ARBITRATOR'S REVISED DECISION ON REMAND FROM COMMISSION

Procedural History

The Arbitrator originally heard this case on December 4, 2012. At that hearing, the parties placed the following issues in dispute: accident, causal connection, medical services, temporary total disability and nature and extent of the injury. Petitioner testified as did his former co-worker, Raeesa Ali. Petitioner called Ali to testify on his behalf. No witnesses testified on behalf of Respondent.

On December 27, 2012, the Arbitrator issued a decision finding that Petitioner was not credible and failed to prove a compensable work accident. The Arbitrator found the remaining disputed issues to be moot and denied compensation.

Petitioner filed a Petition for Review. The Commission heard oral arguments on December 5, 2013. On December 11, 2013, the Commission issued a Decision and Opinion on Review affirming and adopting the Decision of the Arbitrator.

Petitioner filed a Circuit Court review thereafter. On September 30, 2014, the Circuit Court issued an order finding that the Commission's decision was against the manifest weight of the evidence. The Circuit Court reversed the Commission and remanded the case, utilizing the following language:

> "The Arbitrator's decision finding Plaintiff's [sic] testimony not credible and that Plaintiff [sic] failed to prove a compensable work accident occurred, is against the manifest weight of the evidence. The Arbitrator did not address the remaining issues as she found them moot. The Board [sic] affirmed and adopted the Arbitrator's decision. Therefore, the Court reverses the Board's [sic] decision and remands it for further determination of the remaining issues."

On May 28, 2015, the Commission issued a Decision and Opinion on Remand, reversing its previous decision and "remand[ing] the matter back to the Arbitrator to address all outstanding issues regarding Petitioner's claim." The Commission noted that, while the Arbitrator "did not address certain issues in her decision due to her finding of no accident . . . evidence was taken at arbitration regarding the issues of accident, causal connection, temporary total disability benefits, medical expenses and permanent disability benefits." The Commission found the existing arbitration record "sufficient to

address any and all outstanding issues" but "nonetheless . . . remand[ed] the matter back to the Arbitrator as ordered by the Circuit Court."

The Arbitrator respectfully disagrees with the Commission's interpretation of the Circuit Court's directive. The Circuit Court did not order the Commission to send the case back to the Arbitrator. The Circuit Court remanded the case for further determination of the remaining issues. If the existing arbitration record is sufficient to resolve those issues, as the Commission concedes, it should be the Commission that resolves them. To simply "reverse" and send the case back to an arbitrator who found the claimant not credible as to accident and other matters, with directions to make new findings based on the existing record, undermines the arbitrator's role in the decision-making process. For the Arbitrator, everything in this case hinged on whether Petitioner's account of his pre-accident state of health and the mechanics of his claimed accident was to be believed. Petitioner's account as to the former was undermined by his own medical records and his account as to the latter was undermined by the credible testimony of his own witness.

The Arbitrator interprets the Commission's "reversal" as meaning that it has found Petitioner to be credible and to have proved a compensable lifting-related accident of October 22, 2009, based on the Circuit Court's reasoning and decision. The Arbitrator adopts those implied findings. The Arbitrator further finds that the accident resulted in a temporary aggravation of a significantly disabling pre-existing spinal condition for which Petitioner was actively treating (with Dr. Candido) as of the accident, with that aggravation ending as of April 17, 2010, the date on which Dr. Melnick noted that Petitioner reported having made a "dry run" at working (for some employer other than Respondent) and requested a formal release to work with no restrictions. Dr. Melnick complied with this request. PX 4, pp. 53-54. The Arbitrator views the need for the treatment that occurred after April 17, 2010 as stemming from the pre-accident thoracic spine condition and/or the post-accident fall of June 23, 2010 and lifting incident of October 23, 2010.

In so finding, the Arbitrator relies on the following: 1) the pre-accident records, which show that Petitioner was regularly taking Hydrocodone and undergoing active treatment for spinal and radicular pain, with that treatment including medical branch blocks administered on October 6, 2009, about two weeks before the accident; 2) the radiographic studies performed at Advocate Lutheran General Hospital on October 23, 2009, which showed no disruption of the previous fusion and no new structural injury, according to both the radiologist, Dr. Geremia, and orthopedist, Dr. Spencer (PX 3); and 3) Dr. Melnick's December 6, 2009 characterization of the work accident as "an acute episode of mid-back pain on top of a picture of chronic radicular thoracic pain" (PX 3, p. 30). On December 29, 2009, Dr. Davis interpreted another study as showing an annular tear that "might be new" but he did not believe this tear was the cause of Petitioner's symptoms. The Arbitrator assigns no weight to the causation-related opinions of Petitioner's examiner, Dr. Chmell, since the doctor based those opinions on the assumption that Petitioner's pain syndrome was "under control" and Petitioner was "doing well" before the work accident. PX 7. That assumption is belied by the pre-accident records (PX 5) and Petitioner's admission that the treatment Dr. Candido provided before the work accident resulted only in "so-so" relief of his chronic pain.

In accordance with the foregoing, the Arbitrator finds that Petitioner was temporarily totally disabled from October 23, 2009 through April 17, 2010, a period of 25 2/7 weeks, and that Petitioner is entitled to the claimed medical expenses in PX 1 relating to the treatment rendered from October 22, 2009 through April 17, 2010, subject to the fee schedule. A print-out in PX 1 makes clear that some or

all of these expenses were paid by Blue Cross Blue Shield, Petitioner's wife's group carrier. Respondent did not claim, and is not entitled to, Section 8(j) credit for any such payments.

Having previously found that the accident caused only a temporary aggravation that resolved, the Arbitrator declines to award any permanency benefits.

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DOUGLAS NIEMERG,
Petitioner,

vs.

NO. 10 WC 2407

STATE OF ILLINOIS DEPT. OF CLAIMS,
Respondent.

ORDER

This matter comes before the Commission pursuant to its Notice of Return Date on Review, Requiring Petitioner's Appearance and Authenticated Transcript.

On June 23, 2015 a Petition for Review was filed on behalf of Petitioner. A return date on review was set for September 4, 2015. The authenticated transcript was not received by this date. This matter was set with Notice to all parties on the Commission's own Motion for Rule to Show Cause on October 15, 2015. The Petitioner failing to appear, this matter was entered and continued on the Commissions own motion to November 5, 2015. The Petitioner did not appear at the second setting. The Commission has not received the authenticated transcript

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review of the Arbitrator's Decision is Dismissed for Want of Prosecution.

AUG 4 - 2016

DATED:

APPROVED BY AUTHORITY OF THE
ILLINOIS WORKERS' COMPENSATION COMMISSION
pursuant to the provisions of the
Workers' Compensation and Workers'
Occupational Diseases Acts

JUL 28 2016

By: Kevin W. Lamborn, Commissioner

Kevin Lamborn
Commissioner

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ 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

CYNTHIA KETRING,

Petitioner,

vs.

NO: 10 WC 5172
10 WC 5257

SOUTHERN ILLINOIS UNIV. /
STATE OF ILLINOIS,

16IWCC0568

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of "Reinstatement" and being advised of the facts and law, affirms the Decision of the Arbitrator.

On July 17, 2015, a hearing was held before Arbitrator Nowak on Petitioner's Motion to Reinstate. The Motion to Reinstate had been timely filed on August 21, 2013, but it had not been noticed for hearing until March 2015. The Arbitrator found that this delay was due, in part, to the transition in southern Illinois with arbitrator assignments and that the delay in noticing the motion for hearing was reasonable under the circumstances. The Commission affirms the Arbitrator's decision to reinstate.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator to reinstate is hereby affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that the cases be remanded to the Arbitrator and returned to the docket for further proceedings.

DATED: AUG 3 1 2016

Charles J. DeVriendt

Ruth W. White

Stephen Mathis

SE/
O: 8/15/16
49

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

☒ 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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Darrick McMillion,
Petitioner,

vs.

NO: 10 WC 26985,
13 WC 13535

University of Illinois,
Respondent.

16IWCC0545

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, temporary total disability, permanent partial disabiliity, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 10, 2015 is hereby affirmed and adopted.

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: AUG 19 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-08/15/16
jdl-wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McMILLION, DARRICK
Employee/Petitioner

Case# **10WC026985**

13WC013535

UNIVERSITY OF ILLINOIS
Employer/Respondent

16IWCC0545

On 6/10/2015, 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 0.08% 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:

2333 WOODRUFF JOHNSON & PALERMO
RUSSELL HAUGEN
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

0734 HEYL ROYSTER VOELKER & ALLEN
JOSEPH GUYETTE
102 E MAIN ST SUITE 300
URBANA, IL 61801

1073 UNIVERSITY OF ILLINOIS
100 TRADE CENTER DR
SUITE 103
CHAMPAIGN, IL 61820

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 10 2015

RONALD A. RAGGIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

☐ 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

DARRICK MCMILLION
Employee/Petitioner

Case # 10 WC 26985

v.

Consolidated cases: 13 WC 13535

UNIVERSITY OF ILLINOIS
Employer/Respondent

16IWCC0545

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 Molly Dearing**, Arbitrator of the Commission, in the city of **Urbana**, on **April 9, 2015**. 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 _____

16IWCC0545

FINDINGS

On **June 21, 2010** and **January 2, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***were*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to either of these accidents.

In the year preceding the injuries, Petitioner earned **$30,466.80**; the average weekly wage was **$585.90**.

On the June 21, 2010 date of accident, Petitioner was **35** years of age, ***single*** with **1** dependent child.
On the January 2, 2013 date of accident, Petitioner was **39** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$0** 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 for **any** medical bills paid under Section 8(j) of the Act.

ORDER

Because Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries that arose out of and in the course of his employment on either June 21, 2010 or January 2, 2013, and that his current condition of ill-being is causally related to his employment, all benefits are denied.

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

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

Arbitrator Molly Dearing

June 8, 2015
Date

JUN 10 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DARRICK MCMILLION
Employee/Petitioner

v.

Case Nos. 10 WC 26985
13 WC 13535

UNIVERSITY OF ILLINOIS
Employer/Respondent

16IWCC0545

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner alleges that he sustained injuries of bilateral carpal tunnel syndrome arising out of and in the course of his employment with Respondent on June 21, 2010 and January 2, 2013. Arb. X 3, 4. On those dates of accident, Petitioner was thirty-five and thirty-nine years of age, respectively, and employed by Respondent as a Food Sanitation Laborer. He has been employed in that capacity for approximately nineteen years. As a Food Sanitation Laborer, Petitioner testified that his daily work activities include "sweeping, mopping, cleaning grills, pots and pans, loading and unloading machines, taking stuff out of the freezer, refrigerator, store room and any other duties needed." He explained that "[s]weeping and mopping entails, I guess using a push broom, a mop, you know, mopping with your wrist motion repetitively left and right, in and out, pushing with the broom, maybe pushing with the mop, pulling to you, squeegeeing the same way." Petitioner utilizes a scratch pad, soap, and brushes to clean dishes, utensils and pots and pans, which requires pushing and pulling motions, before loading them into the washing machine, as well as a scraper to clean the grills and a "high pressure hose" to remove food and residue from dishes, pots, and pans. Petitioner testified that pots and pans vary in weight from one to twenty pounds.

Petitioner testified that his job duties have remained consistent over his career for Respondent, though he stated that approximately five years ago, he moved to a new building, Ikenberry, where "we feed three times the people that we previously fed or had to clean up behind, so that probably changed a little." He explained that Ikenberry has "six, seven stations, maybe eight. So, you are feeding where you might have fed 7 or 800 over there now you might feed 1,500, 2,000 and clean up behind them. So that's many more pots, many more pans, more grills, more cardboard, more garbage." He acknowledged that Ikenberry has "a little more high tech" equipment than the previous facility and that there are more cooks, kitchen laborers, and student helpers to assist in the work. Petitioner testified that one additional kitchen laborer is present in the morning, and three or four in the afternoon. Petitioner testified that the "pot room" proves most problematic for his bilateral hand condition because kitchen laborers utilize a spray hose that he stated causes "carpal tunnel issues". He testified that prior to transferring to Ikenberry facility, he was not frequently assigned to the pot room, though he decided "to be in there [pot room] more since we went to Ikenberry." Petitioner testified that he previously rotated amongst

different stations, and he acknowledged that he may be assigned to a different station in the kitchen and perform different work duties in increments of every one to two weeks.

Petitioner testified that in August 2009, he suffered a laceration to his right hand resultant from an accident unrelated to his employment with Respondent in which a light fixture fell onto his right hand. On August 23, 2009, Petitioner presented to the Emergency Room at Provena Covenant Medical Center with a five-centimeter laceration over the dorsal aspect of his right hand and an extensor tendon injury. He was referred to Dr. Clifford Johnson for further treatment. PX 3. On August 26, 2009, Petitioner underwent a repair of the laceration of the right index extensor with Dr. Johnson. He returned to Dr. Johnson for care following that procedure and underwent a course of therapy post-operatively beginning on September 15, 2009. PX 2, 4. Petitioner testified that he underwent extensive physical therapy as part of his recovery from his right hand laceration. Specifically, Petitioner testified that he spent a significant amount of time in physical therapy gripping putty and rubber balls to build the strength in his injured hand. Petitioner testified that he experienced symptoms of carpal tunnel syndrome while he was off of work recovering from his right hand laceration, and he acknowledged that the exercises he performed during physical therapy likely aggravated the carpal tunnel symptoms in his right hand. He testified that he primarily utilized his left hand for activities of daily living while recovering from the laceration as all of the exercises in physical therapy involved his right hand.

Petitioner completed eighteen physical therapy sessions at Christie Clinic, which were supplemented by a home exercise program. At Petitioner's initial evaluation on September 15, 2009, the physical therapist noted no complaints of numbness and tingling complaints in either hand. On December 31, 2009, Petitioner complained of numbness and tingling in the first and fifth fingers of his right hand. Petitioner was provided with another therapy ball to use for continued strengthening exercises at that therapy visit. PX 4. On January 4, 2010, Petitioner presented to Dr. Johnson and complained of pain at night that awakes him from sleep. He also complained of "tenderness and pain in full digital flexion in combination with wrist flexion (composite flexion)." Dr. Johnson recommended that Petitioner continue with his course of physical therapy. PX 2. On February 4, 2010, Petitioner reported during physical therapy that his right hand felt weak, and he was experiencing "some sensation changes" as well as pain in his right hand occasionally waking him at night. He denied numbness or tingling. Petitioner was provided a Thera-Bar for "more intense strengthening exercises with the hand and wrist." PX 4.

On February 15, 2010, Petitioner returned to Dr. Johnson with ongoing pain in his right hand and wrist. Dr. Johnson recommended that Petitioner undergo a functional capacity evaluation "to determine the degree of disability, the veracity of the disability and ultimately assign permanent work ability." On April 1, 2010, Petitioner underwent a functional capacity evaluation at Carle Therapy Services. During that evaluation, Petitioner reported fatigue in his arms with wrist weakness and pain, as well as "a tingle in the right wrist" after therapy activities. He was observed opening and closing his fist and rolling his right wrist after activity. Petitioner was able to perform all functions of his job description with the exception of floor to waist lift of sixty pounds. He was recommended to get assistance with lifting more than fifty pounds. Petitioner returned to Dr. Johnson on April 6, 2010 and after reviewing the functional capacity evaluation, Dr. Johnson determined that

Petitioner could return to work with assistance of lifting weights greater than fifty pounds. Petitioner was instructed to return on an as needed basis. PX 2.

After he was released from treatment regarding his right hand laceration by Dr. Johnson on April 6, 2010, Petitioner testified that he returned to work for Respondent with restrictions performing the same duties as before the laceration with the exception of being assigned to the pot room, and that his bilateral hand symptomatology significantly increased "a little while after" he returned to work. He stated that he began to experience symptoms after the first month of his return, and explained that "[f]or a month I was probably on the floor in the dish room because the pot room is the hardest place in the place really because you are constantly spraying with a hose that, like I said it's a pressure hose." Petitioner acknowledged experiencing symptoms in both hands prior to 2010, but he testified that upon returning to work in April 2010, the symptoms in both his hands gradually worsened.

On May 30, 2010, Petitioner presented to James Blatzer, PA-C, at Christie Clinic and complained of right hand pain "over the dorsal aspect where he had surgery. He apparently had trauma several months ago and had some tendons severed. He just finished physical therapy I believe in February this year. He is also complaining of pain on the volar aspect of the forearm around the radial carpal joint." Mr. Blatzer diagnosed him with right hand and wrist tendinitis, and prescribed him medication. He was instructed to follow up with Dr. Ho, his primary care physician, if his symptoms did not improve. PX 4.

On June 15, 2010, Petitioner returned to Dr. Johnson and complained of numbness in his right hand and fingers exacerbated by "repetitive motion of the hand at work." Dr. Johnson diagnosed carpal tunnel syndrome and ordered electrodiagnostic testing. An electromyography on June 16, 2010 revealed moderate bilateral carpal tunnel syndrome, slightly greater on the right than the left. On June 21, 2010, Petitioner returned to Dr. Johnson and reported that his symptoms remained the same despite utilizing splints. Dr. Johnson diagnosed him with bilateral carpal tunnel syndrome without evidence of permanent nerve injury. Petitioner inquired "as to the relatedness to his other injury. I do not believe that they are related." Dr. Johnson recommended treatment by way of surgical intervention. PX 2.

Petitioner testified that after learning of his bilateral carpal tunnel diagnosis on June 21, 2010, he completed an accident report with Respondent. On the report dated June 27, 2010, Petitioner indicated that the injury occurred "over time" and that he reported it to Tina Davis after leaving his doctor's appointment on June 21, 2010. RX 8.

On August 6, 2010, Petitioner presented to Dr. Ho for a discussion of surgery. "Patient injured his right hand on the dorsum...The doctor at Carle did the surgery, Dr. ? Johnson who believed that the injury was not related to work and that is true...In fact, patient underwent an EMG by Carle and he was told that he had bilateral carpal tunnel syndrome. Which was through to be secondary to his work the University housing project for the last 12 years." Dr. Ho noted that there was a "[q]uestion of work comp" and bilateral carpal tunnel syndrome. Dr. Ho referred him to Occupational Health. PX 5. Petitioner returned to Dr. Ho one week later, at which time Dr. Ho noted that "[t]he work situation of the right hand is getting more and more complex to me. Last time it was thought that it was work comp so he saw me. It turned out that it was not work comp now,

so he was not seen at Occupational Health." Petitioner reported that he did not believe he was capable of working with more than thirty pounds by himself, for which Dr. Ho imposed a medical work restriction of no lifting more than thirty pounds alone, right hand, and more than fifty pounds with co-worker assistance. PX 6.

On November 12, 2010, Petitioner returned to Dr. Ho and complained of pain "at both wrists since today. Still working at the kitchen at the university housing." Dr. Ho provided him wrist splints for the right wrist. PX 6.

On June 30, 2011, Petitioner underwent an electromyography/nerve conduction velocity test for finger and hand numbness upon referral by Dr. Ho, which revealed moderate bilateral carpal tunnel syndrome. On December 22, 2011, Petitioner returned to Dr. Ho for a "[s]ix month recheck regarding hypertension and FMLA form for history of hand injury and CTS. Doing well but gaining weight." PX 7.

On December 3, 2012, Petitioner presented to Dr. Ho with complaints of "right hand pain that has been going on and off intermittently for the last 2 years. He had a laceration on the dorsum of the hand more than 2 years ago and since that time has been having pain in his hands with weakness and numbness in the tips of the fingers. He also has been having low back pain that radiates down the right leg from time to time." Dr. Ho assessed probable carpal tunnel syndrome relative to his right hand pain for which he prescribed Motrin and referred him for an orthopedic evaluation. On December 10, 2012, Dr. Ho removed Petitioner from work for one week relative to his low back pain, after which time Dr. Ho allowed him to resume work activities with no flexion, pushing, pulling or lifting more than five pounds. PX 7.

On December 21, 2012, Petitioner presented to Brian Shore, PA-C, at Christie Clinic Department of Orthopedics, and reported "that he had an injury to his hand in 2010 and had surgery with Dr. Johnson for a lacerated extensor tendon. Patient states that over the course of the last year and a half he has been noticing numbness and tingling occurring in his hand, mostly located in his first through third fingers. He states that as a result he has been having weakness and dropping objects." Mr. Shore assessed right hand carpal tunnel syndrome and possible left hand carpal tunnel syndrome, and accordingly ordered Petitioner to undergo bilateral electrodiagnostic testing. Electrodiagnostic testing of January 2, 2013 revealed moderately severe bilateral carpal tunnel syndrome. PX 7.

On January 3, 2013, Petitioner presented to Dr. Ho for completion of a FMLA form "as I signed it last year and the year before because of the injury at the right hand that he cannot lift anything heavier than 25 pounds. That injury of the hand was about 2 years ago. Patient is doing well otherwise." PX 7.

Petitioner returned to Mr. Shore on January 9, 2013 with continued complaints of numbness and tingling, and pain in his hands. Petitioner was unable to qualify which hand was worse, and instead indicated they felt about the same and varied with activities. Mr. Shore diagnosed Petitioner with bilateral carpal tunnel syndrome and recommended surgical intervention. PX 7.

On April 24, 2013, Petitioner underwent a left carpal tunnel release and a right carpal tunnel release on June 12, 2013 with Dr. Daniel Dethmers. PX 7. Petitioner followed-up

with Dr. Dethmers and underwent physical therapy post-operatively. PX 7. On August 13, 2013, Petitioner returned to Mr. Shore and reported difficulty tolerating lifting fifteen pounds. Mr. Shore stated that, "I do not feel this patient has any functional limitations. I understand that he continues to have pain and even some numbness in his fingers. However I feel with customary use of the CMC should be able to regain his strength and to work with no restrictions." Petitioner was allowed to resume work without restrictions on that date and released to return as needed. PX 7. Petitioner testified that he felt unable to return to his prior work duties because of a lack of strength in his hands. He stated that, "I was still feeling, I guess the effects of the surgeries and I didn't feel I was capable of doing everything that was going to be required of me when I returned."

Petitioner presented to Dr. Ho on August 15, 2013. Petitioner reported that "the maximum that he can tolerate at PT is 15 pounds. Now he is supposed to return to work and seeing Brian Shore yesterday and Brian Shore signed for fulltime work and he is quite upset, saying that he cannot do fulltime work because at work the kitchen at the university requires more than 50 pounds of lifting. He is going back to PT to have some restriction." Dr. Ho and Petitioner "agreed with the restriction of 30 pounds that he can accommodate." Dr. Ho issued permanent restrictions in accordance with that agreement. PX 7.

Petitioner testified that he resumed his position as a Food Sanitation laborer and he presently earns at least the same pay as he did at the time of his alleged work accidents. Petitioner testified that his hands have improved, but he continues to suffer functional limitations. Petitioner testified that he presently requires assistance with lifting heavy items, like large bowls, and his diminished grip strength renders it difficult to open jars. He takes Tylenol and Ibuprofen for symptom relief, and he presents to Dr. Ho every three to six months, or more frequently as needed, for treatment of his bilateral hand condition.

A Position Description for a Food Service Sanitation Laborer was admitted into evidence. The duties and responsibilities enumerated therein include washing pots, pans and other kitchen equipment, washing, mopping and scrubbing dining service areas, washing and scraping dishes, transporting dining service supplies and equipment, cleaning equipment, assisting employees in heavy lifting, specially cleaning equipment, emptying trash, assisting with caterings and specialty restaurants, handling recycling units, working with various cleaning chemicals, and performing other related duties as assigned. RX 7. Petitioner testified that the job duties reflected on the Description accurately describe his job tasks.

Petitioner was examined by Dr. Jeffrey Coe on October 1, 2013 pursuant to Section 12 of the Act at his counsel's request. Dr. Coe is board certified in occupational medicine and practices same at Occupational Medicine Associates. On October 1, 2013, Petitioner reported to Dr. Coe performing "a number of activities, all of which required forceful gripping lifting, carrying, pushing and pulling. Mr. McMillion describes assignments to clean the kitchen and food preparation areas, sweep, most, empty garbage, stock and clean freezers, move boxes, break down boxes and lift mixing bowls and bowls of prepared food (weighing up to 50-pounds)." Dr. Coe reviewed Petitioner's treating records and conducted a physical examination, which revealed normal flexion bilaterally, normal extension bilaterally, normal radial deviation bilaterally, normal ulnar deviation bilaterally, negative Phalen signs bilaterally, equivocal Tinel signs bilaterally, and grossly intact sensation of the upper extremities. Dr. Coe assessed Petitioner with bilateral carpal tunnel syndrome and

opined that his "repetitive strain injuries were a factor causing the development" of that condition. He further opined that Petitioner has suffered permanent partial disability to both hands as a result of his repetitive strain injuries, and he recommended work restrictions of no lifting greater than thirty pounds. PX 1.

Dr. Coe testified at Arbitration by way of evidence deposition on November 14, 2014. Dr. Coe testified that Petitioner reported to him "that he carried out a number of different activities", including cleaning, sweeping, mopping, emptying garbage, stocking freezers and lifting mixing bowls and bowls of prepared food. Dr. Coe acknowledged that Petitioner's duties as a kitchen laborer involved a number of different tasks, but he maintained "they are all activities that do cause stress and strain on the upper extremities." Dr. Coe was aware that Petitioner was off work for a period of time as a result of a contusion laceration of his right hand. Dr. Coe testified that he would generally expect an employee's carpal tunnel symptoms to lessen while away from work if his or her work was indeed a causative factor in the development of the condition, though he explained that "[w]ith carpal tunnel syndrome there comes a point where even rest or remaining off work for a period f time doesn't fully eliminate the problem." He stated that Petitioner reported experiencing "[s]ome improvement while he was off work" and thereafter developed symptoms initially in his right hand over a period of a "few months" after he returned to work. Petitioner reported a long history of episodic bilateral hand tingling, cramping and turning, which "became increasingly severe over time as he continued to work at the kitchen laborer position." PX 1.

Dr. Coe opined that Petitioner's bilateral carpal tunnel syndrome was causally related to his work activities as a Food Sanitation Laborer for Respondent. In formulating his opinion, Dr. Coe explained that "the nature of the work that he carried out as a kitchen laborer for 40 hours a week at the University of Illinois was work that required repetitive and forceful use of both upper extremities. You'll recall that he described gripping, lifting, squeezing, moving materials of up to 50 pounds, sweeping, mopping, and carrying. So those activities as he related them to me throughout his workday are in my opinion factors that cause carpal tunnel syndrome." Dr. Coe acknowledged that Petitioner's obesity could have contributed to the development of his carpal tunnel syndrome and he recognized the possibility that Petitioner could have developed carpal tunnel syndrome he had not been working at all. Dr. Coe stated that the accuracy of his opinions was dependent upon the accuracy of Petitioner's reporting of his job duties and symptoms. PX 1.

Petitioner was examined by Dr. Nash Naam on December 6, 2010 pursuant to Section 12 of the Act upon the request of Respondent. Dr. Naam is board certified in hand surgery and has been practicing hand surgery exclusively since 1982. He treats approximately eight hundred to one thousand patients with carpal tunnel syndrome per year. On December 6, 2010, Petitioner reported to Dr. Naam that he sustained a deep laceration of the dorsal aspect of his right hand involving extensor tendons in August 2009 which was repaired and for which he remained off of work until April 2010 when he returned with a work restriction of no lifting greater than thirty five pounds. Petitioner stated that "almost immediately after he went back to work, he started to develop more symptoms involving both hands." Petitioner acknowledged experiencing symptoms that started "awhile ago", but he reported the same worsened significantly as of April 2010. Dr. Naam examined Petitioner at that time and requested additional medical records to review prior to

formulating his opinions concerning causation. RX 1. After receiving additional medical records, Dr. Naam issued a supplemental report on January 28, 2011. Dr. Naam opined that Petitioner's work activities were not causally related to his bilateral carpal tunnel syndrome. RX 2.

Dr. Naam testified at Arbitration by way of evidence deposition on May 10, 2011. Petitioner provided him a history of his job activities and specifically explained that "...he worked for the University of Illinois in the Food Sanitation Department, and he told me that his job required cleaning grills, cleaning pots and pans, mopping, sweeping, climbing, cleaning refrigerators and taking out the trash." Dr. Naam noted inconsistent effort with regard to strength testing. He testified that upon initial strength testing, Petitioner's strength registered forty four pounds, which Dr. Naam explained was "very clear that he was not giving us his maximum effort" as it did not result in a bell-shaped curve. On the second test on the right side, Petitioner's strength registered at eighty two pounds. Dr. Naam stated that, "I think you could say maybe the patient did not understand, give him the benefit of the doubt, or he was trying to impress us that he was having more problems. So I just had to talk to him as a mature adult and say come on you can do better than that. And he went from 44 pounds to 82 pounds and that represents the real strength." Dr. Naam ultimately agreed with the diagnosis of bilateral carpal tunnel syndrome. Dr. Naam concluded that based on the job description provided by Petitioner, his work activities were varied and did not involve the type of forceful grasping or repetitive flexion causative of carpal tunnel syndrome. Dr. Naam found the onset of Petitioner's symptomology significant, explaining that "when he went back to work he was actually on light duty so we was not doing a whole lot compared to before and so he was not exposed to that kind of work or the aggressive, any aggressive work for a long period of time, and that even indicates there is, it's highly unlikely there is any relationship between his work activities and his carpal tunnel syndrome." RX 3.

Petitioner was reexamined by Dr. Naam on February 13, 2014. Dr. Naam characterized the results of Dr. Dethmers' carpal tunnel releases as "excellent." Dr. Naam opined that Petitioner was able to resume his regular work activities without any restrictions, and he noted Petitioner's had normal grip strength bilaterally for his age and normal range of motion. Dr. Naam found "no justification whatsoever to put any restrictions on this patient." RX 5. On March 4, 2014, Dr. Naam issued a supplemental report, wherein he opines that Petitioner's job activities do not involve frequent forceful gripping, awkward positioning of his writs for extended periods of time, or exposure to vibrating tools or a cold environment. RX 6.

CONCLUSIONS OF LAW

In regard to disputed issues (C) and (F), given the commonality of facts and evidence relative to these issues, the Arbitrator addresses them jointly.

The Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries that arose out of and in the course of his employment with Respondent on either June 21, 2010 or January 2, 2013, and that his current condition of ill-being is causally related to his work duties. In so concluding with respect to his June 21, 2010 accident, the Arbitrator finds the onset of Petitioner's symptomatology significant, which, by virtue of

Petitioner's own testimony and treating records, occurred during a seven-month period in which Petitioner was not working for Respondent and was incited by exercises performed during physical therapy for an unrelated injury. Dr. Coe testified that he would generally anticipate a reduction in symptoms while an employee was away from work if his work was indeed a causative factor in the development of his condition. PX 1. Petitioner acknowledged that he experienced symptomatology relative to his carpal tunnel syndrome while he was off of work recovering from his right hand laceration, and he further acknowledged that the exercises he performed in physical therapy likely aggravated his right hand condition. Even though Dr. Coe stated that there a comes a point in time with carpal tunnel syndrome where rest or remaining off of work is not successful in reducing the symptomatology (PX 1), Petitioner's condition at that time was specifically noted to be moderate "without evidence of permanent nerve injury". PX 2. Further, while Petitioner reported to Dr. Naam that his symptoms worsened significantly "almost immediately" upon returning to work for Respondent in April 2010 and similarly testified that he began to develop symptomatology approximately one month after returning to work, the Arbitrator notes that Petitioner did not give a history of his job tasks or relate his complaints to work duties when he presented to Dr. Ho on May 30, 2010, and instead gave a history of his right hand tendon trauma, which further undermines the suggestion of a relationship between his work duties and his current bilateral hand condition. PX 4.

With respect to his alleged January 2, 2013 accident, the Arbitrator finds it probative of a lack of a causal connection between his work duties and his bilateral hand condition that his treating medical records reflect that Petitioner himself related his bilateral hand complaints to his prior right hand extensor tendon injury. On December 3, 2012, Petitioner presented to Dr. Ho with complaints of "right hand pain that has been going on and off intermittently for the last 2 years. He had a laceration on the dorsum of the hand more than 2 years ago and since that time has been having pain in his hands with weakness and numbness in the tips of the fingers." Similarly, on December 21, 2012, Petitioner presented to Physician's Assistant Shore and reported "that he had an injury to his hand in 2010 and had surgery with Dr. Johnson for a lacerated extensor tendon. Patient states that over the course of the last year and a half he has been noticing numbness and tingling occurring in his hand, mostly located in his first through third fingers. He states that as a result he has been having weakness and dropping objects." PX 7. The Arbitrator finds significant that Petitioner did not indicate his employment as a factor in the development of his symptomology or report any history of his job tasks in relation to same to his treating physicians at that time, though he was capable of doing so, given that he reported to Dr. Johnson on June 15, 2010 that the symptoms in his fingers were exacerbated by "repetitive motion of the hand at work." PX 2.

The Arbitrator finds that the continuity of similar symptomatology Petitioner experienced from the onset of his complaints in 2009 when removed from work through both of his alleged dates of accident further negates the suggestion of a causal relationship between his job duties and his current condition. In 2009 into 2010, while he was undergoing physical therapy for the unrelated right hand injury and not working for Respondent, Petitioner complained of intermittent numbness and tingling, weakness in his right hand, fatigue and weakness in both hands, and bilateral hand pain that awakes him at night, which the Arbitrator notes essentially remained unchanged after he returned to modified work for Respondent, as he reported on May 30, 2010 experiencing right hand

pain "over the dorsal aspect where he had surgery", numbness and tingling in his right hand and wrist on June 21, 2010 (PX 2, 4) and weakness in his right hand on December 21, 2012. PX 7.

Further, in concluding that Petitioner's current bilateral hand condition is unrelated to his work duties, the Arbitrator finds the opinions of Dr. Naam to be more persuasive than those of Dr. Coe in that they are more informed and well-founded in the record. The Arbitrator finds that Dr. Coe's opinions are based upon an erroneous understanding of the onset of Petitioner's symptomatology. Dr. Coe testified that it was his understanding that Petitioner's symptomatology began to develop when he returned to work for Respondent in April 2010 following the release from treatment for his right hand laceration, and that Petitioner reported to him that he experienced some improvement in his symptomatology "while he was off of work" for that injury. PX 1. However, his understanding is inconsistent with Petitioner's treating medical records that demonstrate his symptomatology began and continued during physical therapy relative to his right hand laceration. It is not evident from the record whether Dr. Coe had reviewed Petitioner's physical therapy records following his right hand extensor tendon repair that demonstrate an onset of symptomatology consistent with carpal tunnel syndrome during a time when he was off work completely and undergoing intensive physical therapy for an unrelated hand injury, whereas Dr. Naam identified reviewing Petitioner's therapy reports from Carle Clinic. RX 3. It is also unclear whether Dr. Coe reviewed medical records from Dr. Ho on December 3, 2012 and PA-C Shore on December 12, 2012 in which Petitioner gave a history of his 2009 right hand laceration rather than his work duties when he presented for treatment relative to his bilateral carpal tunnel condition, while Dr. Naam, on the other hand, specifically referenced reviewing those records. The Arbitrator questions whether Dr. Coe was aware that Petitioner's job duties rotated amongst various kitchen stations and duties every one to two weeks, a fact both relative and significant to the alleged repetitive nature of his employment. Based upon the foregoing, the Arbitrator does not find the opinions of Dr. Coe to be sufficiently informed and well-founded so as to warrant significant evidentiary weight, and the Arbitrator instead relies upon the opinions of Dr. Naam.

In accordance with the opinions of Dr. Naam, the Arbitrator finds that Petitioner's job duties are insufficiently repetitive or cumulative to support a finding of causation. Petitioner's job description and his own testimony demonstrates that his job duties varied and did not involve the use of forceful, prolonged gripping, grasping, or flexion of the wrist or hands. While Dr. Coe opined that each of the tasks performed by Petitioner required repetitive stress on his upper extremities (PX 1), Petitioner failed to proffer evidence to establish that his job duties necessitate essentially similar upper extremity motions, positioning, or stresses to support finding that all of his job duties, as varied as they suggest, are cumulative in nature. In the absence of such evidence, the Arbitrator is not persuaded to find that Petitioner's mopping tasks, which he explained involved left and right, pushing and pulling movements of his upper extremities, require the same upper extremity positioning and motions as does that of stocking food, or that Petitioner's tasks of scraping a grill necessitates the same upper extremity motions as taking out the garbage. While there is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma, *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill. App. 3d 186, 193-194 (2d Dist. 2005), the number and variability of the job duties Petitioner performs on a daily basis, in conjunction with his additional rotation amongst

kitchen positions every one to two weeks indicates that Petitioner does not perform any task, and hence the same upper extremity positioning and motions, for any sustained or prolonged period of time, and Petitioner failed to proffer evidence, such as evidence concerning the frequency or duration of his job tasks, to demonstrate otherwise.

Based upon the foregoing and the record in its entirety, the Arbitrator concludes that Petitioner has failed to prove that he sustained accidental injuries that arose out of and in the course of his employment on either June 21, 2010 or January 2, 2013, and that his current condition of ill-being is causally related to his employment. All benefits are denied. The remaining issues of medical bills, temporary total disability benefits, and the nature and extent of the injury are moot, and the Arbitrator makes no conclusions as to those issues.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

DONNA TOPPS,

Petitioner,

16IWCC0544

vs.

NO: 10 WC 27593

CITY OF CHICAGO,

Respondent.

ORDER PURSUANT TO SECTION 19(h) and Section 8(a)

Petitioner, pursuant to Section 19(h) and 8(a) of the Act, filed a timely motion seeking additional benefits under Section 8(e) of the Act and, in said motion, alleges her left leg has worsened since she was awarded 30% loss of use of her left leg in the February 6, 2013,arbitration decision. Both parties were represented by counsel before Commission Kevin Lamborn at the February 11, 2016, hearing, and before the Commission on June 21, 2016. The Commission, after reviewing the evidence, including Petitioner's testimony given at the February 11, 2016, hearing, finds the condition of Petitioner's left leg had materially worsened since she was awarded benefits under Section 8(e) in 2013 albeit modestly so.

Petitioner sustained an injury to her left knee while working on a road construction crew on July 7, 2010, and subsequently underwent arthroscopic medial and lateral meniscectomies on October 13, 2010, that failed to both resolve her subjective complaints of pain and restore her left knee to the condition it was prior to the July 7, 2010, accident. After declining to undergo a medial-sided unicompartmental knee replacement to address the deficits in her left knee, Petitioner proceeded to undergo a series of conservative treatment measures that eventually allowed her to return to her regular job duties. Arbitrator Svetlana Kelmanson, presiding over Petitioner's claim, awarded Petitioner benefits under Section 8(a) and Section 8.2 of the Act and benefits under Section 8(e), the 30% loss of the use of her left leg, on February 6, 2013.

The Commission finds Petitioner's condition has modestly changed since February 6, 2013. The most significant change to Petitioner's condition after February 6, 2013, was

16IWCC0544

Petitioner undergoing the total left knee replacement that she had sought to avoid. Her recovery from the procedure allowed her to return to with only one formal restriction, a prohibition against kneeling. Ad hoc modifications, such as her coworkers occasionally helping Petitioner complete her tasks and allowing Petitioner to take cabs between worksites rather than to be crowed into a municipal vehicle, are employed to help Petitioner on the job.

She continues to exercise regularly. She still rides her bicycle twice a week. She still participates in watersports and skiing though she is more cautious doing these activities. She runs on a treadmill but not as often as before her accident. The most significant change to Petitioner's exercise regimen is she now performs palates rather than yoga as yoga caused discomfort to her left knee.

Petitioner testified on February 11, 2016, that the pain she experienced after February 6, 2013, was different than the pain she experienced prior to that date. She did not testify to experiencing greater pain or more frequent pain.

Petitioner also testified before Commissioner Lamborn to experiencing aches in cold and damp weather and of her left leg being weaker than her right leg. Both complaints echo what was complained of before Arbitrator Kelmanson.

The Commission finds the November 25, 2014, total left knee replacement and its lingering effects, most notably, the modifications to Petitioner's employment, both formal and informal, represent a worsened physical condition that merits additional compensation. Accordingly, the Commission awards Petitioner an additional 15% loss of the use of her left leg due to it becoming worse since Arbitrator Kelmanson's February 6, 2013, arbitration decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the additional 15% loss of the use of the left leg.

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: AUG 18 2016
KWL/mav
O: 6/21/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE WORKERS' COMPENSATION COMMISSION OF ILLINOIS

Cindi Mandel,
Petitioner,

vs.

NO. 10WC 31801
16 IWCC 0462

State of Illinois Department of Transportation,
Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

Motion to recall pursuant to Section 19(f) of the Act, having been filed by the Respondent finds that a clerical error exists in its Decision and Opinion dated July 7, 2016 in the above captioned.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated July 7, 2016, is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein.

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

DATED: AUG 18 2016

Kevin W. Lamborn

STATE OF ILLINOIS)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF LAKE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CINDI MANDEL,

Petitioner,

vs.

NO: 10 WC 31801
16 IWCC 0462

STATE OF ILLINOIS (IDOT),

Respondent.

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 medical expenses, PPD and penalties and fees 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 finds no reason to disturb the Decision of the Arbitrator with respect to the findings pertaining to medical expenses and the conferred PPD award. The Commission does find, though, the record does not support the awarding of penalties and fees.

No petition for penalties and attorneys' fees is found in the evidentiary record. As such, the Commission is uncertain as to Petitioner's exact claims and bases its conclusion upon arguments made by the parties in their pleadings before the Commission and upon the Commission's own database.

The Commission finds Petitioner's Petition for Penalties and Attorneys' Fees is premised on Respondent's failure to pay for the FCE that was performed on August 12, 2014, at Function First Physical Therapy and for charges for services rendered to Petitioner by Suburban Orthopedics. For both instances, the Commission finds Petitioner failed to prove Respondent's

actions were vexatious or unreasonable as contemplated under both Section 19(k) of the Act.

It is noted Petitioner's Petition for Penalties and Attorneys' Fees, per the Commission database, predates the FCE by more than a year. The petition was filed with the Commission on February 5, 2013, but the FCE was not performed until August 12, 2014. There was not claim of Petitioner's petition being amended to reflect the charges of the FCE have gone unpaid. As such, the Commission is uncertain as to how the petition addressed charges that had yet been incurred.

Furthermore, with respect to the charges for the FCE, the Commission finds no evidence of Petitioner tendering a bill for the charges associated with the FCE prior to the date of the arbitration hearing. As such, the Commission finds Respondent cannot be faulted for not making a payment on a bill that it did not possess until the arbitration hearing.

Concerning the charges incurred in relation to Petitioner's treatment with Suburban Orthopedics, the Commission finds Respondent acknowledges payment of those charges was not made. Uncertain, however, is whether some or all of the charges have gone unpaid.

Respondent claims its inaction in paying charges attributable to Petitioner's treatment at Suburban Orthopedics is due to a dispute as to the reasonableness and necessity for some of the treatment Petitioner received there. Petitioner claims that such an issue exists as Respondent did not dispute causation. The Commission finds Petitioner's counterargument unpersuasive as it finds there can be agreement or acknowledgement concerning the compensability of an accident but disagreement as to the necessity and/or reasonableness of how an injury stemming from the agreed-upon accident should be treated. In this particular case, Respondent's questioning of the need for x-rays to be taken on each of Petitioner's visits to Suburban Orthopedics, including x-rays of body parts seemingly unrelated to the claimed injured body part, is deemed to be not unreasonable or vexatious.

The totality of the evidence before it precludes the Commission from finding Respondent acted in a manner that was either vexatious or unreasonable. Accordingly, the Commission vacates the penalties and liability for attorneys' fees imposed upon Petitioner in the Arbitration Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 300 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 60% loss of the persona as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,566.00 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that awards conferred upon Petitioner in the Decision of the Arbitrator pursuant to Section 19(k) and Section 16 of the Act are vacated.

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.

DATED: AUG 1 8 2016
KWL/mav
O: 5/10/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0462

MANDEL, CINDI, ON BEHALF OF SPOUSE MANDEL, ALAN DECEASED
Employee/Petitioner

Case# **10WC031801**

STATE OF ILLINOIS (IDOT)
Employer/Respondent

On 5/11/2015, 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:

1521 FITZ & TALLON LLC
NICHOLAS FITZ
30 N LASALLE ST SUITE 1510
CHICAGO, IL 60602

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1430 CENTAL MGMGT SERVICES
WORKERS' COMP MGR
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

MAY 11 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

☐ 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

16IWCC0462

Cindi Mandel on behalf of Spouse Alan Mandel, deceased
Employee/Petitioner

Case # 10 WC 31801

v.

Consolidated cases: _____

State of Illinois (IDOT)
Employer/Respondent

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 **George Andros**, Arbitrator of the Commission, in the city of **2/26/15 and**, on **3/13/15**. 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 **Benficiary(s) under the WC Act**

16IWCC0462

FINDINGS

On **8/10/10**, 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 **$65,547.04**; the average weekly wage was **$1,260.50**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **2** 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 **$194,236.28** for TTD, $ for TPD, $ for maintenance, and **$82,362.57 (medical bills previously paid)** for other benefits, for a total credit of **$276,598.85**.

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

ORDER

Respondent shall pay to Petitioner and his attorney the reasonable and necessary medical services of $1,566.00 for bill of Function 1st PT, as provided in Section 8(a) of the Act. The Respondent shall further pay to the Petitioner and his attorney the additional sum of $6887.00 for balance of services for Suburban Orthopedics S.C. This is based upon the evidence. No contrary medical opinion, medical record review or Utilization Review under the Act was provided by Respondent's claims management services in response thereto to show charges/care of the treating doctor and physical therapy services were unreasonable or unnecessary.Quite the contrary , the section 12 examiner for Respondent endorsed the treatment and makes no objections to billing even though this IBJI doctor documents 4 years post accident that he had the treating doctors records.

Respondent shall pay Petitioner and his attorney the permanent partial disability benefits of $669.64/week for 300 weeks, because the injuries sustained caused the 60% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner and his attorney pursuant to Section 19K the sum of $4271.50 plus pay to the attorney the sum of $854.30 under section 16 of the Act, as amended.

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.

/s/ George Andros May 7th, 2015

MAY 11 2015

16IWCC0482

STATEMENT OF FACTS 10 WC 31801

The issues on the 2/26/15 stipulation Addendum are notice of accident, medical expenses, the nature and extent of the injury, penalties and beneficiaries.

The petitioner was a bridge crew worker for the State of Illinois-Department of Transportation, the Respondent at bar

. By stipulation of the attorneys and by the testimony of Respondent's own employee Vito Mazzana, the worker was injured on the job during bridge repair while using a jack hammer. The hammer point entangled with a rebar causing the undisputed accident. Vito Mazzana the lead worker plus supervisor Lou Capuzzi and co - worker Nick Cassada picked him up. The State employee –lead person testified he took the injured worker to the designated company clinic namely the occupational clinic affiliated with Alexian Brothers Medical Center. Mr. Mazzana testified the supervisors affiliated with the State instruct people to go there. Respondent employee, Mr. Mazzana, testified the worker was treated there and all attendant paperwork and notice to IDOT was done. No other State of Illinois employees testified. Mr. Capuzzi the supervisor was the one who took the worker to the company clinic. Given the ultimate restrictions Mr. Mandel never returned to work for the State after he reached medical stability post FCE and final assessment by his orthopedic doctor.

The Petitioner passed away of unrelated causes as per the death certificate in evidence. The parties agree that the death is unrelated to the condition of ill being. Widow Cindi Mandel so testified she and the Petitioner married prior to the date and injury at bar. The documentation in evidence shows said marriage. The Application was amended to show the widow in the capacity as widow and effectively a successor to the Petitioner in the Application for Adjustment of Claim 10 WC 31801. Thus the Stipulations show Cindi Mandel on behalf of Alan Mandel, deceased, as Petitioner.

The Arbitrator takes judicial notice of two filings over a decade ago under 01 WC 64918 plus 05 WC 54682. One represents 20% loss of use of the right arm under 8(e). The other represents 7.5% under 8(d)2. The records of treatment show indications of a prior shoulder injury.

After progression of treatment including diagnostics by October 11, 2010 his complaints continued.

Surgery was prescribed then completed on 1/21/11. Relative to lack of payment of medical bills and claim for penalties it is important to cite the records in evidence offered by each attorney as follows: this surgery is about 1090 days before the last medical bill review (audit) by Tristar Managed Care per Respondent Exhibit 1, pp 1-4 un-numbered). Yet, no offer of even one Tristar Bill Review record was offered for the basis for denial of bills Not any offer of proof or indication was made of a Utilization Review Report under the reform workers compensation act of 2005. Said Uitization Report would have been a prime facie statutory bar to assessment of penalties under one of the two "reform" Workers Compensation Act, 2005 & 2011.

Surgery ensued via extraction of loose bodies, a chondroplasty of glenoid and humeral head which showed microfracture, biceps tendinosis with a subacromial decompression, distal clavicle resection plus rotator cuff repair.

By mid February his shoulder symptoms were manifested while exiting a shower. This is not an intervening accident given no medical opinion designated it as such. It appears the complaints to the upper extremity continued with indications for the future surgeries to elbows and wrists.

By 8/1/11 Dr. Freeburg performed the predicted left carpal tunnel decompression, release of the Guyon's canal and median nerve neurolysis. The right hand and elbow symptoms continued per the records. Eventually, he was placed on a light or sedentary status.

On 1/23/12 he had a right CTS release, guyon canal release plus median nerve neurolysis. By June he still had numbness but the tingling resolved.

By 2013 he was seen by Dr. Freeburg's colleague for his spine, the relationship to the injury is not clear.

In March 2013 he had continuing complaints of elbow and right shoulder pain resulting in injection. He consented to a right cubital tunnel decompression with debridement of the bone. By the fall of 2013 the doctor wants to operate on the right elbow.

Dr. T. Baxamusa of Illinois Bone and Joint was Respondent section 12 examiner. He found causation to right shoulder, bilateral elbows and wrist complaints. Petitioner was not placed at maximum medical improvement.

On February 6, 2014 he had MRI to lumbar area showing degenerative pathology in great significance. He did have a shot for the left arm complaints This neck seemed to be a source of complaints but there is no clear causation.

The Petitioner is recommended a right CTD (Arbitrator infers carpal tunnel decompression) surgery with cervical spine & evaluation due to leg pain. He reported years of leg pain after his 2010 on the job injury. Given his multifactorial medical problems no surgical indications were deemed proper. In April 2014 He was sent to Dr. Noveselsky for pain management for leg pain, lumbar stenosis and alike.

On August, 7, 2014 he saw Dr. Freedburg. He was to have an FCE to add information regarding his 10 pound lifting restriction. By then he had stage four lung cancer plus began chemo. He had significant right upper extremity complaints. An SRS disability report was completed. As to restrictions, Dr. Freedberg opined he was sedentary for shoulder, elbow and wrist issues. The record is bare for lumbar issues.

On August 12, 2014, Decedent underwent a Functional Capacity Evaluation at Function 1st Physical Therapy. The therapist upon FCE concluded he could perform 18.8% of the physical demands of a highway maintainer. It placed him in the light physical demand category. Decedent could lift 10 pounds to shoulder height and could push and pull 15 pounds. He had occasional tolerance for pinching, gross coordination, simple grasping and fine coordination.

Prior to death he told the doctor on 12/30/14 he had only brief relief from his right shoulder injection. He reported shoulder, wrist and neck problems.

The notes show the treating doctor agreed with the section 12 doctor's report. Dr. Freeburg did not pursue medical treatment, did not expect change in his clinical condition. He placed Petitioner at maximum medical improvement. He thereafter died on 1/14/15.

Cindi Mandel stated under oath Alan had one minor child at death namely Alexandra Donna Mandel, by birth certificate born November 9, 1999. Evidence shows Judgment for Dissolution of Marriage between Alan and Francine Mandel in 2002. The Judgment documents Samantha, born April 25, 1989, Nicolette born June 17, 1992 and Alexandra born November 7, 2000. Petitioner testified that she had no children with Alan either before or after they married in 2013.

Mrs. Mandel stated Alan has trouble using his hands and arms with spasms, weaknes and control issue. Activities of daily living were significantly impacted. He was depressed by her observation not by clinical diagnosis.

The entire records, highlights above are underscored, is the basis for the Conclusions of law below and the Award.

CONCLUSIONS OF LAW

As to the issue of Notice:

The Arbitrator adopts the testimony of the State of Illinois employee that he, a coworker, plus supervisor Lou Capuzzi witnessed the accident. Mr. Capuzzi drove the worker to the company designated occupational clinic. Treatment ensued. Workers Compensation benefits were thereafter paid.

Based upon the totality of the evidence and by a preponderance thereof that as a matter of law and fact notice was given under section 6© of the Act.

As to the issue of casual connection:

The Arbitrator holds by stipulation signed by both attorneys that causal connection exists and was not in issue. However, the Arbitrator infers that stipulation exists only as to the upper extremities, shoulders , elbows and wrists. The records of both Dr. Freeburg and Dr. Baxamusa seem to agree to much of the medical basis for that stipulation. The evidence supports this conclusion.

Both the treating doctor plus Respondent section 12 examiner agree that the injury resulted in his sedentary and or light work capacity, and, deemed the functional capacity valid. The Arbitrator sees much of the FCE dealt with limited lifting but not testing road construction body mechanics and work with a jack hammer and other tasks.

Based upon the totality of the evidence and the preponderance thereof, the Arbitrator finds as a matter of law and fact that causation exists to the injury to his shoulder(s), both arms, elbows and wrists which resulted in significant physical incapacitation under section 8(d)2 to his ability to work his pre-injury trade as a road maintainer. Both doctors agree he could not perform his pre injury trade. See The Act, as amended section 8 (d) 2.

To wit: Dr. Baxamusa of IBJI report of 1/09/2014 response #5 finds causation and need for treatment. Response #6 indicates he may need future treatment. #7 indicates he may require continued physical restrictions or limitations. He agreed with a current assessment of a light duty restriction.

No treatment ensued to the cervical or lumbar area or left leg until close to three years after the accident. All records are devoid of causation to the accident. The history taken if accurate shows Alan Mandel told the doctor he had back complaints since the time of his prior accident.

As to the reasonable and necessity of treatment and whether Respondent has paid all medical expenses under section 8 per Stipulation paragraph 7 in Second stipulation marked Amended Stipulation presented at close of proofs:

The Stipulations show agreement by Respondent to hold Petitioner harmless for reasonable and related medical bills. Respondent documents show medical bills paid and temporary total disability paid (Rx. 1)

Petitioner exhibit 4 is a compendium of medical bills from two providers that the parties agree are unpaid. The first is the bill of Function 1st Physical therapy. (Px 4). That is for the FCE. The bill in evidence shows $1566.00.

The second bill is the balance from Suburban Orthopedics for $6887.00. Respondent counsel seems to dispute the bill based upon a medical theory the lack of need for X rays taken in this complex medical matter. Per the Statement of Facts supra, at least 12 "Bill Reviews" were performed by Respondent's agent named TriStar Managed Care through April 29, 2014. Not one scintilla of medical evidence and or a Utilization Report, even from some out of state provider, was tendered into evidence from TriStar.

Awards cannot be made by speculation or conjecture. The Award must be based upon the medical evidence adduced by the parties not by arguments of counsels.

The medical evidence shows Suburban Orthopedics treated this worker over a number of years for current significant shoulder and upper extremity and wrist issues.

Critical in the Award of bills and penalties is the Respondent's own section 12 report being the medical report dated 1/9/14 in evidence proves that Dr. T. Baxamusa of Illinois Bone and Joint Institute had the medical records of Mr. Mandel's treatment based upon his concern about the workers complete history of all his medical problems years before the section 12 exam. Thus, someone obtained and provided the section 12 expert with the workers' records of Suburban Orthopedics. However, Dr. Baxamusa offered nothing by way of a criticism or affirmation of the billing, documentation or treatment of Suburban.

The law provides two possible ways to dispute the reasonableness and necessity of medical care, either retroactively or prospectively. The first way has been and may still be now by way of the opinion of a section 12 examiner i.e. an expert witness.

For treatment after Sept 1, 2011, the newest of two "reform" Workers Compensation Acts in black letter law states the Respondent may avail itself of the officially sanctioned utilization review process. This may address either retroactive treatment or prospective treatment. See Act as amended for bar to penalties under UR.

A close, detailed study of Dr. Baxamusa's report shows no commentary or even one scintilla of dispute or question of the reasonableness or necessity of the care, treatment or charges from Suburban Orthopedics S.C. or the charges of the FCE provider. Dr. Baxamusa actually agrees on the care. It one point he does caution on the future results that may be obtained after future elbow surgery.

Respondent's claims management provider failed to obtain or furnish a statutorily sanctioned Utilization Review report to justify the nonpayment of the remaining bills from Suburban Orthopedics or the FCE . This UR statute provides the UR report, if obtained, is the absolute first line of defense to a claim for penalties for nonpayment of medical bills. To foist this claims failing on their Counsel is disingenuous on the part of claims management while counsel was diligently defending this case at every turn. Assertions from (either) counsel are not evidence on which an Award must be based.

Based upon the medical evidence, not argument by either counsel, the Arbitrator holds the Respondent is liable for the medical expenses of $8453.00.

Thus, based upon the totality of the evidence and preponderance thereof, the Respondent is ordered to pay to the Petitioner and his attorney the sum of $8453.00.

A. What is the nature and extent of Decedent's injury?

The medical records establish that as a result of the accident, he suffered permanent injuries to his right shoulder, elbows and hands. Both the treating doctor and the section 12 examiner adopt the above mentioned functional capacity evaluation.

The evidence clearly shows Mr. Mandel sustained injuries that prevented him from returning to his usual and customary line of employment as a highway maintainer for IDOT. This conclusion comports with one of the three categories of disability that places a case under section 8(d) 2 of the Act and not section 8(e).

This case is one of what's known as disability to man as a whole and not a specific loss to the extremities. Both doctors find either sedentary/ light or light in terms of his physical ability to return to work. This category via a close reading of the records relates more to "lifting" that to on the job body mechanics of this worker. The evidence via employee from the State of Illinois is adopted that the work of a highway maintainer or bridge repairer is heavy.

See Award for Conclusion based upon the totality of the evidence that Petitioner decedent sustained as a result of the accident serious and permanent injuries under section 8 (d) 2 of the Act to the extent of sixty per cent thereof.

As to the issue of beneficiaries:

The Arbitrator holds both Cindi Mandel plus Alexandra Mandel are beneficiaries under the Act. They are entitled as a matter of law to the Award in the case at bar.

As to the Issue is Respondent liable for Penalties for non payment of Medical Expenses plus attorneys fees:

The evidence admitted on the issue of medical bills fails to show a medical opinion ,even couched by inference in the Respondent IME report, on the unreasonableness of the treatment or charges relating to treatment either before or after 9-1-11.

Moreover, per their statutory right no utilization report or medical bill review was offered to this Arbitrator why Respondent did not pay the bills of the FCE (after 9-1-11) or Suburban Orthopedics for services after 9-1-11.

The evidence failed to show even a letter advising opposing counsel why these benefits were not paid- per the Rules of the Commission.

Therefore, in an Award rarely ever given by this Arbitrator: The Arbitrator finds as a matter of law and fact the Respondent shall pay to the Petitioner and his attorneys $8543.00 (see above) for medical bills admitted plus 50% penalties under section 19 (K) thereon plus an additional 20 % attorney's fees payable to Petitioner's counsel under section 16.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☐ 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

Elza Mancilla,

Petitioner,

vs. NO: 10 WC 36479

Ventra Belvidere,

16IWCC0524

Respondent.

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 issue of nature and extent, 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.

Petitioner testified that she began working for Respondent through a temporary service in 2008. (T.14). She could not remember the job title but said it had something to do with sequence. (T.14). Petitioner noted that her job duties depended on where she was working on the line. (T.14). If she was doing bumpers she would go to each tote and pick up the colors that they needed for the day. (T.15). She explained that totes are boxes and that each tote contained about 20 parts or bumpers stacked two high. (T15-16). She noted that a forklift brings the totes to the line. (T.16). Each tote had different colors and she would have to bring the correct color part to the line depending on what they were running that day. (T.16). After the part was brought to the line she would put them in sequence and another lady would inspect them. (T.16). She indicated that the lids on the totes weighed about 50 to 75 pounds. (T.18). Petitioner testified that "[w]e had to uncover the tote so that we could get to the parts. And because I'm short, I had to kind of twist to get it over and to the side and then make sure that it was leaning so that it wouldn't fall into the totes where the bumpers were." (T.18). She noted that she is 5'1" and that the totes were taller than she was. (T.19). As a result, she would take the tote apart to get to the parts, and to remove the lid she would "... take a corner and kind of play with it until [she] could get it over."

16IWCC0524

(T.19). She believed that the parts (bumpers) inside the totes weighed between 7 and 20 pounds each. (T.19).

Petitioner testified that when she first started working for Respondent "... they were rotating us and that helped a lot; because sometimes, it would get tired and you couldn't do the lifting a lot. So it was working pretty good. But then they added the Compass, and ... they couldn't move us anymore, because they wanted to keep Chrysler working." (T.21). She indicated that they stopped rotating her right before Christmas of 2009. (T.21-22). Petitioner noted that after they stopped rotating she could work 8, 9 or 12 hours a day on the same job. (T.22).

Petitioner testified that in January of 2010 she was still working as a sequencer, "... taking bumpers out of the totes, putting them in sequence, putting them on these racks. They would go on the line, and we would do this 8 hours, 9 hours every day." (T.29). Once again, she noted that the bumpers weighed between 7 and 20 pounds and that the tote lid weighed 50 to 75 pounds. (T.29). When asked how many totes would come down during that period, Petitioner testified that "[w]e had to stay late that day (1/26/10). I think we put in 14 hours, because we didn't want Chrysler to shut down. So I want to say 15 to 20 totes." (T.29). She estimated that she would have removed maybe half of those lids, or 7 to 10 lids on 1/26/10, the date of the alleged accident in question. (T.29). Petitioner indicated that there was another partner there "[b]ut if she was so far away picking up her parts, she couldn't be there to help me lift it." (T.30). She agreed that if she lifted 10 tote lids that day that would mean she lifted about 200 bumpers (10 x 20). (T.31).

Petitioner noted that since they were working a lot of hours she started noticing back pain and notified her union representative as well as Rico, Respondent's vice president. (T.32). Petitioner indicated that at that time her low back was hurting her, she was having trouble getting out of bed and she couldn't sit for very long. (T.32). She denied having this problem with her low back before, and noted that she was working full duty at the time. (T.32-33). She also denied taking any medication at that time. (T.33).

On 1/27/10 Petitioner visited Dr. Hughes. (T.33). Dr. Hughes recorded a history of "... low back pain noted yesterday when she was working in a factory line. She carries heavy objects at work..." (PX1). The diagnosis was "[l]umbago." (PX1). Petitioner testified that Dr. Hughes sent her for an MRI of the low back, which was performed on 2/3/10. (T.34). The MRI was interpreted as evidencing "[r]elatively mild diffuse degenerative changes without evidence for a high-grade stenosis or disc protrusion." (PX1). Petitioner subsequently underwent physical therapy from February of 2010 to April of 2010. (T.35). Petitioner noted that the therapy stopped at that point when they did not see any improvement. (T.35). She stated that she also saw Dr. Joworowicz when Dr. Hughes was not in the office. (T.39).

Petitioner eventually visited Dr. Mark Lorenz around 1/6/11. (T.35). In his progress note on that date, Dr. Lorenz noted that the MRI of the lumbar spine performed on 2/3/10 "... shows disc bulging at L4-5 with what appears to be a possible internal tear." (PX3). Dr. Lorenz's assessment was L4-5 disc disruption and annular tear with spondylosis and axial back pain with radiculitis. (PX3). Petitioner agreed that she saw Dr. Lorenz three or four times, and that he and

his partner, Dr. Bardfield, "... reviewed my x-rays and MRIs and things. They were talking about doing surgery, and then they decided to do shots instead." (T.36). She noted that Dr. Bardfield administered several shots and that Dr. Lorenz also recommended a functional capacity evaluation, which was performed on 3/16/11 and in regards to which she claims to have given a full effort. (T.37).

In a letter accompanying the FCE dated 3/16/11, certified functional assessment specialist Lucas Schultz noted that the test was valid and that Petitioner demonstrated physical capabilities at the sedentary to light physical demand level, which means she is capable of occasionally lifting and carrying 13 pounds from floor to chair, and due to her demonstrated functional deficits and pain reports/behaviors recommended occasional bending, stooping, squatting, crawling, climbing stairs, crouching, kneeling and balancing. (PX4).

Petitioner then saw a pain management physician, Dr. Morgan, in March of 2011 at which time she claims she was given "... lots of pain pills" as well as "a lot" of injections. (T.38-39). She noted that the pain pills helped, but that she didn't like to take them because then she'd sleep all day. (T.39). She also saw a Dr. Jain at this facility. (T.39). Petitioner agreed that the injections stopped around August of 2011 after which she took prescription pain pills. (T.40-41). She noted that she returned to Dr. Lorenz one time after that to talk about surgery because there had been no improvement with injections. (T.41). She indicated that she decided not to go ahead with surgery because Dr. Lorenz could not promise that the pain would go away and not come back. (T.41).

At the request of Respondent, Petitioner visited Dr. Alexander J. Ghanayem for purposes of a §12 examination on 5/4/15. (RX1). Dr. Ghanayem noted that he reviewed the MRI from 2010, which he noted "... confirms some mild, age appropriate midlumbar disc degeneration." (RX1). He also indicated that he "... disagree[d] with the notion that there are anular [sic] tears or anything traumatic or acute. The findings are basically a mild case of age appropriate arthritis. Of note, the L5-S1 disc is entirely normal." (RX1). Following his examination and review of the records, Dr. Ghanayem's impression was that Petitioner "... has subjective complaints of back pain, which appear to have been soft tissue in nature from the past. These complaints are ongoing in the context of a real paucity of findings on her MRI scan. While she may have had some soft tissue strains in the past, based on her own history, I find no objective reason why she should not return to work at her regular duty. She requires no further medical care. A brief course of physical therapy on the order of four to six weeks for each of her injuries would have been medically appropriate. Injections were not appropriate given the lack of any neurologic compression. She is at MMI. She requires no restrictions relative to her work injury." (RX1).

Also at the request of the Respondent, Petitioner's medical records were reviewed by Dr. Stephen Pineda. (RX2). Dr. Pineda noted that he reviewed the MRI films from 2/3/10 directly and that they "... demonstrate that this patient has very minimal degenerative changes in the lumbar spine ... [and] is essentially an MRI that is benign and does not have any nerve root compression." (RX2). Following his review of the records, Dr. Pineda opined that "... the patient has essentially an MRI, which I would consider normal for age with minimal, if any, degenerative changes and does not have any nerve root impingement... [and] while certainly, she may report symptoms at different points, there is no anatomic evidence or examination evidence

that suggest some permanent injury or functional abnormality that would have resulted from the lifting of January 2010…" (RX3).

Petitioner testified that after her injury she was fired by Ventra, but her union was able to help her get her job back. (T.42). However, Petitioner indicated that she did not go back to her job and has not worked since that time. (T.42). Petitioner filed for Social Security and is presently on disability. (T.43).

Currently, Petitioner testified that she still can't go to the grocery store, can't walk far or lift anything, and "[d]ays like this, I'm in a lot of pain." (T.43). She noted that the pain is in the low part of her back by her tailbone. (T.43). She indicated that she is not presently taking any pain medication, noting that she "… stopped it a couple of months ago, because I was losing my memory and on top of other medications I was taking." (T.44). She noted that she can't pick up her granddaughter anymore, and if she does she has to sit down so she can sit on her lap. (T.45). She stated that she was always active and that she has issues with stairs and cleaning now, and has to "… fight to make [her] bed in the morning." (T.45). She agreed that she has not seen a doctor since she stopped treating around 2011, noting that "I guess I have to live with my pain." (T.45-46).

On cross examination, Petitioner indicated that the pain in her low back has remained since her termination, and is worse depending on what activity she is doing that day, to the point where she can't get out of bed in the morning. (T.52-53).

Based on the above, and the record taken a whole, the Commission modifies the decision of the Arbitrator to find that Petitioner suffered permanent partial disability to the extent of 7-1/2% person-as-a-whole pursuant to §8(d)2 of the Act. The Commission notes that as a result of the accident Petitioner aggravated her underlying degenerative disc disease and sustained a possible tear of the dura. She has undergone multiple injections, with only temporary relief of her symptoms, and has elected not to undergo surgery as recommended by Dr. Lorenz. She continues to complain of ongoing pain in the low part of her back by the tailbone. An MRI of the lumbar spine performed on 2/3/10 was interpreted as evidencing mild dorsal hyperthrophic facet changes with mild dorsal disc bulging at L2-3 and L3-4 as well as moderate dorsal hyperthrophic facet changes with mild dorsal disc bulging at L4-5. The FCE performed on 3/16/11 was found to be valid and revealed that Petitioner demonstrated physical capabilities at the sedentary to light physical demand level, which means she is capable of occasionally lifting and carrying 13 pounds from floor to chair, and due to her demonstrated functional deficits and pain reports/behaviors recommended occasional bending, stooping, squatting, crawling, climbing stairs, crouching, kneeling and balancing. (PX4). As a result, the Commission finds that Petitioner lost the use of 7-1/2% person-as-a-whole pursuant to §8(d)2 of the Act.

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $314.40 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 7.5% person-as-a-whole.

16IWCC0524

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $24,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 9 - 2016
o:7/11/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MANCILLA, ELZA
Employee/Petitioner

Case# **10WC036479**

10WC007417
11WC012708

VENTRA BELVIDERE
Employer/Respondent

16IWCC0524

On 1/7/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% 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:

0293 KATZ FRIEDMAN EAGLE ET AL
JON WALKER
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

0522 THOMAS MAMER & HAUGHEY
ERIC CHOVANEC
PO BOX 560
CHAMPAIGN, IL 61824-0560

16IWCC0524

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

- ☐ 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

Elza Mancilla
Employee/Petitioner

v.

Ventra Belvidere
Employer/Respondent

Case # **10** WC **36479**

Consolidated cases: **10 WC 7417 & 11 WC 12708**

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 **Christine M. Ory**, Arbitrator of the Commission, in the city of **Rockford**, on **November 16, 2015**. 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. X 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. X 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. X 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. X What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. X Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **January 26, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$27,248.00**; the average weekly wage was **$524.00**.

On the date of accident, Petitioner was **53** years of age, ***single*** with **0** 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.

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

Respondent shall pay the bills totaling **$11,750.07**, subject to the fee schedule and pursuant to §8 and §8.2.

Respondent shall be given credit for all provable sums paid pursuant to §8 j or any sums already paid by respondent's workers' compensation insurance carrier.

Respondent shall pay Petitioner the sum of **$314.40**/week for a period of **25** weeks, as provided in Section **8 (d) 2** of the Act, because the injuries sustained caused **5% loss of use of person as a whole.**

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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.

Christine Moy

01/06/2016

Signature of Arbitrator — Date

JAN 7 - 2016

16IWCC0524

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elza Mancilla	)	
Petitioner,	)	
vs.	)	**No. 10 WC 36479**
Ventra Belvidere	)	
Respondent.	)	

ADDENDUM TO ARBITRATOR'S DECISION

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Rockford on November 16, 2015. The parties agree that on January 26, 2010, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. They agree that Petitioner gave Respondent notice of the accident within the time limits stated in the Act. They further agree that in the year preceding the injuries, the Petitioner earned $27,248.00, and that her average weekly wage was $524.00. (Although on the Request for Hearing, the yearly and weekly wage was reversed.)

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment;
2. Whether petitioner's current condition of ill-being is causally connect to the claimed injury.
3. Whether respondent is liable for the unpaid medical bills.
4. What is the Nature and Extent of Injury
5. What credit is due respondent.

STATEMENT OF FACTS

Petitioner testified she worked for respondent through a temporary service for a year and a half before she was hired directly by respondent in March, 2008. She worked on bumpers assembly. She described the job as sequence. Respondent provided parts for Chrysler. The totes, or boxes, of bumpers and parts were brought in by forklift. Petitioner testified the lids to the totes weighed between 50 and 75 pounds. Petitioner testified that as she was only 5'1" it was difficult for her to lift the tote lids. Petitioner would lift the corner and play with the lid until she could get the lid over. She leaned in to pick up the bumpers out of the tote, holding onto the lid. Sometimes she would have help to do that. The parts inside the tote weighed seven to twenty pounds. She attached a shield which increased the weight of the bumper.

Petitioner testified she was originally able to rotate in and out of that position so that she wouldn't get tired. However, when Chrysler added the Compass vehicle, respondent stopped rotating petitioner. This took place right before Christmas, 2009. She remained on that job for 19 weeks until she was laid off. She worked eight to twelve hours a day.

Petitioner testified that her personal physician was Dr. Katarina Doronila-Hughes. Petitioner first saw Dr. Hughes at Crusader Clinic and then at St. Anthony Medical Group when

Dr. Hughes became associated with St. Anthony Medical Group. Dr. Hughes prescribed some pain pills and put petitioner on weight-lifting restrictions. She did not see Dr. Hughes again for back problems until March 27, 2009.

Petitioner testified that at the time petitioner saw Dr. Hughes in April, 2008, she was working on a line that put fascia on little tractors. Petitioner estimated the fascia weighed between 20 to 25 pounds. She was lifting the fascia for nine hours a day for the whole week. She estimated she lifted 14 of the parts per hour; each weighing about 25 pounds. The fascia came in a tote, with the lid that weighed 50 to 75 pounds. Petitioner estimated there were 28 to 30 fascias in each tote. She estimated she removed 10 lids per day.

Petitioner denied prior back problems or injuries and denied any injuries after April 2, 2008 until her March 26, 2009 work injury. On January 26, 2010, petitioner was working as a sequencer for respondent. She was not rotating. In January, 2010, she would take the bumpers out of the totes; put them in sequence on the racks. This was done eight to nine hours a day. The bumpers weighed seven to twenty pounds and the lids to the totes she was required to lift to get to the bumpers weighed 50 to 75 pounds.

On January 26, 2010, she worked 14 hours, staying late, and removed half of the 15 to 20 lids off the totes. Her back started hurting. She called her union representative and advised her back was hurting and asked either for help or to be moved. Petitioner then reported to Rico, respondent's vice president, her back was hurting.

She went to see Dr. Hughes on January 27, 2010. Petitioner advised Dr. Hughes that her back was hurting so bad she couldn't get out of bed. Dr. Hughes sent her for an MRI, which was done at Swedish American Hospital on February 3, 2010. Petitioner received physical therapy from February through April, 2010 at Swedish American Hospital (PX.2). Petitioner testified the physical therapy did not help, so it was stopped.

Petitioner testified she did not see another doctor for her back again until January 6, 2011, when she went to Dr. Lorenz in Hinsdale. The union representative recommended petitioner see Dr. Lorenz for treatment of her back. Petitioner received treatment from Dr. Lorenz and Dr. Lorenz's associate, Dr. Bardfield. She received an injection from Dr. Bardfield. She testified she was sent for a functional capacity evaluation and that she put forth her best effort in completing the functional capacity evaluation.

At the time of his initial evaluation of petitioner on January 6, 2011 Dr. Lorenz opined that petitioner had a L4-5 disc disruption and annular tear with spondylosis and axial back pain and radiculitis which was caused by the work accident of January 27, 2010 from lifting bumpers. Dr. Lorenz referred petitioner to Dr. Bardfield, who saw the petitioner on January 14, 2011. Dr. Bardfield recommended a bilateral L4-5 transforaminal epidural injection. Petitioner returned to Dr. Lorenz on March 7, 2011 and reported the injection made her condition worse. A surgical fusion was discussed. Dr. Lorenz recommended a functional capacity evaluation and kept petitioner off work. (PX.3)

The functional capacity evaluation completed on March 16, 2011 was reported as valid. It demonstrated petitioner's physical capabilities were at the sedentary to light physical demand level. (PX.4)

Thereafter she was referred by Dr. Bardfield/Dr. Lorenz to Dr. Morgan with Chicago Pain and Orthopedic for Pain Management. She was seen by Dr. Morgan in March, April, May, and August, 2011. She received pain medication and injections at Chicago Pain and Orthopedic. She also saw Dr. Jain associated with Dr. Morgan, who did injections on March 29, 2011, May 17, 2011 and August 2, 2011.

Petitioner testified that in addition to seeing Dr. Hughes, she saw Dr. Jaworowicz at Crusader Clinic. Petitioner testified she returned to Dr. Lorenz one time after August, 2011. Dr. Lorenz recommended surgery as petitioner had no improvement from the injections or pain medication. Petitioner testified she did not agree to have surgery as Dr. Lorenz could not guarantee the pain would away and not come back with the surgery.

Petitioner testified she was fired by respondent. The union got her job back, but she did not return back to work. She applied for and is receiving Social Security disability benefits. She is not able to do much herself. She relies on her son's family, with whom she lives, to do such things as go to the grocery store or do her laundry. She stopped taking pain medication a few months before the hearing as it was having an effect on her memory along with the other medication she was taking.

The Decision from Social Security listed impairments of the back, knee, history of CVA, cardiovascular disease and obesity as the reason for the award (PX. 7).

On cross examination petitioner stated the lids were not 50 pounds, but were actually 50 to 75 pounds. She agreed that the bumpers weighed 16 pounds. Petitioner testified that in January, 2010, she had no problems with anything outside of work that contributed to her back condition.

Petitioner denied she had back problems in 2005 that were made better with physical therapy. Petitioner admitted she fell in April, 2010 and landed on her knees, but claimed it was her back pain that caused her to fall.

The records of from Crusader Clinic indicate petitioner first saw Dr. Katarina Doronila-Hughes for back pain on April 2, 2008. The history given to Dr. Hughes was that petitioner had started a new assembly line five days before and was doing repetitive lifting. The pain in her left lumbar area and left gluteus muscle began the day before. Dr. Hughes diagnosed left lumbar strain. Dr. Hughes recommended Tylenol, heating pad and stretching exercises. Petitioner was to return for follow up in four weeks. (PX.1, p.38 & 173)

According to the records, the next time she was seen at Crusader Clinic was on November 7, 2008. Petitioner became dizzy while lifting laundry. There was no mention of any back problems. (PX.1, p.32)

On March 27, 2009 petitioner returned to Crusader Clinic with complaints of low back pain due to heavy lifting. Diagnosis was back muscle spasms. She was prescribed Relafen and Flexeril as well as Norco. She was advised to do stretching exercises and apply ice. (PX.1, p.27 & 163)

Petitioner was next seen on January 27, 2010. Petitioner's history at that time was that she had severe back pain that started yesterday while working on a factory line. Diagnosis was Lumbago. X-rays were ordered and Flexeril was prescribed. (PX.1, p.145)

An MRI of February 3, 2010 was reported as showing mild diffuse degenerative changes without significant stenosis or disc protrusion (PX. 1, p.112). Petitioner returned to Dr. Hughes on February 12, 2010 to discuss the MRI results. She was referred for physical therapy and prescribed a TENS unit (PX.1, p.141).

On April 23, 2010 petitioner returned to Dr. Hughes after completing physical therapy. Petitioner gave a history of slipping and falling two weeks before and landed on her knees. Dr. Hughes diagnosed the back condition as degenerative disc disease. (PX.1, pp.106-107)

On May 12, 2010 petitioner was seen by Dr. Jaworowicz with Crusader Clinic for pain management. History to Dr. Jaworowicz was petitioner had injured her back two months ago while lifting bumpers. She had two months of physical therapy and was fired. She had prior

back injury five years ago that was resolved with physical therapy. Bilateral facet injections were recommended. (PX.1, p. 125)

Petitioner underwent an MRI to her left knee on May 13, 2010 due to the fall she had taken a few weeks before (PX.1, pp.152-153).

On August 13, 2010 petitioner was seen again by Dr. Hughes with ongoing complaints of back pain (PX.1, pp.234-239).

On August 18, 2010 Dr. Hughes wrote a letter advising petitioner was under her care for degenerative disc disease and placed a ten-pound weight-lifting restriction on petitioner (PX.1, p.243)

Respondent introduced the report of Dr. Ghanayem without objection. According to the report, petitioner was examined by Dr. Ghanayem on May 4, 2015. Dr. Ghanayem's examination of the petitioner was negative for any ongoing neurological disorder. Dr. Ghanayem reviewed the X-rays and MRI of petitioner's back. His review indicated petitioner had a mild case of age-appropriate arthritis. He did not find annular tears or anything of a traumatic or acute nature. He believed petitioner may have had a soft tissue injury, from which petitioner had completely recovered. (RX.1)

Dr. Ghanayem believed a brief course for four to six weeks of physical therapy was appropriate. He did not believe injections were appropriate given the lack of neurological compression. He did not believe petitioner had any work restrictions from her back condition. (RX.1)

Respondent also introduced the June 21, 2011 report of Dr. Stephen Pineda, of the Springfield Clinic, without objection. Dr. Pineda performed only a records review. Based upon the records reviewed, Dr. Pineda opined that petitioner had occasional complaints of back pain in 2008 and 2009 that subsided. Dr. Pineda also believed that petitioner had complaints of pain as a result of a lifting incident in January, 2010, that had subsided. Dr. Pineda believed petitioner had a normal MRI and normal age degenerative changes without nerve impingement. Dr. Pineda did not believe petitioner would have lasting benefit from radiofrequency ablation that had been suggested. (RX.2)

The job description of Sequencer indicates petitioner, in that position, was required to occasionally lift up to 50 pounds. It also shows petitioner was required to open and close containers (which included totes). (RX.3)

Respondent introduced the July 12, 2000 emergency room report of St. Anthony Medical Center for petitioner's left pyelonephritis (kidney infection). (RX.4)

CONCLUSIONS OF LAW

In support of the Arbitrator's decision with regard to whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

Petitioner testified, without rebuttal, that on January 26, 2010 she had worked 14 hours as a sequencer and was not allowed to rotate her job. The job required her to lift bumpers out of totes and put them in sequence on the racks. The bumpers weighed between seven and twenty pounds. On that day, petitioner was required to lift about half of the 15 to 20 totes, each weighing 50 pounds. Petitioner went to the doctor on January 27, 2010 and reported to the doctor that her back pain started the day before while working on a factory line.

Based upon the foregoing, the Arbitrator finds petitioner sustained accidental injuries to her back which arose out of and in the course of her employment with respondent on January 26, 2010.

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following finding:

On January 27, 2010, petitioner physician, Dr. Hughes, diagnosed petitioner's condition as lumbago. The MRI done on February 3, 2010 showed mild diffuse degenerative changes without significant stenosis. Petitioner obtained physical therapy from February to April, 2010. Dr. Hughes records from February 12, 2010 indicated petitioner had mild diffuse degenerative disc disease with no herniation. Dr. Hughes referred petitioner to Dr. Jaworowicz for pain management.

Petitioner was seen by Dr. Hughes on April 23, 2010. Dr. Hughes diagnosed petitioner with degenerative disc disease. Dr. Hughes' records also indicated petitioner had fallen two weeks before and landed on her knees.

Petitioner saw Dr. Jaworowicz on May 12, 2010. Dr. Jaworowicz indicated under history that petitioner had injured her back two months previously while lifting bumpers. Dr. Jaworowicz diagnosis was facet arthropathy and DDD (degenerative disc disease). Dr. Jaworowicz recommended bilateral L5-S1 facet injections that were never authorized.

She did not obtain any treatment for her back again until January 6, 2011 when she saw Dr. Lorenz. Dr. Lorenz indicated the petitioner had a L4-5 disc disruption, annular tear with spondylosis and axial back pain and radiculitis was the result of the work accident of January 27, 2010 from lifting bumpers.

Dr. Morgan, with Chicago Pain and Orthopedic Institute, saw petitioner initially on March 15, 2011 as a referral by Dr. Lorenz/Dr. Bardfield. Dr. Morgan opined that petitioner's underlying degenerative disc disease was rendered symptomatic by the work accident.

Dr. Ghanayem believed petitioner suffered a soft tissue injury to her back, which should have resolved with four to six weeks of physical therapy.

Dr. Pineda opined petitioner suffered back pain from the lifting incidences from 2008, 2009 and again in January 2010.

Based upon the foregoing, the Arbitrator finds petitioner's ongoing back pain was an aggravation of petitioner's underlying degenerative disc disease caused by the work accident of January 26, 2010. This finding is supported by petitioner's testimony and the medical records of Dr. Hughes, Dr. Jaworowicz, Dr. Morgan, Dr. Ghanayem and Dr. Pineda. The Arbitrator does not find Dr. Lorenz's opinion that petitioner suffered an L4-5 disc disruption, annular tear with spondylosis and radiculitis is supported by the objective medical evidence and disregards Dr. Lorenz's opinion as to causation other his opinion petitioner had axial back pain.

The Arbitrator also finds that Dr. Lorenz's opinion that petitioner's back condition is so severe that it warrants a fusion is unsubstantiated by the objective medical evidence.

In support of the Arbitrator's decision with regard to the medical bills incurred, the Arbitrator finds the following:

The evidence supports an award of the following bills which are awarded pursuant to §8 and 8.2 of the Act:

$2,537.82 ATI for the FCE completed on 03/16/2011
$439.00 Hinsdale Orthopedics for 01/06/2011 visit only
$2,641.00 Northern Illinois Imaging for MRI 02/03/2010
$4,141.19 Swedish American Hospital (Excludes knee X-rays - 04/23/2010)
$269.00 Crusader Clinic-visit 01/27/2010, 02/12/2010, 05/12/2010
$934.07 EMPI
$305.99 IWP
$482.00 Radiology Consultants of Rockford for 01/31/10-Lumbar X-ray; 02/11/10-MRI

The Arbitrator specifically denies the costs associated with the various injections provided by Dr. Bardfield, Dr. Morgan and Dr. Jain based upon the findings and opinion of Dr. Ghanayem.

In support of the Arbitrator's decision with regard to the nature and extent of injury, the Arbitrator finds the following:

The evidence supports a finding petitioner suffered repeated aggravation of her underlying degenerative joint disease, resulting in ongoing back pain. The Arbitrator notes the injuries to petitioner's back has resulted in limitations of sedentary to light physical demand as evident by a valid functional capacity evaluation.

The Arbitrator therefore finds the nature and extent of petitioner's injury to be 5% of a person as a whole pursuant to §8 (d) 2 of the Act.

In support of the Arbitrator's decision with regard to the credit due respondent, the Arbitrator finds the following:

Petitioner submitted various bills and a summation of the bills, as well as a claim by Blue Cross and Blue Shield for sums paid toward the bills claimed (PX.8.) A portion of the bills submitted suggests some payment had been made by both the workers' compensation insurance carrier for respondent and Blue Cross and Blue Shield. Therefore, the Arbitrator finds respondent shall be given credit for any provable sums paid pursuant to §8 j or by the respondent's workers' compensation insurance carrier for the bills awarded.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ 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

Maureen Lynch,
Petitioner,
vs.

16IWCC0541
NO: 10 WC 37691

Loyola University Medical Center,
Respondent.

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 medical expenses, temporary total disability, permenant partial disability, penalties, vocational rehabilitation and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 19, 2014 is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 18 2016
KWL/vf
O-6/21/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0541

MAUREEN LYNCH,
Employee/Petitioner
v.

Case # **10 WC 37691**

LOYOLA UNIVERSITY MEDICAL CENTER
Employer/Respondent

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **October 3, 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?
☒ 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 **vocational rehabilitation; prospective medical care**

MAUREEN LYNCH
10WC37691

FINDINGS

On **August 10, 2009**, 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 partially**, causally related to the accident.

In the year preceding the injury, Petitioner earned **$67,128.88**; the average weekly wage was **$1,290.94**.

On the date of accident, Petitioner was **52 years** of age, ***married***, with **5** 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 **$110,037.64** for TTD, **$10,891.79** for TPD, **$13,770.08** for maintenance, for a total credit of **$134,699.51**. Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner maintenance benefits of $860.63/week for 12 4/7 weeks, commencing through 6/2/13 through 8/28/13, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $860.63/week for 127 4/7 weeks, commencing 8/2/10 through 3/12/11 and 7/31/11 through 6/1/13, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits for a total of $10,891.79 total for the periods of 4/25/10 through 7/31/10 and 3/13/11 through 7/30/11 as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 350 weeks, because the injuries sustained caused the 70% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from 4/25/10 through 10/3/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall have a credit of $2,827.78, which shall be applied toward accrued permanency.

Respondent shall pay for a lift to assist the Petitioner in loading and unloading her scooter from her motor vehicle.

No penalties or attorney's fees are awarded.

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.

MAUREEN LYNCH
10WC37691

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) maintenance period; 3) vocational rehabilitation; 4) medical expenses; 5) credit for maintenance paid; 6) prospective medical treatment; 7) penalties; 8) attorney's fees; and 9) the nature and extent of the petitioner's injuries. *See,* AX1.

At the time of the accident, Maureen Lynch, ("Petitioner") was a fifty three year old mother of five; who worked as a full time technical specialist supervisor at Loyola Hospital blood bank, ("Respondent"). She testified that she was responsible for all areas of the blood bank, including overseeing the staff. She prepared all the documents to obtain credentials for the blood bank, wrote all of the standard operating procedures, worked with the Food and Drug Administration, the College of American Pathologists, and with the American Association of Blood Banks, to obtain accreditation. *See,* Tr. pg. 14.

The Petitioner testified that her qualifications are MTASCP, SBE; and she has a specialty in blood banking, which is additional credentialing, for which she had to pass an exam. *See,* Tr. Pgs. 14, 15.

The petitioner testified that she worked for Respondent for nineteen (19) years and that she was the technical specialist for four (4) years. She had worked at Augustana Hospital until it closed in 1989. The petitioner testified that she has two Bachelor of Science degrees. The first is a biology degree from the Loyola University Chicago and the second is a medical technology degree from Augustana Hospital. The petitioner stated that the medical technology degree is the study of clinical laboratory science. The curriculum involved learning to help physicians render diagnoses available for blood tests and transfusion of blood chemistry, hematology, and pathology tests. She testified that she loved her job.

On August 10, 2009, while cleaning a twenty-liter water bath, to defrost plasma, Petitioner sustained a severe, debilitating, lower-back injury in the course of her employment with the Respondent. *See,* Tr. P. 16-20.

Following the accident, at the end of her shift, the petitioner presented to her primary physician Dr. Keith Veselik, who gave her anti-inflammatory medication, which did not relieve the pain. He subsequently referred her to a sports medicine specialist who recommended physical therapy, prescribed additional pain medication; and diagnosed the problem as an S1 joint disruption. The petitioner continued to work full time, taking pain medication so she could sleep.

The petitioner was then referred to Dr. Bajaj, a pain specialist at Loyola Hospital, who administered an injection into the S1 joint on Nov. 4, 2009, which she testified, afforded her no relief. The petitioner informed Dr. Bajaj that the epidural was not relieving her pain; at which time he sent her for an MRI of the lumbar spine on October 22, 2009. She returned to Dr. Bajaj, who informed her

that she had a herniated disc and subsequently prescribed three epidurals at L4-L5, which afforded her no relief from pain.

Dr. Veselik then sent the petitioner to Dr. Anderson at Loyola, who prescribed two more pain medications. These analgesics did not work and Petitioner called Dr. Veselik, who referred her to Dr. Alexander Ghanayem, an orthopedic surgeon. Dr. Ghanayem viewed the MRI; recommended and subsequently performed an L4-L5 laminectomy. *See*, Tr. pgs. 21-27.

Following the laminectomy, Petitioner initially experienced some relief however, the pain became severe when Petitioner stood up from a sitting position and due to the severe pain in the left leg and buttock on August 14, 2010, she went to the emergency room at Loyola where she received intravenous morphine.

A second MRI of the lumbar spine was performed, after which, Petitioner received a call from Dr. Ghanayem who told her that she had to be admitted into the hospital, as she again had a badly herniated disc and disc material had entered into her lumbar spine.

On August 15, 2010, Petitioner received a second laminectomy at L4-L5 from Dr. Ghanayem, after which she testified that she did receive some relief from the pain radiating down her left buttock and leg. Petitioner was prescribed Norco and Cymbalta for the pain, and when she presented to Dr. Ghanayem, she told that him she was still having a lot of pain. X-rays and another physical examination of her lumbar spine was performed.

Dr. Ghanayem then suggested a spinal fusion as the spine was no longer straight but had tilted to the side. The petitioner received physical therapy after each of the two surgeries, which subsequently did not decrease the pain. *See*, PX1 & 3.

Following Dr. Ghanayem's recommendation for the fusion surgery, Petitioner received a second opinion from orthopedic surgeon, Steven Mardjetko, at Illinois Bone and Joint who referred her to Dr. Jerry Bauer at the Brain and Spine Surgery Center; after which she received two more epidural injections at L4-L5. Dr. Mardjetko then recommended and performed a spinal fusion at L4-L5 and a subsequent laminectomy. Petitioner continued to have pain radiating down her left leg from her buttock.

The fusion surgery lasted four hours, Dr. Bauer spent most of the time trying to decompress and move the nerve out of its embedment and immersion in scar tissue. Following the fusion-laminectomy on January 25, 2011, Petitioner received additional physical therapy, which ended in December of 2011. *See*, Tr. pgs 28-34.

Dr. Mardjetko then sent the petitioner to the Pain Center at Lutheran General Hospital where she saw specialists Drs. Adanin, and Sakhadia, who increased her dosage of Lyrica and Norco and prescribed Contin for her pain. She was then referred to Dr. Igor Rechitsky, for an EMG, which was performed on November 23, 2011. The findings were positive for chronic L5 radiculopathy on the left and mild chronic S1 and L5 radiculopathy.

The petitioner, at Dr. Mardjetko's direction, went back to work, on a part-time basis, working almost four months with a back brace. The respondent subsequently terminated her employment because they could not accommodate her restrictions. *See,* Tr. pg. 35.

The petitioner continued taking pain medication, received four more epidural injections from Drs. Sakhadia and Strimling that gave her no relief. She also received aqua therapy and several nerve blocks from which she developed an elevated blood pressure. *See,* Tr. pgs. 36-38.

Dr. Bajaj then referred her to Heidi Renner for blood pressure medication and the petitioner developed depression over the loss of her job. Dr. Veselik wrote a prescription for Cymbalta, and Dr. Sakhadia referred her to Dr. Lacey a psychologist, who Petitioner saw for psychotherapy. Petitioner was diagnosed with severe depressive disorder after which Dr. Veselik prescribed Wellbutrin, Zoloft and Amitriptoline. *See,* Tr. pgs. 40-46.

Petitioner testified that contrary to Dr. Sakhadia's note, she never experienced a fifty percent reduction in her pain from the neuro-stimulator which was installed into her spine and which, she testified did not ease her pain.

Petitioner terminated her relationship with Dr. Sakhadia after he accused her of selling her medications because she misplaced a prescription, which she testified that she subsequently found and gave to him. She began treatment with pain specialist Dr. Holtman.

Dr. Noone, a urologist, subsequently discovered that Petitioner had developed a neurogenic bladder, per a cystoscopy and nerve test which he administered to her and accordingly implanted a bladder stimulator and an inter-stimulation device which relieved her incontinence. On November 23, 2011, an electromyelogram was administered by Dr. Igor Rechitsky, which confirmed positive predominant chronic L5 radiculopathy on the left and mild chronic L5 and S1 radiculopathy. *See,* Tr. pgs. 46-49; PXs 4-6B.

Petitioner testified that she occasionally drives her nine-year-old daughter to school and herself to the pharmacist and her doctors' appointments. She further testified that she has difficulty ambulating; has to walk with a cane, and that she has difficulty walking two blocks, due to the pain in her left leg. Petitioner further testified that she would love to work but does not think that she can; and has

authored a letter to her employer indicating that she would like to return to work. She testified that she always expected to go back to her job.

Petitioner also testified that she has to catheterize herself four times a day for twenty minutes per catheterization; that inserting the catheter is painful and that she has had five urinary tract infections to date because of catherization and has had to take antibiotics because of the infections. *See,* Tr. pgs. 50-58 & PX10.

Petitioner further testified that Drs. Sakhadia and Holtman, the pain doctors, have advised her that she will need another neuro-stimulator, which would be broader and have a paddle; and that she requires more invasive surgery. In addition, that she will likely be on multiple medications for the rest of her life. Dr. Noone advised her that she also might have to receive a bladder inter-stimulation device.

Petitioner testified that she has been advised that she has failed back syndrome and has lost the normal use of her left leg. She cannot dance or walk for any length of time. She testified that she no longer exercises, has gained thirty to forty pounds, is limited in her activities with her children, that she must nap every afternoon for two hours; and that her pain level is a constant six out of ten. Petitioner testified that she continued to have pain and ultimately a spinal cord stimulator was inserted, after a trial test. Petitioner testified that she uses a remote control to send vibrations down her leg however; the stimulator does not alleviate the left buttock pain. *See,* Tr. pgs. 59-63.

The petitioner testified as to the restrictions written by Dr. Mardjetko as of May 31, 2013, which are working part-time four to six hours per day, with no repetitive bending or twisting of the spine; no lifting over 20 pounds, and she must be allowed to change positions from sitting, standing, and walking, as needed. She stated that she has looked on the computer for employment but she did not see any part-time supervisory jobs. She stated that she has looked at Monster, as well as in the Chicago Tribune. She indicated that she wanted to "keep my ears and eyes in the game."

The petitioner was asked about the Section 12 examination with Dr. Lanoff and his recommendation that she undergo a multi-disciplinary pain program. Petitioner was asked:

Q: "And is it your understanding that Loyola rendered treatment at the Rehabilitation Institute of Chicago, if you wanted to visit that facility, they would authorize?

A: I have not heard anything about that before."

The petitioner testified that she met with Mr. Dean Geroulis, who was selected by the respondent to provide vocational rehabilitation services. The petitioner was asked, at hearing, if she wanted to proceed with vocational rehabilitation services through Coventry and answered, "I really don't think I am able to do that". The petitioner further testified that because of the pain medication that she has to take, she does not think it was in anyone's best interest for her to be employed in a medical arena.

Kathy Davis testified on the petitioner's behalf. Ms. Davis testified that she is self-employed and that she works through third-party, case management contractors to provide vocational placement and assessment. She also testified that she is a registered nurse. Ms. Davis further testified that she had provided a vocational assessment for Petitioner. She stated that she did an assessment of her education, her experience, and reviewed medical records as to her physical limitations. Ms. Davis testified that the petitioner is limited to part-time hours that would "kind of restrict supervisory positions." She stated that her physical limitations required changing positions every ten (10) to fifteen (15) minutes. She also stated that the petitioner would have to self-catheterize herself, that she would need a clean area to do that. When asked by Petitioner's counsel as to whether she had an opinion if these barriers would be prohibitive to gainful employment, Davis responded, "I felt it would be more challenging."

Upon cross-examination, Ms. Davis testified that the barriers that she listed in her report would be challenging to the petitioner returning to work. However, she stated, "I believe anyone can probably find employment. But, it can be very challenging and it may take an extremely long amount of time. I mean it just depends on how much time." She further stated that she was not instructed to start providing Petitioner with any services. She did an assessment and made recommendations. She stated that if she was to find employment for the petitioner, it would be in an office environment. Ms. Davis further testified that she did not take the next step in searching for positions and that she was not aware of any particular employers in Illinois, which prohibited employees from self-catheterization in the workplace. *See,* Tr. pgs 70-106.

Mr. Geroulis testified on behalf of the respondent that he is a vocational field manager with Coventry Workers' Compensation Services. Mr. Geroulis testified that he is a certified rehabilitation counselor, licensed clinical professional counselor, and a certified life care planner. He has a master's degree in counseling from Northeastern Illinois University and a bachelor's degree from the University of Illinois-Champaign, Urbana. He testified that he works as a vocational field case manager and receives referrals for people who have been receiving workers' compensation benefits and have been released to return to work. He stated that he assists them with a variety of activities or services, in an effort to help them return to work. Mr. Geroulis testified that his understanding of Petitioner's limitations or restrictions was that she was released to work up to 6 hours per day with no lifting of more than 25 pounds; and she had to be allowed to change positions frequently, i.e., every 15 or 20 minutes. She could do no repetitive bending, twisting, or crouching, and no stooping, crouching, or climbing of ladders.

Mr. Geroulis further testified that after his discussion with Petitioner, he thought that Dr. Mardjetko's recommendations were accurate. Concerning her employment skills, Mr. Geroulis testified that the petitioner had a professional looking resume; and she had computer skills, as well as internet access. She seemed well educated and was articulate. Mr. Geroulis testified that he performed a transferrable skills analysis and that the petitioner's skills and physical restrictions matched with some department

of transportation code titles. He found her to be well educated and highly skilled. She had a solid work history; was professional and personable in her appearance. Mr. Geroulis concluded that the petitioner did have some placement challenges and would require some accommodations in whatever job she was seeking however, he felt that her assets outweighed those challenges and that she could be employable.

Mr. Geroulis testified that based on a reasonable degree of certainty as a certified counselor, that the petitioner could benefit from vocational services and that there is a stable labor market for her in Illinois; taking into consideration Petitioner's injuries and restrictions, the nature of her previous employment, her age, experience, training, education, and capabilities. Mr. Geroulis further testified that he did not believe that self-catheterization was a barrier prohibiting Petitioner from finding employment in Illinois. According to him, it could present a challenge because it would require accommodation. He further testified that employers are required, under the ADA, to provide accommodations. Finally, Mr. Geroulis testified that in late August of 2013, he was advised by Petitioner's attorney, that she did not wish to use the vocational rehabilitative services offered by Coventry.

On cross-examination, Petitioner's counsel addressed the issue of Petitioner's necessary use of opioid medications. Mr. Geroulis stated that not all employers required drug tests, and if the petitioner is not operating heavy equipment or having to operate a vehicle, it may not be an issue. Mr. Geroulis testified that he did not have a note from any of Petitioner's doctors suggesting that she would have cognitive impairment due to her medications; and that he relies on a physician's statement, as to medications, to determine whether the petitioner could perform certain tasks.

On redirect, Mr. Geroulis was asked his opinion as to whether there existed a stable labor market for Petitioner and he stated that Petitioner was working in the healthcare industry, which was expected to experience job growth. He also listed her education and the fact that she did quite a bit of work, in what would be traditionally referred to as light or sedentary duties. *See*, Tr. pgs. 120-135.

Petitioner was seen by Dr. Martin Lanoff of Adult and Pediatric Orthopedics, by request of Respondent. Dr. Lanoff examined the petitioner on two occasions. In his June 22, 2013 report, he strongly suggests that the petitioner seek an independent medical examination from an urologist/Urogynecologist, that has a good understanding or at least a special interest in urodynamics. Further, Dr. Lanoff does not recommend a second spinal cord stimulator. He strongly recommended that Petitioner be seen at a multi-disciplinary pain clinic, such as Rehabilitation Institute of Chicago. He found no objective abnormalities, other than ongoing pain complaints. *See*, RX6.

Dr. Lanoff admits that Petitioner had a disc herniation but then apparently ignores the recurrent herniation that occurred; and then attempts to cite the recurrent herniation as only existing per

hearsay from the petitioner, despite the fact that there is clear and convincing evidence of ongoing recurrent herniations throughout the petitioner's medical records. There is also evidence of chronic left-sided radiculopathy. This suggests that either Dr. Lanoff did not read the medical records or is choosing to ignore the evidence in formulating his opinion.

Dr. Lanoff denies the objective findings in the EMG performed by Dr. Rechitsky and suggests that Dr. Sakhadia does not understand the clear and consistent EMG findings of chronic radiculopathy.

Dr. Lanoff then finds no basis for Petitioner's complaints and suggests that the petitioner exhibited signs of symptom magnification. In his second report, he recommends use of either the spinal cord stimulator or a multi-chronic disciplinary pain approach but not both. In that Petitioner has already received the spinal cord stimulator apparently, Dr. Lanoff is recommending, as an alternative, multi-chronic, disciplinary, pain therapy and goes on to state that further surgical intervention may eventually be warranted.

Dr. Lanoff then suggests that there is secondary gain occurring although he then states he does not find any evidence of it. He has a difficult time finding any evidence of chronic radiculopathy, which is clearly present in the medical records.

Respondent also introduced into evidence a report from Dr. Jeffrey Coe, who is a board certified physician in occupational medicine. Dr. Coe concluded that Petitioner's urinary dysfunction and need for self-catheterization was not an absolute or inevitable barrier to employment in healthcare. Dr. Coe stated that any potential employer would have to cooperate with the petitioner by providing an adequate rest break for catheterization. Further, most large healthcare facilities, i.e. medical centers and outpatient clinics, would have restroom facilities or examination rooms appropriate for such catheterization. Dr. Coe noted that her work history and educational background in medical technology would certainly qualify her for work in a medical field.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving, by a preponderance of the evidence, all of the elements of her claim. It is the function of the Commission to judge the credibility of the witnesses and resolve conflicts in medical evidence. *See, O'Dette v. Industrial Comm'n*, 79 Ill. 2d. 249, 253, 403 N.E.2d 221, 223 (1980). In deciding questions of fact, it is the function of the Commission to resolve conflicting medical evidence, judge the credibility of the witnesses and assign weight to the witnesses' testimony. *See, R & D Thiel*, 398 Ill. App.3d at 868; *See also, Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury to be compensable to be compensable under the Workers' Compensation Act, she must establish the fact that the injury is due to a cause connected with the employment such that it arose out of said employment. *See, Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App.3d. 284, 574 N.E.2d 1244 (1991). It is not enough that Petitioner is working when accident injuries are realized; Petitioner must show that the injury was due to some cause connected with employment. *See, Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill.2d 207 at 214, 254 N.E.2d 522 (1969).

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

It is established law that at hearing, it is the employee's burden to establish the elements of his claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See, Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 356 N.E.2d 28 (1976). Furthermore, a causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. *See, Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 193 (1986).

The Arbitrator finds that Petitioner's testimony concerning her current condition of ill-being was credible, convincing, unrebutted, and consistent with her medical records, the medical treatment and conditions described therein. The need for continuing opioid medications, taken by the petitioner, due to the severity of her pain from severe left radiculopathy, is documented throughout the medical records.

The petitioner testified that throughout 2011, her pain levels consistently remained between seven and ten and her medical records support this. In addition, Drs. Mardjetko and Sakhadia opined respectively, in early 2012, that Petitioner has chronic neuropathic pain syndrome and chronic L5 radiculopathy secondary to scarring around the nerve root consistent, which is supported by the positive EMG performed by Dr. Rechitsky, on November 23, 2011. The records show that Dr. Mardjetko released the petitioner as of May 31, 2013, with permanent restrictions.

Dr. Lacey has confirmed that the petitioner has chronic depression; and Dr. Sakhadia opined that the persistent lumbar radiculitis, as confirmed by the EMG performed by Dr. Rechitsky on November 23, 2011, needed a spinal stimulator, which was implanted. In addition, Dr. Sakhadia referred Petitioner for a piriformis injection, which was performed on January 24, 2013, which yielded no benefit.

The Arbitrator has reviewed the records of Dr. Noone introduced as Petitioner's Exhibit 9 and does not find any definitive causal connection statement regarding Petitioner's bladder condition. Dr. Jerry Bauer, Petitioner's surgeon, states, "I am uncertain of the cause of her hypotonic bladder." Dr. Bauer notes that a CT scan from July 13, 2012, revealed no evidence of nerve root or spinal cord compression and Dr. Bauer further states, in his January 2, 2013 report, that the petitioner has an inability to empty her bladder and was told that she had a neurogenic bladder by Dr. Noone. Dr. Bauer states, "the cause of this is not apparent to me. She never had cauda equina compression syndrome or thecal sac compression." Dr. Bauer further states in a note generated August 13, 2012, "I have since spoke to Dr. Noone who felt there were potentially other reasons for poor bladder emptying which are not related to cauda equina compression syndrome."

Dr. Noone does not provide a causal connection statement and Dr. Bauer is of the opinion that the condition regarding her back did not cause her neurogenic bladder. The petitioner has not proven, by preponderance of the evidence, that the current condition of ill-being, regarding her bladder, is causally related to the August 10, 2009 accident. The Arbitrator finds that her condition regarding the back, including the two surgeries by Dr. Ghanayem and the fusion by Dr. Mardjetko, is causally related to the accident; as is Dr. Lacey's referral of Petitioner for a psychiatric consultation. The records document approximately four years of ongoing medical treatment for the petitioner's chronic, left-sided radiculopathy; including clear medical causation opinions by her treating physicians and continued, objective, medical evidence of a serious and disabling condition of ill-being, in this regard.

The Arbitrator does not find persuasive the opinions of Dr. Lanoff, who performed two independent medical examinations ("IME") as he examined the petitioner twice for approximately twenty minutes; and apparently agreed with the opinions of Dr. Anderson, who examined Petitioner on two occasions; and prescribed medication, which afforded her no relief. In addition, Dr. Lanoff admits he did not review the petitioner's medical records, in toto. The Arbitrator assigns some weight to the opinions of Dr. Coe, although he never examined the petitioner.

The Arbitrator accordingly finds that the Petitioner's present condition of ill-being, regarding the chronic left radiculopathy caused by severe nerve damage initiated by recurrent disc herniation and her present mental state are causally related to the work injury. The Arbitrator finds that the Petitioner's neurogenic bladder and pain syndrome is not causally related to the petitioner's work accident.

K. What temporary benefits are in dispute?

The Arbitrator finds that the respondent has not paid Petitioner maintenance, as Petitioner has never engaged in a vocational rehabilitation program. Maintenance is only paid to a petitioner who agrees to comply with a vocational rehabilitation program, pursuant to Section 8(a) of the Act; and apparently, the petitioner decided not to engage in vocational rehabilitation that was offered by Respondent.

The Arbitrator finds that all of the weekly amounts received to date are correct and are for temporary total disability except for the amounts Petitioner received for part-time work which were for temporary partial disability and that none of it was for maintenance.

The Arbitrator finds that Petitioner has received, to the date of hearing, the proper amount of temporary total disability and temporary partial disability and has refused Respondent's offer of vocational rehabilitation, therefore no maintenance is due and owing.

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

The petitioner claims that she is totally, permanently disabled and that there is no stable labor market wherein she can work. The Arbitrator finds that the petitioner has sustained injuries to the extent of 70% person as a whole.

The petitioner's testimony, the medical records, the testimony of petitioner's vocational assessment witness, Kathy Davis, and the respondent's assessment person all indicate that she can work four to six hours per day. While the petitioner's restrictions may not be accommodated in her chosen field of endeavor, she may be able to work in other employment fields.

Respondent shall pay Petitioner $669.72 per week for three hundred fifty (350) weeks as the injuries sustained by the petitioner cause loss of use of 70% of a person as a whole.

M. Should penalties or fees be imposed upon Respondent?

According to her proposed findings, Petitioner is requesting penalties and attorney's fees for failure to authorize payment for a lift to enable her to take her scooter in and out of her motor vehicle.

Section 19(k) of the Illinois Workers' Compensation Act states that "[i]n cases where there has been any unreasonable or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award.

Section 19(l) of the Act states that "[i]f the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30.00 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000.00. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Section 16 of the Act states that "[w]henever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

The Arbitrator finds that the Respondent's actions have not risen to the level of unreasonable or vexatious delay of any payments of benefits due to Petitioner nor has there been any unreasonable or intentional underpayment of compensation or unfairness towards an employee in the adjustment, settlement or payment of benefits. As such, the Arbitrator does not award any penalties or attorney's fees. However, Respondent shall authorize payment for a lift and payment to attach the lift, to assist Petitioner in loading and unloading her scooter out of her motor vehicle.

N. Is the Respondent due any credit?

The Arbitrator finds that no maintenance period has accrued as the petitioner has elected not to engage in vocational rehabilitation, which was offered by the respondent. Petitioner has permanent restrictions and limitations, which in addition to her ongoing need for self-catheterization, includes the prolonged use of controlled substances including opioids, which makes it extremely challenging, but not impossible for the petitioner to engage in gainful employment. Working from home would be an option for this petitioner.

Therefore, the Arbitrator awards maintenance for the period of June 1, 2013 through August 28, 2013. After that date, the petitioner declined further vocational rehabilitation services that Respondent offered therefore, the respondent is entitled to credit for maintenance benefits paid after August 28, 2013. Respondent's Exhibit #9 shows that the respondent paid additional maintenance for the period of August 29, 2013 through September 21, 2013, and is entitled to a credit of $2,827.78 against an award of permanency.

O. Is Petitioner entitled to vocational rehabilitation and prospective medical care?

The parties have agreed that all compensation, i.e., TPD, TTD and maintenance has been paid through August 28, 2013. Payment records introduced by Respondent show that the petitioner was paid temporary partial disability for the period of August 25, 2010 through June 16, 2010; as well as June 8, 2010 through July 31, 2010. The total TPD, as stipulated and awarded for that period, is $1,931.13.

The petitioner was then off work for the period of August 2, 2010 to March 12, 2011, and testified that she returned to work, on a part-time basis. The records show that she was paid temporary partial disability for the period of March 13, 2011 through July 30, 2011. The total amount of TPD paid for the second period is $8,960.66. According to Respondent's evidence, TTD was reinstated as of July 31, 2011.

The records show that Dr. Mardjetko released the Petitioner as of May 31, 2013 with permanent restrictions including working part-time up to 6 hours per day; no repetitive bending or twisting the spine, no lifting over 20 pounds. Further, the petitioner must be allowed to change positions from sitting, standing and walking.

The Arbitrator finds that the Petitioner reached maximum medical improvement as of May 31, 2013. Following that date, Petitioner would be entitled to maintenance during a period in which vocational rehabilitation was appropriate. The Arbitrator agrees with some of the conclusions and opinions of Dean Geroulis, who stated that the petitioner could benefit from vocational rehabilitation. The testimony of the petitioner and Dean Geroulis show that vocational rehabilitation was refused as of August 28, 2013. The Arbitrator also agrees that a limited but stable labor market exists even with the

petitioner's injuries and restrictions as outlined by Dr. Mardjetko. One must consider the nature of her previous employment, her age, experience, training, education, and capabilities. The Arbitrator notes that Petitioner's treating physician has indicated that she can work four to six hours per day. The Arbitrator finds that there may be a small existing market where the petitioner could work from home to accommodate her physical restrictions.

Therefore, the Arbitrator awards maintenance for the period of June 1, 2013 through August 28, 2013. The respondent is entitled to credit for maintenance benefits paid after August 28, 2013. Respondent's Exhibit #9 shows that additional maintenance was paid for the period of August 29, 2013 through September 21, 2013, and therefore, Respondent is entitled to a credit of $2,827.78 against permanency, which has accrued as of August 29, 2013.

Regarding Petitioner's request for prospective medical care, the Arbitrator finds this request to be contradictory to and mutually exclusive of Petitioner's request for the Arbitrator to determine the nature and extent of her injuries. The Arbitrator notes that the petitioner has received ongoing, extensive medical treatment for the past four years and will, in all likelihood, continue to need medical care. However, as the petitioner (1) has filed a request for an arbitration decision that does not include consideration of 19(b) or 8(a) issues under the Act; (2) had not requested or testified as to any specific medical treatment she is seeking; and (3) has been declared to be at maximum medical improvement by her treating doctor, the Arbitrator finds that the petitioner is not entitled to prospective medical treatment.

MAUREEN LYNCH
10WC37691

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION
10WC37691
SIGNATURE PAGE

Signature of Arbitrator

February 19, 2014
Date of Decision

FEB 19 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

STATE OF ILLINOIS,
ILLINOIS WORKERS' COMPENSATION COMMISSION,

Petitioner,

16IWCC0535

vs.

NO: 11 INC 00541

MICHAEL BECKHAM, individually, and as President,
and LYNDELL S. BECKHAM, individually and as
Secretary, d/b/a BECKHAM TRANSIT CO.,

Respondent.

DECISION AND OPINION RE: INSURANCE COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Division, brings this action, by and through the Office of the Illinois Attorney General, against the above-captioned Respondent, alleging violations of Section 4(a) of the Illinois Workers' Compensation Act ("Act") and Section 7100.100 of the Rules Governing Practice Before the Illinois Workers' Commission ("Rules"), codified as 50 Illinois Administrative Code, Chapter 11. Proper and timely notice was given to all parties.

Commissioner Kevin W. Lamborn presided over a hearing on April 9, 2015, in Chicago, Illinois. Petitioner was represented by Colin Kicklighter from the Office of the Illinois Attorney General. Neither Michael Beckham nor Lyndell S. Beckham appeared nor did consul appear on their behalf or on the behalf of Beckham Transit Co.

Shelton Wilson, an insurance compliance investigator for the Insurance Compliance Division of the Illinois Workers' Compensation Commission, testified to and presented documentary evidence at the April 9, 2015, of Respondent not being a self-insured entity as is allowed under Section 4(a) of the Act and of Respondent failing to have valid workers' compensation insurance.

16IWCC0535

Mr. Wilson testified that, once it was determined Resident was non-complaint with the Act, a Notice of Noncompliance was sent to Respondent by both regular and certified mail on December 9, 2011.

Mr. Wilson also testified to having hand-delivered a Notice of Insurance Compliance Hearing to Respondent on October 11, 2013, tendering said notice to Lisa Nelly, a receptionist for Respondent. The Notice of Insurance Compliance Hearing alleged Respondent failed to have workers' compensation insurance from August 3, 2007, through January 10, 2008, from May 14, 2008, through May 20, 2008, from August 31, 2008, through December 31, 2008, from February 7, 2009, through February 6, 2011, from February 24, 2012, through June 6, 2012, and July 6, 2012, through October 23, 2013. The Notice of Insurance Compliance Hearing also indicated that the hearing was scheduled for December 19, 2013, at 9:00 a.m. before Commission Lamborn.

Commission records indicate this matter was repeatedly continued until April 9, 2015. These records also indicate Respondent neither responded to the above-referenced notices nor presented in person or by way of counsel before the Commission to contest the allegations.

The Commission, after considering the record in its entirety and the applicable law, finds Michael Beckham, individually and as President of Beckham Transit Co. d/b/a Beckham Transit Co., and Lyndell S. Beckham, individually and as Secretary of Beckham Transit Co. d/b/a Beckham Transit Co., willfully any knowingly violated Section 4(a) of the Act and Section 7100.100 of the Rules from August 3, 2007, through January 10, 2008, from May 14, 2008, through May 20, 2008, from August 31, 2008, through December 31, 2008, from February 7, 2009, through February 6, 2011, from February 24, 2012, through June 6, 2012, and July 6, 2012, through October 23, 2013. Accordingly, the Commission finds Respondent liable for operating for 1,600 days without workers' compensation insurance and subject to a fine of $800,000.00 pursuant to Section 4(a) of the Act and Section 7100.100(b)(1) of the Rules and an additional fine of $40,936.00 for undue personal enrichment by failing pay $40,936.00 in insurance premiums from July 6, 2012, through (prorated amount).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Michael Beckham, individually and as President of Beckham Transit Co. d/b/a Beckham Transit Co., and Respondent Beckham, individually and as Secretary of Beckham Transit Co. d/b/a Beckham Transit Co., are found to be employers who were in non-compliance with the insurance provisions of Section 4(a) of the Act and Section 7100.100 of the Commission Rules and are ordered to pay the Commission a fine of $800,000.00 pursuant to Section 4(d) of the Act and Section 7100.100 of the Rules.

Pursuant to Commission Rule 7100.100(f), once the Commission assesses a penalty against an employer in accordance with Section 4(d) of the Act, payment shall be made according to the following procedure: 1) payment of the penalty shall be made by certified check or money order and made payable to the State of Illinois; 2) payment shall be mailed or presented within thirty (30) days of the final order of the Commission or the order of the court of review after final adjudication to:

16IWCC0535

Illinois Workers' Compensation Commission
Fiscal Office
100 W. Randolph Street, Suite 8-328
Chicago, Illinois 60601
(312) 814-6625

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

DATED: AUG 18 2016
KWL/mav
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

Zachary Fusco,

Petitioner,

vs.

NO: 11WC 03386

16IWCC0569

Play N Trade and Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund,

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of statute of limitations and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 30, 2015 is hereby affirmed and adopted.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION the Illinois State Treasurer as *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

16IWCC0569

entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $4,152.84. 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: AUG 3 1 2016

MB/mam
o-8-25-16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FUSCO, ZACHARY J
Employee/Petitioner

Case# **11WC003386**

16IWCC0569

PLAY N TRADE AND ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 10/30/2015, 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 0.15% 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:

0412 RIDGE & DOWNES
MATT COLEMAN
101 N WACKER DR SUITE 200
CHICAGO, IL 60606-7307

0000 PLAY N TRADE
9270 JOLIET RD
SUITE 600
HODGKINS, IL 69525

4980 ASSISTANT ATTORNEY GENERAL
COLIN KICKLIGHTER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

16IWCC0569

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

Zachary J. Fusco
Employee/Petitioner

Case # **11WC 003386**

v.

Play N Trade and Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

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 **October 7, 2015**. 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 **Is the claim against the Injured Workers' Benefit Fund barred by the Statute of Limitations?**

16IWCC0569

FINDINGS

On August 10, 2010, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$13,260.00**; the average weekly wage was **$255.00**.

On the date of accident, Petitioner was **17** years of age, *single* with **0** children under 18.

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

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

ORDER

Respondent-Employer, Play N Trade shall pay Petitioner **reasonable and necessary medical expenses of $4,152.84**, in accordance with Sections 8(a) and 8.2 of the Act.

Respondent Injured Workers' Benefit Fund shall **pay reasonable and necessary medical services of $4,152.84**, pursuant to the Medical Fee Schedule, as provided in Sections 8(a) and 8.2 of the Act.

The Illinois State Treasurer, as 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's Office. Award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of the Act. In the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner, Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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 30, 2015
Date

OCT 30 2015

FINDINGS OF FACT

The Petitioner, Zachary J. Fusco ("Petitioner"), testified that he was born on May 26, 1993, and that he was single without dependents on the date of accident. Petitioner testified that was employed by Play N Trade ("Respondent-Employer"), located at 9720 Joliet Road, Hodkins, IL. 60525 on August 10, 2010. Madhav Reddi was the owner of this franchise. Petitioner described Play N Trade as a new and used video game store that Petitioner himself had frequented before becoming an employee. Petitioner stated that he worked for the Respondent-Employer beginning in October of 2009 after being hired by Respondent-Employer to attract attention outside the store by dancing in a heavy, plush-like, "Super Mario" costume provided by Respondent-Employer. The costume consisted of a heavy wool suit with a large foam head that allowed the wearer to breathe only through the eye holes. Petitioner testified that he worked for Respondent-Employer for about 30 hours per week during the summer and was paid at a rate of $8.50 per hour. Petitioner did receive pay checks and was issued W-2s from Respondent-Employer. Petitioner was unable to provide the W-2 documents or check stubs to substantiate this claim. Petitioner testified that he was paid more than 1,000 dollars by Respondent Employer in the year preceding the accident.

Petitioner testified that on August 10, 2010 he was working for Respondent-Employer and dancing outside the store in the costume. The temperature outside was about 102 degrees, with 97% humidity. Petitioner stated that he recalled dancing and then waking up in an ambulance. The ambulance and medical records from the date of accident show that Petitioner suffered from acute heat stroke. Petitioner received medical treatment in the form of IV saline drips, observation and rest at Adventist LaGrange Memorial Hospital. Petitioner was discharged the same day in good condition and was released to work without restrictions. (PetExs. 3&5)

Petitioner testified that his supervisor, John Stotrach, was present at the store at the time of the accident and that Stotrach met Petitioner at the emergency room at Adventist LaGrange Hospital. Petitioner claims that he notified John Stotrach of the incident both at the hospital and on a formal notice of injury that he filled out at

the store after the incident. Petitioner claims that Respondent-Employer failed to pay the medical expenses in this case despite its knowledge of the accident and treatment. Petitioner left the employ of Respondent-Employer in October 2010.

Petitioner testified that his injury resolved and that he has not had any similar issues since the date of accident. Petitioner has "felt well" since the incident and has not required any medical attention since his release. Medical bills from Pleasantview Fire Protection District ($1,100.00) and Adventist LaGrange Memorial Hospital ($3,052.84) were claimed by Petitioner and submitted as Petitioner's Exhibit Nos. 4 and 6.

CONCLUSIONS OF LAW

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

A. RESPONDENT-EMPLOYER WAS OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKER'S COMPENSATION ACT:

The Arbitrator finds that the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act. Petitioner testified credibly that Respondent-Employer was in the retail business and that he was paid more than $1,000.00 in the year preceding the accident.

B. THERE EXISTED AN EMPLOYER-EMPLOYEE RELATIONSHIP BETWEEN RESPONDENT-EMPLOYER AND PETITIONER:

The Arbitrator finds that there was an employee-employer relationship between Petitioner and Respondent-Employer. Petitioner testified that Respondent-Employer provided him W-2 documents and paid Petitioner on an hourly rate of $8.50 to dress in a suit provided by the Respondent-Employer to attract attention and business to Respondent's store. Petitioner was hired in 2009 and his employment continued until October of 2010.

C-D. THE ACCIDENTAL INJURIES OF AUGUST 10, 2010 AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT-EMPLOYER:

The Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment by the Respondent on August 10, 2010, based upon the unrebutted testimony of Petitioner and the medical records.

E. NOTICE OF THE ACCIDENT WAS GIVEN PURSUANT TO THE ACT:

The Arbitrator finds that timely notice, in accordance with Section 6(c) was given to Respondent-Employer, based upon the unrebutted testimony of Petitioner.

F. PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE ACCIDENTAL INJURY:

Petitioner has no current condition of ill-being related to the injury. Petitioner testified that he has "felt well" since the incident and that he did not have any residual complaints following his treatment at the ER on the date of the injury. Petitioner's condition of ill-being at the time that he was taken by ambulance to the hospital and during the time that he received treatment at the hospital is causally related to the accidental injury.

G. (EARNINGS), H. (AGE), AND I. (MARITAL STATUS) :

Petitioner provided no evidence of earnings besides his testimony. Petitioner worked 30 hours a week at an hourly rate of $8.50. Accordingly, Petitioner's Average Weekly Wage was $255.00. The Arbitrator finds that on the date of accident, Petitioner was 17 years of age and single with no dependent children.

J. THE MEDICAL SERVICES PROVIDED TO PETITIONER WERE REASONABLE AND NECESSARY:

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary to treat heat exhaustion and orders the Respondent-Employer to pay the Petitioner for necessary medical services in the amount of $4,152.84 (Pleasantview FPD: $1,100.00; Adventist LaGrange Memorial $3,052.84), as provided in Sections 8(a) And 8.2 of the Act.

L. NATURE AND EXTENT

Petitioner currently has no complaints of ill-being. Petitioner testified that he has "felt well" since the incident and that he has not had any residual complaints following the initial treatment at the ER. Therefore, no award for permanent partial disability is made.

O. IS PETITIONER'S CLAIM AGAINST THE IWBF BARRED BY THE STATUTE OF LIMITATIONS?

The Motion to Dismiss the Injured Workers' Benefit Fund ("Fund"), based upon the Statute of Limitations, is denied. The Fund's Motion argues that it should be dismissed from the case, pursuant to Section 6(d) of the Act, because the Fund was not added as a Party until more than three years after the date of accident.

Petitioner's Application for Adjustment of Claim was timely filed against Respondent-Employer. Due to the nature of the franchise business, it took Petitioner's attorney years to determine whether there was valid insurance coverage for the Play N Trade franchise where Petitioner worked. Upon learning there was no valid insurance through NCCI, the Fund was added as a Party to the case.

The Arbitrator notes that the legislative intent of in establishing the Fund is to protect workers whose employers fail to provide adequate workers' compensation coverage and that the Fund is Petitioner's only recourse for benefits under the Illinois Workers' Compensation Act ("Act"). The Fund is a special fund, and not an employer. See: Illinois State Treasurer v. Illinois Workers' Compensation Commission, 2015 IL 11748 (2015)

Section 4(d) of the Act clearly states, "Monies in the Injured Workers' Benefit Fund shall be used only for payment of workers' compensation benefits for injured employees when the employer has failed to provide coverage..." 820 ILCS 305/4(d). Section 4(d) does not provide any time limit as to when the Fund may be added to an Application. Furthermore, the Act specifically defines who is considered an employer in Section 1(a). The Fund is not considered an employer under any reading of Section 1(a) and, thus, there is no statute of limitations barring when the Fund may be added to a timely filed Application for Adjustment of Claim against an employer-respondent. The Fund's liability to a petitioner-employee is clearly derivative of the respondent-employer's liability. A timely filed Application against the respondent-employer negates any claim for a Statute of Limitation defense by the Fund.

Interestingly, the Act provides that the Fund has the same Section 5(b) subrogation rights as the employer who failed to pay benefits, as if the employer had paid those benefits. The Legislature failed to provide the Fund with the limitations protection afforded by Section 6(d). Indeed, if the limitations provision of section 6(d) is available to the Fund, then arguably the notice provisions required by Section 6(c) would be available as well. Of course, then the Fund would likely prevail on all cases, as notice is jurisdictional and it would be impossible for the injured employee to give notice to the Fund within 45 days of the accident.

For the above stated reasons, the Fund's Motion to Dismiss the Application, based upon the running of the Statute of Limitations, is denied.

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

THOMAS SULZMANN,

Petitioner,

vs.

NO: 11 WC 16448

AUDIO VISUAL SERVICES CORP.,

Respondent,

16IWCC0558

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, and prospective medical care, 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 for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

On December 22, 2015, Respondent filed a Motion to Continue the Return Date on Review and a Motion to Amend the Trial Record. These motions were heard before Commissioner DeVriendt on January 27, 2016. On January 29, 2016, the Commission issued an Order granting Respondent's motions and finding that the wrong medical documents had been entered into evidence as Respondent Exhibit 5. Those records pertained to a different patient and not Petitioner. The Commission ordered that the records in Respondent Exhibit 5 be removed from the record and the correct records of Petitioner be placed into evidence as Commission Exhibit 1. The Commission found that the correction of a mistake and the admission of the correct medical records do not constitute the admission of additional evidence on review.

Based on the correct records now being in evidence, the Arbitrator's statement on page four and the finding on page seven are no longer accurate that there were no records in evidence from Dr. Nelson indicating that Petitioner had a complete resolution of his knee complaints. We hereby modify the decision to reflect that there is an August 15, 2012 chart note from Petitioner's primary care physician, Dr. Nelson, indicating that Petitioner reported a "complete resolution" of his knee

16IWCC0558

complaints after receiving a series of stem-cell injections in Mexico. Nevertheless, the Commission still finds that the opinion of Dr. Kuesis is more persuasive than that of Dr. Komblatt on the issue of causation and that Petitioner's work injury remains a contributing factor in his need for further treatment.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical bills from Core Orthopedics, incurred from May 10, 2013 through December 2, 2014, under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the right knee arthroscopy offered by Dr. Kuesis along with all related services.

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.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 5 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 7/13/16
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

SULZMANN, THOMAS
Employee/Petitioner

Case# **11WC016448**

AUDIO VISUAL SERVICES CORP
Employer/Respondent

16IWCC0558

On 8/21/2015, 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 0.24% 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:

2095 LAW OFFICE PHILIP BLOMBERG
11516 W 183RD ST
SUITE N E
ORLAND PARK, IL 60467-9473

2542 BRYCE DOWNEY & LENKOV LLC
JESSICA RIMKUS
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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)/8(a)

THOMAS SULZMANN
Employee/Petitioner
v.
AUDIO VISUAL SERVICES CORP.
Employer/Respondent

Case # 11 WC 016448

16IWCC0558

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 **12/02/2014**. 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 _____

16IWCC0558

FINDINGS

On the date of accident, **06/13/2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$138,994.00**; the average weekly wage was **$2,672.00**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$11,187.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$11,187.00**. The Parties agreed that Petitioner was temporarily and totally disabled for **9 weeks**, from **6/14/2010** through **8/15/2010**.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of Core Orthopedics, incurred from 5/10/2013 through December 2, 2014, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall authorize and pay for the right knee arthroscopy offered by Dr. Kuesis in his chart note of 7/29/2013, along with all related services.

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

August 21, 2015
Date

ICArbDec19(b)

AUG 21 2015

161WCC0558

FINDINGS OF FACT

Petitioner is employed as a "rigger" for Respondent. His job duties include hanging theatrical productions, climbing, beam walking, aerial lifts, pulling chains and physically handling from 10 to 250 pounds. He has been employed with Respondent and its predecessors for 25 years.

Petitioner was working at the Sheraton Ball Room on June 13, 2010, when he tripped over a lighting cable and felt pain in his right knee. He reported the accident and finished the day. Respondent stipulates to notice (Arb X1).

Petitioner first sought treatment with Dr. Kuesis on June 14, 2010. Dr. Kuesis previously treated his left knee. Dr. Kuesis x-rayed the right knee, injected the right knee, prescribed an MRI, physical therapy and restricted work.

Petitioner was temporarily totally disabled for the following nine (9) weeks, from June 14, 2010 through August 15, 2010, stipulated by the Parties (Arb X1). During that time, he received TTD compensation, an MRI, physical therapy and returned to work on August 16, 2010.

Petitioner returned to Dr. Kuesis on March 30, 2011, with continuing complaints of pain and instability. Dr. Kuesis mentioned knee replacement when the pain becomes intolerable (PX 2, p. 17).

Petitioner continued working and returned to Dr. Kuesis on June 17, 2011. He received a second injection in his right knee.

Petitioner continued working and returned to Dr. Kuesis on December 16, 2011. Dr. Kuesis noted positive McMurray's and Apley's signs and recommended right knee arthroscopy.

Petitioner chose alternative treatment and underwent injections of stem cells and growth hormones in January and May of 2012 in Mexico. He felt better for awhile. He is not claiming those expenses in this claim. There was testimony about a chart note from Petitioner's PCP, Dr. Nelson, of August 12, 2012, where it was noted that Petitioner had a "complete resolution" of his knee complaints. That document was not submitted into evidence, so the Arbitrator will accept Petitioner's testimony that his right knee improved immensely after these injections.

Petitioner continued working and returned to Dr. Kuesis on May 10, 2013, as his knee was feeling worse. A current MRI was obtained on July 16, 2013. This MRI showed worsening arthritis, the meniscal tears and chronic to mid grade sprain of the ACL. Dr. Kuesis again recommended right knee arthroscopy on July 29, 2013. (PX 3)

Petitioner attended a §12 examination with Dr. Ira Kornblatt on December 16, 2013, at the request of Respondent. Dr. Kornblatt thought that the injury caused a temporary aggravation of Petitioner's knee condition that resolved and any surgery would be related to the natural progression of the degenerative condition. (RX 3)

Surgery has not been authorized. Petioner would like to undergo the arthroscopy procedure that Dr. Kuesis has offered. Petitioner continues working with a knee brace, limps, has daily pain and swelling and takes Arthrotec, an anti-inflammatory.

A Petition for Medical treatment was filed on January 31, 2014 (PX 1). Dr. Kuesis testified via evidence deposition on behalf of Petitioner. (PX 4) Dr. Kornblatt testified via evidence deposition on behalf of Respondent. (RX 1)

CONCLUSIONS OF LAW

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

B. ACCIDENT

The Arbitrator finds that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on June 13, 2010 based upon the credible testimony of Petitioner and the medical records. He tripped over a light cable and injured his right knee. Dr. Kuesis' notes the same history on June 14, 2010. (PX 2, p. 22) Petitioner's testimony was unrebutted.

F. CAUSAL RELATION

The Arbitrator finds that Petitioner has proved that there is a causal connection between the accidental injuries and the Petitioner's current condition of ill-being with respect to his right knee.

Petitioner was fully engaged in a physically demanding job for years, until he injured his right knee on June 13, 2010. The Arbitrator believes that Petitioner wanted to continue working and avoid surgery, so he declined the offer of surgery in 2011, had the stem cell injections in 2012, and continued to

work his physically demanding job until he sought further treatment with Dr. Kuesis in may of 2013, do to worsening problems with his right knee.

There are positive objective diagnostics and findings, including:

1. 06/25/2010: MRI (PX 2, pp. 20-21)
   - ACL tear
   - Medial meniscal tear
   - Lateral meniscal tear
   - Moderate osteoarthritis

2. 07/16/2013: MRI (PX 3, pp. 3-5)
   - Worsening medial tear
   - Worsening chondromalacia
   - ACL sprain vs. tear

3. Positive Apley's and McMurray's noted in 2011 and 2013 by Dr. Kuesis.

Dr. Kuesis opined a positive causal relation at deposition. (PX 4, pp. 18-19) Dr. Kuesis' opinion is found to be credible and persuasive in this case. Significantly, Petitioner had positive McMurray's and Apley's signs on December 16, 2011, when surgery was first recommended. Petitioner chose to pursue the stem cell injections, instead of undergoing surgery and he was able to delay surgery for 1½ years.

Dr. Kornblatt opined a negative causal relation at deposition. (RX 1, p. 22) He opined a temporary aggravation of a pre-existing degenerative condition. (RX 1, pp. 22) He testified on cross-exam that he never saw the MRI report from June 25, 2010. (RX 1, p. 27) He retracted that statement and said that he was wrong, that he had the MRI report from June 25, 2010, and there is evidence of ACL tear. (RX 1, pp. 28-29) He never saw the MRI images from June 25, 2010, but he saw the images from the July 16, 2013 MRI. (RX 1, pp. 31-32) Both reports refer to moderate osteoarthritis, not severe. (RX 1, pp. 32-33) Arthroscopic surgery on the right knee is reasonable. (RX 1, p. 30) There was no evidence of any work restrictions prior to this accident. (RX 1, p. 39) Dr. Kornblatt's opinions are not persuasive in this case, especially in light of the lack of supporting documentation of a complete resolution of Petitioner's right knee condition in the records of the PCP.

J and K INCURRED AND PROSPECTIVE MEDICAL

The Arbitrator finds the services provided to Petitioner by Core Orthopedics, including the July 16, 2013 MRI to be reasonable and necessary to cure or relieve the effects of the injuries. The proposed arthroscopic surgery is also found to be reasonable and necessary.

In light of the Arbitrator's findings regarding Accident and Causal Connection above, Respondent is ordered to pay for the medical services provided by Core Orthopedics from May 10, 2013 through December 2, 2014 and is ordered to authorize and pay for the arthroscopic surgery offered by Dr Kuesis in the chart note of July 29, 2013, along with all related services.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sherry Campbell,

Petitioner,

vs.

NO: 11 WC 19293

White County Coal, LLC,

16IWCC0523

Respondent.

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, causation, wages, medical expenses, temporary total disability and nature and extent, reverses the Decision of the Arbitrator and awards compensation, for the reasons stated below.

Findings of Fact

Petitioner, a 43 year old belt shoveler, testified that she began working for Respondent on 3/8/10. (T.94[1]). She indicated that prior to that job she drove a dump truck at a mine construction in Akon, Illinois, and before that she was a waitress in a restaurant in Benton, Illinois. (T.94). Petitioner noted that prior to that time she was a corrections officer from 2003 to September of 2008. (T.95). Petitioner testified that when she started working for Respondent she spent the first four weeks or so learning where everything was in the mines and cleaning belts, which are the 48 inch strips of rubber around rollers that carries the coal out of the mine. (T.97). After that she worked as a pinner operator or roof bolter which involves using a machine to drill a hole and install a plate to hold the roof up in a cut in the mine. (T.98-99). Thereafter, she went to a different mine called Riverview for about 45 days where she was assigned to "out buy work" which involved "clean[ing] up everything that's left behind as the unit moves forward" and required the use of a shovel, pick axe and sledge 60% of the time. (T.99-101).

[1] The Commission notes that pages from the 4/16/14 transcript will be designated by the letter "T", while pages from the 4/20/15 record will be designated by the letter "R".

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Petitioner testified that she returned to work at the Carmine mine from early July (2010) into February of 2011 during which time she estimated she shoveled underground 80% of the time. (T.102). During this period, Petitioner noted that she "... was shoveling, cleaning belts and headers, breaking up debris. [She] would commute on a golf cart from one location to the another [sic]. [She] had a list of cleaning responsibilities to follow, and take a short break for lunch. And then continue to shovel until the end of [her] day." (T.103). She estimated that 80% of the time she would have either the sledge, pick axe or shovel in her hand. (T.103). The rest of the time she would be commuting from one location to the other and loading and unloading her tools in addition to taking a lunch break. (T.103-104). She indicated that she would break up the rock and sometimes scrape with a rake or the back of the shovel, then "... flip the shovel around and throw it up over [her] head into the top of the belt." (T.104). She noted that some of the belts are ten feet high while others are maybe six to eight inches off the ground, with the average belt being waist high, or three to four feet. (T.104).

On cross examination, Petitioner testified that she began having symptoms of carpal tunnel "[w]hile [she] was shoveling the belt", or approximately the summer to fall of 2010. (T.144-145). She conceded, however, that she had "... a problem with [her] hands in the fall of 2001, like November, December, January of 2002." (T.146). Petitioner then agreed that she was diagnosed with bilateral carpal tunnel syndrome perhaps in about 2001 but at least in 2002. (T.146-147). She acknowledged that she went to a doctor for this condition, but she could not recall being referred to a specialist named Dr. Johnson. (T.147). She then testified that Dr. Gupta was the physician that diagnosed the condition. (T.148). She agreed that the doctor prescribed splints for her to wear on her wrists at that time, but could not recall if he injected her wrists in 2002, although she agreed it was possible. (T.147-149). Petitioner also denied having any problems with her hands or wrists while working as a correctional officer, which she did for five years. (T.150).

At the hearing held on 4/20/15, when asked whether she was diagnosed with carpal tunnel syndrome in 2002, Petitioner testified "[n]ot to my knowledge", although she conceded that her family doctor prescribed splints for both of her hands and wrists in 2002. (R.31). On redirect at the same hearing, Petitioner indicated that she was pregnant in 2001, up until 1/25/02, and that during her pregnancy she had pain in her hands and fingers. (R.55). She noted that she was given cock splints for her hands and she received acupuncture from a chiropractor. (R.56). She indicated that two to four weeks after her pregnancy "...the pain wasn't there but they were numb." (R.56). She also noted that she gained "...[a]n enormous amount of weight." (R.56). Petitioner indicated that she was pregnant again in 2005 to 2006, but had "[n]one of the same symptoms." (R.57). She also denied receiving any treatment for numbness or pain in her hands, or being restricted from work for same, after her first pregnancy and leading up to the date she began working for Respondent in February or March of 2010. (R.57-58). The same can be said for the period that she worked as a corrections officer for the State of Illinois. (R.58).

Petitioner testified that she notified her employer in October of 2010 about the symptoms or problems in her hands. (T.122). She noted that at that time she called Respondent's human resource coordinator, Karen Pharr. (T.122). Petitioner indicated that she knew the proper procedure for reporting injuries "... if there [was] an actual pinpointed time of injury ...", at which point she would fill out an accident report. (T.123). However, she indicated that she

didn't know what to do in this regard because there was no definite date. (T.123). Petitioner noted that Ms. Pharr told her to fill out an accident report, which she did a few days later. (T.124-125). Petitioner indicated that she understood you could only get an accident form from your supervisor, which she did. (T.125). She noted that you would then fill out the form with either your supervisor or the head of the safety department. (T.126).

Petitioner was shown PX10, a copy of the accident report in her case. (T.126). She noted that her name at the top of the first page was not in her handwriting. (T.127). She also indicated that she filled out the report in October of 2010, when she was a rock shoveler and not working third shift, as she was told to do by Ms. Pharr; however, she noted that she was working the third or night shift in March of 2011 as a rock duster. (T.128-130). Petitioner testified that she believed she filled out the first page of this accident form, and came back and signed the second page on 3/31/11, or after she had been told the results of her nerve conduction study. (T.132-133). She noted that once she learned the results of this test she called Ms. Pharr and told her she did in fact have carpal tunnel in both hands. (T.134-135). She indicated Ms. Pharr then informed her that she needed to come in to sign some medical release forms. (T.135). Petitioner testified that she did not read the forms carefully, and that she did not retain copies of the forms she signed around 3/31/11. (T.135). She stated that in October of 2010 she believed she filled out the form with Phillip Kittinger, the head of the safety department at Respondent's Patiki mine. (T.138).

Megan Waller was called to testify by Petitioner at the hearing held on 4/16/14. Ms. Waller currently works at White Oak Resources, an underground coal mine in McLeansboro, Illinois. (T.22-23). Ms. Waller testified that she worked with Petitioner on the same shift as a belt shoveler at White County Coal Carmine from July 2010 until the fall of 2010. (T.23-25). She indicated that they worked together doing the exact same thing and that they were "… within sight or sound of each other the whole time." (T.26). Ms. Waller noted that as belt shovelers they used shovels, pick axes and sledge hammers and were assigned to various parts of the belt line that needed to be cleaned. (T.27). She indicated that they would shovel up coal and rock and use sledge hammers and pick axes to break up larger chunks in order to maintain the required two foot walkway on each side of the belt. (T.28-29). Ms. Waller estimated that 80% or 85% of the time, if not more, was spent with those tools in her hand, depending on one's assignment, and that the rest of the time, other than the 30 minutes allowed for lunch, was spent traveling from one spot to another. (T.32-33). Ms. Waller indicated that coal is typically lighter than the rock to shovel, but that it's all heavy. (T.34). She also noted that the job she just described was the same one that Petitioner performed. (T.35).

In addition, Ms. Waller testified that in general they worked an eight (8) hour shift but it could vary and that "… you're mandatory made to stay and clean up …[a] spill because [you] can't just leave those things… You may not get lunch. You may get lunch, just depending on how your days go and what they're telling you to do." (T.30). She indicated that her use of the word "mandatory" denotes that "… you have to stay." (T.31). She went on to testify that the overtime hours she and Petitioner worked were "… definitely mandatory... The only difference in between her and I is at that time she would have been a [sic] orange hat [or inexperienced worker], and would have worked more required mandatory hours than [Ms. Waller] did, because of the orange [hat] …" (T.36). She indicated that orange hats are required to work more

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Saturdays and that "... if you don't show up, you get an unexcused absence. As a no call, no show. And after three of those and 90 days you're gone. So it didn't matter what you had planned." (T.36-37). Ms. Waller noted that "coal run Saturdays" were not optional for either orange hats or experienced miners and that "[e]verybody had to show up and be there" on those days. (T.38). On cross, Ms. Waller agreed that not all overtime at Respondent is mandatory. (T.87). On redirect, she clarified that by saying that "[i]t's not all mandatory, but orange hats are required to work more mandatory overtime than anyone else." (T.89). She also agreed that sometimes orange hats have an opportunity to work non-mandatory overtime. (T.89).

Petitioner testified that Ms. Waller's testimony concerning overtime was accurate. (T.118). She noted that most of the overtime reflected in the wage records was mandatory or required, and that "[m]aybe one day of overtime out of five days of overtime was voluntary." (T.118). As a result, Petitioner agreed that about 20% of her overtime hours was voluntary as opposed to mandatory. (T.118-119).

Ms. Waller testified that she is also familiar with the accident investigation reports that are collected by Respondent. (T.40). She noted that after she gave birth to her son she worked in the human resource department for two years and that as part of her job duties she would have to make copies of hundreds of such reports. (T.41-42,74). She indicated that during that time she worked under the supervision of Karen Farr [sic] and that she dealt with issues relating to workers' compensation claims. (T.51). Ms. Waller was shown PX10, the accident investigation report with respect to Petitioner's claimed accident. (T.56). She testified that the handwriting highlighted by Petitioner's counsel appeared to be that of Josh Bell, Respondent's safety director. (T.57). She noted that Mr. Bell had just transferred from Gibson County and may not have even been at White County Coal in October of 2010. (T.58). She indicated that Mr. Bell was working as an assistant safety director at White County in March of 2012, or the date noted after his signature on the form in question. (T.58-59). On cross, Ms. Waller conceded that it was possible, even though she doesn't know her handwriting, that Petitioner may have filled in some of the information. (T.79).

In addition, Ms. Waller testified that she "... saw several, several instances where the employees who knew they had filled out accident reports go back and ask for them to be retrieved and ... there would be no record of them ever filling out an accident report." (T.67). In those instances Ms. Waller noted that the employee would be "out of luck" and that they would "... have to miss work and use their group health to get things paid for..." (T.67). She also indicated that at times she would see documents with false or incorrect dates, and that she had witnessed instances where there had been an attempt to recreate missing forms. (T.67-68). Ms. Waller denied misplacing any forms herself, but noted that "[g]enerally when they can't be found, it's because the safety office can't produce them." (T.74). However, she did acknowledge that it was possible such a form cannot be produced because it wasn't filled out. (T.74-75). Ms. Waller testified that the form in Petitioner's case was "... before [her] time working in the office." (T.75).

Ms. Waller testified that she "can guarantee" that Petitioner was "shoveling belt on October 2010." (T.76-77). She also noted that she recalled Petitioner complaining of hand and wrist problems while at work, although she stated that she could not provide any specific details.

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(T.83). Ms. Waller indicated that Petitioner did not tell her about any problems with her hands and wrists before working for Respondent. (T.86). She also noted that she "... couldn't tell you what [Petitioner] did before she worked [for Respondent]." (T.86). Finally, Ms. Waller denied that she socializes with Petitioner. (T.87).

At the hearing held on 4/20/15, Petitioner testified that when she visited her family physician, Dr. Gupta, in October of 2010 she was wearing a little metal splint on her left thumb for an injury (fracture) she had suffered two months earlier. (R.9-13). However, she stated that she couldn't say whether she had splints for her wrists in October of 2010 as well. (R.13).

Petitioner testified that from early February (2011) until her last day of work on 4/20/11 her job entailed "rock dusting", which she described as "... covering any coal area that is not going to be loaded onto the belt with white powdered line dust to prevent an explosion." (T.106). She noted that she would "... take 50 pound bags of dust from a pallet and load them, cut them open, flip them over and load them into a wagon that had a screen. We would do about five ... pallets a shift. They're 64 bags on a pallet. There were two of us, so we each handled 32 bags times five, so around 160, 50 pound bags of rock dust per person, per shift. And then we would pull this wagon down the beltways and take a three inch hose that was probably... two to three hundred feet long by the time we connected it and pull[ed] it down the beltway. Turn on a motor, with a little auger or impaler in there that blew the dust out. And we would dust the side walls and underneath the belt, the roof and around other pieces of mining equipment." (T.107). Petitioner was shown a photograph purporting to depict an underground miner performing rock dusting. (T.107). She noted that the hose she used was several times heavier than a common garden hose and has a certain amount of vibration. (T.108). She also indicated that the hose has enough pressure that "... if you let go of it, it will flip around and actually hit you." (T.108). She estimated that she spent 75% of her time "actually spraying the dust out of the hose." (T.110). She noted that the rest of the time she would move from one location to the other and load the bags of dust into the wagon. (T.110).

Petitioner testified that on 3/31/11 she would have been a rock duster on the third shift. (T.111). She noted that at that time she noticed discomfort and symptoms in her hands but didn't know what they were. (T.111). During this period, she noticed that "[a] day spent with the sledge and [her] hands would just ache, and [she] would have trouble just picking up a glass or an ink pen." (T.112). Petitioner agreed that at times she worked overtime, or more than eight hours a day and more than 40 hours a week and that "[b]y Friday, [her] symptoms were a lot worse. And then by Monday, you know, they were not as severe." (T.112). She indicated that by the fall she ended up buying a new lunch box because "... by the end of the day [she] couldn't hold [her] lunch box to carry it out. So [she] got one with the larger bail on it that [she] could slip up over [her] forearm ..." (T.113). She noted that she was experiencing pain and weakness by that time. (T.114).

Petitioner noted that she began treating with Dr. Gupta for her problem and was eventually referred for a nerve conduction study, which was performed in mid March (2011). (T.114). With respect to this study, she indicated that Dr. Gupta referred her to Dr. Nemani to determine whether or not she had carpal tunnel. (R.61-62). She indicated that Dr. Gupta eventually informed her the test was positive for carpal tunnel in both hands. (T.115).

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Petitioner noted that she began treating for her hands with Dr. Nelson Gauto pursuant to a referral by Dr. Gupta. (T.115-116). The record shows that Petitioner had previously treated with Dr. Gauto following an injury to her left hand on 5/4/10 wherein she "... accidentally hit roof bolting steal [sic] into her left hand." (PX2). Petitioner then apparently suffered a fracture of the left thumb on 8/13/10 when "a belt kick[ed] back a shovel smashing the left thumb tip." (PX2). Petitioner underwent an ultrasound on 8/2/10 and an MRI of the left hand on 8/25/10, which Dr. Gauto noted was "un-conclusive" and revealed no evidence of ganglion cyst or hematoma. (PX2). As a result, Dr. Gauto indicated, in a note dated 9/9/10, that he had no diagnosis and that his recommendation would be an open biopsy. (PX2). This biopsy was apparently performed on 9/15/10. (PX2). The pathology report by Dr. Daniel J. Santa Cruz noted that "... the possibility of fibromatosis (Dupuytren) cannot be completely excluded." (PX2).

An EMG/NCV performed on 3/14/11 by Dr. Saijan K. Nemani "... was supportive of diagnosis of mild bilateral carpal tunnel syndrome right more than the left." (PX3).

In an office note dated 3/18/11, Dr. Gupta recorded complaints of "cervical neck pain" after "pulling on a hose [and] suddenly her neck was stiff [at] 2am on 17th of March." (PX2). Dr. Gupta also noted "no tingling and numbness [but] her carpal tunnel continues to bother her." (PX2). Dr. Gupta's assessment at that time, in addition to a host of other ailments, included bilateral carpal tunnel syndrome. (PX2).

Petitioner testified that she returned to Dr. Gauto on 4/11/11 to discuss the results of the EMG. (R.63). In a letter to Dr. Gupta on that date, Dr. Gauto recorded that Petitioner "... works in a mine lifting 50 lbs[.] bags of dust during a shift of eight hours. Approximately she lifts 70 bags and she is not able to hold them. She has been wearing a splint since 10/10 without any improvement. She also was treated with exercises, Kenalog, and Botox injection with minimal improvement." (PX2). Dr. Gauto reviewed the EMG and noted that it showed mild bilateral carpal tunnel syndrome, *right more than the left*. (PX2). In the next paragraph, however, Dr. Gauto noted that "[c]linically the patient has moderate to severe carpal tunnel and the *left is worse than the right*." (Emphasis added)(PX2). Dr. Gauto then discussed with Petitioner how a decompression of the carpal tunnel would be done, using an open palm technique. (PX2).

Petitioner testified that she learned that she needed surgery on the day of this visit (4/11/11). (R.64). She also indicated that after discussing her job duties with Dr. Gauto at that time she knew that she had carpal tunnel syndrome and that it was work-related. (R.66-68). When asked why she and her attorney changed the claimed date of accident to 4/11/11, Petitioner indicated that that was the date Dr. Gauto "... asked [her] what [she] did, what [her] job consisted of [and] he told [her] he believed that that's what had caused [her] pain, lifting the 50-pound bags of rock dust during the shift of eight hours." (R.20-23).

Petitioner testified that she subsequently "... called Karen [Pharr] and ... told her that [she] had an EMG that said it was positive for carpal tunnel and that [she] needed to seek medical treatment." (R.68). She indicated that she thought this phone call took place after she had seen Dr. Gauto on 4/11/11, or sometime between 4/11/11 and 4/20/11, but she wasn't completely sure. (R.69-70).

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Petitioner agreed that the last day she actually worked in the mine for Respondent was 4/20/11. (T.116). She noted that she was taken off work at that time for an unrelated injury. (T.117). However, at the hearing held on 4/20/15, Petitioner testified that she last worked for Respondent on either 3/19/11 or 4/19/11. (R.23). She noted that on that date she stopped rock dusting, using heavy hoses and shoveling when she pulled a muscle in her back, but that her symptoms relative to her hands and wrists stayed the same. (R.23-24,26). On redirect examination, Petitioner explained that she went down in the mine and worked on 4/19/11, and that when she showed up for work on 4/20/11 the "[p]ower was out, [and] [she] couldn't go underground." (R.60). As a result, she did not do much with her hands or back on 4/20/11 but got paid for showing up. (R.60-61).

Petitioner testified that after Dr. Gauto unexpectedly passed away, Dr. Gupta referred her to another physician, Dr. Harvey Mirly. (T.116).

In a report dated 8/16/11, Dr. Mirly recorded that Petitioner was a coal miner who presented with complaints of bilateral hand pain and numbness. (PX1). Dr. Mirly noted that Petitioner reported that she "... has applied for work comp, but this was denied. She reports working there for a little over a year, I think about a year and 5 months and she had symptoms of her hand for about a year. Prior to that she was [a] correctional officer and [she] reports doing some other jobs, but having no symptoms during that time. She reports her current job as a coal miner include[s] shoveling and occasionally being a rock dusting [sic], which incorporates pulling a hose and spraying down a rock with water I believe to reduce dust. She initially presented with Dr. Gupta who told her that she had carpal tunnel syndrome and I believe referred her to Dr. Nemani. Dr. Nemani performed a nerve conduction study on 3/14/11 showing sensory slowing of the median nerve. The motor was preserved. There were EMG abnormalities of the abductor pollicis brevis bilaterally." (PX1). Dr. Mirly's impression was bilateral carpal tunnel syndrome. (PX1). Dr. Mirly noted that Petitioner had previously been prescribed splints as well as injections, but continued to have symptoms. (PX1). As a result, Mr. Mirly discussed operative treatment as an option. (PX1).

Petitioner testified that Dr. Mirly ended up performing surgeries in December of 2011 and January of 2012. (T.116). Specifically, the record shows that Petitioner underwent a left open carpal tunnel release on 12/12/11 and a right open carpal tunnel release on 1/4/12. (PX1). The record also shows that in a note dated 1/17/12 Dr. Mirly released Petitioner to return to work with no restrictions as of 2/6/12. (PX1). At the hearing held on 4/20/15, Petitioner explained that her initial surgery was delayed when Dr. Mirly had carpal tunnel surgery himself, and that she waited until he was able to perform her surgery. (R.51-53). She denied that she was working in October of 2011 and did not know the meaning of Dr. Mirly's notes when they indicate that surgery at that time would not work with her work schedule. (R.53).

For his part, Dr. Mirly testified that surgery on the left hand was initially scheduled for 10/17/11 but was rescheduled and performed on 12/12/11. (PX7, p.11). On cross examination, he explained that in a note dated 10/13/11 he recorded that Petitioner "... had cancelled surgery that had been scheduled for 10/17/11, and the lady in my office wrote not going to work with her work schedule right now, she will call back to reschedule, which seems to imply there's a

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conflict in her work. Now, what that was, I can't tell you." (PX7, p.28). Interestingly enough, during a different line of questioning, Dr. Mirly volunteered that he "... actually ha[s] had carpal tunnel surgery myself and I know when I unloaded mulch from my truck and spread it around with a shovel, that bothered my symptoms..." (PX7, p.36).

In a letter addressed to Petitioner's former counsel dated 2/24/12, Dr. Mirly indicated that "... the work history that I obtained was that as reported on my initial job history of 8/16/11. I did not receive any specific job description or duties. It is my opinion that based on the work that she describes and with the onset of her symptoms subsequent to beginning work as a coal miner that her duties would have been a contributing or aggravating factor rendering the carpal tunnel symptomatic and requiring surgical treatment. As you may be aware, there are a number of other factors that are felt to be contributory to carpal tunnel including female gender, obesity, exposure to vibration, and age. Ms. Campbell is relatively young at 43. She is of appropriate body mass index and though she does have the risk factor of female gender, I believe that this would not be [the] sole cause for her carpal tunnel. She also does not have any significant medical history including diabetes or hypothyroidism. In summary, I believe that the work duties that she describes would be a contributing factor to the development of her symptomatic carpal tunnel requiring operative treatment." (PX1).

Dr. Mirly testified by way of evidence deposition on 6/21/11. (PX7). Dr. Mirly is a board certified orthopedic surgeon with an added qualification in surgery of the hand. (PX7, Dep.PX1). At the time of Petitioner's initial visit on 8/16/11, Dr. Mirly noted a history of working as a coal miner for approximately a year and five months and symptoms in her hand for about one year. (PX7, pp.6-7). Dr. Mirly recorded that Petitioner had worked in other jobs prior to that, including as a correctional officer, but reported no symptoms during that time. (PX7, p.7). He noted Petitioner's current job as a coal miner included shoveling and occasionally being a rock duster which he believed incorporated pulling a hose and spraying down rock with water to reduce dust. (PX7, p.7). Based on this information, Dr. Mirly was of the opinion that Petitioner's job duties were causally connected to his diagnosis of carpal tunnel syndrome. (PX7, p.9). Dr. Mirly went on to state that this was based on "... the temporal onset following the onset of her occupation; she reported no symptoms before she started the job; symptoms developed into her job. And also discussing the shoveling, the pulling of the hose. Again, you know, you dictate a note but it doesn't reflect everything you talk about, but I stated within my dictation that it was a contributing factor." (PX7, p.10). In addition, Dr. Mirly testified that he was of the opinion that the surgeries he performed on Petitioner's right and left hands were causally related to Petitioner's job duties. (PX7, pp.13-14). Dr. Mirly noted that he last saw Petitioner on 1/17/12 at which time she was given a slip to return to work without restrictions as of 2/6/12. (PX7, p.15).

On cross examination, Dr. Mirly testified that he was under the impression Petitioner was working as a coal miner at the time of her initial visit on 8/16/11, and that he did not have a history of her stopping work in April of 2011 either at the time of his initial visit or the next time he saw her on the date of the first surgery. (PX7, pp.26,28). However, later on redirect, he agreed that Petitioner was symptomatic on the day he saw her. (PX7, pp.38-39). Back on cross, when asked if he had any specific information as to frequency or duration of her shoveling duties, Dr. Mirly noted that he "... was never provided with any type of job duty, work analysis, time spent; I have no knowledge that way. This is patient report." (PX7, pp.31-32). Dr. Mirly

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noted that he did not obtain any history of lifting 50 pound bags of rock dust eight hours a day, although it was reflected in another note. (PX7, p.35). He also agreed that he was not told of any CTS symptoms prior to her working as a coal miner or that she had suffered any trauma to her wrist or hands while working as a coal miner in 2010. (PX7, pp.33-34). In addition, Dr. Mirly indicated that direct trauma to the hand or wrist can cause carpal tunnel and that "[f]ractures are one of the primary traumas that carpal tunnel develop in … I mean there's different kinds of fractures. A fracture to the distal radius is what I'm talking about, a fracture of carpal bones, not so much a fracture of a phalanx, like a finger." (PX7, p.34). However, he acknowledged that blunt force trauma could cause CTS, but noted that Petitioner did not volunteer any information about such a trauma. (PX7, p.34).

At the request of Respondent, Petitioner visited Dr. Timothy D. Farley on 9/24/12 for a §12 examination. (PX8). In his report, Dr. Farley noted that Petitioner described working as a coal miner shoveling coal and rock 9-11 hours per day, 5-6 days per week for at least 6 straight months. (PX8). Dr. Farley also noted that Petitioner denied any prior hand or wrist pain and numbness or tingling, and related no history of prior injuries or some sort of endocrinological issue such as diabetes or hyperthyroidism. (PX8). Following his examination and review of the records, Dr. Farley noted that if the above history was true then "… it would be [his] opinion that her described work activities represent a causative factor in her current condition. I think it would be appropriate to review the patient's work description as well as any work logs or manager's report which would help better define to what degree she has been exposed to these repetitive activities that require use of her hands. Thus, my final comment on causation is somewhat depending on further data required in understanding her work conditions." (PX8).

Dr. Farley testified by way of evidence deposition on 8/27/13. (PX9; RX2). Dr. Farley is a board certified orthopedic surgeon. (PX9, p.4). Dr. Farley noted that the history contained in his report (supra) was from the patient, and that at the time of his examination on 9/24/12 he was not aware that she wasn't employed. (PX9, pp.6-9). Dr. Farley testified that he "… was given a history of an individual who required shoveling coal and rock for nine to 11 hours a day, five to six days a week for six straight months. [He] was not given a history of other predisposing illnesses or problems that can lead to carpal tunnel syndrome, such as diabetes, hyperthyroidism, and other endocrinologic issues. Therefore, it was [his] opinion when [he] saw her that if her described work activities were as she stated, they represented the causative factor in her condition." (PX9, pp.9-10). However, Dr. Farley also agreed that his causation opinion could change if the evidence at arbitration showed that the information and history provided was substantially different. (PX9, p.10).

Currently, Petitioner notices that she is not as strong in her hands now as she was before she started working in the mines, and that she didn't have any trouble with her hands before. (T.119-120). She noted stiffness, but not much pain, in her hands presently, and not as much mobility. (T.121). She indicated that she has difficulty opening pickle jars, and that it was hard for her to pull open a clip when she recently went to a rock climbing gym with her children. (T.120-121).

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Conclusions of Law

An employee seeking benefits for gradual injury due to repetitive trauma must meet the same standard of proof as a petitioner alleging a single, definable accident. *Three "D" Discount Store v. Industrial Commission*, 144 Ill.Dec. 794, 797, 556 N.E.2d 261, 264 (Ill.App. 4 Dist. 1989); citing *Nunn v. Industrial Commission*, 157 Ill.App.3d 470, 109 Ill.Dec. 634, 510 N.E.2d 502 (1987). The petitioner must prove a precise, identifiable date when the accidental injury manifested itself. "Manifested itself" means the date on which both the fact of the injury and the causal relationship of the injury to the petitioner's employment would have become plainly apparent to a reasonable person. *Three "D" Discount Store*, 556 N.E.2d at 264; citing *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill.2d 524, 106 Ill.Dec. 235, 505 N.E.2d 1026 (1987). The test of when an injury manifests itself is an objective one, determined from the facts and circumstances of each case. *Id.*, at 264; citing *Luttrell v. Industrial Commission*, 154 Ill.App.3d 943, 107 Ill.Dec. 620, 507 N.E.2d 533 (1987).

In the present case, Petitioner testified that her job as a belt shoveler for Respondent involved the use of a sledge hammer, pick axe and shovel and that she would have to break up rock and scrape and shovel coal onto and off belts that averaged three to four feet in height. Co-worker Megan Waller corroborated Petitioner's testimony along these lines. Both women estimated that at least 80% of their time was spent with either a sledge, pick axe or shovel in their hands. Petitioner also testified that from February 2011 until her last day at the mine on 4/20/11 she worked as a rock duster which required the lifting, loading and opening of 160 fifty-pound bags of rock dust per shift as well as the use of a three inch hose that was probably two to three hundred feet long and which she would use to dust the side walls and underneath the belt, roof and around the mining equipment. Petitioner noted that the pressure and vibration from this hose was such that "... if you let go of it, it will flip around and actually hit you." (T.108). The Commission finds Petitioner's testimony as to the repetitive nature of her job activities to be entirely credible.

Furthermore, Petitioner denied having carpal tunnel symptoms prior to the commencement of her employment with Respondent on 3/8/10, other than during her first pregnancy from 2001 into 2002. She also denied receiving any treatment for numbness or pain in her hands, or being restricted from work for same, after her first pregnancy and leading up to the date she began working for Respondent. (R.57-58). In addition, she specifically denied having symptoms when she worked as a corrections officer from 2003 to September of 2008. (T.95,150). Instead, Petitioner credibly testified that she began having symptoms of carpal tunnel "[w]hile [she] was shoveling the belt", or approximately the summer to fall of 2010. (T.144-145). She testified that she notified her employer about the symptoms or problems in her hands in October of 2010 and filled out the first page of an accident form at that time, noting that she later signed the second page on 3/31/11 after her EMG. (T.122).

Based on the above, and the record taken as a whole, the Commission finds that Petitioner proved by a preponderance of the credible evidence that she sustained repetitive trauma-type injuries to her right and left hands that arose out of and in the course of her employment with Respondent, and that the date of manifestation for these injuries occurred on or about 4/11/11, or the date Dr. Gauto discussed the results of the EMG with her. The Commission finds that this

was the date on which both the nature of the injury and its relation to the employment would have been plainly apparent to a reasonable person.

The Commission further finds that Petitioner provided Respondent with proper and adequate notice of said accident, given that the original Application for Adjustment of Claim was filed on 5/18/11, or less than 45 days after the date of accident on 4/11/11.

In addition, the Commission finds that Petitioner's current condition of ill-being is causally related to the accident on 4/11/11. This finding is based on Petitioner's credible description of her work activities in conjunction with the opinions of Petitioner's treating surgeon, Dr. Mirly, and Respondent's §12 examining physician, Dr. Farley. Along these lines, Dr. Mirly opined that Petitioner's job duties as described were causally connected to his diagnosis of carpal tunnel syndrome. (PX7, p.9). Dr. Mirly offered the same opinion in a letter dated 2/24/12 wherein he opined "… based on the work that she describes and with the onset of her symptoms subsequent to beginning work as a coal miner that her duties would have been a contributing or aggravating factor rendering the carpal tunnel symptomatic and requiring treatment…" (PX1). Likewise, Dr. Farley testified that "… it was [his] opinion when [he] saw her that if her described work activities were as she stated, they represented the causative factor in her condition." (PX9, pp.9-10).

With respect to earnings, the Commission notes that at the hearing held on 4/16/14, counsel for Petitioner noted that "[i]n light of the fact that the wage records are not complete in the sense they are not representing an entire 52 weeks, the parties agree that the average of the missing wage records is equivalent to the average of the wage records in evidence. Another way of saying that is whatever the average is in the records that you have, the average we agree to. The parties have listed different numbers for the average weekly wage in light of I believe different positions with respect to overtime." (T.16). Counsel for Respondent responded that he "… ha[d] no objection to that. I don't think it's relevant to anything. I mean the date of accident, she's claiming she was not employed there for 52 weeks; but the wage records [sic] speaks for itself, and I think we're missing – for about four weeks, but I have no objection to that stipulation." (T.17). Petitioner submitted a breakdown of the relevant wage information at PX6, while Respondent submitted a "Workman's Comp 52 Week Report" at RX1. PX6 shows straight wages of $19,209.28 and overtime wages at straight pay of $2,228.19. The Commission notes that both Petitioner and Ms. Waller credibly testified that 80% of the overtime was mandatory. The breakdown at PX6 reflects an earnings total of $21,437.47, for the period extending from 4/23/10 through 10/15/10 as well as an AWW of $824.52. (PX6). Therefore, based on the parties' stipulation at the commencement of trial, the Commission finds that Petitioner's average weekly wage during the year preceding the injury was equal to $824.52.

Furthermore, in light of the above holdings as to accident and causation, the Commission finds that Petitioner was temporarily totally disabled from 12/12/11 through 2/5/12, for a period of 8 weeks. The Commission notes that at the start of the initial hearing on 4/16/14, the Arbitrator stated that "Respondent disputes liability for temporary total disability benefits, but not the period of time being claimed." (T.6). The period in question extends from the date of the first surgery (12/12/11) through the date Dr. Mirly released Petitioner to return to work with no restrictions (as of 2/6/12). (PX1).

The Commission also finds that Petitioner is entitled to reasonable and necessary medical expenses as set forth in PX5 pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act, and that Respondent shall be entitled to a credit for any and all amounts paid on account of said injury. The Commission notes that at the commencement of the hearing on 4/16/14, in admitting the Request for Hearing form, the Arbitrator stated that "[t]he parties do agree that Respondent has paid all of the medical bills through its group medical plan, for which credit should be allowed under Section 8(j) of the Act. And in the event of finding of liability and an award of any medical bills, that credit should be recognized." (T.6).

Finally, with respect to permanency, the Commission notes that as a result of her injuries Petitioner underwent carpal tunnel releases on her left and right hands on 12/12/11 and 1/4/12, respectively, and that she was eventually released to return to work with no restrictions as of 2/6/12. There is no indication in the record whether or not Petitioner has returned to work since that date; however, there is no suggestion that her current employment status is any way affected by her injuries. Presently, Petitioner testified that she notices that her hands are not as strong as they were before she started working in the mines. (T.119-120). In addition, she indicated that she notices stiffness, but not much pain, in her hands and not as much mobility. (T.121). She also noted that she has difficulty opening pickle jars, and that it was hard for her to pull open a clip when she recently went to a rock climbing gym with her children. (T.120-121). Based on the above, and the record taken as a whole, the Commission finds that Petitioner suffered the permanent partial loss of use of 12.5% of the dominant right hand and 10% of the non-dominant left hand pursuant to §8(e)9 of the Act. As an aside, the Commission notes that the date of accident in this case (4/11/11) predated the effective date of the amendment (9/1/11), and as a result an analysis pursuant to §8.1b is not required.

All other aspects of the Arbitrator's decision are otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $549.68 per week for a period of 8 weeks, from 12/12/11 through 2/5/12, 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 shall pay to Petitioner the reasonable and necessary medical expenses set forth in PX5 pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $494.71 per week for a period of 46.125 weeks, as provided in §8(e)9 of the Act, for the reason that the injuries sustained caused permanent partial disability to the extent of 12.5% of the right hand and 10% of the left hand.

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.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $27,500.00. 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: AUG 8 - 2016
o:6/7/16
TJT/pmo
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Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. Arbitrator Lindsay's findings are both thorough and well reasoned. This decision is correct and should be affirmed

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CAMBELL, SHERRY
Employee/Petitioner

Case# **11WC019293**

WHITE COUNTY COAL LLC
Employer/Respondent

16IWCC0523

On 6/29/2015, 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 0.08% 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:

0384 NELSON & NELSON
DAVID NELSON
420 N HIGH ST
BELLEVILLE, IL 62220

2742 HAZLETT & SHORT, PC
KEVIN M HAZLETT
1167 FORTUNE BLVD
SHILOH, IL 62269

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STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

☐ 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

SHERRY CAMPBELL

Case # 11 WC 19293
Consolidated Case# N/A

Employee/Petitioner
v.

WHITE COUNTY COAL, LLC.
Employer/Respondent

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 **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Herrin** on **April 16, 2014** and the city of **Collinsville,** on **April 20, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **4/11/11,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

On the date of accident, Petitioner was 43 years of age, was ***single*** with ***two*** dependent children.

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

ORDER

Petitioner failed to prove she sustained an accident on April 11, 2011 that arose out of and in the course of her employment or that her current condition of ill-being in her hands and wrists is causally connected to her accident. Petitioner's claim for compensation is denied and no benefits are awarded.

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.

Nancy Lindsey
Signature of Arbitrator

June 17, 2015
Date

ICArbDec)

JUN 29 2015

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case proceeded to trial on April 16, 2014. Proofs were closed on April 20, 2015. At the time of trial the disputed issues included accident; notice; causal connection; earnings; medical expenses; temporary total disability; and nature and extent. Witnesses testifying at the hearing included Petitioner and Megan Waller.

The Arbitrator finds:

Petitioner began working for Respondent in March of 2010.

On May 8, 2010 Petitioner presented to Dr. Anil Gauto complaining of severe pain in her left hand. Petitioner stated that while she was working the 2nd shift on May 4, 2010 she accidentally hit roof bolting steel into her left hand and she felt sudden severe excruciating pain in her left hand. Petitioner's left hand was swollen with palmer surface tenderness noted. Petitioner was able to move her fingers. Petitioner was diagnosed with a contusion, bandaged, and given instructions for care. (PX 2)

Petitioner returned to see Dr. Anil Gauto on May 25, 2010 reporting ongoing hand pain with no improvement. Tenderness and swelling was still noticed. Conservative care was continued. (PX 2)

On June 26, 2010 Petitioner was examined by Dr. Anil Gupta regarding swelling and a knot on her left hand. Petitioner was given a kenalog shot and the plan was to refer her to a surgeon. (PX 4)

In an office note dated July 12, 2010 Dr. Anil Gupta noted that Petitioner had a consultation with "Dr. Nelson"[1] pending. The knot on her hand was bothering her a lot. (PX 4)

On July 26, 2010 Petitioner was examined by a plastic surgeon, Dr. Nelson Gauto, who ordered an ultrasound of Petitioner's left hand due to the mass. Petitioner provided a history of her accident with the roof bolt. Petitioner, who was right hand dominant, reported that she was continuing to work in the mine but starting to not use her left hand. Petitioner advised the doctor she worked about 8 to 19 hours a day six days a week. (PX 2)

A left hand ultrasound was performed on August 2, 2010. (PX 2) On August 4, 2010, Dr. Nelson Gauto's office ordered an MRI of Petitioner's left hand. (PX 2)

On August 4, 2010 Karen Pharr from Respondent's facility called Dr. Gauto's office stating all approval for tests and/or treatment had to be okayed by Charlotte Hannigan. The MRI was subsequently scheduled for August 23, 2010. (PX 2)

On August 20, 2010 Petitioner presented to Dr. Anil Gupta's office due to a thumb injury. Petitioner reported working and getting her left thumb caught between a shovel and the

[1] a/k/a Dr. Nelson Gauto

side of some metal followed by excruciating pain and bleeding from her thumb tip and nail bed. X-rays taken at the emergency room showed a distal phalynx fracture. (PX 4)

Petitioner underwent a left hand MRI on August 25, 2010. Except for some degenerative changes of the interphalangeal joints and an echogenic region within the deep subcutaneous soft tissue, the MRI was essentially benign. (PX 2)

Dr. Anil Gupta re-examined Petitioner's thumb on August 30, 2010 noting ongoing pain and ecchymosis. The fracture, by x-ray, remained in the same position. (PX 4)

Dr. Anil Gupta again examined Petitioner on September 9, 2010, at which time Petitioner still complained of a painful thumb. She was noted to be wearing a splint. Swelling and eccymossis was less noticeable. (PX 4)

Petitioner followed up with Dr. Nelson Gauto on September 9, 2010. At that time the doctor recommended an open biopsy. In his office note he also recorded that Petitioner was wearing a left thumb splint and Petitioner advised she fractured her left thumb on August 13, 2010 with a shovel. Petitioner had gone to Dr. Anil Gupta for treatment. He had no recommendations for her thumb at that visit but recommended he would gladly review x-rays that had been taken of Petitioner's thumb. (PX 2)

Petitioner underwent a left hand biopsy on September 15, 2010. (PX 2)

Petitioner first complained of bilateral hand problems with her primary care physician, Dr. Anil Gupta, on October 4, 2010. According to the note, "both wrist are hurting painful at night tingling numbeness [sic]." (PX 4; PX 12)

Petitioner returned to see Dr. Anil Gupta on December 2, 2010 and, according to the doctor's note, "Pt continues to have pain in her both hands tingling numbness over her fingers. First 3 fingers night time pain not relieved by any anti-inflammatory. Pt says it started because of shoveling somewhere in June of 2010." (PX 4)

Petitioner presented to Dr. Anil Gupta on December 3, 2010. Her chief complaint was that her fractured left thumb still hurt. Petitioner gave a history of being hit by metal while at work and since then she had been experiencing excruciating pain and her right leg had turned blue, swelled, and was painful to touch. Her diagnoses included a ganglion and contusion of the left hand, migraine headaches, hematoma of the right leg, low back pain, sciatica, acute lumbar muscle spasms, major depression, sun damage, deep wrinkles, a fractured left thumb and bilateral carpal tunnel syndrome. (PX 4) The doctor scheduled her for a nerve conduction study with Dr. Nemani.

The study was performed on March 14, 2011 and Dr. Nemani indicated the study was supportive of diagnosis of "mild bilateral carpal tunnel syndrome, right more than left." There was no mention of Petitioner's work in the report. (PX 2; PX 3)

Petitioner returned to Dr. Anil Gupta on March 18, 2011 with the chief complaint of neck pain after pulling on a hose at work on March 17th. Petitioner reported radiating left arm pain but no right arm pain. Part of the treatment included seven trigger shots to her neck and shoulder. He documented that her carpal tunnel continued to bother her. (PX 2)

On March 31, 2011 Petitioner signed an Accident Investigation Report regarding an accident date of October 15, 2010. Petitioner reported symptoms of pain and numbness in her hands and wrists during work and at night. (PX 10)

On April 1, 2011 four pages were faced to Karen Pharr from Dr. Gupta's office. (PX 11)

On April 11, 2011 Petitioner was examined by Dr. Nelson Gauto. In a letter to Dr. Vena Gupta, Petitioner was noted to have reported working in a mine lifting 50 pound bags of dust during a shift of eight hours. She lifted approximately 70 bags and she told him she was not able to hold them. She also told him she had been wearing a splint since October 2010 without any improvement. Clinically, the doctor felt Petitioner had moderate to severe carpal tunnel syndrome in her left hand/wrist worse than on the right side. They discussed surgery and the doctor's notes indicate Petitioner requested that he get workers' compensation approval before proceeding with surgery. (PX 2)

On May 11, 2011 Petitioner signed her Application for Adjustment of Claim in this case alleging an accident date of October 1, 2010. As to how the accident occurred, Petitioner claimed "Petitioner was injured during the course and scope of employment." Regarding part of body affected she wrote "both arms, hand and other injuries." As to the nature of the injury she wrote "to be determined."
(AX 2)

On August 16, 2011 Petitioner was seen by a hand surgeon, Dr. Harvey Mirly in Belleville, Illinois. Petitioner gave a history of having been employed as a coal miner for about one and a half years and had symptoms in her hand for about one year. He documented "She reports her current job as a coal miner includes shoveling and occasionally being a rock duster, which incorporates pulling a hose and spraying a rock with water I believe to reduce dust." Prior to working for the mine Petitioner had worked as a corrections officer but she denied any symptoms at that time. Petitioner told Dr. Mirly that she had been seen by Dr. Gupta who informed her she had carpal tunnel syndrome and referred her to Dr. Nemani for a nerve conduction study. Dr. Mirly's exam was consistent with carpal tunnel syndrome. (PX 1)

Treatment alternatives were discussed. The doctor's notes indicate they had a discussion about splint wear; however, Petitioner had already tried that and they seemed to help at night and let her sleep but didn't relieve her symptoms. They also discussed intratunnel injections with Petitioner reporting she had already tried that with Dr. Gupta but they weren't beneficial. Lastly, they discussed surgery as an option. Petitioner told him she was going to confer with her attorney. Petitioner was released from any scheduled follow-up and was going to check with her attorney and she could get back to him if she wished to pursue surgery or an injection. (PX 1)

The surgery was initially scheduled for October 17, 2011. On October 13, 2011 Petitioner called to request the surgery be cancelled because it would not work with her current work schedule. She was to call back to reschedule. (PX 1)

Petitioner underwent a left carpal tunnel release on November 14, 2011. As of December 20, 2011 Petitioner wished to proceed on the right wrist and denied any need for therapy on the left wrist. (PX 1)

Petitioner underwent a right carpal tunnel release on January 4, 2012. She was last seen on 1/17/12 at which time she was released to return to work as of February 6, 2012. Petitioner was noted to be doing well and she reported good relief from her pre-operative symptoms. (PX 1)

On February 24, 2012 Dr. Mirly authored a letter to Petitioner's former attorney expressing his opinion that, based upon the work Petitioner described and her onset of symptoms, her work was a factor in her carpal tunnel syndrome. (PX 1)

Dr. Mirly's evidence deposition was taken on June 21, 2013. (PX 7) On direct exam he testified in accordance with his office notes. He said he discussed using wrist splints with Petitioner "I note that she had already tried them." She reported to him that the splints helped at night and she could not sleep without them but was still having symptoms despite using them.

On cross-examination Dr. Mirly testified that before he saw Petitioner in August of 2011 she had made prior appointments but they were crossed out and rescheduled. Petitioner did not tell Dr. Mirly that she last worked as a coal miner in April of 2011. He agreed that stopping an activity that allegedly was causing a condition would be relevant if the symptoms resolved. He agreed this could be a benefit and it is also a recommendation he makes to patient. He testified that he had an office note dated 10/13/2011 indicating Petitioner cancelled surgery scheduled for 10/17/11 and his office staff wrote "Not going to work with her work schedule right now, she will call back to reschedule, which seems to imply there is a conflict in her work." (PX 7)

Dr. Mirly confirmed that he was not provided any specific information regarding the frequency, duration, weights or anything else with regards to her shoveling duties. He was never provided with any type of job duty, work analysis, time spent or duration. All he had was what the patient reported. Petitioner did not tell him that she was diagnosed with carpal tunnel syndrome a few years before starting work as a coal miner. Petitioner did not give him any history but she thought her carpal tunnel was caused by lifting 50 pound or 70 pound bags of rock dust 8 hours a day. (PX 7)

Respondent offered the testimony of Dr. Timothy Farley who performed a Section 12 examination of Petitioner on September 24, 2012. A written report followed. Petitioner told Dr. Farley that her complaints had bothered her for the preceding one to one and a half years and she tried rest and activity modification as well as nighttime splinting. She told him she was hired on March 8, 2010 and that by the fall of 2010 she was having complaints of wrist pain that brought her to her primary care physician, Dr. Gupta. Petitioner told Dr. Farley that on October 15, 2010 a workers' compensation claim was made as she felt her symptoms were a result of her described

work activity. She denied any prior accidents or injuries. By the time of the exam she had undergone surgery. She was happy that she had done so and felt improved although she was continuing to note mild pain in her left hand along with occasional tingling. If indeed Petitioner shoveled heavy coal and rock for 9 to 11 hours per day, 5 -6 days per week for at least six months straight he felt her described work activities represented a causative factor in her current condition. He felt it appropriate, however, that her job description as well as any job logs or manager's reports be provided to him to better define what work activities she had been exposed to. At that point he would then feel prepared to issue a final comment on causation. (PX 8)

Dr. Farley's deposition was taken on August 27, 2013. (PX.9; RX 2) Dr. Farley testified consistent with his earlier report. He testified that Petitioner denied any prior problems with her hands or wrists. (PX 9, p. 8) He also testified that if the information and histories provided by Petitioner were substantially different, his opinion on causation would change. (Id., p. 10) In determining the causation question Dr. Farley would like to know what she was doing, how repetitively she was performing it, the demands it would place upon someone, whether it was being down for extended periods of time or intermittently. (Id.) He acknowledged that carpal tunnel syndrome can wax and wane and even go away if one stops performing the activity supposedly causing it. (Id., p. 11)Dr. Farley was not given a job description by Respondent. (Id. at 18) Dr. Farley agreed with Dr. Mirly's diagnosis. (Id. at 18.) He had no criticism of the treatment. (Id. at 18) Dr. Farley opined that the work activities, as they had been described to him, were the causative factor in her condition of carpal tunnel syndrome. (Id. at 10)

Petitioner's case proceeded to arbitration on April 16, 2014. At the time of trial Petitioner amended her date of accident from October 1, 2010 to October 15, 2010.

Petitioner initially offered the testimony of a former coal worker, Megan Waller. Ms. Waller testified that she worked alongside Petitioner at the White County Coal mine in 2010. Ms. Waller worked alongside Petitioner from July through October of that year when she was transferred to a different part of the mine. While they worked together they were both "belt shovelers" and worked the same shift.

Ms. Waller testified she thought she was initially contacted by Petitioner to testify about one month before April 2014. Before then she had not had any discussions with Petitioner about this case. She testified that she worked side by side with Petitioner but she could not recall how often or how long she worked with her. She did recall that she did not work side by side with Petitioner from Petitioner's start date from March 2010 through July of 2010.

Ms. Waller explained that the two of them used pick axes, shovels, sledgehammers and other tools in the mine, working alongside the belt on which the coal was hauled out of the mine. They rode together, shoveled together and were always in sight or sound of one another. They used sledgehammers and pick axes to break up large chunks of coal that they then shoveled onto the belt. The coal was described as heavier than garden soil, for example. Ms. Waller testified that 80 to 85 percent of the shift, they had one of those tools in their hands. They generally worked an 8 hour shift, sometimes working overtime. She testified that overtime was frequent and, frequently, mandatory. She further testified that Petitioner was an "orange hat" or inexperienced worker so she would work more mandatory.

Ms. Waller testified that she worked in the Mine's office beginning in July of 2012. She was trained by Karen Pharr in matters of workers' compensation. Ms. Waller testified that both Ms. Pharr and Josh Bell have improperly recreated accident form. She had no testimony to offer concerning PX 10 as it was before her time.

Ms. Waller testified that she witnessed Petitioner complaining about her hands and wrists and she thought it was "weird." She couldn't imagine it for herself but they didn't discuss any details.

Petitioner testified that she began working for Respondent on March 8, 2010. Prior to that she drove a dump truck and before that she was a waitress. Petitioner was a corrections officer from 2003 through September of 2008.

Petitioner testified to holding several positions with Respondent since beginning there. Initially, she worked four weeks cleaning belts. She then became a pinner/operator at the mine in Carmi. That mine shut down so she went to Riverview Mine for approximately 45 days and worked in "Outby." Petitioner then returned to Carmi in early July of 2010 and stayed there until February of 2011. During that time she spent 80% of her time underground shoveling and cleaning belts and headers. Eighty percent of her time Petitioner had one of three tools in her hand to break up rock, scrape or shovel, and throw material onto the belt. Petitioner testified that Ms. Waller's description of their job duties was accurate.

Petitioner's last day at the mine was April 20, 2011, when she was taken off work for an unrelated injury. Between February of 2011 and her last day, she worked in "Rock Dusting." According to Petitioner the rock dusting she performed involved covering an area of coal with white powdered lime dust in order to prevent an explosion. Petitioner would load 50lb. bags of dust from a pallet, cut the bags, open the bags, flip the bags, load the bags onto a wagon, and then drag the wagon into place in the underground mine. Once the wagon was in place, Petitioner would drag, lift and hold a three inch hose to deploy the dust from the wagon to the wall or roof of the mine. Petitioner made use of a demonstrative photograph to describe the activity. She described the hose as several times heavier than a common garden hose.

According to Petitioner she began noticing discomfort and symptoms in her hands while shoveling underground at Carmi. As her job intensity increased, her hands ached. Petitioner recalled having difficulty holding her lunchbox. She went to the doctor in March and nerve conduction studies were ordered. She ultimately underwent bilateral surgeries on her wrists.

At arbitration, Petitioner testified she was told by her doctor that she had bilateral carpal tunnel syndrome after having electrodiagnostic studies at the end of March 2011. She also testified Dr. Gauto told her on 4/11/2011 that she had bilateral carpal tunnel syndrome. She also testified she gave complete histories to her doctors that her condition was due to work duties including shoveling and rock dusting.

Petitioner testified that she told Respondent about the problems with her hands in October of 2010. She called Karen Pharr by cell phone and filled out a form with the next day or

a few days thereafter. Petitioner denied that the writing on page 1 of PX 10 was hers. She did not recall meeting with Josh that day; rather, she thought it was Philip Kitinger, the head of safety. Petitioner testified that she completed the first page of PX 10 in October of 2010 and the second page is dated March 31, 2011. She recalled signing forms with Respondent after undergoing her nerve conduction studies. She found out she had carpal tunnel syndrome and called Karen and advised her of the diagnosis. Karen told her she needed to sign medical release forms at her office. Dr. Gupta faxed her records on April 1, 2011. (PX 11)

Petitioner testified that she is not as strong as she once was. While taking her children rock climbing she noticed it was difficult to open the clip. She also notices stiffness in her hands and a lack of mobility. Petitioner lacks complete feeling in her fingers.

Petitioner's case was continued as proofs could not be closed. The hearing was completed in Collinsville, Illinois on April 20, 2015. At that time Petitioner amended her accident date to April 11, 2011. Cross-examination of Petitioner continued.

Petitioner could not recall when she first told Dr. Gupta about hand problems she felt were related to her employment. She acknowledged breaking her left thumb about two months before her visit with Dr. Gupta in October of 2011. She also recalled seeing him for a knot on her left hand. Petitioner also acknowledged quite an injury to her right leg in the Spring of 2010. She clarified that the splint for her left thumb mentioned in Dr. Gupta's records was just a little metal thing to keep her thumb straight. She couldn't recall if she had splints for her wrists in October of 2010.

Petitioner was asked what she told Dr. Gupta on December 3, 2010 concerning what she believed was causing her hand complaints and she responded she couldn't say for sure. She recalled receiving trigger injections for her neck and shoulder in March of 2011. Petitioner was sure that in April of 2011 when she saw Dr. Gauto the rock dusting activities were causing problems.

Petitioner testified that in mid-April of 2011 she pulled a muscle in her back. That is when she last worked for Respondent. Thereafter, her symptoms in her hands and wrists stayed the same.

Petitioner acknowledged having pain and swelling in her hands in 2002; however, she didn't recall being diagnosed with bilateral carpal tunnel syndrome at that time. She was given wrist splints at that time. Petitioner could not recall if she told Dr. Mirly about her 2002 problems when she presented to him.

Petitioner testified that her surgery with Dr. Mirly had to be rescheduled because the doctor himself had carpal tunnel surgery in September and she had to wait until he was recovered. She did not know why there was a note in the doctor's records about rescheduling with her work schedule.

Petitioner also testified that she was pregnant in 2001 and 2002 during which time she experienced numbness, tingling, and pan in her fingers. She wore splints and underwent

acupuncture. She also gained an enormous amount of weight with her pregnancy. She lost the weight thereafter. She also had a second pregnancy and did not experience any of these types of symptoms. She denied undergoing an EMG while pregnant.

Petitioner was also asked about her work with Corrections and she denied needing treatment or being off work or on restrictions.

Petitioner also clarified that the mine was shut down on April 20, 2011.

Petitioner did not know she was going to lose her job in October of 2011 if she didn't return to work.

The Arbitrator concludes:

Issues (C) and (F) did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? Is Petitioner's current condition of ill-being causally related to the injury?

Petitioner failed to prove she sustained an accident arising out of her employment with Respondent or that her bilateral carpal tunnel syndrome was caused by her employment duties with Respondent or her alleged work accident. Petitioner failed to meet her burden of proof on these issues as the Arbitrator is not persuaded by the opinions and testimony of Dr. Mirly. Dr. Mirly had no knowledge of any medical records pre-dating his treatment of Petitioner. Thus, he was unaware of her other left hand injuries and their role, if any, wasn't factored into his causation opinion. Petitioner told Dr. Mirly she was a coal miner who engaged in shoveling and, occasionally, rock dusting. Based upon those jobs and the onset of her symptoms, temporally, he felt her job was a contributing factor in the development of her condition. He primarily thought the shoveling and holding of the nozzle of the hose and twisting while dusting were causes of her carpal tunnel syndrome; however, he had no knowledge as to the frequency, duration or length of time she spent shoveling. He acknowledged that everyone has different thresholds of exposure before they will become symptomatic with an activity. Dr. Mirly testified that Petitioner denied any symptoms of carpal tunnel syndrome before she began her job with Respondent. However, at arbitration Petitioner acknowledged experiencing carpal tunnel-like symptoms in the early 2000s while pregnant. He was also unaware of her trauma to her wrist and hand in 2010 and acknowledged that trauma to one's hand can cause carpal tunnel syndrome.

While Dr. Farley's initial IME report suggests he felt there might be a causal connection between Petitioner's job duties and her carpal tunnel syndrome he noted in his report that before expressing a final comment on causation he felt it would be appropriate to review Petitioner's work description as well as any work logs or manager's report to better define the degree to which she had been exposed to the repetitive type activities that required use of her hands. At the time of his deposition Dr. Farley testified that Petitioner denied any prior wrist or hand problems (which was untrue). He further acknowledged that his opinion would change if the history and information Petitioner provided to him proved to be substantially different.

Quite troubling to this Arbitrator were several aspects of Petitioner's testimony and representations to doctors. When Petitioner first sought medical attention for her bilateral wrist/hand complaints on October 4, 2010, she made no reference to her work for Respondent. When seen by Dr. Anil Gupta again on December 2, 2010 Petitioner referenced "shoveling somewhere" in June of 2010. There is no mention of work being associated with her complaints when Petitioner underwent her nerve conduction study on March 14, 2011. Petitioner was then referred to Dr. Nelson Gauto on April 11, 2011 and she reported working in the mine lifting heavy bags of dust during her shift. Petitioner was complaining about the weight and number of bags and stating she was unable to hold them. She then signed her Application for Adjustment of Claim and provided no detail as to how she allegedly injured herself on October 1, 2010.

Several months later, Petitioner was seen by Dr. Mirly. At that visit she complained of shoveling and rock dusting which "incorporated pulling a hose and spraying a rock with water…." (PX 1) Finally, when seen by Dr. Farley in September of 2012 she described her job as shoveling coal and rock 9 – 11 hours per day, 5 – 6 days per week for at least 6 straight months. She felt her symptoms went back to the fall of 2010 when she consulted her doctor.

At the arbitration hearing Ms. Waller, Petitioner's former co-worker, testified to using pick axes, shovels, sledgehammers and other tools in the mine. She testified that 80 to 85% of the time they had one of those tools in their hands. Petitioner agreed.

Petitioner testified that she began with Respondent in March and initially worked cleaning belts. She then went to another mine and returned to Carmi in early July of 2010 and stayed there until February of 2011. During that time she spent 80% of her time shoveling and cleaning belts and headers. She testified that she usually had one of three tools in her hand to break up rock, scrape, shovel, and/or throw material into a belt. Between February of 2011 and her last day of work in April of 2011 Petitioner worked in "Rock Dusting" and she described what that job involved.

Neither Dr. Mirly nor Dr. Farley was provided with any of the foregoing information. Petitioner, who was right handed, presumably used the tools in her right hand. However, she never provided any testimony as to how she held and used any of the aforementioned tools while performing her job duties, thus making it very difficult to understand how symptoms in her left hand, especially, developed. She did not provide any such history or description to any of the doctors.

In addition, Petitioner was not upfront with Dr. Mirly concerning any prior hand/wrist problems or issues. She did not mention her left hand and thumb injury. She did not mention her prior carpal tunnel-like symptoms while pregnant. Furthermore, she appears to have been somewhat misleading in terms of her representations to him concerning her treatment prior to being seen by him. Dr. Mirly testified that Petitioner told him she had been wearing wrist splints which helped to some degree. No doctor in 2010 or 2011 prescribed or instructed Petitioner to wear wrist splints. She did, however, wear a thumb splint. At arbitration she acknowledged wearing wrist splints when symptomatic during her first pregnancy. Similarly, Petitioner told Dr. Gauto on April 11, 2011 that she had been wearing a splint since October of 2010 without any improvement. Again, no one had prescribed a wrist splint for her. She had, however, been

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prescribed and was wearing a thumb splint since September of 2010 due to her fractured left thumb. Neither doctor was aware that due to Petitioner's left hand injury she was having trouble using her left hand for work duties. (See PX 2, o/n 7/26/10) The Arbitrator views this lack of candor with her doctors as troublesome in considering Petitioner's credibility.

It is axiomatic that in a case of repetitive trauma, the unique facts of each case must be closely scrutinized, analyzed, and considered. The Arbitrator has done so herein. She has also considered Petitioner's credibility. It is also well settled that a doctor's causation opinion is only as good as the information upon which it is based. In this case, neither Dr. Farley's or Dr. Mirly's causation opinions are based on complete, accurate, and thorough information concerning Petitioner's job duties for Respondent and her medical history. Based upon the foregoing, the Arbitrator concludes that Petitioner has failed to prove liability by a preponderance of the credible evidence in the record. Petitioner's claim is denied and no benefits are awarded. All other issues herein are rendered moot.

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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

Pamela Nelson-Campbell,
Petitioner,

vs.

NO: 11 WC 22538

16IWCC0533

University of Illinois,
Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Kane finding Petitioner sustained an accidental injury arising out of and in the course of her employment on February 9, 2011. As a result, Petitioner was temporarily totally disabled from February 10, 2011 through February 22, 2011 and May 20, 2011 through June 13, 2011 for 5-3/7 weeks under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to $582.31 in medical expenses under Section 8(a) of the Act and permanently lost 15% of the use of his right leg and 2% man as a whole under Sections 8(e) and 8(d)2 of the Act. The issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of her employment on February 9, 2011, whether timely notice was given to the Respondent, whether a causal relationship exists between the alleged February 9, 2011 accident and Petitioner's current condition of ill-being and or need for medical services, and if so, the extent of Petitioner 's temporary total disability benefits, the nature and extent of Petitioner's permanent disability and the amount of reasonable and necessary medical expenses. The Commission, after reviewing the entire record, modifies the Arbitrator's decision and finds Petitioner sustained an accidental injury arising out of and in the course of her employment on February 9, 2011 and timely notice of the same was given to the Respondent. However, Petitioner failed to prove her right knee surgery and current right knee condition are causally related to the February 9, 2011 accident. The Commission further finds that Petitioner exceeded her choice of doctors when she sought medical care for her low back from Chiropractor Cicero and Dr. Wilson. The Commission finds that Petitioner sustained an acute

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right knee injury that resulted in lost time from February 10, 2011 through February 22, 2011 for 1-6/7 weeks and Petitioner permanently lost 2.5% of the use of her right leg.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner's medical records show that on February 2, 2006 a MRI was performed on Petitioner's right knee. The MRI findings suggest segmental discoid meniscus of the lateral meniscus involving the anterior horn and a portion of the body segment. It was noted that there was a complex tear of the lateral meniscus affects the anterior horn and body segment. The radiologist noted that there may be a displaced meniscal fragment arising from a flap tear of the meniscal body; incomplete radial tear through the junction of the anterior horn and body of the medial meniscus; small to moderate joint effusion, synovial proliferation, pes anserine bursitis and pretibial bursitis; evidence of old ACL sprain, along with early degenerative joint disease and findings suggestive of trochlear hypoplasia.

2. Petitioner testified that in 2009 she fell and injured her right knee while she was on vacation. A right knee MRI was taken and she was told she had a right knee sprain. She said that the doctors may have told her she had a tear of the anterior horn of the lateral meniscus as well. Surgery was not recommended at that time. Petitioner's medical records show that on October 27, 2009 she was seen by Dr. Mejia at U of I Orthopedics. Dr. Mejia noted that approximately one month ago the patient reported that she sustained a fall while walking off a curb during her vacation in Las Vegas. She was seen in our clinic with significant pain and swelling of the right knee and she was presumed to have a subluxation with possible dislocation of the patella. Physical therapy and patella knee sleeve were prescribed. The patient reported that while physical therapy was greatly reducing the pain, she continued to have mild amount of medial sided knee pain. She was told to continue her physical therapy and to continue to wear her brace. She was also given a medication refill and instructed to follow up in four weeks.

3. Petitioner had a right knee x-ray conducted on October 13, 2009 followed by a right knee MRI on November 6, 2009. The right knee x-ray findings were suprapatellar effusion and the radiologist opined that the effusion may be causing the patella to mal-track. The right knee MRI indicated there was a medial retinaculum tear as well as medial patellar and lateral femoral condyle contusions in a combination consistent with transient patellar dislocation. Edema tracked proximally into the distal vastus medialis muscle and also posteriorly adjacent to the medial collateral ligament. Intact fibers of MCL were identified as was a tear involving the anterior horn of the lateral meniscus and a cartilaginous defect in the lateral femoral condyle.

4. At the January 7, 2010 follow up with Dr. Mejia, Petitioner reports her physical therapist said she is just about finished with physical therapy. Petitioner stated she did not have any complaints at this time. She reported she still had some mild stiffness and mild hyperpigmentation in the medial aspect of her knee. She has not been wearing her knee sleeve except for very strenuous work. She states she is able to perform activities without any major limitations at this time. She only takes mediation when she has pain and this is on an irregular basis. Dr. Mejia told her to continue physical therapy and to perform home exercises. He also instructed her to follow up as needed and to wear her knee sleeve as needed.

5. Petitioner reported she was pain free and received no treatment between February 7, 2010 and the February 9, 2011 work accident. Petitioner also testified that she has had low back pain off and on for ten years. Chiropractor Cicero helped her low back pain.

6. On February 9, 2011, Petitioner, a 60 year old medical bill coder, claims she sustained a work accident. Petitioner testified that on February 9, 2011 she was on her way into work. She had just left the parking lot and was walking into the entrance door of her place of employment when she encountered a mat. The mat was located down the hallway and it was near piles of snow that people had tracked onto the floor from the snow storm which occurred a day or so before. As she stepped off the floor mat and onto the snow located on the floor, she slipped and fell on the tile floor. Her foot went up and she came down on her right side. She identified Petitioner's PX2 as a photograph of the area in question. She was 99% sure that on the day of the accident there was not a wet floor sign as seen in PX2. Petitioner testified that her office was located on the third floor of the building. She was walking to the bank of elevators which she would take to the third floor when she had this accident. It takes her approximately five minutes to walk from her car to the building. If she used the pedway, it would take her much longer. She also said this was the normal route she took to get to her office. Petitioner agreed that there were two other entrances to the building. She entered where she did because it was closest to where she had parked. Petitioner testified that the parking building and the office building are not directly connected. They are connected through another building via a pedway. The parties agreed that these are Respondent's premises. Petitioner further testified that members of the public also use the entry way she came through and she is not aware of any entrances to the building that are for employees only. After the fall, Petitioner testified that she was helped into a wheel chair because she could not step on her right, painful leg. Her whole right side was in pain. She was taken to and seen in the emergency room.

7. On February 9, 2011, the emergency nurse noted that Petitioner reported she was walking in the EEI on the way to work when she slipped on the wet floor. The patient reports experiencing pain in her back, buttocks, right knee and right leg. A final report indicated Petitioner has a headache, back pain and right leg pain. Petitioner reports she was walking into the EEI building when she slipped on wet floor and fell onto right side

striking her right back/buttock and knee. Her lumbar x-ray showed no acute fracture or subluxation along with degenerative disc disease at L5-S1 while her right knee x-ray showed osteoarthritic changes in the knee. Petitioner was diagnosed as having a right knee sprain. She was instructed to follow up with her family doctor in 2-3 days and was given an off work slip spanning from February 9, 2011 through February 22, 2011.

8. On February 14, 2011 Petitioner followed up with Dr. Chmell who instructed Petitioner to not bear any weight on her right knee and he ordered a right knee MRI. The February 20, 2011 MRI was consistent with a recurrent lateral patellofemoral dislocation including likely a chronic disruption of the medial retinaculum near its patellar insertion as well as an avulsion cortical fracture at the retinacular insertion to the patella. The radiologist indicated that the prepatellar soft tissue edema may represent direct injury and subcutaneous hemorrhage. He further noted that the anterior cruciate ligament shows some deformity and altered signal of uncertain clinical importance. If there is a loss of ACL stability on clinical exam, he instructed the doctor to consider whether Petitioner has a full thickness ACL tear. He further noted that increased joint fluid, including layering of blood cells below supernatant, is consistent with large hemarthrosis in the knee. Lastly he noted that the lateral meniscus anterior horn deformity is unchanged when compared to the study conducted more than one year ago.

9. At the February 21, 2011 follow up visit, Dr. Chmell opined that Petitioner most likely had an acute on chronic lateral patellofemoral subluxation. She also had signs of bony edema at the lateral femoral condyle. He advised her to wear a right knee sleeve, to slowly increase her weight bearing on her right leg and to begin physical therapy.

10. Petitioner participated in physical therapy from February 21, 2011 through April 25, 2011. On April 20, 2011 the therapist noted that Petitioner continues to present with instability of right knee although her range of motion and strength are significantly improved. Functionally, she is still somewhat limited and she is apprehensive about her knee giving way. She was instructed to return to the orthopedic clinic for consultation regard a need for surgery.

11. On April 25, 2011, Dr. Chmell noted that Petitioner is doing quite well. On examination she had no acute distress. Her right knee examination showed some slight tenderness in the medial patellofemoral ligament. She had a full knee range of motion which was stable to vargus and valgus stress, He instructed Petitioner to continue her VMO strengthening as well as the use of brace and instructed her to follow up in 4-6 weeks.

12. Petitioner testified she went for a second opinion after she felt that the physical therapy was not helping. She went to Dr. Cherf at Weiss Memorial Hospital. She brought in her records to Dr. Cherf. Dr. Cherf's treatment records were not admitted into the record. Any records pertaining to Dr. Cherf were found in Petitioner's PX4, the medical records from Weiss Memorial Hospital.

13. On May 2, 2011 a right knee x-ray was ordered by Dr. Cherf. The radiologist indicated that multiple view of Petitioner's right knee reveal no evidence of an acute fracture-dislocation. There was no significant degenerative changes noted and no joint effusion.

14. On May 20, 2011, Dr. Cherf operated on Petitioner's right knee. The medical records contained in PX4 indicate that Petitioner's group insurance provider was listed as the primary insurance. Petitioner's post-operative diagnosis was listed as a lateral meniscal tear and patellar instability of the right knee The procedure was listed as an arthroscopy of the right knee and a partial lateral meniscectomy, limited lateral release and injection of the knee with Marcaine.

15. From May 25, 2011 through October 13, 2011 Petitioner participated in physical therapy on an intermittent basis. During the June 10, 2011 Petitioner indicated she was upset and said that the knee exercises were increasing her back pain. Petitioner testified she was off of work from May 20, 2011 to June 13, 2011. On July 19, 2011, it was noted that Petitioner had discontinued physical therapy in June because it was exacerbating her back pain/sciatica. She indicated that she had been prescribed prednisone and bed rest at that time. No re-referred for knee rehabilitation was made at that time. Petitioner did eventually return to physical therapy. The October 13, 2011 physical therapy discharge exam indicated Petitioner was seen for 26 physical therapy visits. The therapist indicated Petitioner has done extremely well with good strength and range of motion. She has mild instability in her right knee but it is not limiting her function. Petitioner was discharged from physical therapy with instructions to continue her home exercises.

16. From June 13, 2011 through August 8, 2011 Petitioner treated with Chiropractor Cicero. On June 13, 2011 Petitioner completed a spine pain questionnaire for Chiropractor Cicero in which she indicated that her present back attack began 2-3 weeks ago. She further indicated that she had had back pain attacks on and off again for 10 years. Chiropractor Cicero diagnosed Petitioner as having acute low back pain, secondary discogenic pain and spasm, incidental right L5 weakness, acute bilateral lower extremity pain secondary to lumbar radiculitis. He further indicated he was going to rule out lumbar intersegmental instability. He told the Petitioner that her symptoms were coming from an inflamed nerve in low back and that more likely than not the change in her gait and post knee surgical rehabilitation had brought on these symptoms. He then referred Petitioner to Dr. Wilson, a neurologist, for x-rays.

17. On June 15, 2011, Petitioner saw Dr. Wilson. The doctor noted that Petitioner has come to the office for an evaluation of low back pain which is radiating down into her right leg along with some numbness and mild weakness in her right leg. He noted that Petitioner initially developed problems last winter when she slipped and fell on her way into work. Petitioner ended up with knee problems for which she had knee surgery. She now reports that she continues to have pain after the knee surgery. She states that her knee hurts as

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much after surgery as it did before the surgery. She has been using crutches in the last couple of months. She has developed low back pain radiating down into the right leg, which she states is new. She reports she has had some mild back issues in the past but nothing remotely approaching this. Dr. Wilson evaluated Petitioner and advised her to continue with Chiropractor Cicero for treatment.

18. On June 20, 2011, Chiropractor Cicero ordered a lumbar MRI. The June 23, 2011 lumbar MRI indicated Petitioner had a disc herniation at L3-4, L4-5 and L5-S1. On June 29, 2011 Chiropractor Cicero scheduled Petitioner for back school and advised Petitioner to see Dr. Wilson for medication.

19. Dr. Coe, a board certified occupational medicine doctor was deposed on June 12, 2012. He examined Petitioner on June 5, 2012. Petitioner reported she had an accident at work where she stepped off a mat that was wet from snow and she slipped and fell onto her right side. She reported feeling immediate pain in her back, right hip, buttock, knee, ankle and foot. He reviewed her medical records and tests. Her records showed a patellofemoral dislocation. Petitioner's kneecap had slid out of its groove and which had moved laterally. There was evidence of disruption of the medial patellar retinaculum, which is a ligament that holds the kneecap in place. There was a cortical avulsion fracture where the retinaculum inserted into the patella. There was pre-patellar soft tissue swelling. There was a large hemarthrosis, which is blood inside the knee joint. The lateral meniscus was abnormal and it had been described as such on prior diagnostic tests. Dr. Chmell noted findings of an acute on chronic lateral patellofemoral subluxation with bone edema, which means there was both an old problem and new problem in in Petitioner right knee. The old problem was subluxation and arthritis and the new problem was hemarthrosis, swelling, stiffness and bruising

Dr. Coe noted that in Petitioner's described accident there was lateral subluxation of the patella that caused bruising and inflammation of the cartilage on the surface of the knee joint and it caused tearing of small capillaries in the patella itself which caused bleeding into the patellofemoral joint in the knee joint and this produced hemarthrosis. This was separate from the tears of the meniscus. During surgery, Dr. Cherf's provided a description of lateral tracking of the patella. He found cartilage abnormalities on the inside of the patella, which is a softening, loosening and loss of cartilage down to the surface of the bone at the kneecap. He talked about a lateral meniscal tear. He also talked about an irritation or inflammation inside of the knee which occurs from injury. Dr. Cherf trimmed away portions of the lateral meniscus. He released scar tissue on the outer, lateral border of the kneecap to be able to move it back to its central groove.

During her right knee physical therapy, she described increasing pain in the right side of her back radiating into her right leg. She treated with Chiropractor Cicero for her right-sided back and leg pain. He in turn referred her to Dr. Wilson who diagnosed right L5 radiculopathy due to an abnormal gait that her knee symptoms brought on. He

prescribed steroids, rest, pain medication, temporary discontinuation of the physical therapy, and a return to Chiropractor Cicero for treatment. Petitioner's low back MRI showed multilevel disc abnormalities. After the MRI, Chiropractor Cicero preformed additional physical therapy and released Petitioner back to work in June of 2011. Dr. Coe testified that when he evaluated her on June 5, 2012, she was still performing home therapy but was not scheduled for any further medical treatment for her back, right leg or right knee.

Dr. Coe opined that Petitioner's right L5 radiculopathy was caused by her right knee injury and the subsequent surgery. He further noted that Petitioner had told him she had right knee symptoms back in 2006. He noted that Petitioner's February 2, 2006 right knee MRI described some right knee lateral meniscal degeneration and early degenerative change. At that time, she was treated conservatively and there was no recommendation for surgery. In November of 2009, she had another MRI that showed she had a retinaculum tear and some bone changes of the patellar facet which was consistent with a transient patellar dislocation. So in 2009 her right patella was transient, which means it temporarily dislocated and then relocated. She also had a tear of the lateral meniscus and some cartilage changes in her right knee. She was again treated conservatively with physical therapy and home exercises and she improved without surgery. She reported her right knee was asymptomatic after the treatment in 2009. She was participating in full activities including walking up to four miles a day. Dr. Coe opined that the whole condition became considerably worse following the February 9, 2011 accident. He opined that the MRI after the February 9, 2011 was different from the prior two MRIs in that it showed a considerable breakdown in the cartilage of the right kneecap and the underlying bone as well as there being markers of an acute knee injury in the form of effusion and hemarthrosis/blood in the knee joint. Dr. Coe opined that the fact that she had developed right knee effusion, that she was found to have right knee bruising, that her diagnostic test showed a hemarthrosis bleeding and that her symptoms persistent and were unresponsive to conservative care all led him to conclude that the February 9, 2011 accident significantly aggravated any underlying pre-existing change in Petitioner's right knee. Furthermore, while Petitioner reported occasional backaches prior to February 9, 2011 she had no significant injuries to or symptoms from her back and she did not have chiropractic treatment for her back or right leg radiating symptoms prior to that the accident date and the right knee surgery.

When he evaluated her, Petitioner has a slight right-sided limp, which arose from her right knee injury. She had some right knee stiffness and she to some extent limited full weight bearing on her right leg. There was some swelling in her right knee along with tenderness in the medial and lateral joint margins along the medial patellar border both on the inner border of the kneecap and the back side of the knee joint. Her right knee patellar grind test was positive, which is indicative of cartilage breakdown on the inside of her kneecap. There was also still some cartilage inflammation on the inside of her right kneecap. She had stiffness in her right knee. She had lost about 10 degrees of both

straightening of and flexing of her right knee. She had continued post-surgical swelling of her right knee which is indicative of a breakdown of her cartilage. The swelling is from both the chondromalacia and the surgery. She had good strength and good sensation in her right leg. In terms of the low back, she had myofascial pain and facet joint mediated pain as well as right hip trochanteric bursitis with iliotibial band inflammation. He believes Petitioner will need to limit any tasks that require repetitive loading or straining of her right knee. He lastly opined that all of her treatments were reasonable and necessary and she had reached maximum medical improvement.

20. Dr. Walsh, a board certified orthopedic surgeon, was deposed on January 12, 2015. He performed a record review of Petitioner's claim and authored a report dated December 8, 2012. Petitioner had a chronic problem with her kneecap. In October of 2009, she had subluxation and possible dislocation of her kneecap. The 2009 MRI show a wavy appearance to the medial retinaculum with extensive edema. There was a complete tear or near complete tear. She severely injured her knee in 2009. Dr. Walsh testified that once the patellofemoral ligament tears, it never heals correctly and the patient will have chronic problems with his or her kneecap. Petitioner has multiple problems in the knee. She had the prior subluxation episode in 2009 which resulted in a chronic disease of the patellofemoral joint. She has pre-existing osteoarthritis. She has a pre-existing lateral meniscal tear. The MRIs obtained prior to 2011 show she had a very abnormal knee. The May 2011 surgery addressed the torn lateral meniscus. The surgeon also noted that the patient had synovitis, wear and tear of her lateral femoral condyle, wear and tear of her lateral plateau and performed the release. Dr. Walsh opined that none of the components of the surgery were necessitated by the February 9, 2011 work injury. The lateral meniscal tear was clearly pre-existing. It was present on two MRIs prior to 2011.The wear and tear and degenerative changes seen clearly are pre-existing. The lateral release was done for the maltracking of the kneecap which dates back at least to 2009. There was obvious subluxation/dislocation episode in 2009, which is the reason he did the lateral release for the patient's maltracking. The medical records reflect that after the February 9, 2011accident she had a knee sprain. More than likely, her ongoing pain is due to her pre-existing osteoarthritis. Petitioner also has chronic lumbar discogenic pain. It is not likely that the disc changes seen on the MRI were causally related to the February 9, 2011 injury. More likely than not, they are chronic and pre-existing. It was reasonable for Petitioner to have been seen in the emergency room and to follow up with her family doctor regarding her right knee but nothing more. He denied that the findings in the February 19, 2011 right knee MRI were new. The ulcer/osteoarthritis was not caused by the fall. You cannot fall and get an ulcer/osteoarthritis in a week. Ulcers/osteoarthrtis occur over a period of time. While it is true that pre-existing osteoarthritis could be aggravated by trauma, he does not think that happened in this case based on the fact that she was diagnosed with a sprain in the emergency room. She was able to leave the emergency room and did not appear to have any permanent change in her condition. He did not see anything on her MRI or the surgical report that would suggest a permanent change in her condition. There was not any prescription for surgery until she saw Dr.

Cherf. There was no recommendation for surgery in the emergency room, by Dr. Moorchie, her primary care doctor, or by Dr. Chmell. He agreed that the edema on the third MRI was new. Additionally, there was no mention of a large fluid collection in the prior MRIs. Also the avulsion cortical fracture of her retinaculum insertion/small bone fragment of the patella was not mention in the prior MRIs. Although there were new findings in the 2011 MRI, none of the findings in the latest knee MRI were addressed by Dr. Cherf's surgery He agreed that hypothetically an avulsion cortical fracture could be caused by a fall. With the exception of Dr. Cicero's medical records, he did not find any medical records prior to 2009 that showed low back pain or treatment. He said that 60 years old patients often have disc pathology so that's not abnormal at all. He agreed that hypothetically one could aggravate a herniated disc in a fall.

21. At the July 23, 2015 arbitration hearing, Petitioner testified she experiences some difficulty walking up stairs. Her leg by her knee is misshaped. She believes she has swelling in her knee. She used to walk 4 miles a day for exercise. She just started walking again last week, which is approximately. 4-1/2 years after the alleged February 9, 2011 work accident. She is starting off walking one mile. She has to build up her walking a bit. So maybe she could walk 1-1/2 to 2 miles.

Based on the evidence in the record, the Commission affirms the Arbitrator's holding that Petitioner sustained an accidental injury arising out of and in the course of her employment on February 9, 2011. However, the Commission finds that Petitioner failed to prove her current right knee condition is related to the February 9, 2011 work accident. Petitioner's MRIs demonstrates that Petitioner had multiple pre-existing right knee problems that did not change from 2009 to 2011. In addition, the evidence demonstrates that Petitioner sustained an acute right knee injury as evidence by the edema, hemorrhage and increased joint fluid in the right knee as a result of the February 9, 2011 work accident. Said injury resulted in conservative treatment in the form physical therapy, rest and being taken off work being prescribed by the emergency room doctor, Petitioner's primary care doctor and Dr. Chmell alike. Petitioner was still receiving conservative care at the time she chose to change treatment from Dr. Chmell to Dr. Cherf and chose to have her treatment covered under her group insurance policy. It is not until Petitioner starts treating with Dr. Cherf that Petitioner moved from needing conservative treatment to needing surgery. While Dr. Cherf performed the surgery, his treatment records were not placed into evidence and it unknown why Petitioner's treatment moved from the prescribed conservative treatment to surgical treatment. Upon reviewing Dr. Coe's June 5, 2012 and Dr. Walsh's December 8, 2012 reports to find any explanation of the change in treatment from a conservative route to invasive surgery, all they state is that Petitioner was examined by Dr. Cherf on May 2, 2011, x-rays were taken followed by Dr. Cherf prescribing right knee arthroscopic surgery. Again, in addition to no medical records from Dr. Cherf being placed into evidence there was no further explanation that could be derived from the two examining doctors as to why there was a necessity to move from conservative treatment to surgical treatment. Furthermore,

of interest, is the fact that when Dr. Cherf performed the arthroscopic surgery he only repaired Petitioner's pre-existing meniscal tear and pre-existing patellar condition. Post-surgery, Petitioner still complained of right knee pain and she told Dr. Wilson that her knee hurts as much after surgery as it did before the surgery. Thus, the Commission questioning both whether the right knee surgery is causally related to the February 9, 2011 accident and whether the surgery was reasonable and necessary to cure or relieve Petitioner of her injuries from the February 9, 2011 work accident. Of interest, is the fact that Petitioner in addition to not putting into evidence either Dr. Moorchie's, her primary care doctor, or Dr. Cherf's records, Petitioner did not call her treating doctors to address the causation issue, but instead opted for Dr. Coe to do so only after seeing Petitioner on one occasion. Based on the above, the Commission has weighed the evidence and finds Dr. Walsh's causal connection opinion to be more persuasive than Dr. Coe's opinion. Having reviewed the totality of the evidence, the Commission finds that Petitioner failed to fulfill her burden of proof in terms of the issue of causation as it relationship to and need for the right knee surgery. Lastly, based on the above and specifically the causation discussion, the Commission finds Petitioner was only temporarily totally disabled from February 10, 2011 through February 22, 2011 for 1-6/7 weeks.

In terms of Petitioner's low back condition, it appears that Petitioner's need for back treatment only appeared after the knee surgery for Petitioner's pre-existing right knee complaints. It further appears that Dr. Cicero is beyond the chain of referrals allowed under Section 8(a) of the Act. While Petitioner initially saw Dr. Moorthie as evident by his off work slip and the reference to his treatment made by Dr. Walsh, his records were not placed into evidence. Nonetheless, the Commission notes that there is some evidence that Petitioner treated with Dr. Moorthie followed by Dr. Chmell, Dr. Cherf and Chiropractor Cicero and Dr. Wilson. The Commission finds that Chiropractor Cicero and Dr. Wilson's treatments were beyond the chain of referrals allowable under the Act. As such the Commission finds that Chiropractor Cicero and Dr. Wilson's treatments are not reasonable and necessary under the Act and denies the medical bills related thereto.

Based on the above and specifically the finding that Petitioner failed to prove her right knee surgery is causally related to and reasonable and necessary to cure or relieve her injuries related to the February 9, 2011 work accident, the Commission finds Petitioner permanently lost 2.5% of the use of her right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $615.15 per week for a period of 1-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $582.31 for medical expenses under §8(a) of the Act.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $553.63 per week for a period of 5.375 weeks, as provided in §8 (e) of the Act, for the reason that the injuries sustained caused the 2.5% loss of the right leg.

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 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: AUG 1 8 2016

MB/jm

O: 7/7/16

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Maria Basurto

David L. Gore

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SAMMYE MEYER,

Petitioner,

16IWCC0560

vs.

NO: 11 WC 31011

WAL-MART ASSOCAITES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, permanent partial disability, medical expenses both current and prospective, and penalties and fees, and being advised of the facts and law, reverses the Decision of the Arbitrator, and finds that Petitioner did not sustain her burden of proving a work-related accident occurring on June 28, 2011 and denies compensation.

Findings of fact and Conclusions of Law

1. Petitioner testified that on June 28, 2011 she worked for Respondent as a meat stocker. On that date she went into the cooler to get stock, it was dimly lit. She slipped on a piece of paper and fell. The right side of her right ankle struck the concrete. Her ankle began to bruise. Petitioner went to an emergency room that day. She did not remember telling emergency room personnel about tripping but she did tell them she was not dizzy. She later treated with her general practitioner doctor, Dr. Kearney. She has been diagnosed with diabetes since 1997 or 1998 and is insulin dependent.

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2. Petitioner reported the accident to the zone manager and filed a report. Her ankle really hurt, it was swollen, and it was difficult for her to walk. She treated the ankle with ice packs, an Ace bandage, and compression socks. She tried to work for a period after the accident while on crutches, and she "borrowed a walker from a friend."

3. Petitioner testified her ankle "got infected, festered up pretty bad." She went to Dr. Prieb. She had two surgeries to debride the infection and save her leg, but the leg had to be amputated seven inches below the knee. She had never had any such condition in her left leg, ankle, or foot. She has not been employed nor looked for work since the amputation. However, it has not stopped her from her other normal activities. She graduated high school in 1972 and had an associate's degree in hospitality food service. Prior to working for Respondent she worked in fast food; the highest level she achieved was shift leader. She had some secretarial training, but never worked as a secretary. She still takes Gabapentin, which "helps with the phantom pain."

4. On cross examination, Petitioner acknowledged that the emergency room records indicate she denied slipping on anything. She also acknowledged that she signed the accident report which indicated she "just fell down, did not slip or trip, just felt herself falling" and she did not think there was anything on the floor. She did not prepare the report but did review prior to signing it. Petitioner agreed that she sought a return to work statement from her doctor around August 1, 2011 and she was released to work as of August 14, 2011. She cannot drive currently but is able to go to the store; usually taken by her son or minister.

5. On redirect examination, Petitioner testified she went into the cooler on a regular basis to perform her job. The accident report was written by the zone manager. Petitioner "had to correct her a couple of times because she was putting stuff in that didn't happen." She was confident that she slipped on paper at the time of the accident.

6. The medical records indicated that on June 28, 2011, Petitioner presented to an emergency room and reported she "was working and fell. She denies slipping on anything. She denies dizziness and light headedness prior to her fall." The pain diagram showed pain in the inner portion of the right ankle and likely on the bottom of the foot or possibly heel. She had a history of type II diabetes, neuropathy, and hypertension. X-rays showed spurring of the medial malleolus in the anterior distal tibia and metatarcophalangeal joint, a large plantar calcaneal spur, and enthesophyte formation at the insertion cite of the Achilles tendon. A sprained ankle was diagnosed and Petitioner was released with crutches and an air cast. She was to use the crutches until able to bear weight and "continue to use air cast for 1 week after discontinuing air cast."

7. On July 7, 2011, Petitioner presented to Dr. Kearney's partner, Dr. Kim, because of a right ankle "eversion injury" two weeks ago. X-rays in the emergency room were negative. Her pain had not decreased and she still had a constant dull ache radiating to her toes. The ankle was wrapped in an Ace bandage and was in an air cast. Dr. Kim was concerned there may be severe ligament damage because of the lack of improvement. He would refer her to orthopedics to see if they would get an MRI.

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8. On September 13, 2011, Petitioner was admitted to St. Elizabeth for necrotic skin to the right heel. She noticed a change in color of the skin about two weeks ago. She went to an emergency room about a week previously and was told it could be gout. The area progressively got worse. An MRI of the right foot showed diffuse cellulitis without evidence of osteomyelitis and diffuse thickening and abnormal signal possibly indicating ruptured Achilles tendon.

9. On September 15, 2011, a bilateral Doppler of the legs indicated "right SFA and infrapopliteal occlusive disease with moderate to severe distal ischemia. Left occlusive disease with moderate distal ischemia. Ischemic claudication is likely bilaterally. Ischemic rest pain is possible on the right. Wound healing potential on the right is poor."

10. Two days later, Dr. Prieb performed "excision of (*sic*) debridement of necrotic right heel and drainage of abscess" for poor peripheral venous access, infection, and necrosis.

11. By September 20, 2011, Petitioner's condition had improved and she was discharged. It was then noted she had presented and admitted because of a non-healing painful blister on her right foot. She was to follow up with her general practitioner and Dr. Prieb.

12. On October 13, 2011, Petitioner presented to the St. Elizabeth emergency room complaining of pain and yellow discharge from a right heel ulcer for two days. An MRI of the right foot taken the next day showed diffuse subcutaneous edema throughout the foot consistent with cellulitis, with increasing edema involving the calcaneus consistent with osteomyelitis. The Achilles tendon findings were unchanged. It was noted that the September 13th MRI showed infection in the right heel and diabetic ulcer. Petitioner was readmitted to the hospital and IV antibiotics were administered.

13. On October 17, 2011, Petitioner was evaluated by Dr. Painter for osteomyelitis of the right heel. She had been in "the hospital in August for unrelated reasons, but shortly thereafter developed an ulceration over the right heel." It did not heal and she had debridement on September 17th. "Pathology revealed epidural necrolysis. A culture revealed heavy growth of MRSA and heavy Serratia marcencens." She returned to hospital on October 14th with acute onset of fever. Dr. Painter altered some medication, recommended another debridement, noted that long-term antibiotics were anticipated, and noted that Petitioner was not an ideal home IV candidate.

14. On October 18, 2011, Dr. Prieb performed extensive debridement of skin, soft tissue, and bone of the right heel and drainage of abscess for infected large ulcer with osteomyelitis. Petitioner was discharged on October 20th in stable condition and was instructed to keep non-weightbearing on the right foot for four weeks, the duration of her IV antibiotics.

15. On November 3, 2011, Petitioner returned to Dr. Prieb who noted he performed extensive debridement for large necrotic right heel ulcer. She was currently on IV antibiotics.

16. Later that day Petitioner presented to her family doctor, Dr. Kearney, and reported that she just saw Dr. Prieb who indicated her osteomyelitis had worsened and amputation was scheduled for November 9th. Petitioner filled out disability and medical card paperwork.

17. On November 9, 2011, Dr. Prieb performed below-knee amputation of the right leg for severely infected right foot and large amount of tissue loss in the right heel.

18. Petitioner was referred to Dr. Khan for rehabilitation after her amputation. On November 15, 2011, Dr. Khan noted that Petitioner "was admitted to the hospital with a history that she fell down and had some injury to the right heel area. The patient got infected and did not respond to conservative treatment. She ultimately underwent surgery and had right below-knee amputation done by Dr. Prieb on November 9, 2011."

19. On December 5, 2011, Dr. Khan noted that Petitioner's fall was on June 29, 2011 and injured her heel which became infected. She was treated with appropriate antibiotic at the time, but she did not heel and developed deep vein thrombosis also and was anticoagulated. He mentioned the amputation. Petitioner was discharged from intensive multidisciplinary rehabilitation program.

20. Dr. Prieb testified by deposition on May, 9, 2013. He was asked whether Petitioner's accident in which she slipped on paper in a meat cooler, "had an injury to her right ankle and her heel, after which it felt floppy and unfortunately became infected" and given her preexisting condition lead her down the path to requiring amputation. Dr. Prieb answered yes, he thought so. Dr. Prieb explained that diabetics have low resistance to infection and with peripheral vascular disease as well the combination inhibits wound healing. He also seemed to opine that Petitioner would not need additional treatment to keep her current capabilities.

21. On cross examination, Dr. Prieb testified he did not review medical records prior to his treatment. He indicated that he would defer to treaters' opinions who actually examined her between the date of the accident and the beginning of his treatment. Petitioner indicated that she noticed a change in the color of her skin about two weeks before he saw her. The possibility of an ankle sprain leading to infection could be dependent on the severity of the sprain.

22. Dr. Prieb explained that a severe sprain could cause internal bleeding, collection of fluid and later become infected. It was possible, but unlikely, for a person with progressed diabetes to develop a "wound without an injury." Dr. Prieb was not sure how much after a sprain he would expect for an infection to develop. "It is possible that patient may have bleeding, hematoma, collection inside the sprain area for a while, and then it becomes infected, so it can take a few weeks also."

23. Dr. Krause testified by deposition on May 2, 2014. At Respondent's request he conducted a review of Petitioner's medical records and issues a report. The best he could determine was that Petitioner suffered an ankle sprain on June 28, 2011.

24. After the emergency room records, in which x-rays showed no fracture, the next note he saw was from Dr. Kim three weeks later. He noted tenderness in the inside part of the ankle and ordered an MRI. He did not offer any treatment thereafter.

25. Petitioner developed a DVT in September of 2011. It was treated with blood thinners. Treatment for the DVT was reasonable and necessary and the ankle sprain "likely contributed some degree" to development of the DVT, but he did not know to what extent.

26. Dr. Krause also testified that according to the records, Petitioner essentially recovered from the ankle sprain as of August 1, 2011. At that time it was noted she tolerated full weightbearing, there was no trace edema warmth or tenderness, and she wanted to return to work. There was no indication in the records that she was still wearing an air cast at that time. An air cast is used to keep a patient from "re-rolling" the ankle and is reasonable to treat an ankles sprain initially.

27. Dr. Krause indicated that Petitioner's main preexisting condition was poorly controlled diabetes. She also had diabetic neuropathy which causes loss of feeling and can cause problems with feet because diabetics can suffer injuries to their feet without knowing it. Petitioner also had peripheral neuropathy, which is poor blood flow to the extremities and which also can be caused by diabetes.

28. Dr. Krause continued that there was nothing in the medical record to suggest that Petitioner's heel blister was caused by the ankle sprain. "It almost certainly came from something rubbing on her heel or trauma that she didn't recognize." A blister is caused by trauma, not diabetes. However, the diabetes could mask sensation of the trauma. "To get a blister you don't need the breaking of the skin, but to get bacteria underneath the skin you need breaking of the skin."

29. Dr. Krause explained that diabetics have low resistance once an infection begins, but they're not predisposed to get infection. There was nothing in the records to suggest that Petitioner had any sign of infection on August 1, 2011. There were also no records indicating significant ecchymosis, pooling of blood, or anything under the skin. Even if there were polling of blood, there still needs to be bacteria to get infection. He could not say that he has seen an air cast cause a blister on a heel because "the air cast is in front of the ankle area."

30. On cross examination, Dr. Krause agreed he had no records that Petitioner suffered any other injury or trauma to her leg, ankle, or foot. He has not seen a picture of the air cast provided Petitioner. He was not certain what Dr. Prieb meant by "blood pooling," but he presumed it was bleeding or bruising, that can occur with severe sprains. He had no pictures of Petitioner's foot or ankle after the accident. He agreed that obesity can cause an increase in symptoms of an ankle sprain, especially if the patient is unable to keep from bearing weight. All the treatment Petitioner received seemed very reasonable but given her size she will likely need periodic maintenance of the prosthesis.

31. In an earlier report he prepared for Respondent, Dr. Krause opined medical records indicated an unexplained fall and her first contact did not note slipping or tripping on anything. Dr. Krause opined that the sprain caused the DVT. The DVT was not causally related to the blister which became infected.

32. Dr. Krause did not agree with Dr. Prieb that internal bleeding caused the infection because infections are caused by bacteria. The sprain did not cause the blister which became infected. Petitioner had symmetric bilateral low grade swelling as of August 1, 2011, was basically asymptomatic, and there was no report of any break of the skin at that point. The accident did not cause the ulcer, the overwhelming cause of which was her peripheral neuropathy and diabetes.

The Arbitrator found "Petitioner proved she sustained accidental injuries arising out of and in the course of employment. This is based on Petitioner's testimony and the medical records of St. Elizabeth Hospital and Dr. Kim." At the same time the Arbitrator found that Petitioner did not prove that her current condition of ill-being and the eventual amputation were caused by the work injury. Based on his determinations, the Arbitrator awarded Petitioner 6&2/7 weeks of temporary total disability benefits and 16.7 weeks of permanent partial disability benefits representing 10% loss of the right foot.

Respondent argues the Arbitrator erred in finding a compensable accident. It posits Petitioner's testimony was not credible because there was no mention that she slipped on a piece of paper in the medical records or accident report and the first reference to the piece of paper was actually during the hypothetical question posed to Dr. Prieb in his deposition. It is not entirely clear from its brief whether Respondent questions whether Petitioner had an accident at all or whether it simply argues that her accident did not arise out of her employment. The Commission finds that Petitioner did indeed suffer a fall on June 28, 2011. She went to an emergency room and there was evidence of an acute injury to her ankle. However, the Commission finds that Petitioner did not prove that her fall in the meat cooler occurred in the course of, and arose out of, her employment.

In order to establish an accident occurring in the course of a claimant's employment he/she must also prove that the accident arose out of that employment by proving that the risk of that accident/injury was related directly to the employment and not a risk encountered by the general public (*see, Caterpillar Tractor v. Industrial Commission*, 129 Ill. 2d 52 (1989), or of a personal nature particular to the claimant. *See, Oldham v. Industrial Commission,* 139 Ill. App. 3d (2nd Dist. 1985).

In this matter, the Commission does not find credible Petitioner's testimony that she slipped on a piece of paper in the meat locker. Respondent is correct that there is absolutely nothing in the record to substantiate that testimony, and that the first reference to that allegation in fact was during a question posed to Dr. Prieb in his deposition. In addition, in her testimony the Petitioner acknowledged that she signed the accident report which indicated she "just fell down, did not slip or trip, just felt herself falling" and that she did not think there was anything on the floor.

In *Mathis v. U.S. Steel*, 12 IWCC 817, the claimant testified that he fell down stairs at work hitting his hip, back, and head losing consciousness. He further testified the stairs must have been wet because his hand was wet when he recovered consciousness. The Arbitrator found his testimony not to be credible and wrote, "The testimony may have been more credible if he had included water in his accident report, mentioned to one of the several physicians and not brought it up for the first time on the day of hearing." Therefore, the Arbitrator found that "there was insufficient evidence to prove the accident was anything other than an unexplained fall," and denied compensation. The Commission affirmed and adopted the Decision of the Arbitrator and the Appellate Court affirmed the Decision of the Commission by Rule 23 Order issued on April 28, 2014. The Commission finds the fact pattern in *Mathis* to be analogous to that in the instant claim and reaches the same conclusion.

The Commission concludes that Petitioner's fall was either idiopathic, without clear etiology or explanation, or was associated with a risk personal to Petitioner, namely her severe diabetes and related peripheral neuropathy, from which she suffered. That condition causes reduced sensation in her limbs which could have contributed in her fall. Petitioner has not proved that her employment caused any increased risk of suffering an unexplained fall than that encountered by any member of the general population. Therefore, the Commission finds that Petitioner did not prove she suffered a compensable accident.

As noted above, the Arbitrator found that Petitioner proved she suffered a work accident but had not proven that her current condition of ill-being resulting in her amputation. While the Commission's finding that Petitioner did not prove a compensable work-related accident is dispositive of the instant claim, the Commission considers appropriate addressing the issue of causal connection as well.

The Commission agrees with the finding of the Arbitrator that Petitioner did not sustain her burden of proving her fall resulted in the cascade of events resulting in her necrosis and eventual amputation. In this regard, the Commission finds the opinions of Dr. Krause more persuasive than those of Dr. Prieb. In particular, the Commission finds persuasive Dr. Krause's assertion that there must be the introduction of bacteria through a break in the skin in order for an infection to develop. The Arbitrator cited *Myers v. Sol Consultants,* 7 IWCC 0140, in which the Commission denied a claimant's assertion that a necrotic skin condition was causally related to an internal injury to his leg. The claimant there was also diabetic. The Commission in *Myers* found that an open wound or abrasion was necessary to allow bacteria to enter the body, based on credible expert testimony. The *Myers* decision certainly bolsters the opinion testimony of Dr. Krause over that of Dr. Prieb.

There was never any indication in the medical records that Petitioner suffered any break in her skin in the fall on June 28, 2011. There was also no indication in the medical records that Petitioner continued to wear the air cast beyond the one-week period for which it was prescribed. In addition, Dr. Krause testified persuasively that use of the air cast would not cause such a rubbing or abrasive type injury resulting in the blister that became infected. The Commission agrees with Dr. Krause that Petitioner was at maximum medical improvement from her ankle injury as of August 1, 2011, at which time there was no indication of any break in the skin whatsoever.

16IWCC0560

The only reference that could provide even a modicum of support regarding causation is Dr. Khan's notes in November and December of 2011. There, he indicated Petitioner injured her heel in the fall which became infected. However, it seems clear that he was simply reciting a history provided by Petitioner. Dr. Khan would have had no personal knowledge of her previous injury and condition and could not have devised such a conclusion from the medical records, assuming he actually reviewed them. Therefore, the Commission concludes that even if Petitioner suffered a compensable accident on June 28, 2011, Petitioner did not prove that such accident resulted in the condition of ill-being necessitating the amputation of her leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 29, 2015 is hereby reversed and the Commission finds Petitioner did not sustain her burden of proving a work-related accident on June 28, 2011 and compensation is denied.

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 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: AUG 26 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-8/16/16
46

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☒ 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

John Arvai, Jr.,
Petitioner,

16IWCC0550

vs.

NO: 11 WC 35074

State of Illinois/IYC Murphysboro,
Respondent.

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, medical expenses, notice, permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 2, 2015, is hereby affirmed and adopted.

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

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

AUG 25 2016

DATED:
O8/16/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0550

ARVAI JR, JOHN
Employee/Petitioner

Case# **11WC035074**

SOI/IYC-MURPHYSBORO
Employer/Respondent

On 4/2/2015, 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 0.13% 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:

0969 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
KENTON OWENS
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
WORKERS' COMP CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

APR 2 - 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0550

STATE OF ILLINOIS)
)SS.
COUNTY OF **Williamson**)

- ☐ 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

John Arvai, Jr.
Employee/Petitioner

v.

SOI/IYC - Murphysboro
Employer/Respondent

Case # **11 WC 35074**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **02/11/15**. 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

16IWCC0550

FINDINGS

On **11/2/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**62,739.00**; the average weekly wage was $**1207.00**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** 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 $- for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $-.

Respondent is entitled to a credit of $**any benefits paid through group** under Section 8(j) of the Act.

ORDER

No benefits awarded.

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

3/27/15
Date

IC ArbDec p. 2

APR 2 – 2015

16IWCC0550

The Arbitrator makes the following findings of fact:

This is an all issues decision on a repetitive trauma claim. The issues in dispute are accident, notice, causation medical care and nature and extent of injury.

The petitioner, a 59-year-old Juvenile Justice Specialist for Respondent who worked at Illinois Youth Center (IYC) - Murphysboro, alleges accidental injuries to his bilateral hands stemming from repetitive work activities with an effective date of loss of November 2, 2010. (Arb. Ex. 2) The Petitioner began working for Respondent in 1993 at the Duquoin Work Camp. (Px. 9) In 2003 Petitioner began as a Correctional Officer and then later as a Juvenile Justice Specialist at IYC Murphysboro. Petitioner worked in the position until his retirement. (Id.)

October 26, 2010, Petitioner was examined by Dr. Mark Smith, his family physician. (Px. 3) At that time, Petitioner complained of hand numbness. (Id.) Dr. Smith performed a nerve conduction study on October 28, 2010 and referred Petitioner to an orthopedic surgeon. (Id.)

On December 15, 2010 Petitioner returned to Dr. Smith. Petitioner told Dr. Smith that Petitioner related his hand condition to his work duties for Respondent. (Id.)

Petitioner had a previous workers' compensation claim with involving his knee and was off work from May 9, 2010 through May 2, 2011.

On December 15, 2010, Petitioner reported his injury to Respondent and stated he had been diagnosed with carpal tunnel syndrome in both wrists due to repetitive job duties of turning keys and opening and closing doors. (Px. 7)

Petitioner was examined by Dr. Steven Young on November 30, 2011. (Px. 4) Dr. Young diagnosed Petitioner as having bilateral carpal tunnel syndrome and performed carpal tunnel releases on January 27, 2012 and March 28, 2012.

Dr. Young testified by deposition. (Px. 7) Dr. Young testified that Petitioner's work for Respondent could have contributed to bilateral carpal tunnel syndrome. (Px. 7, pg. 17)

On cross-examination Dr. Young admitted that it is helpful to know the frequency duration, intensity and duration of a person's activities to make an accurate causation opinion with regards to carpal tunnel syndrome. (Px. 7, pg. 39) Further, Dr. Young was not familiar with the types of keys used at Duquoin Work Camp, did not know how many bars were in Big Muddy Received Segregation, did not know that IYC Murphysboro was a dorm style facility and that doors were rarely keyed and did not know that keys used at Murphysboro were small keys. (Px. 7, pg. 36, 37, 38)

Lieutenant Harold Schuler testified for Respondent. Lt. Schuler works at Big Muddy River Correctional Center. He is familiar with the job duties at the facility. The bar rapping done at Big Muddy takes less than a minute and requires using a wooden mallet with a rubber end to hit 8 cell bars.

David Craig was called as a witness. Mr. Craig is a Juvenile Justice Supervisor. Mr. Craig testified that IYC Murphysboro opened in January 1997 and was a brand new facility. Mr. Craig stated that IYC Murphysboro is a dorm facility and that there are few doors to open at the facility. The door to the dorm is controlled by the control room officer who flips a switch to open the door. The doors to the bathrooms do not have to be keyed as they were propped open because state law requires the youths to have access to an unlocked bathroom. Additionally, Mr. Craig stated that he sees every incident report at the facility and there are very few incident reports.

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

A claimant must prove by the preponderance of credible evidence all elements of the claim in order to receive compensation under the Act. Orisini v. Industrial Commission, 117 Ill. 2d 38, 44-45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). In cases involving the repetitive trauma concept, the petitioner must show the injury arose out of and in the course of his employment and was not the result of a normal degenerative aging process. Peoria County Bellwood Nursing Home v. Industrial Commission, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec.235 (1987).

Simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased to the petitioner. Id.

The Arbitrator also notes a claimant fails to prove a causal relationship through repetitive trauma where the medical opinion upon which they have relied is based upon incorrect or incomplete information about the claimant's job duties. See, e.g., Lon Dale Beasley v. Decatur Public School #61, 03 IIC 301; Jerry Wiser v. American Steel Foundries. 02 HC 310; Vicki Staley v. BroMenn Lind Medical Hills Internists, 99 IIC 539.

The Commission has determined a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. Gambrel v. Mulay Plastics, 97 IIC 238.

Additionally, in cases involving a repetitive trauma theory, the claimant generally relies on medical testimony to establish a causal connection between the claimant's work and the claimed disability. See, e.g., *Peoria County Bellwood*, 115 Ill.2d 524 (1987); *Quaker Oats Co.* v. *Industrial Commission*, 414 Ill.2d 326 (1953). When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show claimant's work activities caused the condition of which the

employee complains. See, e.g., *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 478 (4th Dist. 1987). The causation of compression neuropathy via repetitive has been deemed to fall in the area requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill. 2d 438 (1982).

The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24 (1977).

"It is imperative that the claimant place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, manner of performing, etc. It is also equally important that the medical experts have a detailed and accurate understanding of the petitioner's work activities." Hancock v. Illinois Department of Corrections-Dixon, 14 IWCC 0073.

The Commission decision Clay v. Hill Correctional Center, 12 I.W.C.C. 0152, is instructive to this case. In Clay, the Commission noted that testimony of locking and unlocking hundreds of doors was unpersuasive testimony to show that those job duties aggravate carpal tunnel syndrome when there is no mention of the force required to do these activities. (Id.) Likewise, in this case there is no testimony about the force to perform any of the activities listed by Petitioner.

Based on the above, Petitioner has failed to meet his burden of prove that his work activities caused his bilateral hand condition.

For the above reasons, Petitioner's claim fails.

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 upon the above, paragraph J is moot.

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

Based upon the above, paragraph J is moot.

Therefore, the Arbitrator concludes that:

1. Petitioner failed to prove an accident that arose out of his employment.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ 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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DIANE GILBOY,

Petitioner,

16IWCC0508

vs.

NO: 11 WC 36706

FISCHER PAPER PRODUCTS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§8(a) and 19(b) having been filed by both the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, temporary total disability, medical expenses both current and prospective, and the imposition of penalties and fees, and being advised of the facts and law, 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. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 28, 2015 is hereby affirmed and adopted.

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.

16IWCC0508

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 1 - 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-7/13/16
46

Mark as Unlisted

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

16IWCC0508

GILBOY, DIANE
Employee/Petitioner

Case# **11WC036706**

FISCHER PAPER PRODUCTS
Employer/Respondent

On 8/28/2015, 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 0.20% 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:

0391 HEALY SCANLON
DAVID HUBER
111 W WASHINGTON ST SUITE 1425
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
IVAN NIEVES
10 S LASALLE ST SUITE 900
CHICAGO, IL 60602

16IWCC0508

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

☐ 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)

Diane Gilboy
Employee/Petitioner

v.

Fischer Paper Products
Employer/Respondent

Case # **11** WC **36706**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Friedman**, Arbitrator of the Commission, in the city of **Waukegan**, on **June 29, 2015**. 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 _____

FINDINGS

On the date of accident, **May 16, 2011**, 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 in part*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$46,048.16**; the average weekly wage was **$885.54**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$76,141.54** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$76,141.54**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $705.00 to Dr. Silver, $3,052 to Lincolnwood Rehabilitation Center, $48,811.53 to Rx Development, $1,506.15 to Infinite Strategic Innovations, $5,455.57 to Prescription Partners and $2,271.00 to North Chicago Medical, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for additional reasonable and necessary treatment for Petitioner consistent with the current recommendations of Dr. Silver for physical therapy for the left shoulder and arthroscopic surgery for the right knee and including, related services, and other reasonable, necessary and causally connected treatment prescribed.

Respondent shall pay Petitioner temporary total disability benefits of $590.36/week for 208 weeks, commencing May 17, 2011 through July 24, 2011 and from September 10, 2011 through June 28, 2015, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $76,141.54 for temporary total disability benefits that have been paid.

The Petition for Penalties and Attorneys Fees is denied.

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
ICArbDec19(b)

August 27, 2015
Date

AUG 28 2015

Statement of Facts

Petitioner Diane Gilboy testified that on May 16, 2011 she was a machine operator for Respondent Fischer Paper Products. Respondent is in the business of manufacturing and printing paper bags primarily used in the food service industry. Petitioner's employment as a machine operator began in approximately 1979. She worked for Respondent through 1986. She returned to Respondent in 1990 or 1991 and worked for them thereafter.

Petitioner testified that as a machine operator she was required to set up, adjust, load and run printing presses used at Respondent. Petitioner testified that she used tools as part of her job. Petitioner testified she loaded rolls of paper and threaded rolls of paper into the machine. Those tasks required Petitioner to climb on and under the machine including squatting and crawling. Petitioner testified that her job required her to change cylinders used in the press depending on the print job being performed. These cylinders are approximately 3 feet long. The diameter ranged from 2 to 10 inches. She testified she would lift the smaller cylinders herself. The larger cylinders which, could weight 50 pounds, required 2 people to move. Petitioner testified the machines she ran required frequent changes in set-up and she performed these tasks daily. Petitioner testified that Petitioner's Exhibit 8 accurately described her day to day duties with the addition of some tasks not detailed in the exhibit. In addition to the listed tasks, Petitioner testified that she was required to load the printing press with 5 gallon buckets of ink.

Petitioner testified that on May 16, 2011 she reported to work without any problems concerning her neck, back, arms or right knee. She had no restrictions that kept her from working. She testified that as she was coming out of the ladies' room returning to the production area, she tripped and fell over a cart located in the passageway. Petitioner testified that she fell all the way to the ground. She testified she struck her head into the skid and landed on her right knee. She immediately felt pain in her right knee, left shoulder blade, left shoulder, and the back of her neck down her left arm. Petitioner testified that the fall was witnessed by numerous employees of Respondent including her supervisor, Tom. Petitioner was driven to Comprehensive Orthopedics, the United Occupational Healthcare medical provider by Tina who worked in the Human Resources department at Respondent.

The records of Gorsuch Chiropractic Center were admitted as Petitioner's Exhibit 3. The records document treatment was initiated on March 25, 2011 for low back complaints resulting from a March 21, 2011 lifting episode. The note indicates Petitioner was prescribed Hydrocodone and Naproxen for low back pain. Petitioner was given work restrictions of no bending or twisting and no lifting over 10 pounds. Petitioner remained under treatment, before the May 16, 2011 accident, through May 13, 2011. The pain diagrams note moderate pain in the back of the left shoulder or between the shoulder blades from April 11, 2011 through May 13, 2011 (PX 3, p 31-44). Beginning on April 15, 2011, the pain diagrams include bilateral knee pain though April 27, 2011. Petitioner remained on a lifting restriction which was increased to 25 pounds on May 13, 2011 (PX 3, p 45).

The records of Comprehensive Orthopedics were admitted as Petitioner's Exhibit 2. The injury management form dated May 16, 2011 noted "Petitioner fell this morning coming from ladies restroom: tripped on a cart-went down on knees. Hit head on skid of boxes. Put hands out. Petitioner complained of left shoulder post with tingles left scapula, right knee. No LOC. Pain and post left arm" (PX 2, p 64). Dr. Foster's diagnosis was mild head contusion, right knee contusion and left shoulder pain and or a cervical component. He prescribed Tylenol 3 with Codeine and ice. On May 24, 2011, Dr. Foster noted that Petitioner thinks her right knee is OK

but that she had not been using it a lot. He finds some tenderness on the tibial tuberosity. Petitioner's left shoulder was the most aggravating of her symptoms with tenderness in the left upper pectoral with reduced range of motion. The diagnosis was head contusion resolving, knee contusion improved and left shoulder still sore (PX 2, p. 63). Petitioner returned to Dr. Foster on June 8, 2011, noting tingling in the left 4th and 5th fingers and continued left shoulder complaints. She also noted her right knee was sore and occasionally popped. Dr. Foster noted a possible cervical disc herniation is plausible, but indicated he would check shoulder first.

Petitioner had an MRI of the left shoulder on June 13, 2011. The impression was spurring of the AC joint with subacromial bursitis. The rotator cuff and glenoid labrum were intact (PX 2, p 65). Petitioner was seen on June 22, 2011. She has been doing therapy and seeing a chiropractor. She has pain in a vague area of the entire shoulder with abduction to only 90 degrees. Dr. Foster notes subjective complaints are greater that objective findings. He referred Petitioner to orthopedics (PX 2, p 61).

Petitioner was seen by Dr. Vashi on July 6, 2011. Her primary complaint was left shoulder pain. She also noted numbness and tingling in the left thumb and index finger, and pain related weakness in the left shoulder. Dr. Vashi diagnosed left shoulder impingement/subacromial bursitis and recommended injections. The injections were performed on July 6, 2011, July 20, 2011. Petitioner noted improvement after the injection, but still got shoulder blade sharp pain with "zingers" down the arm. Dr. Vashi states that she will be released for restricted duty by Dr. Foster (PX 2, p 16-18).

On July 29, 2011, Dr. Foster notes she sometimes gets headaches and zingers. He finds full abduction with decent strength. He notes upper extremity pain with a likely cervical component and a postural component. He prescribed a cervical MRI (PX 2, p 47). The August 5, 2011 MRI of the cervical spine was read as showing degenerative disc disease most prominent at C5-6 and C6-7 (PX 2, p 54). Dr. Foster reviewed the MRI and referred Petitioner to Dr. Didinsky.

On August 9, 2011 Petitioner saw Dr. Michael Didinsky. Dr. Didinsky assessed degenerative changes at C5-6 and C6-7 with left cubital tunnel syndrome on clinical examination, left trapezius burning and left subacromial impingement which improved with an injection. He recommended Petitioner obtain an EMG of the left arm which he predicted would show cubital tunnel syndrome which would explain the tingling in her hand. Dr. Didinsky did not see evidence on MRI of severe stenosis at C5-C6 or C6-C7 which would cause her trapezius numbness (PX 2, p 6-7). Petitioner returned to Dr. Vashi for a repeat subacromial injection on August 31, 2011. Dr. Vashi allowed Petitioner to continue restricted work per Dr. Foster's limitations (PX 2, p 4).

Petitioner returned to restricted duty for Respondent on July 25, 2011. Petitioner testified she did this for about a month. She did paperwork and operated the Bag Drilling machine. The job description and a video for this job were admitted as Respondent's Exhibits 10A and 10B. Petitioner was employed in a light duty position where she organized and assembled the machine maintenance manuals. Thomas Carleton testified that the manual job was completed by Petitioner. Petitioner testified she was able to perform these duties within her restrictions.

Petitioner began treatment with Dr. Ronald Silver on September 8, 2011. The records of Orthopedics Associates of North Shore were admitted as Petitioner's Exhibit 1. The September 8, 2011 correspondence records the history of the May 16, 2011 accident with complaints in the right knee and left shoulder. Petitioner stated that prior to the accident her left shoulder and right knee were normal with no symptoms or treatment.

Petitioner advised of prior right knee surgery that had been asymptomatic. Dr. Silver diagnosed impingement in the left shoulder and recommended arthroscopic surgery. He disabled Petitioner pending surgery. He recommended an MRI of the right knee to determine possible cartilage damage (PX 1, p 88-89).

On September 13, 2011, Dr. J.S. Player performed a Section 12 medical evaluation, at Respondent's request. He diagnosed the petitioner with resolved cervical pain and left upper extremity numbness and tingling, resolved right knee symptoms and left shoulder impingement syndrome (RX 14, p 18; Ex.2, p.14, 18). Dr. Player opined that the May 16, 2011 work accident caused a soft tissue contusion of the right knee and a soft tissue strain of the cervical spine, both resolved with no further treatment for the cervical region or right knee required, and Petitioner had attained full-duty maximum medical improvement from these conditions (RX 14, Ex.2, p 17, 18). Dr. Player opined that the May 16, 2011 accident did not cause left cubital tunnel syndrome. For the left shoulder, Dr. Player recommended two additional steroid injections and if left shoulder impingement syndrome was not resolved, Petitioner would be a candidate for an arthroscopic surgery subacromial decompression and possible distal clavicle resection, followed by 3 months of 3 times weekly postoperative left shoulder physical therapy. Dr. Player recommended work restrictions of no lifting more than 20 pounds with the left arm and no overhead work with the left arm (RX 14 p.19-20; Ex.2, p 17-18).

On September 26, 2011, Respondent's carrier Secura advised Petitioner's counsel that unless Dr. Player's recommendation for further conservative treatment was initiated that benefits would be denied (RX 9). Respondent offered Petitioner a light duty job within Dr. Player's 20 pound restriction effective October 13, 2011 (RX 8).

On October 26, 2011, Dr. Silver performed surgery on Petitioner's left shoulder. The operative report includes: (1) Arthroscopic subacromial decompression, partial anterior acromioplasty, coracoacromial ligament transection; (2) Arthroscopic lysis of adhesions; (3) Arthroscopic distal clavicle resection greater than 1 cm; (4) Arthroscopic synovectomy; and (5) Arthroscopic debridement. The petitioner's pre and postoperative diagnosis was "rotator cuff impingement of the left shoulder" (PX 1, p 114).

On November 3, 2011, the petitioner followed up with Dr. Silver. He noted she has approximately 140 degrees of active forward flexion. She will start physical therapy. The petitioner was continued off of work "pending re-evaluation in four weeks at which time we anticipate modified return to work (PX 1, p 87). On December 1, 2011, Dr. Silver found that petitioner had regained full forward flexion and 120 degrees of lateral abduction. She was instructed to continue physical therapy and was limited to right-handed work only at that time (PX 1, p 86). On January 5, 2012, the petitioner saw Dr. Saul Haskell due to the absence of Dr. Ronald Silver. The petitioner was noted as improving in motion and use of the left shoulder, very slowly and gradually. The petitioner had good forward flexion and moderate improvement in lateral abduction and her surgical incisions were well healed. Dr. Haskell recommended continued physical therapy and further continued Dr. Silver's right-handed work only restriction (PX 1, p 85).

On Feb 2, 2012, Dr. Silver transmitted a letter to Respondent's insurance company where he stated that because of the delay in approval for physical therapy, Diane has only had one session of physical therapy since her evaluation. Therefore, she will continue at her previous restriction. She may use her left arm below her shoulder level with no lifting. She will be upgraded in four weeks after further therapy (PX 1, p 83). On March 1, 2012, Dr. Silver noted that Petitioner had regained forward flexion and lateral abduction due to only being permitted half of the normal amount of physical therapy that Dr. Silver recommended. He noted that Petitioner still had significant weakness as well as loss of rotational motion. He recommended that Petitioner

continue physical therapy. He restricted her lifting to five pounds on the left side, below the shoulder level (PX 1, p 82). The Arbitrator notes that Respondent obtained a Utilization Review which did not certify therapy beyond February 16, 2012 (RX 5). Dr. Silver also recommended Petitioner see a cervical spine specialist Dr. Chris Bergin (PX 1, p 82). On April 5, 2012, Dr. Silver noted that Petitioner was making good progress in physical therapy but had been denied further physical therapy. Dr. Silver prescribed work restrictions of no lifting over five pounds below the left shoulder level (PX 1, p 80).

On April 9, 2012, Dr. Player re-examined Petitioner (RX 14; Ex 3). Dr. Player diagnosed status/post left shoulder arthroscopic subacromial decompression surgery with a very good post-operative result; left upper extremity subjective complaints that go to the left shoulder and neck but are not radicular in nature (RX 14, p.24-25; Ex 3, p.14). Dr. Player opined that petitioner had recovered very well from the surgery and post-operative rehabilitation (RX 14, p 25). Dr. Player testified that left shoulder range of movement had improved by about a 5 degree increase in shoulder flexion, abduction was about the same, a slight decrease in internal shoulder rotation, the shoulder examination showed definite improvement. The Hawkins test for impingement which had previously been positive was now negative. The supraspinatus which was previously positive was now negative. The cross-arm test which was previously positive was now negative. The AC joint tenderness continued to remain mildly positive. Dr. Player testified that this was not uncommon. Dr. Player testified that based on his physical examination, all of the impingement findings had resolved except for the left AC joint tenderness which would be expected following such an operation (RX 14, p 23-25). Dr. Player opined that petitioner had attained full-duty maximum medical improvement status as of April 9, 2012 (RX 14; Ex 3, p 15). Dr. Player opined that there was no causal relationship between recent EMG findings of carpal tunnel syndrome and ulnar nerve compression related to the original fall because the mechanism of injury did not involve direct compression of either of these areas and the medical records document no subjective complaints specific to these areas and based upon his physical examination which documented diffuse decreased sensation throughout the left upper extremity not consistent with either carpal tunnel syndrome or ulnar nerve compression (RX 14; Ex 3, p 15).

Dr. Player testified that he disagreed with Dr. Silver's recommendation for additional physical therapy. There was no repair of rotator cuff tear. He testified that in April, Petitioner was well above the horizontal and she had fallen within the physical parameters for range of motion for a good functional post-op result and she had a resolution of all of the physical findings relating to impingement by his second exam that she had previously manifested as positive on his first exam (RX 14, p 26-29).

On May 3, 2012, Dr. Silver authored a correspondence to Secura Insurance Company maintaining work restrictions of five pounds lifting below the left shoulder level and that lacking further therapy, petitioner would be permanently disabled (PX 1, p 55).

On May 17, 2012, Dr. Jay Pomerance performed a Section 12 examination at Respondent's request. Dr. Pomerance authored reports dated May 17, 2012; June 27, 2012; and September 2, 2012 (RX 15, Ex 2, 3, 4). Dr. Pomerance testified that his physical examination revealed "active range of left shoulder motion is 180 degrees flexion, 175 degrees abduction, 60 degrees external rotation with internal rotation to L1. This was compared with 180/180/65/T9 for the right shoulder. Left shoulder abduction to about 90 degrees actively produces left dorsal forearm pain. There was not any mechanical block passive range of motion for either shoulder. There is mild generalized left shoulder weakness on manual muscle testing compared to the right side, but no loss of contour or any visible atrophy. The patient also reported lateral shoulder pain with active or passive elbow flexion and extension. There were no clinical signs of shoulder impingement or instability.

There is a negative drop arm, sulcus, and speeds test. To palpation, pain complaints could be recreated at the anterior and posterior glenohumeral joint lines. There were minimal pain complaints at the greater tuberosity and anterolateral acromion. Mild shoulder crepitus was noted with active or passive shoulder circumduction. Petitioner did report diminished sensation to light touch within the left ring and small fingers, but normal sensation on the dorsal aspect of the hand. No muscle atrophy was noted in the left hand, wrist, arm, or forearm (RX 15, p.13-15; Ex 2, p 2).

Dr. Pomerance testified that with range of motion testing, all but her internal rotation would be considered within normal limits. Dr. Pomerance testified that he would not have a medical reason to relate any of the abnormalities on her nerve conduction study to the May 16, 2011 event because there wasn't any documented trauma to her hand or elbow in the medical records provided and the findings on the nerve conduction study were not consistent with trauma. Dr. Pomerance testified that petitioner was at maximal medical improvement as to her shoulder. He opined that there wasn't an indication that additional supervised therapy would change the course of her current complaints (RX 15, p 22). Dr. Pomerance testified that from an orthopedic perspective, petitioner's chiropractic treatment would not be indicated (RX 15, p 21). Dr. Pomerance testified that from the information presented to him at the time of the report, he didn't have a medical reason to support Dr. Silver's five pounds lifting restrictions (RX 15, p 24). Pursuant to his May 17, 2012 report, Dr. Pomerance stated that petitioner had full shoulder elevation and he would not have a restriction in upper extremity motion; he suggested reasonable weight accommodations of 25 pounds or less until he had the opportunity to review the MRI films and color photographs from the October 26, 2011 arthroscopy (RX 15, Ex 1, p 3).

Dr. Pomerance testified that he reviewed an August 29, 2012 email correspondence from Fischer Paper Products that further clarified the lifting requirements and availability of co-worker assistance with lifting for the machine operator position as he had requested pursuant to his May 17, 2012 report (RX 12, RX 14, p 30-31). Mr. Carleton testified as to the accuracy of the August 29, 2012 email. Dr. Pomerance testified that based on the additional information it would be reasonable to allow Miss Gilboy an opportunity to return to her prior job and if specific problems arise they could be addressed on an as needed basis if appropriate (RX 15, p 33). At arbitration, Mr. Carlton testified that Respondent could provide petitioner with assistance.

On May 3, Dr. Silver repeated his April statement that lacking further therapy Petitioner would be permanently disabled. On May 31, 2012, Dr. Silver prescribed Vicodin for pain, meloxicam for inflammation and other medications. On July 17, 2012, Dr. Silver saw Petitioner and reiterated his recommendation that Petitioner be allowed the physical therapy he prescribed. He continued Petitioner's five pound lifting restriction and reiterated that Petitioner would be permanently disabled lacking approval of physical therapy. On August 21, 2012, Dr. Silver again saw Petitioner, recommended she remain at a five pound lifting restriction because she was not permitted to complete physical therapy, and would be permanently disabled lacking further physical therapy. He prescribed Vicodin and Meloxicam. On September 25, 2012, Dr. Silver and reiterated his previous concerns regarding physical therapy and renewed Petitioner's prescriptions for medication (PX 1, p 51-55).

Thomas Carleton, Respondent's Vice President of Operations, testified that Petitioner could not work pursuant to the Drug Free Policy (RX 13) because of her prescription pain medication. Petitioner's use of such narcotic pain medication was in violation of the Drug Free Workplace Policy, against OSHA policy and could potentially create a hazardous situation for co-workers by the nature of the machinery. He testified that the Drug Free Policy prohibited Petitioner from operating a machine. He discussed with Petitioner that if she was taking the drugs she could not work as a machine operator. He did not authorize her return to work in any capacity in the

production operations section at Respondent. He testified that Respondent has a light duty program and could accommodate that physical restrictions imposed on Petitioner.

Dr. Pomerance re-examined Petitioner on January 13, 2014. His history records that Petitioner never returned to her former job duties, and continued shoulder complaints were present as well as complaints for her right knee. She continued to treat with her surgeon, and it is her understanding additional therapy for her shoulder would be ordered. She also has been on chronic narcotic pain medication for approximately two and-a-half years in addition to other anti-inflammatory and pain medications (RX 16, p 9, Ex 2, p 1). Dr. Pomerance testified his physical examination findings were mild global limitation of neck range of motion, and posterior neck and shoulder pain with extension as well as right and left lateral rotation. Pain complaints appear localized within the mid body of the scapula. Active range of motion of the left shoulder is 170 degrees flexion, 90 degrees abduction, 45 degrees external rotation with internal rotation to T8. This is compared with 170 degrees, 165 degrees, 45 degrees; T7. There is full passive range of motion present in both shoulders without any mechanical block. There does not appear to be any visible muscle atrophy. Strength testing of individual muscles of both shoulders is symmetric. To palpation, the areas of greatest discomfort are at the posterior angle of the acromion along with the superior aspect of the long head of the biceps tendon. Speeds' testing is negative. There does not appear to be any signs of shoulder impingement or instability. There did not appear to be any shoulder crepitus with active or passive shoulder circumduction (RX 16, p 10, Ex 2, p1). Dr. Pomerance advised that his prior medical opinions regarding petitioner's maximum medical improvement and return-to-work status remained unchanged (RX 16, p 12-13, Ex 2, p2). Dr. Pomerance testified that he was concerned with petitioner's use of narcotic pain medication. Unless there was a reason from an anatomical structural standpoint why she needed them, he recommended that she be weaned off them (R 16, p 13, Ex 2, p 1).

Dr. Silver testified by evidence deposition on July 6, 2012. He testified that he took a history from Petitioner which included the May 16, 2011 accident. His history reflects that prior to the accident her left shoulder and knee were normal without symptoms. She had been working without restriction as a machine operator. Since the time of the accident she has had persistent pain in both her right knee and left shoulder. Her right knee symptoms slowly increased to the point where it was painful while she walked. Petitioner's left shoulder had persistent pain in spite of four to five steroid injections, extensive physical therapy and medication prior to seeing Dr. Silver. Dr. Silver reviewed and MRI taken June 13, 2011 of Petitioner's left shoulder. He formed a treatment plan including arthroscopic surgery of her left shoulder (PX 7a, p 9-11). Dr. Silver testified the recommended surgery was reasonable and necessary given her injury and condition. On October 26, 2011, Dr. Silver performed arthroscopic surgery (PX 7a, p 11-13). After surgery, Dr. Silver recommended Petitioner undergo physical therapy to continue four or five months (PX 7a. p 14). Dr. Silver testified that after December 2011, Respondent's insurance carrier at first cut the therapy in half and then discontinued it completely. Dr. Silver testified that physical therapy is essential post shoulder surgery to avoid a condition known as frozen shoulder which is a permanently weakened and stiff shoulder (PX 7a, p 17). Dr. Silver testified that lacking further physical therapy, Petitioner will have permanent restricted motion and a permanently weak shoulder. Dr. Silver's testimony was that it was essential that Petitioner be able to continue physical therapy as prescribed by him. He opined that a home exercise program was not adequate and that Petitioner required a supervised program (PX 7a, p 20-21).

Dr. Silver testified that he prescribed narcotic pain medication for Petitioner including hydrocodone and Meloxicam, an inflammatory medication, which were reasonable and necessary as a result of Petitioner's work injury in May of 2011 (PX 7a, p 22-24).

Dr. Silver testified that he investigated the cause of tingling symptoms in Petitioner's fingers, left hand and shooting pains in her arm. He suspected that these symptoms reflected a cervical spine injury. He testified that since he does not treat ailments of the spine, he referred Petitioner to Dr. Christopher Bergin (PX 7a, p 26).

Dr. Silver testified by further evidence deposition on March 9, 2015. Dr. Silver testified that since his first deposition taken July 1, 2012 he continued to treat Petitioner for both her right knee and shoulder (PX 7b, p 5). He opined that Petitioner could work with a 20 pound lifting restrictions as to her shoulder (PX 7b, p 5). Dr. Silver prescribed medication to Petitioner for both pain and inflammation symptoms. He testified that prescriptions he wrote for Petitioner were reasonable and necessary given her injury, care and treatment (PX 7b, p 5). Dr. Silver testified with regard to Petitioner's shoulder that she has permanent restrictions to avoid heavy lifting, repetitive motion activities as well as over-the-shoulder activities (PX 7b, p 15). He testified that her symptoms are worse with activity and that he as prescribed medication to Petitioner for both her shoulder and knee. Dr. Silver testified that Petitioner has tried to take the minimum amount of prescription medication under his direction. He has prescribed the smallest possible dosage of Hydrocodone, as well as less use of Tramadol. Dr. Silver hopes that Petitioner's need for pain medication would go away if he could take care of her knee surgically (PX 7b, p 16).

Dr. Silver testified that the condition of the Petitioner's shoulder was worsened by the delay in authorizing surgical treatment and that the end result of Petitioner's shoulder repair was impeded by the refusal of Respondent to approve physical therapy of the type recommended. He testified that physical therapy was denied and that Petitioner did indeed become permanently disabled as a result (PX 7b, p 17-18).

In his October 23, 2012 correspondence to the workers' compensation insurance company, Dr. Silver reported that petitioner's right knee pain has increased ever since the work accident; on examination she has medial joint line tenderness, patellofemoral crepitation, and mild effusion, ligaments were stable and motion limited to full flexion due to pain and recommended an MRI (PX 1, p 49). On October 26, 2012, the MRI was not authorized per Dr. Player's report (PX 1, p 59).

Dr. Silver testified that based on the history and physical examination of Petitioner, he was concerned that she damaged cartilage in her right knee during the fall when she struck it on the ground. He recommended obtaining an MRI scan of the knee. Dr. Silver testified that the MRI of the right knee was reasonable and necessary (PX 7a, p 5-6). Dr. Silver testified that her right knee symptoms had been persistent since the time of her accident.

On February 10, 2014, Petitioner is examined by Dr. Nikhil Verma at Respondent's request with regard to the right knee (RX 17, Ex 2). Dr. Verma's history includes that Petitioner noted a prior history of a right knee arthroscopy about eight years prior to May 16, 2011 work accident (RX 17, p 9; Ex 2, p 1). Dr. Verma testified that Dr. Silver's medical records state that when the patient was initially seen on September 8, 2011, she had some medial joint line tenderness with patellofemoral crepitation. Radiographs were normal. MRI scan was recommended to evaluate for cartilage damage. Dr. Verma testified that Petitioner underwent a left shoulder surgery in October of 2011, and that he did not see further recommendation for knee evaluation until October 23, 2012. Subsequent notes throughout 2012, 2013 and 2014 indicated an ongoing recommendation for an MRI (RX 17, p 9-10). Dr. Verma testified that his physical examination "was essentially normal. Petitioner was five-foot-seven and weighed 245 pounds. She had a normal gait. Her knee showed no effusion or swelling. She had findings of prior arthroscopy, healed portals. She had symmetric knee circumference indicative of no

effusion or swelling. She had full range of motion which was symmetric, no pain over the joint lines, no patellar findings and normal stability, proximal hip exam and distal nerve exam (RX 17, p 11-12; Ex 2, p 2). Dr. Verma testified that X-rays of the right knee were performed at his February 10, 2014 examination and were normal. He opined that he did not see any evidence of an anatomic injury to the knee based on her normal objective examination and that Petitioner was at full-duty maximum medical improvement with regards to the right knee (RX 17, p 13; Ex 2, p 3).

Petitioner did undergo an MRI of the right knee on October 6, 2014. The impression was chondromalacia involving the lateral joint compartment with several fissures and partial thickness erosions, minimal chondromalacia patellae, edema, and inflammation (RX 17, Ex 4). On October 7, 2014, Dr. Silver saw Petitioner and reviewed the results of an MRI scan of the right knee. Dr. Silver noted that the scan demonstrated articular cartilage fracturing and fissuring of both the patellar and articular cartilage and lateral compartment articular cartilage. He stated that the findings were consistent with her work injury of 2011. He opined that the fall resulted in articular cartilage damage that was causing symptoms since that time. Dr. Silver recommended arthroscopic surgery to Petitioner's right knee to repair the articular cartilage fracturing. He noted that Petitioner remain temporarily disabled pending surgical treatment. He prescribed various medication including hydrocodone and Ultram for pain plus analgesic creams and patches to provide pain relief without use or narcotic analgesics. He prescribed a topical anti-inflammatory due to the persistent and development of significant inflammation (PX 1, p 18). He has reiterated his recommendations on January 10, 2015, March 10, 2015, May 5, 2015 and June 9, 2015 (PX 1, p 1-5).

Dr. Verma testified by evidence deposition on April 8, 2015., He reviewed an October 6, 2014 right knee MRI report; the MRI films and Dr. Silver's October 7, 2014 medical report (RX 18, p 6-7; Ex 4,5,6). Dr. Verma testified that the October 6, 2014 right knee MRI showed evidence of chondromalacia, which is degenerative changes in the cartilage surface involving the kneecap or patella as well as the lateral compartment, which is the outside portion of the knee. There was no evidence of meniscal tear. There was no effusion in the knee joint or swelling. There was no edema within the bone. The remainder of the ligament structures were normal (RX 18, p 8). Dr. Verma disagreed with Dr. Silver's causation opinion and recommendations for right knee arthroscopy and off work restrictions pursuant to his October 7, 2014 medical narrative report and testified. Dr. Verma opined that the findings on the MRI scan are consistent with age-related changes typical of the knee in a 59-year-old. He did not find any evidence that there was any acute process or anatomic injury to the knee. He testified that this is consistent with his original opinion that there was no indication for an MRI scan based on her exam. He further opined that these types of findings on an MRI scan do not require surgical intervention and are best treated in a conservative fashion (RX 18, p 8-9). Dr. Verma testified that his prior medical opinions regarding petitioner's maximum medical improvement and return-to-work status remained unchanged (RX 18, p 9).

Dr. Silver testified that Petitioner's MRI showed damage to the articular cartilage under the patella as well as damage to the articular cartilage in the lateral compartment between the femur and tibia (PX 7b, p 10). He testified that the MRI findings were consistent with the observations he made of Petitioner during his care and treatment. He opined that his treatment plan for surgery was reasonable and necessary and caused by her fall in 2011 (PX 7a, p 12). The type of injury mechanism explained to him involved both a twisting and a direct blow to the knee are the two most common mechanisms of injury which damage cartilage. He testified that the circumstances of Petitioner's fall are consistent with the MRI and his treatment of Petitioner (PX 7b, p 23-24).

With respect to Dr. Verma's opinion that Petitioner's right knee was normal, Dr. Silver testified that her right knee was not normal with regard to clinical findings. He testified that there is crunching, clicking, popping, swelling in the knee and tenderness. He testified that her knee is not normal based on the MRI scan. He disagreed with Dr. Verma's assessment that Petitioner suffered from age-related chondromalacia of the patella and lateral compartment. Dr. Silver testified that the MRI demonstrates fissuring of the patellar cartilage, which means that it has cracked, as well as erosion of the tibial cartilage. Dr. Silver opined that the findings of the October 6, 2014 MRI are not exclusively degenerative. He notes the findings specifically reference fissuring, cracking, erosions and fragmentation which he describes as different from wear and tear. He attributes these findings to trauma from the fall Petitioner sustained on the anterior aspect of her knee. Dr. Silver opined that even if Petitioner suffered from degenerative changes in her knee which accounted for some symptoms, that Petitioner at least exacerbated and accelerated permanently previously asymptomatic degenerative changes in the knee (PX 7a, p 13).

Dr. Silver testified the Petitioner never made any complaints with regard to her left, un-injured knee. He testified that if Petitioner was truly suffering from age related degenerative changes in the knee he would expect complaints to be bilateral. Dr. Silver hopes to relieve Petitioner's pain, swelling, stiffness and the crunching and popping by performing surgery (PX 7a, p 14).

Dr. Silver testified that at no time did Petitioner ever indicate to him that her knee symptoms had resolved. Petitioner, considering the condition of her knee, would not be able to work without restrictions even on a good day because of the type of cartilage damage she suffered (PX 7a, p 20-21). Dr. Silver testified that he concentrated his treatment on Petitioner's left shoulder surgery first and did not perform knee surgery at the same time because the patient will have only use of one arm and would have a more difficult time getting around using a cane or crutches. He testified that he routinely does not perform upper and lower extremity surgeries concurrently for this reason (PX 7b, p 24).

With respect to Dr. Verma's physical exam of Petitioner's knee, including 115 degrees of flexion, as to whether he would characterize that as normal, Dr. Silver testified that he examined Petitioner approximately 30 times and that he found her consistent flexion range of motion to be between approximately 95-100 degrees. He testified that the 115 degrees was still not normal because a normal range of motion is 135 degrees. Dr. Silver testified he also found swelling and tenderness in Petitioner's knee and tenderness medially along with a positive McMurray's test which involves clicking of the cartilage when it's damaged. Dr. Silver opined Dr. Verma's assessment of Petitioner's knee as normal was incorrect (Px 7b, p 25-27).

Petitioner testified that she reduced her narcotic use in an attempt to return to work. She had reduced her use to taking one pill before bed. She had spoken to Tina and Doug at Respondent to tell them. She has not been offered a job. Mr. Carleton testified that no job in production has been offered.

Petitioner testified she has continued symptoms in her left shoulder. She cannot use it above 90 degrees. Dr. Silver has restricted her to no lifting over 20 pounds, no repetitive work with the left arm. Her symptoms in the right knee are getting worse. It acts up if she sits or stands too long. She has pain when she goes up or down stairs. Petitioner would attend physical therapy for her shoulder and undergo surgery for her right knee if it was authorized.

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner sustained an undisputed accident arising out of her employment on May 16, 2011, when she tripped over a cart. Her testimony, supported by the medical records, demonstrates she suffered injuries to the left shoulder with a possible cervical component and the right knee at that time. Petitioner testified to an old right knee injury with arthroscopic surgery for a meniscus injury from which she claimed complete recovery.

The Arbitrator notes that Petitioner's testimony, that she had no problems concerning her neck, back, arms or right knee immediately prior to her accident, appears to be contradicted by the Gorsuch Chiropractic Clinic records. Those records document treatment from March 25, 2011 through May 13, 2011 for low back complaints. The pain diagrams also note moderate pain in the back of the left shoulder or between the shoulder blades from April 11, 2011 through May 13, 2011 and bilateral knee pain though April 27, 2011. Petitioner was prescribed Hydrocodone and Naproxen for low back pain. Petitioner initially was given work restrictions of no bending or twisting and no lifting over 10 pounds, and remained on a lifting restriction which was increased to 25 pounds on May 13, 2011. The fact that Petitioner was able to perform her regular job during this period raises questions as to her description of the physical nature of her job duties, specifically the amount of lifting required.

Following the May 16, 2011 accident, Dr. Foster and Dr. Vashi confirm an injury to the right knee and a diagnosis of impingement/bursitis to the left shoulder. Dr. Didinsky assessed degenerative changes at C5-6 and C6-7 with left cubital tunnel syndrome on clinical examination. Dr. Didinsky did not see evidence on MRI of severe stenosis at C5-C6 or C6-C7 which would cause her trapezius numbness.

Petitioner began treatment with Dr. Silver in September, 2011. Dr. Silver initially diagnosed impingement of the left shoulder and documented complaints in the right knee. He recommended an MRI of the knee for possible cartilage damage. On October 26, 2011, Dr. Silver performed surgery on Petitioner's left shoulder. The operative report includes: (1) Arthroscopic subacromial decompression, partial anterior acromioplasty, coracoacromial ligament transection; (2) Arthroscopic lysis of adhesions; (3) Arthroscopic distal clavicle resection greater than 1 cm; (4) Arthroscopic synovectomy; and (5) Arthroscopic debridement. The diagnosis was rotator cuff impingement of the left shoulder.

Petitioner remains under the care of Dr. Silver with an ongoing diagnosis of pain, weakness and loss of motion in the left shoulder and damage to the articular cartilage under the patella as well as damage to the articular cartilage in the lateral compartment between the femur and tibia in the right knee. He is currently recommending a course of physical therapy for the left shoulder and arthroscopic surgery for the right knee.

Respondent has disputed the causal connection of Petitioner's current complaints and treatment recommendations based upon the opinions of Dr. Player, Dr. Pomerance and Dr. Verma.

With respect to Petitioner's left shoulder, there is no disputed as to the original diagnosis of impingement. While Dr. Player recommended additional conservative care before surgery, a recommendation ignored by Dr. Silver, ultimately the surgical procedure performed was not disputed.

Ongoing disputes thereafter center on the reasonable amount of therapy required. Dr. Silver testified that his recommendation of four to five months of therapy was continually interrupted by Respondent, who reduced the frequency of care and thereafter denied treatment on a consistent basis. Dr. Silver testified that he continues to recommend further therapy. While review of his medical records and off work slips do not disclose any comment with respect to the shoulder after a January, 2014 comment on the denial of therapy, the last indication of his impression of the ongoing shoulder condition is in the December 13, 2013 Work Status report including a diagnosis of impingement syndrome-left shoulder. The record does not disclose if this is simply the initial diagnosis being repeated, or a current assessment. In his deposition testimony, Dr. Silver discusses the development of frozen shoulder but does not give a current diagnosis of impingement.

Dr. Player, in his April 9, 2012 report confirmed that Petitioner had an aggravation of a pre existing impingement in the left shoulder, but that as of the date of his examination, he opined that she had a successful post operative course and was at maximum medical improvement with no need for further care. On May 17, 2012, Dr. Pomerance opined that there was no evidence of ongoing impingement but does diagnose pain and weakness. He does not believe further formal therapy is indicated. On January 13, 2014, Dr. Pomerance again notes complaints of weakness, pain and loss of motion. He notes loss of active abduction with no sign of impingement. He opines that Petitioner does not have impingement, and is at maximum medical improvement without the need for restrictions. He does discuss the option of obtaining an MRI to determine if there is any anatomic abnormality.

In weighing the medical opinions, the Arbitrator notes the consistent complaints by Petitioner with respect to pain, weakness and loss of motion in the shoulder in the medical histories and her testimony. The Arbitrator finds these complaints reasonable and proportional to the pathology documented. The Arbitrator also notes the documented loss of abduction between Dr. Pomerance 2012 and 2014 examinations. Given the testimony, the initial medical diagnosis and surgery, and the ongoing reported complaints, the Arbitrator finds that Dr. Silver's opinion that Petitioner continues to have an ongoing condition of ill being in the left shoulder causally connected to the accidental injuries sustained on May 16, 2011 more persuasive that the opinions of Dr. Player and Dr. Pomerance.

With respect to the right knee condition, the initial records confirm complaints of pain in the right knee immediately after the accident. The initial diagnosis was a contusion. Dr. Silver, at his first visit with Petitioner, requested an MRI of the knee for suspected cartilage damage. The MRI was not performed until October 6, 2014 due to denial by Respondent. The MRI impression was chondromalacia involving the lateral joint compartment with several fissures and partial thickness erosions, minimal chondromalacia patellae, edema, and inflammation. Dr. Silver has recommended arthroscopic surgery and opined that this condition is causally connected to the May 16, 2011 work injury.

On September 15, 2011, Dr. Player diagnosed a resolved right knee contusion. He does not address the knee in his subsequent April 9, 2012 examination. On February 10, 2014, Dr. Verma recorded Petitioner's complaint of intermittent knee pain requiring a brace. He found no condition of ill being to the right knee causally related to the May 16, 2011 injury based upon an objectively normal knee, normal radiographs and a gap in complaints between September, 2011 and October, 2012. Following review of the October 6, 2014 MRI, he opined that the findings were age related degeneration and that Petitioner was not a surgical candidate, and was at maximum medical improvement.

In weighing conflicting medical opinions the Arbitrator must weigh the opinions in conjunction with the other evidence presented. Expert opinions must be supported by facts and are only as valid as the facts underlying them. A finder of fact is not bound by an expert opinion but may look behind the opinion to examine the underlying facts. Considering the medical opinions and the testimony presented, the Arbitrator finds the opinion of Dr. Silver that Petitioner has a cartilage injury causally connected to the accident more persuasive.

The Arbitrator notes that Dr. Player's opinion of a resolved right knee contusion is refuted by Petitioner's testimony that she continued to experience right knee pain and Dr. Silver's September 8, 2011 note requesting an MRI for possible cartilage damage. The Arbitrator also finds Petitioner's testimony that she had ongoing complaints in the knee during the period between that date and October, 2012 corroborated by Dr. Silver's testimony. The decision to proceed with treatment on the more acute shoulder complaints first is also consistent. The failure of Dr. Silver to document ongoing complaints in the knee during this gap is better explained by the denial of the MRI, the focus on the shoulder recovery, and Dr. Silver's rather cavalier approach to keeping medical records and his greater focus on escalating the confrontation with Respondent's carrier over the physical therapy requested for the shoulder condition. This penchant is also demonstrated by Dr. Silver's ongoing correspondence and work status reports focusing solely on the demand for authorization for knee surgery after early 2014 despite the ongoing issues with the left shoulder testified to by Petitioner and Dr. Silver.

Petitioner has also advance complaints in the neck and down the left arm. The Arbitrator finds the opinion of Dr. Didinsky that these symptoms are not related to any cervical condition persuasive. The Arbitrator also finds the opinions of Dr. Pomerance and Dr. Player persuasive that the EMG findings of carpal tunnel syndrome and ulnar nerve compression are unrelated to the accident.

Based upon the record as a whole including the testimony presented, the medical records and depositions admitted, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that Petitioner's ongoing conditions of ill being of the left shoulder and right knee as diagnosed by Dr. Silver are causally connected to the accidental injuries sustained on May 16, 2011. The Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence any other ongoing condition of ill being to the cervical spine or left arm, including any diagnosed cubital tunnel syndrome, are causally connected to the accidental injuries sustained on May 16, 2011.

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

Based on the Arbitrator's finding with respect to Causal Connection, Petitioner would be entitled to payment for medical bills which are for reasonable, necessary treatment causally connected to Petitioner's condition of ill being in the left shoulder and right knee and which are substantiated by the medical evidence submitted. Petitioner has submitted medical bills as Petitioner's Exhibit 9a-9g. Respondent has provided a payment log as Respondent's Exhibit 4. After review of these exhibits and the medical evidence submitted the Arbitrator finds as follows with respect to the medical bills claimed:

Exhibit 9a Dr. Silver:

Based on the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds Dr. Silver's opinions persuasive and the treatment rendered by Dr. Silver as reasonable and necessary. The Respondent has demonstrated payment of all charges through August 21, 2012. The bill submitted includes unpaid office visits from September 21, 2012 through March 7, 2013 for a total of $705.00.

Exhibit 9b Gorsuch Chiropractic Clinic
This exhibit includes charges for treatment beginning before the date of accident. A review of the records of Gorsuch Clinic (PX 3) document treatment for multiple body parts both before and after the date of accident. The bill fails to document or specify what if any treatment would be specifically related to the conditions causally connected to the accident on May 16, 2011. The Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that any of the charges are reasonable, necessary and causally connected.
Exhibit 9c Lincolnwood Rehabilitation Center
Lincolnwood Rehabilitation Center provided physical therapy prescribed by Dr. Silver. Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds this treatment was reasonable and necessary. The exhibit reflects payments by Respondent for a portion of the treatment. The balance owing is $3,052.00.
Exhibits 9d, 9e and 9g Prescription Bills
Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that treatment prescribed by Dr. Silver was reasonable and necessary including the prescription medications provided. The Arbitrator therefore finds the bills from Rx Development ($48,811.53); Infinite Strategic Innovations ($1,506.15); and Prescription Partners ($6,578.86) are reasonable, necessary and causally related to the accident. Respondent's Exhibit 4 documents payment of the 1/31/13 charges listed on Petitioner's Exhibit 9g which reduces the balance due to Prescription Partners to $5,455.57.
Exhibit 9f North Chicago Medical
The bill submitted from North Chicago Medical is for a CPM machine. The bill is for use from October 27, 2011 through January 31, 2012. Neither the records of Dr. Silver (PX 1) nor his deposition (PX 7 and 7a) identify this prescription. The only reference is in the record of North Chicago Medical (PX 6) which contains a prescription form from Dr. Silver dated October 26, 2011 and rental day sheet listing the first date of service as October 27,2011 and the continued days of service to October 28, 2011. The records of physical therapy for the relevant period do not mention the use of the CPM machine. Based upon the records in evidence, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that the use of the CPM machine was reasonable and necessary only for the period of October 27 and 28, 2011. The charges for the period proved total $2,271.00.

Based upon the record as whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that the above bills are reasonable, necessary and causally related to the accidental injuries sustained on May 16, 2011. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $705.00 to Dr. Silver, $3,052 to Lincolnwood Rehabilitation Center, $48,811.53 to Rx Development, $1,506.15 to Infinite Strategic Innovations, $5,455.57 to Prescription Partners and $2,271.00 to North Chicago Medical, as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator has found that Petitioner's conditions of ill being in the left shoulder and right knee are causally connected to the accidental injuries sustained on May 16, 2011. The Arbitrator also found the opinions of Dr. Silver more persuasive with respect to the diagnosis and recommended treatment.

Dr. Silver initially recommended a course of four to five months of physical therapy for the post operative recovery of the left shoulder. Dr. Player has initially indicated three months therapy. The record indicates that

Respondent disrupted the prescribed therapy beginning in December, and that additional therapy was not consistently approved. The record documents that Petitioner has had increased symptoms following the suspension of therapy. The Arbitrator therefore finds an additional course of therapy consistent with Dr. Silver's initial recommendation is reasonable, necessary and causally connected to the accident.

Dr. Silver has recommended an arthroscopic surgery for Petitioner's right knee. Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that such surgery is reasonable, necessary and causally connected to the accident.

Based upon the record as a whole, including the testimony presented, the medical records and depositions admitted, the Arbitrator finds that Petitioner is entitled to prospective medical treatment as currently recommended by Dr. Silver including additional physical therapy for the left shoulder, arthroscopic surgery for the right knee and additional reasonable, necessary and causally connected care.

In support of the Arbitrator's decision with respect to (L) Temporary Compensation and (N) Credit, the Arbitrator finds as follows:

Petitioner was off of work from May 17, 2011 through July 24, 2011 when she returned to modified duty with a 20 pound restriction. She was taken off work again beginning on September 10, 2011 by Dr. Silver and has not returned from that date to the date of trial on June 28, 2015.

Dr. Silver's September 8, 2011 note takes Petitioner completely off of work pending surgery. There is no indication of a medical reason by Dr. Silver that she could not continue working within the 20 pound restriction provided by Dr. Foster and Dr. Vashi. But the September 8, 2011 note documents that a prescription was issued for Hydrocodone. Based upon Mr. Carleton's testimony and the Drug Free Workplace policy, Petitioner was unable to work in production as of that date. Although Mr. Carleton testified to Respondent's ability to accommodate Petitioner's weight restrictions, the prescription precluded Petitioner from working and continues to do so.

Postoperatively Petitioner has been kept on restrictions by Dr. Silver for her shoulder and her knee. Dr. Silver, in response to the denial of shoulder therapy, placed Petitioner on a 5 pound restriction. His Work Status reports and correspondence demonstrate no consistency as to his restrictions and no medical basis for the alterations which vary from his initial 5 pound limits to 25 pounds in September 9, 2013 to off work completely on September 19, 2013 and back to 20 pounds on October 24, 2013 before taking Petitioner off work on December 5, 2013, yet writing that she could lift 20 pounds in his letter of the same date. Dr. Pomerance also felt an initial restriction of 25 pounds would be appropriate. The Arbitrator finds Dr. Silver's justification for this severe 5 pound limitation unpersuasive and finds Dr. Pomerance 25 pound restriction more reasonable. The testimony supports that Petitioner would have been able to perform the bag driller job within this reasonable restriction. The Arbitrator also notes Petitioner was given a 25 pound restriction by her chiropractor before the accident at which time she testified she was able to perform her regular job duties as a machine operator. However, Petitioner remains on medication which precluded her return to work. Mr. Carleton confirmed that no job offer has been extended.

Based upon the Arbitrator's findings with respect to Causal Connection, Medical and Prospective Medical, the Petitioner remains on reasonable and necessary narcotic medication which prevents a return to work. She is in need of further medical treatment and has not yet reached maximum medical improvement.

Based upon the record as a whole, including the testimony and exhibits, the medical records and depositions submitted, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from May 17, 2011 through July 24, 2011 and from September 10, 2011 through June 28, 2015, being the date of trial in this matter, being a period of 208 weeks.

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

Respondent has denied additional medical treatment including surgery for Petitioner's right knee and additional physical therapy for her left shoulder, claiming the treatment is not reasonable, necessary or causally connected to the accidental injuries sustained. Respondent has also denied Petitioner's entitlement to ongoing temporary compensation, based on the position that work is available for Petitioner, either her regular job or within her reasonable restrictions. In support of these denials, Respondent has presented the medical opinions of Dr. Player, Dr. Pomerance and Dr. Verma and the testimony of Mr. Carleton.

Although the Arbitrator has found that the requested treatments is reasonable and necessary and that Petitioner is entitled to ongoing temporary total disability, the Arbitrator finds that a legitimate dispute existed as to entitlement to those benefits. Respondent did obtain a utilization review which did not certify the ongoing therapy. Dr. Player, Dr. Pomerance and Dr. Verma provided opinions that the Petitioner was at MMI and no longer in need of either medical treatment or restrictions with respect to the shoulder and knee. They also disputed the causal connection of Petitioner's complaints in the scapula and down the arm. The opinions were based upon the experts' examinations of the Petitioner and review of medical records. In the evaluation these opinions, the Arbitrator notes the lack of precision and completeness of Dr. Silver's records was a contributing factor to the divergence of opinions. Dr. Silver's records and testimony demonstrate an adversarial stance with respect to Respondent.

Respondent also provided evidence of a willingness to accommodate Petitioner's restrictions. The Arbitrator also notes the Petitioner's testimony as to her pre injury state is inconsistent with the records of her chiropractor and raising questions as to the veracity of her testimony concerning the physical demand of her job. With respect to the Drug Free Workplace policy preventing a return to work, the Arbitrator notes the apparent timing of the inclusion of narcotics to Petitioner's medications and her prior prescription of Hydrocodone before the accident. The Arbitrator also notes the medical opinion of Dr. Pomerance that this prescription is not reasonable and necessary.

Based upon this evidence, the Arbitrator finds that the denial of benefits in this matter was not unreasonable or vexatious and was in good faith and supported by substantial evidence. The petition for penalties and attorneys fees is denied.

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

Christopher Kornfeind,

Petitioner,

vs.

NO. 11WC043319

16IWCC0497

Gottlieb Memorial Hospital,

Respondent.

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 temporary disability, permanent disability, causal connection, medical expenses, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2015 is hereby affirmed and adopted.

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

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

16IWCC0497

No bond is required for removal of this cause to the Circuit Court. 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: JUL 29 2016
SJM/sj
o-7/7/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KORNFEIND, CHRISTOPHER
Employee/Petitioner

Case# **11WC043319**

16IWCC0497

GOTTLIEB MEMORIAL HOSPITAL
Employer/Respondent

On 11/13/2015, 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 0.34% 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:

1315 DWORKIN AND MACIARIELLO
JORDAN BROWEN
134 N LASALLE ST SUITE 1515
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
DIEDRE CHRISTENSON
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

16IWCC0497

CHRISTOPHER KORNFEIND
Employee/Petitioner

Case #11 WC 43319

v.

GOTTLIEB MEMORIAL HOSPITAL
Employer/Respondent

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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on July 20 and October 20, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On July 9, 2011, the respondent was operating under and subject to the provisions of the Act.

- On this date, an employee-employer relationship existed between the petitioner and respondent.

- In the year preceding the injury, the petitioner earned $25,170.65; the average weekly wage was $484.05.

- At the time of injury, the petitioner was 55 years of age, single with no children under 18.

ORDER:

- The petitioner's request for temporary total disability benefits is denied.

- The respondent shall pay the petitioner the sum of $290.43/week for a further period of five weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 1% loss of the person as a whole.

- The respondent shall pay the petitioner compensation that has accrued from July 9, 2011, through October 20, 2015, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee through October 9, 2011, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee after October 9, 2011, and for his left elbow and teeth was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall

hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

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.

Robert E. Williams

Signature of Arbitrator

November 13, 2015

Date

NOV 13 2015

FINDINGS OF FACTS:

The petitioner, a security officer, received emergency care at the respondent's place of business on July 9, 2011, for left hip, left shoulder, left arm and back pain. He reported that he was thrown by a patient in the ER. The physician noted a full range of motion of all extremities and the petitioner was provided Vicodin for contusions and musculoskeletal strains. The petitioner saw Dr. Sarantos on August 6th and October 13th; however, the treatment notes are handwritten and are not legible. A lumbar MRI on September 3rd revealed no significant change from an MRI on October 15, 2007, no acute skeletal injury, degenerative disease and endplate changes from L3-4 through L5-S1. The petitioner worked from July 9th through the date of his termination in October 2011.

Dr. Stamelos saw the petitioner on January 23, 2012, and noted a history of severe low back pain and knee pain due to an altercation resulting in a blow to his left knee and the loss of two crowns. The petitioner started physical therapy at ATI for low back weakness and pain on March 7, 2012, and followed up with Dr. Stamelos, who kept him off work. An MRI of his left knee on December 14, 2012, revealed a peripheral medial meniscus tear and grade 1/2 patella chondromalacia. An MRI of his lumbar spine the same day revealed a diffuse bulge at L4-5 and L5-S1 causing narrowing of the foramina and a central bulge at L3-4.

At the request of the respondent, the petitioner was evaluated by Dr. Michael Kornblatt on February 20, 2013. Dr. Kornblatt opined that the petitioner's lumbar and left knee strain and contusion had resolved and warranted no specific treatment, that there were no abnormal neurologic deficits caused by his multilevel lumbar degenerative disc disease and that he had no deficits and a normal clinical physical examination of his left

knee. Dr. Kornblatt further opined that the petitioner reached maximum medical improvement approximately 8-12 weeks post-injury, that he could perform all gainful employment that a person of his age and stature would normally perform and that no additional work restrictions were necessary.

Dr. Stamelos noted at the last follow-up on February 18, 2013, that the petitioner had a negative straight leg raise test, that he was not in any distress and that he could perform restricted work activities.

Video surveillances of the petitioner on August 25 and 31, 2015, and September 1, 2015, reveal him walking normally, walking without a cane, bending down, entering a vehicle without leveraging his body weight with either arm, using a cane without reducing the stress on his left leg and swinging his left arm and cane in tandem with his right leg.

The petitioner had prior left knee problems and lumbar degenerative disc disease and surgery. The last prior lumbar MRI was on October 15, 2007, and a prior left knee MRI was on June 18, 2011.

FINDING WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that he sustained an accident on July 9, 2011, arising out of and in the course of his employment with the respondent. There is no evidence to rebut the petitioner's testimony that he fell during a scuffle with a patient.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The petitioner notified JoAnn Naples with the respondent's Employee Health Service Department on July 15, 2011. The respondent received timely notice of the petitioner's injury.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

Based upon the testimony and the evidence submitted, the medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee through October 9, 2011, was reasonable and necessary and is awarded. The medical care rendered the petitioner for his lumbar spine, left hip, left shoulder and left knee after October 9, 2011, and for his left elbow and teeth, if any, was not reasonable or necessary and is denied.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his condition of ill-being with his lumbar spine, left hip, left shoulder and left knee through October 9, 2011, was causally related to a work injury on July 9, 2011. The petitioner failed to prove that his condition of ill-being with his left elbow, mouth and teeth is causally related to a work injury and that his condition of ill being with his lumbar spine, left hip, left shoulder and left knee after October 9, 2011, is casually related to the work injury.

The petitioner had a pre-existing condition of ill-being with his lumbar spine and left knee prior to July 9, 2011. The initial medical care records revealed that the petitioner sustained contusions and strains only to his lumbar spine, left hip, left shoulder and left knee. The physician noted a full range of motion of all the petitioner's extremities. The

petitioner was specific and comprehensive with the description of his injuries and symptoms and did not indicate any injuries or symptoms with his left elbow, mouth or teeth. The petitioner continued to work, did not seek further medical care and reported improved symptoms to respondent on July 21, 2011. Also contradictory to the petitioner's testimony was his ability to continue working his regular duties for three months and the absence of any debilitating symptoms until his termination for misconduct in mid October 2011. Moreover, the surveillance videos of the petitioner belie his testimony and credibility. The opinions of Dr. Kornblatt are more consistent with the evidence and are more persuasive. The petitioner reached maximum medical improvement on October 9, 2011. The opinions of Dr. Stamelos are not supported by the evidence and are given no probative weight.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based on the finding of the causal relationship of the petitioner's condition of ill-being, he failed to prove any entitlement to temporary total disability benefits. The petitioner continued to work through October 9, 2011, the date he reached maximum medical improvement. The petitioner's request for temporary total disability benefits is denied.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

Contrary to his testimony, the surveillance videos reveal that the petitioner is active and not limited with routine activities. The respondent shall pay the petitioner the sum of $290.43/week for a further period of 5 weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 1% loss of the person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Douglas Acevedo,
Petitioner,

v. Case No. 12 WC 2359

McDonalds,
Respondent.

ORDER

This matter comes before the Commission on Respondent's Motion to Dismiss Petitioner's Petition for Review of Arbitrator's Decision filed on February 16, 2016. Due notice having been given, a hearing was held before Commissioner Thomas J. Tyrrell on April 7, 2016 in Chicago, Illinois. The Commission having jurisdiction over the persons and subject matter and after being advised in the premises, hereby grants said motion and hereby dismisses Petitioner's Petition for Review, for the reasons set forth below.

The records shows Petitioner filed a Petition for Review on 11/20/15 requesting oral argument but failing to check any of the boxes on said form that would indicate the issues being excepted to. The Commission notes that no Decision on Arbitration was issued by the Arbitrator in this matter.

In its Motion to Dismiss Petitioner's Petition for Review of Arbitrator's Decision filed on 2/16/16, the Respondent represented that counsel for Petitioner had filed a Motion for Petitioner to Testify by Deposition or Telephone, given that Petitioner was required to leave the country and now apparently resides in El Salvador. Respondent asserts that the motion was argued before Arbitrator Cronin on 11/18/15. At that time, the Arbitrator apparently denied the motion and advised the parties that the matter would be assigned to his Chicago status call and would receive a trial date due to the above-the-line status of the case.

Petitioner thereupon filed the aforesaid Petition for Review on 11/20/15 and Respondent filed its Motion to Dismiss on 2/16/16.

The Commission notes that "[o]nly final determinations of the Commission are appealable." *Supreme Catering v. Workers' Compensation Commission*, 976 N.E.2d 1047, 1049, 364 Ill.Dec. 484, ___ (1st Dist. 2012); citing *Bechtel Group, Inc. v. Industrial Commission*, 305 Ill.App.3d 769, 772, 713 N.E.2d 220, 221, 238 Ill.Dec. 225 (2002). A judgment is final if it determines the litigation on the merits, and it is not final if the order leaves a case pending and undecided. *Supreme Catering*, 713 N.E.2d at 1049; citing *Honda of Lisle v. Industrial Commission*, 269 Ill.App.3d 412, 414, 646 N.E.2d 318, 320, 206 Ill.Dec. 104 (1984).

In the present matter, the Arbitrator's ruling, denying Petitioner's motion to testify via deposition or via telephone, in no way determined the litigation on the merits and in fact left the case pending on arbitration. Petitioner's anticipation of what may or may not occur once the matter proceeds to trial in light of the Arbitrator's ruling is of no import.

Therefore, based on the above, the Commission finds that the Arbitrator's ruling, denying counsel for Petitioner's motion to allow his client to testify via deposition or telephone, by its very nature was an interlocutory order and not a final and appealable determination.

Accordingly, the Commission grants Respondent's Motion to Dismiss Petitioner's Petition for Review of Arbitrator's Decision and hereby dismisses Petitioner's Petition for Review.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Petitioner's Petition for Review of Arbitrator's Decision is granted, and Petitioner's Petition for Review is hereby granted.

DATED: AUG 2 - 2016

r-04/7/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronnie Wade,

Petitioner,

16IWCC0505

vs.

NO: 12 WC 15190

Teleflex Medical Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of prospective medical treatment and being advised of the facts and law, corrects the Decision of the Arbitrator as stated below and otherwise affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof. The sole issue in dispute is causal connection for prospective medical treatment in the form of a third right shoulder surgery. After considering all of the evidence, we affirm the Arbitrator's finding that Petitioner failed to prove he is entitled to prospective medical care. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The final page of the Decision of the Arbitrator erroneously states that the recommendation by Dr. Pavlatos for a third surgery was not found in the record. In fact, the March 3, 2014 office note of Dr. Pavlatos is included in Petitioner's Exhibit #2 and on that date Dr. Pavlatos recommended right shoulder arthroscopy with possible debridement of the rotator cuff and distal clavicle resection. Dr. Pavlatos noted, "I cannot guarantee this would relieve his pain, and if it does relieve it how much is undetermined." We note that Dr. Pavlatos was not deposed in advance of hearing and has not issued an opinion within a reasonable degree of

16IWCC0505

medical certainty that the surgery he recommends is medically necessary and causally connected to the Petitioner's work-related injury. There is no medical testimony explaining why the March 14, 2013 procedure, which Dr. Pavlatos also recommended, failed to improve Petitioner's condition. Furthermore, the operative note from March 14, 2013 is absent from the record. As Dr. Pavlatos indicated on March 3, 2014, his prognosis for a third surgery is guarded.

Respondent's §12 examiner, Dr. Levin, examined Petitioner and issued a report dated December 6, 2012. Dr. Levin concurred with the recommendation of Dr. Pavlatos and Dr. Elrashidy for a second right shoulder arthroscopy, distal clavicle excision and evaluation of the glenohumeral joint and biceps area. Petitioner was reexamined by Dr. Levin on October 23, 2014. At that time, Petitioner had not been back to Dr. Pavlatos since March of 2014 and he took no medications for his right shoulder. Petitioner reported going to the gym on a daily basis and lifting weights up to 25 pounds on the right side. Dr. Levin reviewed the October 28, 2013 MRI arthrogram of the right shoulder and found no evidence that any additional orthopedic intervention was required. He opined that Petitioner had reached maximum medical improvement and he agreed that Petitioner's restrictions appeared to be appropriate. We rely on the opinion of Dr. Levin and agree with the Arbitrator's denial of Petitioner's request for an award of a third right shoulder arthroscopic surgery pursuant to §8(a) and §19(b).

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator dated October 8, 2015 is corrected as stated above and otherwise affirmed.

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.

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: AUG 1 - 2016
RWW/plv
o-6/22/16
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

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

16IWCC0505

WADE, RONNIE
Employee/Petitioner

Case# **12WC015190**

TELEFLEX MEDICAL INC
Employer/Respondent

On 10/8/2015, 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 0.06% 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:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE SUITE 1810
CHICAGO, IL 60654

0532 HOLECEK & ASSOCIATES
JEFF C GOLDBERG
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

16IWCC0505

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)

Ronnie Wade
Employee/Petitioner

v.

Teleflex Medical, Inc.
Employer/Respondent

Case # **12** WC **15190**

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 **Maria S. Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **July 15, 2015**. 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 **the parties stipulate that the sole issue at trial is prospective medical care pursuant to Section 8(a)**

16IWCC0505

FINDINGS

On the date of accident, **2/9/12**, 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 $**69,544.28**; the average weekly wage was $**1,337.39**.

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

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services. The parties stipulate that this issue is reserved for a later time.

Respondent shall be given a credit of $**152,510.80** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**152,510.80**.

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

ORDER

The Arbitrator finds and concludes that Petitioner failed to prove he is entitled to prospective medical care in the form of a third right shoulder surgery. Such prospective medical care is hereby denied.

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

10/8/15
Date

OCT 8 2015

BACKGROUND

Ronnie Wade ("Petitioner") and Teleflex Medical, Inc. ("Respondent") proceeded to arbitration on 7/15/15 on all disputed issues in case number 12 WC 15190 for which Petitioner alleged a 2/9/12 accident arising out of and in the course of his employment with Respondent. At issue were the following: causal connection and prospective medical under Section 8(a). Ax1.

FINDINGS OF FACT

The Petitioner is employed as a BFS machine technician for the Respondent. The Respondent is a company that makes inhaler equipment for asthma patients such as saline solution and water. On 2/9/12, Petitioner was putting out a fire on a machine behind him when he slipped and fell on leaking hydraulic fluid. His right shoulder struck the ground first when he fell. Petitioner treated with Advocate Condell Immediate Care in February 2012 through April 2012.[1] Rx2. He also sought a second opinion with Buffalo Grove Treatment Center in April 2012.[2] Rx2.

The Petitioner's first orthopedic physician was Dr. Hany Elrashidy with Greenleaf Orthopedics. Px1. On 4/10/12, MRI showed distal supraspinatus tendinopathy with small partial tear at the most distal anterior insertion, mild AC joint arthropathy with caudal spurring encroaching upon the myotendinous junction of the supraspinatus muscle. The doctor diagnosed pain in the joint and supraspinatus sprain/strain. Petitioner was given an injection and sent for an arthrogram to evaluate the labrum. Petitioner began physical therapy for the right shoulder/arm on 4/18/12. Petitioner reported only temporary improvement in symptoms. On 4/24/12, MRI arthrogram of the right shoulder showed mild impingement with moderate tendinopathy and a small intrasubstance rotator cuff tear without sign of complete full thickness rotator cuff tear and no sign of labral injury along with intact bicep labral complex.

On 5/14/12, Dr. Elrashidy recommended right shoulder arthroscopy, subacromial decompression, distal clavicle excision, rotator cuff debridement versus repair and possible biceps tenodesis. On 5/21/12, utilization review determined surgery to be medically necessary. Px1. On 6/1/12, Petitioner underwent and Dr. Elrashidy performed a right shoulder arthroscopy with subacromial decompression, distal clavicle co-planing and debridement of fraying around the biceps pulley and bicep anchor. Px1. The glenoid was normal and the cuff and labrum were intact. The subacromial space revealed a large anterolateral bone spur consistent with a hooked acromion. The doctor also noted a low hanging distal clavicle with a fairly large osteophyte about the joint. Rx2. Petitioner testified to only temporary symptomatic relief in the shoulder following his first surgery. In July 2012, Petitioner was reporting to therapists that that he was still having 4 to 7.5 out of 10 pains, locking up, pains in the AC joint area, feeling as if his shoulder was separating from its socket and that he could not reach across his body to the opposite shoulder because of lack of range of motion.

Petitioner went for a second opinion with Dr. Christ Pavlatos. Px2. The doctor administered a cortisone injection and in October 2012, recommended a repeat arthroscopy and distal clavicle excision. Rx2. On 10/1/12, Dr. Elrashidy noted that he felt Petitioner had improved somewhat functionally and objectively with regard to range of motion and strength but warned Petitioner that sometimes scar tissue in and around the subacromial space and around the AC joint make take a full 6 months to resolved and even up to one year. On 11/26/12, Dr. Elrashidy thought Petitioner's history and symptoms seemed somewhat discordant in that he did have AC joint pain directly tender to palpation but negative cross body adduction. In addition, the cortisone injection into the AC joint provided no relief. The doctor also noted that Petitioner's pain seemed to be coming

[1] Those medical records were not introduced into evidence.
[2] Those medical records were not introduced into evidence.

from his anterior shoulder and that he did have direct bicipital tenderness although initial testing results showed normal biceps. The doctor ordered a repeat arthrogram.

On 12/6/12, Petitioner was evaluated by Dr. Mark Levin at the request of Respondent. Rx2. Dr. Levin took down Petitioner's work injury and treatment history. Exam showed tenderness directly to palpation over the right AC join with prominence over the AC joint. Right shoulder adduction created pain over the AC joint. The doctor conclude that based on Petitioner's history, physical exam and records, he did sustain a work injury to the right shoulder for which he continued to have pain over the right AC joint with shoulder pain. Dr. Levin believed that Petitioner required additional medical intervention by way of right shoulder arthroscopy to full y evaluate the glenohumeral joint and biceps area as well as a distal clavicle excision since most pain was over the AC joint consistent with his injury. He also opined that although any bone spurring would be preexisting, the injury would have directly contributed to making those symptomatic. Finally, he noted that if there were bicep problems during surgery, a bicep tenodesis may be required but would be determined during surgery.

Petitioner continued with therapies while awaiting approval for surgery. On 3/14/13, Petitioner underwent and Dr. Elrashidy performed a second right shoulder arthroscopy and a distal clavicle excision.[3] Rx1. The first post operative physical therapy record is on 6/20/13, where soreness over incision was noted. Px1. Through-out therapies, Petitioner reported pain and some numbness over the incision site; difficulty sleeping on the right side, Petitioner again testified that the second surgery only temporarily helped his symptoms in his right shoulder.

On 6/24/13, Petitioner followed up with Dr. Pavlatos rather than Dr. Elrashidy after surgery. Px2. In July 2013, Petitioner complained to therapists of continued pain and limited sleep due to positioning. He went to the emergency room for chest and back pain. The emergency room told Petitioner that his pain was due to motion in the right arm.[4] Px1. In August 2013, Petitioner reported to therapists 0 to 2-3 out of 10 pains, pain while sleeping, numbness, tingling and a deep burning sensation over the incision site, increased pain with reaching and stiffness in front of the shoulder into the bicep. Dr. Milejczyk recommended no weights in therapy and anti-inflammatories until follow up.[5] Px1. Petitioner continued therapy into September 2013 where he was re-evaluated and was noted to have active range of motion within normal limits with limitation to external rotation to 70 degrees, 5 out of 5 strength, 2 out of 10 constant pains and lifting of approximately 20 pounds.

On 9/16/13, Petitioner underwent a work readiness assessment through Greenleaf Industrial Rehabilitation. Px1. Exam showed active range of motion within normal limits with limitation to external rotation to 70 degrees. Strength was 5 out of 5 in each direction with a lot of shoulder blade substitution and some scapular instability. Pain was 2 out of 10 and reported as constant. It was concluded that Petitioner showed difficulties and performed at medium – light level of function for lifting and carrying as well as pushing and pulling. Limiting factors were noted to be shoulder instability and shoulder weakness. Px1. During work conditioning, Petitioner expressed various ranges of pain and soreness following exercises. Therapists noted that Petitioner required constant verbal instruction on proper form and technique. At the end of September, Petitioner reported to therapists marked increased in pains, along with a sensation of separating, raw pain.

In October, Petitioner was cleared by the NCM to continue work conditioning/hardening. Px1. He continued to complain of night pains, primarily in the petralis, pectoral tendons and bicep tendon. Therapists noted that pain level was increasing to 7 out of 10 with pain traveling down the arms to all fingers. Petitioner reported clicking, pain with lifting a drinking glass, raising the arm up and turning the arm to reach.

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[3] This operative report was not submitted into evidence.
[4] Records from an emergency room were not submitted into evidence.
[5] Records from Dr. Milejczyk were not submitted into evidence.

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On 10/28/13, a right shoulder arthrogram showed 1) diffuse supraspinatus and infraspinatus tendinosis without evidence of full thickness or partial thickness rotator cuff tear, 2) contrast within interstitial portion of subscapularis tendon, 3) subacromial / subdeltoid bursitis, 4) post operative changes and 5) non visualization of superior labrum and intra-articular portion of the biceps consistent with labral debridement and biceps tenodesis but if not consistent with clinical history then they were torn. Px1. On 11/18/13, Dr. Saltzman did not recommend any additional surgery and instead recommended an FCE.[6] Rx1:4. On 11/22/13, Petitioner underwent an FCE showing he could occasional lift 60 pounds, frequently 40 pounds and 30 minutes of overhead work with rest. Rx1:4. The next and last medical record is dated 11/26/13 which is a physical therapy record noting pain in the upper shoulder from the front toward the back and 5 out 10 pains. Px1. On 12/2/13, Petitioner was released per his FCE by Dr. Saltzman.[7] Rx1. In March 2014, Dr. Pavlatos recommended the possibility of a third surgery without guarantee of relief of symptoms.[8] Rx1.

On 10/23/14, Petitioner was once again re-evaluated by Dr. Mark Levin at the request of Respondent. Rx1. According to the report, Petitioner switched care to Dr. Pavlatos as Dr. Elrashidy had stopped practicing. Petitioner completed an FCE and apparently light duty was not available.[9] Dr. Pavlatos discussed a third surgery or living with the pain. At the time of the exam, Petitioner reported being able to attend the gym on a daily basis and lift up to 15 pounds and 5 lifts of 25 pounds each on the right side. During exam, the doctor noted subjective complaints of burning and weakness in the right shudder with no night pain. Petitioner also reported numbness and tingling when his arm is at the right side. He rated his pain anywhere from 4 to 8.5 out of 10. Impingement sign was positive on the right. Pain was positive with abduction and external rotation. Petitioner had pain over the bicep tendon. The doctor interpreted the recent arthrogram as showing fluid in the cuff, post operative changes and noted that the superior labrum and bicep tendon was not seen well. The doctor concluded that Petitioner was at maximum medical improvement and that additional surgical intervention would not change his condition. Dr. Levin continued to believe that Petitioner's condition was work related.

Petitioner testified he remains symptomatic in his right shoulder and takes pain medications daily and ices his shoulder daily to treat his pain. He wants to have the surgery recommended by Dr. Pavlatos since 3/3/14 so that he can get back to work. He would pursue the surgery recommended by Dr. Pavlatos right away if it is authorized.

CONCLUSIONS OF LAW

ISSUE (F) ***Is Petitioner's current condition of ill-being causally related to the injury?***
ISSUE (K) ***Is Petitioner entitled to any prospective medical care?***

The Arbitrator has carefully reviewed and considered all medical evidence and Petitioner's unrebutted trial testimony. The Arbitrator concludes that Petitioner's right shoulder condition, namely his rotator cuff pathology and bicep tenodesis, subacromial impingement, all of which have been addressed surgically to be causally related to his work accident. Ax1. Petitioner had no prior history of right shoulder injury or symptoms and under a chain of events theory, as supported by the medical records, including Dr. Levin's opinions, Petitioner's current condition of ill-being is causally related.

The dispute between the parties primarily centers on whether Petitioner is entitled to additional prospective medical care in the form of a third surgery to his right shoulder. After careful consideration of the medical records and of Petitioner's credible testimony, based on a preponderance of the evidence, the Arbitrator

[6] This date of service from Dr. Saltzman was not submitted into evidence.
[7] This date of service from Dr. Saltzman is not in evidence.
[8] This date of service from Dr. Pavlatos was not submitted into evidence.
[9] The FCE was not submitted into evidence.

concludes that Petitioner has failed to prove he is entitled to additional medical intervention by way of a third right shoulder surgery under Section 8(a).

In reviewing Petitioner's medical records, the Arbitrator finds that Petitioner underwent two reasonable, necessary and otherwise uncomplicated right shoulder arthroscopies. There is nothing in the record to suggest these surgeries were done incorrectly or that the surgeries otherwise failed to address any pathologies or conditions identified in the medical record. In addition, the Arbitrator finds that Petitioner's post-operative care following the second surgery largely reported minimal complaints of pain, minimal if no use of medications and increased use, strength and functionality of the right shoulder. Petitioner's shoulder pain appeared to increase after implementation of work conditioning/hardening.

However, Petitioner's then treating physician, who was apparently Dr. Saltzman, ordered an arthrogram, which was essentially negative per Dr. Levin. It is not clear from the record what Dr. Saltzman's exact reading of the arthrogram was, as his records were note submitted. The repeat arthrogram did suggest correlation regarding the non visualization of superior labrum and intra-articular portion of the biceps consistent with labral debridement and biceps tenodesis or perhaps they were torn. However, according to Dr. Levin's report, Dr. Saltzman ultimately did not feel surgery was appropriate. This opinion was echoed by Dr. Levin's second report, who did not find anything significant on that same arthrogram and stated Petitioner's condition would not improve following a third surgery.

The Arbitrator also relies on the post-operative therapy notes in support of this conclusion as the last medical note from any treating physician submitted into evidence at trial is dated 6/24/13. Most of Petitioner's therapy notes following the second surgery note decreasing pain, decreasing use of medications and pain over the incision site. Dr. Levin also noted increased pain with daily gym activity. Thus, while some of the therapy notes do mention pain with various increased activity, the Arbitrator finds this, in light of Petitioner's repeat arthrogram and FCE, as evidence going toward Petitioner's permanent disability or impairment but not as evidence in support of further surgery. In so finding, the Arbitrator concludes that Petitioner's condition reached a state of permanency and that he is otherwise at maximum medical improvement as of 10/24/14, the date in which Dr. Levin opined surgery was not necessary and that Petitioner was at maximum medical improvement and could work within his permanent restrictions outlined in his FCE.

In support of Petitioner's request for surgery, Petitioner relies on the medical opinion of Dr. Pavlatos recommending a third surgery. The Arbitrator is unable to adopt this opinion for several reasons. First, this medical note does not appear anywhere in the records submitted at trial and therefore the Arbitrator is unable to determine exactly the type of surgery recommended. This date of service mentioning the possibility of surgery is referenced only in Dr. Levin's second report. Rx1. In Dr. Levin's report, he states that Dr. Pavlatos mentioned the possibility of a third surgery without any guaranteed outcome. Second, as read, the statement only mentions the *possibility* of a surgery, not that surgery was in fact recommended. Further, that Dr. Pavlatos may have indicated that there was no guarantee suggests to the Arbitrator that Dr. Pavlatos was not fully endorsing a third surgery, which if true, would further support the opinions of Drs. Levin and Saltzman. Third and finally, there is no indication that Dr. Pavlatos, in mentioning a third surgery, reviewed the results of the recent repeat arthrogram. Dr. Pavlatos does not appear to base any surgical recommendation on an arthrogram but rather it appears based on Petitioner's ongoing complaints of pain. Without any such evidence, the Arbitrator must adopt and rely on the opinions of Drs. Saltzman and Levin over those of Dr. Pavlatos. Petitioner's request for prospective medical care in the form of a third right shoulder surgery is hereby denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ 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

Sharon Kohl,
Petitioner,

vs.

Estee Lauder,
Respondent.

16IWCC0507

NO: 12 WC 20950

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, medical expenses, permanent disability, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 21, 2015 is hereby affirmed and adopted.

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

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

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: AUG 1 - 2016
O7/13/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KOHL, SHARON
Employee/Petitioner

Case# **12WC020950**

ESTEE LAUDER INC
Employer/Respondent

16IWCC0507

On 10/21/2015, 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 0.11% 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:

5317 JOHN J CASTANEDA
47 DuPAGE COURT
ELGIN, IL 60120

2097 GRANT & FANNING
PAUL-ERIC SEAL
300 S RIVERSIDE PLZ SUITE 2050
CHICAGO, IL 60606

16IWCC0507

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SHARON KOHL,
Employee/Petitioner

v.

ESTEE LAUDER, INC.,
Employer/Respondent

Case # 12 WC 020950

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Elgin**, on **September 24, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 8, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$22,285.64**; the average weekly wage was **$428.57**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$1,650.00** for other benefits, for a total credit of **$1,650.00**.

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

ORDER

Denial of benefits

Based on the Arbitrator's findings of no accident and no causal connection for the current conditions of ill-being, no benefits are awarded under the Act.

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 M. Doherty

Signature of Arbitrator

10/15/15

Date

OCT 21 2015

FINDINGS OF FACT

Petitioner, a 56 year old Estee Lauder employee, testified that on 2/8/12 she worked for Respondent as a Clinique associate. As such, her duties required her to travel to different store locations and educate store employees about the Clinique product line. Petitioner testified that she traveled to large retail stores such as Macy's or Carson's which had a Clinique counter in the makeup department of the store. Once she arrived at the store Petitioner worked at the Clinique counter with store employees educating the store employees on the use and sale of Clinique products. Petitioner testified that she drove her own vehicle to work and that she worked scheduled shifts of either 11 am to 4 pm or 2 pm to 7 pm. Petitioner's hourly time was tracked via store computer and her shift hours worked were approved by the store manager. Petitioner testified that she always worked an average of 20 hours per week but that she was given different shift hour assignments each week. Petitioner received mileage reimbursement if she traveled over 25 miles out of her assigned territory.

Petitioner testified that while at work she wears a white coat. Petitioner testified that she started her shift behind the Clinique counter in the store to educate the store employees. In addition to educating store employees, Petitioner testified that part of her duties required her to leave the counter and walk through the store handing out flyers to store customers with the goal of bringing the store customers to the Clinique counter to facilitate product sales. Petitioner testified that she was paid for her 15 minute breaks which she used to get coffee or use the bathroom.

Petitioner testified that on 2/8/12, she was assigned to work at a Carson's in the Fox Valley mall on the 11 am to 4 pm shift. Petitioner testified that she arrived at the Carson's store and began her shift. Petitioner testified that at one point around 1 pm the counter was slow so the store manager said Petitioner could take her break and get coffee. Petitioner testified that she walked out of Carson's and into the mall wearing her white coat and carrying Clinique flyers in her pocket. Petitioner testified that she walked through the mall on her way to Gloria Jean's coffee shop and that she passed out flyers to mall customers on her way. Petitioner testified that she got coffee at Gloria Jeans and then started her walk back through the mall to Carson's. Petitioner testified that while walking back from Gloria Jean's to Carson's she saw a store called Gilly Hicks where she knew her daughter liked to shop. Petitioner testified that an employee from the Gilly Hicks store approached her to hand her a Gilly Hicks flyer. Petitioner testified that she did not approach the woman in order to give her a Clinique flyer but rather to receive the Gilly Hicks flyer from the woman. Petitioner testified that she walked into the Gilly Hicks store and tripped on the steps which were inside the store entrance. PX 21 is a photo of the Gilly Hicks entryway. The photo depicts the doorway, the two steps inside the doorway going up into the store and a large lighted chandelier hanging inside the store. Petitioner testified that she does not know what caused her to trip up the steps but that she was distracted by the woman at the door with flyers and by the large chandelier which caught her eye.

Petitioner testified that immediately after the fell she was disoriented and had immediate soreness in her knees, right elbow, left hand and back. Petitioner was taken by ambulance to the ER at Rush Copley and did not complete her work shift. Petitioner testified that she described the accident to the ambulance paramedics and to the ER doctors.

Following the fall of 2/8/12, Petitioner underwent extensive medical treatment. Petitioner underwent initial conservative care for both shoulders, both elbows and both knees including physical therapy and injection to her

shoulder and both knees. She also underwent care for her left wrist and underwent a left thumb surgery performed by Dr. Chen on 3/27/12. Dr. Puppala performed left shoulder surgery on 4/8/12 and no tear was found. Dr. Daley performed a left knee surgery on 6/14/12 and a total right knee replacement on 7/31/12.

Following an MRI of her left shoulder 10/16/12, Dr. Puppala recommended an additional left shoulder surgery noting that the MRI showed a partial thickness left shoulder tear. Dr. Puppala noted on 10/22/12 that the left shoulder tear now seen was "likely overuse from recent knee surgery while using assistive devices for her left knee." PX 4. Petitioner received more injections to her left shoulder from Dr. Puppala thereafter.

On referral from her primary doctor, Dr. Gutta, Petitioner saw Dr. Fernandez in January 2013. Dr. Fernandez x-rayed Petitioner's left elbow and recommended an EMG on 1/30/13. Dr. Fernandez performed left elbow surgery in February 2013 and Petitioner attended physical therapy thereafter. Petitioner continued physical therapy at ATI for her left elbow until she was discharged from care by Dr. Fernandez on May 14, 2013.

On May 2, 2013 Petitioner was sent to Dr. Belich for a Section 12 exam for her knees. Prior to this accident Petitioner had a torn meniscus in her right knee in 2006. Dr. Belich examined the petitioner regarding her bilateral knee conditions. RX#1, p.3. Dr. Belich opined that the petitioner had pre-existing bilateral osteoarthritis and that the incident of February 8, 2012 did not cause, accelerate or worsen the conditions in either knee. RX#1, p.3. He noted that the left knee surgery was four months after the fall and that it showed osteoarthritic changes and no evidence of a meniscal tear. He disagreed with the need for right knee replacement 5-1/2 months after the fall without first attempting conservative measures of relief. He noted that Petitioner received only one steroid injection to the right knee between fall and knee replacement. Dr. Belich opined that the petitioner had reached maximum medical improvement for both knees and could return to work full duty. RX#1, p.3.

Petitioner saw Dr. Daley in June 2013 and an x-ray of the right knee was taken. Dr. Daley discharged Petitioner in June 2013 but told her to return in one year for a repeat right knee x-ray.

With regard to Petitioner' bilateral knees, Dr. Daley testified that he performed left knee arthroscopic surgery on petitioner on June 14, 2012 and a total right knee replacement on July 31, 2012. PX#6, pp. 68-69 and PX#14, pp. 21-22. Dr. Daley testified via deposition that he is board-certified in orthopedics and limits his practice to hip and knee problems. PX#19, p.6. Dr. Daley opined that all of the treatment provided to the petitioner in her right and left knee was a result of the aggravation of her preexisting condition in her right and left knees. PX#19, pp. 22-23, 32. Dr. Daley opined that petitioner's fall on February 8, 2012 might or could have aggravated the preexisting condition in her left knee as petitioner informed Dr. Daley that "her fall precipitated and brought on her symptoms and therefore was related . . her pain complaints would be related to the fall she's describing." PX#19, pp. 23-24. With regard to petitioner's right knee, Dr. Daley opined that "(s)he clearly had longstanding arthritic changes in her knee, but apparently had no or must have been minimal symptoms for her to report that to me, and the injury, which sounds like a fall, had aggravated and precipitated her pain." PX#19, p. 32.

On cross-examination, Dr. Daley admitted that the arthritic changes seen on the MRI and x-rays of the petitioner's right knee "would not be interpreted as being related to a recent trauma." PX#19, p. 43-44. Dr. Daley also admitted that no meniscal tear was seen on the left knee during the arthroscopic surgery and that arthritic changes would not be related to any recent trauma. PX#19, pp. 41,45-46.

On July 2, 2013, Petitioner underwent another left shoulder MRI. Thereafter, Dr. Puppala again recommended an additional left shoulder surgery which he performed on 9/12/13. Petitioner attended physical therapy

thereafter for her left shoulder. Petitioner continued seeing Dr. Puppala for post-op care and on May 1, 2014 Dr. Puppala discharged Petitioner from care.

Dr. Choi also examined this petitioner's upper extremities under section 12 of the act at the respondent's request in October 2014. He agreed that the left shoulder treatment including 2 surgeries was reasonable to treat the left shoulder rotator cuff tear, superior labral tearing and subacromial impingement. Dr. Choi found Petitioner at MMI for her left shoulder. Dr. Choi noted that he did not have complete records on Petitioner's left shoulder or left elbow treatment and surgeries. As a result, he felt it "challenging" to assess causation for these conditions. However, based on the records he did review, Dr. Choi opined no causation between this petitioner's alleged mechanisms of injury and her current conditions of ill being in her left shoulder and left elbow noting that these conditions are usually the result of repetitive overuse rather than trauma. (RX2). In so opining, Dr. Choi further noted that no tear was seen during the first left shoulder surgery in April 2012.

Petitioner testified that she has never returned to work for Respondent and that she has had no subsequent accident or injuries to any of the involved body parts. Petitioner is not claiming any back injury due to the occurrence as she has had a chronic back issue since 1989. Petitioner continues to take Neurontin 1200 milligrams and 7.5 milligrams of Norco daily. She also takes Ambien to sleep at night. Petitioner testified that when the weather changes she wears a knee brace. After 15 minutes of driving her leg becomes stiff. Petitioner testified that her current symptoms include chronic right knee pain. She has not seen any physician for these body parts since her discharge in 2014. Petitioner testified that she receives Medicare and SSDI.

CONCLUSIONS OF LAW

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

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? (F) Is Petitioner's current condition of ill-being causally related to the injury? (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? TTD (L) What is the nature and extent of the injury? (N) Is Respondent due any credit?

Based on the record in its entirety, the Arbitrator finds that Petitioner did not prove by a preponderance of the credible evidence that her fall on 2/8/12 arose out of and in the course of her employment by Respondent. In so finding, the Arbitrator initially notes that the parties agree that Petitioner was a traveling employee but that alleged accident did not occur while Petitioner was traveling to or from work. Directly at issue is whether Petitioner's accident arose out of and in the course of her employment by Respondent.

The Arbitrator notes that Petitioner described handing out flyers as one of her duties for Respondent. She testified that typically handed out the flyers to customers shopping in the assigned store. Petitioner testified that she had arrived at Carson's and started her shift at 11:00 am. Around 1:00 pm, Petitioner obtained permission from the store manager to take her paid 15 minute break. Petitioner testified that she typically used her break to get coffee or use the bathroom. On this occasion, Petitioner left Carson's and walked through the mall to Gloria Jean's for coffee. Petitioner was wearing her work attire white coat and carrying Clinique flyers while walking to the coffee shop.

Petitioner testified that she obtained the coffee and started to walk back to Carson's through the mall. Petitioner testified that she saw a store, Gilly Hicks, where she knew her daughter liked to shop. Gilly Hicks is a store with no relationship to Carson's or Clinique. Petitioner further testified that she saw a Gilly Hicks employee handing out flyers outside the store and thought she would take a flyer and buy something for her daughter. Petitioner did not testify that the Gilly Hicks employee approached her for one of the Respondent's flyers or that Petitioner handed the woman one of Respondent's flyers. Rather, Petitioner testified that she took the Gilly Hicks flyer, started to walk into the store and then tripped on the two steps inside the doorway of the Gilly Hicks store. Petitioner testified that she was distracted by the woman and the lighted chandelier inside the store while entering the store.

In finding that Petitioner's fall did not arise out of Petitioner's employment, the Arbitrator notes that Petitioner was engaged in an act of personal comfort in that she was "on a coffee break." However, the Arbitrator finds that this sole fact does not provide a sufficient basis to find that Petitioner's fall arose out of her employment. Rather, the Arbitrator notes that there is nothing in the record to support the requisite finding of an increased risk attributable to Petitioner's employment such that the arising out of component is met. Although the Arbitrator finds that it is not unreasonable to assume Petitioner might hand out flyers or be incidentally approached by mall customers for a flyer outside of her assigned store while she walked through the mall on a break, Petitioner did not testify that was the case in this instance. Petitioner was not injured while handing out Respondent's flyers among the general public in the mall. The Arbitrator further notes that Petitioner did not fall on company premises or in the open mall but rather in the entryway of a store wholly unrelated to her job duties. Finally, Petitioner did not testify that she was in a hurry to return to Carson's while entering the unrelated store.

Further, the evidence does not support a finding that the fall occurred in the course of Petitioner's employment by Respondent. Although Petitioner was on a coffee break and fell during her work hours, the Arbitrator notes that Petitioner's deviation from work to personal activity occurred when she approached the Gilly Hicks employee for a flyer with the intent to enter the Gilly Hicks store and shop for her daughter. Petitioner did not testify that she approached the Gilly Hicks employee in order to give her a Clinique flyer but rather to obtain a Gilly Hicks flyer for her own personal use. Petitioner was in the middle of this personal deviation and had not reentered the course of her employment at the time she fell. Accordingly, the Arbitrator finds that Petitioner sufficiently deviated from a work activity to a personal pursuit breaking the link between her injury and her employment.

Finally, the Arbitrator finds that even if Petitioner had an accident that arose out of and in the course of her employment by Respondent, Petitioner's conditions of ill-being are not causally related to the accident or injury of 2/8/12. Based on the medical evidence, the Arbitrator finds Petitioner's left upper extremity injures to the left shoulder and left wrist are not causally related to her injury of 2/8/12. In so finding, the Arbitrator notes that Petitioner fell on the right side; the lack of any symptoms to the left shoulder or left elbow or left wrist at the time of the emergency room visit, and the lack of diagnosis or findings related to trauma rather than degenerative conditions or conditions more susceptible to repetitive type of trauma per her treating physician Dr. Puppala.

The Arbitrator further finds no causal connection for Petitioner's left knee or her right knee. Petitioner clearly had significant degenerative arthritis in both knees which long pre-existed this fall in February 2012. The Arbitrator notes Dr. Daley's causal opinion is based on the lack of Petitioner's complaints of knee symptoms in either knee before this fall followed by her temporal complaints after the fall. However, the Arbitrator finds that the strength of Dr. Daley's opinion on causal relationship is fatally diminished by his further testimony that the arthritic changes seen on the MRI and x-rays of the petitioner's right knee would not be interpreted as being

related to a recent trauma, that no meniscal tear was seen on the left knee during the arthroscopic surgery and that arthritic changes of the left knee would not be related to any recent trauma. PX#19, pp. 41,45-46.

Based on the Arbitrator's findings on the issues of Accident and Causal Connection, all remaining issues are moot, no findings are made on those issues and no benefits are awarded to Petitioner under the Act.

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

Woinshet Tamrat,
Petitioner,

vs.

NO: 12 WC 28697

Hilton Worldwide Inc.
Respondent,

16IWCC0530

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 employee/employer relationship, jurisdiction, accident, notice, temporary total disability, causal connection, medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2015, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $100.00. 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: AUG 10 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TAMRAT, WOINSHET
Employee/Petitioner

Case# **12WC028697**

16IWCC0530

HILTON WORLDWIDE INC
Employer/Respondent

On 10/8/2015, 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 0.06% 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:

5271 LEADERS LAW CENTER LLC
OWOLABI ALABA
30 E ADAMS ST SUITE 400
CHICAGO, IL 60603

1139 NOBLE & ASSOCIATES PC
MICHAEL MAHAY
3387 SHUMAN BLVD SUITE 210E
NAPERVILLE, IL 60563

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

Woinshet Tamrat
Employee/Petitioner

v.

Hilton Worldwide, Inc.
Employer/Respondent

Case # **12** WC **28697**

Consolidated cases: **N/A**

16IWCC0530

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 **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **6/18/15 and 7/22/15**. 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 _____

Woinshet Tamrat
12 WC 28697

16IWCC0530

FINDINGS

On **June 26, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$32,656.00**; the average weekly wage was **$628.00**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** 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

Petitioner has not proven, by a preponderance of the evidence, that an accident arose out of and in the course of her employment with Respondent, therefore, no benefits are awarded pursuant to the Act.

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.

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical expenses; 4) temporary total disability; and 5) the nature and extent of the injuries. *See,* AX1.

The Arbitrator notes that Ms. Tamrat is of Ethiopian descent and does not have a good grasp of the English language. The person who came with her is also of Ethiopian descent but could not act as a translator because she was not certified as such and also testified on the petitioner's behalf.

Ms. Woinshet Tamrat, ("Petitioner") testified she has been employed as a housekeeper by Hilton Worldwide, Inc., ("Respondent") for approximately eight (8) years and that her duties were to clean fifteen (15) rooms per day. She next testified she was working on June 26, 2012, cleaning a bathroom. and in the course of cleaning, she was using a sponge and a spray bottle to clean a wall. She testified that she, "... slipped, fell in wall and door hit me my back and my head, and then that happened." The arbitrator notes that although questioned on direct examination regarding the cause of her "slipping", petitioner did not testify to any defect as being the cause of the fall. Petitioner next testified that she felt dizzy after she fell. Tr. pp. 15-19.

Petitioner then testified she reported this injury to safety manager, Sylvia Zavala and was sent to Concentra Medical Center. The patient statement from Concentra dated June 26, 2012 indicates petitioner stated, "I fell at work hurting my back, shoulders, arms and right foot". Further, petitioner makes no complaints regarding her thumb. It also states under 'history of present illness' "The patient states that she was cleaning today when she started to shake and nearly passed out. The patient did not lose consciousness or fall over." She further stated, "She feels that her pain is due to the very long hours and consecutive days she has been working". The arbitrator notes this history does not corroborate petitioner's testimony regarding slipping and falling and indicates that the petitioner felt dizzy before she fell. PX2.

On July 12, 2012, Petitioner began treatment with her primary care doctor, James Diesfeld, at his office at Chicago Pain Medicine Center. Dr. Diesfeld authored three different consultation notes dated July 12, 2012. The original note appears at page 000073 of petitioner's exhibit #3 and was dictated on July 13, 2012. This note records a history of petitioner's illness and noted petitioner was being seen for evaluation and management of pain with insidious onset. Further, Petitioner denied any accident or injuries. Her chief complaint as recorded at this time is, "Right shoulder, low back, and right leg pain. There is radiation to both hands and fingers." There is no complaint of thumb pain or history indicating a work related accident occurred. The petitioner specifically denies an accident or trauma. PX3.

Dr. Diesfeld authored a second consultation note dated July 12, 2012 and it appears at page 000065 of petitioner's exhibit 3. This note is dictated on August 27, 2012 and the history of the present illness now reads, "...her symptoms began a few weeks ago when she was feeling dizzy at work and fell backwards hitting her head and back against the wall". Her chief complaints recorded at this time are, "Right thumb, wrist, neck and low back pain with right shoulder and right leg pain with radiation into

both hands and fingers." The chief complaints recorded in this note differ from the original consultation note authored by Dr. Diesfeld, on the date of the initial examination. There is no description of a cause of the dizziness or fall. Also, this history does not corroborate petitioner's testimony with regard to how the accident occurred. There is no mention of petitioner using a spray bottle or sponge. There is no mention of petitioner being in an awkward position to wipe the shower walls. There is no mention of a defect causing the petitioner to slip and fall.

Dr. Diesfeld authored a third consultation note dated July 12, 2012 and dictated on September 18, 2012. This note offers the chief complaints as being "Right shoulder and neck pain radiating into both hands and fingers, low back pain radiating into the right leg." Also, this note states petitioner, "... reports that she felt dizzy and fell backwards hitting her head against the wall." Again, this new incident description depicts petitioner having an idiopathic incident of feeling dizzy at work and falling backwards. There is no stated cause of the dizziness or the fall. Also, this history does not corroborate Petitioner's testimony with regards to how the accident occurred as there is no mention of petitioner using a spray bottle or sponge or being in an awkward position to wipe the shower walls. Also, there is no mention of any defect causing petitioner to slip. PX3, p. 000060.

Also, a review of the pain questionnaire contained in petitioner's exhibit # 3 at page 000099 states the following questions and answers:

Q: How and when did it begin?
A: 2 wks ago-Don't know

Q: Work or accident related?
A: N/A

The Arbitrator finds that the petitioner's testimony is not supported by the initial treating medical records regarding the mechanism of injury. At best, they document an idiopathic incident which has no relation to petitioner's work activities.

The petitioner testified that when she reported the incident to her supervisor, her supervisor, Sylvia Zavala, told her that if she reported a work-related accident and sought medical treatment for same; Respondent would terminated her employment. This case was bifurcated, over Petitioner's objection, so the Respondent could bring in Sylvia Zavala to testify.

Petitioner's witness

Kiros Tewolde-Gabriel, ("Kiros"), a leader within the Ethiopian community in the Chicago area, testified at trial. Kiros met Petitioner sometimes in August of 2012. She testified that she persuaded Petitioner to disclose to her doctors the facts of her injuries at work. She also testified that Petitioner told her that she feared Silvia Zavala, the Hilton Hotels Security Manager, because she had threatened her with the loss her job, if she disclosed facts of her injuries.

Kiros testified that she had recently retired after 28 years of working for the City of Chicago, in the office of Mayor Harold Washington and for the Chicago Police Department. Kiros testified that she felt that it was only by telling the truth of the injury that Petitioner could receive proper care from her doctors. Tr. pp. 78-94.

Respondent called Ms. Sylvia Zavala, who testified that she was the respondent's night and safety manager, at the time of this incident. She also was the person taking the workers' compensation claims for the respondent. Ms. Zavala testified that she met with petitioner on June 29, 2012 and had a conversation regarding the injury petitioner reported. This witness authored an email on June 30, 2012 confirming the conversation. Ms. Zavala noted in her email and testimony that petitioner "...reported she was experiencing pain in multiple areas of her body. Ms. Tamrat reports she did not have an injury but believes this pain to be caused by repetitive lifting, wiping, pushing, pulling." Tr. 26, RX18.

Ms. Zavala testified that she did not see Petitioner on the day of the injury. Zavala claimed she was out. Petitioner's testimony was that she talked to Ms. Zavala in her office, the day of the incident, Ms. Zavala threatened her; then called a cab that took her to Concentra. Ms. Zavala could not remember if she called a cab for the petitioner to go to Concentra.

Although, Zavala testified that she discussed with Petitioner, an injury sometimes after June 26, 2012, Zavala testified that she had no records of the actual discussion with Petitioner after the fall on June 26, 2012, save a certain email. Ms. Zavala remembered that she took notes during her discussions with Petitioner, but testified at trial that she did not keep those notes.

Ms. Zavala denied that she in any way attempted to direct or control petitioner's medical treatment and denied directing petitioner what to tell the doctor regarding this incident. Ms. Zavala testified to her extensive experience dealing with workers' compensation claims for respondent and the companies policies related thereto.

CONCLUSIONS OF LAW

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

A decision by the Commission cannot be based upon speculation or conjecture. *Deer and Company v. Industrial Commission,* Ill.2d 144, 265 N.E.2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of technology v. Industrial Commission,* 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a causal connection between work and the alleged condition of ill-being, compensation must be denied.

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).
The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances [emphasis added] support the decision. See generally, *Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill. App. 3d 665, 674 (2009).

Although the Arbitrator does not disbelieve the petitioner's version of events regarding what was said to her about filing a worker's compensation claim, because the petitioner chose not to tell her doctors the truth as she testified, the medical records do not support a finding that the petitioner suffered a work-related accident. The Arbitrator finds that the petitioner has not proven, by a preponderance of the evidence, that her condition of ill-being arose out of and in the course of her employment with Respondent. Therefore, no benefits are awarded pursuant to the Illinois Workers Compensation Act. Having found that the petitioner has not proven an accident, the remaining issues are moot and will not be addressed.

16IWCC0530

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
12WC38697
SIGNATURE PAGE

Signature of Arbitrator

October 7, 2015
Date of Decision

OCT 8 - 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ 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

Jeffrey Swieter,

Petitioner,

vs.

NO: 12 WC 29658
13 WC 07930

Hribar Brothers Trucking and R & D Express,

16IWCC0563

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of average weekly wage, penalties, fees, employee/employer relationship, temporary total disability, medical, prospective medical, petition for reimbursement and being advised of the facts and law, 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 4, 2015, is hereby affirmed and adopted.

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

Confidential

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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.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $58,700.00. 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: AUG 3 0 2016
o082516
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

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

SWIETER, JEFFREY
Employee/Petitioner

Case# **12WC029658**

13WC007930

HRIBAR BROTHERS TRUCKING AND R & D EXPRESS
Employer/Respondent

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On 12/4/2015, 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 0.41% 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:

0926 LEONARD LAW GROUP LLC
ANDREW LEONARD
300 S ASHLAND AVE SUITE 101
CHICAGO, IL 60607

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST 2ND FL
ROCKFORD, IL 61101

0000 R & D EXPRESS
LARRY ROBERTSON
333 LEXINGTON AVE
FOX RIVER GROVE, IL 60021

2965 KEEFE CAMPBELL BIERY & ASSOC
LINDSAY R VANDERFORD
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jeffrey Swieter
Employee/Petitioner

v.

Hribar Brothers Trucking and R & D Express
Employer/Respondent

Case # **12** WC **29658**

Consolidated cases: **13 WC 07930**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Waukegan**, on **September 15, 2015** and in the city of **Rockford on October 8, 2015** . 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. [x] Were Respondents operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [x] Was there an employee-employer relationship?
C. [x] 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. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Berkley Risk Coverage for R & D Express**

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FINDINGS

On the date of accident, **August 15, 2015**, Respondents *were* operating under and subject to the provisions of the Act.

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

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 Respondents.

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

In the year preceding the injury, Petitioner earned $24,681.87; the average weekly wage was **$548.49**.

On the date of accident, Petitioner was **50** years of age, *single* with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary 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

Respondents shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,029.00 to Midwest Orthopedics at Rush, as provided in Sections 8(a) and 8.2 of the Act.

Respondents shall authorize and pay for additional reasonable and necessary treatment for Petitioner consistent with the current recommendations of Dr. Singh including the recommended surgery, consisting of an anterior cervical discectomy and fusion at C4-5 and C6-7 with plate removal and re-instrumentation from C4-7, and other reasonable, necessary and causally connected treatment prescribed.

Respondents shall pay Petitioner temporary total disability benefits of **$365.66**/week for **160 2/7** weeks, commencing August 20, 2012 through September 15, 2015, as provided in Section 8(b) of the Act.

Hribar Brothers Trucking and R & D Express are jointly and severally liable for payment of this award. Respondent Hribar Brothers Trucking, as the borrowing employer, is primarily responsible for payment of the award and R & D Express, as the loaning employer, is secondarily responsible for payment of the award. Berkley Risk does not provide coverage for the accidental injuries sustained by Petitioner and has no responsibility to indemnify R & D Express in this matter.

The Petition for Penalties and Attorneys Fees is denied.

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

December 1, 2015
Date

ICArbDec19(b)

DEC 4 - 2015

Statement of the Case

Petitioner has filed two separate Applications for Adjustment of Claim with respect to the accident alleged on August 15, 2015 (Arb Ex 2 and 3). These applications were amended on July 1, 2015 naming Respondents Hribar Brothers Trucking and R & D Express as employers pursuant to Section 1(a)4 of the Act. These claims were consolidated and this single decision with respect to the accident date of August 15, 2012 is being issued.

The Arbitrator notes that R & D Express was properly served with the Request for Hearing in this matter and has not filed an appearance. Mr. Larry Robertson, the President of R & D Express, appeared on September 15, 2015 pursuant to subpoena and was advised of the right to appear and defend this matter. He advised the Arbitrator that he did not wish to do so. Mr. Robertson was present during the testimony and was called as a witness by Petitioner and testified at the hearing on September 15, 2015. He did not appear for the close of proofs on October 8, 2015. Counsel appeared for Berkley Risk on the issue of whether they provided coverage for R & D Express on the date of the accident.

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Statement of Facts

Petitioner Jeffrey Swieter testified that he began working as a truck driver for Respondent R&D Express (hereinafter "R&D") in May, 2010. R & D is located in Fox River Grove, Illinois. Larry Robertson is the principal owner of R&D and was at all times Petitioner's immediate supervisor. Larry Robertson testified that Petitioner's Exhibit 10 is his personnel file for the Petitioner. The exhibit includes an application for employment dated May 19, 2010, W-4 and I-9 forms. Petitioner also completed a drug screen and driver's license check.

On March 28, 2011, R&D entered into a lease agreement with Respondent Hribar Brothers Trucking (hereinafter "Hribar"). Hribar is located in Caledonia, Wisconsin. The lease agreement (PX 9) called for R&D to lease a certain 1998 Freightliner with a Vehicle Identification Number 1FUYDSEB1WL802067 to Hribar. The lease agreement also called for R&D to lease a driver and/or drivers to operate this equipment. The lease provided that Hribar had exclusive possession, control and use of the equipment and shall assume complete responsibility for the operation of the equipment for the duration of the lease. At Larry Robertson's direction, Petitioner applied for the job of a truck driver at Hribar on March 8, 2011. The application materials from Hribar were admitted as Petitioner's Exhibit 5. In addition to the application itself, Petitioner had a drug screen and physical examination. He had a license check and road test. He signed a non-compete agreement. Petitioner completed Hribar's application process and Hribar hired Petitioner as a driver on March 28, 2011 which was also the same day R&D and Hribar executed their lease agreement.

Beginning on March 28, 2011, Petitioner drove R&D's tractor and made various pick-ups and deliveries with Hribar's trailers to Hribar's customers. He would keep the tractor at a yard near his home. The trailers were in the Hribar Caledonia yard. He would delivery empty trailers to pick up fly ash for power plants. He would deliver to job sites. He would do one or two runs per day. He never had runs that took more that one day. Petitioner testified Hribar set his work schedule which determined when Petitioner would start and stop working. Petitioner could determine the route to take for delivery of the loads. Petitioner testified he called Hribar's dispatch the night before and was given work orders for the following day. Petitioner testified he did not have to confirm Hribar's work orders with anyone from R&D. Petitioner testified throughout his work week Larry Robertson and employees and management from R&D were not present. Petitioner testified he was aware he could be disciplined by Hribar if he violated any of Hribar's employment terms. Petitioner testified he believed Hribar had the authority to fire him from their employ without the consent of R&D. Petitioner testified that he did not think Hribar could fire him from the employ of R&D. Larry Robertson testified he relinquished control of his equipment, of Petitioner, and of the right to control either to Hribar.

Petitioner testified he was paid by R & D. He received a percentage of the load. The driver rate was 30%. If there was a problem with the tractor, he would contact R & D. If there was a problem with the trailer, he would contact Hribar. Tolls were paid by R & D. Every Friday he would turn in his paperwork to R & D and pick up his check.

On August 15, 2012 while in Carol Stream, Illinois, Petitioner noticed the computer in the cab of his truck was not working. He exited his vehicle and attempted to fix the antenna on the top of his truck. As he climbed around the outside of his truck up some steps he slipped. He grabbed the railing with his left hand and injured his neck. Petitioner testified that he notified Larry Robertson from R&D and a dispatcher at Hribar of the accident. Larry Robertson testified that Petitioner called him on Monday, August 20, 2012.

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On August 20, 2012, Petitioner sought medical attention at the Central DuPage Hospital Emergency Department (PX 2). Petitioner presented with a consistent history of the accident. He complained of right sided neck pain. He denied numbness or tingling. His history included a cervical fusion several years ago with no neck problems since. He was diagnosed with a cervical strain. He was given medication, advised to avoid heavy lifting and advised to follow up with his own physician in five to seven days if his pain persisted.

Petitioner saw Dr. Kern Singh at Midwest Orthopedics at Rush on August 23, 2012. Dr. Singh's records were admitted as Petitioner's Exhibit 3. Petitioner provided a consistent history of accident and complaints of sharp pain with range of motion and tingling into his third and fourth digits. He advised Dr. Singh of the prior fusion in 1999. Dr. Singh recommended a cervical MRI. He took Petitioner off work. His report states that the condition is causally related to the accident. Petitioner had a cervical MRI on August 27, 2012. The test was read as showing the previous C5-6 fusion and moderate stenosis at C4-5 and moderate to severe stenosis at C6-7. On August 27, 2012, Dr. Singh reviewed the MRI, examined Petitioner, and kept him off work, and recommended physical therapy for four weeks and a follow up visit in four weeks.

Petitioner returned to Dr. Singh on March 17, 2014. Petitioner reported he was denied authorization at that time for therapy or any treatment. He now was complaining of increased neck pain radiating down the left arm as well as right arm weakness. Dr. Singh recommended a CT scan and kept Petitioner off work. Petitioner testified he was seen for Respondent's Section 12 examination by Dr. Jay Levin in February, 2015. Petitioner had a cervical CT scan on April 1, 2015. He saw Dr. Singh on April 1, 2015 with worsening neck pain and upper extremity dysethesias. Dr. Singh reviewed the CT scan which showed a solid fusion on C5-6, but severe kyphosis at C4-5 and severe disc space collapse at C6-7. Dr. Singh recommended an anterior cervical discectomy and fusion at C4-5 ad C6-7 with plate removal and re-instrumentation from C4-7 as Petitioner had a prior C5-6 fusion.

Petitioner returned to see Dr. Singh on August 27, 2015. Dr. Singh referenced the Dr. Levin February 20, 2015 examination report. Hribar did not introduce Dr. Levin's report. Dr. Singh states that Dr. Levin agrees that there are acute changes on the MRI following the cervical fusion and a CT scan would help in determining the need for additional surgery. He again recommends surgery and notes Petitioner was placed on the surgical schedule.

Petitioner testified he has not worked since August 20, 2012. He has not received any workers compensation. He did apply for and receive six months of unemployment compensation. He has been borrowing from his sister and brother. He wants the surgery Dr. Singh recommended if it is authorized.

Berkley Risk admitted a notice of cancellation of insurance effective 12:01 AM on August 15, 2012 (Ex 1) and a denial of coverage dated September 3, 2012 (Ex 3).

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Conclusions of Law

In support of the Arbitrator's decision with respect to (A) Operating under the Act, the Arbitrator finds as follows:

Petitioner testified credibly that he was working as a truck driver at the time of his accidental injuries on August 15, 2012. Section 3(3) of the Act specifically includes carriage by land and loading or unloading in conjunction therewith in the automatic coverage of the Act. Petitioner's occupation is therefore a covered occupation under the Act. Petitioner testified that he was hired by R & D Express in May, 2010. The contract for hire was made in Illinois. Petitioner also testified that the accident on August 15, 2012 occurred within Illinois. Therefore, the accidental injuries sustained on August 15, 2012 fall within the jurisdiction of the Illinois Workers' Compensation Act pursuant to Section 1(b)2 of the Act.

Based upon the record as a whole, the Arbitrator finds that, at the time of Petitioner's accidental injuries on August 15, 2012, the Respondents herein Hribar Brothers Trucking and R & D Express were operating under and subject to the Illinois Workers' Compensation Act.

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

The Arbitrator notes that the Commission has concurrent jurisdiction to address coverage disputes in Workers' Compensation cases. Berkley Risk submitted evidence that they issued a policy of insurance to R & D Express for the policy period of March 17, 2012 through March 17, 2013. Berkley Risk also provided proper notice of cancellation effective August 15, 2012 at 12:01 AM to R & D Express on June 11, 2012. Petitioner testified that his accident occurred after 12:01 on August 15, 2012. The policy of insurance had therefore been cancelled before the accidental injuries sustained.

Based upon the record as a whole, the Arbitrator finds that at the time of said accidental injury, the policy of insurance by Berkley Risk for R & D Express had been cancelled. Berkley Risk does not provide coverage for the accidental injuries sustained by Petitioner and has no responsibility to indemnify R & D Express in this matter.

In support of the Arbitrator's decision with respect to (B) Employer/Employee, the Arbitrator finds as follows:

Petitioner has amended his Applications for Adjustment of Claim alleging that he was employed by R & D Express and Hribar Brothers Trucking under a borrowing/lending employer theory pursuant to Section 1(a)4 of the Act. Petitioner's testimony, corroborating by Mr. Robertson, is uncontested that he was hired as a truck driver by R & D Express in May, 2010 and continued in their employ through the date of the accident.

The disputed issue is whether Petitioner was loaned by R & D Express and was a borrowed employee if Hribar Brothers Trucking. The inquiry required for the determination of the existence of the loaned-employee status is two-fold: (1) whether the special employer had the right to direct and control the manner in which Petitioner performed the work; and (2) whether there existed a contract of hire between Petitioner and Respondent Hribar Brothers Trucking.

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Petitioner's unrebutted testimony was that he was assigned exclusively to drive loads for Hribar after March 28, 2011 through the date of accident. He contacted the Hribar dispatcher each night to obtain his assignment for the next day. He was instructed by Hribar as to where he should pick up or deliver the load. Mr. Robertson also testified that he relinquished control of his tractor and driver to Hribar. While Petitioner had certain discretion as to the route he took, and the maintenance of the tractor was R & D Express's responsibility, there was no evidence presented to dispute Petitioner's testimony that the Hribar dispatcher controlled his daily assignments. Paragraph 3 of the Hribar Brothers Lease Agreement specifically states that they have the exclusive possession, control and use of the equipment.

With respect to whether or not there was an express or implied contract of hire between the employee and the alleged borrowing employer, Petitioner applied for employment for Hribar including filling out an application for employment, going through a background check, and submitting himself for a physical examination and drug screen. Petitioner testified he was aware he was applying for work during the application process. Petitioner's employment file from Hribar supports Petitioner's testimony. The testimony and evidence also confirms Petitioner knew Hribar generally controlled and/or was in charge of his work. Petitioner accepted and followed direction from Hribar.

The Arbitrator finds the facts of this case similar to the recent holding in *Steel & Machinery Transportation, Inc. v. IWCC*, 33 N.E.3d 674; 2015 Ill. App. LEXIS 329; 392 Ill. Dec. 873 (1st Dist., 2015). Although the Petitioner in that matter signed a document entitled Independent Contractor Agreement, the Court affirmed the Commission finding of an employer/employee relationship. The Court found significant that the Agreement expressly provided that claimant's equipment was for Respondent's "exclusive possession, control and use for the duration of [the] Agreement." While Respondent in that matter purported to include this language in the Agreement solely to conform to federal regulations, it does not diminish the fact that Respondent had the right to control claimant's activities. Further, it is undisputed that, between his date of hire and the date of the accident, claimant never actually hauled goods for any other carrier. Other indicia of control evincing an employment relationship include a "pre-qualification" process, which involved completing an application, undergoing a medical examination, and submitting to a drug test.

The Commission found a borrowing/lending employment relationship in a similar fact situation in *Anthony Stanley v. J.R. Auto Transportation and Fleet Car Lease*, 13 IWCC 518; 2013 Ill. Wrk. Comp. LEXIS 587 (Employer/Employee affirmed, Notice reversed in *J.R. Auto Transportation* v. *IWCC et al.*, 2015 IL App (3d) 140198WC-U; 2015 Ill. App. Unpub. LEXIS 1688). See also *Larry Petrak v. Klemm Tank Lines*, 12 IWCC 749; 2012 Ill. Wrk. Comp. LEXIS 787 (Affirmed *Klemm Tank Lines v. Larry Petrak and IWCC,* 2015 IL App (1st) 140352WC-U; 2015 Ill. App. Unpub. LEXIS 2243).

Based upon the record as a whole, the Arbitrator finds that Petitioner was employed by R & D Express as a loaning employer and by Hribar Brothers Trucking as a borrowing employer. Therefore, pursuant to the provisions of Section 1(a)4 of the Act, R & D Express and Hribar Brothers are jointly and severally liable for the benefits awarded herein.

The Arbitrator has reviewed the testimony and documents presented, and does not find any agreement shifting the responsibility in this matter. The addition of Petitioner to R & D coverage submitted as Hribar Exhibit 4 is unpersuasive as that document was prepared before the agreements with Hribar were executed in March, 2011. The Arbitrator therefore finds, pursuant to the provisions of Section 1(a)4 of the Act, that Hribar

16IWCC0563

Brothers Trucking is primarily liable and R & D Express is secondarily liable for the benefits due and owing to Petitioner.

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

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of" employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury. The Arbitrator finds that Petitioner's testimony in this matter is credible and unrebutted.

Petitioner testified that on August 15, 2012 he exited his vehicle and attempted to fix the antenna on the top of his truck. As he climbed around the outside of his truck up some steps he slipped. He grabbed the railing with his left hand and injured his neck. This history is consistently repeated in the medical records. This event occurred during employment and at a place where the claimant may reasonably perform employment duties. It originated from a risk connected with, or incidental to, the employment.

Based upon the record as a whole, the Arbitrator finds that Petitioner sustained an accidental injury arising out of and in the course of his employment on August 15, 2012.

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

Petitioner testified that he provided notice of his accident to Larry Robertson of R & D Express and to the dispatcher for Hribar Brothers Trucking. Larry Robertson testified that he received a telephone call from Petitioner on August 20, 2012. He prepared an Employer's First report of accident on that August 23, 2012. Hribar presented no evidence to rebut Petitioner's credible testimony.

Based upon the record as a whole, the Arbitrator finds that Petitioner provided notice of accident pursuant to the provisions of the Act to Respondents R & D Express and Hribar Brothers Trucking.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner testified that as a result of the accidental injuries sustained on August 15, 2012, he developed pain in his neck. He sought treatment beginning August 20, 2012 with a consistent history of accident and complaints. Petitioner's symptoms increased to include radiation into his arms. Petitioner's history includes a prior cervical fusion at C5-6 in 1999. There was no evidence presented of complaint or treatment prior to the accident. Petitioner had been working his regular job for at least two years. It is well established that prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident.

Dr. Singh has treated Petitioner. He was advised of the prior fusion. He opined that Petitioner's current condition is causally connected to the accident. No other medical opinions were offered in this matter.

16IWCC0563

Based upon the record as a whole, the Arbitrator finds that Petitioner's condition of ill being is causally connected to the accidental injuries sustained on August 15, 2012.

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

Petitioner's Exhibit 7 contains Petitioner's R&D pay sheets documenting the wages Petitioner earned while working for Hribar during the fifty-two weeks preceding the August 15, 2012 accident date. The exhibit documents earnings of $24,681.87 for the year preceding the accident. Petitioner testified he was "on-call" while employed at Hribar. He would call dispatch the night before and was given his work schedule for the next day. Petitioner was paid by 30% percent of the load he hauled. He was not paid hourly. Although Petitioner testified he spoke with the Hribar dispatcher every day Monday through Friday, Petitioner did not testify that he was guaranteed a load every day or any particular number of loads per week. He did not testify to a regular 5 day work week. The Lease Agreement in paragraph 8 states that shipments will be available from time to time and that no agreement to furnish any specific number of loads is made. Petitioner's Exhibit 7 documents Petitioner received compensation in 45 weekly pay periods. There is no payroll for weeks during the period from the week ending February 11, 2011 until the week ending April 29, 2012. Dividing Petitioner's earning by the 45 weeks worked results in an average weekly wage of $548.49.

Based upon the record as a whole, the Arbitrator finds that Petitioner's average weekly wage pursuant to Section 10 of the Act is $548.49 per week.

In support of the Arbitrator's decision with respect to (J) Medical and (K) Prospective Medical, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Causal Connection, the Petitioner has established that the condition of ill being in his neck and upper extremities is causally connection to the accidental injuries sustained on August 15, 2012. The Petitioner submitted the medical records of the Central DuPage Hospital Emergency Department and Dr. Singh. The Arbitrator finds that the treatment provided is reasonable, necessary and causally connected to the accident based upon the medical records submitting and particularly the opinions of Dr. Singh. No other medical opinions were admitted to rebut the findings and opinions of Dr. Singh.

The records of Central DuPage Hospital (PX 2) do not include any unpaid bills. The records of Midwest Orthopedics at Rush (PX 3) include billing totaling $3,029.00 for treatment on August 23 and August 27, 2012.

Based upon the unrebutted opinion of Dr. Singh, Petitioner remains in need of prospective medical care including the recommended surgery, consisting of an anterior cervical discectomy and fusion at C4-5 and C6-7 with plate removal and re-instrumentation from C4-7.

Based upon the record as a whole, the Arbitrator finds that Respondent is to pay reasonable, necessary and causally connected medical bills of $3,029.00 pursuant to the provisions of Section 8(a) and 8.2 of the Act and further, that Respondent shall be responsible for reasonable and necessary prospective medical care recommended by Dr. Singh including surgery consisting of an anterior cervical discectomy and fusion at C4-5

and C6-7 with plate removal and re-instrumentation from C4-7 and other reasonable and necessary related treatment prescribed.

In support of the Arbitrator's decision with respect to (L) Temporary Compensation, the Arbitrator finds as follows:

Petitioner testified that he has been off work since August 20, 2012 when he first sought medical treatment. Central DuPage Hospital placed Petitioner on restricted duty on August 20, 2012. Dr. Singh took Petitioner off work as of August 23, 2012. At no time has Petitioner been released to return to work. No offer of work has been extended by either Respondent. Based upon the Arbitrator's findings with respect to Causal Connection and Prospective Medical, the Petitioner is not at maximum medical improvement.

Based upon the record as a whole, the Arbitrator finds that Petitioner is entitled to temporary total disability from August 20, 2012 through September 15, 2015, being the date of the hearing in this matter, a period of 160 2/7 weeks.

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

Although the Arbitrator has found that Hribar Brothers Trucking is primarily liable herein, the Arbitrator notes that contrary evidence to this finding of employment was presented including Petitioner's statements to all medical providers that he was employed by R & D Express. The agreement between R & D Express and Hribar Brothers Trucking specifically delineates the relationship as that of independent contractor in paragraph 6.

The Arbitrator notes that the Court in *Steel & Machinery Transportation, Inc., supra,* stated that the question of whether a claimant is an employee remains one of the most vexatious in the law of workers' compensation. The difficulty arises from the fact-specific nature of the inquiry. Notably, many jobs contain elements of both an employment and an independent-contractor relationship. Since there is no clear line of demarcation between the status of an employee and an independent contractor, no rule has been, or could be, adopted to govern all cases in this area. The Arbitrator also notes that this decision was not unanimous and that there was a vehement dissent written.

The Arbitrator also notes that there is conflicting and contrary case law to *Steel & Machinery Transportation, Inc.,* and that that case was not decided until three years after the accident in the current claim. The Arbitrator also notes that the amended Applications for Adjustment of Claim advancing the borrowing/lending theory were not filed until July, 2015.

Based upon the record as a whole, the Arbitrator finds that the denial of benefits in this matter was not unreasonable or vexatious and was in good faith and supported by evidence in the agreements and conduct of the parties and some cited case law addressing an this difficult issue of law. The petition for penalties and attorneys fees is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary A. Drevdahl,

Petitioner,

vs.

NO: 12 WC 30002

Hononegah Community High School District #207,

16IWCC0527

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, extent of temporary total disability, nature and extent of permanent disability and medical expenses and being advised of the facts and law, corrects the clerical error of 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 notes that the main issue in this case is whether Petitioner's condition of ill-being resolved when she returned to work on September 28, 2011. Dr. Klein discussed with Petitioner about getting a right shoulder MRI/arthrogram on August 23, 2011, which she declined at that time. On September 20, 2011, Dr. Klein released Petitioner to return to work at full duty effective September 29, 2011. Petitioner continued physical therapy through October 4, 2011. Petitioner testified that she did improve with physical therapy and she did return to work. However, she still had significant pain while performing certain activities, particularly mopping. On January 19, 2012, Petitioner saw Dr. Fanopoulos, a rheumatologist she had been seeing for a number of years for arthritis in her knees and feet. At that time, Petitioner complained of her feet, but also reported right shoulder pain that was worse than the pain in her feet.

16IWCC0527

On March 21, 2012, Petitioner saw Dr. Fanopoulos and complained of continued right shoulder pain and tingling. A right shoulder ultrasound was ordered and performed on March 22, 2012, which revealed a full-thickness tear of the supraspinatus tendon with subscapularis bursitis. Dr. Fanopoulos ordered a right shoulder MRI, which was done on April 3, 2012 and showed a torn and retracted supraspinatus tendon, subscapularis tendinopathy and a thinned or torn proximal biceps tendon. Dr. Fanopoulos referred Petitioner to orthopedic surgeon Dr. Johnson, who subsequently performed surgery on May 24, 2012. Petitioner attended post-operative physical therapy. Petitioner returned to work full duty on September 17, 2012. Petitioner's evaluator Dr. Wolin opined causal connection, that Petitioner's condition had not resolved between the time she returned to work on September 28, 2011 and when she sought treatment with Dr. Fanopoulos on January 19, 2012. §12 Dr. Levin opined that Petitioner's condition did resolve.

The Commission affirms the Arbitrator's finding of causal connection. Given the nature of Petitioner's job duties, it is understandable and predictable that her right shoulder pain would continue after she returned to work full duty on September 28, 2011. Petitioner continued to live with the pain and continued working into the fall/winter of 2011. There is no evidence of an intervening accident.

The Commission notes that on the face sheet, the Arbitrator found accident arising out of and in the course of Petitioner's employment on June 17, 2011. However, the Arbitrator awarded TTD from June 16, 2011. Petitioner testified that the accident occurred on June 16, 2011. The medical records indicate a date of accident of June 16, 2011. The Application for Adjustment of Claim notes a date of accident of June 16, 2011. Therefore, the Commission corrects the clerical error in the date of accident to reflect the correct date of June 16, 2011. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 14, 2015 is hereby affirmed and adopted with the above noted correction of clerical error.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $339.35 per week for a period of 31-4/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $90,534.94 for reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $305.45 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 10%.

16IWCC0527

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $5,335.94 in TTD benefits

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. 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: AUG 10 2016
MB/maw
o07/07/16
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DREVDAHL, MARY A
Employee/Petitioner

Case# **12WC030002**

16IWCC0527

HONONEGAH COMMUNITY HIGH SCHOOL DISTRICT #207
Employer/Respondent

On 8/14/2015, 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 0.24% 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:

0529 TUITE & ASSOCIATES
GREG E TUITE
PO BOX 59
ROCKFORD, IL 61105

1109 GARFALO SCHREIBER & STORM
LAURA D HRUBEC
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

16IWCC0527

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

☐ 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

Mary A. Dreydahl
Employee/Petitioner

v.

Hononegah Community High School District #207
Employer/Respondent

Case # **12** WC **30002**

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 **George Andros**, Arbitrator of the Commission, in the city of **Rockford**, on **JUNE 18, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 17, 2011**, 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 **$26,472.16**; the average weekly wage was **$509.08**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** 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 **$5,335.94** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,335.94**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $339.35/week for 31 4/7 weeks, commencing 6/16/11 through 9/28/11 and 5/24/12 through 9/16/12, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $90,534.94 pursuant to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act

Respondent shall pay Petitioner permanent partial disability benefits of $305.45/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall be given credit for $5,335.94 for TTD benefits paid under Section 8(b) of the Act.

Respondent shall pay Petitioner compensation that has accrued from June 16, 2011 through 6/18/15, and shall pay the remainder of the award, if any, in weekly payments.

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.

George Andros
Signature of Arbitrator

JUNE 14TH, 2015
Date

AUG 14 2015

FINDINGS OF FACTS 12 WC 30002

On June 16, 2011, Petitioner, Mary Ann Drevdahl was employed as a custodian for the Hononegah Community High School. This job included general maintenance of the classrooms and hallways. During the summer months, the custodial staff would perform a more intensive custodial cleaning. This included moving school desks in order to fully clean the classrooms.

Ms. Drevdahl sustained an undisputed injury on June 16, 2011. She testified that she went to grasp an upside down desk by the legs in order to flip it over. During the process the desk began to slip. She attempted to keep it from falling by grabbing the leg of the desk with her right arm. She is right hand dominant. She felt a pop in her shoulder as well as immediate pain in the front and top of the shoulder. Petitioner immediately reported the incident to Tim White, her supervisor. She and Mr. White completed an accident report that was admitted into evidence as Petitioner's Exhibit 2. This document corroborated Ms. Drevedahl's testimony regarding the mechanics of the injury.

Her supervisor directed her to receive care at NorthPointe Immediate Care. (PX 3). A review of these records also shows a history consistent with what Ms. Drevdahl testified to at trial. Ms. Drevdahl was examined by Dr. Andreakos who took a history, performed an examination, and ordered an x-ray of the right shoulder. The x-ray showed no acute processes and only mild degenerative changes. (PX 6-0008). Dr. Andreakos diagnosed a shoulder sprain and referred her to Dr. Klein, a physiatrist for a follow-up in seven days. In addition, he suggested that she take ibuprofen and use ice on the shoulder area. Petitioner initially received treatment on June 20, 2011 with Dr. Anjum, her primary physician, at the Beloit Health Systems Westside Clinic. She indicated that she tried to get an appointment with Dr. Klein, but he was out of the office through the end of June. She told Dr. Anjum that her pain was "too much" and that she was unable to work. Dr. Anjum diagnosed a right shoulder injury. He placed restrictions on her and directed her to follow-up with Dr. Klein. The employer was unable to accommodate the restrictions and temporary total disability benefits were initiated.

Ms. Drevdahl initially saw Dr. Klein on July 5, 2011. (PX 4-0003). He also took a history that was consistent with Petitioner's testimony. Dr. Klein noted pain and weakness in the right shoulder, as well as a shooting pain that went up her right arm. He found an impingement in the right shoulder with forward flexion and abduction, as well as tenderness at the rotator cuff insertion, biceps tendon and AC joint. Yergason's test was also positive. (PX 4-007). His initial diagnosis was "right biceps tendonitis/AC sprain" along with questionable carpal tunnel syndrome. He continued the work restrictions and indicated he would consider physical therapy after the next visit.

Petitioner returned to Dr. Klein on July 19, 2011. Ms. Drevdahl told Dr. Klein that there had not been much change in her condition. She indicated that she had numbness and tingling in her right arm and hand and weakness in her right shoulder and biceps muscle. She further indicated that had difficulty sleeping because of shoulder pain. Dr. Klein noted continued impingement with forward flexion and abduction. There was tenderness and reproduction of symptoms with palpation of the right rotator cuff, biceps tendon, and AC joint. At that point, Dr. Klein diagnosed right biceps tendonitis, an AC joint sprain and a questionable labrum tear. (PX 4-0017). Dr. Klein continued the work restrictions and started her on a formal physical therapy program.

The initial physical therapy evaluation took place at NorthPointe. Ms. Drevdahl had previously received extensive physical therapy at NorthPointe to her opposite left shoulder through May 9, 2011. Those records are in evidence as PX 11. Once again, the history contained in the initial right shoulder evaluation is consistent with that testified to at trial. During the initial evaluation she reported continued aching of the right shoulder as well as tingling in the arm, wrist and hand. In addition, she noted a feeling of weakness in the right upper extremity when lifting objects. The Speed's and Empty Can tests were both positive at that time.

Dr. Klein next saw her on August 2, 2011. At that point she was somewhat improved with therapy and medications, but Dr. Klein continued her work restrictions. Physical therapy was continued as well. An August 8, 2011 evaluation at NorthPointe noted shoulder joint pain at 5/10 with rest and 8/10 with activity. The Speed's test was still positive and there was tenderness over the AC joint and right biceps tendon. (PX 4-00025). On August 23 he noted no change in her pain complaints; she still had right shoulder impingement with forward flexion and abduction. There was still tenderness at the AC joint and biceps tendon. An MRI/arthrogram was offered; she wished to hold off on that. (PX 4-0028). The physical therapy program was continued along with the work restrictions.

On September 20, 2011. (PX 4-0038). She indicated that she was better and that she was still attending therapy twice a week and performing home exercises on a daily basis. Dr. Klein told her to continue her therapy and home exercise program. He released her to return as needed and allowed her to return to full duty work as of September 29, 2011. She did return to work at her normal job on the 29th. She was then discharged from physical therapy on October 4, 2011. (PX 10-0043). At that time, she was complaining of continued pain in the shoulder at a level of 2/10 at rest and 5/10 with activity. She noted that overhead activity exacerbated the problem. The examination noted that the Speed's test was still positive, while improvements had been made in strength and range of motion. Continued PT was recommended. PT did improve her condition and she was able to return to work on September 29, 2011. She further testified that despite the improvement, she still had significant pain when performing certain activities, particularly with mopping.

On September 19, 2012, she saw Dr. Fanopoulos, a rheumatologist with Beloit Health Systems. Dr. Fanopoulos had treated her for a number of years for arthritis in her knees and feet. (PX 7). A review of his records shows that he was treating her in the Fall of 2011 with injections into both knees. Ms. Drevdahl saw Dr. Fanopoulos on January 19, 2012 for her feet, but reported that her shoulder pain was worse than her feet. Ms. Drevdahl returned to Dr. Fanopoulos on March 21, 2012. At that time, she complained of continuing pain in the right shoulder. She indicated that it was waking her up at night and she was having some tingling. Dr. Fanopoulos prescribed a right shoulder ultrasound. He questioned whether there was right shoulder tendonitis or bursitis. The ultrasound was performed on March 22, 2012, and revealed a full-thickness tear of the supraspinatus tendon with subscapularis bursitis. Ms. Drevdahl reviewed the results of the ultrasound with Dr. Fanopoulos that afternoon. He then recommended an MRI of the right shoulder, which was performed on April 3, 2012. This revealed a torn, retracted supraspinatus tendon, subscapularis tendinopathy and a thinned or torn proximal biceps tendon.

Ms. Drevdahl was subsequently referred to Dr. Leighton Johnson, an orthopedic surgeon with the Beloit Health System. Dr. Johnson was seen on April 10, 2012. Dr. Johnson's records also contain the history of a work injury the previous summer. He also noted that she was able to return to work as a custodian, but continued to have pain especially at nighttime in the right shoulder. She also told him she had regained quite a bit of motion and did not feel as weak. Dr. Johnson suggested that she consider having surgery on the shoulder. This was discussed with Dr. Johnson again on April 24, 2012.

On May 24, 2012, Dr. Johnson performed an arthroscopy of the right shoulder along with a mini open combined rotator cuff repair and subacromial decompression. The diagnosis was a biceps tendon tear with degenerative labral tearing and a full-thickness supraspinatus tendon tear with retraction. He also noted chronic subacromial impingement with subacromial bursitis.

Subsequent to the surgery, Ms. Drevdahl was off work and attended physical therapy, again at NorthPointe. She was ultimately released to return to work as of September 17, 2012. A NorthPointe physical therapy evaluation of September 20, 2012 noted limited overhead activity due to weakness of the right shoulder and a lack of full strength. She was released from Dr. Johnson's care on November 12, 2012. The Arbitrator notes the care in the past by the rheumatologist along with some PT care that was somewhat limited and out of context when presented to Dr. Wolin in his deposition.

Ms. Drevdahl testified that she continues to have pain in her shoulder that extends from the front of the shoulder down into her biceps muscle. She is able to perform her work activities, but indicated that she tries to avoid any heavy, overhead work. She still has difficulties in reaching overhead.

Ms. Drevdahl was seen by Dr. Preston Wolin, at her attorney's request, on May 13, 2014 under section 12. (PX 8). His examination showed continued loss of motion in flexion, internal rotation and external rotation. Her muscle strength was significantly less than her non-dominant left shoulder. As part of his examination, Dr. Wolin performed a diagnostic ultrasound on the shoulder. This showed the biceps to be retracted and that there was thinning of the supraspinatus/anterior infraspinatus. Because of these findings, Dr. Wolin believed that she would need further medical care that included injections, medications and physical therapy.

Ms. Drevdahl was also evaluated by Dr. Mark Levin under section 12 at the request of her employer on January 8, 2013. Dr. Levin noted full range of motion and full rotator cuff strength with a trace impingement on the right. There was crepitus in both shoulders, but no pain to palpation. All testimony was studied.

CONCLUSIONS OF LAW

PRELUDE

After extended and multiple readings/ reviews of the testimony of both Dr. Preston Wolin and Dr. Marc Levin the Arbitrator finds the opinions of one more persuasive that the other in this specific case and totality of evidence.

. The Arbitrator acknowledges their significant training and background in the field. However, the tipping point in the determination in this specific case are the answers of Dr. Wolin in terms of anatomy, differential diagnosis, diagnoses over time of this person, interpretation of records of prior treatment including available therapy information and testing. Dr. Wolin excelled in grasping the rather complex questions posed during cross examination, putting the essence of those questions (and those on direct examination) in context with the total clinical picture while formulating answers and his opinions. His professional writing, research and teaching in noted in deposition Ex.1 pages 4 through 22 given credence to his opinions.. Page two shows he is the Chairman of the workers compensation task force of the Illinois State Medical Society.

HOLDING ON THE ISSUE OF CAUSATION

Thus, based upon the totality of the evidence in the case at bar, the Arbitrator adopts the opinions of Dr. Preston Wolin on causation in finding as a matter of law causal connection exists between the accident as alleged and her present condition of ill being.

In regard to (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following facts:

The key issue in this claim is whether the right shoulder surgery performed by Dr. Johnson on May 24, 2012 was casually related to the injury of June 16, 2011. Respondent does not dispute that an injury did take place on June 16, 2011, nor does the Respondent dispute the medical treatment rendered in 2011 or the period of temporary disability from June 16, 2011 through September 28, 2011.

Initially, it appears that Respondent attempted to deny the claim on a belief that Petitioner had a significant pre-existing condition of the right shoulder and that the accident caused a "minor temporary aggravation." This position, though, is not supported by the evidence presented by Petitioner at the hearing. Petitioner presented records of her primary physician, Dr. Anjum, going back to 2008. (PX 7). In addition, she presented records from Dr. Fanopoulus, her rheumatologist, dating back to March 2010. Of note is the fact that Dr. Fanopoulus began treating Petitioner's left shoulder in March 2010. Other than a mention of some right shoulder pain on March 11, 2010, which was diagnosed as a myofascial neck pain syndrome, there is absolutely no mention of any right shoulder problem prior to the June 16, 2011 injury.

The record reveals that from 2008 on Petitioner was receiving significant treatment on a monthly basis by either Dr. Anjum or Dr. Fanopoulus. A full-thickness tear of the left supraspinatus tendon was diagnosed on July 16, 2010. A referral was made to Dr. Emmy Ho, an orthopedic surgeon with Beloit Health, on Feburary 4, 2011. A full-thickness tear was also diagnosed on February 11, 2011 by Dr. Ho. An intensive physical therapy program was initiated in February 2011 at NorthPointe Physical Therapy. This continued through May 2011. Of great significance is the fact that during all of this treatment there is absolutely no mention of any difficulty or complaint with the right shoulder. Based upon this substantial amount of evidence, there is no indication of any pre-existing condition involving the right shoulder until after the June 16, 2011 injury. Therefore, the Arbitrator finds that there was no significant pre-existing condition prior to the injury of June 16, 2011.

Having found that Respondent's pre-existing condition defense is without merit, the Arbitrator turns to the question of whether the condition diagnosed by Dr. Fanopoulus in March 2012, and confirmed by Dr. Johnson on April 10, 2012, was causally related to the June 16, 2011 incident. The issue boils down to whether or not Ms. Drevdahl had a continuing condition that persisted from the date of injury through the recommendation of surgery by Dr. Johnson in April 2012. Upon a review of the totality of the evidence, along with Petitioner's credible testimony, the Arbitrator finds that the condition of ill-being involving the right shoulder never resolved and that the need for surgery was related back to the June 16, 2011 injury. In particular, the Arbitrator notes that Dr. Klein suspected a torn labrum in August 2011, just a few weeks after the injury.

He discussed an MRI/arthrogram with Ms. Drevdahl on August 23, 2011, but she declined, preferring to continue with the conservative course of care. In addition, during his examinations Dr. Klein noted tenderness of biceps, rotator cuff and AC joint. This was confirmed by the evaluations of the physical therapist who noted a positive Speed's test and Empty Can test, which suggests rotator cuff pathology. Petitioner testified that after her release by Dr. Klein she continued to have significant pain in the right shoulder while performing her work activities. In fact, she mentioned this to her rheumatologist, Dr. Fanopoulus during a visit on January 19, 2012. She told him that her shoulder pain was actually worse than her foot pain at that time. She reiterated this on March 21, 2012, which lead to the scheduling of the ultrasound of the right shoulder. That ultrasound was consistent with a full-thickness tear of the supraspinatus tendon.

A review of the initial intake form completed by Petitioner and Dr. Fanopoulus on April 10, 2012 indicates that she sustained the initial injury, improved with medications and therapy, but continued to have significant night pain in the right shoulder. There was never any indication of an intervening injury or any period of complete resolution of her symptoms. As noted above, Petitioner testified credibly, and the records are all consistent with her version of the events.

Petitioner offered the report and deposition testimony of Dr. Preston Wolin in support of her claim. (PX 8). Dr. Wolin indicated that there was no indication of any right shoulder pathology prior to the accident in question. He also testified that he believed that the surgery performed by Dr. Johnson was related back to the original injury. He based that opinion on the history, the physical examination he performed, the imaging studies and his review of all of the medical records. He also testified that Ms. Drevdahl's description of a popping sensation at the time of the accident would be consistent with a tear of the rotator cuff and the biceps tendon. Based upon a review of all of the evidence, the Arbitrator finds Dr. Wolin's testimony to be persuasive and supports a finding that there is a causal relationship between the accident of June 16, 2011 and the surgical procedure performed by Dr. Leighton Johnson.

The Arbitrator declines to give the opinions of Dr. Mark Levin any significant weight. In his initial report of January 8, 2013, Dr. Levin opined that the work injury of June 16, 2011 was a "temporary minor shoulder aggravation" which resolved back to an ability to perform full activity. He further opined that with the underlying arthritic changes the findings in 2012 would have been present irrespective of her alleged work injury of June 2011. This opinion is not supported by the evidence, particularly the fact that Ms. Drevdahl had no complaint of any right shoulder difficulties during the period of time that she was receiving physical therapy in the Spring of 2011 just before her right shoulder injury. As noted earlier, there was no evidence of any pre-existing condition involving the right shoulder. An x-ray performed on the date of injury showed only mild arthritis.

During his deposition, Dr. Levin seemed to change his position to imply that Ms. Drevdahl must have had an intervening injury between the June 2011 accident and her visit with Dr. Johnson on April 10, 2012. The basis of his opinion was that he believed she had regained full strength and motion when released by Dr. Klein in September 2011. In addition, he opined that because the x-ray taken on the date of injury did not show a "high riding" humeral head, she could not have completely torn her rotator cuff on that date. The Arbitrator does not give any weight to these opinions. First, the medical records and testimony show that she did not completely recover in the fall of 2011. Instead, the records show that she made improvement, but had ongoing difficulties with her right shoulder that never resolved. When discharged from therapy, she had continued weakness and pain. She later complained to her rheumatologist that her shoulder was worse than her feet. The Arbitrator also finds that Dr. Wolin's opinion that plain x-ray films do not always show a complete rotator cuff tear is persuasive. (PX 9). In fact, a review of Ms. Drevdahl's left shoulder treatment shows that plain films were normal despite the fact that she had a full-thickness tear of the left supraspinatus tendon. If Dr. Levin's testimony is to be believed, the plain film imaging of the left shoulder should have shown a "high riding" humeral head.

In context with the above, Dr. Preston Wolin made it very clear that the waxing and waning of symptoms does not mean the lesion as he described such shoulder pathology did not exist. Dr. Wolin's answers to insightful questions by both sides is underscored inter alia on pages: 16, 18 on causation, 20 on permancy, plus 52 through 58. The Arbitrator finds Dr. Wolin's explanation of rotator cuff pathology (or lesion as he describes it at one point) as it relates to actual symptoms from the neck into the finger(s) to be the most clarifying explanation of this complex subject as I have ever heard or read. That testimony is underscored and adopted herein.

Based upon the totality of the evidence, the Arbitrator finds that the condition of ill-being of the right shoulder from the date of injury onward was causally related to the accident in the case at bar.

In regard to (J) HAS RESPONDENT PAID FOR ALL APPROPRIATE CHARGES FOR REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds the following facts:

Having found in Petitioner's favor on the issue of casual relationship, the Arbitrator awards the medical bills contained in the Petitioner's Exhibit 1. The medical records in evidence show that the bills contained therein are related to treatment rendered by Dr. Fanopoulus and Dr. Johnson for the right shoulder. The Arbitrator awards the sum of $90,534.94 subject to the Illinois Workers' Compensation fee schedule; That payment under section 8 shall be payable to the Petitioner and his attorney.

In regard to (K) WHAT TEMPORARY BENEFITS ARE IN DISPUTE, the Arbitrator finds the following facts:

Having found in Petitioner's favor on the issue of casual relationship, the Arbitrator awards the period of claimed TTD. Respondent's objection was not to the period of disability, but to liability for payment of benefits. Medical records offered support the period of disability. Petitioner was off work initially from June 16, 2011 through September 26, 2011 and received TTD benefits. Petitioner was off again from May 24, 2012 through September 16, 2012 recovering from the shoulder surgery performed by Dr. Leighton Johnson.

Therefore, the Arbitrator finds based upon the totality of the evidence that the Petitioner is entitled to TTD as follows: The Arbitrator awards a period of 31 and 4/7 weeks of TTD and gives credit to respondent for $5,335.94 in benefits paid. Said payment shall be payable to the Petitioner and his attorney.

In regard to (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following facts:

The Petitioner had significant surgery to her right shoulder. This included a mini open, combined rotator cuff repair along with a subacromial decompressive acromioplasty. She also had a debridement of her biceps tear. She underwent extensive physical therapy through October 18, 2012. Upon release, she had improved range of motion, but still was lacking shoulder strength. Dr. Wolin evaluated Ms. Drevdahl on May 13, 2013. His evaluation showed continued impaired range of motion in abduction, flexion as well as external and internal rotation. At his deposition, he indicated he was concerned that she had a recurrent tear and believed that she would need future medical treatment for her shoulder.

Petitioner testified that while she is able to work, she does have continued difficulty performing all of her work activities because of her right shoulder. She is also affected in her activities of daily living.

Based upon the totality of the evidence, the Arbitrator awards benefits under section 8d2 as described in the Decision document part of this Award,

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt	☐ 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

Jeanne C. Farmer,
Petitioner,

16IWCC0539

vs.

NO: 12 WC 30341

Illinois State Toll Highway Authority,
Respondent.

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, medical expenses, temporary total disability, permanent partial disability, penalties and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 13, 2014 is hereby affirmed and adopted.

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

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

DATED: AUG 18 2016
KWL/vf
8/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0539

FARMER, JEANNE C
Employee/Petitioner

Case# **12WC030341**

ILLINOIS STATE TOLL HIGHWAY AUTHORITHY
Employer/Respondent

On 2/26/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

0230 FITZ & TALLON LLC
PATRICK A TALLON
PO BOX 6040
WOODRIDGE, IL 60517

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT DELANEY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1024 IL STATE TOLL HIGHWAY AUTHY
WORKERS' COMPENSATION CLAIMS
2700 OGDEN AVE
DOWNERS GROVE, IL 60515

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 26 2016

Ronald A. Rascia
RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☐ 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

16IWCC0539

Case # 12 WC 30341

JEANNE C. FARMER,
Employee/Petitioner

v.

Consolidated cases:

ILLINOIS STATE TOLL HIGHWAY AUTHORITY,
Employer/Respondent

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 **GERALD GRANADA**, Arbitrator of the Commission, in the city of **WHEATON**, on **January 21, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

16IWCC0539

On June 22, 2012, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $37,689.60; the average weekly wage was $724.80.

On the date of accident, Petitioner was 60 years of age, married, with 0 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 $1,167.07 for TTD, $0.00 for TPD, $0.00 for maintenance, $0.00 for other benefits, for a total credit of $1,167.07.

Respondent is entitled to a credit of $20,621.51 under Section 8(j) of the Act.

ORDER

Petitioner failed to meet her burden of proving the issue of accident. Therefore her claim for benefits is denied.

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

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

Gerald Granada, Arbitrator

2/23/16
Date

FEB 26 2016

16IWCC0539

FINDINGS OF FACT

This disputed case stems from an alleged accident sustained by Petitioner while working for Respondent on June 22, 2012. The issues in dispute are as follows: 1) accident; 2) causation; 3) medical expenses; 4) TTD; 5) nature and extent; and 6) penalties and attorneys' fees.

Petitioner testified that has worked for Respondent since 2001. Her job at the time of the arbitration hearing was as a CSR, which was an administrative position involving the processing of I-Passes, dealing with customers and various other office functions. She testified that on June 22, 2012, she arrived at work in the morning and parked in a parking lot at the north end of the building. As she walked up concrete steps and after reaching a landing near the entrance, she fell.

Petitioner described that she fell and landed on her left knee while holding her left hand out to brace for the fall. She got up without looking down with help of two nearby individuals, and hurried into the building while feeling embarrassed. As the day progressed she observed that her left hand was hurting and her knee was bruised. When she left work at the end of the day she looked at the area where she fell and noticed cracks in the sidewalk and an indentation. She did not describe the size of the indentation until cross-examination when she agreed the general area she referenced was four or five feet across. There is no description of how deep it is. It was possibly a low spot in the concrete but the Petitioner offered no evidence about its appearance, size, dimensions or information characterizing it as a dangerous condition. It was possibly a lower lying area of the landing. No subsequent repairs were made to the specific location of the fall.

The Respondent called Sonya Sigers as its first witness. Sigers testified that she worked as the claim adjuster who took a recorded statement from Petitioner on July 12, 2012, approximately three weeks after the occurrence. The transcribed statement was admitted into evidence. (RX 2) Petitioner claimed that the statement was not recorded with her permission though the statement includes her consent at the beginning of the conversation and at its conclusion. Her statement described that she tripped and fell. The statement included the following:

> Q. And do you know what you fell over or what caused you to trip and fall, or caused the fall?
>
> A: [inaudible], no, but they were saying that there's some lose (sic) concrete out there, but I don't think I hit the concrete. I don't know what happened, but I fell. (RX 2)
>
> Q: Okay, so again, you think that what caused your fall was you just tripped over the stairs, or, you, over . .
>
> A: I just tripped and fell. I mean, you know, I, they were saying at work today, did you see concrete, 'cause there was broken concrete. I said you know to tell you the truth I never even noticed. I fell, I, you know, got up, and just walked into work. I never even looked." (RX 2)

Petitioner claimed there were quite a few things in the transcribed statement that were not true. The only specific misinformation she described was whether the statement was recorded with her permission.

Paula Jordan, the Respondent's claims supervisor, also testified about a telephone conference with Petitioner about the fall a few days to a week after the incident. Jordan recalled that Petitioner did not really know how she fell, and possibly that she tripped over her feet. Jordan also described that if an incident was reported that was

16IWCC0539

attributed to the condition of the premises, she would immediately contact the safety department or maintenance division to inspect and correct a problem. In response to a question from the Arbitrator. Jordan denied that Petitioner ever told her she tripped on a broken sidewalk or broken concrete. Jordan did recall a few other employees falling at the same entrance but usually ones occurring over winter months with ice or snow conditions involved.

Respondent's third witness, Mike Sulima, is a maintenance worker for Respondent who described how his crew repaired other cracks and broken concrete in the sidewalk one week before the Petitioner fell nearby. Broken concrete was cut out and the crew poured fresh concrete. The new cement would harden in less than an hour. The sidewalk was then swept clear or any loose debris. Sulima agreed that photographs of the area taken after the accident show surface cracks but not any with gaps in the surface. He described them as spider cracks in the surface. He claimed the concrete was not separating such that a person could catch a heel in a crevice.

Respondent offered photographs of the location of the fall taken ten days afterward. Petitioner offered photographs taken more than six months afterward that showed a puddle on the walkway. The Petitioner suggested this indicates a "divot" in the sidewalk. Mike Sulima was not able to offer any explanation for the puddle, but did not view the condition as a risk.

Petitioner claims the conversation with Jordan occurred in person in Jordan's office a week after the fall. However, Petitioner also claims she was off work from the next work day after the occurrence until July 11, 2012.

Over the course of her testimony Petitioner described several conditions of the sidewalk in explaining how she may have tripped. She described at various times an indentation in the sidewalk which possibly was a low spot several feet across, surface cracks, and also loose concrete. She admits she did not look down after falling and only looked at the early after work that day.

There is no dispute concerning at least the initial medical treatment. She treated initially at Advocate Occupational Health for a left thumb and hand injury. The first treatment occurred four days later on June 26, 2012. She was provided a splint for her hand and medication. She was given light duty restrictions.

A left hand MRI completed on July 11, 2012 was reviewed by Dr. Ramsey Ellis who described multiple findings including degenerative arthrosis at the triscaphoid joint, a small palmar ganglion cyst, and a 5 mm x 2 mm chronic bone fragment near the trapezium. The Petitioner also treated with Dr. Jack Casini, who diagnosed her with degenerative arthritis of the right thumb carpometacarpal joint with treatment options that included a trapeziectomy procuredure.

Following conservative medical treatment with physical therapy and injections to the hand Petitioner underwent surgery on March 28, 2013. The surgery involved a ligament reconstruction and tendon interposition. She did develop a rash condition following surgery that required additional treatment.

Petitioner at a later time also was diagnosed with carpal tunnel syndrome and recommended to undergo a release. That condition was not shown to be related to a fall.

On June 11, 2013, Petitioner returned to her same job duties for Respondent and earns the salary affiliated with that job description. She testified that she continues to regularly experience pain in the left hand. Notes from Dr. Casini following surgery in 2013 and treatment of a rash described the petitioner's pain being nearly completely

resolved at a visit on July 12, 2013, and having no pain in the left thumb at a visit on August 9, 2013. It was at that visit she complained about numbness and tingling in the thumb.

In terms of the condition of the left hand, Petitioner continues to experience pain and takes Aleve when necessary. She claims she cannot lift as much weight from weakness in the left hand, which is her non-dominant hand. She also had cut back on physical activities including golf and participation on a baseball team. Respondent questioned her why she only told Sonya Sigers about bicycle as being among her physical activities or hobbies and did not mention golf, gardening or baseball. Petitioner did not understand she had to list all her activities, but did not explain how she only listed one and chose bicycling as that activity. Petitioner also reported occasional difficulty sleeping.

CONCLUSIONS OF LAW

1. With regard to the issue of accident, the Arbitrator finds that the Petitioner has failed to meet her burden of proof. This finding is supported by the testimony of the various witnesses and the investigative documentation entered into evidence. The main question in dispute is what caused the Petitioner to fall. During the Petitioner's direct examination, she testified that she went up two steps and ended up falling, injuring her hand and knee. The Arbitrator specifically notes that Petitioner did not testify that she tripped, or that her shoe got caught on something or that anything caused her to fall. She later testified that she noticed cracks in the sidewalk when she was leaving work that day. However, this later observation appears to be at odds with what she told Ms. Sigers in her recorded statement two weeks following the incident, wherein Petitioner again fails to indicate what caused her to fall. Furthermore, the testimony of Petitioner's supervisor, Ms. Jordan, further casts doubt on this case. Ms. Jordan spoke with Petitioner a few days after the incident and Petitioner did not indicate what caused her to fall. It was Ms. Jordan's impression that the Petitioner simply tripped, with no indication that it was due to any crack or defect in the sidewalk. And while the various photos entered into evidence may show some cracks in the sidewalk in question, they fail to show the "divot" Petitioner described in her testimony. All of these facts point to the conclusion that the Petitioner most likely did not know what caused her fall, which is evident in her direct examination testimony that fails to give any helpful description of the mechanics of her fall. As such, the Arbitrator concludes that the Petitioner failed to prove that she sustained an accident arising out of her employment on June 22, 2012.

2. Based on the Arbitrator's findings with regard to the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ 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

Gary Kiefer,
Petitioner,

vs.

NO: 12WC 30570

16IWCC0562

Vienna Correctional Center,
Respondent,

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, medical, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2015, is hereby affirmed and adopted.

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

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

DATED: AUG 3 0 2016
o081616
CJD/jrc
049

Joshua D. Luskin

Ruth W. White

16IWCC0562

DISSENT

I must respectfully dissent from the majority's decision that the Petitioner failed to prove that his current condition of ill-being was causally connected to the accident on June 29, 2012. I would instead reverse the findings of Arbitrator Lee.

The Petitioner was employed as a correctional officer from 1991-2013 at Menard, Big Muddy, Pinckneyville and Vienna correctional facilities. He testified that over those 22 years he rapped thousands on top of thousands of bars, unlocked chuckholes, performed shakedowns, searched property boxes, and cuffed and un-cuffed inmates. The Petitioner's testimony was un-rebutted in regard to the work he performed at each of these facilities.

On 6/28/12, Petitioner lost feeling in both hands while driving home. He filed a report of injury with his supervisor on 6/29/12. The Petitioner was tentatively diagnosed by Dr. Tongwarin on 6/30/12 with carpal tunnel syndrome and referred to Dr. Alam for an EMG and nerve conduction study. Dr. Prieb confirmed the diagnosis and performed bilateral carpal tunnel and cubital tunnel release surgery.

It is well settled that a claimant's testimony, standing alone, may be sufficient to support an award of benefits under the Act. *See* Seiber v. Industrial Comm'n, 82 Ill.2d 87, 97 (1980). Petitioner's un-rebutted testimony regarding the gross and fine manipulation of his upper extremities during his 22 years as a correctional officer coupled with the findings of the EMG and nerve conduction study supporting a carpal tunnel and cubital tunnel diagnosis, support a causal connection between Petitioner's job duties and his ultimate injuries.

Although Dr. Sudekum testified he spent several hours reviewing Petitioner's job descriptions and other documents from the State of Illinois regarding Petitioner's job, his 2.5 hour long physical examination of Petitioner was after surgeries on both the left and right sides were performed and Petitioner was essentially asymptomatic as of that date and Dr. Sudekum could not testify as to whether Petitioner had carpal and/or cubital tunnel syndrome and the extent of same. (Respondent's Exhibit 4)

Respondent argues that Dr. Prieb is not credible regarding causation as he testified he did not review Petitioner's work description until the day prior to the deposition. (Petitioner's Exhibit 7) Further, Respondent argues that since a causation opinion was not formulated until 2012, it should be discounted. (Petitioner's Exhibit 7) However, Dr. Prieb's medical records do reference Petitioner is being seen for a work-related injury (Petitioner's Exhibit 5). Additionally, Dr. Prieb testified that Petitioner had no co-morbidities, such as diabetes or obesity, which would contribute to cause carpal tunnel or cubital tunnel syndrome. (Petitioner's Exhibit 7)

Based on the above, I would reverse the Arbitrator's decision and would find that Petitioner sustained a repetitive trauma accident arising out of and in the course of his employment and that his condition of ill-being is causally related to his employment. I would also find that he is entitled to benefits including medical expenses, temporary total disability, and permanent partial disability.

DATED:

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KEIFER, GARY
Employee/Petitioner

Case# **12WC030570**

VIENNA CORRECTIONAL CENTER
Employer/Respondent

16IWCC0562

On 7/2/2015, 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 0.11% 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:

0969 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
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0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUL 2 - 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ 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

Gary Kiefer
Employee/Petitioner

v.

Vienna Correctional Center
Employer/Respondent

Case # 12 WC 030570

Consolidated cases: N/A

16IWCC0562

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **5/12/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **6/29/12**, 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 **$58,980**; the average weekly wage was **$1,134.23**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of **any medical benefits paid through its group carrier** under Section 8(j) of the Act.

ORDER

Petitioner has failed to meet his burden of proof and thus shall be barred from recovery. Petitioner specifically testified he noticed his symptoms while he was performing his job duties years before filing his claim. Additionally, Petitioner relies heavily on job duties that are attenuated from the date of accident. A reasonable employee in this situation would have filed a claim upon noticing symptoms while performing their job duties. Moreover, the Respondent's section 12 examiner credibly testified the Petitioner's condition was not caused by his work duties.

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

6/24/15
Date

JUL 2 - 2015

FINDINGS OF FACT

A full hearing was held in this matter. The issues at trial were accident, notice, causal connection, liability for medical costs, and nature and extent.

Petitioner testified that he worked as a correctional officer with the Illinois Department of Corrections beginning in March of 1991 and retiring on November 30th, 2013. Petitioner's testimony concerning his job duties at various times was a bit difficult to follow. He testified he began his employment at the Menard Correctional Center where he worked for approximately six years. He then transferred to Big Muddy Correctional Center where he worked approximately four years. When he transferred into Big Muddy he was put on the 11-7 at night shift on Segregation. He further testified he only spent 25% of his time assigned to segregation. On cross examination he admitted there was, "very little" movement in segregation at night. He stated the rest of his time was assigned as the sanitation officer. There were times he would have to demonstrate how to clean to the inmates and "...take light switches off and clean behind that."

Mr. Kiefer then transferred to Pinckneyville Correctional Center in either 2001 or 2002 where he worked until 2011. While working at Pinckneyville he worked as a correctional officer with numerous assignments. He did at times work in segregation but testified there was no bar rapping. Again, his testimony was he was assigned to segregation about 25% of the time. He further testified the only time he would cuff and uncuff inmates was during lockdown or shakedowns. He finished out his career at Vienna Correctional Center, a minimum security prison, where he also worked as a correctional officer working mainly the 3 to 11 shift assigned to the housing unit 5.

There was very little testimony as to how many times he would turn times a day. When he operated as a control room officer his testimony was he would turn approximately 25 keys in an entire day. His testimony when on the 3-11 shift was between 100-125 times a night. Suffice it to say he testified he began losing sensation before he began working at Vienna. His testimony was he would drop cups of coffee in the morning and at least once, dropped a pistol during firearms training due to the lack of feeling. He testified it became so bad he would intertwine his arms, "into the bed at night and lay flat on my back and to keep my hands from throbbing so I could sleep." On cross examination he admitted the dropping cups of coffee incidents were, "on almost a weekly, daily basis."

He stated during trial that he went to see Dr. Tongwarin on June 30th, 2012 over a year after starting work at Vienna Correctional Center. On cross Respondent's counsel asked Mr. Kiefer about Dr. Tongwarin's note of August 13, 2012 in which Dr. Tongwarin noted, "...tingling and numbness both hands all the time for seven to eight years." Petitioner admitted this was true; he had indeed had these complaints for seven to eight years prior to his visit in August of 2012. When asked about this; his testimony was, " I thought it was just natural." It is worth mentioning there is no mention of Petitioner's work duties contained within Dr. Tongwarin's notes. Petitioner had nerve conductions studies performed by Dr. Alam. These tests were conducted on July 25th, 2012. The findings were mild to moderate bilateral ulnar neuropathy at elbow and mild bilateral carpal tunnel syndrome. Dr. Tongwarin referred Mr. Kiefer to Dr. Kosit Prieb. Dr. Prieb conducted surgery for left carpal and cubital tunnel syndromes on August 15th, 2012 and to the right side on August 29th, 2012. There is little to nothing contained within the evidentiary record of any history taken by Dr. Prieb from the Petitioner. There doesn't appear to be any mention of the job or duties of Mr. Kiefer.

Petitioner's counsel took the deposition of Dr. Prieb on March 24th, 2015. He testified on direct that he had reviewed a work description prepared by the Petitioner but had only reviewed it the day before and the day of the deposition. Dr. Prieb testified he had no knowledge of when the Petitioner was assigned to work at

Pinckneyville and no idea of his job duties. He also didn't know what the Petitioner's job title was at Vienna Correctional Center. He also testified he didn't know that Mr. Kiefer had submitted a Workers' Compensation case before when he was initially seen by the good Doctor.

In a very important piece of testimony Dr. Prieb was asked:
Q: So it's safe to say that you didn't really have an opinion in 2012 as to the cause of the conditions; is that correct?
A: That's correct. [Page 25, lines 1-4].

Respondent had the Petitioner undergo a section 12 exam by Dr. Anthony Sudekum, a board certified surgeon of the upper extremities, on April 18th, 2013. Additionally, Dr. Sudekum testified by Deposition on December 2nd, 2013. He had a detailed analysis of the job description as well as, other documents from the state of Illinois regarding the job duties of the Petitioner. He also examined the Petitioner individually. Petitioner informed Dr. Sudekum he had ,"no numbness, tingling, or parathesias of either hand and feels that he has good strength and range of motion." This is contrary to the Petitioner testimony at trial in which he indicated he has daily tingling. In another incongruit the Petitioner testified Dr. Sudekum had conducted nerve conduction studies. Dr. Sudekums' report states: "Nerve conduction Studies: Not taken at today's visit."

The report of Dr. Sudekum is worth reading in its entirety for its thoroughness in handling the Petitioner's and findings and the documentation. Dr. Sudekum did have the work history of the Petitioner in his report and when he gave his opinion. He reviewed the job analysis of the Pinckneyville Correctional Center as well as the "Estimation of Key Usage at Pinckneyville Correctional Center." Additionally, he had a written job analysis for the position of "Correctional Officer" at the Vienna Correctional Center. He opined the Petitioners condition was not caused by his job duties. Furthermore, he stated, "It is my opinion, with a reasonable degree of medical certainly, that Mr. Kiefer's job duties as a Correctional Officer for the State of Illinois, Department of Corrections did not serve to cause or aggravate carpal or cubital tunnel syndrome in either upper extremity.

Mr. Kiefer testified he is spends about fifteen to twenty minutes a day fishing. He also mows the grass as well as spends some time, "...tinkering with a little woodwork." It is noteworthy that Petitioner testified he still has symptoms AFTER retirement, "[t]hey still tingle all the time. It feels like I've got electricity, just slight electricity running through them...but I constantly have that little bit of jittery feeling in them all the time."

The Petitioner testified that he had been suffering symptoms for seven to eight years before his date of accident. He also testified these symptoms were present while doing his job activities. A reasonable employee in his situation would have filed a claim and alerted his employer of a work related injury. Additionally, the Petitioner testified he continues to have symptomology even after being retired and after surgery. Clearly, the Petitioner does not have a work related condition.

CONCLUSIONS OF LAW

Petitioner has failed to meet his burden of proof and thus shall be barred from recovery. Petitioner specifically testified he noticed his symptoms while he was performing his job duties years before filing his claim. Additionally, Petitioner relies heavily on job duties that are attenuated from the date of accident. A reasonable employee in this situation would have filed a claim upon noticing symptoms while performing their job duties. Moreover, the Respondent's section 12 examiner credibly testified the Petitioner's condition was not caused by his work duties.

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 Accident/Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICARDO HARO,

Petitioner,

16IWCC0506

vs.

NO: 12 WC 32701

CARL BUDDIG,

Respondent.

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, causation, temporary total disability, permanent partial disability, medical expenses both current and prospective, and penalties and fees, and being advised of the facts and law, reverses the Decision of the Arbitrator, and finds that Petitioner proved a compensable accident occurring on February 6, 2012 which caused a current condition of ill being.

Findings of fact and Conclusions of Law

1. Petitioner testified that on February 6, 2012 he was working for Respondent as a forklift driver and had been for a little over a year. He loaded and unloaded trucks, made orders, and put away stock. He had to lift cases of product "all day sometimes." On the date noted above, he was making orders and to expedite the process they would push "six to eight layers of boxes together" down to another skid. "The whole layer would be like 6, 12, 24, like 28 boxes in a row, sometimes, depending how big, what the box is. So it was 26 times *sic* from the layers." It weighed "like 100 pounds." He was pushing the boxes with a coworker, Gustavo. After he pushed them he felt pain in the left side of his lower back. In an eyewitness report, the coworker reported that on February 6, 2012 they were pushing three layers of product when Petitioner said that he pulled a muscle.

16IWCC0506

2. Petitioner stopped working for about 10 minutes but he noticed the pain had not gone away. He went to the office and reported the accident to his supervisor, Mario. Mario called security and somebody from security took him to the emergency room at Ingalls Memorial Hospital. X-rays were taken, Petitioner was given Ibuprofen and Skelaxin, and he was referred to Ingalls Occupational Health for follow up.

3. Petitioner was examined at Ingalls Occupational Health the next day. He returned about weekly at which times he was examined, it was determined what he "was able to do," and given more medication. He went to physical therapy for about two months. He was put on restrictions, which Respondent did not always accommodate. A doctor at Ingalls recommended an MRI but that was not approved by Respondent.

4. Petitioner was released to return to work on a trial basis on March 26, 2012. However, he was not able to continue working because it increased his back pain. He worked the entire day of the 26th but returned to Ingalls the next day. He complained of low back pain and some pain in his left leg. He was put back in physical therapy and on restricted duty; again an MRI was recommended and again it was denied. Ingalls stopped physical therapy as of April 6, 2012, after about 18 sessions. Petitioner was still on restricted duty, which Respondent could not accommodate.

5. Petitioner also testified that the last time he went to Ingalls was on May 9, 2012. He was told to continue his medication and once again an MRI was recommended. Also in May 2012, Respondent sent him to Dr. Heller for an examination under Section 12 of the Act. Respondent terminated medical treatment after Dr. Heller issued her report. Thereafter, Petitioner began treating at MetroSouth Medical Center, where his primary care physician practices. He saw three doctors there. He returned there "like every month." They kept examining him and prescribing additional medication. Nevertheless, he experienced more pain in his back and left leg, "all the way to the toes."

6. On about four or five occasions doctors at MetroSouth took him off work and released him to work. Petitioner returned to work on October 1, 2012 and worked about 16 days. He experienced pain in his back and left leg down to his toes. His toes became numb, swollen, and painful. He last work for Respondent on October 16, 2012, and has been off work since.

7. Petitioner eventually had an MRI on October 23, 2012. It showed he had a herniated disc. He was referred to an orthopedist, Dr. Amine, whom he saw on November 15, 2012. He administered three injections, the last on August 30, 2013. However, he still had pain which was getting worse. He noticed no improvement from the injections. He returned to Dr. Amine on September 26, 2013 and asked to have surgery. Dr. Amine ordered a repeat MRI, after which he performed surgery on February 10, 2014. The surgery did not resolve his back/leg pain. Dr. Amine prescribed Vicodin and Neurontin. He also recommended physical therapy, but that was not approved by insurance. He last saw Dr. Amine on September 18, 2014.

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8. At Respondent's direction, on March 10, 2014 Petitioner had another examination under Section 12 with Dr. Singh. He saw Dr. Singh again on August 14, 2014. He recommended a 3rd MRI, which he had on August 18, 2014. Thereafter, Dr. Singh recommended a second surgery, and Petitioner agreed to treat with him. He scheduled surgery for September 9, 2014, but it was not approved. Dr. Singh indicated Petitioner could not return to work until he had surgery. Petitioner wants the surgery. Petitioner has not seen Dr. Singh since the MRI. However, Dr. Singh keeps refilling his medications, Tramadol, Ibuprofen, Gabapentin, and another he could not remember.

9. Petitioner further testified he never injured or had treatment for his lower back prior to February 6, 2012. He has not reinjured his back in any way subsequent that date. Petitioner has not received any workers' compensation benefits since Dr. Heller's report. He has no source of income and is surviving economically by living with his parents and with help from his girlfriend. He is subject to "a couple of lawsuits" due to his inability to pay bills.

10. Petitioner identified a person sitting in the hearing room as Dave Streeter. He has not given Mr. Streeter permission to contact his doctors. Petitioner has not experienced any benefit from his surgery. He still has pain in his lower back and left leg, foot, and toes.

11. On cross examination, Petitioner testified that at the time of his accident he had seven year old son and five year old daughter weighing about 70 and 50 lbs, respectively. There are different shapes of boxes and cases of product with different weights, but he doesn't know exactly what they weigh. He agreed that making an order involves "taking several layers of boxes and transferring them to another pallet." He reiterated that at the time of his accident he was pushing "like six layers" of boxes. Petitioner denied he told his doctors that he was pushing only three layers of boxes. Petitioner was shown the accident report he filled out. He agreed that it did not show how many layers of boxes he was pushing.

12. After the Section 12 examination with Dr. Heller, in May 2012, Respondent sent him a letter asking him to return to work. The day after he went back to work he went to Dr. Hajat, who was his primary care physician. He told her he had pain in his back but he did not ask her to take him off work. Petitioner denied that in August of 2012 he told Dr. Hajat that he experienced back spasms picking up and carrying his son; he once told her he experienced spasm "from walking from the house to his school." He did not remember whether he told her about carrying his son 100 yards.

13. Petitioner agreed that he did tell Dr. Hajat he moved some chairs and his back hurt more after. He had an MRI on October 23, 2012, which was about six weeks after he told Dr. Hajat about moving chairs. He had tried to help out by trying to move "not even six chairs." He tried to help with the furniture, but he could not move the chairs because of the pain. Petitioner was referred to Dr. Amine by Dr. Hajat because of the results of the MRI.

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14. When asked whether it was true that he did not have any numbness in his leg or toes until after he "lifted the party tent," Petitioner could not remember. However, he later denied he was setting up a party tent but was just moving chairs. He again testified that he did not reinjure his back. He agreed that he did not receive any bills from Dr. Singh and Respondent likely paid them.

15. On redirect examination, Petitioner testified that since he injured his back on February 6, 2012 "everything" aggravates his back pain, including walking, lying, and sitting. Ingalls recommended MRIs on February 29, 2012, March 7, 2012, and March 27, 2012, which were all denied.

16. David Streeter was called by Respondent for which he worked as safety and security manager for six and a half years. Mr. Streeter has been in safety and human resources for about 20 years. Probably more than 50% of his time is spent on the work floor so he has a lot of interaction with the employees. He creates and ultimately enforces all safety-related policies and procedures. He also administers return to work programs. Respondent has a 100% return to work program; they honor all light duty restrictions. If there were restrictions he would contact the employee and indicate they would accommodate them. Employees can be assigned to drive a forklift with no lifting, "cycle counts" in parts and maintenance, or even simply to do paperwork and make copies.

17. Mr. Streeter thought Petitioner started working for Respondent about when he did, so he thought he knew him for about six years. He believed he was informed of the alleged accident the next day because it occurred late. He was told Petitioner was sent to the clinic.

18. Mr. Streeter identified documents, which were Petitioner's accident report, an eyewitness report, and supervisor's report, respectively. They indicated Petitioner was injured while pushing layers of boxes into an empty pallet. Respondent has a policy that when employees are pushing layers of boxes "they should work as a team and should push a maximum to two layers." There was nothing unsafe about pushing two layers of boxes. Mr. Streeter was "surprised to see that they had pushed three layers;" the force needed to push two was acceptable, three was not.

19. It was the witness' understanding that doctors' reports indicated that Petitioner suffered a muscle strain. Mr. Streeter did not recall any resistance from any employees about accommodating Petitioner's restrictions and he did not recall whether Petitioner complained to him of pain after he returned to light-duty work. After he received Dr. Heller's report indicating Petitioner could return to work without restrictions, Mr. Streeter asked him to return to work at full duty.

20. On cross examination, Mr. Streeter testified he was aware that Ingalls put Petitioner on restricted duty. When asked whether it was true that Respondent did not provide work within his restrictions, he answered that he did not recall. He also did not recall whether Respondent paid him workers' compensation benefits.

21. Mr. Streeter repeated his testimony that Respondent attempts to accommodate all restrictions, and he believed that it always does. He would have to review the paperwork to see whether Respondent accommodated Petitioner's restrictions. He did not recall whether he sent Petitioner a letter informing him light duty was available, but he certainly believed he spoke to him in person.

22. Mr. Streeter also testified he did not remember whether he called Ingalls and told them that Petitioner had a history of trying not to work and he believed Petitioner was exaggerating symptoms. However, he acknowledged that there was a note indicating he called on February 8, 2012. What he saw was that he "called in regard to his restrictions." Petitioner did not give him a signed authorization to contact his doctor, but he thought it was legal to contact a doctor about restrictions.

23. Mr. Streeter also testified he did not specifically recall seeing Dr. Singh's Section 12 report. However, he believed he remembered that he indicated Petitioner had a herniated disc. He did not remember whether he contacted Petitioner after he saw that report.

24. On redirect examination, Mr. Streeter testified after injuries employees are informed that Respondent "would abide by restrictions" and wants them to return to work. He told Petitioner that Respondent was willing to accommodate any restrictions. He presumed it would have been the day after the accident when he became aware of the injury. He had no reason to disbelieve the account of the witness that they were pushing three layers of boxes. Moving six layers made no sense to him; he was not even sure it was possible. Six layers "would be an entire pallet. So it would not make sense for us to push all the boxes from one pallet to another pallet. We would just utilize that existing pallet of product." If the witness remembered correctly, the type of box Petitioner was moving weighed about three pounds each. If an order included three layers, employees would be expected to move two layers and return for the third.

25. On re-cross examination, Mr. Streeter testified the number of boxes in a layer depended on the product. He estimated that there would be 16 to 20 boxes per layer at three pounds per box. Therefore, three layers of boxes would be in excess of 100 pounds.

26. Louis Draganich was called by Respondent and testified he has a "Ph.D. in bioengineering focusing in biomechanics." He is "an expert consultant in injury biomechanics." He studies the effect of forces or displacements on the body. Respondent's lawyer asked him to assess records and "try to make a determination whether or not the activity alleged resulted in the injury alleged" in the current instance.

27. Mr. Draganich read the medical and workplace records, researched the literature, performed an inspection, oversaw a reenactment demonstration of the alleged incident, and issued a report. The enactment was performed by Mr. Streeter and Mr. Pacheco, the coworker who worked with Petitioner on February 6, 2012. The enactment included three layers of boxes totaling about 85 boxes, which were reported to be identical to those involved in the incident.

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28. Mr. Draganich then asked Respondent's lawyer to serve as a surrogate because he is the same height as Petitioner, and the variation of weight, Petitioner was 185 pounds and the lawyer was 150 pounds, was sufficiently close to satisfy Mr. Draganich. Mr. Pacheco was involved in the incident and set up the demonstration as it was at the time of the incident.

29. Mr. Draganich explained that "it's been pretty conclusively demonstrated that for a healthy disc, a compressive force can't rupture the disc unless also the vertebral end plates, the bony end plates, are ruptured. And among investigators, it's accepted that his is primarily a fatigue injury, due to, for example, a cyclic flexion/extension loading." He saw no evidence of any such fractures in the medical records. That implies to him that "this ruptured disc was not produced acutely," but rather the result of fatigue. Statistically, 21% of individuals in Petitioner's age category, 21-39, would have asymptomatic herniated discs.

30. In the demonstration Mr. Draganich found that it took 72 lbs of force to push the boxes. The compressive force on L5-S1 was between 485 and 630 pounds. By comparison, fast walking would produce 545 lbs of compressive force on the lumbar spine, bending over at about 80 degrees would cause about 561 pounds of compressive force, a sit up would produce about 600 pounds of compressive force, and carrying a typical carry-on suitcase would produce 621 pounds of compressive force which was almost exactly the same as the alleged accident.

31. Mr. Draganich concluded that the force exerted in the alleged accident was very similar to those exerted in normal exercise and activities of normal everyday living. He determined that for Petitioner's "age and weight," "his tolerance limit was a little over 2,000 pounds" to fracture the bone. Therefore the force was not sufficient to cause the ruptured disc or to aggravate any preexisting condition.

32. On cross examination, Mr. Draganich agreed that many activities that do not require much heavy lifting can cause disc herniations. He gathered information about the mechanism of the alleged injury from reports of Mr. Streeter and Mr. Pacheco. Mr. Pacheco had engaged in the activity for decades. Mr. Draganich is not a doctor or a board certified orthopedist. He agreed that Mr. Streeter was not present at the time of the accident. Mr. Draganich was aware that Dr. Singh had a degree in engineering.

33. On redirect examination, Mr. Draganich testified he worked regularly with orthopedic surgeons. He not only performed research, he taught medical students. For coughing or sneezing to result in a herniated disc it would be "the straw that broke the camel's back" after fatigue.

34. Petitioner testified in rebuttal that the letter dated May 10, 2012 was the only letter he received about returning to work from Mr. Streeter. He had no conversations with Mr. Streeter about returning to work in a light-duty capacity. After he was first injured there was no light duty work available or Respondent did not honor his restrictions.

35. On cross examination, Petitioner testified that he was informed by the supervisor Alex that he could not work with the restrictions that were imposed. That was when he returned with the restrictions from the doctor. He took his restrictions in every time he went back. Mr. Streeter never mentioned Respondent's 100% return to work policy.

36. The medical records indicated that a little after midnight on February 7, 2012, Petitioner presented to the emergency department at Ingalls complaining of 8/10 non-radiating lower back pain with swelling after injuring his back at work pushing boxes off one skid to another skid. X-rays were normal. Lumbar sprain was diagnosed, medication prescribed, and Petitioner was advised to return for reevaluation at Ingalls Occupational Health in two days.

37. Petitioner returned on February 8th with 5/10 pain and did not think he was improving. He was not in physical therapy and found his pain was exacerbated by bending and lifting. Petitioner's supervisor called the previous day and indicated Respondent could accommodate no bending and lifting restrictions and asked whether Petitioner could drive a forklift. Dr. Reddy indicated he would allow it on a trial basis. Petitioner reported that his pain increased by the end of the day "because he did not have any breaks and was required to use stairs and inclines very often." Tenderness and reduced flexion was noted. Restrictions and medications were continued.

38. An addendum treatment note indicated that David Streeter called. He was concerned about the restrictions and indicated Petitioner had a history of "trying not to work and believes he is exaggerating symptoms." He also stated there are no stairs at Respondent's facility. Dr. Reddy suggested he send a case manager at the next visit and they might consider physical therapy.

39. Petitioner continued to treat at Ingalls Occupational Health, including physical therapy, through May 9, 2012 with little improvement. Repeated requests for MRIs by doctors at Ingalls were denied by Respondent.

40. On August 20, 2012, Petitioner presented to his principle care provider, Dr. Hajat because of a sore throat and back spasms. He had pain since the previous day when he carried his son and carried him for over 100 yards. He was unable to walk since August 15th. Dr. Hajat did not find muscle spasms and sent him back to work on August 27th.

41. Petitioner returned to Dr. Hajat on September 11, 2012 reporting back pain for past two days "after putting up a party tent and furniture." He was unable to return to work. Dr. Hajat noted paraspinal spasms in both the thoracic and lumbar spine, ordered an MRI, and sent him back to work as of September 16th.

42. On November 15, 2012, Petitioner presented to Dr. Amine and reported feeling a snap in his back in the February 6, 2012 incident and had intermittent low back pain with radiculopathy since. He had physical therapy for a couple of weeks and could not tolerate a return to work. Dr. Amine noted that an October 23, 2012 MRI showed a left L5-S1 disc herniation with extrusion into the left neural foramen.

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43. By September 20, 2013, Dr. Amine's notes indicated he had administered three epidural steroid injections. Petitioner left sided back pain radiating down the left leg was almost constant and he wanted to proceed with surgery. Dr. Amine ordered a repeat MRI, which showed an acute-appearing herniated disc at L5-S1 with compression of the L5 nerve roots at the neural foramen and lateral recess, respectively.

44. On February 10, 2014, Dr. Amine performed left L5-S1 laminectomy, foraminotomy, and medial facetectomy for a herniated disc and radiculopathy.

45. On March 10, 2014, at the direction of Respondent, Petitioner presented to Dr. Singh for a medical examination under Section 12. He reported pushing boxes weighing about 100 pounds when he developed low back pain. He currently had 8/10 low back and left leg pain. He recently had lumbar surgery and was not working.

46. Dr. Singh noted that an October 2012 MRI showed a large herniated disc at L5-S1 causing L5 nerve compression and an October 2013 MRI showed no change. Dr. Singh indicated that Petitioner's condition was consistent with the reported mechanism of injury, which was "no different than can be expected result from normal daily activity."

47. Dr. Singh opined that Petitioner's work injury caused his condition of ill being. Treatment provided, including surgery, was indicated. He could have worked light duty up to the injections and surgery but was currently unable to work. Petitioner was not at maximum medical improvement and needed physical therapy and work conditioning. He disagreed with the report of Dr. Heller because Petitioner had a herniated disc and an earlier MRI would have been prudent and could have expedited treatment.

48. Petitioner continued to treat with Dr. Amine, with little improvement. Prescriptions for physical therapy were denied. Dr. Amine noted that the denial seemed to make Petitioner depressed.

49. On August 11, 2014, Petitioner presented to Dr. Singh for him to become his treating doctor and for his recommendations for additional treatment. He reported 7-8/10 low back pain, 5-6/10 with medication, with radiation in the L5-S1 distribution. He found little relief from the laminectomy/discectomy performed in February 2014. Dr. Singh ordered a repeat MRI and took Petitioner off work.

50. Dr. Singh noted the MRI showed a large residual L5-S1 disc herniation causing severe foraminal stenosis with disc height loss at L5-S1. He recommended a revision laminectomy/discectomy with interbody fusion and iatrogenic facet resection for the recurrent disc herniation. The MRI report indicated a moderate posterior disc bulge with paracentral annular tear, small osteophytes, and moderate to severe foraminal and mild spinal canal stenosis at L5-S1.

51. On October 28, 2014, Dr. Heller, Respondent's initial Section 12 medical examiner, testified by deposition. She testified she was board certified in physical medicine and rehabilitation. She is also a licensed physical therapist. She sees 50 to 75 spine injury patients and performs one Section 12 examination per week.

52. She examined Petitioner on May 12, 2012 and issued a report. She did not remember Petitioner but normally she would review the medical records she is supplied by the requesting party prior to her examination. In her report she noted that Petitioner told her "he was pushing some stacked boxes of fairly light items four to five feet on a skid and he felt some pain in his low back."

53. Dr. Heller diagnosed that Petitioner suffered a mild lumbar strain in the incident. She based that opinion on the medical records, discussion with Petitioner, and her physical examination, which was essentially normal. She concluded that Petitioner's injury did not seem severe compared to other patients she has seen. She believed Petitioner achieved maximum medical improvement at the time of her examination because he did not need any additional treatment based on her normal physical exam, his extensive physical therapy, and because he was taught "how to change positions properly."

54. On cross examination, Dr. Heller testified that while Petitioner continued to complain of lower back pain in his weekly exams through April 6, 2012, the physical exams were normal except for tenderness and decreased range of motion; there were no findings of sensory or motor deficits. Her dictation does not indicate that Petitioner began complaining of radiating left leg pain. If he had pain to the knee, that would generally not be radicular pain, radicular pain would involved below the knee with numbness and tingling. Leg pain in the front of the leg would be inconsistent with an L5-S1 herniation.

55. Dr. Heller did not believe an MRI was indicated because Petitioner did not complain of radicular or leg pain and the Ingalls records showed no such symptoms. She was shown the Ingalls note from March 21, 2012 in which Petitioner reported low back pain with radiation to the base of the buttocks and the posterior of the left leg to the knee with no numbness or tingling. "That is not hard and fast radicular to" her. The report of pain could be referred pain because his symptoms did not follow the nerve distribution. Dr. Heller agreed that the October 2012 MRI showed a large disc herniation. However, that did not change her opinion that when she saw him he had only a mild lumbar strain. At that time he did not complain of leg pain, numbness or tingling, and normal sensory normal motor sensors. When she saw him his exam was "practically normal." Dr. Heller acknowledged she did not know anything about Petitioner's condition or treatment rendered after her examination.

56. Dr. Singh testified by deposition on March 19, 2015. He testified he is board certified in orthopedic surgery and an associate professor at Rush University Medical School. He performs 400 to 500 spine surgeries a year. He first saw Petitioner on March 10, 2014 for a Section 12 medical examination on referral "by the insurer." An MRI in 2012 showed a disc herniation at L5-S1 and one from 2013 showed no change. He opined that Petitioner's reported work injury caused the herniated disc at L5-S1.

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57. Dr. Singh explained his notation that "the mechanism of injury is no different than can be the expected result from normal daily activity" meant that he thought that either pushing boxes or normal activities were plausible mechanisms of injury.

58. Petitioner returned on August 11, 2014. Dr. Singh noted positive straight leg raises and weakness in his calf muscle and big toe. He recommended a repeat MRI because he had "actually [neurological] deficit at that time."

59. The MRI showed a large disc herniation was still present causing nerve compression at L5 and the previous surgery had "taken away a lot of the L5-S1 facet joint." Dr. Singh felt "that the patient's symptoms were essentially unchanged, now with a new neurological deficit." He also "felt that the residual disc herniation was a direct byproduct of his original work-related injury." He reasoned that the "initial surgery resulted in a large portion of the facet being taken down, rendering it unstable," though he thought the surgery was reasonable.

60. On cross examination, Dr. Singh agreed that his initial Section 12 examination was essentially normal. Nevertheless, he thought Petitioner's pain complaints were very reasonable considering he was only four weeks postop. He saw no indications of symptom magnification. Dr. Singh's undergraduate degree was in biomechanical engineering. However, based on the interrogatories he was given, he did not believe he was asked to utilize any such analysis in his report. He would not defer to a biomechanical analysis; he would have to analyze it. However, he felt it would be "highly unlikely" that one would change his opinion on causation.

61. Dr. Singh also indicated that the previous treaters who diagnosed lumbar muscular strain were clearly incorrect because the MRI revealed a large disc herniation. He also noted that those doctors did not have the benefit of an MRI because it had not been approved. The fact that Petitioner treated for chronic low back pain since 1997 would be consistent with degeneration seen at L5-S1, but not the disc herniation.

62. Dr. Singh also testified that it was not accurate to say that lifting a 100 pound weight would cause a larger disc herniation that lifting a five pound weight because "it related to the integrity of the disc, the time of lifting, the integrity of the annulus fibrosis all those factors in to determine the size of the disc herniation." The cause of neurological deficit was twofold, there was the still present large disc herniation and after the surgery his spine was a little more unstable which can cause more compression of the nerve root.

63. Dr. Singh noted that Dr. Amine did what surgeons have to do. Unfortunately you "have to take off some bone to get at the disc herniation." Petitioner should stay off work pending surgery because the spinal segment at L5-S1 is unstable with a large herniation causing nerve root compression. About 3-4% of patients with lumbar spine surgery will have recurrent or residual disc herniation possibly necessitating a lumbar fusion.

The Arbitrator found Petitioner did not prove accident because his testimony about "a compensable accident occurring," was "not credible regarding the mechanism of his alleged injury, history of chronic back pain, and several documented intervening causes." She specifically noted that his testimony that he was pushing six to eight layers of boxes was contradicted by his earlier reports his coworker's report, his reference to the required use of stairs, and his statements to providers that there was no light duty work available. She noted that the reference to the need for the use of stairs and the lack of available light duty work were specifically denied by Mr. Streeter.

The Arbitrator clearly premised her denial of compensation based on her finding that Petitioner did not prove accident rather than that he did not prove causation. She wrote specifically that "Petitioner has not proven, by a preponderance of the evidence, that an accident occurred that arose out of and in the course of his employment by Respondent therefore no benefits are awarded***. In that the Petitioner has not proven a compensable accident, all other issues are moot."

The Commission finds that the Arbitrator was incorrect in finding Petitioner did not prove a compensable "accident." In particular, the Commission finds the Arbitrator's reliance on the testimony of Mr. Streeter to be somewhat misplaced. His testimony that there is always light duty available to accommodate any restrictions is not credible and does not make sense intuitively. If that were indeed the case, one would think that Respondent would have documented its offer of light duty employment and terminated temporary total disability benefits if Petitioner refused; it did not. In addition, his testimony seemed to equivocate when asked if Respondent had actually offered Petitioner light duty work.

The Commission also finds the primary inconsistency in Petitioner's testimony, that he was pushing six layers of boxes rather than three, to be of limited importance. He testified the load weighed about 100 pounds and Mr. Streeter confirmed that three layers of boxes would weigh over 100 pounds. Therefore, based on Petitioner's immediate reporting of the accident, his consistent reports to medical providers, and corroboration by an eye witness, the Commission finds that Petitioner proved he sustained a compensable accident on February 6, 2012.

On the issue of causation, the Commission notes that Petitioner's complaints of pain and symptoms arose immediately after the accident and were consistent and persistent thereafter. In addition, the Commission finds the testimony and opinion of Dr. Singh more persuasive than that of Dr. Heller. The Commission considers noteworthy that Dr. Singh was hired to perform his examination by Respondent, which obviously valued his expertise and opinions. Nevertheless, Dr. Singh found Petitioner's herniated disc was consistent with the reported mechanism of injury, as reported by Petitioner, and that his condition was caused by the work accident. On the other hand, Dr. Heller did not have the benefit of MRI results when she examined Petitioner and issued her report. The very fact that there was no objective evidence of significant pathology for more than eight months was likely due to Respondent's denial of authorization for an MRI despite repeated requests from doctors at Ingalls Occupational Health, its preferred medical provider. The Commission also finds that Respondent did not successfully establish the incidents of increased symptoms after Petitioner reportedly carried his son and moved lawn furniture were intervening events severing causation.

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Finally, regarding the testimony of Mr. Draganich, the Commission notes that while he may have tried to duplicate the mechanism of injury as closely as possible, it was impossible for him to precisely determine exactly how Petitioner performed the activities during the incident. In addition, his calculations were based on the force needed to herniate a health disc. There is no evidence as to Petitioner's back condition prior to the accident. Also, Mr. Draganich's analysis presumes that more than 1/5 of people in Petitioner's age group have one or more asymptomatic disc herniations. That statistic could certainly support the theory that Petitioner had a preexisting asymptomatic disc herniation which became symptomatic after the work accident. Finally, the fact that Dr. Singh has a degree in biomechanical engineering and found the mechanism consistent with the herniated disc injury, works to lessen the impact of Mr. Draganich's opinions.

On the issue of medical expenses, the Commission finds that all medical treatment rendered to date were necessary and reasonable and related to Petitioner's work-related injury. Respondent has not presented any evidence to the effect that any medical treatment rendered, and associated expenses incurred, thus far were either unnecessary or unreasonable. Therefore, the Commission awards all outstanding medical expenses incurred to date, subject to the applicable medical fee schedule. In addition, the Commission orders Respondent to authorize and pay for prospective treatment prescribed by Dr. Singh.

On the issue of temporary total disability, the Commission notes that Petitioner was taken off work and released back to work on several occasions. The Commission awards a total of 159&2/7 weeks of temporary total disability benefits representing off work status from February 8, 2012 through March 25, 2012, March 27 through May 23, June 11 through June 13, July 17 through July 24, August 14 through August 26, August 30 through September 30, and October 17, 2012 through July 17, 2015, the date of arbitration. The Commission awards benefits through the date of arbitration based on the testimony of Dr. Singh that Petitioner's spine was currently unstable and he could not work until after the recommended surgery.

At this time it is inappropriate for the Commission to award permanent disability benefits. Because the Commission has ordered prospective medical treatment, Petitioner clearly has not achieved maximum medical improvement. While this matter was not arbitrated pursuant to Sections 8(a)/19(b) of the Act, the effect of this decision is to require that the matter be remanded to the Arbitrator to determine any additional temporary total disability benefits as well as permanent disability benefits similar to an action commenced and arbitrated pursuant to Sections 8(a)/19(b).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 5, 2015 is hereby reversed and the Commission finds Petitioner proved a compensable accident on February 6, 2012 which caused a current condition of ill being.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $286.00 per week for a period of 159&2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all outstanding medical expenses incurred to treat the work-related injury under §8(a) of the Act, subject to the appropriate fee schedule pursuant to §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment recommended by Dr. Singh.

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.

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

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

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

DATED: AUG 1 - 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-7/17/16
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12 WC 32701
16 IWCC 506

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICARDO HARO,

Petitioner,

vs.

NO. 12 WC 32701
16 IWCC 506

CARL BUDDIG,

Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

A Petition to Recall Decision pursuant to Section 19(f) of the Illinois Workers' Compensation Act to correct a clerical error in the Decision and Opinion on Review of the Commission dated August 1, 2016 having been filed by Petitioner herein, and the Commission having considered said Petition, the Commission is of the opinion that the Petition should be granted.

IT IS THEREFOR ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated August 1, 2016 is hereby recalled pursuant to Section 19(f) for clerical error 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: AUG 9 - 2016

RWW/dw
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Ruth W. White

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 Accident/Causation	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICARDO HARO,

Petitioner,

vs.

NO: 12 WC 32701
16 IWCC 506

CARL BUDDIG,

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, causation, temporary total disability, permanent partial disability, medical expenses both current and prospective, and penalties and fees, and being advised of the facts and law, reverses the Decision of the Arbitrator, and finds that Petitioner proved a compensable accident occurring on February 6, 2012 which caused a current condition of ill being.

Findings of fact and Conclusions of Law

1. Petitioner testified that on February 6, 2012 he was working for Respondent as a forklift driver and had been for a little over a year. He loaded and unloaded trucks, made orders, and put away stock. He had to lift cases of product "all day sometimes." On the date noted above, he was making orders and to expedite the process they would push "six to eight layers of boxes together" down to another skid. "The whole layer would be like 6, 12, 24, like 28 boxes in a row, sometimes, depending how big, what the box is. So it was 26 times *sic* from the layers." It weighed "like 100 pounds." He was pushing the boxes with a coworker, Gustavo. After he pushed them he felt pain in the left side of his lower back. In an eyewitness report, the coworker reported that on February 6, 2012 they were pushing three layers of product when Petitioner said that he pulled a muscle.

2. Petitioner stopped working for about 10 minutes but he noticed the pain had not gone away. He went to the office and reported the accident to his supervisor, Mario. Mario called security and somebody from security took him to the emergency room at Ingalls Memorial Hospital. X-rays were taken, Petitioner was given Ibuprofen and Skelaxin, and he was referred to Ingalls Occupational Health for follow up.

3. Petitioner was examined at Ingalls Occupational Health the next day. He returned about weekly at which times he was examined, it was determined what he "was able to do," and given more medication. He went to physical therapy for about two months. He was put on restrictions, which Respondent did not always accommodate. A doctor at Ingalls recommended an MRI but that was not approved by Respondent.

4. Petitioner was released to return to work on a trial basis on March 26, 2012. However, he was not able to continue working because it increased his back pain. He worked the entire day of the 26th but returned to Ingalls the next day. He complained of low back pain and some pain in his left leg. He was put back in physical therapy and on restricted duty; again an MRI was recommended and again it was denied. Ingalls stopped physical therapy as of April 6, 2012, after about 18 sessions. Petitioner was still on restricted duty, which Respondent could not accommodate.

5. Petitioner also testified that the last time he went to Ingalls was on May 9, 2012. He was told to continue his medication and once again an MRI was recommended. Also in May 2012, Respondent sent him to Dr. Heller for an examination under Section 12 of the Act. Respondent terminated medical treatment after Dr. Heller issued her report. Thereafter, Petitioner began treating at MetroSouth Medical Center, where his primary care physician practices. He saw three doctors there. He returned there "like every month." They kept examining him and prescribing additional medication. Nevertheless, he experienced more pain in his back and left leg, "all the way to the toes."

6. On about four or five occasions doctors at MetroSouth took him off work and released him to work. Petitioner returned to work on October 1, 2012 and worked about 16 days. He experienced pain in his back and left leg down to his toes. His toes became numb, swollen, and painful. He last work for Respondent on October 16, 2012, and has been off work since.

7. Petitioner eventually had an MRI on October 23, 2012. It showed he had a herniated disc. He was referred to an orthopedist, Dr. Amine, whom he saw on November 15, 2012. He administered three injections, the last on August 30, 2013. However, he still had pain which was getting worse. He noticed no improvement from the injections. He returned to Dr. Amine on September 26, 2013 and asked to have surgery. Dr. Amine ordered a repeat MRI, after which he performed surgery on February 10, 2014. The surgery did not resolve his back/leg pain. Dr. Amine prescribed Vicodin and Neurontin. He also recommended physical therapy, but that was not approved by insurance. He last saw Dr. Amine on September 18, 2014.

8. At Respondent's direction, on March 10, 2014 Petitioner had another examination under Section 12 with Dr. Singh. He saw Dr. Singh again on August 14, 2014. He recommended a 3rd MRI, which he had on August 18, 2014. Thereafter, Dr. Singh recommended a second surgery, and Petitioner agreed to treat with him. He scheduled surgery for September 9, 2014, but it was not approved. Dr. Singh indicated Petitioner could not return to work until he had surgery. Petitioner wants the surgery. Petitioner has not seen Dr. Singh since the MRI. However, Dr. Singh keeps refilling his medications, Tramadol, Ibuprofen, Gabapentin, and another he could not remember.

9. Petitioner further testified he never injured or had treatment for his lower back prior to February 6, 2012. He has not reinjured his back in any way subsequent that date. Petitioner has not received any workers' compensation benefits since Dr. Heller's report. He has no source of income and is surviving economically by living with his parents and with help from his girlfriend. He is subject to "a couple of lawsuits" due to his inability to pay bills.

10. Petitioner identified a person sitting in the hearing room as Dave Streeter. He has not given Mr. Streeter permission to contact his doctors. Petitioner has not experienced any benefit from his surgery. He still has pain in his lower back and left leg, foot, and toes.

11. On cross examination, Petitioner testified that at the time of his accident he had seven year old son and five year old daughter weighing about 70 and 50 lbs, respectively. There are different shapes of boxes and cases of product with different weights, but he doesn't know exactly what they weigh. He agreed that making an order involves "taking several layers of boxes and transferring them to another pallet." He reiterated that at the time of his accident he was pushing "like six layers" of boxes. Petitioner denied he told his doctors that he was pushing only three layers of boxes. Petitioner was shown the accident report he filled out. He agreed that it did not show how many layers of boxes he was pushing.

12. After the Section 12 examination with Dr. Heller, in May 2012, Respondent sent him a letter asking him to return to work. The day after he went back to work he went to Dr. Hajat, who was his primary care physician. He told her he had pain in his back but he did not ask her to take him off work. Petitioner denied that in August of 2012 he told Dr. Hajat that he experienced back spasms picking up and carrying his son; he once told her he experienced spasm "from walking from the house to his school." He did not remember whether he told her about carrying his son 100 yards.

13. Petitioner agreed that he did tell Dr. Hajat he moved some chairs and his back hurt more after. He had an MRI on October 23, 2012, which was about six weeks after he told Dr. Hajat about moving chairs. He had tried to help out by trying to move "not even six chairs." He tried to help with the furniture, but he could not move the chairs because of the pain. Petitioner was referred to Dr. Amine by Dr. Hajat because of the results of the MRI.

14. When asked whether it was true that he did not have any numbness in his leg or toes until after he "lifted the party tent," Petitioner could not remember. However, he later denied he was setting up a party tent but was just moving chairs. He again testified that he did not reinjure his back. He agreed that he did not receive any bills from Dr. Singh and Respondent likely paid them.

15. On redirect examination, Petitioner testified that since he injured his back on February 6, 2012 "everything" aggravates his back pain, including walking, lying, and sitting. Ingalls recommended MRIs on February 29, 2012, March 7, 2012, and March 27, 2012, which were all denied.

16. David Streeter was called by Respondent for which he worked as safety and security manager for six and a half years. Mr. Streeter has been in safety and human resources for about 20 years. Probably more than 50% of his time is spent on the work floor so he has a lot of interaction with the employees. He creates and ultimately enforces all safety-related policies and procedures. He also administers return to work programs. Respondent has a 100% return to work program; they honor all light duty restrictions. If there were restrictions he would contact the employee and indicate they would accommodate them. Employees can be assigned to drive a forklift with no lifting, "cycle counts" in parts and maintenance, or even simply to do paperwork and make copies.

17. Mr. Streeter thought Petitioner started working for Respondent about when he did, so he thought he knew him for about six years. He believed he was informed of the alleged accident the next day because it occurred late. He was told Petitioner was sent to the clinic.

18. Mr. Streeter identified documents, which were Petitioner's accident report, an eyewitness report, and supervisor's report, respectively. They indicated Petitioner was injured while pushing layers of boxes into an empty pallet. Respondent has a policy that when employees are pushing layers of boxes "they should work as a team and should push a maximum to two layers." There was nothing unsafe about pushing two layers of boxes. Mr. Streeter was "surprised to see that they had pushed three layers;" the force needed to push two was acceptable, three was not.

19. It was the witness' understanding that doctors' reports indicated that Petitioner suffered a muscle strain. Mr. Streeter did not recall any resistance from any employees about accommodating Petitioner's restrictions and he did not recall whether Petitioner complained to him of pain after he returned to light-duty work. After he received Dr. Heller's report indicating Petitioner could return to work without restrictions, Mr. Streeter asked him to return to work at full duty.

20. On cross examination, Mr. Streeter testified he was aware that Ingalls put Petitioner on restricted duty. When asked whether it was true that Respondent did not provide work within his restrictions, he answered that he did not recall. He also did not recall whether Respondent paid him workers' compensation benefits.

21. Mr. Streeter repeated his testimony that Respondent attempts to accommodate all restrictions, and he believed that it always does. He would have to review the paperwork to see whether Respondent accommodated Petitioner's restrictions. He did not recall whether he sent Petitioner a letter informing him light duty was available, but he certainly believed he spoke to him in person.

22. Mr. Streeter also testified he did not remember whether he called Ingalls and told them that Petitioner had a history of trying not to work and he believed Petitioner was exaggerating symptoms. However, he acknowledged that there was a note indicating he called on February 8, 2012. What he saw was that he "called in regard to his restrictions." Petitioner did not give him a signed authorization to contact his doctor, but he thought it was legal to contact a doctor about restrictions.

23. Mr. Streeter also testified he did not specifically recall seeing Dr. Singh's Section 12 report. However, he believed he remembered that he indicated Petitioner had a herniated disc. He did not remember whether he contacted Petitioner after he saw that report.

24. On redirect examination, Mr. Streeter testified after injuries employees are informed that Respondent "would abide by restrictions" and wants them to return to work. He told Petitioner that Respondent was willing to accommodate any restrictions. He presumed it would have been the day after the accident when he became aware of the injury. He had no reason to disbelieve the account of the witness that they were pushing three layers of boxes. Moving six layers made no sense to him; he was not even sure it was possible. Six layers "would be an entire pallet. So it would not make sense for us to push all the boxes from one pallet to another pallet. We would just utilize that existing pallet of product." If the witness remembered correctly, the type of box Petitioner was moving weighed about three pounds each. If an order included three layers, employees would be expected to move two layers and return for the third.

25. On re-cross examination, Mr. Streeter testified the number of boxes in a layer depended on the product. He estimated that there would be 16 to 20 boxes per layer at three pounds per box. Therefore, three layers of boxes would be in excess of 100 pounds.

26. Louis Draganich was called by Respondent and testified he has a "Ph.D. in bioengineering focusing in biomechanics." He is "an expert consultant in injury biomechanics." He studies the effect of forces or displacements on the body. Respondent's lawyer asked him to assess records and "try to make a determination whether or not the activity alleged resulted in the injury alleged" in the current instance.

27. Mr. Draganich read the medical and workplace records, researched the literature, performed an inspection, oversaw a reenactment demonstration of the alleged incident, and issued a report. The enactment was performed by Mr. Streeter and Mr. Pacheco, the coworker who worked with Petitioner on February 6, 2012. The enactment included three layers of boxes totaling about 85 boxes, which were reported to be identical to those involved in the incident.

28. Mr. Draganich then asked Respondent's lawyer to serve as a surrogate because he is the same height as Petitioner, and the variation of weight, Petitioner was 185 pounds and the lawyer was 150 pounds, was sufficiently close to satisfy Mr. Draganich. Mr. Pacheco was involved in the incident and set up the demonstration as it was at the time of the incident.

29. Mr. Draganich explained that "it's been pretty conclusively demonstrated that for a healthy disc, a compressive force can't rupture the disc unless also the vertebral end plates, the bony end plates, are ruptured. And among investigators, it's accepted that his is primarily a fatigue injury, due to, for example, a cyclic flexion/extension loading." He saw no evidence of any such fractures in the medical records. That implies to him that "this ruptured disc was not produced acutely," but rather the result of fatigue. Statistically, 21% of individuals in Petitioner's age category, 21-39, would have asymptomatic herniated discs.

30. In the demonstration Mr. Draganich found that it took 72 lbs of force to push the boxes. The compressive force on L5-S1 was between 485 and 630 pounds. By comparison, fast walking would produce 545 lbs of compressive force on the lumbar spine, bending over at about 80 degrees would cause about 561 pounds of compressive force, a sit up would produce about 600 pounds of compressive force, and carrying a typical carry-on suitcase would produce 621 pounds of compressive force which was almost exactly the same as the alleged accident.

31. Mr. Draganich concluded that the force exerted in the alleged accident was very similar to those exerted in normal exercise and activities of normal everyday living. He determined that for Petitioner's "age and weight," "his tolerance limit was a little over 2,000 pounds" to fracture the bone. Therefore the force was not sufficient to cause the ruptured disc or to aggravate any preexisting condition.

32. On cross examination, Mr. Draganich agreed that many activities that do not require much heavy lifting can cause disc herniations. He gathered information about the mechanism of the alleged injury from reports of Mr. Streeter and Mr. Pacheco. Mr. Pacheco had engaged in the activity for decades. Mr. Draganich is not a doctor or a board certified orthopedist. He agreed that Mr. Streeter was not present at the time of the accident. Mr. Draganich was aware that Dr. Singh had a degree in engineering.

33. On redirect examination, Mr. Draganich testified he worked regularly with orthopedic surgeons. He not only performed research, he taught medical students. For coughing or sneezing to result in a herniated disc it would be "the straw that broke the camel's back" after fatigue.

34. Petitioner testified in rebuttal that the letter dated May 10, 2012 was the only letter he received about returning to work from Mr. Streeter. He had no conversations with Mr. Streeter about returning to work in a light-duty capacity. After he was first injured there was no light duty work available or Respondent did not honor his restrictions.

35. On cross examination, Petitioner testified that he was informed by the supervisor Alex that he could not work with the restrictions that were imposed. That was when he returned with the restrictions from the doctor. He took his restrictions in every time he went back. Mr. Streeter never mentioned Respondent's 100% return to work policy.

36. The medical records indicated that a little after midnight on February 7, 2012, Petitioner presented to the emergency department at Ingalls complaining of 8/10 non-radiating lower back pain with swelling after injuring his back at work pushing boxes off one skid to another skid. X-rays were normal. Lumbar sprain was diagnosed, medication prescribed, and Petitioner was advised to return for reevaluation at Ingalls Occupational Health in two days.

37. Petitioner returned on February 8th with 5/10 pain and did not think he was improving. He was not in physical therapy and found his pain was exacerbated by bending and lifting. Petitioner's supervisor called the previous day and indicated Respondent could accommodate no bending and lifting restrictions and asked whether Petitioner could drive a forklift. Dr. Reddy indicated he would allow it on a trial basis. Petitioner reported that his pain increased by the end of the day "because he did not have any breaks and was required to use stairs and inclines very often." Tenderness and reduced flexion was noted. Restrictions and medications were continued.

38. An addendum treatment note indicated that David Streeter called. He was concerned about the restrictions and indicated Petitioner had a history of "trying not to work and believes he is exaggerating symptoms." He also stated there are no stairs at Respondent's facility. Dr. Reddy suggested he send a case manager at the next visit and they might consider physical therapy.

39. Petitioner continued to treat at Ingalls Occupational Health, including physical therapy, through May 9, 2012 with little improvement. Repeated requests for MRIs by doctors at Ingalls were denied by Respondent.

40. On August 20, 2012, Petitioner presented to his principle care provider, Dr. Hajat because of a sore throat and back spasms. He had pain since the previous day when he carried his son and carried him for over 100 yards. He was unable to walk since August 15th. Dr. Hajat did not find muscle spasms and sent him back to work on August 27th.

41. Petitioner returned to Dr. Hajat on September 11, 2012 reporting back pain for past two days "after putting up a party tent and furniture." He was unable to return to work. Dr. Hajat noted paraspinal spasms in both the thoracic and lumbar spine, ordered an MRI, and sent him back to work as of September 16th.

42. On November 15, 2012, Petitioner presented to Dr. Amine and reported feeling a snap in his back in the February 6, 2012 incident and had intermittent low back pain with radiculopathy since. He had physical therapy for a couple of weeks and could not tolerate a return to work. Dr. Amine noted that an October 23, 2012 MRI showed a left L5-S1 disc herniation with extrusion into the left neural foramen.

43. By September 20, 2013, Dr. Amine's notes indicated he had administered three epidural steroid injections. Petitioner left sided back pain radiating down the left leg was almost constant and he wanted to proceed with surgery. Dr. Amine ordered a repeat MRI, which showed an acute-appearing herniated disc at L5-S1 with compression of the L5 nerve roots at the neural foramen and lateral recess, respectively.

44. On February 10, 2014, Dr. Amine performed left L5-S1 laminectomy, foraminotomy, and medial facetectomy for a herniated disc and radiculopathy.

45. On March 10, 2014, at the direction of Respondent, Petitioner presented to Dr. Singh for a medical examination under Section 12. He reported pushing boxes weighing about 100 pounds when he developed low back pain. He currently had 8/10 low back and left leg pain. He recently had lumbar surgery and was not working.

46. Dr. Singh noted that an October 2012 MRI showed a large herniated disc at L5-S1 causing L5 nerve compression and an October 2013 MRI showed no change. Dr. Singh indicated that Petitioner's condition was consistent with the reported mechanism of injury, which was "no different than can be expected result from normal daily activity."

47. Dr. Singh opined that Petitioner's work injury caused his condition of ill being. Treatment provided, including surgery, was indicated. He could have worked light duty up to the injections and surgery but was currently unable to work. Petitioner was not at maximum medical improvement and needed physical therapy and work conditioning. He disagreed with the report of Dr. Heller because Petitioner had a herniated disc and an earlier MRI would have been prudent and could have expedited treatment.

48. Petitioner continued to treat with Dr. Amine, with little improvement. Prescriptions for physical therapy were denied. Dr. Amine noted that the denial seemed to make Petitioner depressed.

49. On August 11, 2014, Petitioner presented to Dr. Singh for him to become his treating doctor and for his recommendations for additional treatment. He reported 7-8/10 low back pain, 5-6/10 with medication, with radiation in the L5-S1 distribution. He found little relief from the laminectomy/discectomy performed in February 2014. Dr. Singh ordered a repeat MRI and took Petitioner off work.

50. Dr. Singh noted the MRI showed a large residual L5-S1 disc herniation causing severe foraminal stenosis with disc height loss at L5-S1. He recommended a revision laminectomy/discectomy with interbody fusion and iatrogenic facet resection for the recurrent disc herniation. The MRI report indicated a moderate posterior disc bulge with paracentral annular tear, small osteophytes, and moderate to severe foraminal and mild spinal canal stenosis at L5-S1.

51. On October 28, 2014, Dr. Heller, Respondent's initial Section 12 medical examiner, testified by deposition. She testified she was board certified in physical medicine and rehabilitation. She is also a licensed physical therapist. She sees 50 to 75 spine injury patients and performs one Section 12 examination per week.

52. She examined Petitioner on May 12, 2012 and issued a report. She did not remember Petitioner but normally she would review the medical records she is supplied by the requesting party prior to her examination. In her report she noted that Petitioner told her "he was pushing some stacked boxes of fairly light items four to five feet on a skid and he felt some pain in his low back."

53. Dr. Heller diagnosed that Petitioner suffered a mild lumbar strain in the incident. She based that opinion on the medical records, discussion with Petitioner, and her physical examination, which was essentially normal. She concluded that Petitioner's injury did not seem severe compared to other patients she has seen. She believed Petitioner achieved maximum medical improvement at the time of her examination because he did not need any additional treatment based on her normal physical exam, his extensive physical therapy, and because he was taught "how to change positions properly."

54. On cross examination, Dr. Heller testified that while Petitioner continued to complain of lower back pain in his weekly exams through April 6, 2012, the physical exams were normal except for tenderness and decreased range of motion; there were no findings of sensory or motor deficits. Her dictation does not indicate that Petitioner began complaining of radiating left leg pain. If he had pain to the knee, that would generally not be radicular pain, radicular pain would involved below the knee with numbness and tingling. Leg pain in the front of the leg would be inconsistent with an L5-S1 herniation.

55. Dr. Heller did not believe an MRI was indicated because Petitioner did not complain of radicular or leg pain and the Ingalls records showed no such symptoms. She was shown the Ingalls note from March 21, 2012 in which Petitioner reported low back pain with radiation to the base of the buttocks and the posterior of the left leg to the knee with no numbness or tingling. "That is not hard and fast radicular to" her. The report of pain could be referred pain because his symptoms did not follow the nerve distribution. Dr. Heller agreed that the October 2012 MRI showed a large disc herniation. However, that did not change her opinion that when she saw him he had only a mild lumbar strain. At that time he did not complain of leg pain, numbness or tingling, and normal sensory normal motor sensors. When she saw him his exam was "practically normal." Dr. Heller acknowledged she did not know anything about Petitioner's condition or treatment rendered after her examination.

56. Dr. Singh testified by deposition on March 19, 2015. He testified he is board certified in orthopedic surgery and an associate professor at Rush University Medical School. He performs 400 to 500 spine surgeries a year. He first saw Petitioner on March 10, 2014 for a Section 12 medical examination on referral "by the insurer." An MRI in 2012 showed a disc herniation at L5-S1 and one from 2013 showed no change. He opined that Petitioner's reported work injury caused the herniated disc at L5-S1.

57. Dr. Singh explained his notation that "the mechanism of injury is no different than can be the expected result from normal daily activity" meant that he thought that either pushing boxes or normal activities were plausible mechanisms of injury.

58. Petitioner returned on August 11, 2014. Dr. Singh noted positive straight leg raises and weakness in his calf muscle and big toe. He recommended a repeat MRI because he had "actually [neurological] deficit at that time."

59. The MRI showed a large disc herniation was still present causing nerve compression at L5 and the previous surgery had "taken away a lot of the L5-S1 facet joint." Dr. Singh felt "that the patient's symptoms were essentially unchanged, now with a new neurological deficit." He also "felt that the residual disc herniation was a direct byproduct of his original work-related injury." He reasoned that the "initial surgery resulted in a large portion of the facet being taken down, rendering it unstable," though he thought the surgery was reasonable.

60. On cross examination, Dr. Singh agreed that his initial Section 12 examination was essentially normal. Nevertheless, he thought Petitioner's pain complaints were very reasonable considering he was only four weeks postop. He saw no indications of symptom magnification. Dr. Singh's undergraduate degree was in biomechanical engineering. However, based on the interrogatories he was given, he did not believe he was asked to utilize any such analysis in his report. He would not defer to a biomechanical analysis; he would have to analyze it. However, he felt it would be "highly unlikely" that one would change his opinion on causation.

61. Dr. Singh also indicated that the previous treaters who diagnosed lumbar muscular strain were clearly incorrect because the MRI revealed a large disc herniation. He also noted that those doctors did not have the benefit of an MRI because it had not been approved. The fact that Petitioner treated for chronic low back pain since 1997 would be consistent with degeneration seen at L5-S1, but not the disc herniation.

62. Dr. Singh also testified that it was not accurate to say that lifting a 100 pound weight would cause a larger disc herniation that lifting a five pound weight because "it related to the integrity of the disc, the time of lifting, the integrity of the annulus fibrosis all those factors in to determine the size of the disc herniation." The cause of neurological deficit was twofold, there was the still present large disc herniation and after the surgery his spine was a little more unstable which can cause more compression of the nerve root.

63. Dr. Singh noted that Dr. Amine did what surgeons have to do. Unfortunately you "have to take off some bone to get at the disc herniation." Petitioner should stay off work pending surgery because the spinal segment at L5-S1 is unstable with a large herniation causing nerve root compression. About 3-4% of patients with lumbar spine surgery will have recurrent or residual disc herniation possibly necessitating a lumbar fusion.

The Arbitrator found Petitioner did not prove accident because his testimony about "a compensable accident occurring," was "not credible regarding the mechanism of his alleged injury, history of chronic back pain, and several documented intervening causes." She specifically noted that his testimony that he was pushing six to eight layers of boxes was contradicted by his earlier reports his coworker's report, his reference to the required use of stairs, and his statements to providers that there was no light duty work available. She noted that the reference to the need for the use of stairs and the lack of available light duty work were specifically denied by Mr. Streeter.

The Arbitrator clearly premised her denial of compensation based on her finding that Petitioner did not prove accident rather than that he did not prove causation. She wrote specifically that "Petitioner has not proven, by a preponderance of the evidence, that an accident occurred that arose out of and in the course of his employment by Respondent therefore no benefits are awarded***. In that the Petitioner has not proven a compensable accident, all other issues are moot."

The Commission finds that the Arbitrator was incorrect in finding Petitioner did not prove a compensable "accident." In particular, the Commission finds the Arbitrator's reliance on the testimony of Mr. Streeter to be somewhat misplaced. His testimony that there is always light duty available to accommodate any restrictions is not credible and does not make sense intuitively. If that were indeed the case, one would think that Respondent would have documented its offer of light duty employment and terminated temporary total disability benefits if Petitioner refused; it did not. In addition, his testimony seemed to equivocate when asked if Respondent had actually offered Petitioner light duty work.

The Commission also finds the primary inconsistency in Petitioner's testimony, that he was pushing six layers of boxes rather than three, to be of limited importance. He testified the load weighed about 100 pounds and Mr. Streeter confirmed that three layers of boxes would weigh over 100 pounds. Therefore, based on Petitioner's immediate reporting of the accident, his consistent reports to medical providers, and corroboration by an eye witness, the Commission finds that Petitioner proved he sustained a compensable accident on February 6, 2012.

On the issue of causation, the Commission notes that Petitioner's complaints of pain and symptoms arose immediately after the accident and were consistent and persistent thereafter. In addition, the Commission finds the testimony and opinion of Dr. Singh more persuasive than that of Dr. Heller. The Commission considers noteworthy that Dr. Singh was hired to perform his examination by Respondent, which obviously valued his expertise and opinions. Nevertheless, Dr. Singh found Petitioner's herniated disc was consistent with the reported mechanism of injury, as reported by Petitioner, and that his condition was caused by the work accident. On the other hand, Dr. Heller did not have the benefit of MRI results when she examined Petitioner and issued her report. The very fact that there was no objective evidence of significant pathology for more than eight months was likely due to Respondent's denial of authorization for an MRI despite repeated requests from doctors at Ingalls Occupational Health, its preferred medical provider. The Commission also finds that Respondent did not successfully establish the incidents of increased symptoms after Petitioner reportedly carried his son and moved lawn furniture were intervening events severing causation.

Finally, regarding the testimony of Mr. Draganich, the Commission notes that while he may have tried to duplicate the mechanism of injury as closely as possible, it was impossible for him to precisely determine exactly how Petitioner performed the activities during the incident. In addition, his calculations were based on the force needed to herniate a health disc. There is no evidence as to Petitioner's back condition prior to the accident. Also, Mr. Draganich's analysis presumes that more than 1/5 of people in Petitioner's age group have one or more asymptomatic disc herniations. That statistic could certainly support the theory that Petitioner had a preexisting asymptomatic disc herniation which became symptomatic after the work accident. Finally, the fact that Dr. Singh has a degree in biomechanical engineering and found the mechanism consistent with the herniated disc injury, works to lessen the impact of Mr. Draganich's opinions.

On the issue of medical expenses, the Commission finds that all medical treatment rendered to date were necessary and reasonable and related to Petitioner's work-related injury. Respondent has not presented any evidence to the effect that any medical treatment rendered, and associated expenses incurred, thus far were either unnecessary or unreasonable. Therefore, the Commission awards all outstanding medical expenses incurred to date, subject to the applicable medical fee schedule. In addition, the Commission orders Respondent to authorize and pay for prospective treatment prescribed by Dr. Singh.

On the issue of temporary total disability, the Commission notes that Petitioner was taken off work and released back to work on several occasions. The Commission awards a total of 159&2/7 weeks of temporary total disability benefits representing off work status from February 8, 2012 through March 25, 2012, March 27 through May 23, June 11 through June 13, July 17 through July 24, August 14 through August 26, August 30 through September 30, and October 17, 2012 through July 17, 2015, the date of arbitration. The Commission awards benefits through the date of arbitration based on the testimony of Dr. Singh that Petitioner's spine was currently unstable and he could not work until after the recommended surgery.

At this time it is inappropriate for the Commission to award permanent disability benefits. Because the Commission has ordered prospective medical treatment, Petitioner clearly has not achieved maximum medical improvement. While this matter was not arbitrated pursuant to Sections 8(a)/19(b) of the Act, the effect of this decision is to require that the matter be remanded to the Arbitrator to determine any additional temporary total disability benefits as well as permanent disability benefits similar to an action commenced and arbitrated pursuant to Sections 8(a)/19(b).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 5, 2015 is hereby reversed and the Commission finds Petitioner proved a compensable accident on February 6, 2012 which caused a current condition of ill being.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $299.73 per week for a period of 159&2/7 weeks, that being the period of temporary total incapacity for work under §8(b), and this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all outstanding medical expenses incurred to treat the work-related injury under §8(a) of the Act, subject to the appropriate fee schedule pursuant to §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment recommended by Dr. Singh.

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.

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

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

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

DATED: AUG 9 - 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-7/17/16
46

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ 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

Valerie Vancil,
Petitioner,
vs.

NO: 12WC 33168

Decatur Memorial Hospital,
Respondent,

16IWCC0555

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 nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 9, 2016, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $32,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 25 2016
o081516
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VANEIL, VALERIE
Employee/Petitioner

Case# **12WC033168**

DECATUR MEMORIAL HOSPITAL
Employer/Respondent

16IWCC0555

On 2/9/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.42% 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:

0333 SHAY & ASSOCIATES
TIMOTHY M SHAY
260 E WOOD ST
DECATUR, IL 62523

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

☐ 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
NATURE AND EXTENT ONLY

Valerie Vancil
Employee/Petitioner

Case # 12 WC 33168

v.

Consolidated cases: _____

Decatur Memorial Hospital
Employer/Respondent

16IWCC0555

The only disputed issue is the nature and extent of the injury. 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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **January 18, 2016**. By stipulation, the parties agree:

On the date of accident, **June 26, 2012**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did 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 earned **$184,670.72**, and the average weekly wage was **$3,551.36**.

At the time of injury, Petitioner was **59** years of age, married with **0** dependent children.

Temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$28,172.98** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$28,172.98**.

Respondent is entitled to a credit under Section 8 (j) of the Act for all medical paid by it's group insurance provider

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$695.78**/week, the statutory maximum rate, for a further period of 86 weeks, because the injuries sustained caused a **40%** loss of the use of the right leg.

Per stipulation of the parties, Respondent shall pay Petitioner's outstanding medical bills, as set forth in Petitioner's Exhibit 12, pursuant to the medical fee schedule or any lesser amount the Respondent may negotiate with the medical provider, directly to the provider, as set forth in the Act. Petitioner's bills have been paid in part by Consociate, a group health insurer for Respondent. Pursuant to section 8(j) of the Act, Respondent shall receive a credit for bills paid by Consociate, and Respondent shall hold Petitioner harmless and indemnify her in the event that Consociate attempts to collect its subrogation interest. If any provider has accepted payment for an amount less than set forth in the fee schedule, Respondent shall only be responsible for such lesser amount.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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.

D. Dglas McCarty

Signature of Arbitrator

2/5/2016

Date

ICArbDecN&E p.2

FEB 9 - 2016

ADDENDUM 16IWCC0555

FINDINGS OF FACT

Petitioner has been employed by Respondent for the past 29 years as a nurse anesthetist. Petitioner has received her bachelor's degree in nursing, a certificate as a nurse anesthetist, and a master's degree. Since obtaining her certificate as a nurse anesthetist, Petitioner has spent all but six months of her career with Respondent. She testified that her job duties as a nurse anesthetist for Respondent include delivering anesthetic for surgical procedures, moving the patient to pre-op and surgery on a stretcher, moving the patient from the stretcher to the operating table and back, and moving the patient to the recovery room on a stretcher. Petitioner testified the stretcher has four, eight inch wheels.

On June 26, 2012, Petitioner was working her normal 7:00 a.m. to 3:00 p.m. shift. She was in the process of transporting a 350 plus pound patient from the surgery suite to the recovery area, and attempted to turn a corner. While maneuvering the stretcher, it started to turn to her right towards a wall and she moved to stop the stretcher, injuring her right knee.

Petitioner testified that prior to her date of accident June 26, 2012, she had never injured or sought treatment for her right knee. She had treated with Dr. Edmund Raycraft for her left knee. She testified based on her knowledge as a nurse, prior to June 26, 2012, her right knee had 120 degrees of flexion.

Petitioner presented to DMH Corporate Health on July 16, 2012. PX 1. She reported aching in her right knee that was constant and made worse by walking. PX 1. She rated her pain level as a 3 out of 10. PX 1. She reported when she initially injured the knee she felt a sudden pain in the medial and anterior aspect of the right knee. She denied any prior right knee problems. PX 1. Physical examination revealed mild tenderness to the anterior medial knee and slight limp. PX 1. Petitioner was placed on restricted duty of sitting or standing as needed and recommended acetaminophen for pain. PX 1.

Petitioner continued to treat with DMH Corporate Health. She was referred for a one time physical therapy evaluation for home exercise program instruction on August 6, 2012 at Decatur Memorial Hospital's SHORE facility. PX 2. Petitioner was subsequently discharged from DMH Corporate Health on August 23, 2012. PX 1.

On August 20, 2012, Petitioner presented to APN Julie Maley, a nurse practitioner who works under the supervision of Dr. Edmund Raycraft. PX 7. Dr. Raycraft testified via his evidence deposition, taken on October 31, 2014, and entered into evidence as Petitioner's Exhibit 11. Dr. Raycraft testified that he is a board certified orthopedic surgeon who predominately treats conditions to the lower extremities. PX 11, p. 4-5. Petitioner had previously treated with Dr. Raycraft for her left knee. Dr. Raycraft testified that when he saw her for her left knee in January 2012, she did not have any complaints of right knee pain. PX 11, p. 6. At that time Dr. Raycraft ordered x-rays of Petitioner's bilateral knees. PX 11, p. 7. Dr. Raycraft testified that he ordered an x-ray of the right, non-symptomatic knee as it is his practice to do so for comparison. PX 11, p. 7-8. Dr. Raycraft testified that the x-ray taken on January 25, 2012 of the right knee showed mild to moderate changes of osteoarthritis. PX 11, p. 8. He testified that a person can have mild to moderate degenerative arthritis in the knee and be asymptomatic. PX 11, p. 8.

At her August 20, 2012 office visit with APN Maley, Petitioner reported injuring her right leg while pushing a large patient on a stretcher and twisting her leg. She reported pain under the knee cap. Petitioner was examined by APN Maley and discussed her knee pain with Dr. Tyler Jones, due the Dr. Raycraft's absence. Dr. Jones recommended Petitioner undergo a steroid injection to the right knee. PX 7. Dr. Raycraft testified that the corticosteroid injection helps diminish inflammation. PX 11, p. 12. Petitioner returned to Dr. Jones' office on August 24, 2012 and underwent a right knee injection. PX 7.

Petitioner contacted Dr. Jones' office on September 5, 2012, noting that her right knee had not improved with the injection. She complained of ongoing medial joint line pain. PX 7. APN Maley ordered an MRI of the right knee. PX 7.

On September 10, 2012, Petitioner underwent the MRI of her right knee. PX 7. The MRI revealed a tear of the posterior horn of the medial meniscus with mild meniscal extrusion and an apparent partial tear and strain injury of the popliteus tendon and musculotendinous junction. PX 7. Dr. Raycraft testified that he would expect a person with a medial meniscus tear to exhibit pain at the medial joint line, anywhere from the anterior to the posterior aspect of the knee on the medial side. PX 11, p. 14. He further noted that Petitioner's prior complaints as reported to DMH Corporate Health on July 16, 2012 were consistent with the MRI findings. PX 11, p. 15.

Subsequent to her MRI, Petitioner returned to Dr. Jones on September 13, 2012 to discuss her results. Petitioner noted ongoing medial joint line pain and soreness and tightness in the upper thigh. PX 7. Dr. Jones reviewed the MRI and noted a large effusion, a medial meniscus tear, and a small tendon sprain. PX 7. He diagnosed Petitioner with a medial meniscus tear and localized osteoarthritis of the lower leg and recommended the Petitioner undergo an arthroscopy. PX 7. Dr. Raycraft testified within a reasonable degree of medical certainty that the arthroscopic procedure recommended by Dr. Jones was reasonable and necessary medical treatment. PX 11, p. 17. Dr. Jones also placed Petitioner on light duty of no more than four hours of standing per shift. PX 7.

On October 18, 2012, Petitioner presented to Dr. Tomasz Borowiecki for a second opinion regarding her knee. She reported her accident and indicated that she has had knee pain since. PX 6. She noted anterior and medial pain, and that some of her pain radiated along the medial aspect of the tibia. PX 6. Examination of the right knee revealed tenderness upon stressing the medial collateral into valgus and slight lateral discomfort with varus stress of the lateral collateral. PX 6. Medial joint line was tender to direct palpation and McMurray's test. PX 6. There was slight patellofemoral crepitance. PX 6.

Dr. Borowiecki reviewed Petitioner's prior MRI, noted a medial meniscal tear and a strain pattern without complete tearing of the medial collateral and popiteal tendon. PX 6. He further noted some increased signal in the subchondral bone of the medial tibial plateau that may have indicated a bony contusion. PX 6.

Dr. Borowiecki diagnosed Petitioner with a medial meniscal tear and a medial collateral and popiteal strain. PX 6. He noted that her complaints were consistent with his diagnoses. PX6. Dr. Borowiecki recommended Petitioner undergo a knee arthroscopy to address the medial meniscal tear. PX 6. Dr. Borowiecki amended Petitioner's light duty restrictions to no more than 30 minutes of standing or walking per hour. PX 3.

Petitioner underwent a right knee arthroscopy with arthroscopic partial medial meniscectomy as well as debridement of unstable fibrillated cartilage on the patella, medial femoral condyle, and tibial plateau on November 26, 2012 with Dr. Borowiecki. PX 4. Dr. Borowiecki's post-operative diagnosis was complex tear involving the inner rim of the medial meniscus as well as grade III and IV changes of the medial compartment,

including the tibial plateau where there was exposed subchondral bone and grade II changes in the patella. PX 4. Subsequent to surgery, Petitioner was placed off work.

Petitioner continued to follow up with Dr. Borowiecki post surgically. PX 6. On December 4, 2012, Dr. Borowiecki referred Petitioner to physical therapy for post-operative rehabilitation. PX 6. Petitioner presented to Kenwood Physical Therapy on December 7, 2012 for her initial therapy evaluation. PX 5. She continued to receive physical therapy at Kenwood until February 14, 2013. PX 5.

On December 27, 2012, at her five week post-operative appointment with Dr. Borowiecki, Petitioner testified she was continuing to improve with therapy, but was still having fairly significant symptoms. PX 6. However, Dr. Borowiecki noted increased discomfort post-surgically in the infrapatellar area. PX 6. Dr. Borowiecki recommended Petitioner undergo a corticosteroid injection in her right knee to speed up healing. PX 6. The injection was performed in office that day. PX 6. Petitioner testified that the injection provided some relief. PX 6. Petitioner was returned to full duty work. PX 6.

Petitioner returned to work on January 3, 2013. However, on January 14, 2013, she requested a change in work status from 40 to 32 hours. She testified that she sought a reduction from 40 hours to 32 hours due to discomfort with her right knee.

Petitioner returned to Dr. Borowiecki on January 31, 2013. Examination showed slight crepitus with knee flexion and extension and slight tenderness along the medial knee both at the joint line and slightly anterior. PX 6. Dr. Borowiecki prescribed nabumetone and instructed Petitioner to continue physical therapy. PX 6.

Petitioner's final visit with Dr. Borowiecki was on February 28, 2013. Examination revealed slight patellofemoral crepitus. Dr. Borowiecki noted Petitioner continued to improve post surgery and instructed her to return as needed. PX 6.

Petitioner testified that subsequent to being discharged by Dr. Borowiecki, she continued to have pain and discomfort in her right knee. On April 8, 2013, Petitioner returned to Dr. Raycraft's office as he had returned from medical leave. PX 8. Dr. Raycraft reviewed Petitioner's films, noting her osteoarthritis had progressed to the bilateral medial joint lines and that she had severe bone on bone osteoarthritis in both knees. PX 8.

Dr. Raycraft testified that he also reviewed Dr. Borowiecki's operative report, noting he found a complex tear involving the medial meniscus, as well as grade three and four changes of the medial compartment. He testified that this level of degeneration was not anticipated based on his x-rays taken in January of 2012. PX 11, p. 20. Dr. Raycraft testified it was his opinion, within a reasonable degree of medical certainty, that Petitioner's history of twisting of her knee while transporting a heavy patient would be sufficient to cause the tear of the posterior horn of the medial meniscus of the right knee as demonstrated in the MRI and Dr. Borowiecki's operative report. PX 11, p. 21. He further testified that the accident of June 26, 2012 accelerated the arthritis in Petitioner's knee to the extent noted in Dr. Borowiecki's operative report. PX 11, p. 21.

Dr. Raycraft advised Petitioner she would require a total knee replacement and recommended a steroid injection to the right knee. PX 8. The injection was performed by Dr. Raycraft in office on that date to the lateral suprapatellar area. PX 8. Petitioner underwent a second steroid injection to the right knee on July 17, 2013. PX 8.

Ultimately, upon Dr. Raycraft's recommendation, Petitioner underwent a total knee arthroplasty to her right knee on October 10, 2013 at Decatur Memorial Hospital. PX 9. Dr. Raycraft testified a total knee replacement involves replacement of the surfaces of the knee, replacing cartilage and bone with metal and plastic. PX 11, p. 30-31. The end of the thigh bone is replaced with metal, the top of the shin is replaced with metal and plastic, and the underside of the patella is replaced with plastic. PX 11, p. 31. Dr. Raycraft testified in Petitioner's case, he chose to cement the new structures into position so they are affixed to the bone with bone cement. PX 11, p. 31. Petitioner was placed off work subsequent to surgery. PX 11, p. 31.

Petitioner returned to Dr. Raycraft's office on November 13, 2013 for post-surgical follow-up. PX 8. Petitioner noted walking, weight-bearing, rising from chairs, going up and down stairs, and twisting caused her pain. PX 8. Dr. Raycraft referred Petitioner for physical therapy and kept her off work. PX 8.

Petitioner presented to Decatur Memorial Hospital for physical therapy evaluation on November 13, 2013. She continued to undergo post-surgical physical therapy until December 18, 2013. At her final therapy visit, the Petitioner reported pain in the tibial plateau. She was found to have active range of motion between 2 and 115 degrees, with strength at normal levels for the quad and hamstring muscles. She was recommended to do a home exercise program at a fitness center and use cold packs to reduce inflammation. PX 10.

Petitioner continued follow-up care with Dr. Raycraft until January 22, 2014. PX 8. At her last office visit, Petitioner indicated she was continuing to have pain in the right knee around the tibial plateau that she described as dull. PX 8. She was also having some issues with tightness and some continued problems with stairs. PX 8. However, she indicated that she was improving. PX 8. Dr. Raycraft noted that some people do not feel a full recovery from a knee replacement until closer to a year post-surgery. PX 8. Petitioner was returned to full duty work as of February 3, 2014, with the exception that she was limited to 8 hour shifts for the first month back. PX 8.

On December 26, 2014, Petitioner presented to Dr. Timothy Payne at the request of the Respondent for a Section 12 exam. Dr. Payne rendered a report and his deposition was taken on October 14, 2015. RX 6. Dr. Payne testified he is an orthopedic physician, who has not performed surgery since July 2013 and has not taken part in performing a total joint replacement since 1983 or 1984. RX 6, p. 6-7; 56. Dr. Payne testified that Petitioner informed him that she had no pre-injury problems with her right knee. RX 6, p. 14. He noted that although Petitioner had been diagnosed with diabetes three years before her injury, there was nothing to suggest the diabetes caused chronic problems with her knee. RX 6, p. 14. Petitioner's subjective complaints included difficulty going up and down stairs, pain in the front of the right knee, stiffness, when sitting or driving for a long time, and inability to kneel on the right knee. RX 6, p. 14-15.

Petitioner filled out a Lower Limb Questionnaire for Dr. Payne, which included 6 questions which evaluated the function of her leg. RX 6, p. 34. Petitioner noted in her answers that during the past week her lower limb had been mildly stiff. RX 6, p. 35. She further answered that her leg was mildly painful when going up and down stairs. RX 6, p. 36. She further indicated she had a little bit of difficulty taking her socks off. RX 6, p. 37. Dr. Payne testified he would expect these symptoms to be ongoing and permanent in nature. RX 6, p. 37.

Dr. Payne performed a physical examination, and noted he observed Petitioner walked with a mild limp. RX 6, p. 15. Petitioner's range of motion to the right knee was zero to 95 degrees on the right verses zero to 110 degrees on the left. RX 6, p. 15. She also had slight laxity in the right knee post knee replacement. RX p. 6, p. 16. He further said the Petitioner had a residual loss of flexion because she had a flexion contracture deformity present prior to her total knee replacement. (Id at 28)

After Petitioner was released to return to full duty work in February 2014, she returned to work at DMH. She chose to decrease her hours to 24 hours per week, or three 8-hour shifts. She testified that she chose to decrease her hours because she felt she no longer had the endurance to do a 24 hour shift due to the condition of her right knee. She testified she felt she had some limitation of range of motion and discomfort.

Petitioner testified that while working the 8-hour shifts after returning to work in February 2014, she had limitations with any type of twisting motions, such as making a turn with the stretcher. She also felt limited in her ability to bend down.

Petitioner testified that she was not experiencing any pain in her right knee at the time of Arbitration, but that she does continue to have issues with her right knee. She testified that she has trouble going up and down stairs and that she is required to take them slower. She also has issues with bending down. She cannot kneel, and does not do so even at church. She testified she is also very careful when moving patients from a bed to a stretcher.

Petitioner testified that while she is applying anesthesia to a patient in an operating room, there is a stool available for her to sit on; however, 90% of the time she stands so that she can observe what the surgeon is doing so as to provide the appropriate anesthetic.

Dr. Raycraft testified that prosthetic knees do not last forever. PX 11, p. 35. At the twenty year mark, there is a 20% chance Petitioner will require another replacement. PX 11, p. 35. Further, Dr. Raycraft testified that Petitioner should not be involved in any impact sports and he does not encourage running. PX 11, p. 36. He also testified that some patients find it hard to kneel on a total knee replacement. PX 11, p. 36-37.

Petitioner is currently on medical leave for her left knee, which is not at issue in this matter. Her leave for her left knee began on October 13, 2015 and is expected to end February 1, 2016.

CONCLUSIONS OF LAW

I. Nature and Extent of the Injuries

For accidents occurring after September 1, 2011, the Arbitrator must look to the five factor test in determining permanent partial disability. The first factor is impairment rating according to the AMA Guidelines 6th Edition. In this case, an AMA Guidelines rating was not performed. Therefore, the Arbitrator gives this factor no weight.

As to the second factor, nature of the employment, the Petitioner has returned to work at her regular job. Her job required her to stand most of the shift, bend at the knee to pick up items from the floor and push stretchers with patients on a regular basis. She testified credibly as to the symptoms she notices when performing those duties, as said symptoms are what one would expect given her condition. The Arbitrator gives weight to the Petitioner's claim for this factor.

. With regards to the third factor, age, the Petitioner was 59 years old on the date of his accident. The Arbitrator finds that the Petitioner is likely near retirement age. As such, the Arbitrator places some weight on this factor, as it favors the Respondent's position..

With regards to the fourth factor, future earning capacity, Petitioner has returned to his prior position with Respondent, at a same or higher pay rate. Her decision to decrease her hours is certainly understandable.

However, it was not prescribed by any doctor and Dr. Raycraft clearly indicated that she could return to her regular shifts including hours in excess of eight one month after her release. (PX 8) The Arbitrator gives little or no weight to this factor.

Finally, with regards to the fifth factor, evidence of disability corroborated by treatment records, the Petitioner testified she continues to have limited range of motion and discomfort in her knee. She continues to have issues with her right knee. She has trouble going up and down stars and is required to take stairs slower. She has trouble bending down and cannot kneel on her right knee.

At her final visit with Dr. Raycraft on January 22, 2014, Petitioner continued to exhibit pain in the right knee around the tibial plateau. PX 8. She also had some tightness and continued problems with stairs. PX 8. Dr. Raycraft testified that it is normal for an individual who has had a knee replacement to have trouble kneeling. PX 1, p. 36-37. Further, Petitioner testified she no longer play tennis, which is consistent with Dr. Raycraft's recommendation she not play impact sports. RX 11, p. 36. As indicated above, he also testified that her prosthesis would likely wear out within 20 to 30 years. (PX 11 at 35) The Arbitrator likens this to opinions often seen in meniscal injuries of an increased likelihood of future arthritis. It is and should be considered in this determination of permanency.

Further, upon presented to Dr. Payne, Petitioner noted mild stiffness in the right knee and mild pain going up and down stairs. RX 6, p. 35-36. Dr. Payne testified he expected these problems to be permanent. RX 6, p. 37. Dr. Payne further noted Petitioner walked with a mild limp, had reduced range of motion, and slight laxity in the knee. RX 6, p. 15-16.

The Arbitrator finds that the Petitioner's current complaints are consistent with the findings on her most recent medical examinations. As such, the Arbitrator places significant weight on this factor.

Taking the evidence and the five factors into consideration, the Arbitrator finds that Petitioner has sustained a 40% loss of the right leg as a result of the June 26, 2012 accident. Respondent is ordered to pay Petitioner $695.76 per week, the statutory maximum rate, for a period of 86 weeks.

II. Past Medical Bills

At the time of Arbitration, a number of medical bills related to Petitioner's care and treatment for her right knee remained outstanding. These bills are set forth in Petitioner's Exhibit 12. The parties are in agreement that these charges represent reasonable and necessary medical treatment causally related to Petitioner's June 26, 2012 work related accident and have agreed to a stipulation as to the payment of these bills, set forth in the Order section of this decision. The Arbitrator orders payment of medical bills be made pursuant to the stipulation of the parties, as set forth above.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ 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

RICHARD THOMPSON,

Petitioner,

vs.

NO: 12 WC 39884

BOMBARDIER,

16IWCC0521

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, prior medical benefits, prospective medical benefits, and temporary total 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 Arbitrator incorrectly headed the decision as "Petitioner's Proposed 19(b) Decision". The Commission strikes the improper heading. The decision is properly entitled "19 (b) Decision".

The Arbitrator awarded TTD benefits be paid by Respondent to Petitioner for the period of time commencing November 13, 2012 through July 1, 2013 for a total of 34 4/7 weeks. This award was predicated upon an incorrect reading of the medical notes authored by Dr. McIntosh on September 25, 2012 and November 11, 2012. On September 25, 2012 Dr. McIntosh noted Petitioner's current work capacity to be "Current work capacity at this time is full duty."

16IWCC0521

On November 13, 2012, Petitioner's next appointment with Dr. McIntosh, he charted "Current work capacity at this time is no work *as his company is no longer in business.*" (Emphasis added). Clearly, Petitioner's non-work status on that date is a function of the Respondent company having closed effective June 12, 2012 and not a new work restriction placed upon the Petitioner by Dr. McIntosh.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $13,594.79 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize the pending right shoulder surgery as recommended by Dr. Nathan Mall.

IT IS FURTHER ORDERED BY THE COMMISSION that the language "Petitioner's Proposed 19(b) Decision" be stricken from the decision.

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

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

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

DATED: AUG 5 - 2016
o-6-9-16
SM/msb
44

Stephen Mathis

David L. Gore

Mario Basurto

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

THOMPSON, RICHARD
Employee/Petitioner

Case# **12WC039884**

16IWCC0521

BOMBARDIER INC
Employer/Respondent

On 11/20/2015, 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 0.33% 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:

1239 KOLKER LAW OFFICES
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

0299 KEEFE & DePAULI PC
JAMES K KEEFE SR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

16IWCC0521

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ 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)

Richard Thompson
Employee/Petitioner

v.

Bombardier, Inc.
Employer/Respondent

Case # **12** WC **39884**

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **9/28/15**. 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 _____

FINDINGS

On the date of accident, **6/12/12**, 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 $; the average weekly wage was **$589.36**.

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

Respondent ***has 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

Petitioner has sustained causally connected repetitive trauma injuries to his right shoulder, right hand and left long finger.

Respondent shall pay the medical bills, according to the applicable Fee Schedule, listed in Petitioner's Exhibit 13 consisting of:

A.	Dr. McGuire	8/3/12 – 9/26/12	$ 3,012.36
B.	Dr. McIntosh	9/25/12 – 12/4/12	$ 753.60
C.	NovaCare	10/11/12 – 11/30/12	$ 1,905.00
D.	Dr. Guyton	11/6/12	$ 1,902.00
E.	Dr. Mall	7/1/13 – 8/18/13	$ 2,490.00
F.	Dr. Peeples	7/5/13	$ 1,239.00
G.	MRI Partners	7/5/13	$ 2,140.00
H.	IWP	7/5/13	$ 152.83
		TOTAL:	**$ 13,594.79**

Respondent shall pay Petitioner Temporary Total Disability benefits for the period of 11/13/2012 through 7/1/2013 for a total of 34 4/7 weeks.

Respondent shall authorize the pending right shoulder surgery as recommended by Dr. Nathan Mall.

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.

16IWCC0521

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.

Carl Coe
Signature of Arbitrator

11/20/15
Date

ICArbDec19(b)

NOV 20 2015

16IWCC0521

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RICHARD THOMPSON,	)	
	)	
Petitioner,	)	
	)	12 WC 39884
v.	)	Honorable Edward Lee
	)	
BOMBARDIER, INC.	)	
	)	
Respondent.	)	

Petitioner's Proposed 19(b) Decision

I. PROCEDURAL POSTURE

Petitioner alleges causally connected repetitive trauma injuries to his right hand, right arm, right shoulder and left long finger. Further, Petitioner is requesting approval of a right shoulder surgery at the hand of Dr. Nathan Mall. The issues in dispute are accident, causal connection, prior medical benefits, prospective medical benefits, and temporary total disability benefits.

At the close of testimony Petitioner made a motion to amend the Application for Adjustment of claim, changing the date of accident from June 17, 2012 to June 12, 2012 to accurately reflect the last day Respondent was in business. There was no objection to Petitioner's oral motion and the motion was granted.

II. FINDINGS OF FACT

Petitioner began working at the Bombardier factory through a temporary service company in November, 2011. While Petitioner's work duties did not change during the entire time he was working at Respondent's facility, he became an official employee of Respondent in February 2012. (R. 9-10, 25) Petitioner worked at Respondent's facility until it closed on June 12, 2012. (Id.) After Respondent's facility closed, Petitioner began working for Aisin Manufacturing in July 2013. (R. 24) Between the Respondent's closing and the beginning of his work for Aisin, Petitioner was unemployed. (Id.)

Petitioner worked in the grind and trim department. The Petitioner is right handed. His job required him to cut and grind portions of boat hulls and mount hardware in the same. Petitioner performed this job eight hours a day, five days per week. (R. 10-11) To perform his job, Petitioner utilized a number of tools. To perform the fiberglass grinding job, Petitioner used a large hand held grinder equipped with a grinding wheel which weighed approximately ten pounds. This grinder was utilized primarily in an overhead position. Petitioner testified he would work overhead with this handheld grinder for twenty to forty minutes at a time. Petitioner testified that approximately 75%-80% of his work day was spent performing the grinding job. (R. 11-12)

In addition to the grinding job, Petitioner performed a cutting job. To cut holes into the boat hulls Petitioner used both a jigsaw and a bone saw. Both saws were pneumatic air powered tools. Petitioner testified that all the tools he used to both grind and cut were vibratory in nature. (R. 12) Petitioner introduced a Respondent authored job description at hearing. (PX. 2) The job description mirrors Petitioner's testimony regarding his job duties for Respondent.

Prior to beginning his work for Respondent, Petitioner underwent a cervical disc replacement surgery at C5-C6 on July 26, 2011. (R. 13, PX. 12) Petitioner testified that he had no right shoulder pain, no right hand pain and no left hand pain after this treatment for his cervical spine concluded. After his cervical disc surgery treatment concluded, he was released to work full duty without restriction on October 8, 2012. (PX. 12) Petitioner's testimony is supported by the medical records of his prior treatment submitted into evidence.

Petitioner testified that he began to have right shoulder, right hand and left hand symptoms which came on gradually on over time while performing his job with the Respondent. (R. 15) Petitioner testified he experienced these symptoms especially when working overhead and utilizing the various vibratory tools. (R. 16)

Petitioner testified during the last week the Respondent's facility was open, he felt his symptoms had progressed to a point that they needed to be documented. Petitioner did so, and felt the symptoms would lessen over time and with less work improve. (R. 16)

Petitioner testified that the symptoms continued to progress however and while driving in July 2012, he noticed significant numbness and tingling sensations radiating down his right arm into his right hand. Petitioner testified that because of the worsening of his symptoms he began treatment with Dr. Dennis McGuire in August 2012. (R. 17)

Dr. McGuire's intake sheet notes the reason for the visit was numbness in the right hand and that the middle finger on the left hand was locking up. (PX. 3) The pain diagram on the intake note is marked from the right elbow area extending down into the right hand as well as having the left hand marked. (Id.) Dr. Mcguire initially diagnosed Petitioner with bilateral carpal tunnel syndrome. Dr. Mcguire performed chiropractic treatment on Petitioner's right arm, left arm, right and left hand. Ultimately, Dr. McGuire referred Petitioner to Dr. Mcintosh for evaluation and treatment. (PX. 3)

Petitioner began treating with Dr. McIntosh on September 25, 2012. (PX. 4) Petitioner gave a consistent history to Dr. McIntosh regarding his job duties for Respondent. Dr. McIntosh performed a physical exam and diagnosed Petitioner with left long finger flexor tenosynovitis, bilateral carpal tunnel disease, and bilateral cubital tunnel disease. Dr. McIntosh ordered nerve conduction studies and prescribed a medrol dose pack and Mobic. (Id.)

On November 13, 2012, Petitioner returned to see Dr. McIntosh. After reviewing the studies, Dr. McIntosh opined Petitioner suffered from, "Impingement syndrome involving the patient's right shoulder which may very well be part of his initial complaints." (PX. 3) Dr. McIntosh injected the right shoulder and recommended physical therapy as well as anti-inflammatory medications. At this time Dr. McIntosh took Petitioner off work. On December 4, 2012, Petitioner returned to see Dr. McIntosh with the same pain complaints as before. Dr. McIntosh ordered and MRI of the right shoulder. (Id.) Petitioner testified that the right shoulder injection done by Dr. McIntosh only provided transient relief of his symptoms. (R. 18) Further treatment with Dr. McIntosh was denied by Respondent's workers' compensation insurance carrier. (R. 33)

Petitioner next sought treatment with Dr. Nathan Mall on July 1, 2013. (PX. 7) Petitioner indicated to Dr. Mall that in June 2012 he was experiencing right shoulder symptoms with numbness and tingling in his right arm and both hands. Petitioner told Dr. Mall about the details of his grind/trim job while working at Respondent's facility. After performing a physical examination, Dr. Mall opined Petitioner suffered from a right rotator cuff strain or possible tear, right cubital tunnel syndrome and possible right sided carpal tunnel syndrome, and a left long trigger finger. Dr. Mall injected the left long trigger finger, ordered and MRI of the right shoulder, and repeat EMG/nerve conduction studies. Dr. Mall opined the type of work Petitioner did for Respondent could easily cause his symptoms. Dr. Mall returned Petitioner to full duty work. (PX. 7)

Petitioner underwent the MRI and EMG/nerve conduction studies and returned to see Dr. Mall on July 5, 2013. Petitioner indicated his left trigger finger symptoms were markedly improved. Dr. Mall opined the right sided EMG/nerve conduction study did not demonstrate any evidence of carpal or cubital tunnel syndrome. However, the MRI of the right shoulder demonstrated a high grade partial versus full thickness rotator cuff tear. Dr. Mall injected the right shoulder using differential injection sites. Dr. Mall ordered another round of physical therapy for his shoulder and provided a carpal tunnel injection on the right wrist. Dr. Mall also placed work restrictions on the Petitioner to avoid constant repetitive use of the right upper extremity, primarily one handed work, no overhead work, and no lifting over 10 pounds overhead. Petitioner testified and the Respondent authored job duties indicate, these restrictions could not be accommodated.

In terms of causation on the right shoulder, Dr. Mall opined, "In terms of causation, he is only 52 years old and it would be uncommon to see a full thickness rotator cuff tear or a high grade partial thickness rotator cuff tear such as this person who is not a manual laborer without a significant or non-work injury. The rotator cuff does begin to break down over time, however we typically do not see full thickness rotator cuff tears or high grade partial thickness tears in this age population. Therefore, I do think that his repetitive activities at work with overhead lifting of a large mechanical grinder has contributed to and is likely the underlying factor in his rotator cuff tear, as well as his symptoms associated with his rotator cuff tear."

In terms of causation of the right sided carpal tunnel syndrome, Dr. Mall opined, "Carpal Tunnel is not 100% diagnosed with EMG/nerve conduction study, as this is not a

completely 100% accurate test and therefore I have had several patients who have had carpal tunnel syndrome with a negative EMG and nerve conduction study. His signs and symptoms are consistent with carpal tunnel syndrome and therefore I have discussed with him the possibility of doing a carpal tunnel injection and see what this does for him. If this takes away 100% of his problems of the numbness, tingling, etc., then this would be another indication that he does have carpal tunnel syndrome and that he would benefit from a carpal tunnel release should this effect wear off."

Petitioner returned to see Dr. Mall on August 19, 2013. Petitioner indicated the right wrist injection had given him maintained relief. However, the right shoulder injection had begun to wear off. Dr. Mall then opined Petitioner was in need of a causally connected right rotator cuff repair. (PX. 7)

Respondent continued to deny the treatment recommended by Dr. Mall and arranged a Section 12 IME with Dr. Nogalski. (PX. 10, 11) Dr. Nogalski opined in his report, "With respect to causation Mr. Thompson himself, admitted today that he did not have any numbness in his upper extremities until he was driving, after his employment at Bombardier. He also was somewhat vague with respect to when he might have had shoulder symptoms. There is no documented claim of these symptoms in the medical record until 11/13/12, which would have been approximately five months after his work at Bombardier concluded. The medical history as provided by Mr. Thompson today, as well as the histories provided in the documents from Dr. McGuire and Dr. McIntosh do not support that his claimed 6/17/12 problem or alleged problems leading up to that 6/17/12 date were caused by his work activities, nor do they support that his work activities were a factor in causing these complaints. Therefore I do not believe they were." (PX. 10)

Dr. Nogalski was deposed (PX. 11) Dr. Nogalski, on cross examination admitted that he did not know how much of Petitioner's work was overhead. (PX. 11 at 13) Dr. Nogalski further testified that working with vibratory hand tools could cause carpal tunnel syndrome and aggravate pre-existing carpal tunnel syndrome. (PX. 11 at 13-14) With regards to the shoulder injury, Dr. Nogalski opined that using a 10 pound grinder overhead 45 minutes at a time multiple times per day could aggravate a pre-existing full thickness rotator cuff tear. (PX. 11 at 14) Dr. Nogalski, when forming his opinions did not review the shoulder MRI at all. (PX. 11 at 14) Dr. Nogalski's ultimate opinion however remained that he "did not believe that the right shoulder complaints are related to his work at Bombardier." (PX. 11 at 10)

With regards to Dr. Nogalski's claim that Petitioner told him he did not have symptoms until driving to vacation after his employment with Bombardier ended, Petitioner was asked if he told Dr. Nogalski that his symptoms only started while driving to vacation. Petitioner responded, "Absolutely not. We had a lengthy discussion. He wanted me to pinpoint an actual date of the accident when there would be like a pop or when I felt a tear or something, and I just could not give him that date." (R. 23)

III. CONCLUSIONS OF LAW

1. Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent?

The Arbitrator finds that Petitioner's right shoulder, right hand and left long finger states of ill being arose out of and in the course of Petitioner's employment with Respondent.

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. University of Illinois v. Industrial Comm'n., 365 Ill.App.3d 906,910, 851 N.E.2d 72,77 (1st Dist. 2006)

Further, if an employee is exposed to a risk common to the general public to a greater degree than the general public, the accidental injury arises out of employment. Caterpillar Tractor Co. v. Ind. Comm'n., 129 Ill.2d 52, 541 N.E.2d 665 (1989)

An employee who alleges injury based on repetitive trauma must meet the same standards of proof of other workers' compensation claimants alleging accidental injury. That is, there must be a showing that the injury is work related and not the result of a normal degenerative process. Peoria County Belwood Nursing Home v. Ind. Comm.n. 505 N.E.2d, 115 Ill.2d 524 (1987)

There is ample evidence in the record to support the finding that Petitioner meets his burdens of proof and persuasion. There is no dispute between the parties as to Petitioner's job demands. It is clear that Dr. Mall, when giving his opinion on the issue of accident was much more informed than Dr. Nogalski. Further, the Petitioner's testimony was credible and detailed a history of gradual onset of his symptoms, not an immediate onset of symptoms post-employment with Respondent as alleged by Dr. Nogalski.

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

The Arbitrator finds that Petitioner's current state of ill-being in his right shoulder, right hand and left long finger is causally related to his repetitive trauma injuries. It is undisputed that prior to coming to work for Respondent, Petitioner was released at full duty and maximum medical improvement without any complaints with regards to his right shoulder, right hand or left long finger.

Further, on the issue of whether Petitioner's current state of ill-being is related to his repetitive work, the Arbitrator again finds Dr. Mall more credible than Dr. Nogalski. Dr. Nogalski believed Petitioner had no symptoms until he left Respondent's employ. That opinion is simply not supported by the entirety of the record which includes Petitioner's testimony and the medical records submitted.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt	☐ 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

Jerad Pekins,

Petitioner,

16IWCC0522

vs. NO: 12 WC 39940

City of Marion,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, two physicians and being advised of the facts and law, 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 11, 2015, is hereby affirmed and adopted.

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.

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 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: AUG 8 - 2016
KWL/vf
O-6/7/16
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell

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

16IWCC0522

PERKINS, JERAD
Employee/Petitioner

Case# 12WC039940

CITY OF MARION
Employer/Respondent

On 8/11/2015, 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 0.24% 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:

5060 EVANS & BLASI LLC
PETER S BLASI
1512 JOHNSON RD
GRANITE CITY, IL 62040

0180 EVANS & DIXON LLC
MARILYN C PHILLIPS ESQ
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ 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)

16IWCC0522

Jerad Perkins
Employee/Petitioner

v.

City of Marion
Employer/Respondent

Case # 12 WC 039940

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 Edward Lee, Arbitrator of the Commission, in the City of Collinsville, on June 25, 2015. 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 the 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 the 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, 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 – Prospective medial, whether Petitioner exceeded his permissible choices of caregivers

Findings

- On 7/7/11, the respondent City of Marion was operating under and subject to the provision of the Act.
- On this date, an employee-employer relationship **did** exist between the petitioner and respondent.
- On this date, the petitioner **did** sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- Petitioner's current condition of ill-being *is* causally related to the accident.
- In the year preceding the injury (partial), the petitioner earned $10,154.76; the average weekly wage was $461.58.
- At the time of the injury, the petitioner was 33 years of age, married with 0 children under 18.
- Petitioner has not received all reasonable and necessary medical services.
- Some necessary medical services have not been provided by the respondent.
- To date, $27,079.36 has been paid by the respondent for TTD and/or maintenance benefits.

Order

- Respondent shall pay Petitioner Temporary Total Disability Benefits of $307.72 a week for 203 6/7 weeks commencing 7/27/11 through 6/25/15
- Respondent shall reimburse to Petitioner $2,630.20 for Petitioner's out of pocket/pool medical payments and expenses.
- Respondent shall pay reasonable and necessary medical expenses as set including those set forth in (PX1), as provided in Sections 8(a) and 8.2 of the Act and subject to the Medical Fee Schedule. Respondent shall receive credit for any medical bills previously paid.
- Respondent shall be given credit for medical benefits that have been paid by Petitioner's group insurance carrier, if any.
- Respondent shall authorize and pay for treatment recommended by Dr. Lehman and Dr. Mall.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a 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

7/31/15
Date

AUG 11 2015

Arbitrator's Findings of Fact:

The Petitioner was sent for medical treatment to Occupational Performance Rehab by the Respondent on July 19, 2011. The Petitioner reported sustaining an injury 3 weeks prior while stepping backwards off a truck and missing a step and twisting his left knee. The Petitioner reported feeling a "pop" and having immediate pain. The Petitioner reported sharp pain at the anterior medial aspect of the left knee. The physical examination revealed tenderness along the mid joint line, mild edema and pain was reported when lower leg was unsupported/hanging and when stressing the MCL. The Petitioner's gait was noted as "non-antalgic" and it was also reported that the Petitioner was unable to do a full squat. Pain was also noted when rotating the left knee either inward or outward. 6 visits of "early intervention for pain/edema control" were recommended and "further medical investigation" was contemplated to address concerns of possible "ligamentous/ cartilage involvement. Follow up appointments were made. The Petitioner attended two additional sessions of therapy on July 20th and July 22nd 2011. The note from the July 22, 2011 visit indicates that the Petitioner reported that he didn't feel that his left knee was getting "any better" and that it continued to pop and click. (PX2).

The Petitioner was examined by his primary care physician Dr. Roger D. Jones on July 27, 2011. Dr. Jones's notes indicate that the Petitioner reported that he injured his left leg 2 ½ weeks prior while stepping off a truck. The Petitioner reported to Dr. Jones that he "missed a step and he kind of fell on his leg" in a twisting type motion. The Petitioner was reported as complaining of pain around the inner aspect of the knee joint. Dr. Jones's assessment was a "very likely tear of the medial meniscus." Dr. Jones noted that because the injury had persistently caused the Petitioner pain and was made worse at work, the Petitioner would be placed on off-work status. Dr. Jones ordered an MRI and indicated that if a torn meniscus was found, the Petitioner would be sent for an orthopedic consultation. The Petitioner was prescribed. (PX3).

An MRI of the left knee was performed at Cedar Court Imaging on July 29, 2011. The radiologist report indicates moderate joint effusion, meniscal bodies not well seen, minimal high signal within the posterior horn, areas of diffuse heterogeneous signal within the articular cartilage of the patella. The radiologist indicates that the patella changes could potentially be due to the reported injury. Also noted by the radiologist is diffuse high signal in the patellar tendon which could be due to the reported injury, a component of tendonitis or a possible tear. The radiologist also notes a bone contusion and abnormalities of the femoral condyle and medial femoral condyle articular cartilage. The radiologist concludes that there are "numerous abnormalities which in a patient of this age are most likely due to reported injury." (PX4).

The Petitioner returns to see Dr. Jones on August 3, 2011 reporting feeling a "little better." Dr. Jones reported reviewing the MRI and noting a contusion of the femoral condyle and irritation around the patella tendon. Dr. Jones placed the Petitioner on crutches, kept him off-work and instructed him to follow up in two weeks. (PX3).

Dr. Jones next saw the Petitioner on August 17, 2011. The Petitioner reported pain with just straight walking at a 2 on a 1-10 pain scale. The Petitioner also reported to Dr. Jones that at times he experiences a locking sensation and increased pain symptoms that last for some time thereafter. Dr. Jones notes that

his concern is the presence of a loose body from a tear. Dr. Jones refers the Petitioner for an orthopedic evaluation with Dr. J.T. Davis. The Petitioner was kept off- work by Dr. Jones. (PX3).

The Petitioner was examined by Dr. John Thomas Davis of the Southern Orthopedic Associates on 8/29/11. The Petitioner gave a history to Dr. Davis of persistent left knee pain following an incident at work where he was "coming off a fire engine, down the steps, when he wretched the knee." The Petitioner reported to Dr. Davis that he felt a "pop." The Petitioner reported experiencing pain focally, medially and occasional posterior pain that was at times dull, sharp and throbbing. The Petitioner reported to Dr. Davis that his pain was a 2-4 on a 1-10 pain scale and that his pain increased with weight bearing, rotating and bending of the knee. Complaints of mild swelling and occasional clicking and catching-type sensations were also reported to Dr. Davis. Dr. Davis's physical exam of the left knee revealed trace effusion, pain with hyperflexion medially, tenderness along the medial joint line and medial femoral condyle and pain medially with McMurray's. Dr. Davis commented that the MRI showed evidence of edema in the medial femoral condyle with abnormality in the articular surface and increased signal in the patellar tendon consistent likely with tendinosis versus possible partial tear. Dr. Davis's diagnosis was medial condyle contusion versus early OCD lesion. Dr. Davis recommended physical therapy and protective weight bearing with crutches. Dr. Davis indicated that if the Petitioner failed to make adequate improvement, had persistent mechanical complaints and effusion, an arthroscopic surgery would be considered. Dr. Davis placed the Petitioner on sedentary duty only and instructed him to return in two weeks. (PX5).

Dr. Davis next saw the Petitioner on September 12, 2011 where the Petitioner reported left knee pain and a giving way sensation. Upon physical exam, Dr. Davis notes a grade 2 to 3 posterior drawer, positive quadriceps active test, questionably trace effusion. Dr. Davis diagnosed the Petitioner with a grade 2-3 PCL sprain and medial femoral condyle contusion vs. osteochondral defect. Additional physical therapy was ordered along with prescriptions. Dr. Davis indicated that conservative measures would be exhausted before considering surgical options. Dr. Davis's notes indicate that the surgery options discussed with the Petitioner included addressing the cartilage lesion and a PCL reconstruction. Dr. Davis indicated that the surgeries would not be performed concurrently and would require extended periods of immobilization. Petitioner was kept on sedentary status (PX5).

The Petitioner began physical therapy at NovaCare on September 14, 2011. (PX9). The Petitioner reported to NovaCare physical therapist on September 19· 2011 that he slipped on wet carpet at Schnucks while on his crutches and had an increase in his pain after the incident. His pain level was a 4-5 on a 1-10 pain scale prior to therapy. (RX6).

Dr. Davis saw the Petitioner on October 13, 2011. Dr. Davis ordered another MRI and ordered aquatic therapy. Following the MRI, Dr. Davis indicated that the MRI showed a grade 2-3 PCL sprain and a resolving medial condyle contusion. Dr. Davis indicates that P.T. and the sedentary work status will continue. Dr. Davis added that should the Petitioner continue not to improve over the next several months further consideration will be given to a PCL reconstruction and a debridement surgery. (PX5).

An MRI was performed at Memorial Hospital of Carbondale on October 18, 2011. The radiologist's findings included a PCL deep fiber chronic tear with about a 70% reduction in ligament diameter, Distal ACL mild-chronic sprain, medial and lateral retinaculum mild sprains, mild medial compartment chondromalacia, Minimal knee effusion and minimal Hoffa's fat pad synovitis. (PX7).

The Petitioner returned to see Dr. Davis on October 27, 2011. Dr. Davis continued the Petitioner P.T. , anti-inflammatories and sedentary work status. Dr. Davis recommended continuing the conservative measures another 2-3 months before considering surgical intervention. (PX5).

Dr. Davis examined the Petitioner on December 1, 2011 noting some improvement in the Petitioner's strength, but noting complaints of continued pain and difficulty going up and down stairs. The Petitioner reported that it felt like his knee was hyperextended. Dr. Davis indicated that he was giving the Petitioner another month to continue P.T. and consider his options on surgery and to remain on his work restrictions. Dr. Davis also mentioned the fact that the Petitioner may not be able to return to his job regardless of the surgical outcome. (PX5).

The Petitioner saw orthopedic surgeon Dr. Richard Lehman on December 8, 2011. The Petitioner gave Dr. Lehman a history of being injured while descending a fire truck, missing the last step and landing directly on his foot causing a compression injury to his knee. Dr. Lehman noted that he reviewed the MRIs and previous medical records from Dr. Davis. Dr. Lehman indicated that the October 2011 MRI showed a PCL deep fibers chronic tear and a distal ACL mild chronic sprain. A physical exam of the Petitioner, revealed posterior instability with grade 3 sliding posteriorly, medial joint line tenderness, grinding anteriorly, a grade 3 posterior sag and significant discomfort and soreness of the patella. Dr. Lehman recommended an outpatient arthroscopy and posterior cruciate ligament reconstruction. Dr. Lehman noted that he discussed the positives and negatives of surgery with the Petitioner and that he did not feel that the Petitioner should have to live with the problem. The Petitioner was kept off-work. (PX6).

Dr. Lehman performed a left knee arthroscopy, double bundle PCL reconstruction, osteochondral reconstruction and debridement procedure on January 6, 2012 at Des Peres Hospital. (PX6).

The Petitioner returned to see Dr. Lehman on January 17, 2012. Dr. Lehman noted the Petitioner was experiencing pain but had good mechanics and range of motion. Dr. Lehman noted that the Petitioner fell through a chair at the hospital and experienced pain over the anteromedial aspect of the knee. Dr. Lehman indicated that the Petitioner did not appear to have torn his ACL. Dr. Lehman recommended putting the Petitioner on an antibiotic and continue strengthening. (PX6).

The Petitioner returned to see Dr. Lehman on February 14, 2012. Dr. Lehman recommended an aggressive approach to physical therapy to improve the biomechanics of the knee. Dr. Lehman noted that the Petitioner could not look any better and that he was pleased with the Petitioner's progress. Petitioner was kept off-work, P.T. continued and a follow up appointment was scheduled. (PX6).

The Petitioner performed physical therapy at Advanced Training and Rehab beginning on February 14, 2012. (PX8).

Dr. Lehman saw the Petitioner on March 15, 2012 where it was noted the Petitioner was doing exceptionally well other than his flexion. Dr. Lehman noted that flexion was slow, the Petitioner was tight, had good extension and complained of swelling when he is up on his leg for a period of time. Dr. Lehman notes that the Petitioner was making good strides but that if in two weeks if the Petitioner does not have full range, an additional arthroscopy or closed manipulation would be considered. Petitioner was kept off-work, P.T. was continued and a follow up appointment was scheduled. (PX6).

The Petitioner returned to see Dr. Lehman on March 29, 2012. Dr. Lehman noted that the Petitioner was still tight and was considered to have a loss of full flexion. Dr. Lehman indicated that the aggressive approach would be continued. (PX6).

Dr. Lehman saw the Petitioner on April 17, 2012. Dr. Lehman noted that the Petitioner's left knee looks "outstanding" and that he was pleased with the mechanics. Dr. Lehman kept the Petitioner on an aggressive program of exercises and thought the Petitioner was making good strides. (PX6).

Dr. Lehman saw the Petitioner on May 17, 2012. Dr. Lehman recommended continuing strengthening and prescribed Relafen. Dr. Lehman was working to have the Petitioner return to work as a fireman without restrictions (PX6).

Dr. Lehman saw the Petitioner on June 14, 2012. Dr. Lehman noted that the Petitioner's mechanics evidence some inflammation and that the inflammation is overloading his joint making the Petitioner sore. Dr. Lehman altered therapy including giving him Supartz injections with the goal of reducing the inflammation. (PX6).

The Petitioner returned to see Dr. Lehman on June 28, 2012 and July 10, 2012 where he received Supartz injections. (PX6).

Dr. Lehman saw the Petitioner on July 24, 2012 and noted that the Petitioner was experiencing a loss of motion and tightness from what he thought was related to the scar tissue. Dr. Lehman felt that the injections did not work. Dr. Lehman ordered and outpatient enhanced arthrogram/MRI. (PX6).

MRI arthrogram of the left knee was performed on August 6, 2012 at Memorial Hospital Carbondale. The radiologist's found in additional to the surgical changes an ACL sprain, MCL sprain lateral retinaculum sprain, proximal popliteus mild tendinopathy, medial gastrocnemius mild tendinopathy, medial meniscus root degenerative fraying vs radial tear, patellofemoral compartment moderate chondromalacia among other conditions. (PX7).

The Petitioner returned to see Dr. Lehman on August 7, 2012. Dr. Lehman notes that the MRI shows moderate degenerative changes present along the graft surfaces and multiple chronic ligament and tendon injuries including an ACL sprain, MCL sprain, and a medial meniscus root-degenerative fraying versus radial tear. Dr. Lehman indicated that he recommended an arthroscopy to debride the scar tissue. (PX6).

The Petitioner returned to see Dr. Lehman on August 23, 2012. Dr. Lehman notes that the Petitioner's left knee is grinding and he has sever crepitus. Dr. Lehman recommended an arthroscopy and extensive debridement of the scar tissue and debriding the mechanics of the knee in the patellofemoral articulation.. (PX6).

Dr. Lehman performed a left knee arthroscopy and debriding of the medial meniscus, lateral meniscus, lateral retinacular release, medial retinacular release, scar tissue, patella, medial femur, intercondylar notch, lateral meniscus and synovectomy, tricompartmental and extensive debridement of joint surfaces on August 27, 2012 at the Webster Surgery Center.. (PX6).

The Petitioner returned to see Dr. Lehman on September 6, 2012. Dr. Lehman notes that it is too early to tell if the Petitioner will ever return and be able to perform the functions of a firefighter. Dr. Lehman

decreased the Petitioner's activities to protect the knee and kept the Petitioner on a conservative course. The Petitioner resumed P.T. (PX6).

Dr. Lehman saw the Petitioner on October 2, 2012 noting improvement and an interest in getting the Petitioner off crutches. (PX6).

Dr. Lehman saw the Petitioner on October 30, 2012 and noted that the Petitioner's left knee was "rock stable" but that the Petitioner still had subjective complaints or soreness. The Petitioner was instructed to continue with exercises and an FCE was discussed. (PX6).

Dr. Lehman saw the Petitioner on November 27, 2012. The Petitioner reported weakness and soreness. Dr. Lehman indicated that the Petitioner was slowly getting better. Dr. Lehman indicated that the Petitioner just started to walk more normally and actually began improving the mechanics of walking. Dr. Lehman wanted to "bump up" the Petitioner's strength for the upcoming FCE. The Petitioner was noted as being full weightbearing and walking. Petitioner was instructed to continue physical therapy and remain off work. (PX6).

The Petitioner was examined by Dr. Lehman on January 3, 2013. Dr. Lehman indicated that the Petitioner was doing "fairly well" with his knee and had completed an FCE. Dr. Lehman noted that the Petitioner had appropriate pain behaviors, had good mechanics, good flexion and extension and no instability. Dr. Lehman reviewed the FCE and believed that the Petitioner should have restrictions of no lifting greater than 40 pounds with limited kneeling and crawling. Dr. Lehman believed at that time that the Petitioner had reached MMI. (PX6).

Dr. Lehman on March 7, 2013 drafted a letter to the Respondent's insurance carrier indicating that the Petitioner was at MMI and that additional independent home therapy was recommended not 12-16 additional physical therapy. (PX6).

Dr. Lehman on May 7, 2013 drafted a letter to the Petitioner's counsel's office indicating that the Petitioner was disabled as it relates to the ability to return to the job activities of a firefighter. (PX6).

Dr. Lehman's records show a prescription from June 12, 2013 where physical therapy was ordered to evaluate and treat per therapist discretion including exercises and modalities as needed. (PX6).

The Respondent sent a Vocational Consultant to meet with the Petitioner on July 16, 2013. Consultant Karen Thaler documented the Petitioner's job search efforts to date and gave advice as to assisting the Petitioner in finding employment within the original restrictions as set forth by Dr. Lehman. When the Petitioner was taken off-work again and placed off MMI status due to future treatment being pursued, the Petitioner discontinued his job search efforts. (RX3).

The Petitioner was examined by Dr. Lehman on July 25, 2013. Dr. Lehman indicated that the Petitioner presented with complaints to his left knee, right knee and left hip. Upon physical examination, Dr. Lehman noted significant tenderness over the medial joint line, tenderness over the lateral joint line, patella evidences of pain with over pressure and some mild crepitus. Dr. Lehman further finds significant popping of the left hip with restrictions, pain with flexion, adduction and internal rotation as well as a femoroacetabular impingement-type exam. Popping appears directly on the joint. Dr. Lehman notes that the X-rays show spurring of the left hip consistent with femoroacetabular impingement, appropriate

position of the hardware in the left knee and good alignment of the right knee. Dr. Lehman indicates that he believes the Petitioner's complaints are based on "overload" directly related to the Petitioner's previous left knee injury and subsequent treatment. The overloading of the right knee and left hip are part of a compensatory mechanism. (PX6).

The Petitioner underwent a right knee arthrogram MRI on September 5, 2013 at Memorial Hospital of Carbondale. The radiologist reported finding a possible lateral meniscus posterior body, partial meniscocapsular separation and ligament sprain/partial tears, patellar cartilage deep fissuring c/w mild chondromalacia, medial retinaculum normal variation vs chronic partial tear, distal quadriceps mild tendinopathy, proximal and distal patellar tendinopathy. (PX7).

The Petitioner underwent a left knee arthrogram MRI on September 6, 2013 at Memorial Hospital of Carbondale. The radiologist reported finding in addition to post-surgical changes tendinopathy, medial meniscus root degenerative fraying vs radial tear, mild chondromalacia and arthrofibrosis in Hoffa's fat (posterolaterally). (PX7).

The Petitioner underwent a left hip arthrogram MRI on September 10, 2013 at Memorial Hospital of Carbondale. The radiologist reported a labral tear. (PX7).

The Petitioner was examined by Dr. Lehman on September 17, 2013. Dr. Lehman noted that the Petitioner had new MRI films of the right knee, left knee and left hip. The right knee MRI revealed a possible lateral meniscus posterior body, partial meniscal capsular separation, patellar cartilage deep fissures consistent with mild chondromalacia. The left knee MRI showed surgical changes and other degenerative conditions. The left hip arthrogram/MRI revealed a labral tear. Dr. Lehman opined that the labral tear of the left hip and right knee conditions were compensatory injuries due to the abnormal mechanics of the left knee. (PX6).

Dr. Lehman saw the Petitioner on October 10, 2013. Dr. Lehman notes that the Petitioner's left knee MRI showed a potential meniscal root breakdown with some fraying of the medial meniscus, strain of the MCL and other degenerative changes. Dr. Lehman indicated that torn labral shown the left hip MRI could be considered acute. Dr. Lehman recommend an injection into the left hip followed by an arthroscopy if Petitioner continues to be symptomatic. Dr. Lehman opined that the injuries to the Petitioner's hip and both knees are compensatory in nature and related to his work related breakdown. Dr. Lehman also recommended arthroscopic surgery of the right and left knees and a possible stem cell injection of the right and left knees. A cortisone injection was recommended Dr. Lehman for the left hip. Dr. Lehman indicated that the Petitioner was not at MMI if he was pursuing treatment and placed him off work. Dr. Lehman recommended further physical therapy. (PX6).

The Petitioner was examined by Dr. Lehman and Dr. Stahle on November 21, 2013. The Petitioner reported to Dr. Stahle that he has pain in his right knee, left knee and hip. The Petitioner gave a history of pain, soreness, tenderness and experiencing an uncomfortable feeling. Dr. Stahle noted that the Petitioner's left knee was grinding and found pain over the patellofemoral joint and weakness when compared to the right. Dr. Stahle noted that the Petitioner "is going to get another surgery. Dr. Stahle recommended PRP injections but told Petitioner to wait until after surgery. Dr. Lehman also saw the Petitioner and took a similar history. Dr. Lehman notes that the Petitioner was experiencing grinding on the right and left knees and that the Petitioner experienced popping on the left knee as well. Dr. Lehman

noted that the left knee appeared sore and the right knee was painful over the medial joint line. Dr. Lehman's recommendations were "arthroscopy and re-evaluation." (PX6).

Orthopedic Surgeon Dr. Nathan Mall examined the Petitioner on December 3, 2013. The Petitioner gave Dr. Mall a history of working as a firefighter and injuring his leg while backing off a truck, having his leg hyperextended and hearing a pop. The Petitioner told Dr. Mall that his knee swelled and he tried anti-inflammatories and physical therapy but it gave him little relief. Dr. Mall was aware of the surgeries performed by Dr. Lehman. The Petitioner gave a history of developing right knee and left hip pain as well as the left knee pain. Dr. Mall indicates that the Petitioner reported popping in his hip. Dr. Mall's physical exam found pain with resisted hip flexion, a tight IT band and tenderness over the grater trochanter. The Petitioner was found to have mild joint line tenderness, mild patellofemoral crepitus on the right knee. As for the left knee, Dr. Mall found moderate patellofemoral crepitus, pain over the medial femoral condyle, mild medial joint line pain, pain with valgus stress testing and mild effusion. Dr. Mall reviewed the left knee MRI noting what appears to him to be a meniscal root tear or radial tear in the medial meniscus, mild edema at the insertion of the MCL and a significant cartilage defect. Dr. Mall reviewed the right knee MRI noting a signal within the lateral meniscus and a clear grade IV cartilage injury to the right knee patella. Dr. Mall noted that the MRI of the left hip shows a possible labral tear. Dr. Mall opined that the right knee clearly has a cartilage defect of the patella which is symptomatic. Dr. Mall recommends an arthroscopic procedure and Carticel biopsy for later implantation of ACI cells as well as to address any meniscus pathology. Dr. Mall opined that the Petitioner's left knee is more of the problem and source of the Petitioner's major symptoms. Dr. Mall believes the Petitioner is a good candidate for osteochondral autograft versus allograpft procedure to address the rather large "pothole" in Petitioner's medial femoral condyle left from the OsseoFit plug. Dr. Mall would also recommend addressing the repair of the patellar defect with a ACI biopsy followed by ACI implantation. Dr. Mall would also recommend repairing any meniscal pathology at the root as he believes it to be warranted considering the patients age. Dr. Mall opined the left knee pain and symptoms the Petitioner is experiencing is "related to the initial injury." Dr. Mall opined that the procedures performed by Dr. Lehman did not cure or alleviate the problems and the Petitioner still has a large medial femoral condyle defect that needs to be addressed. Dr. Mall opined that these defects could have been caused by the injury and are currently symptomatic. Dr. Mall opined that the Petitioner's right knee is symptomatic due to the "stress put on the knee due to the left knee, in which he has been partial weight bearing or non-weight bearing on for some time." Dr. Mall opined that "this clearly puts additional stress" on the right knee and has "created symptoms in this knee as well. Dr. Mall's records show that the Petitioner's treating physician was Dr. Jones and the referring physician was Dr. Paletta. (PX10).

Dr. Mall drafted a letter directed to Petitioner's counsel wherein he indicates he reviewed the MRI films from 7/29/11 and 10/18/11. Dr. Mall opined that the 7/29/11 "clearly does demonstrate a PCL injury as well as a focal cartilage defect." Dr. Mall opined that this was something the radiologist "simply missed" as there is a "clear abnormality" present. Dr. Mall indicated that the grading of a PCL injury needs to be performed clinically. Dr. Mall opined that the later MRI of 10/18/11 is not drastically different that the 7/29/11 MRI and look fairly similar to him in terms of the PCL appearance. Dr. Mall indicated that there is nothing he can see that would indicate any sort of new injury present on the 10/18/11 MRI as compared with the 7/29/11 MRI. (PX10).

The Respondent sent the Petitioner to Dr. Peter Mirkin for a section 12 examination on October 28, 2013. Dr. Mirkin reported that the Petitioner gave a history of an injury occurring on 7/7/11 at work while steeping off a step and carrying a load. Dr. Mirkin reviewed MRIs and medical records. Dr. Mirkin's report that upon physical examination the Petitioner complained of mild tenderness on deep palpitation of the left hip. The Petitioner was found to have 1cm of atrophy of the left quad compared to the right. The Petitioner reported to Dr. Mirkin that he cannot squat and rise from a squat position. The Petitioner reported to Dr. Mirkin patellofemoral tenderness and Dr. Mirkin reported lateral tenderness in the right knee. Dr. Mirkin opines that his reading of the right knee MRI reveals no evidence of medial or lateral meniscus tear. Dr. Mirkin opines that the first left knee MRI did not "really" reveal any PCL pathology. Dr. Mirkin testified that the second left knee MRI revealed a partial PCL tear and possible medial meniscus tear. Dr. Mirkin notes that the Petitioner has persistent pain and atrophy. Dr. Mirkin opines that he believes the Petitioner has some disability and does not think the Petitioner can do activities that require prolonged repetitive squatting or climbing up and down, ladders or running. Dr. Mirkin believe the Petitioner could participate in most other activities other than lifting 75 pounds on a repetitive basis. Dr. Mirkin believes that he Petitioner may have mild strain injuries to the right knee and hip. Dr. Mirkin opined that there is not conclusive scientific data showing stem cells injections are efficacious and the need for right knee surgery and/or left hip surgery is not the result of the work injury or activities. Dr. Mirkin opined that the Petitioner is at MMI and should attempt to rehabilitate himself and get back to the workforce. (RX4)

Dr. Mirkin prepared a letter dated November 26, 2013 wherein he reportedly reviewed the July 2011 left knee MRI film and found that the ACL and PCL appeared to be intact. Dr. Mirkin opined that when compared to the radiologist report from the October 2011 left knee MRI where a partial tear of the PCL was noted, the possibility of another injury occurring after 7/7/11 exists. (RX4)

Dr. Lehman testified that he is a board certified orthopedic surgeon with 99% of this practice devoted to the actual practice of medicine verses performing legal consultations. Dr. Lehman testified that the posterior cruciate ligaments is one of the two main stabilizers of the knee and when a PCL is reconstructed it can be replaced with either an allograft, meaning a cadaver tendon, or can be replaced with the patient's own tendon. Dr. Lehman testified that basically holes are drilled in the knee and the surgeon recreate the course of the posterior cruciate ligament. Dr. Lehman testified that upon review of the MRIs and confirmed at the time of the arthroscopic procedure the Petitioner's left knee was found to have a torn PCL, a partial anterior cruciate ligament tear, a defect on the medial femoral condyle, a small medial meniscus tear and quite a bit of inflammation in the knee. Dr. Lehman testified that he placed the Petitioner off-work when he began seeing him. Dr. Lehman testified that the Petitioner's fall from a chair at the hospital in January 2012 did not have any long-term effect on the Petitioner's recovery. Dr. Lehman testified that he sent the Petitioner to physical therapy. Dr. Lehman testified that a second procedure was performed on August 27, 2012 to debride and release the tightness of the knee caused by the scar tissue. Dr. Lehaman testified that he spoke directly to the adjuster in the case concerning the Petitioner's care and progress. Dr. Lehaman testified that on January 3, 2013 that he felt that the Petitioner was at MMI, but that the Petitioner was still having complaints of pain, general soreness and achiness. Dr. Lehman testified that the next time he saw the Petitioner was in July of 2013 and the Petitioner had complaints involving the left knee, right knee and the left hip. Dr. Lehman testified that the Petitioner's right knee and left hip complaints were the result of an overload or compensation mechanism placing more stress in the right knee and left hip. Dr. Lehman testified that he recommended

additional physical therapy. Dr. Lehaman testified that he recommended a left hip injection and that if the Petitioner continued to be symptomatic an arthroscopic procedure would be performed. Dr. Lehman testified that if the right knee continued to be symptomatic with the chondromalacia and fissuring on the patella that an arthroscopic procedure would be recommend. Dr. Lehman testified that the Petitioner was interested in proceeding with the procedure to improve his function. Dr. Lehman testified that the recommendations for treatment he has made a reasonable and medically necessary. Dr. Lehman testified that the history the Petitioner gave him, coming off the firetruck, was sufficient to have caused the injuries that he diagnosed and treated. Dr. Lehman testified that the past treatment was reasonable and medically necessary. Dr. Lehman testified that the physical therapy he ordered was reasonable and medically necessary and that the Petitioner reported it was beneficial to his recovery. Dr. Lehman opined that the Petitioner was unable to return to being a firefighter. Dr. Lehman testified that he Petitioner is not at MMI. Dr. Lehman testified that the Petitioner's symptoms in the right knee and left hip were increased due to the overcompensation from the left knee injury. Dr. Lehman testified that he is unaware of the Petitioner complaining of left knee, right knee or left hip prior to the accident in July 2011. Dr. Lehman testified that the radiologist report from the 7/29/11 does not mention a PCL tear or an ACL injury. Dr. Lehman testified there is a difference in radiologist reports concerning the objective findings concerning the PCL between the 7/29/11 and the October 18, 2011 MRIs. Dr. Lehman at the time of the deposition was not comparing the actual films. Dr. Lehman testified that if the radiologist reports were accurate there could have been an intervening injury between the two MRI dates to explain the pathology. Dr. Lehamn's deposition was continued (PX11).

Dr. Lehman's testified that since the first part of this deposition he went back and again reviewed the actual MRI films from 7/29/11 and 10/18/11. Dr. Lehman testified that the films were not of the greatest quality and it's hard to see the definition of the ACL and PCL well, but that it looks to him that the ligaments had been damaged. Dr. Lehman testified that the PCL appears to be torn and there is definite damage to the ACL that can be seen in the 7/29/11 MRI. Dr. Lehman testified that the Petitioner had a large effusion, swelling, and piece chipped out of the joint surface in the July 2011 film. Dr. Lehman testified that the October 2011 MRI film, the PCL "kind of looks the same." Dr. Lehman testified that the knee looked a lot less inflamed in October and the ability to discern detail of the ACL in October was better. Dr. Lehman testified that the Petitioner had trouble getting his range of motion back in his left knee and Dr. Lehman believe this caused the Petitioner to have a "pretty significant altered gait." Dr. Lehman testified that the Petitioner's left hip was "clearly gait related." Dr. Lehman testified that the Petitioner's right knee symptoms come from "overload" factors due to "non-weightbearing" on the left knee. Dr. Lehman testified that the Petitioner "worked hard" in therapy trying to get his range back and that the Petitioner was not a big fan of closed manipulation or scoping. Dr. Lehman testified that at the time of treatment he had reviewed the MRI films from July of 2011 and October of the 2011. Dr. Lehman testified that the Petitioner sustained a significant injury to the left knee in July 2011 most likely causing some damage to the ACL and PCL. Dr. Lehman testified that if the Petitioner continues to be experiencing similar complaints his recommendations for further treatment would be the same. Dr. Lehman testified that prior to the second MRI Dr. Davis clinically diagnosed the Petitioner with a PCL tear. Dr. Lehman testified that one of the reasons a second MRI is ordered is due to the quality being insufficient. Dr. Lehman testified that the October 2011 MRI is of better quality. Dr. Lehman testified that "whether the radiologist read it right or wrong, it's a fact that his PCL was torn." (PX12).

Dr. Peter Mirkin testified that he was asked by the Respondent to examine the Petitioner as a section 12 examiner in October 2013. Dr. Mirkin testified that the Petitioner's initial MRI revealed bone contusions and strains to the patellar ligament, but no signs of an ACL or PCL tear. Dr. Mirkin described the quality of the July 2011 MRI as "decent." Dr. Mirkin testified that the Petitioner was at MMI for his work injury 4-8 weeks after the accident date. Dr. Mirkin testified that only 4-8 weeks of physical therapy can be related to the work injury. Dr. Mirkin testified that the absence of the tear in the first left knee MRI indicates to him that there was an intervening injury. Dr. Mirkin testified that he felt the two surgeries performed were appropriate. Dr. Mirkin testified that the Petitioner could not do the type of work he did before or heavy lifting. Dr. Mirkin testified that the Petitioner does not need treatment for the right knee and he wouldn't recommend surgery for the hip. Dr. Mirkin doesn't know what to relate the right knee and left hip conditions to. Dr. Mirkin provided no medical treatment with regard to the Petitioner. Dr. Mirkin only met with the Petitioner on one occasion. Dr. Mirkin testified that he had been hired in the past by Respondent's counsel's firm. Dr. Mirkin has charged the Respondent close to $5,000 for his services. Dr. Mirkin testified that the majority of his practice is devoted to treating conditions of the spine. Dr. Mirkin testified that he estimates that less than 5% of his practice involves treating knee conditions. Dr. Mirkin testified that 80% of the workers compensation cases he consults on or treats under the Missouri Workers Compensation system are for the defense. Dr. Mikin testified that the Respondent's attorney's office refers approximately 1 case per month to his office. Dr. Mirkin testified that he is unaware of the any other injury occurring after 7/7/11. Dr. Mirkin did not recall Dr. Davis being concerned that the Petitioner sustained a PCL injury. Dr. Mirkin did not review any surgical photographs. Dr. Mirkin testified that he was familiar with the case *Ottinger vs. Roadway Express* where the Missouri Department of Labor Relations found that he had materially changed his testimony to suit an employer and fabricated medical conditions in order to assume an indefensible opinion. Dr. Mirkin testified that he was familiar with the case *Wieda vs. Stupp Brothers* where the Appellate Court of Missouri found that the "employer's medical expert, Dr. Mirkin," was "biased, uninformed and not credible." Dr. Mirkin testified that the Petitioner can never go back to being a fireman because he has a "bad knee" that's not dependable. Dr. Mirkin testified that the Petitioner should continue his exercises either on his own or with a physical therapist. Dr. Mirkin testified that a "fall" does not cause a PCL tear "unless you really fell off a height." (RX4)

Dr. Nathan Mall testified that he is a board certified orthopedic surgeon and that the Petitioner saw him for treatment in December 2013. Dr. Mall testified that he was asked by the Petitioner's attorney to review and compare the two MRI films from July and October 2011 and to prepare a report. Dr. Mall testified that the PCL on both films appeared "pretty much the same" to him. Dr. Mall testified that the PCL is usually a very thick, black ligament and that in his opinion the Petitioner "definitely" had a PCL injury in both studies. Dr. Mall testified that the October 2011 MRI was of better quality. Dr. Mall testified that the radiologist erred in reading the 7/29/11 MRI and that sometimes radiologists "miss things" when they are not specifically looking for an injury. Dr. Mall testified that here is no evidence to support an intervening injury occurred when comparing the two films. (PX13).

The Petitioner testified that in July of 2011 he was working for the Marion Fire Department for the past five months as an entry level firefighter. The Petitioner testified that he worked towards becoming a firefighter for over 15 years and first worked as an EMT in Carterville, IL. The Petitioner testified he sustained a left knee injury on July 7, 2011 when he was backing down the stairs of a fire truck, after checking air tanks, and his foot slipped on the bottom step. The Petitioner testified that his foot struck the

ground, he heard a pop and hyperextended his knee backwards which caused him to fall to the ground. The Petitioner testified that he twisted his knee as well. The Petitioner testified that he sat there for a few minutes in great pain before attempting to walk. The Petitioner noticed he was walking with a limp. The Petitioner testified that he reported the injury to his Lieutenant. The Petitioner testified that he did not seek immediate medical attention nor did his supervisor turn the claim in immediately. The Petitioner testified that he was in a great deal of pain and taking anti-inflammatories before the Chief was finally notified and he was referred by the Respondent to an occupational health clinic. (T)

The Petitioner testified that he went to the Respondent's occupational health clinic on two occasions before he decided to be treated by his primary care physician, Dr. Jones. The Petitioner testified that Dr. Jones referred the Petitioner for an MRI, placed him on an off-work status and referred him for an orthopedic consultation with Dr. J.T. Davis. The Petitioner testified that Dr. Davis placed the Petitioner off-work and ordered physical therapy and aquatic therapy. The Petitioner testified that he was taken on and off crutches two or three times with Dr. Davis and was unsatisfied with his progress. The Petitioner testified that he was referred to another orthopedic surgeon Dr. Richard Lehman by Dr. Jones. The Petitioner testified that Dr. Lehman immediately recommended surgery and the procedure was similar to what Dr. Davis had recommended. The Petitioner testified that the surgery was performed at Des Peres Hospital and Dr. Lehman ordered additional physical therapy at Advanced and NovaCare. The Petitioner testified that Dr. Lehaman kept him off-work. The Petitioner testified that following surgery he was in great pain and was in bed for weeks. The Petitioner testified that he experienced slight improvement, but was still having a lot of problems. (T)

The Petitioner testified that Dr. Lehman performed a second procedure involving revisions at the Webster Groves Surgery Center in August of 2012. The Petitioner testified that he was kept off-work by Dr. Lehman and resumed additional physical therapy. The Petitioner testified that all of his doctors had referred him for pool therapy and that he paid of it out of pocket along with the expenses listed in Petitioner's exhibit 1. The Petitioner testified that he underwent a FCE in December of 2012. The Petitioner testified that the Dr. Lehman released him with 40 pound weight restrictions, no crawling or climbing ladders. The Petitioner testified that he was slightly better experiencing some improvement but still having a lot of issues. The Petitioner testified that he would experience pain, instability and trouble weight bearing. The Petitioner testified that he was transferring his weight to his right leg. The Petitioner testified his knee would pop since it felt like it was bone on bone. The Petitioner testified that he attempted to look for work using the internet job sites, craigslist, newspapers and word of mouth from friends and family. The Petitioner testified that he sought career counseling at Southern Illinois University. The Petitioner testified that he did not find any work within his restrictions. The Petitioner testified that he continued with physical therapy and pool therapy almost daily. The Petitioner testified that he followed up with Dr. Lehman again in July of 2013 because he was experiencing problems with his right knee and left hip in addition to the left knee. The Petitioner testified that Dr. Lehman sent him to Memorial Hospital in Carbondale for additional testing of the right knee, left knee and left hip. The Petitioner testified that Dr. Lehman again placed the Petitioner off-work. The Petitioner testified that Dr. Lehman was recommending surgical intervention for the left knee, left hip and right knee. (T)

The Petitioner testified that Dr. Jones referred him for another opinion to Dr. George Paletta, however, his office referred him to Dr. Nathan Mall. The Petitioner testified that he saw Dr. Mall and that he had recommended surgeries similar to what Dr. Lehman had recommended. The Petitioner testified that he

has not returned to work since the accident and is currently off-work per Dr. Lehman. The Petitioner testified that with regard to his left knee he suffers continued weakness, pain, instability, trouble weight bearing and range of motion limitations. The Petitioner testified that with regard to his right knee he experiences pain from over use. The Petitioner testified that with regard to his hip he is walking "unleveled" and causing pain. The Petitioner testified that the injuries are affecting every aspect of his life from getting in and out of his truck to getting up and down of a chair. The Petitioner testified that he has to lower himself with his upper body to use the bathroom and it's embarrassing. The Petitioner denied re-injuring his knee between the first two MRIs. (T)

The Petitioner testified that he did not fall at Schnucks but that his crutch slipped on the tile and he caught himself with his other leg. The Petitioner testified that he is willing to let either Dr. Lehman or Dr. Mall perform the surgery, however, he prefers the route Dr. Mall is recommending. The Petitioner testified that when he was looking for employment after his release from Dr. Lehman he would look every day. The Petitioner testified that he turned in applications to a golf course and a hardware store. The Petitioner testified that he has not been paid to perform any services to date since the accident. The Petiitoner testified that he works out at this gym doing the exercises he was taught in physical therapy. (T)

The Petitioner amended his application for adjustment of claim to include the right leg and left hip.

The Arbitrator Concludes:

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

Petitioner's current condition of ill-being is causally related to the injury/accident of July 7, 2011. This conclusion is based upon the Petitioner's credible testimony, the medical records, the chain of events, the lack of any pre-existing history of injury and the opinions of Dr. Davis, Dr. Lehman and Dr. Mall. The Arbitrator finds the opinions of Dr. Lehman and Dr. Mall more persuasive on the issue of the pathology when comparing the two MRI films in 2011. The Arbitrator takes exception of the fact that Dr. Davis's records specifically diagnosis a grade 2 to 3 posterior drawer indicative of a PCL injury on September 12, 2011, several days prior to the alleged "Schnucks" slipping incident. The Arbitrator found the Petitioner's testimony credible that the "Schnucks" incident was minor and temporary and did not represent an intervening injury. The Arbitrator further takes notice of the fact that the Respondent's own section 12 examiner testified that he didn't believe that even a fall could cause a PCL tear. The Arbitrator further takes notice of the fact Dr. Mirkin admittedly is an orthopedic physician primarily focusing on spinal conditions, testifies regularly for the Respondent's attorney's law firm and was found on several occasions to not be credible by the Missouri Courts and Division of Workers' Compensation. The Arbitrator notes there is no other facts in the record to support that an injury occurred between the two 2011 left knee MRIs. Therefore, the Arbitrator concludes that the injury to the left knee/leg including but not limited to PCL, ACL and cartilage defects, corresponding treatment including surgeries by Dr. Lehman and those future treatments and surgeries as recommended by both Dr. Lehman and Dr. Mall are causally related to the injury of July 7, 2011.

The Arbitrator further finds that the Petitioner conditions of the right leg and left hip are causally related and a direct consequence of the injuries sustained to the left knee on July 7, 2011. The Arbitrator finds credible the testimony of the Petitioner concerning his development of these complaints as a direct consequence of his altered gait and difficulty weight bearing after the left knee injury and subsequent

treatment. The Arbitrator finds credible the opinions of both Dr. Lehman and Dr. Mall that the injuries are caused by an overloading and over compensating on account of the original left knee injury and treatment. The Arbitrator takes exception of the fact that the Respondent's section 12 examiner, Dr. Mirkin, had no explanation as to why the Petitioner developed these conditions. The Arbitrator finds that the treatment proposed to address the right leg and left hip by Dr. Lehman and Dr. Mall are causally related to the injury of July 7, 2011.

The Arbitrator finds more credible the opinions of Dr. Lehman and Dr. Mall that the Petitioner has not reached MMI. Although Dr. Lehman for a brief period of time in 2013 released the Petitioner at MMI with permanent restrictions, it is clear from the medical records, credible testimony of the Petitioner and subsequent surgical recommendations that the Petitioner in fact never reached such a status. Dr. Lehman testified that the Petitioner was still complaining of ongoing problems at the time of the release. The proposed surgeries and subsequent MRI's confirm that the Petitioner never reached MMI. The fact that Dr. Lehman has since withdrawn that designation supports that the Petitioner never reached MMI. The Arbitrator finds that the Petitioner is not at MMI nor has he ever reached MMI.

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

The medical services received through the present were reasonable and medically necessary to cure or alieve the effects of the work related injury of July 7, 2011. The Arbitrator finds the opinions of Dr. Lehman and Dr. Mall more persuasive than Dr. Mirkin's. The Arbitrator notes that Respondent's section 12 examiner, Dr. Mirkin, had no objection to reasonableness and necessity of the treatment the Petitioner received to date when asked in his deposition. The Respondent is to pay directly to the providers all related medical and that as set forth in Petitioner's Exhibit 1 per the fee schedule as stipulated to by the parties at the beginning of trial. In addition, the Respondent shall pay directly to the Petitioner the sum of $1,148.20 for out of pocket medical expenses and $1,482.00 for pool therapy expenses. Respondent shall authorize treatment recommended by Dr. Lehman and Dr. Mall.

K. What temporary benefits are in dispute, TTD?

The Arbitrator finds that the Petitioner has not reached maximum medical improvement and never has despite a brief 2013 release from Dr. Lehman which has since been rescinded. The Petitioner has never returned to work, his employer never accommodated his restrictions and future medical procedures are pending. The Petitioner is entitled to TTD from 7/27/11 through 6/25/15 a period of 203 6/7th weeks minus any TTD credit/previously paid. (RX1).

(In the alternative, the Arbitrator, could award maintenance for the period 1/4/13-10/10/13 representing 39 6/7th weeks. The Arbitrator notes that the Respondent did not offer work to the Petitioner within his restrictions. The Arbitrator found that the Petitioner made a reasonable effort to find work on his own through computer searching, networking and career counseling at SIU. The Arbitrator considers the fact the Petitioner ongoing condition was worsening and in fact he had not reached MMI. The records support that the Petitioner complaints were clearly progressing. The Arbitrator additionally awards TTD to Petitioner for the periods 7/27/11-1/3/13 and 10/11/13-6/25/15 a period of 164 weeks.)

O. Other – Prospective medial, whether Petitioner exceeded his permissible choices of caregivers

Petitioner did not exceed his choice of two physicians by seeking treatment with Dr. Mall. The Arbitrator found the Petitioner credible on the referral issue. The Respondent offered no evidence to refute the testimony of the Petitioner that he was referred by Dr. Jones to Dr. Paletta who in turn was referred him to Dr. Mall. The Arbitrator notes that the Petitioner's first choice was Dr. Jones, who referred the Petitioner to both Dr. Davis and Dr. Lehman.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Denise Zuhn,

Petitioner,

vs.

NO. 13WC00165

T.K. Behavioral LLC

Respondent.

16IWCC0567

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, prospective medical care, temporary disability, and being advised of the facts and law, 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 8, 2015 is hereby affirmed and adopted.

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.

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

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

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

DATED:
SJM/sj
o-8/25/16
44

Stephen J. Mathis

Mario Basurto

David L. Gore

16IWCC0567

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.

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DATED: AUG 3 0 2016
SJM/sj
o-8/25/16
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

ZUHN, DENISE A
Employee/Petitioner

Case# **13WC000165**

T K BEHAVIORAL LLC
Employer/Respondent

16IWCC0567

On 7/8/2015, 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 0.08% 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:

0612 DWYER & COOGAN PC
JAMES COOGAN
140 S DEARBORN ST SUITE 1603
CHICAGO, IL 60603

0560 WIEDNER & McAULIFFE LTD
BROOKE TORRENGA
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0567

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)

Denise A. Zuhn
Employee/Petitioner

v.

T.K. Behavioral LLC
Employer/Respondent

Case # **13 WC 00165**

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **5/18/15**. 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

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FINDINGS

On the date of accident, **11/15/12**, 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 $75,692.24; the average weekly wage was $1,455.62.

On the date of accident, Petitioner was 53 years of age, ***single*** with 0 dependent children.

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

Respondent shall be given a credit of **$78,133.54** for TTD, **$3,571.12** for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of **$81,704.66**.

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

ORDER

Respondent shall pay Petitioner $970.41 per week for 84-2/7ths weeks for temporary total disability, from 12/21/12 through 2/25/14; and 3/7/14 through 8/11/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit for $78,133.54, for temporary total disability previously paid to Petitioner.

Respondent shall pay Petitioner $242.61 per week for temporary partial disability benefits, from October 10, 2014 through the date of hearing, i.e. May 18, 2015, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $3,571.12 for temporary permanent disability previously paid.

Respondent shall pay for any and all necessary and reasonable medical treatment involving the temporary and permanent placement of a spinal cord stimulator, pursuant to the medical recommendations of Dr. Timothy Lubenow; including rehabilitative treatment, as provided in Sections 8(a) and 8.2 of the Act.

No penalties or attorney's fees are awarded.

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.

PROOF COPY

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FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) temporary total disability paid on dates the petitioner took sick days, due to knee pain; 3) temporary permanent disability; 4) penalties; and 5) attorney's fees. *See,* AX1.

Denise Zuhn, (the "petitioner"), is 55 years old, employed by T.K. Behavioral LLC, ("Respondent"), as a nurse case manager. Petitioner testified that she was walking on Respondent's campus, on November 15, 2012, slipped on ice, landing on her right knee. The injury to her right knee is undisputed.

Petitioner's treatment

Petitioner sought medical care on the date of injury, at Premier Occupational Health. She was diagnosed with a knee contusion. She continued to follow-up at Premier Occupational Health over the next two (2) weeks and was eventually referred to an orthopedist. On December 5, 2012, an MRI of her right knee revealed a Grade III tear of the posterior horn of the medial meniscus, red marrow conversion, a mild knee joint effusion; and minimal soft tissue edema of the anterior aspect of the knee. PX6, pp. 95, 136.

On January 17, 2013, Petitioner was seen by Dr. James Hill who diagnosed her as having complex regional pain syndrome ("CRPS") with a questionable non-displaced fracture of the patella. He recommended a referral to a pain clinic for a nerve block followed by physical therapy. Petitioner was referred to Dr. Michael Liston, who was noted to be her treating physician. The Arbitrator notes that Dr. Liston's records were not offered into evidence. PX10, p. 638.

On February 15, 2013, Petitioner saw Dr. Matthew Jaycox, at Rush Pain Center, on referral from Dr. Liston. Petitioner reported that her pain was initially a burning sensation in her left knee, but that over the last three (3) weeks, it had been a cold, freezing pain radiating to the shin and foot. Dr. Jaycox felt that Petitioner was suffering from right lower extremity neuropathic pain, which he thought could be the early stages of CRPS, but that she did not have the full spectrum of the syndrome. He recommended Lyrica, a series of lumbar sympathetic blocks, and aquatic therapy. Physical therapy began on February 25, 2013, at Palos Community Hospital. PX5, p. 67; PX8, p. 480.

On March 4, 2013, Petitioner came under the care of Dr. Timothy Lubenow, who administered a series of four lumbar sympathetic nerve blocks between March 4 and April 1, 2013. Petitioner was discharged from physical therapy on July 9, 2013, having completed thirty-eight (38) sessions. PX5, pp. 78-81, 544.

Petitioner's first Independent Medical Evaluation ("IME")

On July 16, 2013, Petitioner underwent an IME with Dr. Kenneth Candido, at the request of Respondent. She reported pain 5/10 in the right knee at rest and up to 10/10 with increased activity; but stated that her pain was better with physical therapy and medication. Dr. Candido performed a detailed physical examination and took a series of photos of Petitioner's lower extremities, noting Petitioner's painted toenails. He observed no color abnormalities, swelling or disparity between the right and left lower extremities on physical examination; no evidence of blood flow abnormalities, tactile allodynia, or deep pressure hyperalgesia to the knee, leg or foot. Dr. Candido recorded bilateral equivalent temperature measurement at the thigh, knee, calf, ankle and forefoot of the lower extremities and usual minimal discrepancies in circumference measurement between the right and left side. The only objective findings that Dr. Candido recorded were reduction in light touch and pinprick in the right saphenous nerve and a flexion reduction to 110 degrees of the right knee compared to 140 degrees on the left. RX1, pp. 6, 11-15.

Based on his examination, Dr. Candido opined that petitioner sustained a patellar contusion as a result of the November 2012, accident, as well as a Grade III tear of the medial meniscus and neuropathic pain in the right knee. He identified no signs of CRPS Type I or II. Dr. Candido testified that Petitioner "ascribed all of her improvement essentially to the use of physical therapy." Thus, he recommended an additional six to eight weeks of aquatic physical therapy, after which he felt she would be at maximum medical improvement ("MMI").

Petitioner resumed physical therapy on August 16, 2013. As of October 14, 2013, she had completed twenty-one (21) sessions, stating "I wouldn't have gotten to where I am if it wasn't for the therapy." She was discharged from therapy at that time. PX8, pp. 552, 580.

Petitioner testified that on October 18, 2013, she underwent surgery by Dr. Verma, to repair her right medial meniscal tear. The Arbitrator notes that the operative report is not contained in the record. Subsequently, the petitioner resumed physical therapy on October 29, 2013 and as of November 19, 2013, she had completed an additional ten (10) sessions, reporting overall improvement. It was noted that she still had an epidural pump and would benefit from skilled therapy after the pump was removed. The therapist recommended an additional four to six weeks of therapy. PX8, p. 395-7; PX10, p. 637.

Petitioner resumed physical therapy on December 30, 2013. Her therapist observed that she had her epidural pump removed, but now had residual symptoms of CRPS, including coldness down her bilateral lower extremities into her feet. She was to continue with two additional weeks of therapy before completing a functional capacity evaluation ("FCE").

Petitioner was discharged from physical therapy on January 3, 2014 and completed an FCE on January 14 and 15, 2014. Based on the two-day FCE, Petitioner displayed most job-performance

Preview

abilities, meeting a medium physical demand level. She was limited by CRPS symptom complaints, but did display overall endurance in activities that would be required for her job. A return to work, on a trial basis, was recommended. PX4; PX8, p. 440.

Petitioner testified that she returned to work for approximately four (4) weeks, sometime in February or March 2014. As of March 20, 2014, Dr. Lubenow placed the petitioner under restrictions of a seated job, with her right leg elevated as needed; maximum standing/walking of ten minutes and her work hours limited to four per day. The Arbitrator notes that there is no medical record of Dr. Lubenow associated with this date of service contained in the record, only a work release form. Dr. Lubenow testified that he first recommended a spinal cord stimulator on or about May 29, 2014. The Arbitrator cannot identify a chart note, work status report, or prescription form corresponding with this date of service, in the records entered into evidence. PX1, p. 16; PX12, p. 18.

Petitioner's second Independent Medical Evaluation

Dr. Candido reevaluated Petitioner on June 24, 2014. Petitioner stated that overall she was improving due to increasing her activity levels, which was concomitant with an improvement in her right leg range of motion. However, she continued to have pain. Her pain level was 3-4/10 in relation to the right knee and up to 6/10 with activity, which Dr. Candido observed was lower than the first evaluation. Upon physical examination, Dr. Candido again noted the absence of any color abnormalities, swelling, blood flow abnormalities, allodynia, or hyperalgesia in the right lower extremity compared to the left. Petitioner did have isolated discomfort to deep palpation about the right patella and hypesthesia to light touch and pin prick on the right saphenous deep peroneal and lateral plantar nerve distributions in the right foot. He again took a series of photos of Petitioner's lower extremities, and again noted her toenails appeared freshly manicured. RX1, pp. 19-22.

Dr. Candido again opined that Petitioner did not meet the criteria for a clinical diagnosis of CRPS. He noted that several individuals had told her that she had CRPS and therefore she believed she was on a path towards a spinal cord stimulator. Dr. Candido did not feel that a spinal cord stimulator was appropriate. Instead, he recommended additional physical therapy, noting this was a mainstay of any neuropathic pain condition, as well as continued use of vitamins and Tramadol. He believed petitioner was able to return to full duty light work and recommended that she slowly reintegrate herself into the workplace, starting with four-hour workdays in the first month, followed by six-hour workdays for the second month, and eight-hour workdays by the third month. RX1, pp. 24-26.

Deposition of Dr. Kenneth D. Candido, dated March 17, 2015

Dr. Candido stated that the petitioner sustained an injury to her right knee at work, that her injury was a Grade-III tear to her right medial meniscus; and that she has neuropathic pain in her right knee because of her work injury. Dr. Candido also stated that the placement of a spinal cord stimulator is an appropriate treatment for a patient with neuropathic pain; however, said procedure was not necessary in this case. RX1, p. 27.

To support his position, Dr. Candido states that Petitioner initially reported to him that she did not want to have a stimulator implanted into her body. Petitioner testified that she initially preferred to recover through conservative treatment after her knee surgery however, upon exhaustion of all conservative treatment, extensive attempts at alternative methods of pain control, concerns about developing addiction to or side effects of narcotics, Petitioner concluded that implantation of the pain stimulator was her best option. Dr. Candido interprets Petitioner's change in position to her being unreasonably single-minded, in her pursuit of this treatment. RX1, p. 24.

Upon his second examination of Petitioner, he opines that she was at MMI as of that visit because of a "substantial improvement." However, in the same report, he states that she requires further treatment, because she continues to suffer from pain and swelling of her neuropathic-afflicted lower right extremity. Specifically, he states that Petitioner requires six-to-eight weeks of physical therapy to improve her condition, which would indicate that she is not at MMI. His confusing opinions continue with his statement that Petitioner would improve with or without therapy, but then agrees that once these options are exhausted that spinal cord stimulation is appropriate for a patient with neuropathic pain such as Ms. Zuhn's. RX1, p. 27.

Dr. Candido's testimony admittedly, is not based upon the petitioner's current condition. He apparently thinks that a petitioner having difficulty working through a 6-hour day would have no problem doing physical therapy, during the course of consecutive workdays. He stated that six-to-eight weeks of therapy was all the treatment Petitioner needed and that if she tried that therapy and it was unsuccessful, he might change his opinion about the spinal cord stimulator. Then he states that if the petitioner attended only six therapy visits, that would be a failure to exhaust conservative treatment, regardless of whether she was actually experiencing increased pain at the therapy visits. RX1, pp. 27-31.

It is noted that Dr. Candido found Petitioner to be "very compliant" during his examinations and stated that his opinion about the use of a spinal cord stimulator, was based upon her relief of symptoms, during a period when she was off work. Finally, he states that he would need to re-evaluate the petitioner, based upon her current status, while working 6-hour days. RX1, pp. 44-52.

Petitioner resumed physical therapy on September 26, 2014. On October 1, 2014, she saw Dr. Lubenow, stating that she had a worsening of pain after recently returning to work. He felt that she had worsening CRPS and continued to recommend a spinal cord stimulator. Petitioner completed six sessions of physical therapy and was discharged on October 15, 2014, apparently per Dr. Lubenow's request. PX1, p. 20; PX9.

Petitioner returned to Dr. Lubenow on January 8, 2015, who recorded allodynia and hyperalgesia over the right knee upon physical examination, as well as temperature differences and erythematosus

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discoloration between the right and left lower extremity. He stated that the petitioner had symptoms consistent with CRPS and he continued to recommend a spinal cord stimulator. PX1, p. 29.

Petitioner last saw Dr. Lubenow on March 19, 2015 and on that date his physical examination was positive for allodynia and hyperalgesia, in the right lower extremity. Although Dr. Lubenow observed Dr. Candido's recommendation for eight weeks of therapy, he noted that the petitioner had attempted to complete further physical therapy, but was instructed by her therapist to stop after several weeks, due to having increased swelling and decreased range of motion in the right knee. He again recommended a spinal cord stimulator. PX11.

Deposition of Dr. Timothy Lubenow, dated January 15, 2015

Dr. Lubenow's specialty is pain management, in his practice as an anesthesiologist. He testified that he has treated Ms. Zuhn since March 2013; that at that time, a colleague in the Rush Pain Clinic initially saw her. He explained the initial history that Ms. Zuhn presented with: that she had fallen on November 15, 2015 and twisted her right knee. He explained that the knee had a fractured patella and a tear of the medial meniscus and that these injuries were treated orthopedically prior to referral to his office. He notes that the referral to his office was based upon Dr. James Liston of Northwestern Orthopedic, diagnosing her with CRPS and sending her to Dr. Hale for a nerve block. He stated that he has commonly treated patients with this sort of traumatic knee injury in his practice and that he initially diagnosed her with neuropathic pain in her right lower extremity. He testified regarding the course of treatment of her knee: that it first involved the use of a series of lumbar sympathetic nerve blocks, which occurred in March and April of 2013; then placement of an epidural catheter to deliver medicine to the knee space; and she underwent physical therapy. On February 6, 2014, Dr. Lubenow ordered the petitioner to return to work with restrictions of avoiding cold, ambulation as tolerated, a 35-pound lifting restriction; and a workday of four hours. He testified that by early 2014, Mrs. Zuhn's condition had improved, but she was struggling in her attempt to return to work. Based upon stagnation in her improvement, Dr. Lubenow ordered a trial placement of a spinal cord stimulator as the next reasonable step, in attempts to relieve Ms. Zuhn's chronic pain and swelling in her knee.

Specifically, Dr. Lubenow offered the opinion that Petitioner suffers from either CRPS or a neuropathic pain problem related to her right lower extremity. He opines that the CRPS or neuropathic pain that the petitioner is suffering, is causally related to the fall in November 2012.

Dr. Lubenow opines that the appropriate treatment for Petitioner's work-related medical condition is the surgical placement of a spinal cord stimulator. He opines that the petitioner has not reached MMI, stating that he has not exhausted the course of pain management treatment available to Petitioner. This conclusion is also based upon the fact that whether the diagnosis is neuropathic pain or specifically CRPS, the placement of a spinal cord stimulator is an "FDA-approved treatment modality for this condition"; and Petitioner "continues to have pain and other associated symptoms, i.e., difficulty walking and swelling, that preclude her from returning to work, eight hours a day. Dr. Lubenow explained that it is expected that a person with the neuropathic condition of the type the

petitioner exhibits, to struggle with returning to a full day's work. He stated that Petitioner "crashes and burns," when she returns home after the six (6) hours she is currently working.

Dr. Lubenow testified that he has particular expertise with the diagnostic criteria for CRPS, as he was involved in the group of twenty-nine (29) physicians that attended the Budapest conference where the criteria were developed. These are the criteria that Dr. Candido followed in his examination of the petitioner, acknowledging that they are the par excellence standard for diagnosis of this condition.

By testimony, both physicians agree that the reasonable treatment for CRPS is the placement of a spinal cord stimulator once other treatment modalities are exhausted. Dr. Lubenow testified that all the treatment that Petitioner has received so far was reasonable and necessary and causally related to her accident. He further testified that the placement of a spinal cord stimulator would be reasonable and necessary. His testimony, based upon treating the petitioner on a regular basis since she returned to 6-hour workdays, is that she would not benefit from any further physical therapy. PX12.

CONCLUSIONS OF LAW

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

Causation, in a workers' compensation case, may be established by a chain of events showing prior good health, an accident and a subsequent injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill. App. 3d 92, 96-97, 631 N.E.2d 724 (1994); *see also, Darling v. Industrial Comm'n,* 176 Ill. App. 3d 186, 193, 530 N.E.2d 1135 (1988).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission,* 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); *see also, Hansel & Gretel Day Care Center v Industrial Commission,* 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).
There is no disputed that this petitioner was in good health regarding her right knee, prior to falling on ice while working. After and review of the evidence presented, the Arbitrator finds and concluded that Petitioner has established, by a preponderance of the evidence, that there is a causal connection between her current condition of ill-being and the November 15, 2012 work accident.

K. Is Petitioner entitled to prospective medical care?

Petitioner is seeking authorization for a spinal cord stimulator, which has been recommended by Dr. Lubenow. Dr. Candido does not feel a spinal cord stimulator is appropriate to treat petitioner's neuropathic pain condition, given her prior improvement with conservative measures alone. Instead,

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Dr. Candido recommended that Petitioner complete six to eight weeks of physical therapy while maximizing her reliance on analgesic medications.

The Arbitrator adopts the opinions of Dr. Lubenow, as to prospective medical treatment, finding his opinions to be more persuasive. Dr. Candido's opinions are not as reliable as those of Dr. Lubenow, who has treated the petitioner and actively manages her pain and is aware that her current condition of ill-being has been exacerbated by her return to work. The Arbitrator finds and concludes that the petitioner has proven, by a preponderance of the evidence, that she is entitled to the prospective medical treatment, as proscribed by Dr. Lubenow.

L. What temporary benefits are in dispute?

The parties have stipulated to 84-2/7ths weeks of TTD, representing the periods of December 21, 2012 through February 25, 2014 and March 7, 2014 through August 11, 2014. Petitioner also claims she was sporadically temporarily totally disabled on 18 various dates between September 6, 2014 and May 7, 2015. Finally, petitioner claims that she is entitled to temporary partial disability benefits from October 10, 2014 through May 15, 2015.

Petitioner testified that she called in sick to work on the 18 days listed on the Request for Hearing because she was in pain due to her disabled knee. She has acknowledged that no doctor authorized her off work for any of these days. Since petitioner was not authorized off work and instead took these days off because she believed that she was unable to work, the Arbitrator finds that petitioner failed to prove, by a preponderance of the evidence, that she was temporarily, totally disabled during this period.

Petitioner also claims she was temporarily, partially disabled from October 10, 2014 through May 15, 2015 because she was only able to work six hours per day. She is currently restricted to six-hour workdays by Dr. Lubenow. The FCE found petitioner capable of returning to medium level work without mention of any hourly restriction. The Arbitrator finds and concludes that pursuant to Section 8(a) of the Act, the petitioner is entitled to TPD in the amount of the difference between $1,455.62, i.e. average weekly wage and the amounts actually paid for the work performed by Petitioner, i.e., an average of $1,091.71, multiplied by 2/3, which amounts to $242.61 per week.

Petitioner acknowledged that her restrictions are being accommodated by her employer, that she is provided transportation to go between buildings on campus; and is able to elevate her leg as necessary. She spends most of her day working at a physical demand level that can be classified as sedentary to light, based on her testimony.

The issue of how Petitioner has responded to returning to work would be central to any reliable and relevant opinion about her current physical condition and her ability to continue to work. However, when asked a direct question about physical therapy and the Petitioner working, Dr. Candido offered

generalities. Alternatively, his response was that there is no "study conducted of that nature" regarding a working person, with the subject condition, also undergoing therapy. This undermines the persuasiveness of his opinion concerning the petitioner participating in further physical therapy as a conservative treatment; and that conservative measures must be exhausted prior to the treatment recommended by Dr. Lubenow. Further, Dr. Candido's theory that neuropathic pain medication would make it possible for Ms. Zuhn to work eight hours, then do physical therapy, with no impact on her ability to focus, is speculative. Moreover, it disregards her testimony that she explained to him that she has concerns about taking narcotic medication, because of its lack of effectiveness and severe side effects.

Petitioner testified that her head seems to "float" when she takes Norco. Additionally, she listed several different medications that have been attempted in her treatment, with limited impact on pain relief and serious side effects, that affect her focus, mental acuity, and elicit nausea. Those medications include Lidoderm, Medrol, Pristiq, Lyrica, Cymbalta, Clonidine, Topamax, and Celebrex. Dr. Candido's opinion disregards the fact that treatment with these medications has been attempted and have had negative consequences.

Additionally, Dr. Lubenow reports that after Petitioner returned to work in the fall of 2014, she had "worsening pain with a greater amount of swelling that is noted to be predictably worse at the end of the day." He elaborated that: "[r]elafen has not helped, but she continues to take it."

Petitioner has followed Dr. Lubenow's recommendations, and only worked six (6) hours per day. TPD was cut off as of October 10, 2014 and she was not paid during that period. The Arbitrator finds that a 6-hours of work per day is appropriate and thus the 2-hour difference from a full day should be paid from that date to the hearing date, and reinstated going forward until her work status changes. The PTD rate that applies is $1,455.62, minus a weekly paid wage averaging of $1,091.71, multiplied by 2/3, which amounts to $242.61 per week.

M. Should penalties or fees be imposed upon Respondent?

To avoid the imposition of penalties and fees, an employer must show that the facts in its possession would have led a reasonable person to believe that a claimant is not entitled to prevail under the Act. *Cook County v. Industrial Comm'n*, 160 Ill. App. 3d 825, 830 (1987).

The intent of awarding penalties and fees is "to implement the Act's purpose to expedite the compensation of industrially injured workers and penalize an employer who unreasonably, or in bad faith, delays or withholds compensation due an employee." *Avon Products, Inc. v. Industrial Comm'n*, 82 Ill. 2d 297, 301, 45 Ill. Dec. 117, 412 N.E.2d 468 (1980). The burden is on the employer to show that any delay in paying benefits is reasonable. *Electro-Motive Division v. Industrial Comm'n*, 250 Ill. App. 3d 432, 436 (1993).

Penalties are not ordinarily imposed where an employer acts in reasonable reliance on a medical opinion that establishes an objectively reasonable basis to dispute liability. *Reynolds v. Ill. Wrk. Comp. Comm'n,* 395 Ill.App.3d 966, 971 (3rd Dist. 2009). Respondent had a good faith basis to deny medical and indemnity benefits based on the opinion of Dr. Candido, although the Arbitrator finds his opinion unpersuasive. Accordingly, the petitioner's claim for penalties and attorney's fees is denied.

16IWCC0567

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
13WC00165
SIGNATURE PAGE

L Thompson Smith
Signature of Arbitrator

July 8, 2015
Date of Decision

JUL 8 - 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

WILFRED DOWDELL,

Petitioner,

16IWCC0543

vs.

NO: 13 WC 02015
13 WC 33620

INLAND DIE CASTING,

Respondent.

DECISION AND OPINION ON REVIEW UNDER SECTION 19(b)

Timely Petition for Review under §19 (b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, and temporary disability and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below. 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The August 17, 2015, 19(b) Decision of Arbitrator found Petitioner failed to establish that he sustained a work-related repetitive trauma injury on September 4, 2013, that resulted in bilateral carpal tunnel syndrome, bilateral trigger thumbs, bilateral biceps tendinitis, and right-sided deQuervain's tenosynovitis. The 19(b) Decision of Arbitrator recognized Petitioner's work activities required him to use a mallet and a hammer, to file and grind on machine #17, and to lift upwards to forty pounds but found no evidence was presented of vibratory equipment being

used, of forceful grasping or twisting movement of Petitioner's hands occurring, or of the frequency and duration of involved in the performance of his work activities. The Commission takes issue with findings of the arbitrator's Decision pursuant to § 19(b) of the Act.

The Commission finds the 19(b) Decision of the Arbitrator recounted Petitioner's work activities but failed to appreciate the damaging effect they had upon Petitioner's fingers, hands, and wrists. Respondent manufactures metal parts, and Petitioner, employed by Respondent as a secondary trim press operator, lifted these metal parts, some weighing up to forty pounds prior to being trimmed, and then trimmed the excess metal from these parts using a hammer, a mallet, a grinder and a file. Petitioner testified these tools were handheld. Forceful gripping would be employed in using each of these tools given how they were used and that striking the metal parts with a hammer and a mallet and grinding with a grinder would result in vibrations that would be felt in Petitioner's hands. The Commission finds Petitioner credibly testified that his work activities required him to engage in forceful grasping and exposed to both a vibratory tool and to tools that caused vibrations when used as he had used them. Accordingly, it is found that Petitioner's bilateral carpal tunnel syndrome, bilateral trigger thumbs, bilateral biceps tendinitis, and right-sided deQuervain's tenosynovitis did arise out of and in the course of his employment and were causally related to his work activities.

The Commission, having found both a compensable accident and a causal connection exists between Petitioner's injuries and his work activities, addresses the issue of Petitioner's medical treatment and prospective medical treatment. Dr. Irvin Weisman, Petitioner's treating physician, testified and provided the opinion that Petitioner's work activities were a causative factor in the symptomatic conditions in both of Petitioner's upper extremities. Dr. Weisman's testified that this opinion stems from the history he took from Petitioner of him being engaged in forceful gripping, heavy lifting, and grinding with tools as well as Petitioner's subjective complaints and his own findings upon examining Petitioner. Dr. Ramsey Ellis examined Petitioner on behalf of Respondent pursuant to Section 12 of the Act on three occasions, and opined Petitioner's work activities were not a cause of Petitioner's injuries save for left de Quervain's tenosynovitis and right ring finger stenosing tenosynovitis as he found no evidence of Petitioner's work activities included prolonged use of vibratory tools or involved highly repetitious flexion/extension of the wrist coupled with forceful grasping. Dr. Ellis testified to viewing a video in which Petitioner did not use a handheld vibratory tool to buff the edges. The Commission notes no video was entered into evidence. Dr. Ellis provided no testimony of whether he saw Petitioner use a grinder. Nor did he opine as to whether striking metal with a hammer and/or mallet might also result in vibrations being felt in Petitioner's hands. The Commission finds Dr. Weisman, given his greater familiarity with Petitioner and his work activities, to be a more credible witness regarding the condition of Petitioner's upper extremities and need for further treatment than Dr. Ellis. The Commission adopts Dr. Weisman's opinion concerning Petitioner's past medical treatment and the need for the prospective medical treatment Dr. Weisman proposes.

Adopting Dr. Weisman's opinion concerning Petitioner's past medical treatment leads

the Commission to also adopt Dr. Weisman's opinion concerning Petitioner's ability to work. Dr. Weisman, following an office examination of Petitioner on December 10, 2013, precluded Petitioner from returning to work after finding Petitioner failed conservative therapy to address his bilateral thumb pain, left wrist pain, and left arm pain. Petitioner continued to be off work due to Dr. Weisman's prescription when his employment with Respondent was terminated effective September 30, 2014. At that time and through May 1, 2015, Petitioner continued to treat with Dr. Weisman. On May 1, 2015, Dr. Weisman released Petitioner to return to work at a light duty capacity with a restriction against lifting more than 10 pounds with his right hand. Petitioner then sought employment as a driver, believing that he would not have to use his arms and hands as much. Petitioner unsuccessfully secured such employment but found employment as a dishwasher on June 1, 2015. The Commission finds Respondent's responsibility to provide Petitioner with temporary total disability benefits continued until Petitioner's condition stabilized on May 1, 2015. Petitioner provided no evidence of any job search beyond his own testimony, and the job search he did testify to conducting was unnecessarily and unreasonable restricted to only one profession. Petitioner, consequently, is entitled to the 2-2/7 weeks of temporary total disability benefits as stipulated to by the parties plus an additional 72-3/7 weeks of temporary total disability benefits that represents that period of time Dr. Weisman deemed Petitioner unsuited to work.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $291.47 per week for a period of 74-5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner under §8(a) of the Act the medical expenses incurred for treatment of bilateral carpal tunnel syndrome, bilateral trigger thumbs, bilateral biceps tendinitis, and right-sided deQuervain's tenosynovitis.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay under §8(a) of the Act the surgery to treat Petitioner's right trigger thumb as recommended by Dr. Weisman.

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.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,900.00. 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: AUG 1 8 2016
KWL/mav
O: 06/21/16
42

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Williams' thorough and well-reasoned decision.

Kevin W. Lamborn

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

16IWCC0543

DOWDELL, WILFRED
Employee/Petitioner

Case# **13WC002015**

13WC033620

INLAND DIE CASTING
Employer/Respondent

On 8/17/2015, 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 0.24% 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:

4595 WHITESIDE & GOLDBERG LTD
BRENT R EAMES
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

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

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

STATE OF ILLINOIS)
)
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

16IWCC0543

Case #13 WC 02015
#13 WC 33620

WILFRED DOWDELL
Employee/Petitioner

v.

INLAND DIE CASTING
Employer/Respondent

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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on June 18 and July 23, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☒ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☐ Should penalties or fees be imposed upon the respondent?

M. ☐ Is the respondent due any credit?

N. ☒ Prospective medical care?

FINDINGS

- On October 9, 2012, and September 9, 2013, the respondent was operating under and subject to the provisions of the Act.
- On those dates, an employee-employer relationship existed between the petitioner and respondent.
- The respondent agreed that the petitioner sustained injuries on October 9, 2012, that arose out of and in the course of employment.
- Timely notice of the accidents was given to the respondent.
- In the year preceding the injuries, the petitioner earned $22,734.40; the average weekly wage was $437.20.
- At the time of injury, the petitioner was 40 through 41 years of age, married with two children under 18.
- The petitioner agreed that the respondent paid $729.13 in temporary total disability benefits for his injury on October 8, 2012.
- The respondent agreed that the petitioner is entitled to temporary total disability benefits for 2-2/7 weeks, from April 9 through April 14, 2013, and from May 21 through May 31, 2013, for his injury on October 9, 2012.

ORDER:

- The medical care rendered the petitioner for his right ring trigger finger and left de Quervain's tenosynovitis was reasonable and necessary and is awarded. The medical care rendered the petitioner for his right and left carpal tunnel syndrome, left and right trigger thumbs and left and right biceps tendinitis and right de Quervain's tenosynovitis was not reasonable or necessary and is denied. The respondent shall pay the medical bills in accordance with the Act, the medical fee schedule or any prior adjustments or negotiated rate. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

- The evidence is insufficient to establish that the petitioner sustained a work injury on September 4, 2013. The petitioner's request for benefits for claim #13WC 33620 is denied and the claim is dismissed.

- The petitioner's request for temporary total disability benefits, medical costs and prospective medical for his left and right carpal tunnel syndrome, left and right trigger thumbs, left and right biceps tendinitis and right de Quervain's tenosynovitis is denied.

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

Robert E. Williams

Signature of Arbitrator

August 17, 2015
Date

AUG 17 2015

FINDINGS OF FACTS:

The petitioner, a right-handed, secondary trim press operator, sought care on October 9, 2012, at NCH Immediate Care for sharp, intermittent wrists pain, right greater than the left, aggravated by movement. The date and the condition of ill-being is the subject matter of claim #13 WC 2015. X-rays were negative for acute fractures or dislocation. He was given wrist splints. At a follow-up on October 16th, he reported some improvement with the splints, no prior wrist problems and that his symptoms started as a result of work. The assessment was bilateral tenosynovitis of the wrists. On November 6th, the petitioner reported pain in his elbows. He denied wrist pain with movement but pain only while sleeping.

The petitioner saw Dr. Vender on December 21, 2012, for multiple complaints in both upper extremities. Dr. Vender noted the most significant complaints were radial hand and wrist pain. The petitioner reported numbness and tingling mostly prominent at night and pain and/or numbness and tingling with certain activities. He also complained of pain in his volar forearm, the base of his palms and, at times, both the lateral and medial aspects of his elbows. He complained of triggering of his ring finger in the morning only. The doctor's examination revealed crepitation in the thumb carpometacarpal joints and pain with movement. X-rays of his thumbs and wrists were within normal limits.

An NCV/EMG study on January 8, 2013, concluded that there was mild right median neuropathy at his wrist but no evidence of ulnar palsy, cervical radiculopathy or left median neuropathy. On January 11, 2013, Dr. Vender gave the petitioner a steroid

injection into his left first extensor for de Quervain's extensor tenosynovitis, which the petitioner reported no benefit.

Pursuant to the request of the respondent, Dr. Ramsey Ellis at Hand to Shoulder Associates evaluated the petitioner on February 5th, and opined that the petitioner's job duties contributed to the development of tendinitis in his right ring finger and left wrist but felt that the right carpal tunnel syndrome was not due to any work duties. On March 1st, Dr. Vender gave the petitioner a steroid injection into his right ring finger for a flexor stenosing tenosynovitis condition, which provided no benefit. On April 9th, Dr. Vender excised a mass from the petitioner's right ring finger and released the flexor tendon sheath. Therapy for his finger was started on April 12th.

On May 21st, Dr. Vender released the petitioner's first extensor compartment due to his de Quervain's extensor tenosynovitis. The petitioner began therapy on May 24th. On June 11th, Dr. Vender performed a right carpal tunnel release. On July 19th, Dr. Vender noted complaints of relatively localized tenderness in the left dorsal radial wrist area at the base of the snuffbox, tenderness in the right volar forearm near the insertion of the distal biceps and in the left forearm but less prominently. On August 9th, Dr. Vender allowed the petitioner to work without forceful gripping and noted that he could work without restrictions beginning August 26, 2013. On August 28th, the petitioner reported to the therapist bilateral upper extremity pain since resuming full duty on the 26th.

September 4, 2013, is the date of injury for claim #13 WC 33620 involving the petitioner's right and left trigger thumbs, left carpal tunnel syndrome, left and right biceps tendinitis and right de Quervain's tenosynovitis. In the therapist report #50 on September 4th, she noted that the petitioner reported bilateral upper extremity, hand and

forearm pain. She noted in her report #31 the same day that the petitioner complained of pain in his forearm and palm and had pinch strength on the right of 50 pounds. On September 6th, Dr. Vender noted in reports #32 and #51 that the petitioner made complaints throughout his upper extremities. He opined that the petitioner had reached maximum medical improvement and that his multiple complaints in his forearm, hand and fingers were not related to his previous diagnosis. On September 13th, the petitioner reported to Dr. Vender a history of locking of his right thumb mostly at night and the continuance of various pains throughout his upper extremities.

The petitioner saw Dr. Wiesman on October 1, 2013, for clicking in his thumbs with locking in the right thumb, forearm pain and biceps tendinitis, which he reported had been previously diagnosed. He received steroid injections along the A1 pulley of his thumbs on October 8th and the right fifth compartment on November 5th because of a positive Finkelstein test.

On January 14, 2014, Dr. Wiesman performed an A1 pulley release and synovectomy on the petitioner's left thumb. He received a steroid injection for his right ring trigger finger on March 14th. Restricted work duties were given on April 15th. The petitioner reported right wrist radial pain and right thumb pain on June 3rd and a first extensor compartment release of the right hand was recommended. Dr. Wiesman's assessment on July 1st was right radial tunnel syndrome and right de Quervain's tenosynovitis. He received a steroid injection for his right trigger thumb on September 15th. An A1 pulley release of his right thumb was recommended. The doctor's recommendations for the right first extensor compartment release and the right A1 pulley release were reiterated at follow-ups through May 1, 2015.

FINDING WHETHER THE PETITIONER'S ACCIDENT ON SEPTEMBER 4, 2013, AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he sustained an accident on September 4, 2013, arising out of and in the course of his employment with the respondent.

The petitioner reported bilateral upper extremity, hand and forearm pain to his therapist on September 4, 2013, but did not report an acute or repetitive incident. Nor did he complain of any pain or symptoms with his thumbs. On September 6, 2013, the petitioner saw Dr. Vender but did not report an acute or repetitive injury occurring on September 4, 2013. Moreover, Dr. Vender opined on the 6th that the petitioner reached maximum medical improvement and that his multiple complaints in his forearm, hand and fingers were not related to his previous diagnosis. And when the petitioner saw Dr. Vender on September 13, 2013, he did not report an acute or repetitive injury occurring on September 4, 2013, but only a history of his right thumb locking mostly at night.

In addition, while it is noted that a trim press operator's duties required the use of a mallet and hammer, filing and grinding on machine #17 and lifting up to 40 pounds, there is no evidence of the use of any vibratory equipment and of any forceful grasping, twisting, rotation or torquing movement of his hands, wrists or arms. Also lacking is evidence of any repetition, frequency and duration involved with each of his work duties, details on how the tasks are performed and the grasping, pinching and/or movement required of his arms, wrists, hands and/or thumbs.

The evidence is insufficient to establish that the petitioner sustained a work injury on September 4, 2013. The petitioner's request for benefits for claim #13WC 33620 is denied and the claim is dismissed.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his right ring trigger finger and left de Quervain's tenosynovitis was reasonable and necessary and is awarded. The medical care rendered the petitioner for his right and left carpal tunnel syndrome, left and right trigger thumbs and left and right biceps tendinitis and right de Quervain's tenosynovitis was not reasonable or necessary and is denied.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that his current condition of ill-being with his right ring finger and left de Quervain's tenosynovitis is causally related to the work injury on October 9, 2012. The petitioner failed to prove that his current condition of ill-being with his right carpal tunnel syndrome is causally related to the work injury on October 9, 2012. Dr. Ellis opined on February 5, 2013, that the petitioner's job duties did not contribute to the development of his right carpal tunnel syndrome. The petitioner's request for temporary total disability benefits, medical costs and other benefits due to his right carpal tunnel syndrome is denied.

The petitioner failed to prove that his condition of ill-being with his left carpal tunnel syndrome, left and right trigger thumbs, left and right biceps tendinitis and right de Quervain's tenosynovitis is causally related to the work injury on October 9, 2012. The

petitioner's use of a mallet and hammer, filing and grinding on machine #17 and lifting up to 40 pounds is not sufficient evidence to establish a casual relationship with his conditions of ill-being. The petitioner's request for temporary total disability benefits, medical costs and prospective medical for his left carpal tunnel syndrome, left and right trigger thumbs, left and right biceps tendinitis and right de Quervain's tenosynovitis is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JEFFRIES, SEAN
Employee/Petitioner

Case# **13WC005576**

08WC056095
14WC029797

CITY OF CHICAGO
Employer/Respondent

On 8/2/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.39% 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:

1747 SEIDMAN MARGULIS & FAIRMAN
STEVEN J SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0010 CITY OF CHICAGO LAW DEPT
ELIZABETH MANNION
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sean Jeffries
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13 WC 5576**

Consolidated cases: 08WC56095; 14WC29797

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 **Kurt Carlson** Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **April 7, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **1/8/13**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the 1/8/13 injury, Petitioner earned **$70,408.00**; the average weekly wage was **$1,354.00.**

On the date of the 1/8/13 accident, Petitioner was **51** years of age, ***single*** with **1** 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 **$72,603.68** for TTD, **$00.00** for TPD, **$3,481.88** for maintenance, and $00.00 for other benefits, for a total credit of **$76,603.68.**

Respondent is entitled to a credit of **$882.02** under Section 8(j) of the Act.

ORDER

PETITIONER'S CLAIM FOR BENEFITS IS DENIED AS PETITIONER FAILED TO PROVE ACCIDENT. RESPONDENT IS DUE A CREDIT FOR TTD AND MAINTENANCE BENEFITS PAID.

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 — Date: 8-2-16

AUG 2 - 2016

Sean Jeffries v. City of Chicago
08 WC 56095 & 13 WC 5576

FINDINGS OF FACT:

08 WC 56095

The parties stipulate that the City of Chicago (hereinafter referred to as the "respondent") was operating under the Illinois Workers' Compensation Act on August 27, 2008, and January 8, 2013. On these dates, Sean Jeffries, (hereinafter "petitioner") was working as motor truck driver for the City of Chicago's Department of Water Management.

Parties proceeded to hearing on April 7, 2016, with disputed issues as to accident, causation, TTD, and nature and extent of the injuries.

Petitioner testified on August 27, 2008, he was exiting his truck and slipped on some debris on the step of the truck landing on his left ankle and injuring it. (Tr. 11-12). Petitioner completed a Report of Occupational Injury that date, which he signed, attesting to a similar incident of "left foot contusion. Debris on truck steps. Exiting truck." (Rx 7). On cross-examination, Petitioner clarified that he did not fall to the ground in this incident. (Tr. 34-35). Outside of the left foot, Petitioner claimed no other body parts as injured.

Petitioner went to Mercy Hospital that date, where he was diagnosed with a left foot contusion. (Rx 1). Petitioner followed up care with Mercy Work on August 28, 2008. X-rays showed no acute injury and he was diagnosed with left foot sprain and contusion. (Rx 2, p.2). On September 3, 2008, the Dr. Sheth of Mercy Works noted Petitioner was using a cane, although the records are unclear as to whether it was prescribed. (Rx 2, p. 2). The medical records also show Petitioner sustained a first toe nail bed avulsion. (Rx 2, p.3). Dr. Pern's medical records from September 8, 2008 detail that Petitioner stated "He was wearing a flip-flop type of shoe" when he slipped down the stair of the truck, "which caused him to avulse or tear off his great toenail on the left foot." Dr. Perns detailed in his office visit note, "He states he was given a note to wear no steel toe shoes because of heel pain on the left side but I questioned him wearing a flip-flop type of shoe versus a gym shoe and he stated that the flip-flop felt better than the gym shoe." (Rx 3). When questioned on cross-examination if Petitioner sustained a toe-nail wound as a result of this incident, Petitioner testified he could not recall. Tr. 36. Petitioner testified that he was not wearing flip flops on the date of accident and that the medical records were incorrect. Petitioner further could not recall telling Dr. Perns about his prior heel problems requiring him to wear flip flops at work. Tr. 36-37.

Petitioner's foreman at the City of Chicago, Mr. Norman Clark testified at the arbitration hearing. Mr. Clark has worked as a foreman for the City of Chicago for 13 years in the Department of Water. (Tr. 118). As a foreman, his job entails dispatching all drivers to their locations, assigning them trucks, and maintaining all the trucks in the fleet. Mr. Clark also supervises employees in their job descriptions, handing permission for vacations, and granting vacation days or sick days. He supervised Mr. Jefferies beginning approximately 6 years ago (2010). Tr. 119.

Mr. Clark testified that as part of the department's uniform/dress code, motor truck drivers must wear steel-toed shoes or boots. Further, if an employee claimed medical reasons for needing to wear flip-pages or sandals, it would not be permitted. (Tr. 123-124).

Petitioner admitted on cross-examination that he complained to his doctor about right ankle pain in late 2008, but denied any history of right ankle pain prior to that point. Tr. 38. X-rays were

taken at that time. (Rx 1). Petitioner testified he only hurt his left ankle in the August 27, 2008 incident. (Tr. 35).

Petitioner continued to treat with Mercy Works and Dr. Perns for his left ankle. On April 16, 2009, he underwent left ankle arthroscopy, excision of anterior tibial osteophyte, and synovectomy debridement with Dr. Westin. (Rx 4). Petitioner followed up treatment with physical therapy. He was released back to work full duty on November 23, 2009. He was paid TTD benefits while he was off work until his release back to work. (Rx 2, p. 9). Petitioner returned to Mercy Works on February 16, 2010 complaining of pain in his knees and both ankles. Petitioner was kept at full duty. (Rx 2, p. 10).

Petitioner continued to work full duty and resumed his regular work hours. (Tr. 39, 40). He testified he had another work incident involving his hand which he resolved via settlement. (Tr. 40).

13 WC 5576

Petitioner filed a claim for injuries for a claimed date of accident of January 8, 2013. On direct examination Petitioner testified that he stepped on something that seemed like a big rock, and his ankle twisted. He then stepped up on the truck, and his left foot got caught on the bottom of the truck carriage or steps, and it twisted again. Tr. 18. Petitioner testified he sought care at the end of his shift on January 9, 2013, as Petitioner worked until 7 a.m. the next day. (Tr. 19). On cross-examination, when asked if he saw the rock he stepped on, he stated "it was dark." (Tr. 41). The Report of Occupational Injury for that date reported "left foot and ankle entering truck caught in undercarriage of truck." (Rx 8). Petitioner testified he only injured his left ankle in this incident. (Tr. 42-43). There were no witnesses to this incident.

Petitioner's supervisor and foreman at the time of this incident, Normal Clark testified at the arbitration hearing that in January 2013, at around 3:00 a.m., Mr. Clark got a call from his supervisor saying that he caught Mr. Jeffries sleeping, and that he was to write him up and start discipline actions. Then, Mr. Clark was notified once he got to work that Petitioner "got hurt or injured on the job prior to." (Tr. 127-128). Mr. Clark testified he could not take any disciplinary action, because the day he got caught sleeping on the job, he had later reported a work injury. (Tr. 121).

It is also noted that Petitioner had requested FMLA on January 2, 2013, "to care for his mother." (Rx 12). His application was pending and had not yet been approved at the time of this January 8, 2013 work incident. (Tr. 105) Ms. Marisol Santiago, Director of Administration at the Water Department, testified at the arbitration hearing. Ms. Santiago oversees the personnel, human resources and payroll division for the department. (Tr. 95). The human resources division is responsible for processing all employees' leaves of absences, resignations, retirements, new hire processing, payroll, vacation payouts, and employee relation issues. (Tr. 95). Ms. Santiago testified that an employee would not be paid by the City of Chicago under FMLA for that time off. (Tr. 105).

Petitioner reported to Mercy Works on January 8, 2013, and reported a twisting injury to his left ankle from his foot slipping while he was climbing up into the truck. (Rx 13, p.2). There was no mention in the records of the rock-like object Petitioner testified to tripping over at the hearing. X-rays were taken at that time showing no fracture, and Petitioner was diagnosed with a "sprain, left anke and left foot." (Id.). There was no ecchymosis upon examination. (Id.). Petitioner

returned to Mercy Works on January 15, 2013, at which point a MRI was recommended. Treatment recommendations included an elastic ankle support, cane, ibuprofen and Norco. (Id.). Petitioner underwent a MRI on January 19, 2013, which Mercy Works noted as a ligamental tear of his left ankle and impingement syndrome.

Petitioner began treating with his choice of physical Dr. Simon Lee at Midwest Orthopedic at Rush on January 31, 2013. (Px 16)(Tr. 43). Petitioner reported to Dr. Lee a similar accounting of his foot being lodged in the undercarriage when stepping into his truck. However, he also reported his "ankle gave way" seven hours later into his shift on January 8, 2013, causing him to fall. (Px 16, DOS 1/31/13). Petitioner did not report any fall on his incident report or at trial. Dr. Lee reviewed the January 2013 MRI and compared it to the 2008 MRI of Petitioner's left ankle, and found Petitioner had a "left osteochondral lesion of the posteromedial talar dome that appeared "to have some collapse as compared to in 2008 with increased edema formation as well as a small cyst underneath the OCD, this is not present in 2008." (Px 16, DOS 2/25/13).

On February 25, 2013, Dr. Lee recommended continued use of the Cam boot and for Petitioner to begin physical therapy. On March 25, 2013, Dr. Lee recommended continued physical therapy and a start to weaning out of the Cam Walker. (Px 16). On May 13, 2013, due to continued pain, Dr. Lee administered a corticosteroid injection and discussed possible surgery in the future. An MRI taken between visits showed the osteochondral injury involving the medial talar dome appeared stable to minimally decreased with surrounding bony marrow edema since the prior study. (Px 16, 5/13/13). On June 20, 2013, Dr. Lee noted the injury as a left ankle injury with sprain and contusion resulting in a re-aggravation of his previous left medial talar OCD." (Px 16).

Petitioner attended an IME with Dr. Michael Pinzur of Loyloa University Medical Center on August 9, 2014, who found the injury to be an exacerbation of if his pre-existing condition, and agreed with Dr. Lee's recommendations for repeat surgery, even finding Dr. Lee to be a well-trained surgical arthroscopist. (Rx 15). Petitioner underwent left ankle arthroscopy, extensive debridement, and then open posteromedial arthrotomy with repair of the osteochondral defect of the talas with Dr. Lee on September 27, 2013. (Px 16). The post-operative diagnosis was left posteromedial OCD ankle and impingement bursitis. (Px 16).

Petitioner followed up treatment with physical therapy and Dr. Lee at Midwest Orthopaedics at Rush. On November 4, 2013, 10 months following this incident, Petitioner first mentioned his right ankle having intermittent soreness. (Px 16). On January 27, 2014, Dr. Lee noted Petitioner reported complaints to his right ankle and right shoulder, which Dr. Lee found "abnormal for the normal postsurgical." Further, Dr. Lee advised Petitioner there is no specific anatomical nature to his symptoms." Dr. Lee ordered additional MRI to evaluate the left ankle for any abnormal post-surgical changes. As for the right ankle, testing was ordered to see if there was any soft tissue pathology to that would be causing his abnormal issues with his non-operated ankle. (Px 16). An MRI of the right ankle, which was not injured in the incident, similarly showed an osteochondral lesion with a tiny amount of bone marrow edema. Petitioner also had a right foot chronic mild ATFL injury, findings associated with injury to the deep deltoid ligament, chronic mild ATFL injury, and mild plantar fasciits. (Px 16, DOS 2/26/14).

At trial, Petitioner denied any pre-existing or unrelated right ankle problems at hearing, additionally, Petitioner testified that only his left ankle was injured in the January 2013 incident. (Tr. 43-44). Dr. Lee ordered an FCE on June 2, 2014. Dr. Lee also recommended Petitioner re-consult with Dr. Pinzur to see if he believed there were any further treatment options or recommendations or if Dr. Pinzur agreed with the IME status. (Px 16, DOS 6/2/14). Dr. Lee also

found Petitioner's significant subjective complaints of pain were in discordance with the MRI, which showed improvement of original symptoms, complaints and edema. (Id.).

Petitioner went to second IME with Dr. Pinzur on June 27, 2014. (Rx 15). Dr. Pinzur noted Petitioner appeared at the evaluation with his cane. Dr. Pinzur found Petitioner had reached MMI, and opined Petitioner's injury contributed to his chronic condition, but was not fully responsible as he had a pre-existing disease. Dr. Pinzur found Petitioner had a favorable outcome from his surgery, and found and FCE to be very reasonable moving forward. (Id.).

Petitioner underwent and FCE on July 11, 2014. Petitioner exhibited an inconsistent effort in his performance, and the FCE documented that the overall results of the evaluation did not represent a true and accurate representation of Petitioner's overall physical capabilities and tolerances, suggesting a minimal level of function. The FCE report outlined "GIVEN THE FACT THAT THE CLIENT DEMONSTRATED 47.7% INCONSISTENT EFFORT, HE IS CAPABLE OF GREATER FUNCTIONAL ABILITIES THAN THAT DEMONSTRATED DURING THE FCE." Additionally, Petitioner demonstrated 77.8% inconsistent reliability of pain. The recommendations found Petitioner to be functionally employable. (Rx 6).

Dr. Lee released Petitioner back to work with permanent restrictions on August 1, 2014 with partial lifting of 30-40 lbs, and partial climbing. (Rx 17).

Petitioner testified he met with City of Chicago for reinstatement on or about Friday, August 22, 2014. (Tr. 45). Petitioner then could not recall the exact date he started working. (Tr. 46). Petitioner testified when he was reinstated, he knew prior to going back of exactly what date he would be brought back to work. (Tr. 47). Petitioner testified that when he was reinstated, he did not request to be off for any additional time for any unrelated reasons outside of his workers' compensation injury. (Tr. 46).

About approximately six hours into his shift on Monday, August 25, 2014, Petitioner reported a new incident, which was filed under 14 WC 29797 (Tr. 47).

Petitioner seeks compensation for permanency and claimed outstanding medical for injuries to his left foot under claims 08 WC 56095 & 13 WC 5576. Respondent denies accident and causation, and seeks a credit for TTD/maintenance benefits paid under these claims.

CONCLUSIONS OF LAW:

Regarding (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; Regarding (F) Is Petitioner's current condition of ill-being causally related to the injury?; and Regarding (L) What is the nature and extent of the injury?

To be compensable under the Workers' Compensation Act, the injury complained of must be one "arising out of and in the course of the employment." *Ill.Rev.Stat.1991, ch. 48, par. 138.2.* The claimant has the burden of establishing both requirements. (*Castaneda v. Industrial Comm'n* (1983), 97 Ill.2d 338, 341, 73 Ill.Dec. 535, 454 N.E.2d 632.) An injury " 'arises out of' one's employment if its origin is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Jewel Cos. v. Industrial Comm'n (1974),* 57 Ill.2d 38, 40, 310 N.E.2d 12. "An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may

reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto". *Scheffler Greenhouses, Inc. v. Industrial Comm'n (1977)*, 66 Ill.2d 361, 367, 5 Ill.Dec. 854, 362 N.E.2d 325.

When determining the above issues the Arbitrator must carefully weigh all of the evidence presented. This includes the credibility and testimony of the petitioner. The weight of a witness's testimony depends upon that witness's personal credibility. Once the petitioner's credibility is questioned, the concept of truthfulness becomes critical.

The mere existence of testimony does not require its acceptance. *Smith v. Industrial commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require than an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v. Industrial Commission*, 8 Ill.2d 407, 134 N.E.2d 307 (1956).

Additionally, it is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

Overall, the Petitioner did not appear credible. Thus, the Arbitrator relies on the medical records and evidence, the testimony of the supervisor for a determination.

08 WC 56095

In regards to Petitioner's claim for injury for date of accident August 27, 2008, the Arbitrator finds Petitioner did sustain an accident that resulted in an aggravation of a pre-existing osteochondral defect condition in Petitioner's left foot, resulting in surgery on April 16, 2009. Petitioner underwent physical therapy and was released full duty on November 23, 2009. It is clear from the medical records that although no right ankle foot or knee injuries were sustained, Petitioner had complaints to these body parts, unrelated to the incident, which were symptomatic at this time. Thus the Petitioner's testimony that he had no pre-existing issues with his right ankle is found to be not credible.

This Arbitrator notes that Petitioner's testimony as to the incident itself and the resulting injuries conflict with the medical records, specifically as to Petitioner's claim that he wearing steel toed boots on the date of accident. The medical records provide that Petitioner reported wearing a flip flop type shoe, and even sustained a nail avulsion. Although Petitioner's failure to follow uniform protocol does not take his accident outside the scope of employment, his denial of these issues raises questions as to his credibility. Additionally, the medical records following that date of accident show Petitioner reporting he had long standing ankle problems, as he claimed a "medical note" excusing him from wearing the uniform required foot wear.

With respect to Petitioner's claims of injury to his left ankle under claim 08 WC 56095, the Petitioner is entitled to have and receive from Respondent $664.72 for 33.4 weeks, representing a 20% loss of use of the left foot as provided in Section 8 of the Act.

13 WC 5576

In regards to Petitioner's claim for injury for date of Accident January 8, 2013, this Arbitrator finds that Petitioner failed to prove the accident. The Petitioner's testimony throughout the trial was not credible and in contradiction with the medical records.

Petitioner claims an unwitnessed accident on January 8, 2013 where he tripped on a rock-like object he did not see, and then caught his left foot in the undercarriage of the truck. Petitioner's supervisor at the time, Mr. Norman Clark, testified credibly at the hearing. Mr. Clark testified that on the alleged date of incident, Petitioner was caught sleeping on the job and was in line to be disciplined. No disciplinary action was taken as Petitioner reported an injury following his shift. Additionally, Mr. Clark testified that a motor truck driver, such as Petitioner, should always be with a crew. Yet, this incident was unwitnessed.

Petitioner also had applied for FMLA leave in early January for unrelated reasons. At the time of his alleged incident, his application had not been approved. Ms. Marisol Santiago, Director of Administration of the Water Department testified that FMLA leave would have been unpaid. The records reflect this request was approved by the Water Department following the alleged incident date.

Petitioner was off of work for this incident from January 9, 2013 until August 21, 2014. At trial, Petitioner only reported an injury to his left ankle from this incident. Again, medical records reflect long-standing, unrelated right ankle pain and treatment for it.

Petitioner underwent an additional left Petitioner underwent left ankle arthroscopy, extensive debridement, and then open posteromedial arthrotomy with repair of the osteochondral defect of the talas with Dr. Lee on September 27, 2013. Both the treating records and the IMEs of Dr. Pinzur make clear Petitioner had a chronic condition in his left foot that needed to be addressed. He was returned to work with restrictions following the failure of his FCE for inconsistent effort and 77.8% inconsistent reliability of pain.

Petitioner was able to return to work within his restrictions to the position of a motor truck driver, and reinstated on August 22, 2014.

The Arbitrator finds that Petitioner failed to prove an accident that occurred on January 8, 2013 that caused or aggravated Petitioner's condition. Thus, Petitioner's claim for benefits under 13 WC 5576 is denied.

Regarding (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? TTD , and (N) Is Respondent due any credit?

The Arbitrator finds that Petitioner received reasonable and necessary medical treatment under claim 08 WC 56095, and TTD was properly paid, for which the Respondent receives a credit for payments made.

However, under claim 13 WC 5576, as Petitioner failed to prove accident and causation under the Act, the Respondent is due a credit for all TTD and maintenance benefits paid under this claim.

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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID ANGUIANO,

Petitioner,

vs.

NO: 13 WC 06451

KLEIN TOOLS, INC.,

16IWCC0525

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein, and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was a Machine Operator for Respondent.

2. Petitioner testified that his work duties required him to stand for long periods of time, along with lifting metal parts weighing at least 30 pounds. He then took materials out of the machine and grouped them in pans. He testified that, occasionally, when Material Handlers were not available, he would move the pans that were filled with parts himself. He worked 40 hours per week with an occasional 10 hours of overtime.

3. In May of 2011 Petitioner had an onset of back pain while working on a machine. He treated in July of 2011 and was eventually recommended for therapy, which did not ease his pain.

4. The pain persisted and Petitioner eventually underwent back surgery in April of 2013. The surgery alleviated some pain.

5. Respondent's company subsequently re-located, but Petitioner testified that he did not believe he would have been able to return to his pre-injury job duties even if Respondent had stayed local.

6. Petitioner suffered back pain in 2008, underwent a lumbar MRI, and was prescribed medication. The MRI revealed a large circumferential bulge with a left paracentral and lateral disc protrusion at L4-5 with moderate central stenosis.

7. Petitioner underwent a second lumbar MRI in 2012. Dr. Butler performed an Independent Medical Examination (IME) on Petitioner and reviewed both MRI's.

The Commission reverses the Arbitrator's finding of accident. The Commission finds that Petitioner failed to allege any specific mechanism of injury. He simply alleged that he injured his back on May 6, 2011 while working on the machine. He failed to indicate what act or movement he was performing at the time of the injury. The Commission finds that this is too vague of a description for a compensable claim.

Additionally, medical records do not provide much more detail regarding the onset of his symptoms. Petitioner simply stated that he performed repetitive tasks at work, which led to his injury. He did not indicate to any physician what those tasks were, nor did he describe the tasks that he was performing at the time of injury.

With no specific mechanism of injury provided, the Commission hereby reverses and vacates the Arbitrator's finding of accident.

With no accident, there is no causal connection found, and the awards for medical expenses, temporary total disability and permanent partial disability are hereby vacated as well.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner failed to prove he sustained an accident arising out of and in the course of his employment with Respondent on May 6, 2011.

IT IS FURTHER ORDERED BY THE COMMISSION that no medical expenses, temporary total disability or permanent partial disability be awarded to Petitioner.

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.

16IWCC0525

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

DATED: AUG 10 2016
O:6/23/16
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANGUIANO, DAVID
Employee/Petitioner

Case# **13WC006451**
13WC012532

KLEIN TOOLS INC
Employer/Respondent

16IWCC0525

On 9/28/2015, 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 0.11% 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:

4103 GRAVLIN, MICHAEL J LLC
134 N LASALLE ST
SUITE 2020
CHICAGO, IL 60602

0445 RODDY LAW LTD
RICHARD ZENZ
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

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

David Anguiano
Employee/Petitioner

v.

Klein Tools Inc.
Employer/Respondent

Case # 13 WC 06451

Consolidated cases: 13 WC 012532

16IWCC0525

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **8/13/15**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **5/06/11**, 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 **$39,013**; the average weekly wage was **$750.25**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** dependent child.

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** 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

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $28,375.00 to Adventist LaGrange Memorial Hospital, $1,286.34 to Athletico Physical Therapy, and $9,360.00 to Chicago Area Rehabilitation Experts, as provided in Sections 8(a) and 8.2 of the Act. ($39,021.34)

Respondent shall pay Petitioner temporary total disability benefits of $500.41/week for 28 1/7 weeks, commencing 3/27/13 through 10/09/13, as provided in Section 8(b) of the Act. ($14,083.04)

Respondent shall pay Petitioner permanent partial disability benefits of $450.15/week for 166.5 weeks, because the injuries sustained caused the 33.3% loss of the person as a whole, as provided in Section 8(d)2 of the Act. ($74,949.98)

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

09-28-15
Date

SEP 28 2015

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE WORKERS' COMPENSATION COMMISSION OF ILLINOIS

DAVID ANGUIANO,)
)
Petitioner,)
) NO. 13 WC 06451
)
v.)
)
KLEIN TOOLS, INC.,)
)
Respondent.) **16IWCC0525**

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The issues in dispute in this matter are: 1) accident; 2) notice; 3) causal connection; 4)unpaid medical bills, 5) TTD, and 6) the nature and extent of Petitioner's injury.

Petitioner David Anguiano (hereinafter "Petitioner") worked for Respondent Klein Tools, Inc. (hereinafter "Respondent") for 22 years including on the date of accident May 6, 2011. The parties stipulated to an average weekly wage of $750.25. At the time of the accident, Petitioner was a 46 year old married man, with one dependent child under the age of 18.

Petitioner testified that on May 6, 2011 he was working as a machine operator for Respondent. Petitioner's duties as a machine operator included standing for long periods of time and operating machines which both produce and assemble parts for pliers. Petitioner also had to occasionally carry, lift, and push heavy pans filled with parts. Petitioner testified that he began to experience acute pain in his lower back on May 6, 2011. He was working on machine number 292, while pulling a skid and that is when the pain developed. This was the 22nd year he had been working as a machine operator for Respondent. Petitioner testified that he had worked at least forty hours a week, and usually picked up as much overtime as he could throughout his time working for Respondent.

Petitioner went to see the Occupational Health Nurse for Respondent, Alexa Geeza, on Friday May 6, 2011 to inform her of his back pain. (Pet. Ex. 15). Ms. Geeza wrote a note to Petitioner in which she assigned a nurse to him and informed him that she would try to get addresses of physical therapy offices to him by Monday. (Pet. Ex. 15).

Petitioner sought treatment at Galilee Medical Center on May 6, 2011; the very same day he began to experience a more defined pain in his lower back while working for Respondent.

(Pet. Ex. 14). Galilee Medical is Petitioner's primary care doctor, and Petitioner testified that he mentioned during his May 6th visit to Galilee that he was having pain in his back. (Pet. Ex. 14). Petitioner testified that the doctors at Galilee recommended that Petitioner pursue physical therapy for his back pain.

Petitioner next sought treatment at Northwestern Memorial Hospital on July 6, 2011, complaining of back and bilateral leg pain which he had been experiencing for the past two months. (Pet. Ex. 4). He was seen by Kristen Smith, Nurse Practitioner for Dr. Tyler Koski, and was diagnosed with lumbago, cervicalgia, and lumbar radicular pain. (Pet. Ex. 4). Petitioner told Kristen Smith that he does a lot of repetitive tasks at work and believes this has caused the pain in his back and legs. (Pet. Ex. 4). Petitioner was also given a physical therapy recommendation, and proceeded to receive physical therapy treatment at Athletico starting in October of the same year. Petitioner reported back to Northwestern Medical Faculty on December 15, 2011 with reports of continued pain in his neck and back and seeking another physical therapy order. (Pet. Ex. 4).

Petitioner had an Independent Medical Examination performed by Dr. Douglas L. Johnson on January 10, 2012 at DuPage Neurosurgery, S.C. (Pet. Ex. 5). Dr. Johnson reviewed Petitioner's blood work which demonstrated a positive ANA titer, which was suggestive of an automimmune disorder and needed further evaluation. (Pet. Ex. 5). Dr. Johnson opined that Petitioner has the potential for a lifelong situation in which he will have good days and bad days. (Pet. Ex. 5). Dr. Johnson further noted that Petitioner's underlying condition might be related to an autoimmune disorder; however that Petitioner's work for Respondent certainly would aggravate an underlying joint condition. (Pet. Ex. 5).

Petitioner sought treatment with Dr. Ajmani Harpinder, a rheumatology specialist, on February 11, 2012 for a consultation on the pain in his back and legs, and as a follow up for the positive ANA titer test. (Pet. Ex. 6). Dr. Harpinder opined that Petitioner may be suffering from Scleroderma Limited Disease with Raynaud's. (Pet. Ex. 6). Petitioner was to follow up in 3 months after blood tests came back, and the doctor had a chance to review them. (Pet. Ex. 6). Petitioner followed up with Dr. Harpinder on March 3 and March 24, 2012 during which time he prescribed Nifedipine to deal with the pain. (Pet. Ex. 6).

Petitioner was treated again by Dr. Koski at Northwestern Memorial on April 24, 2012. (Pet. Ex. 4). Petitioner complained of low back pain and pain that radiates into the bilateral lower extremities. (Pet. Ex. 4). Dr. Koski recommended over the counter pain medication and to follow up with his primary care doctor for further pain management and physical therapy. (Pet. Ex. 4). Petitioner was treated by Kristen Smith, RN once again on November 14, 2012 after a 6 month absence from Northwestern Memorial. Petitioner reported that he was having increased neck pain, neck stiffness, occasional shooting arm pain, and persistent low back pain. (Pet. Ex. 4).

Petitioner reported to Athletico Physical Therapy for an initial evaluation on October 24, 2012 as per Dr. Tyler Koski's referral. (Pet. Ex. 7). Petitioner reported that he experiences headaches, dizziness, double vision at times, dysarthria, and vertigo. (Pet. Ex. 7). Petitioner complained of neck pain, numbness and tingling in his arms, and pain in his middle and upper

thoratic region. (Pet. Ex. 7). Petitioner presented with limited cervical rotation range of motion, and myotomes 4+/5 or greater bilaterally. Petitioner was again seen back at Athletico Physical Therapy on November 20, 2012 and reported that the headaches, dizziness, and neck pain have subsided. He continued to report pain in his middle and upper back with aggravating factors such as prolonged positioning at work. (Pet. Ex. 7). Dr. Marti Ebert, PT reported that physical therapy is medically necessary to improve Petitioner's ailments and to allow for a full return to his prior ability to push, carry, lift and tolerate prolonged positioning at work. (Pet. Ex. 7). Petitioner continued physical therapy at Athletico until he was discharged to a home exercise program on December 5, 2012. (Pet. Ex. 7).

Petitioner once again returned to Athletico for physical therapy on January 23, 2013 with continued back pain, left posterior high and lateral leg pain, and tingling in his left posterior and lateral leg. (Pet. Ex. 7). Petitioner attended seven physical therapy sessions at Athletico over the next few weeks during which his pain and numbness seemed to improve. (Pet. Ex. 7). Petitioner discontinued physical therapy at Athletico on February 28, 2013 because 'his insurance company was not paying for it'. (Pet. Ex. 7).

Petitioner testified that he also sought treatment with Dr. Francisco Espinosa. He had an initial consultation with Dr. Espinosa on March 27, 2013. (Pet. Ex. 8). Once again, Petitioner's complaints consisted of low back pain with radiation down the left lower extremity and intermittent neck pain. (Pet. Ex. 8). Dr. Espinosa opined that Petitioner suffered from low back pain and left lower extremity pain and paresthesias. Dr. Espinosa noted a large left L4-5 herniation visible from Petitioner's MRI dated 11/12/2012. (Pet. Ex. 8). Dr. Espinosa recommended for Petitioner to have surgery since he had already been experiencing the pain for two years. (Pet. Ex. 12). Petitioner elected to pursue the "definitive treatment of surgery" and scheduled a L4-5 laminotomy, foraminotomy, and microdiscectomy for April 1, 2013. (Pet. Ex. 8).

Petitioner had the microdscectomy surgery done on April 1, 2013. (Pet. Ex. 8). Petitioner was seen again by Dr. Espinosa on April 16, 2013 for a follow up post surgery. (Pet. Ex. 8). Petitioner's condition had improved; he had no leg pain but did have residual numbness in his left big toe. (Pet. Ex. 8). Petitioner testified that the surgery increased his level of functioning, but did not bring him all the way back to his pre injury state. Petitioner was to begin physical therapy and follow up with Dr. Espinosa in 6 weeks. (Pet. Ex. 8). Petitioner was seen by Dr. Espinosa for a final time on June 26, 2013. (Pet. Ex. 8). He complained of mild low back pain; however the pain in his leg was gone. Petitioner was ordered to remain in physical therapy for an additional 5 weeks. (Pet. Ex. 8).

Petitioner received his final physical therapy treatments at Chicago Area Rehabilitation Experts beginning in May of 2013, and ending on October 9, 2013. (Pet. Ex. 10).

Petitioner had an Independent Medical Examination performed by Dr. Jesse P. Butler on April 9, 2014. Dr. Butler wrote a summary of the medical records he was presented with, and stated that he did not see any documentation of any injury in 2011 that affected the back resulting in the disc herniation event. (Pet. Ex. 11). He relied on the fact that Petitioner's MRI's from 2008 and from 2012 were essentially "unchanged", with a herniation being present in 2008. (Pet. Ex. 11).

Dr. Espinosa stated in his November 4, 2014 deposition that Petitioner was asymptomatic prior to 2011, and that his work for Respondent increased and aggravated the symptoms in the lower back and left leg. (Pet. Ex. 12). Dr. Espinosa explained that even if there was a prior finding of a herniated disc, this is a common finding in asymptomatic patients. (Pet. Ex. 12). The disc herniation may have been present, but Petitioner was not experiencing any pain. Dr. Espinosa added that Dr. Butler's IME of April 9, 2014 and the existence of a prior herniated disc did not change his opinion that Petitioner's work as a machine operator increased and aggravated his low back symptoms. (Pet. Ex. 12).

Petitioner testified that he first found employment working part time after his surgery around October 2013, and didn't start working full time until February 2014. Petitioner currently works at O' Hare Airport restocking cleaning supplies for airplane servicing. Petitioner is currently making $10 per hour at his job at O'Hare Airport.

CONCLUSIONS OF LAW

(C) DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENTBY RESPONDENT?

The Arbitrator finds that the Petitioner suffered a repetitive-trauma type injury which was caused by his twenty two years of work for Respondent as a machine operator. In support of his finding, the Arbitrator relies on the following facts:

Petitioner testified that his duties while working for Respondent included working on machines, moving metal parts, and sometimes carrying heavy pans with metal parts. Petitioner testified that on May 6, 2011 he began to feel a much sharper, pronounced pain in his lower back while working on a machine and pulling a skid for Respondent. That same day he was seen at Galilee Clinic and mentioned that his back hurt. Further, in July of 2011, Petitioner was seen at Northwestern Memorial Hospital, complaining of lower back and leg pain which he had been experiencing for two months. This was the twenty second year that Petitioner had been working as a machine operator for Respondent. Therefore, the Arbitrator finds that Petitioner suffered a repetitive-type trauma injury on May 6, 2011 when Petitioner's back pain became much more acute at work and it became apparent to him that the pain was a result of the work he was doing.

(E) WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT?

The Arbitrator finds that timely notice of the accident was given to respondent when Petitioner informed Alexa Geeza, Occupational Health Nurse for Respondent, about his back condition on May 6, 2011. The Petitioner was given a note from Ms. Geeza stating that a nurse was assigned to him, and that she would sometimes go to the doctor with him. Ms. Geeza notes that she gave a copy of Petitioner's paperwork to Respondent's "workers comp person". May 6th of 2011 being a Friday, Ms. Geeza stated that she hopes to have some physical therapy addresses for Petitioner by the following Monday. Further, Respondent possessed known facts related to Petitioner's doctor's appointments and eventual surgery as early as the day of the accident and

continuing on throughout treatment. Based on the foregoing, the Arbitrator finds that timely notice of the accident was given to Respondent on May 6, 2011.

(F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Based upon the credible testimony of the Petitioner and upon the medical records, the Arbitrator finds that Drs. Espinosa's and Koski's opinions are more persuasive than those of Dr. Butler and that Petitioner's current state of ill being is causally related to his work for Respondent. Dr. Espinosa stated in his November 4, 2014 deposition that Petitioner was asymptomatic prior to 2011and that his work for Respondent increased and aggravated the symptoms in the lower back and left leg. Dr. Espinosa added that that Dr. Butler's IME of April 9, 2014 and the existence of a prior herniated disc did not change his opinion. Dr. Johnson opined that Petitioner's employment "certainly would or could aggravate an underlying joint condition". Petitioner had been working for Respondent for over twenty two years in a role which required bending, twisting, and occasional pushing, pulling and carrying. He had worked at least forty hours a week, usually more, throughout the entirety of his time with Respondent. Based on the foregoing, the Arbitrator finds that Petitioner's work as a machine operator for Respondent for over twenty two years aggravated his back condition and is causally related to his current symptomatic condition of ill-being.

(J) REASONABLE AND NECESSARY MEDICAL SERVICES AND RESPONDENT'S PAYMENT OF ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES

Based upon the credible and unrebutted testimony of the Petitioner and the medical records, the Arbitrator finds that Petitioner's treatment at Chicago Area Rehabilitation Experts was reasonable and necessary, and the $9,360.00 charges associated with that treatment were reasonable and necessary. Petitioner was recommended to pursue physical therapy to treat his back by Dr. Koski, Dr. Espinosa, and by the doctors at the Galilee Clinic. Petitioner received physical therapy treatment pursuant to these orders following his surgery from May of 2013 until October of 2013. The Arbitrator finds that Respondent is now required to pay the $9,360.00 charges owed to Chicago Area Rehabilitation Experts for the reasonable and necessary treatment.

Further, the Arbitrator finds that Petitioner's treatment at Adventist LaGrange Memorial Hospital was reasonable and necessary, and the $28,375.00 charges associated with the treatment were reasonable and necessary. Petitioner was experiencing acute pain in his lower back for two nearly years when Dr. Espinosa recommended he get surgery. Both Petitioner and Dr. Espinosa confirmed that the surgery did in fact help alleviate Petitioner's lower back symptoms a great deal. The Arbitrator finds that Respondent is now required to pay the $28,375.00 charges owed to Adventist LaGrange Memorial Hospital.

The Arbitrator finds that Petitioner's treatment at Athletico Physical Therapy was reasonable and necessary, and the $1,286.34 charges associated with that treatment were

reasonable and necessary. Petitioner received physical therapy treatment pursuant to Drs. Espinosa's and Koski's orders. The charges of $1,286.34 for the services provided by Athletico Physical Therapy to Petitioner were reasonable and necessary as appropriate treatment for Petitioner's work-related injuries. The Arbitrator finds that Respondent is now required to pay the $1,286.34 charges owed to Athletico Physical Therapy.

(K) PAST TTD

Based upon Petitioner's testimony and the medical records, the Arbitrator finds that Respondent is responsible for 28 1/7 weeks of TTD payments for the time period between March 27, 2013 and October 9, 2013. Petitioner could not go back to work following the April 1, 2013 surgery. His last day of work for Respondent was March 27, 2013. On October 9, 2013 Petitioner was officially discharged by Respondent. Petitioner testified that his doctor placed restrictions on his work capabilities, and he didn't find steady work after the surgery until around February of 2014.

(L) NATURE AND EXTENT OF THE INJURY

Based upon the medical records and the credible and unrebutted testimony of the Petitioner, the Arbitrator finds that Petitioner has sustained a loss pursuant to section 8(d)(2) of the Act.

Petitioner testified that the pain in his back was substantial, and that it had manifested over a period of time, however the pain became much more acute and noticeable on May 6, 2011. Petitioner testified that his back hurt anytime he tried to lift, bend over, or carry anything. Dr. Espinosa opined that Petitioner suffered from low back pain and left lower extremity pain and paresthesias. Dr. Espinosa also noted a large left L4-5 herniation visible from Petitioner's MRI dated 11/12/2012. Dr. Espinosa advised Petitioner that a microdiscectomy surgery would help alleviate his pain. The surgery helped alleviate his pain; however Petitioner still cannot perform some things he was once able to do. Petitioner's current employment is far less physically demanding than the work Petitioner was doing for Respondent.

Petitioner testified that his lower back feels better today, but he would not be physically able to perform the same work he was doing as a machine operator. Based upon the foregoing, and upon medical records and Petitioner's testimony, the Arbitrator finds that Petitioner has sustained a loss pursuant to section 8(d) (2) of the Act. The Arbitrator finds that Petitioner is entitled to 33.3% loss of use of a man as a whole, equivalent to 166.5 weeks of benefits, as a result of the repetitive-trauma injury he sustained while working for Respondent.

ARBITRATOR

DATED AND ENTERED

9.28.15

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 Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Antonio Alvarez-Reyna,

Petitioner,

vs.

NO: 13 WC 6539

16IWCC0510

Hudson Group,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability, and being advised of the facts and law, 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 14, 2015, is hereby affirmed and adopted.

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.

16IWCC0510

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $41,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 - 2016
TJT:yl
o 7/26/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

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

ALVAREZ-REYNA, ANTONIO
Employee/Petitioner

Case# **13WC006539**

HUDSON GROUP
Employer/Respondent

16IWCC0510

On 8/14/2015, 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 0.24% 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:

2512 THE ROMAKER LAW FIRM
TOD ALLSWANG
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

0532 HOLECEK & ASSOCIATES
BARBALI ROU-MOHANTY
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

16IWCC0510

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Antonio Alvarez-Reyna
Employee/Petitioner

v.

Hudson Group
Employer/Respondent

Case # **13** WC **6539**

Consolidated cases: **D/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 **Molly Mason** , Arbitrator of the Commission, in the city of **Chicago**, on **7/21/15**. 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. X Other **Did Petitioner exceed the choices afforded by Section 8(a)?**

FINDINGS

On the date of accident, **2/11/13**, 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.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to a lumbar spine disc condition with a radicular component that essentially stabilized as of February 7, 2014 but remains symptomatic. The Arbitrator further finds that Petitioner failed to establish causation as to the need for a lumbar fusion.

In the year preceding the injury, Petitioner earned $**30,020.12**; the average weekly wage was $**577.31**.

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

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

Respondent shall be given a credit of $**4,618.44** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**4,618.44**.

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

ORDER

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner exceeded the choices afforded by Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $25,697.90, as provided in Sections 8(a) and 8.2 of the Act, and said payment shall be made to Petitioner rather than the providers. See pages 14-15 of the attached decision for a breakdown of the medical award.

Respondent shall pay Petitioner temporary total disability benefits of $384.89/week from February 12, 2013 through February 7, 2014, a period of 51 4/7 weeks, as provided in Section 8(b) of the Act, with Respondent receiving credit for the $4,618.44 in benefits it paid prior to the hearing.

For the reasons set forth in the attached decision, the Arbitrator declines to award prospective care in the form of a lumbar fusion.

Having found that Petitioner's lumbar spine condition essentially stabilized as of February 7, 2014, but remained symptomatic thereafter, the Arbitrator modifies the typical Section 19(b) order language as follows: In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of compensation for 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.

Molly E Mason
Signature of Arbitrator

8/14/15
Date

ICArbDec19(b)

AUG 1 4 2015

16IWCC0510

Antonio Alvarez-Reyna v. Hudson Group
13 WC 6539

16IWCC0510

Summary of Disputed Issues

The threshold issue is accident, with Petitioner, a deliveryman, claiming a lower back injury of February 11, 2013. Causation is also in dispute, with Respondent citing prior work injuries occurring in 2010 and 2012.

Petitioner seeks prospective care in the form of a lumbar fusion. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified through an interpreter.

Petitioner testified he has co-owned and operated a landscaping and cement finishing business, Antonio's Complete Landscaping, since approximately 2002 or 2004. His son is the other owner. T. 16.

Petitioner testified he began working for Respondent on October 23, 2009. T. 18. Before he started working for Respondent, he regularly performed a variety of physical tasks in the course of operating his landscaping business. Those tasks included kneeling, cutting grass and moving wheelbarrows that were full of cement. T. 17-18. Petitioner testified he took the job with Respondent because, as of about 2008, his landscaping business was not turning a profit. T. 18. His job with Respondent involved traveling to the airport in a company vehicle, manually unloading merchandise on skids, transporting the merchandise to the basement of Terminal 2 via electric pallet jacks, picking up empty 30-pound skids and returning the pallets to Respondent's warehouse. T. 14-15. Petitioner testified a loaded skid could weigh between 100 and 1,000 pounds. T. 15.

Petitioner acknowledged being involved in other accidents while working for Respondent. He recalled injuring his neck in 2010 or 2011, when another Respondent truck rear-ended him. T. 47. He acknowledged settling claims he filed in connection with two 2010 accidents but denied that these accidents involved his lower back. Under cross-examination, he took issue with Commission main frame entries reflecting the settlements were for back injuries. T. 47-50. He acknowledged sustaining another work accident on September 28, 2012. On direct examination, he testified this accident involved his back and ribs. Under cross-examination, he testified the accident involved his ribs. T. 52.

Records from the University at Illinois at Chicago Medical Center – O'Hare [hereafter UIC] reflect that, on September 28, 2012, Petitioner reported an abrupt onset of left flank pain secondary to twisting his trunk while lifting cases. On examination, Dr. Dorevitch noted tenderness at the posterior axillary line at the inferior margin of the ribcage. He ordered a chest X-ray, which he described as negative. [No X-ray report is in evidence.] He also ordered a

urinalysis, which was positive. He assessed Petitioner as having a chest wall strain and bilirubinuria and proteinuria. He imposed restrictions as to lifting, bending, twisting and overhead work and recommended that Petitioner follow up with an internist. PX 1.

Petitioner returned to UIC on October 6, 2012 and saw a different physician, Dr. Zautcke. Petitioner complained of severe left posterior rib pain. He reported having seen his personal care physician, who had ordered laboratory work and started him on pain medication. Dr. Zautcke diagnosed a left chest wall injury and possible rib fracture. He continued the previous restrictions. PX 1.

At the next visit, on October 13, 2012, Petitioner again complained of left rib pain. An examining nurse practitioner noted tenderness over the left posterior ribs and no spinal tenderness. The nurse practitioner recommended that Petitioner return in one week. At that return visit, on October 20, 2012, the nurse practitioner noted ongoing left rib complaints and prescribed physical therapy. On October 27, 2012, a different nurse practitioner recommended continued therapy and deep breathing exercises. On November 6, 2012, Dr. Forst noted point tenderness "over back, lower left lowest rib." She theorized that there was an "underlying bone problem that was exacerbated by lifting." She recommended that Petitioner undergo a bone scan or MRI, as well as PSA testing. She indicated Petitioner would be able to resume working in about two weeks if these tests proved to be negative. PX 1. There are no records indicating whether Petitioner underwent a bone scan or MRI during this time period.

Petitioner continued attending therapy and seeing various providers at UIC thereafter. On December 1, 2012, a nurse practitioner noted ongoing left lower back pain and a limited range of back motion in all planes. She referred Petitioner to UIC's orthopedics department and instructed Petitioner to complete his scheduled therapy visits. She continued the previous work restrictions. PX 1. There is no follow-up note indicating whether Petitioner did in fact undergo an orthopedic consultation.

Petitioner testified he resumed full duty for Respondent at some point in December 2012. T. 19.

Petitioner testified that, on February 11, 2013, he was at Respondent's warehouse, lowering the lift gate of a delivery truck, when his back "snapped," causing him to fall. T. 20-21. Petitioner testified the lift gate weighed between 400 and 600 pounds. T. 20-21. Petitioner agreed with a history set forth in a UIC note dated February 15, 2013, indicating he believed the spring of the lift gate was broken, causing the gate to descend more quickly than usual. Petitioner testified that the spring, when functioning correctly, supported the weight of the gate. T. 20-21.

Petitioner testified the lift gate incident occurred at about 1 or 2 AM, near the end of his shift. He finished his shift after the incident. Petitioner further testified that three Respondent employees witnessed the incident. These employees included a supervisor named Charles and

two drivers, Omar and Juan. T. 22. Petitioner testified he told Charles that an incident report should be completed. T. 22.

Petitioner testified he sought treatment at UIC at Respondent's direction. T. 23.

Records in PX 1 include a pre-printed form apparently signed by Petitioner on February 11, 2013. The following handwritten history appears on this form: "When I pull the lift gate to unload the truck I feel pain in my back." The form also reflects that the lift gate incident occurred at a dock at 2:13 AM on February 11, 2013.

Petitioner saw Dr. Zautcke at UIC on February 11, 2013. The doctor described the lift gate incident as follows:

> "[Petitioner] is a driver for Hudson group. While performing a delivery, he bent down to lift the gate of the elevator and felt a sudden severe pain in his lower back along with a sudden crunching sound. The pain is present over the lumbar spine and radiates into both [sic] the flank region."

Dr. Zautcke noted that Petitioner denied any history of back problems but reported having fractured a rib in 2012.

On lumbar spine examination, Dr. Zautcke noted severe tenderness diffusely over the spinous process of the lumbar spine and in the paraspinal region bilaterally. He also noted a severely decreased range of lumbar spine motion. He described straight leg raising as negative but noted that Petitioner experienced stretching pain in the back on raising both of his legs. He also noted decreased strength in both legs. He obtained lumbar spine X-rays, which showed mild degenerative disc disease.

Dr. Zautcke diagnosed a severe low back sprain. He took Petitioner off work and prescribed Naproxen and Hydrocodone. He directed Petitioner to return to UIC in four days. PX 1.

Petitioner returned to UIC on February 15, 2013, as directed. On this occasion, he saw a nurse practitioner, Jennifer Jackson, APN. Jackson recorded a history of the February 11, 2013 lift gate incident. She noted that Petitioner had been off work since the incident and was complaining of mid lumbar spine pain radiating to both buttocks. She also noted a history of a left posterior rib fracture in 2012 due to a work injury with "left-sided back pain treated with PT and orthopedic referral."

On examination, Jackson noted severe tenderness diffusely over the spinous process of the lumbar spine and in the paraspinal region bilaterally. She also noted a decreased range of lumbar spine motion and negative straight leg raising. She described strength as intact and equal in both legs. She prescribed ice or heat, medication and gentle stretching exercises. She

released Petitioner to restricted duty, with alternating sitting/standing and no lifting over ten pounds. PX 1.

Petitioner testified that Respondent did not accommodate the UIC restrictions. T. 24.

Petitioner returned to UIC on February 18, 2013 and again saw Dr. Zautcke, who noted that Petitioner was still off work and was now complaining of mild radiation of his pain to both legs. After re-examining Petitioner, the doctor prescribed physical therapy and released Petitioner to modified duty. PX 1.

Petitioner testified he did not work in any capacity, either for Respondent or his own business, between February 11 and 18, 2013. T. 25.

Petitioner testified he next sought treatment with Dr. Freedberg at Suburban Orthopaedics. T. 25. Under cross-examination, Petitioner acknowledged choosing Dr. Freedberg. T. 50. Dr. Freedberg's initial note of February 21, 2013 sets forth a consistent history of the lift gate incident of February 11, 2013 and subsequent care. Dr. Freedberg noted that Petitioner was scheduled to begin therapy at Nova Care that day, per UIC's recommendation.

Dr. Freedberg noted that Petitioner complained of low back pain radiating down both legs into his calves. He also noted that Petitioner had begun experiencing neck and clavicular pain on February 18, 2013. He further indicated that Petitioner denied any prior low back injury.

Dr. Freedberg described Petitioner's gait as normal. On cervical spine examination, he noted tenderness in the paraspinal muscles, a limited range of motion and a positive Spurling's test. On lumbar spine examination, he noted tenderness in the spinous process and paraspinal muscles and positive straight leg raising. He obtained multiple cervical and lumbar spine X-rays, which he described as showing mild degenerative changes. He prescribed a cervical spine MRI and indicated Petitioner might later require a lumbar spine MRI. He also prescribed a lumbar corset, medication and physical therapy. He took Petitioner off work. PX 2.

Petitioner returned to Dr. Freedberg on April 1, 2013. The doctor noted that Petitioner complained of low back pain radiating down both legs. He also noted that Petitioner was scheduled to undergo an IME in two days. He recommended continued therapy, noting that only back therapy was being approved, and indicated Petitioner should be off work "depending on MRI." PX 2.

At Respondent's request, Petitioner underwent a Section 12 examination by Dr. Hsu on April 3, 2013. Dr. Hsu's letterhead identifies him as an orthopedist affiliated with Medical Consultants Network. In his report of April 3, 2013, Dr. Hsu indicated he had last examined Petitioner on December 3, 2012, at which time he concluded Petitioner had a "thoracic strain

that had resolved." Dr. Hsu also indicated that, on December 3, 2012, he recommended Petitioner resume full duty. [Dr. Hsu's report of December 3, 2012 is not in evidence.]

Dr. Hsu indicated he reviewed a description of a Respondent warehouse associate job. He indicated that, according to this description, Petitioner was required to lift up to 40 pounds on a regular basis. [This job description is not in evidence.] Dr. Hsu also indicated he reviewed a UIC note of February 18, 2013, Dr. Freedberg's note of February 21, 2013 and some therapy notes.

On lumbar spine examination, Dr. Hsu noted negative straight leg raising and 2/4 positive Waddell's signs. On cervical spine examination, Dr. Hsu noted negative Spurling's, Lhermitte's and Hoffman's signs. He obtained lumbar and cervical spine X-rays. He described the lumbar spine films as showing mild, age appropriate spondylosis and the cervical spine films as showing no abnormalities.

Dr. Hsu concluded that the February 11, 2013 work accident caused a lumbar strain but did not cause any neck, chest or clavicular condition. He noted that Petitioner did not complain of any neck, chest or clavicular symptoms. He recommended two weeks of work hardening, five days per week, anticipating that Petitioner would be able to resume full duty thereafter. He found Petitioner currently capable of restricted duty with no lifting over twenty pounds and occasional bending, crouching and stooping.

Dr. Hsu described Petitioner's prognosis as "very good." He indicated that Petitioner had a "high chance of success with work hardening." RX 1.

Petitioner underwent a lumbar spine MRI on April 8, 2013. The MRI showed minimal diffuse bulging at L4-L5, mild diffuse bulging with minimal foraminal narrowing at L5-S1 and edema in the sacrum, "suggestive of recent sacral fracture." The radiologist noted that an MRI of the sacrum would be more definitive, if clinically indicated. PX 3.

Petitioner underwent an MRI of the sacrum and coccyx on April 11, 2013. The radiologist interpreted this MRI as showing a "signal abnormality within both sacral wings, left greater than right, suggesting a subacute to chronic fracture."

Petitioner returned to Dr. Freedberg on April 15, 2013. In his note of that date, Dr. Freedberg indicated he discussed the MRI results with Petitioner. He also indicated Petitioner had been examined by Dr. Hsu but that the doctor's report was not yet available. He noted that Petitioner had been "forced" to return to work but not by him. He recommended continued neck and low back therapy but noted that only low back therapy was being authorized. He directed Petitioner to continue wearing the lumbar corset and remain off work. PX 2.

Petitioner next saw Dr. Freedberg on April 29, 2013. Petitioner complained of low back and bilateral leg pain, left worse than right. Petitioner also indicated he had last attended therapy three days earlier, at which point authorization for therapy ended.

Dr. Freedberg re-examined Petitioner and reviewed Dr. Hsu's report. He recommended more therapy but noted that only work conditioning was being authorized. He commented that it made no sense for Petitioner to attend work conditioning since Petitioner felt he would "absolutely fail." He directed Petitioner to remain off work and made an appointment for Petitioner to see his associate, Dr. Novoseletsky, a pain physician. PX 2.

Petitioner first saw Dr. Novoseletsky on May 3, 2013. The doctor obtained a history of the work accident and examined Petitioner. He prescribed Neurontin and recommended a bilateral lower extremity EMG. PX 2.

Petitioner returned to Dr. Freedberg on June 3, 2013 and reported that Dr. Novoseletsky had started him on Neurontin. Petitioner described his neck pain as 50% improved. He continued to complain of low back pain. Dr. Freedberg reiterated his therapy recommendation, again noting that only work conditioning was being authorized. He directed Petitioner to remain off work. PX 2.

Petitioner saw Dr. Freedberg again on June 27, 2013. On that date, the doctor noted 80% improvement of Petitioner's neck pain and persistent low back pain, radiating primarily into the left leg. He also noted that, per a "company doctor," Petitioner had presented to work the previous week but had been told that no restricted duty was available. Dr. Freedberg kept Petitioner off work and recommended back therapy and continued lumbar corset usage. PX 2.

There is a gap in treatment following June 27, 2013.

On October 3, 2013, Petitioner underwent the recommended EMG. Dr. Arayan performed this test. It showed electrodiagnostic evidence of a left L5-S1 radiculopathy. PX 3.

Petitioner returned to Dr. Novoseletsky on October 15, 2013. Petitioner complained of persistent low back pain, radiating into both legs, worse on the left. Petitioner reported he had not followed up in several months "because he was concerned about insurance coverage for the office visits." Dr. Novoseletsky described straight leg raising as negative. He recommended a left S1 selective nerve root block. PX 2.

Petitioner testified he was never able to secure authorization for Dr. Novoseletsky to administer the recommended nerve block. T. 28.

On January 9, 2014, Petitioner saw Dr. Jain at Pain Care Specialists. T. 29. Dr. Jain performed a left L4-L5, L5-S1 and S1 transforaminal epidural steroid injection on that date. PX 5. He also prescribed a lumbar vascutherm/"game ready" cold therapy system (PX 7) and a back brace (PX 8). Petitioner testified that the cold therapy system consisted of a massaging

belt that he filled with ice. He indicated that using the system made him feel well "but not for long." He used the system two to three times daily. T. 30. Petitioner testified he wore the brace on a daily basis for a while, until he began to experience itching. He still wears the brace once in a while, when he is feeling bad. T. 31.

On January 24, 2014, Petitioner saw Dr. Jain's assistant, Leah Brown, P.A-C. Brown noted that Petitioner reported experiencing 50% improvement of his symptoms for two or three days after the injection. She recommended another injection, along with a lower extremity EMG and additional therapy. She directed Petitioner to remain off work. PX 4.

Petitioner returned to Dr. Freedberg on January 27, 2014 and complained of constant low back pain as well as numbness and tingling in his left leg. Petitioner reported undergoing an injection two weeks earlier. He indicated he experienced only two days of pain relief after this injection.

Dr. Freedberg indicated he could not move forward with Petitioner's care since he did not know the identity of the doctor Petitioner had seen two weeks earlier or the type of injection Petitioner underwent at that time. He also indicated he did not discuss surgery with Petitioner. He released Petitioner to light duty with lifting up to 20 pounds and no stooping, kneeling, repetitive bending or climbing. PX 2.

There is no indication that Petitioner returned to Dr. Freedberg after January 27, 2014.

On February 3, 2014, Dr. Jain performed another left L4-L5, L5-S1 and S1 transforaminal epidural steroid injection, along with a selective nerve root block.

On February 4, 2014, Petitioner underwent EMG testing. Dr. Paly performed this testing. He interpreted the results as "consistent with mild left L5-S1 nerve root irritation." He recommended repeat testing in four to six months if clinically warranted. PX 4.

On February 7, 2014, Dr. Jain's assistant, Leah Brown, P.A-C, noted that Petitioner reported "no interval relief" following the most recent injection. She recommended additional therapy and bilateral facet injections. On February 11, 2014, Dr. Jain performed bilateral facet joint injections at L3-L4, L4-L5 and L5-S1. PX 5. Petitioner testified these injections provided two days of relief. T. 31.

On February 14, 2014, Leah Brown, P.A-C reported that Petitioner was unchanged and had scheduled an appointment to see his chiropractor. Brown increased Petitioner's Gabapentin dosage and referred Petitioner to Dr. Koutsky for a surgical consultation. PX 5. There is no evidence indicating Petitioner saw Dr. Koutsky.

On February 19, 2014, Petitioner saw Dr. Dixon, a neurosurgeon. Dr. Dixon noted that Petitioner complained of back and leg pain secondary to a work accident of February 11, 2013. Dr. Dixon did not note any abnormalities on examination. He noted that Petitioner's lumbar

spine MRI was not available. He recommended a lumbar discogram at L2-L3 through L5-S1. He directed Petitioner to return with his MRI and remain off work in the interim. PX 9.

On February 21, 2014, Petitioner saw a chiropractor, Dr. Bialon, at New Life Medical Center. Dr. Bialon indicated that Petitioner complained of low back and radiating left leg pain secondary to a work accident in which he attempted to pull a lift gate down. He noted a past history of a motor vehicle accident two or three months before the lift gate incident, indicating that Petitioner denied experiencing any back pain due to that accident.

On initial examination, Dr. Bialon noted positive Kemp's testing bilaterally and positive straight leg raising on the left. He attributed Petitioner's symptoms to the work accident. He recommended that Petitioner see him three times weekly for one month, with treatment to include lumbar adjustments, ultrasound, massage and exercises. PX 10.

On February 26, 2014, Petitioner underwent a lumbar spine CT scan and a provocative discogram at L2-L3, L3-L4, L4-L5 and L5-S1. Dr. Jain performed the discogram. He described Petitioner's responses as valid. He noted severe concordant pain at L5-S1. PX 5. Dr. Kuritza interpreted the post-discogram CT scan as showing 2-3 mm protrusions/herniations at L4-L5 and L5-S1, without significant stenosis at either level. Dr. Kuritza also noted "nonspecific sclerotic changes in both sacroiliac joint regions." He indicated these changes "might be a contributing factor to [Petitioner's] back pain." He suggested further work-up in the form of a nuclear medicine bone scan. PX 11.

On February 28, 2014, Dr. Jain's assistant noted that Petitioner was still complaining of 7/10 pain in his back and left leg. She described Petitioner as having been "referred by" Dr. Dixon for purposes of a CT discogram. She refilled Petitioner's medications and directed Petitioner to remain off work. She provided Petitioner with a written referral to Dr. Dixon. PX 4.

Petitioner returned to Dr. Dixon on March 10, 2014, at which time the doctor reviewed the lumbar spine MRI and discogram results. The doctor discussed various treatment options, including an L5 laminectomy with L5-S1 interbody fusion, with Petitioner. He indicated Petitioner wanted to proceed with surgery. He also indicated Petitioner should remain off work while awaiting workers' compensation approval of the surgery. PX 9.

On March 17, 2014, Dr. Bialon noted that Petitioner denied improvement and had made "no notable progress." PX 10.

Petitioner testified he last went to Pain Care Specialists on March 27, 2014. Dr. Jain's note of that date reflects that Petitioner was still attending therapy and remained off work. The note also reflects that Dr. Dixon "apparently recommended surgery at L5-S1" and that Petitioner was awaiting authorization. Dr. Jain recommended that Petitioner remain off work, continue therapy and medication and follow up with Dr. Dixon. PX 4.

On March 28, 2014 Dr. Bialon issued an interim report indicating that Petitioner was still experiencing 6/10 pain in his low back and left leg. His examination findings were unchanged. He recommended another month of chiropractic care. PX 10.

On April 21, 2014, Dr. Bialon noted that Petitioner reported increased pain, rated 7/10, in his back and left leg. The doctor again described Petitioner as making no notable progress. PX 10.

Respondent's examiner, Dr. Hsu, noted that Petitioner saw Dr. Michael on April 21, 2014, with Dr. Michael apparently indicating Petitioner "might be a surgical candidate." RX 2. The Arbitrator notes that no records authored by Dr. Michael are in evidence.

On June 20, 2014, Dr. Bialon again described Petitioner's symptoms as unchanged. PX 10. Dr. Bialon's last note, dated July 16, 2014, reflects that Petitioner reported slight improvement of his back and left leg pain. Dr. Bialon discharged Petitioner from care. PX 10.

Petitioner did not testify to seeing Dr. Michael. Nor did he indicate that Dr. Bialon's care extended into July 2014. Rather, he denied undergoing any formal treatment between March 27, 2014 and January 14, 2015. He testified he had no health insurance coverage during this period. T. 33. He self-treated by taking Ibuprofen. T. 33.

On January 14, 2015, Petitioner saw Dr. Erickson, a neurosurgeon. Under cross-examination, Petitioner acknowledged selecting this physician.

In his note of January 14, 2015, Dr. Erickson recorded a consistent account of the February 11, 2013 accident and subsequent care. He noted that Petitioner complained of back and radiating left leg pain. On examination, he noted positive straight leg raising bilaterally and a positive Lasegue's maneuver on the left side only. He performed SSEP testing and interpreted the results as showing a delay at L5 and S1 on the left side.

Dr. Erickson diagnosed "primarily mechanical back pain with a radicular component affecting the left leg secondary to discal injury at L5-S1." He agreed with Dr. Dixon that Petitioner would likely benefit from an instrumented fusion at L5-S1. He opined that Petitioner's problems began with the February 11, 2013 work accident. He presented Petitioner with the option of a minimally invasive fusion performed through a small incision. PX 13.

At Respondent's request, Dr. Hsu re-examined Petitioner on June 8, 2015. In his report of June 22, 2015, Dr. Hsu indicated that Petitioner still complained of low back pain but denied any radicular complaints. He also noted that Petitioner reported working as a supervisor for his own landscaping business and denied undergoing the work hardening that had previously been recommended.

On re-examination of the lumbar spine, Dr. Hsu noted negative straight leg raising and ¾ positive Waddell's signs. On cervical spine re-examination, he again noted negative Spurling's, Lhermitte's and Hoffman's signs.

Dr. Hsu indicated he reviewed updated records concerning the MRIs, the EMG, the injections and the CT discogram.

Dr. Hsu diagnosed a resolved lumbar strain and pre-existing, multi-level lumbar spondylosis. He described Petitioner as having received "appropriate conservative care." He found no causal relationship between Petitioner's ongoing complaints and the work accident. He found Petitioner capable of full duty. He opined that there was a "psychosocial component to [Petitioner's] low back pain." He did not believe that surgery would be appropriate for the work injury. He opined that Petitioner was not a good candidate for a lumbar fusion, based on his pathology and demographic. He found that Petitioner reached maximum medical improvement two weeks after his earlier examination, or on April 17, 2013. He indicated he would give an impairment rating of zero percent "as [Petitioner] did not sustain any permanent injuries as a result of the work related condition." He found Petitioner's ownership of a landscaping business to be a non-factor in terms of his condition, treatment needs and work status. RX 2.

Petitioner testified he never returned to work for Respondent after the accident of February 11, 2013. T. 33. He is still operating his landscaping business but has not drawn any salary from this business since the accident. T. 33-34. In the course of operating the business, he drives trucks, meets with customers and supervises employees but does not perform physical labor. T. 34. He still experiences back and leg pain. This pain affects his sleep and his ability to walk. He wants to undergo the surgery that Dr. Dixon recommended. T. 33.

Under cross-examination, Petitioner testified that he, Juan and Omar went to O'Hare on the night of the accident. Juan and Omar drove to the airport in separate trucks. Juan, Omar and Charles, his supervisor, witnessed his accident but are not present at the hearing. His accident occurred at 1 or 2 AM, near the end of his shift. He had started his shift at 8 PM. After the accident, he experienced the immediate onset of pain but he did not undergo care until later that day, at about 3 PM. He filed Applications and received settlements for accidents occurring on April 1, 2010 and July 21, 2010. These accidents involved his neck, not his back. He cannot explain why the Commission main frame shows the accidents involved his back. He still operates his landscaping business. This business was incorporated in 2006. RX 3. He and his son have 50% shares in the business. He does not know why his son's name does not appear on the certified records concerning the business. Since the accident, he has continued driving a pick-up in connection with the business. He uses this vehicle to visit customers and jobsites. He does not use it to physically deliver materials. He acknowledged that his business website directs customers to ask for him by name. He received RX 6, a subpoena requesting the business employment records. Tax documents from 2014 show his business generated $107,000 in sales in 2014. He did not bring any other tax documents to the hearing.

On redirect, Petitioner testified his son designed the business website. His son handles the computer-related aspects of the business. He provided his contact information on the website so that customers could ask him for estimates. He is not the only person who visits jobsites for the business. His son and another worker named Antonio also make these visits. He and his son share the profits. In 2014, he and his son each received $3,000. He issues W2 forms to his salaried employees. The business did not issue a W2 form to him in 2014. He signed PX 15, the Application, when he retained his previous attorney.

Hisen Ademi, an insurance investigator, testified on behalf of Respondent. Ademi testified he first conducted surveillance of Petitioner on June 19, 2013. T. 95. Other investigators also conducted surveillance of Petitioner during this general time period. T. 96. On June 19, 2013, he obtained video showing Petitioner standing near a building, smoking, talking on his cell phone, "slowly walking," driving a Ford F-250 and using some stairs. T. 94-100. Petitioner did not use any assistive devices but walked slowly. T. 101.

Ademi testified he next worked on Petitioner's claim on May 11, 14 and 15, 2015. T. 104. On the morning of May 11, 2015, he obtained video of Petitioner slowly descending some stairs at a residence and departing in a Suzuki vehicle. On the morning of May 14, 2015, he obtained video of Petitioner carrying some yellow papers, descending some stairs and putting the papers inside the Suzuki vehicle. Later the same morning, he obtained video of Petitioner driving the vehicle to several businesses and carrying the yellow papers into those businesses. T. 104-109. On May 15, 2015, he (Ademi) went to one of those business, a Laundromat, and observed some yellow papers posted on a community board. One of the papers was from Superior Staffing and listed several available jobs. T. 110-111.

At this point in the hearing, the Arbitrator, counsel and Petitioner watched the video obtained by Ademi in May 2015. T. 118-119. RX 9. That video did not include any images of the yellow papers that Ademi testified he observed on May 15, 2015.

Under cross-examination, Ademi acknowledged that, in the footage he obtained, Petitioner sometimes appeared to be walking slowly and slightly limping. T. 130.

Petitioner, called in rebuttal, testified that the yellow flyers shown in the surveillance videos were flyers advertising his wife's massage therapy business. He and his wife have relied on this business to support themselves since workers' compensation stopped paying benefits. He hangs the flyers about every two weeks. T. 135-136.

Arbitrator's Credibility Assessment

Petitioner's accident-related testimony was detailed and supported, to a large extent, by the earliest treatment records, which consistently refer to a lift gate. There is no evidence suggesting Petitioner injured his back at a non-work location. There were slight variances in the histories, with one note referring to a lift gate on an elevator, but the Arbitrator does not view those variances as significant.

Respondent maintains Petitioner was less than forthright about his prior work injuries. In particular, Respondent asserts that Petitioner injured his low back on September 28, 2012, not long before the accident at issue herein. Petitioner testified this injury primarily involved his ribs. Petitioner's testimony on this point is supported by the 2012 records from UIC, which show that the treating physicians suspected a rib fracture. Subsequent records do mention complaints of back pain and it appears Dr. Hsu ultimately diagnosed a thoracic sprain but there is no indication that any physician suspected any lumbar disc pathology in 2012. Dr. Hsu found Petitioner capable of full duty in December 2012 and Petitioner testified he returned to full duty at that time. T. 19.

Dr. Hsu noted 2/4 positive Waddell's signs but none of the many treating physicians noted inconsistencies.

The video surveillance that Respondent obtained does not undermine Petitioner's credibility in that it shows Petitioner moving slowly while performing innocuous activities, consistent with the activities Petitioner testified to performing for his landscaping business.

Where the Arbitrator had problems with Petitioner was with his unfortunate tendency to go from one provider to another, as discussed further below.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on February 11, 2013 arising out of and in the course of his employment?

The Arbitrator finds that Petitioner sustained an accident on February 11, 2013 arising out of and in the course of his employment. In so finding, the Arbitrator relies on the following: 1) Petitioner's detailed testimony concerning the location and circumstances of the accident; 2) Petitioner's identification of three witnesses; and 3) the initial treatment records, including the handwritten history form, referencing a lift gate.

Respondent maintains that Petitioner could not have been in as much pain after the accident as he claimed, since he did not immediately seek care. The Arbitrator views the evidence differently. Petitioner testified the accident occurred at 1 or 2 AM, near the end of his shift. Petitioner also testified his supervisor witnessed the accident and directed him to UIC Medical Center, where he was seen later the same day. Given the timing of the accident, there was no untoward delay in care.

Did Petitioner establish a causal connection between his accident of February 11, 2013 and his current condition of ill-being?

The Arbitrator has previously found that Petitioner established an accident of February 11, 2013. The Arbitrator further finds that Petitioner established a causal connection between

that accident and the following conditions: 1) a sacral fracture; 2) a lumbar spine disc condition with a radicular component that required conservative care, including the nerve block that Dr. Novoseletsky prescribed and that Dr. Jain ultimately performed, and that remains symptomatic; and 3) a cervical spine strain that surfaced a few days after the accident and later resolved.

In finding causation as to the sacral fracture, the Arbitrator relies on the sacral MRI and Petitioner's testimony that he fell after trying to move the lift gate and experiencing a sudden onset of low back pain. T. 20.

In finding causation as to a lumbar spine condition that required conservative care and that remains symptomatic, the Arbitrator relies on Petitioner's credible description of the mechanism of his injury along with the treatment records of UIC Medical Center, Dr. Freedberg and Dr. Novoseletsky. The Arbitrator also relies on Petitioner's credible testimony that, following his September 2012 work accident, he resumed full duty for Respondent in December 2012 and continued performing full duty thereafter until the February 11, 2013 accident.

In finding causation as to a cervical spine strain that fully resolved within a relatively short period, the Arbitrator relies on Dr. Freedberg's treatment records.

The Arbitrator further finds that Petitioner failed to prove causation as to the need for lumbar spine conservative care beyond February 7, 2014, the day Petitioner saw Dr. Jain's assistant in follow-up from the L1 nerve block. Petitioner also failed to prove causation as to the need for lumbar spine surgery. Dr. Freedberg, Petitioner's first selected physician, never indicated he viewed Petitioner as a surgical candidate. He recommended evaluation by a pain physician, Dr. Novoseletsky who, following a lower extremity EMG, recommended a left S1 nerve root block. PX 2. Petitioner testified he was not able to secure authorization for Dr. Novoseletsky to administer this block. Petitioner's second selected physician, Dr. Jain, administered the block on February 3, 2014. Dr. Jain's assistant subsequently noted that Petitioner obtained only transient relief from the block. Dr. Jain recommended Petitioner see a surgeon, Dr. Koutsky. Petitioner went on to see a different surgeon, Dr. Dixon. Even if Dr. Dixon could be considered a referral from Petitioner's second chosen physician, Dr. Jain (see further below), his opinions concerning causation and the need for a fusion are vague and unsupported. He cited a work accident of February 11, 2013 as the cause of Petitioner's back and leg pain but never expressed any understanding of the mechanism of that accident. There is no indication he ever reviewed Dr. Freedberg's records. He recommended a CT discogram before he even reviewed the lumbar spine MRI.

<u>Is Petitioner entitled to reasonable and necessary medical expenses? Did Petitioner exceed the two choices afforded by Section 8(a)?</u>

Petitioner claims various medical bills relating to treatment rendered by Dr. Freedberg and the physicians and chiropractor Petitioner saw after his final visit to Dr. Freedberg on January 27, 2014. Before resolving this claim, the Arbitrator addresses the issue of whether Petitioner exceeded the two choices of physicians afforded by Section 8(a) of the Act.

Petitioner initially underwent treatment at UIC Medical Center – O'Hare. Based on Petitioner's credible testimony that Respondent directed him to this facility, the Arbitrator concludes that this facility does not constitute a choice under Section 8(a).

Petitioner next saw Dr. Freedberg. Under cross-examination, Petitioner acknowledged selecting this physician. Dr. Freedberg later referred Petitioner to another physician in his group, Dr. Novoseletsky. The Arbitrator views Dr. Freedberg as Petitioner's first choice of physicians. The Arbitrator views Dr. Novoseletsky as a physician within the chain of referrals from that first choice.

Petitioner next saw Dr. Jain. Under cross-examination, Petitioner acknowledged selecting this physician. The Arbitrator views Dr. Jain as Petitioner's second choice of physicians. Petitioner subsequently saw a chiropractor, Dr. Bialon, at New Life. Dr. Jain prescribed therapy, along with other conservative measures, but there is no indication that he ever prescribed chiropractic care or referred Petitioner to Dr. Bialon. The Arbitrator views Dr. Bialon as outside the two allotted choices.

The Arbitrator further finds that Drs. Dixon and Erickson, as well as Dr. Michael (whose records are not in evidence) were beyond the two allotted choices. Petitioner testified that Dr. Jain referred him to Dr. Dixon for a surgical consultation. In fact, Dr. Jain referred Petitioner to Dr. Koutsky for this consultation. It is not clear whether Petitioner ever saw Dr. Koutsky. It was only after Petitioner had already seen Dr. Dixon that Dr. Jain wrote out a note referring Petitioner to this doctor. Petitioner acknowledges that Dr. Erickson was beyond the allotted choices.

The Arbitrator turns to the claimed medical expenses. PX 2-8, 10-13.

The Arbitrator awards Petitioner the $512.00 balance from Suburban Orthopedics (Dr. Freedberg), subject to the fee schedule. The Arbitrator also awards the $4,454.00 in charges from Chicago Sports and Spine, subject to the fee schedule, for the EMG Petitioner underwent on October 3, 2013. PX 3. The Arbitrator further awards the Pain Care Specialists (Dr. Jain) charges for services provided from January 9, 2014 through February 7, 2014 (the follow-up visit after the L1 nerve root block), subject to the fee schedule. Those charges total $5,949.00.

Consistent with the foregoing, the Arbitrator awards the charges of Dr. Desai (the physician who provided anesthesia for the injections) through February 3, 2014, subject to the fee schedule. Those charges total $1,782.90. PX 6. The Arbitrator also awards $13,000.00 in charges from Northwest Chicago Medical, Ltd., subject to the fee schedule, representing the facility fees for the injections performed through February 3, 2014. PX 5.

The Arbitrator declines to award the $3,045.00 charges from Windy City Medical Specialists (PX 8, 1/16/14 through 2/14/14, back brace, exercise kit and "unusual travel"), noting that, as of January 2014, Petitioner had already obtained and used a lumbar corset per

Dr. Freedberg. The Arbitrator also declines to award the $18,175.00 charges from Network Durable Medical Equipment (PX 7, 1/9/14 through 3/7/14, "game ready" cold therapy set-up and rental). Petitioner testified to obtaining some transient relief from the use of this unit but, in the Arbitrator's view, there is insufficient evidence to support an award of more than $18,000.00 for a massaging, ice-filled belt.

The Arbitrator also declines to award the $10,515.00 in charges from New Life Medical Center (Dr. Bialon). PX 10. Those charges relate to treatment rendered after February 7, 2014 and the Arbitrator has previously found that Dr. Bialon was beyond Petitioner's two choices of physicians.

The Arbitrator declines to award the bills from Edgebrook Radiology (PX 11) and IWP (PX 12) as these bills relate to treatment rendered after February 7, 2014.

The Arbitrator declines to award Dr. Erickson's $500.00 bill (PX 13), having already found Dr. Erickson to be beyond the two choices afforded by Section 8(a).

Is Petitioner entitled to temporary total disability benefits?

Petitioner claims he was temporarily totally disabled from February 12, 2013 (the day after the accident) through the hearing of July 21, 2015. Arb Exh 1.

The Arbitrator has previously found that Petitioner met his burden of proof as to accident and established causation as to the need for conservative care through February 7, 2014 (the date he saw Dr. Jain's assistant in follow-up from the nerve root block). The Arbitrator has also found that Petitioner exceeded the choices afforded by Section 8(a) and failed to establish causation as to the conservative care he underwent after February 7, 2014 and as to the need for a lumbar fusion. The Arbitrator views Petitioner's lumbar spine condition as essentially stabilizing, while remaining painful, as of February 7, 2014. The Arbitrator finds credible Petitioner's testimony that he remains symptomatic and has some difficulty with sleeping and extended walking. Respondent's investigator supported that testimony when he acknowledged that Petitioner walked slowly and seemed to be limping.

The Arbitrator elects to rely on Dr. Freedberg. The Arbitrator finds Dr. Freedberg's opinions concerning treatment needs and work capacity more persuasive than those voiced by the various other treating physicians and Dr. Hsu. On January 27, 2014, Dr. Freedberg released Petitioner to light duty, with lifting up to 20 pounds and no restrictions as to pulling/pushing/carrying, working overhead, walking, standing or sitting. These restrictions allow for some level of activity but, in the Arbitrator's view, would not have permitted Petitioner to resume the work he performed for Respondent. [See RX 1, a report in which Respondent's examiner, Dr. Hsu, references a job description requiring lifting up to 40 pounds.] The Arbitrator further notes that Petitioner has engaged in what amounts to light duty for his own business on a continuous basis since the accident.

The Arbitrator finds that Petitioner was temporarily totally disabled from February 12, 2013 through February 7, 2014, a period of 51 4/7 weeks.

Although the Arbitrator views Petitioner's condition as having essentially stabilized as of February 7, 2014, she does not address permanency because neither party asked the Arbitrator to address this issue as an alternative measure. Arb Exh 1.

Is Petitioner entitled to prospective care in the form of a lumbar fusion?

The Arbitrator, primarily relying on Dr. Freedberg, denies Petitioner's claim for prospective care in the form of a lumbar fusion. There is no evidence indicating Dr. Freedberg viewed Petitioner as a surgical candidate. The Arbitrator also has significant concerns as to whether surgery would help Petitioner. Respondent's examiner, Dr. Hsu, noted 2/4 positive Waddell's signs and the extensive treatment records reflect that Petitioner reported obtaining little to no relief from injections, therapy and chiropractic care.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☒ 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

Travis Morthland,
Petitioner,

16IWCC0548

vs.

NO: 13 WC 9965

State of Illinois/Menard Correctional Center,
Respondent.

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 issue of nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 17, 2016, is hereby affirmed and adopted.

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

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

DATED:
o8/15/16
RWW/rm
046

AUG 25 2016

Ruth W. White

Charles J. DeVriendt

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0548

MORTHLAND, TRAVIS
Employee/Petitioner

Case# **13WC009965**

ST OF IL/MENARD CORRECTIONAL CENTER
Employer/Respondent

On 2/17/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.41% 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:

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6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

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CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

FEB 17 2016

Ronald A. Rascia, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0548

STATE OF ILLINOIS)
)SS.
COUNTY OF **WILLIAMSON**)

☐ 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
NATURE AND EXTENT ONLY

TRAVIS MORTHLAND
Employee/Petitioner

v.

STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER
Employer/Respondent

Case # **13** WC **09965**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. 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 **Christina Hemenway**, Arbitrator of the Commission, in the city of **Herrin**, on **January 12, 2016**. By stipulation, the parties agree:

On the date of accident, **February 24, 2013**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did 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 earned $**59,628.00**, and the average weekly wage was $**1,146.69**.

At the time of injury, Petitioner was **32** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been or will be provided by Respondent.

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

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$688.01**/week for a further period of **50** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **10% loss of use of the person as a whole**.

Respondent shall pay Petitioner compensation that has accrued from **May 29, 2015,** through **January 12, 2016**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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

February 11, 2016
Date

FEB 17 2016

16IWCC0548

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

TRAVIS MORTHLAND
Employee/Petitioner

v. Case #: 13 WC 09965

STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

This matter was previously heard before an Arbitrator appointed by the Illinois Workers' Compensation Commission pursuant to Section 19(b) of the Act on the issues of accident, causal connection and liability for medical services, prospective medical care, and temporary total disability benefits. On July 25, 2013, the Arbitrator rendered his decision on this matter, finding that Petitioner had sustained an accident which arose out of and in the course of Petitioner's employment with Respondent, and further finding that his current condition was causally related to the accident, entitling him to past and prospective medical treatment and temporary total disability benefits. Those findings are hereby incorporated by reference. PX12.

On his date of accident, Petitioner was 32 years of age, married, with no dependents. He was employed as a Correctional Officer at Menard Correctional Center and had been so for approximately twelve years. On February 24, 2013, while lifting a crate of milk he felt a popping sensation near the right shoulder with pain down his right arm. He described the crate as weighing 30-35 pounds. The corrections officers were distributing the milk that day because the facility was on lockdown status. PX12.

Petitioner testified that following the above-referenced hearing he continued to treat with Dr. George Paletta for his right shoulder. He is right hand dominant. He underwent two surgeries to his shoulder, with the second surgery also involving his bicep, and he participated in physical therapy following each surgery. He testified he also sought chiropractic treatment, and the Arbitrator notes there were no records admitted into evidence with regard to such chiropractic care. Petitioner testified he was ultimately allowed to return to work as a correctional officer at Menard Correctional Center. He has since transferred to Southwestern, performing the same job.

Petitioner testified that with regard to his shoulder he still has a lot of pain reaching upward and outward and his strength is not there. He has full range of motion but notices pain with same. With regard to his bicep, Petitioner testified he is able to fully extend but it causes pain. Overall, the strength in his right arm is not the same as before the accident. He notices this in particular when he is in the gym or when he tries to pick something up or reach across his body. He takes Ibuprofen for his pain, usually a couple per day. Petitioner testified his weightlifting has been affected, in that he can no longer do barbell bench press or incline or decline with barbells. He is able to do dumb bells and now uses machines for his incline and decline work. He testified he values being in shape, as he was an athlete in school and it is an important part of his life.

Petitioner acknowledged he had last seen Dr. Paletta on May 29, 2015, at which time he was told he could return to work full duty. He has been working full duty since that date, has no restrictions with regard to his shoulder, and is able to do his job activities. Petitioner acknowledged that at his final appointment, Dr. Paletta gave him some recommendations with regard to cutting back on the weight in his weightlifting activities. He testified he currently works out in the gym five days a week, which is the same amount as before his accident.

Following the 19(b) hearing, Petitioner continued to treat with Dr. George Paletta. On October 1, 2013, he underwent surgery consisting of extensive debridement of the subacromial bursa, extensive debridement of the bursal-sided partial thickness rotator cuff tear, and open subpectoral tenodesis. PX6. Petitioner followed up with Dr. Paletta on October 16, 2013, and November 20, 2013, and participated in physical therapy from October 21, 2013, through December 31, 2013. PX4, PX7. On January 6, 2014, Petitioner returned to Dr. Paletta with complaints of an ongoing catching sensation and pain in the posterior aspect of his right shoulder. PX4. An MRI Arthrogram was done on February 4, 2014, which Dr. Paletta interpreted as inconclusive. PX4, PX5. Petitioner resumed physical therapy and attended sessions from February 10, 2014, through March 24, 2014. PX7.

On March 26, 2014, Petitioner returned to Dr. Paletta with continued complaints of pain with specific movements. Dr. Paletta noted he did not see anything from a structural standpoint that would explain Petitioner's symptoms, and he recommended an ultrasound guided injection. PX4. Petitioner underwent a right subacromial bursa steroid injection on April 9, 2014, which provided immediate relief. The concurrent ultrasound did not show evidence of a rotator cuff tear. PX8. Dr. Paletta ordered an MR Arthrogram, which was completed on April 16, 2014. PX5. It was interpreted by Dr. Paletta as showing expected post surgical changes status post subpectoral biceps tenodesis, no evidence of residual or recurrent rotator cuff pathology, and mild residual subacromial bursitis. PX4.

Petitioner returned to Dr. Paletta on May 5, 2014, at which time he reported dramatic improvement in motion and strength following the injection on April 9, 2014. Examination was entirely normal. Petitioner had full, unrestricted, pain free range of motion in his right shoulder and arm, equal to the opposite side. Dr. Paletta noted the subacromial bursitis had fully resolved, the tenodesis was intact, and Petitioner had normal motion and strength. Dr. Paletta released him to resume full activities as tolerated, including full recreational and work activities. He was released to full duty work and declared to have reached maximum medical improvement.

On July 23, 2014, Petitioner was examined by Respondent's physician Dr. Richard Katz for the purpose of obtaining an AMA rating. Upon examination, all objective testing was normal, except there was found to be mild weakness in the right upper extremity as compared to the left in the biceps, deltoid, and external rotators. Dr. Katz noted, "This is a very muscular power lifting individual, and the side to side difference is notable." In that Petitioner had been found to be at MMI, Dr. Katz provided an impairment rating of 3% impairment of the right upper extremity, which was the default rating. RX2.

Petitioner returned to work and resumed his normal activities. However, his pain returned over time and he sought treatment again with Dr. Paletta on October 8, 2014. He related to Dr. Paletta that his pain had gradually recurred with activity. On examination he had pain with resisted abduction and resisted external rotation and had positive impingement signs. Dr. Paletta diagnosed recurring impingement syndrome and ordered a repeat injection of the subacromial space, a short course of physical therapy, and a Medrol dose pack followed by anti-inflammatory. PX4. The subacromial steroid joint injection was done that day and Petitioner participated in physical therapy from October 13, 2014, through October 28, 2014. PX7, PX9.

On October 22, 2014, Petitioner returned to Dr. Paletta with the complaint that things were worse following the injection. Daily activities were bothering him and he could no longer do his gym workouts. Dr. Paletta noted that although Petitioner's overall strength was good, he continued to have a painful arc of motion and positive impingement signs. He recommended arthroscopy with revision of the subacromial decompression. PX4.

On November 11, 2014, Petitioner underwent his second surgery, for repair of a rotator cuff tear in the right shoulder. Postoperative diagnosis was high-grade partial-thickness tear of the posterior aspect of the supraspinatus and superior aspect of the infraspinatus. PX6.

On November 24, 2014, Petitioner was examined by Respondent's Section 12 examiner Dr. James Emanuel. Dr. Emanuel reviewed Petitioner's medical records, took a history, and conducted an examination. He opined that Petitioner's current condition was causally related to the work accident of February 24, 2013. He further opined that the surgeries performed were reasonable, necessary, and causally related to the accident. RX4.

Petitioner returned to Dr. Paletta on December 1, 2014, and reported he was doing well, with minimal pain. He was allowed to return to one-handed duty at work and participated in physical therapy from December 8, 2014, through December 29, 2014. PX4, PX7.

Petitioner returned to Dr. Paletta on January 5, 2015, and reported he felt significant improvement since the surgery and felt the shoulder was more stable. Dr. Paletta noted he was making good progress in physical therapy and in his daily activities. PX4. Petitioner continued to participate in physical therapy from January 2, 2015, through February 27, 2015, with an emphasis on strengthening. PX7. He followed up with Dr. Paletta on February 18, 2015, and reported continued progress. PX4. Physical therapy continued from March 2, 2015, through March 30, 2015. PX7. Petitioner returned to Dr. Paletta on April 1, 2015. It was noted that Petitioner had contacted the office in March due to increasing pain. He was told to take an over-the-counter anti-inflammatory, which seemed to resolve the pain. Petitioner reported his daily

activities were nearly normal but he felt he lacked some strength. He was told to continue with physical therapy, which he did from April 4, 2015, through April 27, 2015. PX4, PX7.

On April 29, 2015, Petitioner returned to Dr. Paletta and reported things were continuing to improve but that he still had some discomfort and weakness. PX4. Based on his ongoing complaints, Petitioner underwent a sonogram on May 1, 2015. It revealed an intact rotator cuff repair, intact tenodesis longhead of the biceps tendon, mild subacromial bursitis, and calcific tendonitis subscapularis. PX4, PX10. Based on the findings, Dr. Paletta recommended an additional subacromial injection, which was done on May 8, 2015. PX4, PX11.

Petitioner returned to Dr. Paletta on May 29, 2015, at which time he reported that the injection had helped. His only complaint was that he still had some discomfort when he brought his arm down from overhead position. Examination revealed he had excellent overall motion. He had full forward flexion and abduction, equal and symmetric to the opposite side. Impingement signs were negative, as were all other objective tests. He had good cuff strength and good overall strength. Based on the examination, Petitioner was released to full activities, including full workouts as tolerated. With regard to weightlifting, Dr. Paletta recommended if there was a particular lift that bothered him he should either back off on the amount of weight or leave that lift out altogether. He was told to take over-the-counter anti-inflammatories as necessary for symptoms. Dr. Paletta noted Petitioner did not require any restrictions or limitations and was released to return to full duty work. He did not require any additional formal therapy, treatment, or follow up, and was found to be at maximum medical improvement. PX4.

On July 7, 2015, Petitioner was re-examined by Respondent's physician Dr. Katz for the purpose of obtaining an AMA rating. Dr. Katz noted that since his first examination Petitioner had undergone a second surgery. Petitioner complained that he had more pain, which he described as 7/10. He related that the pain was worse with certain movements such as forward flexion and carrying heavier objects. He also complained of continued proximal biceps insertional pain. It was noted he sometimes had pain during sleep. Petitioner's QuickDash raw score was 22 and his adjusted score was 25. All objective tests were negative, with the exception that Petitioner had more weakness in the right forward flexor and abductor of the right shoulder than on the previous exam. In that Petitioner had reached maximum medical improvement, Dr. Katz provided an impairment rating of 4% impairment of the right upper extremity. His rating process started on page 387, "If a patient has 2 significant diagnoses…the examiner should use the diagnosis with the highest causally related impairment rating." He explained that the labral tear, the biceps dislocation or the partial rotator cuff tear could be used, and the rating is 1-5% on page 404. The rating was a Class 1 impairment, the QuickDash was Grade 1 impairment, and the physical examination was now Grade 2 (a change from Grade 1 on the previous examination). The impairment rating was adjusted one to the right of the default value, or 4% impairment of the right upper extremity. RX3.

Dr. Katz testified by way of deposition on November 2, 2015. He is board certified in Physical Medicine and Rehabilitation, Electrodiagnostic Medicine, and Independent Medical Examiners. He is a professor of clinical neurology within the Division of Physical Medicine and Rehabilitation at Washington University. He is also one of the editors of the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition, and the lead author in the neurology and

psychiatry chapter. Dr. Katz testified the AMA Guide is used to help with ratings of impairment and is not a book that determines disability. Impairments are used in conjunction with local statutes within that jurisdiction to determine the disability for a person. RX1.

Dr. Katz testified he examined Petitioner on two occasions and arrived at an impairment rating following each examination, using the 6th Edition of the AMA Guides. His reports included an evaluation of the medically defined and professionally appropriate measurements of impairment, which include loss of range of motion, loss of strength, major atrophy of tissue mass consistent with the injury and any other measurements that establish the nature and extent of the impairment. Dr. Katz testified consistent with his reports of July 23, 2014, and July 7, 2015. RX1, Resp.Dep.Ex.2, RX2, RX3. Dr. Katz noted that on Petitioner's second examination he was more painful than he had been on the first. His range of motion was still normal but he had more weakness in forward flexion and abduction. His QuickDash score, which was how he perceived himself, really did not change. However, Dr. Katz testified that because Petitioner was more symptomatic, the rating increased from the previous default of 3% to the current 4% impairment. He testified his opinion on Petitioner's impairment rating was based on a reasonable degree of medical certainty. RX1.

On cross-examination Dr. Katz acknowledged that with regard to Illinois worker's compensation cases he primarily performs impairment ratings for the defense. He testified that his specialty is physical rehabilitation and medicine, that he does not perform surgery, and that he commonly treats shoulder injuries. Dr. Katz testified that the AMA Guides chapter on upper extremity impairment is one of the most complicated chapters in the guide, and that the training on that chapter alone was one and a half to two hours. Dr. Katz testified he had only a lay knowledge of the factors used in Illinois, besides the AMA rating, that were considered in assigning disability. Dr. Katz acknowledged that to some extent a patient can experience significant activity limitations in the absence of demonstrable impairment, and that you cannot always connect impairment and disability in a linear relationship. RX1.

Dr. Katz testified that in addition to the QuickDash, Petitioner also completed an Oswestry Disability Questionnaire. It was not included in his report of July 7, 2015, because the questionnaire does not impact the AMA Guides ratings. Dr. Katz shared Petitioner's responses to the questions, which reflected the following: "The pain is very mild at the moment; I can look after myself normally without causing extra pain; I can lift heavy weights but it gives extra pain; pain does not prevent me from walking any distance; pain prevents me from sitting more than an hour; I can stand as long as I want without extra pain. My sleep is occasionally disturbed by pain; pain has no significant effect on my social life apart from limiting my more energetic activities such as sports; I can travel anywhere without pain; I can read as much as I want to with no pain in my neck; I have no headaches; I can concentrate fully; I can do as much work as I want to; I can drive my car without neck pain." The Oswestry Disability Questionnaire was admitted as RX1, Pet.Ex.2.

Dr. Katz testified he did not ask Petitioner if his weightlifting had been affected by his injury, but noted he had difficulty with flexion and abduction, which would have an impact on weightlifting. Dr. Katz acknowledged Petitioner did not exhibit any signs of exaggerated pain

behaviors or pain complaints, but rather gave the impression of someone who tried to minimize their problems when speaking with the examiner. RX1.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. The parties stipulated to all issues, including average weekly wage. The only issue in dispute at the time of trial was the nature and extent of permanent partial disability. With regard to the nature and extent of disability, for accidents occurring after September 1, 2011, pursuant to Section 8.1b of the Act, in determining the level of permanent partial disability the Arbitrator must look at the following five factors.

In regard to factor **(i) the reported level of impairment pursuant to Subsection (a)**, Dr. Katz opined that Petitioner sustained an impairment of 4% of the upper extremity in accordance with the AMA Guides to the Assessment of Permanent Impairment, 6th Edition. The Arbitrator recognizes that impairment and permanent partial disability as defined by the AMA Guides are not the same, and the Arbitrator makes note of this distinction when assessing the weight given to Dr. Katz's impairment rating at issue and in determining the permanency award. As part of the process of determining an impairment rating, Dr. Katz considered Petitioner's QuickDash score. Although it was a low score and had not really changed after the second surgery, Dr. Katz noted that Petitioner was more painful on examination the second time he was seen. He further noted Petitioner had more weakness in forward flexion and abduction than on the previous exam. Dr. Katz testified he found Petitioner to be very straightforward in his complaints, never felt he exaggerated his problems, and in fact felt he perhaps minimized his complaints. Given that Petitioner was more symptomatic on the second examination, even though his QuickDash score didn't change, Dr. Katz opined that his physical examination grade was more appropriate at Grade 2, rather than Grade 1. As such, this adjusted Petitioner's impairment rating one to the right of default value, or 4% impairment of the right upper extremity. Although Dr. Katz had Petitioner complete the Oswestry Disability Questionnaire at the second examination, he did not reference the questionnaire or the results in his report. However, during his testimony he discussed the results of the questionnaire, which the Arbitrator notes were only mild complaints reported by the Petitioner, and which were consistent to those reported on the QuickDash. The Oswestry Disability Questionnaire did not impact the impairment rating. While the Arbitrator notes that the AMA Guides do not take into consideration the fact that Petitioner had two surgeries, the Arbitrator also notes that the Guides **do** take into consideration the end result of the two surgeries. Specifically, the Guides consider the diagnoses, objective findings and self-reported pain complaints at the time of the impairment rating examination. In light of the foregoing, the Arbitrator gives significant weight to this factor.

In regard to factor **(ii) the occupation of the injured employee**, the record reveals that Petitioner was employed as a Correctional Officer at the time of the accident and that he was able to return to work in his prior capacity without any restrictions or limitations as a result of said injury. Petitioner's treating doctor, Dr. Paletta, opined that Petitioner could not only work with no restrictions, but that he could also continue his personal weightlifting with no limitations

except with regard to those lifts which he found caused him discomfort. The Arbitrator gives some weight to this factor when making the permanency determination.

In regard to factor **(iii) the age of the employee at the time of the injury**, Petitioner was 32 years old at the time of the accident. He has been able to return to his prior position without limitations and has a significant number of years to continue working. He will have to live and work with the ill effects of his injury for a longer period of time than an older individual. The Arbitrator finds that over time Petitioner's condition could improve, stay the same, or get worse. However, there was no evidence offered to indicate with any degree of likelihood how his age would impact his disability, and the Arbitrator does not speculate as to same. The Arbitrator gives some weight to this factor.

In regard to factor **(iv) the employee's future earning capacity**, Petitioner has returned to his prior position full duty, with no limitations. Neither party offered any evidence to show that Petitioner's future earning capacity has been impacted, and the Arbitrator has no basis to expect he will have any decreased earning capacity in the future. The Arbitrator places little weight on this factor.

In regard to factor **(v) evidence of disability corroborated by the treating medical records**, The Arbitrator notes Petitioner underwent two surgical repairs on his right shoulder, in addition to several injections. The medical records document Petitioner's complaints of pain and limitation of movement throughout his treatment. However, at his final examination by Dr. Paletta on May 29, 2015, Petitioner's only residual complaint was some discomfort when he would bring his arm down from an overhead position. Dr. Paletta released him to full activities, with the use of over-the-counter pain relievers as needed. Petitioner credibly testified to some continuing pain with certain activities and arm movements, both at work and in his personal life. He further candidly testified that he continues to weightlift five days a week and has slightly modified his workout routine to be more comfortable. Drs. Paletta, Emanuel, and Katz all noted, and the Arbitrator observed, that Petitioner was a well-muscled individual, which is consistent with his testimony regarding his weightlifting. The Arbitrator finds this to be significant. In light of the foregoing, the Arbitrator gives significant weight to this factor.

The Arbitrator notes that consideration of the factors enumerated in Section 8.1b does not simply require a calculation, but rather a measured evaluation of all five factors, of which no single factor is the sole determinant on the issue of permanency. Taking the above five factors into consideration, and based on the record in its entirety, the Arbitrator finds that Petitioner has sustained a 10% loss of use of the person as a whole (50 weeks) pursuant to Section 8(d)2 of the Act. The Arbitrator finds that Petitioner's average weekly wage is $1,146.69 and notes that the Stipulation sheet contained a typographical error with regard to same, in that it listed the average weekly wage as "$1,1146.69". The Arbitrator further finds that Petitioner's permanent partial disability rate is $688.01 per week.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ Affirm and adopt	☐ 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

Annette E. Pignon,
Petitioner,

vs.

Illinois State Police,
Respondent.

16IWCC0536

NO: 13 WC 10150

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 27, 2016 is hereby affirmed and adopted.

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

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

DATED: AUG 18 2016
KWL/vf
O-8/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0536

PIGNON, ANNETTE E
Employee/Petitioner

Case# **13WC010150**

14WC009125

ILLINOIS STATE POLICE
Employer/Respondent

On 10/27/2015, 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 0.15% 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:

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CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

OCT 27 2015

RONALD A. RARDIN, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

16IWCC0536

Annette E. Pignon
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # 13 WC 10150

Consolidated cases: 14 WC 09125

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on August 25, 2015. 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 _____

16IWCC0536

FINDINGS

On December 13, 2012, 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 $39,099.84; the average weekly wage was $751.92.

On the date of accident, Petitioner was 59 years of age, single with 0 dependent child(ren).

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 amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 4, 6, 7, 8, 9 and 11 for treatment provided to Petitioner in connection with her right carpal tunnel syndrome, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $501.28 per week for five-sevenths (5/7) weeks commencing February 25, 2013, through March 4, 2013 (one and one-sevenths (1 1/7) weeks less the three-seventh (3/7) weeks waiting period).

Respondent shall pay Petitioner permanent partial disability benefits of $451.15 per week for 19 weeks because the injury sustained caused the 10% loss of use of the right hand, as provided in Section8(e) of the Act.

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.

William R. Gallagher, Arbitrator

October 21, 2015
Date

OCT 27 2015

 Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged she sustained repetitive trauma injuries arising out of and in the course of her employment for Respondent. In case number 13 WC 10150, the Application alleged repetitive trauma to Petitioner's right hand and the nature of the injury was "carpal tunnel." The date of accident (manifestation) was alleged as December 24, 2012 (Petitioner's Exhibit 1). At trial, Petitioner's counsel made a motion to amend the date of manifestation to December 13, 2012. Respondent's counsel had no objection and the Arbitrator granted the motion and changed the date of manifestation alleged on the Application to December 13, 2012. In case number 14 WC 09125, the Application alleged repetitive trauma to Petitioner's left hand and the nature of the injury was "carpal tunnel syndrome." The date of accident (manifestation) was alleged as February 7, 2014 (Petitioner's Exhibit 12). In both cases, Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner began working for Respondent on December 1, 2008, as an Office Assistant in the Records Management Section. Petitioner testified that her job duties required her to manage/maintain a significant number of folders that contained reports/records. When Petitioner worked with the folders, she had to review and sort individual sheets of paper, make certain that they had the correct case number, that they were in proper sequence, in correct chronological order, etc. Petitioner would then use a hole punch at the top of each document and, once they were punched, they could be placed on two metal prongs and secured with a metal closure. When Petitioner used the hole punch, she would generally punch approximately 25 sheets of paper at the same time.

Petitioner stated that she would spend approximately six hours of every seven and one-half hour work day performing the aforementioned duties. Petitioner would assemble 75 to 100 folders per day depending upon how many documents were contained in each one.

Kathy Kirk, Petitioner's immediate supervisor, testified at trial. Kirk confirmed Petitioner's description of her job duties. Kirk also identified a printout of data that indicated how many sheets of paper Petitioner had to sort for the last six months of 2011, all of 2012 and 2013, and the first two months of 2014 (Respondent's Exhibit 5). Kirk testified, based on the preceding, that the amount of paper Petitioner had to handle decreased from 2011 to 2014. She also stated that sometime in May, 2013, Petitioner switched to Quality Control, which did not require Petitioner to sort or handle as much paper as she did previously.

The Arbitrator reviewed the data submitted into evidence by Respondent. For the last six months of 2011, Petitioner reviewed 121,048 sheets of paper; for 2012 and 2013, Petitioner handled 156,270 and 71,389 sheets of paper, respectively; and, for the first two months of 2014, Petitioner handled 10,560 sheets of paper (Respondent's Exhibit 5).

Petitioner testified that she started to experience numbness/tingling in her right hand while at work. In particular, Petitioner had these symptoms when she was in the process of removing folders from shelves in the office. She stated that she had problems grasping the folder long enough to get it from the shelf down to the table.

Petitioner initially sought medical treatment from Dr. Lorie Bleyer, her family physician, on December 13, 2012 (the date of manifestation alleged in the Application, as amended). At that time, Petitioner complained of right arm/hand numbness, in particular, numbness of the tips of the right third and fourth fingers. Dr. Bleyer ordered an EMG/nerve conduction study (Petitioner's Exhibit 10).

On December 13, 2012, Petitioner reported to Kathy Kirk that she had sustained a work-related injury to her right arm/hand (Petitioner's Exhibit 2). Kirk subsequently completed a "Demands of the Job" form which stated that Petitioner used her hands for gross manipulation and fine manipulation for four to six hours per day (Petitioner's Exhibit 2).

On December 24, 2012, Petitioner was seen by Dr. David Gelber, who performed an EMG/nerve conduction study on the right upper extremity. At that time, Petitioner informed Dr. Gelber that she had numbness of the right third and fourth fingers for the preceding six months. The EMG/nerve conduction study was positive for moderately severe right carpal tunnel syndrome (Petitioner's Exhibit 3).

Petitioner was subsequently seen by Dr. Mark Greatting, an orthopedic surgeon, on January 17, 2013. At that time, Petitioner was still being treated by Dr. Greatting for a left shoulder problem. In regard to Petitioner's right hand, Dr. Greatting's findings on examination were positive for carpal tunnel syndrome and he noted the positive EMG/nerve conduction study. He recommended Petitioner have a right carpal tunnel surgical release. On February 22, 2013, Dr. Greatting performed a right carpal tunnel release surgery. When Dr. Greatting saw Petitioner on April 8, 2013, her right hand symptoms had "markedly improved." (Petitioner's Exhibit 5; Deposition Exhibit 2).

In late summer/early fall of 2013, Petitioner started experiencing similar symptoms in her left hand. Petitioner again sought treatment from Dr. Bleyer who saw her on January 28, 2014. At that time, Petitioner complained of numbness in the thumb, index and middle fingers. Dr. Bleyer ordered an EMG/nerve conduction study (Petitioner's Exhibit 10).

On February 7, 2014, Petitioner was seen by Dr. Gelber who performed an EMG/nerve conduction study. The EMG/nerve conduction study was positive for moderate to severe left carpal tunnel syndrome (Petitioner's Exhibit 14).

Petitioner was subsequently seen by Dr. Greatting on February 20, 2014. Dr. Greatting's findings on examination were positive for left carpal tunnel syndrome and he recommended Petitioner have left carpal tunnel surgery performed. Dr. Greatting performed left carpal tunnel surgery on April 4, 2014 (Petitioner's Exhibit 15).

Dr. Greatting was deposed on April 22, 2014, and his deposition testimony was received into evidence at trial. Dr. Greatting's deposition was taken in regard to case number 13 WC 10150. In regard to causality, Dr. Greatting testified that he reviewed the report of injury, the Demands of the Job form and Petitioner's performance review for December 1, 2011, to November 30, 2012. When questioned whether there was a causal relationship between Petitioner's work activities

and the carpal tunnel syndrome on the right side, Dr. Greatting stated "I don't know that I could say that her work would directly cause her to have carpal tunnel. I think in a 60-year old female that did that type of work, that potentially, those activities could aggravate her symptoms, or you know, exacerbate her symptoms to the point where they required treatment." (Petitioner's Exhibit 5; pp 19-20).

When Petitioner's counsel began to question Dr. Greatting in regard to the left carpal tunnel syndrome, Respondent's counsel objected on the basis that Petitioner's counsel had not provided him with records regarding same. Therefore, Petitioner's counsel did not ask Dr. Greatting about whether Petitioner's work activities caused or aggravated the left carpal tunnel syndrome condition (Petitioner's Exhibit 5; pp 24-25).

At the direction of Respondent, Petitioner was examined by Dr. William Feinstein, an orthopedic surgeon, on August 26, 2014. Dr. Feinstein examined Petitioner in regard to both her right and left carpal tunnel syndrome conditions and was also requested to provide an AMA impairment rating. In his narrative report dated August 26, 2014, Dr. Feinstein opined that Petitioner had a permanent partial impairment rating of two percent (2%) at the level of the left upper extremity in regard to the "work-related left carpal tunnel syndrome." He also opined that Petitioner had a permanent partial impairment rating of two percent (2%) at the level of the right upper extremity in regard to the "work-related right carpal tunnel syndrome." Dr. Feinstein's report of that date also contained the statement that "There are no pre-existing conditions that contribute to the permanent partial impairment rating." (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Feinstein subsequently prepared a supplemental report dated September 15, 2014, directed to Charlene Shauwitzer, in response to a letter from her. In this report, Dr. Feinstein stated "In your letter, you requested that I specifically address causation regarding Ms. Annette Pignon's bilateral carpal tunnel syndrome and surgeries. After reviewing the records again and the IME report, it is my medical opinion that the bilateral carpal tunnel syndrome is in fact not related to work on the basis of the dates of injury, July 5, 2012 and February 7, 2014. It is more likely, that her conditions were related to diabetes, thyroid problems, age, menopause or insidious in onset. Again, it is my medical opinion that Ms. Annette Pignon's bilateral carpal tunnel syndrome is not work related." (Respondent's Exhibit 3; Deposition Exhibit 3).

Dr. Feinstein was deposed on January 12, 2015, and his deposition testimony was received into evidence at trial. Dr. Feinstein reaffirmed his opinion that Petitioner's bilateral carpal tunnel syndrome was not work-related as well as his AMA ratings of two percent (2%) impairment of the left and right upper extremities (Respondent's Exhibit 3; pp 13-14).

At trial, Petitioner testified that she was able to return to work to her regular job following both carpal tunnel surgeries. Petitioner stated that she still has some complaints of pain and numbness in the tips of her fingers of both hands.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury to her right hand arising out of and in the course of her employment for Respondent that manifested itself on December 13, 2012, and that her current condition of ill-being is causally related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony that her job duties required the active and repetitive use of her hands was unrebutted.

While Respondent presented evidence that the amount of paper Petitioner had to handle/sort decreased from 2011 to 2014, Petitioner was still required to handle/sort substantial amounts of same, in addition to her other hand intensive activities.

Petitioner's treating physician, Dr. Greatting, opined that Petitioner's work duties aggravated her symptoms to where carpal tunnel surgery was necessary. This opinion was based, in part, on Dr. Greatting's review of Respondent's description of Petitioner's job duties.

Respondent's Section 12 examiner, Dr. Feinstein, initially opined that Petitioner's right hand carpal tunnel syndrome was work-related. It was after he received correspondence from an individual, apparently acting on behalf of Respondent, that he opined to the contrary.

Based on the preceding, the Arbitrator finds the opinion of Dr. Greatting to be more credible and persuasive than that of Dr. Feinstein. Further, the Arbitrator finds that because Dr. Feinstein changed his opinion in regard to causality, it is highly questionable.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 4, 6, 7, 8, 9 and 11 for treatment provided to Petitioner in connection with her right carpal tunnel syndrome, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to payment of temporary total disability benefits of five-sevenths (5/7) weeks, commencing February 25, 2013, through March 4, 2013 (one and one-sevenths (1 1/7) weeks less the three-seventh (3/7) weeks waiting period).

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner was temporarily totally disabled during the aforestated period of time.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 10% loss of use of the right hand.

In support of this conclusion the Arbitrator notes the following:

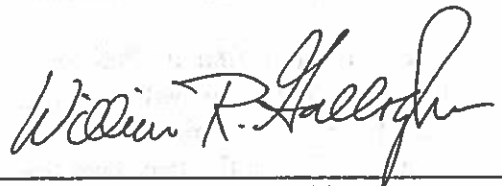
Dr. Feinstein opined to an AMA impairment rating of two percent (2%) permanent partial impairment of the right upper extremity. The Arbitrator notes that the impairment is for the right upper extremity and it is not limited to the right hand. The Arbitrator gives this factor moderate weight.

Petitioner's occupation required the active and repetitive use of her hands. The Arbitrator gives this factor moderate weight.

Petitioner was 59 years of age at the time of the manifestation. There was no evidence that this factor had any impact on Petitioner's right carpal tunnel syndrome condition or her subsequent recovery. The Arbitrator gives this factor no weight.

There was no evidence that Petitioner's right carpal tunnel syndrome will have any effect on her future earning capacity. The Arbitrator gives this factor no weight.

Petitioner was diagnosed with moderately severe right carpal tunnel syndrome and the condition required surgery. Petitioner made a good recovery after surgery, but still has some complaints consistent with the condition. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

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

David Anguiano,
Petitioner,
vs.

NO: 13WC 12532

Klein Tools, Inc.,
Respondent,

16IWCC0526

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 28, 2015, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $29,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 10 2016
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DLG/jrc
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANGUIANO, DAVID
Employee/Petitioner

Case# **13WC012532**

13WC006451

KLEIN TOOLS INC
Employer/Respondent

16IWCC0526

On 9/28/2015, 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 0.11% 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:

4103 GRAVLIN, MICHAEL J LLC
134 N LASALLE ST
SUITE 2020
CHICAGO, IL 60602

0445 RODDY LAW LTD
RICHARD ZENZ
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

16IWCC0526

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

David Anguiano
Employee/Petitioner

v.

Klein Tools Inc.
Employer/Respondent

Case # **13** WC **012532**

Consolidated cases: **13 WC 06451**

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **8/13/15**. 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 _____

16IWCC0526

FINDINGS

On **7/01/09**, 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 $**39,013**; the average weekly wage was $**750.25**.

On the date of accident, Petitioner was **44** years of age, ***married*** with **1** dependent children.

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

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

Respondent shall be given a credit of $**0** 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

Respondent shall pay Petitioner permanent partial disability benefits of $450.15/week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act. ($ 28,134.38)

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

09-28-15
Date

SEP 28 2015

16IWCC0526

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE WORKERS' COMPENSATION COMMISSION OF ILLINOIS

DAVID ANGUIANO,)
)
Petitioner,)
)
) NO. 13 WC 12532
v.)
)
KLEIN TOOLS, INC,)
)
Respondent.)

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The only disputed issue in this matter is nature and extent of Petitioner's injury.

Petitioner David Anguiano (hereinafter "Petitioner") worked for Respondent Klein Tools, Inc (hereinafter "Respondent") for 22 years including on the date of accident July 1, 2009. The parties stipulated to an average weekly wage of $750.25. The parties also stipulated that Petitioner had a work-related injury on July 1, 2009, and that Petitioner's condition of ill-being was causally related to the injury. At the time of the accident, Petitioner was a 44 year old married man, claiming one dependent child under the age of 18.

Petitioner testified that on July 1, 2009 he was working as a machine operator for Respondent. He had been working for Respondent for over 22 years, beginning in September of 1989. Petitioner's duties as a machine operator included standing for long periods of time and operating machines which both produce and assemble parts for pliers. Petitioner also had to occasionally carry, lift, and push heavy pans filled with parts. Petitioner began to experience acute pain on the left side of his neck, in both shoulders and in both elbows around July 1, 2009. Petitioner described the pain as a tense, balled up and swollen sensation in his neck. Petitioner testified that pain shot through his neck every time he would to turn to look to the side.

Petitioner sought treatment with Dr. Peter Petrovas, DC on July 13, 2009 for neck and shoulder pain which began while performing his work duties for Respondent on July 1, 2009. Dr. Petrovas recommended that Petitioner get an MRI of his cervical spine. (Pet. Ex. 1) The MRI of August 25, 2009 showed a 5mm, left-central intervertebral disc protrusion at C5-C6 which lead to effacement of the ventral aspect of the cervical spinal cord and moderate left foraminal stenosis. (Pet. Ex. 1). An EMG conducted on September 5, 2009 revealed bilateral cervical radiculopathy involving C5 and C6 nerves and the associated nerve root. (Pet. Ex. 1). Dr.

Petrovas recommended that Petitioner continue treatment and that he may continue working without restrictions. (Pet. Ex. 1). Petitioner continued physical therapy treatments with Dr. Petrovas through September 18, 2009 and continued to work for Respondent throughout this time.

Petitioner testified that around September 26, 2009 he sought treatment from Dr. David L. Spencer, M.D. at the Spine Center, in Park Ridge, Illinois. (Pet. Ex. 3). Petitioner told Dr. Spencer that he developed pain in his neck and his shoulder region, with numbness and tingling in both arms, as a result of "lots of work" as a machine operator. (Pet. Ex. 3). Dr. Spencer noted that Petitioner was "experiencing mostly muscular type neck and shoulder girdle pain which is probably highly related to his occupational activities". (Pet. Ex. 3). Dr. Spencer recommended a trial course of oral steroids and instructed Petitioner to continue his present work status. (Pet. Ex. 3). Petitioner saw Dr. Spencer again on October 21 and December 3, 2009. Petitioner continued to have pain in his neck which Dr. Spencer recommended he treat with Ibuprofin. (Pet. Ex. 3).

Petitioner sought treatment for his neck pain at Athletico Physical Therapy. His treatment ran from March 22, 2010 and ended April 16, 2010. (Pet. Ex. 3). During the initial evaluation, Mike A. Mendiola P.T., opined that "physical therapy was necessary to restore full, pain-free cervical range of motion and to allow patient to perform normal work duties without pain or restriction". (Pet. Ex. 3). The treatments he received included moist heat, soft tissue massage, stretching, active/passive range of motion, posture reeducation, PREs, and home exercise program instruction. (Pet. Ex. 3). Petitioner testified that he continued to work throughout this time, even though working for Respondent increased his symptoms.

When the pain in his neck would not subside, Petitioner sought treatment at Northwestern Memorial Hospital with Dr. John C. Liu and Dr. Tyler Koski beginning on September 28, 2010. (Pet. Ex. 4). The pain in his neck hadn't improved much over the previous year. (Pet. Ex. 4). Dr. Liu noted that Petitioner's symptoms and MRI were consistent with a C6 radiculopathy which was confirmed by the EMG. (Pet. Ex. 4). Dr. Liu believed that since these symptoms were going on for over a year, Petitioner was a surgical candidate for anterior cervical discectomy follow by fusion or artificial disc. (Pet. Ex. 4).

In February of 2011, Petitioner was again seen at Northwestern Memorial Hospital, this time by Kristen Smith, Nurse Practitioner for Dr. Tyler Koski. (Pet. Ex. 4). Petitioner was interested in attaining the epidural injection which Dr. Liu suggested back in September. At this time, Petitioner was suffering from cervical radiculitis. (Pet. Ex. 4). On March 18, 2011 Dr. Kiran Chekka administered the cervical epidural steroid injection to C5-6 to the center of the back of Petitioner's neck. (Pet. Ex. 4). Petitioner reported substantial improvement to his symptoms; however still had functionally limiting pain. Petitioner testified that he received a second epidural steroid injection with catheter to C5-6 on April 29, 2011. It was again administered by Dr. Kiran Chekka. (Pet. Ex. 4). Petitioner worked through the pain and went to work for Respondent on a regular basis throughout these treatments. Petitioner testified that he would leave work early on the days he received the injections, and would be back at work the next day.

Petitioner had an Independent Medical Examination performed by Dr. Douglas L. Johnson on January 10, 2012 at DuPage Neurosurgery, S.C. (Pet. Ex. 5). Dr. Johnson reviewed Petitioner's blood work which demonstrated a positive ANA titer, which was suggestive of an automimmune disorder and needed further evaluation. (Pet. Ex. 5). Dr. Johnson opined that Petitioner has the potential for a lifelong situation in which he will have good days and bad days. (Pet. Ex. 5). Dr. Johnson further noted that Petitioner's underlying condition might be related to an autoimmune disorder; however that Petitioner's work for Respondent certainly would aggravate an underlying joint condition. (Pet. Ex. 5). Dr. Johnson stated that it is a "testament to [Petitioner's] desire to continue working that he has not allowed himself to be taken off work and has worked continuously for the past two years" while this situation and treatments were ongoing. (Pet. Ex. 5).

CONCLUSIONS OF LAW

(L) NATURE AND EXTENT OF THE INJURY

Based upon the medical records and the credible and unrebutted testimony of the Petitioner, the Arbitrator finds that Petitioner has sustained a loss pursuant to section 8(d)(2) of the Act. The Arbitrator finds that Petitioner is entitled to 15% loss of use of man as a whole as a result of the work related injury.

Petitioner suffered a repetitive-trauma type injury to his neck after twenty years of working for Respondent as a machine operator. Petitioner was deemed to be suffering from cervical radiculitis. Petitioner's August 2009 MRI revealed a left-central intervertebral disc protrusion at C5/6. Petitioner continued to work through his pain; however the pain reached a point to where it was medically necessary and reasonable for him to receive two cervical epidural injections to relieve him of the pain in his neck. The injections were deemed medically necessary by Dr. Tyler Koski and Dr. Kiran Chekka. Further, Dr. Johnson opined in his IME of January 10, 2012 that all of Petitioner's medical treatment to date had been necessary and reasonable. Dr. Spencer opined that the pain Petitioner was experiencing is "probably highly related to his occupational activities." Petitioner testified that his neck feels much better today, but the pain occasionally comes back. Therefore, the Arbitrator finds that Petitioner is entitled to 12.5% loss of use of man as a whole, equivalent to 62.5 weeks of benefits pursuant to Section 8(d)(2) of the Act, for the repetitive-trauma injury he suffered as a result of his employment with Respondent.

ARBITRATOR

DATED AND ENTERED

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

Rosa Martinez,

Petitioner,

16IWCC0509

vs.

NO: 13 WC 20060

Total Staffing,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability and permanent partial disability benefits and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms the Decision of the Arbitrator, which is attached hereto and made a part hereof. After reviewing the entire record and for the reasons set forth below we find that Petitioner was not entitled to temporary total disability benefits after her September 11, 2013 full duty release by her treating physician, Dr. Verma. Additionally, we find that all subsequent treatment provided or ordered by Dr. Silver was excessive.

Petitioner, who sustained an undisputed fall onto her left knee on May 12, 2013, underwent arthroscopic surgery by Dr. Verma on June 26, 2013 for a suspected lateral meniscus tear. Intraoperatively, the lateral meniscus was found to be intact and normal. Petitioner's post-operative diagnosis was a small parapatellar plica. Petitioner participated in extensive physical therapy and Dr. Verma released her to light duty work in August of 2013. Petitioner testified that Respondent could not accommodate modified duty and she remained off of work. On September 11, 2013, Dr. Verma released Petitioner to full duty work. He noted that Petitioner's clinical exam was normal despite subjective complaints of burning pain in the front of the left knee. Dr. Verma advised Petitioner that in his opinion her complaints were not attributable to the injury she sustained.

Petitioner testified that her attorney referred her for a second opinion with Dr. Silver because she was still having severe pain and did not believe that she could return to work. On September 20, 2013, Dr. Silver noted that Petitioner was "limping badly" and complained of pain, swelling and stiffness in the left knee. Dr. Silver excused Petitioner from work and recommended additional physical therapy and medications. On October 9, 2013 Petitioner returned to Dr. Verma and he discharged her from his care at maximum medical improvement. Dr. Verma noted that Petitioner's exam was once again normal and that the source of her ongoing symptoms was unclear. Dr. Verma advised Petitioner that it was safe for her to return to full duty work and she may use ice and anti-inflammatories.

We rely on the credible medical records of Dr. Verma and find that Petitioner reached maximum medical improvement as of October 9, 2013, and that Petitioner was not entitled to temporary total disability benefits after September 11, 2013. We find that treatment by Dr. Silver was excessive. Dr. Silver was not deposed in advance of hearing. We are not persuaded that additional therapy or medications prescribed are medically necessary. Furthermore, Dr. Silver's records indicate that the prescription pain medication he prescribed was not detected in any of the four random drug screens Petitioner was subjected to. Petitioner initially testified that she took her medications as prescribed, but subsequently explained that in fact she did not take pain medication every day. Petitioner's testimony is inconsistent with her claim that she had severe pain on a daily basis.

We find that Petitioner is entitled to permanent partial disability benefits representing 10% loss of use of the left leg pursuant to §8(e). Under the Act, the Commission shall base its determination of permanency on (i) the AMA rating of a medical professional, (ii) the occupation of the injured employee, (iii) the age of the employee at the time of the injury, (iv) the employee's future earning capacity, and (v) evidence of disability corroborated by the treating records. Petitioner was 42-years-old on May 12, 2013 and employed as a laborer for Respondent. Petitioner was released to return to full duty work by her treating physician, Dr. Verma, on September 11, 2013 and he placed her at maximum medical improvement on October 9, 2013. Petitioner's diagnosis is knee pain; on clinical examination her left knee was objectively normal. There is no AMA rating or medical testimony regarding permanent disability. In accordance with our findings, we reduce the Arbitrator's permanent partial disability award to 10% of the left leg pursuant to §8(e).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 3 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 21.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 10% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for reasonable and necessary medical treatment, by Dr. Verma and ATI physical therapy through October 9, 2013 pursuant to §8(a) and §8.2 of the Act. All expenses for office visits, testing and

16IWCC0509

treatment by Dr. Silver as well as the medications and physical therapy prescribed by Dr. Silver are denied as excessive treatment.

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

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

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

DATED: AUG 2 - 2016
RWW/plv
o-06/22/16
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

SAMUEL LINTON,

Petitioner,

16IWCC0542

vs.

NO: 13 WC 031335

UNITED AIRLINES, INC.,

Respondent.

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 jurisdiction, accident, TTD, medical expenses, and nature and extent and being advised of the facts and law, reverses the Decision of the Arbitrator which is attached hereto and made a part hereof.

The Decision of the Arbitrator, filed with the Commission on August 6, 2014, awarded no benefits under the Act. It was found Petitioner, a flight attendant, failed to prove his injury was the result of an accident that arose out of and in the course of his employment. Having so found, all other issues were deemed moot. The Commission posits the contested issue of jurisdiction should not have been deemed as such and should have been addressed in the Decision of the Arbitrator.

The Act confers jurisdiction over employment-related accidents upon the Commission under any one of three criteria: 1) the contract for hire was made within the State of Illinois; 2) accidents that result in injuries occurred within the State of Illinois; and 3) accidents occurring to persons whose employment is principally localized within the State of Illinois. 820 ILCS 305/1(b) (2013). It is the third of the three criteria Petitioner finds confers jurisdiction to the Commission as Respondent, Petitioner argues, is principally localized in Chicago, Illinois.

The question of principal localization of employment was addressed in *Cowger v.*

16IWCC0542

Industrial Commission, 313 Ill.App.3d 364 (5th Dist. 2000). There, a nationwide truck driver wished to exercise Illinois jurisdiction regarding a vehicular accident in Texas. The Commission denied jurisdiction, and the Appellate Court affirmed that finding, stating "...employment is principally localized in this or another State when (1) his employer has a place of business in this or such other State and he regularly works at or from such place of business, or (2) if clause (1) foregoing is not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other State." *Cowger*, 313 Ill.App.3d at 372, internally citing *Montgomery Tank Lines v. Industrial Commission*, 263 Ill.App.3d 218, 222 (1994, and 4 A. Larson, Workmen's Compensation Law app. H, 629, 649-50 (Model Act) (1986).

Under either above scenario, Petitioner fails to show his employment is localized in Illinois. While Respondent is headquartered in Chicago, Illinois, Petitioner testified to working out of Respondent's facility in Houston, Texas. As such, Petitioner's employment is found to be localized there. The alternative consideration, where Petitioner "is domiciled and spends a substantial part of his working time in the service of [Respondent]," is, again, Houston.

The *Cowger* court noted further that this "'focuses first, and foremost, upon the situs where the employment relationship is centered,' and the alternative test involving domicile and working time is not be considered unless the situs of the relationship cannot be determined." *Id.* The *Cowger* court then enumerated five factors to be considered in determining the situs of the employment relationship, to wit:

(1) where the employment relationship is centered, i.e., the center from which the employee works;

(2) the source of remuneration to the employee;

(3) where the employment contract was formed;

(4) the existence of a facility from which the employee received his assignments and is otherwise controlled; and

(5) the understanding that the employee will return to that facility after the out-of-State assignment is complete.

Cowger, 313 Ill.App.3d at 373, itself citing *Montgomery Tank Lines*, supra.

The *Cowger* court then detailed the application of each factor to the claimant's employment, ultimately concluding the claimant's employment was not principally localized in Illinois.

Applying those same factors to this case, the nexus between Petitioner's employment and Illinois is minimal. Petitioner resides in, works out of and returns to Houston after completing his assigned routes. Petitioner's supervisors, both past and present, were and are Houston-based, though Petitioner is required to call the Operations Department in Chicago if he is unable to work as scheduled. Petitioner was hired by then-Continental Airlines in Houston and was not required to reapply for his job after Continental Airlines merged with United Air Lines. There is uncertainty as to where Petitioner's remuneration originates from. Testimony was given by both parties as to the various departments that are located in Respondent's Chicago headquarters. Neither, however, explicitly indicated that the payroll department is among them.

16IWCC0542

The Commission finds Petitioner relies upon a mistaken interpretation of Section 1(b) in arguing Commission has the jurisdiction to adress his claim. It is not the location of the employer, as Petitioner argues, that confers jurisdiction upon the Commission but the principal location of the employee's employment. Accordingly, the Commission finds Petitioner's principal location of employment is Houston, Texas. Under the circumstances of this case, jurisdiction to adjudicate Petitioner's claim is not conferred upon Illinois.

IT IS THEREFORE ORDER BY THE COMMISSION that the Decision of the Arbitrator filed August 7, 2014, is hereby reversed. Compensation is denied.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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: AUG 18 2016
KWL/mv
O-6/21/16
42

Kevin W. Lamborn

Joshua D. Luskin

Thomas J. Tyrrell

ILLINOIS WOR ERS' COMPENSATION C MMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0542

LINTON, SAMUEL
Employee/Petitioner

Case# 13WC031335

UNITED AIRLINES INC
Employer/Respondent

On 8/7/2014, 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 0.05% 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:

0365 BRIAN J McMANUS & ASSOC LTD
30 N LASALLE ST
SUITE 2126
CHICAGO, IL 60602

2542 BRYCE DOWNEY & LENKOV LLC
RICH LENKOV
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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

Samuel Linton
Employee/Petitioner
v.
United Airlines, Inc.
Employer/Respondent

Case # 13 WC 31335
16IWCC0542

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **March 31, 2014, April 25, 2014, and April 30, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS AND CONCLUSIONS

Petitioner, Samuel Linton, claims that he was injured on August 1, 2013, while working for Respondent, United Airlines, Inc., when he fell in his hotel room. One of the highly disputed issues is whether an accident occurred that arose out of Petitioner's employment.

Petitioner testified that he is a flight attendant and that that on August 1, 2013 he was in a Miami hotel room on a layover from Houston. He testified that he had been out on the balcony with the sliding glass door open and decided to get dressed to go downstairs. He testified that he was in his bare feet. He testified that the room had a marble foyer going to the bathroom. He testified on direct examination "And as soon as I hit the marble floor, my feet went up and I landed on my right hip, right shoulder and right side of my head." On cross examination he was asked if there was nothing on the floor to cause him to fall. He testified, in relevant part, "Not that I can remember."

Petitioner, as a traveling employee, is required to stay in hotel rooms during layovers. However, he was not engaged in any foreseeable activity. Petitioner fell down, due to an unknown cause, while walking in his bare feet.

Based upon the foregoing, the Arbitrator finds that Petitioner has not carried his burden of proof, by preponderance of the evidence, that an accident occurred that arose out of his employment.

The remaining issues are moot.

ORDER

No benefits are awarded, because Petitioner has not carried his burden of proof that an accident occurred that arose out of his employment.

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.

Milton Black

Signature of Arbitrator

August 6, 2014
Date

AUG - 7 2014

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

ADAM BURRELL,

Petitioner,

vs.

NO: 13 WC 31957

CITY OF CHICAGO,

Respondent,

16IWCC0512

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 issue of accident, causation, benefit/wage rate, medical expenses, temporary total disability, penalties and attorney's fees, and "Denial by Fault finding," and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the changes noted below.

The Commission strikes the first paragraph on page five relating to distracted driving. We find that the evidence shows that Petitioner was most likely intoxicated and that this was the proximate cause of the accident. Petitioner claimed that he had "a couple" of beers between 12 p.m. and 3 p.m. earlier in the day but didn't have any alcohol between that time and when his shift started at 11 p.m. However, it is unreasonable to believe that Petitioner's breath alcohol test results would be .033% fourteen hours after the last of "a couple" beers. It is most likely that Petitioner actually drank a lot more than he admitted and was significantly intoxicated when he started his shift. We also find that it is likely that the accident occurred much earlier, probably shortly after he arrived at work at 11 p.m., because Petitioner skipped his hourly check-ins at midnight and 1 a.m.

The supervising watchman, Ricardo Martinez, testified that he tried calling Petitioner on the Nextel and then also his personal cell phone when Petitioner did not check in at midnight and 1 a.m. He sent the field supervisor, Mike Adams, to check on Petitioner. At 1:37 a.m., Mr. Adams informed Mr. Martinez that Petitioner was in an accident. A few minutes later, Petitioner called him directly and told him about the accident. In contrast, Petitioner claimed that the

accident happened at 2 or 3 a.m. and that he called the foreman, Michael, and told him he had an accident. (T.17-18). This is not consistent with the other evidence.

A different supervisor, Eliga Jubiter, testified that he went to the location of the accident and completed an accident damage report. He checked "influenced by alcohol or drugs" on the form. He was present when Petitioner underwent his drug/alcohol test and was told by his supervisor to drive Petitioner home because they didn't want him to drive with alcohol in his system.

Although the level of alcohol detected in the breath test does not meet the .08% threshold in Section 11 of the Act to create a rebuttable presumption that intoxication was the proximate cause of Petitioner's injuries, we find that the facts and circumstances of this case, along with Petitioner's lack of credibility on multiple issues, are sufficient to prove by a preponderance of the evidence that Petitioner's intoxication was the proximate cause of his accident.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed July 7, 2015, is hereby affirmed and adopted with the modifications noted above.

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: AUG 2 - 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 6/22/16
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BURRELL, ADAM
Employee/Petitioner

Case# **13WC031957**

CITY OF CHICAGO
Employer/Respondent

16IWCC0512

On 7/7/2015, 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 0.08% 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:

1973 LUIS G ATSAVES LTD
200 W JACKSON BLVD
SUITE 1050
CHICAGO, IL 60606

1452 CHASE & WERNER LTD
300 W ADAMS ST
SUITE 330
CHICAGO, IL 60606

0010 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST 8TH FL
CHICAGO, IL 60602

16IWCC0512

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

Adam Burrell
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # 13 WC 31957

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **February 27 and March 27, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/22/2013**, 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*** 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 **$42,000.90**; the average weekly wage was **$807.71**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **1** dependent child.

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

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

Respondent shall be given a credit of **$0** 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

The Arbitrator finds that Petitioner failed to prove that an accident arose out of or in the course of his employment by Respondent.

As the Arbitrator previously found that there was no accident arising out of or in the course of employment, all other issues are moot.

The Arbitrator finds that there was a reasonable basis of dispute in this case and that Petitioner has not met the burden of proving his case, therefore there is no basis for penalties or fees to be imposed on Respondent.

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

July 7, 2015
Date

JUL 7 - 2015

16IWCC0512

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth on February 27, 2015. Proofs were continued to March 27, 2015, at which time proofs were closed.

Disputed issues included: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to the accident?; ***G:*** What were Petitioner's earnings?; ***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? TTD; ***L:*** What is the nature and extent of the injury?; ***M:*** Should penalties or fees be imposed upon Respondent?

Petitioner, Ricardo Martinez, and Elija Jubitar testified at hearing. The parties submitted documents in evidence. The Arbitrator took all evidence under advisement.

STATEMENT OF FACTS

Petitioner, age 56, testified that on September 22, 2013, he was employed as a yard watchman by Respondent. Petitioner worked the 3rd shift, which started at 11pm and ended at 7am. Petitioner was assigned to the yard at 52nd and Western Avenues. In that yard trucks and machinery were either parked for overnight or awaiting mechanical repairs. He was earning $20.35/hour.

Petitioner testified that on September 22, 2013, while performing his rounds as watchman, driving a small "Jeep", he heard a noise. He turned his head to see what the noise was about. While his head was turned his vehicle struck a parked tow truck. Petitioner testified that following the collision, he felt shook up and had a sharp pain to his neck and back near his waistline. Petitioner testified this occurred between 1:00am and 2:00am.

On the day of the accident (actually the day before), Petitioner testified that he had attended his son's homecoming picnic at Evergreen Park. The picnic was from 12pm to 3pm. He testified that while at the picnic he consumed a couple of beers. He did not consume any alcohol between 3pm through 11pm.

After the accident Petitioner called his supervisor, Mike, on his 2 in 1 radio/phone to report the accident. Police arrived on scene and a report was completed. Another supervisor arrived on scene and took him for a drug test. He testified that as part of Respondent's protocol, he was taken to a clinic at 39th and Pershing, U.S. HealthWorks Medical Group, for drug testing. The drug test was done between 4 am and 5am. He testified that he signed the drug testing form that he was informed that his results were positive, 0.033% alcohol. He

identified his signature on the drug testing form. (RX #2) Following the test, he was driven home.

Petitioner testified that once he got home he noticed a little pain. The next day his pain was worse. He testified that on September 23, 2013, he sought treatment with a chiropractor located at 43rd and Kedzie, Integrity Medical Group (Integrity). Petitioner gave a history at Integrity of driving a Jeep, hearing a noise, and hitting a parked vehicle that was randomly parked. He reported that he was significantly jerked and jolted in his seat. He complained of neck and back pain since the accident.

Petitioner came under the care of chiropractors Mary Dietz and Tina DiGiovanni at Integrity. (PX #2) On September 23 Dr. Dietz recorded Petitioner's history and complaints. Petitioner gave a history of a motor vehicle accident and significant neck and back pain since the accident. Petitioner denied any previous injury or complaint to his neck or back.

Petitioner was diagnosed a cervical and lumbar sprain/strain along with a right finger laceration. Dr. Dietz noted that it was a work related injury. Dr. Dietz ordered conservative physiotherapy 3 times a week for 2 weeks. Dr. Dietz also recommended an evaluation by Dr. Johnson.

Petitioner saw Claudia Johnson, M.D., on October 7, 2013. Petitioner reported his neck and back pain at 7/10. The only prior injury Petitioner reported was one to the right 5th digit which was reinjured in the September 22 accident. Dr. Johnson came to the same diagnoses as did Dr. Dietz. Dr. Johnson recommended therapy 3 times a week for the next 4 weeks and prescribe Mobic.

Petitioner received chiropractic therapy through November 1, 2013. Petitioner was discharged from care and released for return to work on November 5, 2013 after evaluation by Krishna Chunduri, M.D. and findings that all pain had been resolved.

Petitioner testified that when he returned to work as a watchman he felt soreness. He testified that he continued to work as a watchman until his termination in 2014 for sleeping on the job. He still has pain; he has problems getting out of bed and his low back really hurts. He testified that he has not seen any doctors for his injuries since his discharge from care November 5, 2013.

At hearing Petitioner denied that he had ever had an injury to his neck or back before this accident. On cross-examination he admitted that he had a prior Workers' Compensation claim for his back against Christ Hospital, represented by attorney Houston Burnside, in 1999. (RX #1, 00 WC 3121)

Ricardo Martinez testified on behalf of Respondent. He works for Respondent as a supervisor of watchmen. He has held that job for 3 ½ years. Mr. Martinez testified that he was working a split shift on September 22, 2013. He testified that part of the watchman's responsibility is to check in on the 2 way radio or cellphone once an hour. On the date of the accident, he was working a

split-shift. Petitioner failed to make his 12 am and 1am check-ins. Mr. Martinez testified that he made several attempts to reach Petitioner, but was unsuccessful, so he sent field supervisor Michael Adams to check on Petitioner.

Martinez testified that at approximately 1:43 am he was notified by field supervisor Adams that Petitioner had been involved in a collision with a parked tow truck. Mr. Martinez went to the 52nd and Western facility to investigate the event. He spoke with Petitioner and asked if he was OK. Mr. Martinez testified that Petitioner said he was OK and declined medical attention. He said Petitioner reported that he forgot his 12 am and 1 am check-ins.

Mr. Martinez testified that his portion of the split shift was ending, so he briefed his relief, Mr. Elija Jubitar, another supervising foreman.

Mr. Martinez testified that approximately 3 weeks later he completed an Injury on Duty report. He testified that he made the report 3 weeks later because that was the first time an injury was reported to him. He testified that he spoke with Petitioner and copied the information provided to him by Petitioner. The Injury on Duty report indicates that Petitioner crashed into the rear of a parked tow truck and that Petitioner began to feel lower back, neck and right pinky finger pain later that date.

On cross examination, Mr. Martinez testified that he did see the results of the drug test, specifically pages 2, 3, 4, 5, 8a and 9, but he could not recall when he saw the results. He testified that he did not know why he did not include the alcohol results in the accident report and he did not know why Petitioner was never written up.

Mr. Martinez did not offer his lay opinion of whether Petitioner was intoxicated or impaired at the time of the accident.

Mr. Elija Jubitar, Respondent's foreman of watchmen, also testified on behalf of Respondent. He has been employed by Respondent for more than 20 years. He testified that on September 22, 2013, he began his split shift at 3am. Mr. Jubitar testified that when he arrived to work, he was notified that Petitioner had an automobile collision with a parked tow truck. He arrived on the scene of the collision at approximately 3:45am. He took photos of the vehicles. He noticed a plate of food in the vehicle Petitioner was driving.

Mr. Jubitar escorted Petitioner to the 39th and Pershing building for his alcohol testing. He witnessed Petitioner sign the authorization for drug testing and witnessed the testing itself. He testified that at 4:35am the lab tech notified him that Petitioner tested positive for alcohol.

Mr. Jubitar testified that he took photographs of both vehicles and completed a Vehicle/Equipment Accident/Damage Report. (RX #4) The Vehicle/Equipment Accident/Damage Report indicates that the driver was under the influence. He does not know who wrote "driver under the influence". Petitioner told him that he had a few beers at a party hours before the accident.

Mr. Jubitar also testified that Petitioner was terminated sometime after the accident because of sleeping on the job.

Mr. Jubitar did not offer his lay opinion of whether Petitioner was intoxicated or impaired.

Petitioner had a negative test for illicit drugs and a "non-negative" alcohol test. (RX #2) The word "positive" was scratched from the report dated October 3, 2013 for the testing performed on September 22, 2013. The test performed on September 22, 2013 revealed a blood alcohol concentration (BAC) of 0.033%, below the level of a rebuttable presumption of intoxication that would be the proximate cause of injury.

Respondent did not present evidence by way of extrapolation by recognized and accepted scientific method that Petitioner's BAC was at 0.08% or above at the time of the accident.

CONCLUSIONS AT LAW

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

The Arbitrator finds, upon review of all the evidence, that Petitioner failed to prove by a preponderance of the evidence that an accident occurred in the course of his employment by Respondent. Petitioner's claim of injury arising out of and in the course of his employment lies solely on his credibility. The Arbitrator finds that Petitioner was not a credible witness.

Petitioner testified that he was distracted by a noise at the time he drove his vehicle into a parked tow truck. The Arbitrator does not find this account of the events to be believable. There was circumstantial evidence that Petitioner was not attending to his assigned job duties when he failed to make scheduled check-in reports at midnight and at 1:00am. The presence of a plate of food in Petitioner's vehicle is also circumstantial evidence of lack of attendance to assigned job duties.

More damaging to Petitioner's credibility was his multiple denials, at hearing and to treating physicians, that he had a prior back injury. Petitioner admitted to his prior Workers' Compensation claim only after being confronted on cross-examination. In addition, The Arbitrator found Petitioner's demeanor during his testimony to be evasive and equivocal. At times it appeared that Petitioner was formulating rather than remembering when answering. This attribute was best illustrated by Petitioner's testimony that Dr. Dietz, a chiropractor with no prescriptive privileges, prescribed Vicodin, a narcotic analgesic.

Furthermore, Petitioner's claim is based on his own distracted driving. Distracted driving was not incidental to his duties as a watchman. The evidence does not support a finding that some risk of Petitioner's employment caused or contributed to the injury on September 22, 2013. The evidence does not show the activity Petitioner was engaged in at the time of his injury, distracted driving, was a risk distinctly associated with his employment, or the job increased his risk of injury in concert with a personal risk, or that the act he was engaged in exposed him to a greater risk than the general public.

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

The Arbitrator has previously found that Petitioner failed to prove that his accident arose out of and in the course of his employment. Therefore, the issue of his current state of ill-being is moot.

G: What were Petitioner's earnings?

The Arbitrator has previously found that Petitioner failed to prove that his accident arose out of and in the course of his employment. Therefore, the issue of his earnings is moot.

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

The Arbitrator has previously found that Petitioner failed to prove that his accident arose out of and in the course of his employment. Therefore, the issue of the reasonableness and necessity of medical care is moot.

K: What temporary benefits are in dispute? **TTD**

The Arbitrator has previously found that Petitioner failed to prove that his accident arose out of and in the course of his employment. Therefore, the issue of TTD is moot.

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

The Arbitrator has previously found that Petitioner failed to prove that his accident arose out of and in the course of his employment. Therefore, the issue of nature and extent of injury is moot.

M: Should penalties or fees be imposed upon Respondent?

The Arbitrator has previously found that Petitioner failed to prove that his accident arose out of and in the course of his employment. Therefore, the issues of penalties and fees are moot.

However, the Arbitrator does note that Respondent's preliminary investigation of Petitioner's accident revealed that Petitioner had some alcohol in his system at the time of the accident. The Arbitrator finds that this was a reasonable basis to dispute Petitioner's claim. Correspondingly, Petitioner has not met the burden of proving that penalties and fees should be imposed upon Respondent.

Jul 7, 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF URBANA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ruston Morecraft,
Petitioner,

vs.

First Baptist Church of Oblong,
Respondent.

NO: 13 WC 35271

16IWCC0503

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Lindsay finding Petitioner sustained an accidental injury arising out of and in the course of his employment on April 14, 2013. As a result Petitioner was entitled to $28,355.23 in medical expenses under Section 8(a) of the Illinois Workers' Compensation Act and permanently lost 17.5% of the use of his right leg under Section 8(e) of the Act. The issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of his employment on April 14, 2013, whether a causal relationship exists between the alleged April 14, 2013 work accident and Petitioner's present condition of ill-being, and if so, the extent of Petitioner's temporary total disability and the nature and extent of Petitioner's permanent disability. The Commission, after reviewing the entire record, reverses the Arbitrator and finds Petitioner failed to prove he sustained an accidental injury arising out of his employment on April 14, 2013.

FINDING OF FACTS AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified he is a pastor. He normally comes in about 2-3 hours before a service and makes a sweep of the church to make sure none of the lights are on that do not need to be on and the heating units are turned on. He attempts to conserve resources and he

does not think it is necessary to have lights on in an area where the people are not going to gather.

2. On April 14, 2013, approximately 30-45 minutes before other people arrived, he noticed a light was on at the end of the hall that spanned from the entrance to the auditorium. He typically turns off lights that are not being used so that others are not entering in that area. He went to turn the light off that is located next to an outside entrance. There is a mat there where people wipe their feet. The carpeted mat with the one inch rubber edge is located on the carpet in the hallway. On that day he was standing on the mat that did not move when he reached to turn off the light. He was wearing tennis shoes at the time, which he assumed would give him a little more opportunity to grab than his dress shoes would have had. After he turned off the light, he turned/pivoted to go back; he did not pick up his foot. At that time, he experienced a really sharp pain in his right knee. He tried to take another step but he was not able to take one. He stood in the hallway until the first person arrived. He hollered to the couple and they brought him an office chair. He sat down in the chair and wheeled himself to the fellowship hall where he taught. After teaching, he wheeled the chair out to a van where he was loaded in and taken to the hospital. He believes he was probably carrying a Bible and study course book in his hand as he moved toward the fellowship hall to turn off the light. He did not stop to drop these items off.

3. On April 14, 2013, Petitioner was seen at Union Hospital. It was noted that Petitioner presented with a sudden onset of pain, swelling, redness and stiffness in his right knee. He reported that for the past two weeks he had right knee pain. Today, while at church, he put pressure down on right knee and he felt immediate pain. He reported that he had been sitting at a desk for several hours prior to standing up. When he stood up his right knee felt stiff. The patient also stated that he started walking down the hall and when he turned, he suddenly felt a severe pain in his right knee. A right knee CT was ordered. The emergency doctor noted that degenerative changes and joint effusion were present. He diagnosed Petitioner with right knee pain. He ordered an immobilizer and prescribed Norco.

4. On April 17, 2013, Petitioner was seen by Dr. McDonald at CMH Bone and Joint. Dr. McDonald noted that the patient reports that he experienced severe pain after turning off a light at his church. He is unable to recall whether his knee buckled or twisted. His right knee x-ray showed patellofemoral spurring. The radiologist indicated that there was probable joint effusion. Dr. McDonald diagnosed Petitioner with right knee pain, effusion and a loose body versus an osteochondral lesion. On April 18, 2013, Petitioner followed up with Dr. McDonald who diagnosed him with a right knee tibia eminence fracture. Dr. McDonald prescribed a crutch, pain medication, heat and ice and he referred Petitioner for a MRI.

5. The April 19, 2013 right knee MRI showed a complex tear of the anterior and posterior horns of the medial meniscus with small medial tibia plateau bone contusion anteriorly, along with Hyaline cartilage degenerative changes of the patellofemoral joint, particularly along the medial pole.

6. The Accident Medical Claim Form for GTL, report of injury and statement of the attending physician all indicated that when the Petitioner turned to turn off lights he experienced severe pain in his right knee.

7. On May 6, 2013, Petitioner follow up with Dr. McDonald who indicated that Petitioner's x-rays showed a tibia eminence fracture and his MRI shows a medial meniscal tear. Dr. McDonald indicated that as a result of these scans Petitioner may benefit from a knee injection and may also need arthroscopic knee surgery. On June 3, 2013, Petitioner was given the injection and he was told to follow up in three weeks.

8. On July 1, 2013, Dr. McDonald noted that Petitioner is approximately eleven weeks removed from his tibia eminence fracture on the ipsilateral knee. Dr. McDonald recommended that Petitioner undergo arthroscopic knee surgery and on July 22, 2013 Petitioner informed the doctor that he wished to proceed with surgery.

9. On August 12, 2013, a recorded statement was taken from Petitioner by Respondent's insurance representative. During the statement, Petitioner acknowledged that he is the pastor for the church and that the only other employee is a part-time custodian. He indicated that on April 14, 2013 he was the only person in the church. He went to turning off lights that had been left on Sunday morning. While he walked in the building, he turned hall lights on. He noted that there was one light that was left on that did not need to be left on. So, he went to turn that light off. At the time he reached for the light switch, he probably could have taken an extra step, but he felt like he was close enough. When he turned the light switch off, he pivoted to go the other direction and something happened to his knee. At the time this happened he was standing on carpet, which was in good condition. He does not remember doing anything different than he normally does except that he may have stepped instead of pivoted. Petitioner testified that he was not carrying anything at the time. He did not feel any slippage in his knee. Rather, his knee got hot and when he reached down he could tell it was large.

10. On the November 15, 2013 Orthopedic Institute Intake form, Petitioner stated that the pain in his knee just occurred when he turned to flip a light switch. On February 6, 2014, Dr. Miller from the Orthopedic Institute indicated that Petitioner reported back in April of 2013 Petitioner was pivoting on his leg when he felt a pop and ended up in emergency room. Dr. Miller diagnosed Petitioner with a chronic medial meniscal tear, mild degenerative osteoarthritis, predominantly of his patellofemoral joint and suspected in the medial compartment as well He noted that Petitioner had had his left knee scoped in

1990. Dr. Miller prescribed physical therapy, medication and he instructed Petitioner to follow up in three to four weeks.

11. On April 7, 2012, Petitioner was seen at Primary Care Group for a pre-operative evaluation. It was noted that Petitioner is morbidly obese. He weighs 328 pounds and is 73" in height. His body mass index 43.27 kg.

12. On April 15, 2014. Petitioner underwent surgery. The post-surgical diagnosis was right knee arthroscopy with partial medial meniscectomy and findings of grade II chondral changes in the medial femoral condyle and patella.

13. On May 30, 2014 Petitioner followed up with Dr. Miller who indicated that Petitioner is doing really well with his knee. He has very little difficulty at this time. He has a little twinge occasionally when he moves his knee in a certain way. He is basically back to doing everything he was doing previously. The only issue is he still has a little bit of swelling in the joint. On examination he could not really even tell if there is any swelling. Petitioner's range of motion was essentially full. There was no instability. The patella tracks well. There is no crepitus noted and no tenderness over the medial joint line. Petitioner said this is the first time he has been able to straighten his knee out in years. Petitioner was advised to continue to perform exercises. He was told they would perform a recheck in 3-4 weeks if he is having difficulties. Otherwise, he may call and cancel.

14. Petitioner's September 5, 2013 through April 9, 2015 records from the Primary Care Group indicated that while Petitioner received medical treatment for various conditions there is no mention of any right knee treatments.

15. At the August 13, 2015 Arbitration hearing, Petitioner testified that currently he can stand and preach, but if he is standing too long his right knee starts to ache. He reported that when he travels over three hours, he has to stop and adjust his right knee. He testified that sleeping is uncomfortable and he has to sleep with a pillow under his right knee. As a preventative measure, he takes an Ibuprofen within an hour of waking. He takes another one as needed and he takes one before he gets to bed. He can walk up two steps before he has to walk up each step individually. He feels unstable walking up the stairs and he always uses the railing. He used to take the stairs more and now he does not take them very often. He was not able perform physical labor during a mission project in East St. Louis last summer and was not able to go on mission trips. He now stays put behind the pulpit and does not walk down the aisles to be closer to the members.

Upon reviewing the facts in this case, the Commission finds that while Petitioner was in the course of his employment, Petitioner failed to prove he sustained an accidental injury arising out of his employment on April 14, 2013. More specifically, the Commission finds that Petitioner was not subjected to hazard in his work place nor to a

risk of injury to a greater degree than a member of the general public. While Petitioner testified at the Arbitration hearing that he may have been carrying something at the time of the incident, the earlier recorded statement shows that Petitioner denied carrying anything at the time. Petitioner testified that the mat he was standing on at the time he turned off the lights did not move and the carpet was in good condition. Additionally, Petitioner testified that he was wearing tennis shoes that would allow him to have a better grip on the surface than had he been wearing dress shoes. Furthermore, there is no evidence that Petitioner was subjected to risk more frequently than members of the public. The hallway area was frequented by Petitioner as well as members of the congregation alike. The hall had been used earlier that morning and was located near the fellowship auditorium that was being used for bible study shortly thereafter. The mat on which Petitioner was standing on at the time of the incident was located near a public door used for ingress/egress of members of the congregation. There was no evidence submitted to show the frequency in which Petitioner traversed the hall in turning off lights or that he performed this tasks on a more frequent basis than he would at a different local such as his home. Lastly, the Commission finds that the mere act of turning is an activity of everyday life and without more it creates no greater risk than that to which the general public is equally exposed. At the time of the incident, there is no indication that Petitioner was rushing, that he was, for sure, carrying anything or that he was attempting to maneuver around another person or object. Petitioner testified that he could have probably taken an extra step when he turned off the light but instead he rotated, pivoted and did not pick up his foot. Petitioner's medical records indicate that he had prior surgery on his opposite knee and his pre-operative assessment indicated that he was morbidly obese. While the Commission takes the Petitioner as they find them, it cannot overlook the fact that Petitioner is morbidly obese and his knees were taxed by his great weigh. Furthermore, Petitioner had undergone a prior left knee scope which may have made him more vulnerable to injury in terms of his right knee; Petitioner reported to the Union Hospital personnel that in the two weeks prior to the April 14, 2013 incident he had been experiencing right knee pain and immediately prior to the April 14, 2013 incident he stood up after having been seated at a desk for several hours and noted that his knee felt stiff. Based on the evidence, the Commission believes Petitioner sustained an idiopathic injury that as personal to Petitioner and was not related to his work.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained an accidental injury arising out of his employment on April 14, 2013 his claim for compensation is hereby denied.

16IWCC0503

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

DATED: JUL 29 2016

MB/jm

O: 6/9/16

43

Mario Basurto

David L. Gore

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael P. McCallips,

Petitioner,

vs.

NO: 13 WC 38541

16IWCC0528

City of Rockford, Rockford, IL
A Municipal Corporation, Fire Dept.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, nature and extent of permanent disability and medical expenses and being advised of the facts and law, corrects the clerical error of 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 notes that on the face sheet, the Arbitrator awarded temporary partial disability from February 12, 2011 through March 21, 2011, 5-3/7 weeks at $951.90 per week. The Commission notes that Petitioner was off work for the above period of time and therefore was temporarily totally disabled during that time. On the Request for Hearing form, the parties stipulated that Petitioner was temporarily totally disabled during the above time period. Therefore, the Commission corrects the clerical error in the Arbitrator's Decision from temporary partial disability to temporary total disability. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 23, 2015 is hereby affirmed and adopted with the above noted correction of clerical error.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $951.90 per week for a period of 5-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $680.53 for reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 37.50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability of the person as a whole to the extent of 7.5%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury. The Commission notes that Respondent paid $5,167.62 for full salary benefits and is entitled to §8(j)(2) credit in that amount.

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

There is no bond for the removal of this cause to the Circuit Court by Respondent pursuant to §19(f)(2) of the Act. 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: AUG 10 2016
MB/maw
o07/07/16
43

Mario Basurto

Stephen J. Mathis

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McCALLIPS, MICHAEL P
Employee/Petitioner

Case# **13WC038541**

16IWCC0528

CITY OF ROCKFORD ROCKFORD IL A MUNICIPAL CORPORATION FIRE DEPT
Employer/Respondent

On 11/23/2015, 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 0.33% 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:

0529 GREG TUITE & ASSOC
119 N CHURCH ST
PO BOX 59
ROCKFORD, IL 61105

1408 HEYL ROYSTER VOELKER & ALLEN
KEVIN J LUTHER
120 W STATE ST 2ND FL
ROCKFORD, IL 61105

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

16IWCC0528

☐ 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

Michael P. McCallips
Employee/Petitioner

v.

City of Rockford, Rockford, IL A Municipal Corporation, Fire Dept.
Employer/Respondent

Case # **13** WC **38541**

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 **George Andros**, Arbitrator of the Commission, in the city of **Rockford**, on **9/22/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **2/11/11**, 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 **$74,256.00**; the average weekly wage was **$1,428.00**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **2** 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of.

Respondent is entitled to a credit of $**$5,167.62** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $951.90/week for 5 3/7 weeks, commencing 2/12/11 through 3/21/11, as provided in Section 8(a) of the Act.

Respondent shall pay reasonable and necessary medical services of $680.53, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given credit for $5,167.62 for full salary benefits paid under Section 8(j)(2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $669.64/week for 37.5 weeks, because the injuries sustained caused the 7.5% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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.

#01 George J. Andros
Signature of Arbitrator

November 20, 2015
Date

NOV 23 2015

FINDINGS OF FACT 13 WC 38541

On February 11, 2011, the Petitioner, Michael McCallips, was employed as a firefighter for the City of Rockford Fire Department. He had been a firefighter for approximately 11 years at that time. The job requires substantial physical exertion, including carrying equipment and firefighting supplies as well as lifting patients while on medical calls. Before February 11, 2011, Petitioner had never been diagnosed with any abnormality of his heart. Nor had he had any breathing difficulties. He had never smoked.

On February 11, 2011, Petitioner was dispatched to a fire. After arriving at the scene he began pulling a hose toward the fire. As he dragged the hose between two buildings, he inhaled some of the smoke that was passing between the structures. Shortly afterwards, he noted that he had a sensation of being unable to catch his breath. Mr. McCallips described it as trying to breath through a small straw. Despite the fact that he moved away from the fire, he still found that he was unable to catch his breath. His coworkers noted that he was having difficulties, and therefore he was transported by ambulance to Swedish American Hospital. While in the ambulance, he began taking oxygen to try to improve his breathing. EKG leads were attached to his chest and revealed that his heart rate was significantly elevated.

At Swedish Hospital emergency room Dr. Bakshi found by history he had sortness of breath. He had no chest pain or palpations. The exam showed clarity to auscultation bilaterally. He was able to control breathes taking deep and steady breaths. Px.2. The labs at SAH were grossly unremarkable and markers were negative. After admission of fluids the heart rate decreased and then he was placed on "observation". Px. 2.

Mr. McCallips saw Dr. Coleman on February 14, 2011. She performed an evaluation and recommended an EKG, lab work, a pulmonary function test and a cardiac stress test. In addition, she prescribed medication. Norvasc was prescribed to regulate his heart rate. He continued to be off work at that time.

She assessed chest pain maybe secondary to bronchospasm or GERDS. Part of his delay in returning to work around March 11, 11 was to allow the nexeum, the little purple pill , a chance to work for his GERDS. She also wanted to observe him for chest pain secondary to GERDS or gastritis.

By May 2, 2011 he can take equipment up and down stairs. No pain necessarily on exertions. He absolutely refused to go to a cardiologist as he must get his (farm) crops in this month. His heart rate was NSR, normal sinus rhythm. His lung exam was normal with no pain upon deep breathing. Patient says he feels better than he had in years. (Px. 4)

The testing at Rockford Hospital included a stress test with and without contrast on Feburary 28, 2011. The cardiac doctor found normal myocardial perfusion; No myocardiac ischemia was seen. Normal left ventricular size with preserved left ventricular systolic function.

The pulmonary function test performed on February 24, 2011, showed an FEV 1 level that was 77% of predicted. Also, an isolated reduction in the FEF suggested small airway disease. A significant improvement was noted after using inhaled bronchodilators which suggested an asthmatic component. Mr. McCallips returned to Dr. Coleman on March 3, 2011 still complaining of intermittent chest pain. He reported that his breathing had improved after using the bronchodilator, he also reported that his heart rate would increase if he missed taking his medications. Therefore, Dr. Coleman prescribed a Xopenex inhaler. She also recommended that he continue with his Bystolic and undergo an echocardiogram and a CT of the brain to evaluate headaches. She continued to keep him off work.

Petitioner returned to Dr. Coleman on March 17, 2011. At that time, he was still complaining of episodic chest pain. He reported that his headaches had subsided and that his shortness of breath had improved with the use of the inhaler. Dr. Coleman prescribed Nexium for his chest pain and released him to attempt to work on March 22, 2011. Petitioner did return to work at that time. When Mr. McCallips returned to work, he noted that he was still having difficulty breathing and that he would still have the episodic chest pain. After a few weeks, he returned to see Dr. Coleman on May 2, 2011. He complained of chest pain on a daily basis along with headaches two times a month. Petitioner informed Dr. Coleman that the Nexium she had prescribed had not helped the chest pain. Dr. Coleman suggested that he obtain an evaluation from a cardiologist. He refused due to farm season.

Because of the ongoing chest pain, Petitioner contacted Dr. Coleman who then referred him to the University of Wisconsin Hospital and Clinics. He was seen by Dr. Sasse on July 26, 2011. Dr. Sasse reviewed the history and prior evaluations that had been interpreted as being normal. Dr. Sasse also noted that Mr. McCallips had been prescribed Nebivolol, but that he still had tachycardia. Dr. Sasse also noted that by history Petitioner had chest pain and shortness of breath on a daily basis and that inhalers had improved the breathing difficulties. Dr. Sasse's impressions were continued chest pain, palpitations, shortness of breath, hypertension and hyperlipidemia. Dr. Sasse indicated that cyanide exposure in a fire could cause "autonomic instability as well as significant lung injury." Dr. Sasse recommended a cardiac MRI, a chest x-ray, as well as a Holter monitor. The MRI was performed and revealed normal cardiac morphology and function. The Holter monitor was placed for a 48-hour period. It also was interpreted as being normal. Dr. Sasse did not make any change to Petitioner's medical regimen.

However a very close look at Dr. Sasse's conclusions after testing show the 7/22/11 chest x-rays were read as no active disease. The lungs were clear. The heart size was normal.

The August 15, 2011 3.0 tesla Cardiac MRI with and without contrast was normal. It found both atriums and both ventricles to be normal.

Moreover, the testing found no myocardial delayed enhancement.

The medical professor at University of Wisconsin concluded normal cardiac morphology and function and no pathological enhancement. Px. 5.

A review of Mr. McCallips prescription records showed he continued to take the medications prescribed by Dr. Coleman after the visit to the University of Wisconsin. These included the Bystolic (a betablocker) and Cartia (a calcium channel blocker). In September 2013, Mr. McCallips transferred his care to Dr. Oscar Ordonez in Belvidere, Illinois. Petitioner gave Dr. Ordonez the history of smoke inhalation and the resulting tachycardia. The doctor noted a heart rate of 100 bpm in his office. Dr. Ordonez continued some of the medications that had been prescribed by Dr. Coleman, but changed others. For example, he continued the Cartia, but switched from Bystolic to Atenolol. He also later refilled the Xopenex and added Verapamil to the regimen.

Petitioner testified that he continues to take the medications on a regular basis. He also testified that if he fails to take the cardiac medications that he will notice a significant increase in his heart rate. He also testified that he continues to use the inhaler on a daily basis. Petitioner testified that he continues to have the episodes of chest pain. He also uses the inhaler every day in the morning and carries it with him as circumstances dictate. He also notices that environmental irritants such as dusts, cat hair and pollen aggravate his breathing condition. Mr. McCallips also testified that he no longer actively works outdoors in the family farming business as he did prior to the work injury. Now works as an advisor to other members of the family in running the business. Mr. McCallips no longer performs firefighting work as he is out on a duty disability pension as a result of a separate work incident.

As to the doctors' findings, the Arbitrator adopts the conclusions of Dr. Sasse above who is an assistant professor at the U of W medical school in cardiology. The treatment of this latest family doctor seems inconsistent with all the testing and conclusions of Dr. Sasse.

CONCLUSIONS OF LAW

In regard to (F) IS THE PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following facts:

At the time of the accident, Petitioner was an 11-year Rockford firefighter with no history of cardiac or pulmonary difficulty. Mr. McCallips' tachycardia of 150 beats per minute while fighting the fire on February 11, 2011, was the first such incident in his life. The same is true for his shortness of breath that was later documented during the pulmonary function test. He had no prior history of asthma and was not a smoker, yet the test showed an airway obstruction. Bronchodilators provided significant relief. The Emergency Room at Swedish American Hospital ruled-out carbon monoxide poisoning and a blood clot, but it does not appear that they tested for cyanide exposure.

When Mr. McCallips was treated at the University of Wisconsin, Dr. Sasse confirmed that exposure to cyanide can lead to myocardial infarction, palpitations and shortness of breath. Based on these statements, the fact that Mr. McCallips had no difficulties prior to the exposure, as well as the ongoing need for prescription medications, the Arbitrator finds that there is a casual relationship between the tachycardia and shortness of breath to the smoke exposure on February 11, 2011. Chicago Housing Authority v. Industrial Comm. 241 Ill. App.3d 720 (1st Dist. 1993).

In regard to (J) HAS RESPONDENT PAID FOR ALL APPROPRIATE CHARGES FOR REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds the following facts:

The Arbitrator notes that the Respondent has paid for a great majority of charges related to the medical treatment rendered by the providers in this case. The only charges not paid were for office visits on February 10, 2014 and August 14, 2015. These total $54.80. In addition, the Petitioner has had to pay an out-of-pocket expense for his cardiac and pulmonary medications. These total $625.73. Having found in Petitioner's favor on the issue of causal relationship, the Arbitrator awards the sum of $680.53 for reimbursement of the out-of-pocket payments made by Petitioner.

In regard to (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following facts:

As noted above, Petitioner had no prior difficulties with his heart rate or breathing prior to the exposure on February 11, 2011. Since then, he asserts has had regular episodes of chest pain, although not as frequently as in the year after the injury. He by history if he does not take the cardiac medications, he will develop tachycardia.

However, this Arbitrator finds the opinions of the cardiologist at the University of Wisconsin to be much more credible as to diagnosis and lack of significant pathology given the very sophisticated testing at U of M back in 2011.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ 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

Robert Haskins,

Petitioner,

vs. NO: 14 WC 189

Station Imaging,

Respondent,

16IWCC0532

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues raised within Respondent's Motion to Dismiss, and being advised of the facts and applicable law, affirms and adopts the Decision Order 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission notes that Arbitrator's Decision Order dated June 3, 2015 reflects case number 13 WC 7932. This was an obvious scrivener's error on the part of the Arbitrator. It is apparent that neither the Petitioner nor the Respondent recognized this error as all pleadings were filed relative to 14 WC 189. Respondent's Motion to Dismiss was in relation to case 14 WC 189. The Commission therefore corrects the Arbitrator's scrivener's error and amends the caption of the Arbitrator's Order of June 3, 2015 to read Case No. 14 WC 189 and not 13 WC 7932.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 3, 2015 is hereby affirmed and adopted.

16IWCC0532

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.

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.

No bond is required for removal of this cause to the Circuit Court by Respondent. 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: AUG 18 2016
MJB/bm
O-7/26/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

HASKINS, ROBERT
Employee/Petitioner

Case# **13WC007932**

STATION IMAGING
Employer/Respondent

16IWCC0532

On 10/10/2013, 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 0.06% 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:

1948 LIPKIN & HIGGINS
MITCHELL LIPKINS
222 N LASALLE ST SUITE 2100
CHICAGO, IL 60601

4866 KNELL O'CONNOR DANIELEWICZ
KAROLINA M ZIELINSKA
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☐ 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)

Robert Haskins
Employee/Petitioner
v.

Case # 13 WC 7932

Station Imaging
Employer/Respondent

16IWCC0532

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Woodstock**, on **September 6, 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. ☒ 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

FINDINGS 16IWCC0532

On the date of accident, **July 31, 2012**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$58,240.00**; the average weekly wage was **$1,120.00**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

Respondent is entitled to a credit of **$1,040.06** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of **$2,868.00**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of **$1,040.06** for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

No other benefits are awarded herein.

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.

Arbitrator Anthony C. Erbacci

October 7, 2013
Date

13 WC 7932
ICArbDec19(b)

OCT 10 2013

16IWCC0532

FACTS:

The Petitioner testified that on July 31, 2012, he was employed by the Respondent as a working foreman, having been so employed for fifteen to twenty years. The Petitioner testified that on July 31, 2012 he was working at a gas station in Round Lake and that, in the performance of his work, he was required to climb some scaffolding. He testified that as he was climbing the scaffolding, he was holding onto the scaffolding with his right hand and he swung his body around to get onto the platform of the scaffolding. The Petitioner testified that as he swung his body around, his right wrist "popped" and he experienced a sharp pain in the wrist. The Petitioner testified that he continued to work the rest of that week but the pain did not go away. The Petitioner testified that on August 9, 2012 he had difficulty grasping the hammer he was using and he told his boss who directed him to go to the Condell Medical Center.

The Petitioner testified that his work required him to use hand tools and a screw gun on a daily basis but, prior to July 31, 2012, he had never injured his right wrist or sought medical treatment for his right wrist.

On August 9, 2012, the Petitioner presented to Condell Medical Center complaining of pain in the right wrist. The history noted is "pain R wrist since July 31, 2012 → climbing scaffolding 'no' specific trauma." X-rays were completed and the Petitioner was directed to follow up with an orthopedic physician.

On August 9, 2012, the Petitioner also presented to Dr. Peter Hoepfner at Illinois Bone & Joint Institute. The note of that visit indicates that Petitioner reported he was recently climbing a scaffold when he twisted his right wrist and had an onset of pain. The note also indicates that the Petitioner further reported that "He then had a new injury that he reports occurred on August 8, 2012, which has been more problematic." It is noted that the Petitioner reported that on August 8, 2012, he was working when he had pain affecting his right wrist after swinging a hammer. He was frequently hammering as well as twisting his wrist." Dr. Hoepfner's note also indicates that the Petitioner reported that he had intermittent stiffness and pain affecting his right wrist for many years.

On examination, Dr. Hoepfner noted very limited motion in the right wrist, moderate pain over the right radiocarpal joint with dorsoradial swelling, and negative Tinel's and Phalen's tests. Dr. Hoepfner noted that the Petitioner's x-rays indicated significant right wrist arthritis with complete obliteration of the radioscaphoid joint as well as early narrowing of the capitolunate joint. Dr. Hoepfner's diagnosis was a temporary aggravation of right wrist arthritis and he injected the Petitioner's right radiocarpal joint. The Petitioner was returned to regular duty work with use of splint and told to follow up in 6 weeks.

On September 12, 2012 the Petitioner returned to Dr. Hoepfner and reported that the injection helped, but that he now had a recurrence of pain when using his right wrist. Dr. Hoepfner opined that the Petitioner sustained an injury at work on August 8, 2012 and he again injected that Petitioner's right wrist. Dr. Hoepfner recommended surgery for the

Petitioner consisting of a scaphoid excision with four-corner fusion. The Petitioner was returned to regular duty work with the use of splint.

On October 9, 2012, a Utilization Review was conducted regarding Dr. Hoepfner's recommendation for a scaphoid excision with four-corner fusion. Following a records review, Dr. Marco Berard opined that the Petitioner's lesion was chronic and that there was no evidence that working in construction would create a scapholunate advance collapse. Dr. Berard opined that the record did not establish evidence of any clear trauma that triggered the scapholunate advance collapse and that; therefore, there was no direct causal relationship between the requested surgery and the reported industrial accident. Based on that Utilization Review report, the recommended surgery was not authorized.

On December 11, 2012, the Petitioner returned to Dr. Hoepfner. Dr. Hoepfner's note indicates that the Petitioner was climbing a scaffold on August 8, 2012 when he awkwardly twisted his right wrist. Dr. Hoepfner opined that the Petitioner "suffered a temporary aggravation of this underlying preexisting wrist arthritis due to the reported twisting injury at work on August 8, 2012." Dr. Hoepfner recommended moving forward with the surgery consisting of a scaphoid excision with four-corner fusion due to a diagnosis of "advanced right wrist arthritis." The Petitioner was administered an additional cortisone injection and was returned to regular duty work with the use of a splint.

On March 27, 2013, Dr. Hoepfner drafted a narrative report at the request of the Petitioner's attorney. Dr. Hoepfner opined that the Petitioner suffered "an acute aggravation of underlying right wrist pain." Dr. Hoepfner further wrote: "Based on Mr. Haskins' description of his symptoms and his diagnosis, it is my opinion that his work activity of August 2012 aggravated his pre-existing right wrist arthritis."

On August 13, 2013, the Petitioner was examined by Dr. Michael Vender, at the request of the Respondent. In his report, Dr. Vender noted that the Petitioner reported that he was climbing up scaffolding, performing his normal work activities, turning his wrist, when he felt a pop in his wrist. Dr. Vender diagnosed the Petitioner with end-stage degenerative arthritis of the right wrist and opined that the Petitioner's diagnosis represented the significant progression of a degenerative condition. Dr. Vender explained that there is a natural course to degenerative arthritis with progressing complaints and findings although he acknowledged that acute injuries, such as slip and falls, can at times represent aggravations to such a pre-existing condition. Dr. Vender explained that the Petitioner's symptoms had been present for a long time with the known pre-existing condition and that the Petitioner did not describe a true injury that could be considered an exacerbation of the pre-existing condition. Rather, he explained, the Petitioner simply noted a change in the level of his symptoms as they would relate to performing his normal activities. Dr. Vender opined that this would represent the natural progression of the Petitioner's pre-existing condition, and as such, would not be the result of his alleged July 31, 2012 work accident. Dr. Vender did opine that the surgery consisting of a scaphoid excision with four-corner fusion was appropriate treatment for the Petitioner.

The Petitioner testified that he currently experiences discomfort and cramping in his right wrist as well as pain which he described as being at 4/10. He testified that when he works, his pain is at 6/10. The Petitioner testified that, at work, he now does less actual work and he delegates more of the physical work to others.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Petitioner testified that on July 31, 2012, he felt a pop and an onset of pain in his right wrist, when he swung his body around to get onto the platform of a scaffold. He testified that although he continued to work, his pain continued and, on August 9, 2012, while he was swinging a hammer, his pain increased to the point that he could no longer grasp his hammer.

The August 9, 2012 record of Condell Medical Center indicates that the Petitioner complained of right wrist pain since July 31, 2012 when he was climbing scaffolding. The August 9, 2012 record of Dr. Hoepfner indicates that the Petitioner reported a recent onset of pain when he twisted his right wrist while climbing a scaffold and "a new injury" on August 8, 2012, "which has been more problematic" when he had pain in his right wrist after swinging a hammer. Dr. Hoepfner's note also indicates that the Petitioner reported that he had intermittent stiffness and pain in his wrist for many years. Dr. Hoepfner's diagnosis was a temporary aggravation of right wrist arthritis and he injected the Petitioner's right radiocarpal joint.

While the histories contained in the records of the Petitioner's initial medical treatment do not specifically refer to a "pop" in the right wrist while climbing a scaffold, the histories contained in those records are sufficiently corroborative to support the conclusion that the Petitioner had an onset of right wrist pain while climbing a scaffold at work on July 31, 2012.

Based upon the Petitioner's testimony and the records of the Petitioner's initial medical treatment, the Arbitrator finds that the Petitioner did sustain an accidental injury arising out of and in the course of his employment with the Respondent on July 31, 2012.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, and (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Arbitrator notes that the Request for Hearing form submitted by the parties, (Arbitrator's Exhibit 1), indicates a claimed accident date of July 31, 2012, and that no request to amend that form was made at hearing. The Petitioner testified that on July 31, 2012, he felt

a pop and an onset of pain in his right wrist, when he swung his body around to get onto the platform of a scaffold. He testified that although he continued to work, his pain continued and, on August 9, 2012, while he was swinging a hammer, his pain increased to the point that he could no longer grasp his hammer. Although the Petitioner testified that he used hand tools and a screw gun on a daily basis, no other testimony or evidence in support of a repetitive trauma type injury was presented.

The August 9, 2012 record of Dr. Hoepfner indicates that the Petitioner reported a recent onset of pain when he twisted his right wrist while climbing a scaffold and "a new injury" on August 8, 2012, "which has been more problematic" when he had pain in his right wrist after swinging a hammer. Dr. Hoepfner's note also indicates that the Petitioner reported that he had intermittent stiffness and pain in his wrist for many years. Dr. Hoepfner's diagnosis was a temporary aggravation of right wrist arthritis and he injected the Petitioner's right radiocarpal joint.

On September 12, 2012 the Petitioner returned to Dr. Hoepfner and reported that the injection had helped, but that he "now had a recurrence of pain when using his right wrist". At that time, Dr. Hoepfner opined that the Petitioner sustained an injury at work on August 8, 2012. Dr. Hoepfner again injected that Petitioner's right wrist and he recommended surgery for the Petitioner. The Petitioner was returned to regular duty work with the use of splint.

On December 11, 2012, Dr. Hoepfner opined that the Petitioner "suffered a temporary aggravation of this underlying preexisting wrist arthritis due to the reported twisting injury at work on August 8, 2012." Dr. Hoepfner recommended moving forward with the surgery due to a diagnosis of "advanced right wrist arthritis." The Petitioner was administered an additional cortisone injection and was returned to regular duty work with the use of a splint.

On March 27, 2013, Dr. Hoepfner drafted a narrative report at the request of the Petitioner's attorney. Dr. Hoepfner opined that the Petitioner suffered "an acute aggravation of underlying right wrist pain." Dr. Hoepfner further wrote: "Based on Mr. Haskins' description of his symptoms and his diagnosis, it is my opinion that his work activity of August 2012 aggravated his pre-existing right wrist arthritis."

Dr. Berard, who conducted a Utilization Review on October 9, 2012, opined that the Petitioner's lesion was chronic, that there was no evidence that working in construction would create a scapholunate advance collapse and that there was no direct causal relationship between the surgery recommended for the Petitioner and the reported industrial accident.

Dr. Vender, who examined the Petitioner on August 13, 2013 at the request of the Respondent diagnosed the Petitioner with end-stage degenerative arthritis of the right wrist and opined that the Petitioner's diagnosis represented the significant natural progression of the Petitioner's pre-existing degenerative condition. While Dr. Vender did opine that the surgery consisting of a scaphoid excision with four-corner fusion was appropriate treatment for the Petitioner, he opined that the need for the surgery was not a result of his alleged July 31, 2012 work accident.

The Petitioner argues that there is a clear inference that but for the July 31, 2012 and August 9, 2012 incidents, the Petitioner would not have sought medical treatment at all, let alone require surgery. First, the Arbitrator notes that there is no August 9, 2012 accident claimed in the Request for Hearing form submitted by the parties, (Arbitrator's Exhibit 1). Additionally, the Arbitrator notes that the inference that the Petitioner's work accident only temporarily aggravated his pre-existing degenerative condition is equally plausible in the instant matter.

The evidence demonstrates that the Petitioner was working with "intermittent" pain and stiffness in his right wrist prior to July 31, 2012. While the Petitioner experienced an increase in his right wrist pain while climbing a scaffold on July 31, 2012, he continued to work thereafter until he sought medical treatment on August 9, 2012 after an increase in his right wrist pain while he was hammering. The Petitioner missed no time from work following either of those incidents and he has continued to work through the present time, although he now uses a splint and does more supervising and less physical work.

While Dr. Hoepfner, the Petitioner's treating physician, ultimately opined that the Petitioner suffered "an acute aggravation of underlying right wrist pain" and that "his work activity of August 2012 aggravated his pre-existing right wrist arthritis", he initially diagnosed the Petitioner as having suffered a temporary aggravation of his pre-existing right wrist arthritis. Additionally, although Dr. Hoepfner ultimately indicated the Petitioner's "work activity of August 2012 aggravated his pre-existing right wrist arthritis", on December 11, 2012 as well as March 27, 2013, Dr. Hoepfner's treating records contain causal connection opinions indicating that the Petitioner's injury occurred on August 8, 2012.

Dr. Hoepfners records contain no specific opinion that the Petitioner's present condition of ill-being or the need for surgery is causally related to the injury of July 31, 2012. Similarly, Dr. Hoepfners records contain no specific opinion that the Petitioner's work injury accelerated the need for surgery. Both Dr. Berard and Dr. Vender specifically opined that the Petitioner's right wrist condition was not causally related to his claimed work injury.

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence and that an award of benefits cannot be based upon mere speculation. The Arbitrator finds that the Petitioner has not met that burden here. In so finding, the Arbitrator finds that the opinions of Dr. Hoepfner are lacking in accuracy, specificity, persuasiveness, and, ultimately, reliability. There are no other medical opinions in the record which support a finding of causation. The Arbitrator further finds that the opinions of Dr. Vender and Dr. Berard are sufficiently credible and persuasive to be reliable in the instant matter.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that as a result of the injury of July 31, 2012, the Petitioner sustained a temporary aggravation of his pre-existing right wrist arthritis. The Arbitrator further finds that the Petitioner failed to prove that his present condition of ill-being

16IWCC0532

is causally related to the Petitioner's work injury of July 31, 2012. Additionally, the Arbitrator finds that the Petitioner failed to prove that the need for the right wrist surgery recommended for the Petitioner by Dr. Hoepfert is causally related to the Petitioner's work injury of July 31, 2012.

In Support of the Arbitrator's Decision relating to (J.), Were the medical services that were provided to Petitioner reasonable and necessary/Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds and concludes as follows:

The Petitioner introduced evidence of medical expenses totaling $2,868.00. Petitioner's Exhibit 4 shows the charges of Advocate Condell Medical Center in the amount of $848.00 for a date of service of August 9, 2012. Petitioner's Exhibit 5 shows the charges of Illinois Bone and Joint Institute, (Dr. Hoepfner), in the amount of $2,020.00 for dates of service from August 9, 2012 through March 8, 2013. The parties stipulated that the Respondent paid $1,040.06 in benefits for which credit may be allowed under Section 8(j) of the Act.

Based upon the Arbitrator's findings and conclusions relating to the issues of accident and causation, which are adopted and incorporated herein, the Arbitrator finds that the medical treatment provided to the Petitioner through March 8, 2013 was reasonable, necessary and casually related to the injury of July 31, 2012.

Consequently Respondent should pay the Advocate Condell bill in the amount of $848.00 and the charges of Illinois Bone & Joint through August 13, 2013, subject to the limits of the Medical Fee Schedule provided for in the Act and reduced by $1,040.06 for medical benefits Respondent has previously paid.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ 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

Shawn Stanley,
Petitioner,
vs.

NO: 14WC 003156

Porter's Premier Cleaners,
Respondent,

16IWCC0531

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 medical expenses, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 7, 2015, is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the 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 $1,100.00. 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: AUG 18 2016
MJB/bm
o-8/8/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STANLEY, SHAWN
Employee/Petitioner

Case# **14WC003156**

16IWCC0531

PORTER'S PREMIER CLEANERS
Employer/Respondent

On 12/7/2015, 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 0.41% 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:

1157 DELANO LAW OFFICES LLC
PATRICK JAMES SMITH
1 S E OLD STATE CAPITAL PLZ
SPRINGFIELD, IL 62705

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT MACIOROWSKI
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

SHAWN STANLEY
Employee/Petitioner

Case # **14 WC 03156**

v.

PORTER'S PREMIER CLEANERS
Employer/Respondent

16IWCC0531

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 Molly Dearing**, Arbitrator of the Commission, in the city of **Springfield**, on **September 25, 2015**. 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 _____

16IWCC0531

FINDINGS

On **September 20, 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*** 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 in her right knee ***is not*** causally related to the accident.
Petitioner's current condition of ill-being in her right heel ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,621.08** the average weekly wage was **$415.79**.

On the date of accident, Petitioner was **39** years of age, **single** with **0** dependent children.

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

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

Respondent shall be given a credit of **$2,136.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$2,136.00**.

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

ORDER

Respondent shall pay all reasonable and necessary medical services relative to Petitioner's right heel, and all reasonable and necessary medical services for her right knee through January 12, 2014, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. All medical services incurred on and after January 13, 2014 relative to Petitioner's right knee are denied as unrelated to Petitioner's work injury. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Temporary total disability benefits are denied.

Respondent shall pay Petitioner permanent partial disability benefits of $249.47/week for 5.375 weeks, because the injuries sustained caused the 2.5% loss of the right leg, as provided in Section 8(e) of the Act.

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.

Arbitrator Molly Dearing

November 20, 2015
Date

DEC 7 - 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SHAWN STANLEY
Employee/Petitioner

v.

PORTER'S PREMIUM CLEANERS
Employer/Respondent

16IWCC0531

Case # 14 WC 3156

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of her accident, Petitioner was thirty-nine years of age and she had been employed by Respondent since August 2001. Petitioner testified that her job duties included pressing shirts, operating dry cleaning machines, delivering clothes, and managing the counters and stores. She denied experiencing any difficulties with her right knee prior to September 20, 2013.

Petitioner testified that on Friday, September 20, 2013, she was loading clothes into a van at Respondent's plant located at 2120 South MacArthur in Champaign, Illinois to deliver clothes to its store locations. Petitioner testified that with her arms full of clothes, she slipped on water and fell on her right leg. She stated that she fell on all fours onto concrete and then her right leg kicked out and hit a machine, thereby hurting her heel. Petitioner did not complete her work duties that day and instead called in another driver to perform the deliveries. She testified that she reported the incident to Dennis Porter, the owner, and based upon their conversation, she decided not to seek medical treatment at that time. Petitioner testified that over the course of the weekend, she elevated and iced her leg, and used Tylenol. She returned to work the following Monday, September 23, 2013, and she stated that she continued to have problems with her right knee thereafter.

Petitioner presented to Dr. Dennis Adams at St. John's Priority Care on October 2, 2013. She reported slipping on a wet floor while working two weeks prior with persistent pain over the right heel and right knee since that time. A physical examination revealed tenderness of the left knee with some crepitance and no instability, a tender right heel, mild anterior tenderness of the right lower leg without calf tenderness, and minimal tenderness of the right lumbar spine musculature. X-rays of the right knee, right lower leg, and right heel were normal with some bone spurring noted. Dr. Adams reviewed the films and noted "nothing acute by my reading" and assessed Petitioner with a contusion of the right knee with intact skin surface, and a contusion of the heel with intact skin surface. She was prescribed Ibuprofen, Tramadol, and physical therapy. PX 2. Petitioner testified that she continued to work without restrictions and perform all of her usual job duties.

On November 8, 2013, Petitioner returned to St. John's Priority Care with continued complaints of pain and right leg tightness. She denied swelling, redness, stiffness, instability, and decrease in range of motion. Petitioner was prescribed Ibuprofen and Tramadol. An MRI was discussed, and Petitioner reported she was claustrophobic and requested not to have one if possible. She was asked to return in two to three weeks for reevaluation. PX 2. Petitioner testified that she continued to work without restrictions.

Petitioner presented to Dr. Adams at St. John's Priority Care on December 11, 2013 and she reported no improvement in her right knee. She indicated that she could undergo an open MRI, not closed, if necessary. A physical examination revealed poorly localized tenderness to the right knee, no effusion, full range of motion, and no instability. Petitioner was assessed with a contusion of the right knee. She was prescribed Naproxen, Tramadol, and referred to Dr. Karolyn Senica at the Orthopedic Center of Illinois. PX 2.

On December 26, 2013, Petitioner presented to Dr. Senica. Petitioner reported slipping on a wet floor at work in September 2013 and suffering continued complaints in her knee since that time. She indicated that she had been icing the knee and trying to utilize a brace. Petitioner denied any catching or locking. A physical examination revealed that Petitioner was ambulating with a limp, as well as a healed abrasion over the anterior knee, no significant effusion, no ecchymosis or erythema, full extension of the knee, independent straight leg raising, some pain along her medial joint line, no significant pain along the medial or lateral patellar facet, and equivocal McMurray's testing. Dr. Senica administrated a cortisone injection to Petitioner's right knee and indicated that she may require an MRI in the future. Dr. Senica's impression was right knee pain, early arthritis of the right knee patellofemoral joint, and "cannot rule out meniscal pathology." She allowed Petitioner to continue working without restrictions. PX 3, RX 3.

Petitioner testified that on January 13, 2014, she was performing her usual paper route, which required her to deliver sixty-six newspapers, some of those delivered by tossing the paper from her vehicle window and others getting out of the vehicle and walking up the driveway. She testified that she finished the paper route that day at approximately 3:30 to 4:00 a.m. Petitioner then exited her vehicle and walked to a nearby recycling bin to dispose of straps and extra papers when her right knee popped. Petitioner testified that she was unable to bear weight on her right knee and she had to scoot on her buttocks back to her vehicle.

On January 13, 2014, Petitioner presented to Dr. Adams at St. John's Priority Care. She reported suffering a new right knee injury that morning while walking during her paper route when she heard a pop and experienced instant pain in the entire right knee. Petitioner stated that the pain was "severe to the point she couldn't bear weight without great trouble." She reported having had been much better following her steroid injection until that morning. Petitioner denied swelling, redness, burning, locking, instability, laceration, lower leg or foot weakness, and lower leg or foot numbness. Dr. Adams assessed Petitioner with a contusion of the right knee, and prescribed her Hydrocodone, crutches and physical therapy. Dr. Adams also removed her from work for four days until she saw an orthopedist. PX 2, RX 4.

Petitioner returned to Dr. Adams of St. John's Priority Care on January 19, 2014 with continued complaints of pain. She was partially weight bearing with crutches at that time. Petitioner reported continuing to work her paper route with assistance from her vehicle only and her inability to work for Respondent due to the ambulatory demands of that position. A physical examination revealed an abnormal gait, poorly localized tenderness of the right knee, full but painful range of motion, and minimal effusion. Dr. Adams assessed her with a contusion of the right knee and extended her removal from work. PX 2.

Petitioner presented to Dr. Senica on January 28, 2014 with increased pain in her knee following an incident where "she was just walking and putting some stuff into a recycle bin when she felt a pop in her knee. She did not actually fall or twist the knee." A physical examination

demonstrated that Petitioner was limping and utilizing crutches, her range of motion was zero to ninety degrees, her knee was stable to varus and valgus stresses, and she exhibited significant pain along the medial joint line, some mild pain along the medial and lateral patellar facet, and pain medially with McMurray's testing. Dr. Senica's impression was right knee pain, early arthritis of the right knee patellofemoral joint, and "[c]annot rule out meniscal pathology." Dr. Senica noted that "[t]here is apparently concern whether she may have had a new injury on January 13, 2014, to her knee...It is certainly possible that the meniscus is still symptomatic from her injurythat [sic] had occurred in September of 2013. She could have intermittent symptoms with a meniscal tear. I do not think that this would be from a new injury on January 13, 2014." Dr. Senica imposed work restrictions on Petitioner of sit-down work only and ordered an MRI. PX 3. Petitioner testified that following the paper route incident of January 13, 2014, she utilized crutches. She stated that she did not return to work for Respondent with restrictions because there were no positions in Respondent's facility within her restrictions and she did not return to work for Respondent at any time thereafter. Petitioner testified that she attempted to obtain other employment within her restrictions, and subsequently obtained unemployment benefits and medical coverage.

On October 20, 2014, Petitioner presented to Dr. Saadiq F. El-Amin at SIU HealthCare with complaints of localized pain to the medial aspect of her right knee with associated mechanical symptoms of popping and instability, as well as a burning pain that is medially located worsened with ascending stairs and arising from a chair. Petitioner reported an injury at work when she slipped on the floor and "she attempted to fall forward to avoid hitting her head on the concrete, the patient states she sustained a twisting injury to her right knee and fell onto her right leg." She noted right knee pain and delayed swelling following that incident, as well as seeking treatment "two days later". Petitioner also reported feeling a pop in her right knee while walking for which she presented to Urgent care and was given crutches and instructed to remain non-weight bearing. A physical examination revealed tenderness to palpation along the medial aspect of the right knee with positive McMurray's testing localized to the right medial meniscus, slight tenderness to palpation along the bilateral aspect of her right knee, no significant joint effusion, negative Lachman and posterior drawer testing, and stable to varus and valgus stress testing. Dr. El-Amin reviewed Petitioner's MRI, which he noted demonstrated a tear of the posterior horn of the right medial meniscus and associated Bakers cyst, and Dr. El-Amin assessed Petitioner with a right posterior medial meniscus tear of the right knee. He recommended she undergo six weeks of physical therapy and instructed her to return after completion of therapy. PX 4.

Petitioner underwent physical therapy at St. John's Hospital from October 27, 2014 through December 3, 2014. PX 5.

On December 1, 2014, Dr. El-Amin recommended a right knee arthroscopic procedure to address Petitioner's right knee condition (PX 4) and on January 16, 2015, Petitioner underwent a right arthroscopic partial medial meniscectomy, three-compartment chondroplasty and three-compartment synovectomy. PX 6. Petitioner returned to Dr. El-Amin post-operatively and underwent physical therapy at St. John's Hospital through March 17, 2015. PX 4, 5. Petitioner met all therapy goals and was discharged with a home therapy program. PX 5. Dr. El-Amin released Petitioner to return on an as needed basis on January 29, 2015 (PX 4) and Petitioner testified that Dr. El-Amin released her to return to work without restrictions on February 24, 2015.

On April 23, 2014, Dr. Kevin Walsh performed an examination of Petitioner pursuant to Section 12 of the Act. Dr. Walsh took a history of injury from Petitioner, performed a physical examination, and reviewed her treating records. Petitioner reported presently experiencing a

stabbing, burning and aching pain on the outside of her right knee and stabbing pain to the outside of her right ankle. Dr. Walsh opined that due to tenderness along the medial joint line present upon physical examination, Petitioner likely could have meniscal pathology in the medial compartment. He opined that, more likely than not, her current right knee condition is causally related to her incident of January 13, 2014 and not the work accident of September 20, 2013. Dr. Walsh stated that "[i]t is not likely the patient tore her meniscus in September 2013 and continued to work unrestricted for a prolonged period of time. It is clear when the patient was seen by the orthopedic surgeon prior to the incident in 2014 she had only an equivocal McMurray test. She did have some pain along the medial joint line when she was seen after the event in January 2014. She denied significant pain along the medial joint line and the McMurray maneuver did cause her some pain medially. Clearly, her examination changed from 2013 to 2014." Dr. Walsh noted that Petitioner's change in condition correlated with the incident of January 13, 2014 and he opined that had Petitioner torn her meniscus as a result of the September 20, 2013 work accident, she would likely have been diagnosed with clear evidence of a meniscal tear when she was evaluated by multiple examiners thereafter. He opined that it would be reasonable for Petitioner to undergo an MRI and if the imaging study revealed a meniscal tear, he stated that it would be reasonable for Petitioner to undergo a knee arthroscopy. Dr. Walsh stated that Petitioner can weight bear as tolerated, and does not require crutches or work restrictions. RX 2.

Dr. Walsh testified by way of evidence deposition on December 9, 2014. He is board certified in orthopedic surgery and he practices general orthopedic surgery. He testified that when evaluating a patient for a possible meniscal tear, he looks for a history of a twisting injury, effusion in the knee, swelling in the knee itself, tenderness along the joint line, a positive McMurray maneuver reproducing the pain and signs and symptoms of a torn meniscus in the knee joint, and he noted that none of those indications of a meniscal tear were present in Petitioner's treating records through October 2013. He stated that the history Petitioner gave at Priority Care Group of January 13, 2014 of walking during her paper route and hearing a pop in her right knee accompanied by pain is consistent with a meniscal tear because "[y]ou can get a meniscus tear simply walking. You can feel a pop as the meniscus tears." He testified that Petitioner's medical treatment following her work accident of September 20, 2013, including her presentation to urgent care, x-rays, medication prescriptions, and an orthopedic surgeon consultation, was reasonable and necessary in the care of her work injury, though he opined that Petitioner's need for a MRI and possible right knee arthroscopy to address a meniscal tear would not be causally related to Petitioner's work accident of September 20, 2013 and would instead be related to her paper route incident on January 13, 2014. RX 5.

Petitioner testified that she presently cannot kneel as she was able to prior to her work accident, and she has difficulty descending stairs. She did not return to her employment with Respondent and she is currently employed at a tobacco store.

OPINION AND ORDER

In regard to disputed issue (F), Respondent does not dispute that on September 20, 2013, Petitioner suffered accidental injuries that arose out of and in the course of her employment. Respondent disputes the causal relatedness of Petitioner's current condition of ill-being in her right knee following her intervening accident of January 13, 2014.

The Arbitrator concludes that Petitioner failed to prove by a preponderance of the evidence that her current condition of ill-being in her right knee is causally related to her work accident of September 20, 2013. In so finding, the Arbitrator notes that following her work accident of September 20, 2013, Petitioner resumed her normal work activities without restrictions and did not seek medical treatment for two weeks until October 2, 2013. She also denied any mechanical symptoms of instability, catching, or locking at that time. As of November 8, 2013, two months prior to her paper route incident, Petitioner was not experiencing any decreased range of motion, difficulty weight bearing, or difficulty with ambulation, and her McMurray's testing on December 26, 2013 was equivocal. Petitioner reported to Dr. Adams on January 13, 2014 that her right knee had improved following the injection she received on December 26, 2013 until that morning. PX 2, 3. Following her paper route incident on January 13, 2014, however, Petitioner sought immediate medical treatment, she was unable to bear any weight on her right knee, her condition necessitated crutches, she complained of symptoms of popping and instability, her McMurray's testing was now positive, and she was removed from work at that time due to her right knee condition. PX 2, 3, 4.

The Arbitrator finds a notable distinction between Petitioner's right knee condition, complaints, physical examination findings, physical limitations, and ability to work contemporaneously with the incident of January 13, 2014 when compared to that prior to same, which the Arbitrator finds supports a finding that the incident of January 13, 2014 was an independent intervening incident rather than a continuation of her work accident or an incident that would not have occurred but for the work accident. Petitioner presented no evidence to suggest that Petitioner's work accident weakened her knee condition so as to contribute to her subsequent non-work related injury of January 13, 2014. Instead, the preponderance of the evidence demonstrates that Petitioner suffered a contusion as a result of her work accident that improved with conservative treatment and that, absent the incident of January 13, 2014, Petitioner would have continued to work in an unrestricted capacity for Respondent and necessitated only conservative treatment. The evidence further establishes that on January 13, 2014, Petitioner experienced a popping sensation in her right knee while walking, which Dr. Walsh explained is consistent with a meniscal tear (RX 5), that more than likely signified the tearing of her medial meniscus at that time, and the contrast between Petitioner's condition prior to the incident of January 13, 2014 and that subsequent to same supports that finding. In light of the foregoing and the record in its entirety, the Arbitrator finds insufficient evidence to determine that Petitioner's work accident of September 20, 2013 is a causative factor in her current condition of ill-being in her right knee.

In finding Petitioner's current right knee condition unrelated to her work accident, the Arbitrator finds the opinions of Dr. Walsh more persuasive and reliable in this matter than those of Dr. Senica. Dr. Senica opined that "[i]t is certainly possible that the meniscus is still symptomatic from her injurythat [sic] had occurred in September of 2013. She could have intermittent symptoms with a meniscal tear. I do not think that this would be from a new injury on January 13, 2014." PX 3. Dr. Walsh, on the other hand, opined that Petitioner's meniscal tear was not related to her September 20, 2013 work accident. RX 5. It is unclear upon whether Dr. Senica had reviewed Petitioner's prior treating records from St. John's Priority Care, which goes to the weight of her opinion as the Arbitrator finds such records probative in this case, whereas Dr. Walsh reviewed the totality of Petitioner's treating records through January 28, 2014. RX 2. Dr. Senica fails to proffer the basis of her opinion that "I do not think that this would be from a new injury on January 13, 2014" (PX 2), while Dr. Walsh notes that his opinion is based upon the change in Petitioner's McMurray's testing from equivocal to positive, as well as the change in Petitioner's knee pain, physical examination findings, and her ability to work in an unrestricted capacity that occurred

contemporaneously with the January 13, 2014 incident. RX 2, 5. Although Dr. Senica postulates that "[i]t is certainly possible that the meniscus is still symptomatic from her injurythat [sic] had occurred in September 2013", Dr. Senica's cursory suggestion fails to appreciate the change in Petitioner's right knee condition that occurred concomitantly with the incident of January 13, 2014. PX 2. In light of the aforementioned, the Arbitrator does not place evidentiary weight on the opinions of Dr. Senica, and instead, adopts the opinions of Dr. Walsh.

Based upon the foregoing and the totality of the record, the Arbitrator finds that on September 20, 2013, Petitioner sustained an undisputed fall in which she suffered contusions of the right knee and heel that were treated conservatively. The Arbitrator further finds that the incident during Petitioner's paper route on January 13, 2014 in which she experienced a pop in her right knee while walking broke the causal connection between her work accident of September 20, 2013 and her current condition of ill-being in her right knee, as it drastically altered her knee condition, as well as her physical abilities to ambulate and bear weight, and her ability to work. Therefore, the Arbitrator concludes that Petitioner's condition of ill-being in her right knee through January 12, 2014 is causally connected to her work accident of September 20, 2013, and that Petitioner failed to prove by a preponderance of the evidence that her condition of ill-being on and after January 13, 2014 is causally related to her work accident. The Arbitrator further concludes that Petitioner's current condition of ill-being in her right heel is causally related to her work accident.

In regard to disputed issue (J) and in accordance with the Arbitrator's conclusions as to causal connection, the Arbitrator finds that Petitioner's medical treatment to her right knee through January 12, 2014 was reasonable, necessary, and causally related to her work accident of September 20, 2013. The Arbitrator further finds that Petitioner's medical treatment to her right heel was reasonable, necessary, and causally related to her work accident. Respondent shall pay all reasonable and necessary medical services relative to Petitioner's right heel, and all reasonable and necessary medical services for her right knee through January 12, 2014, as provided in Sections 8(a) and 8.2 of the Act, and subject to the fee schedule. All medical services incurred on and after January 13, 2014 relative to her right knee are denied as unrelated to Petitioner's work injury. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K), Petitioner seeks temporary total disability benefits for the periods of January 13, 2014 through March 31, 2014, and January 6, 2015 through February 24, 2015. The Arbitrator notes that those time periods correspond to Dr. Senica's removal of Petitioner from work following the injury sustained while walking during her paper route on January 13, 2014 and for the arthroscopic procedure she underwent on January 16, 2015 as treatment for that injury. Consistent with the Arbitrator's conclusions as to causal connection, the Arbitrator denies temporary total disability benefits from January 13, 2014 through March 31, 2014 and January 6, 2015 through February 24, 2015 as unrelated to Petitioner's work accident.

In regard to disputed issue (L) as to Petitioner's right knee and heel, and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant. 820 ILCS 305/8.1b.

With regard to subsection (i) of 8.1b(b), the Arbitrator notes that no impairment rating pursuant to the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition appears in the record, and as such, the Arbitrator places no weight on this factor.

With regard to subsection (ii) of 8.1b(b), Petitioner was employed by Respondent and her job duties on her date of accident included pressing shirts, operating dry cleaning machines, delivering clothes, and managing the counters and stores. Following her work accident, Petitioner worked without restrictions and she testified that she was able to perform her usual and customary duties for Respondent. She continued to work in an unrestricted capacity until January 13, 2014. Therefore, the Arbitrator finds no evidence in the record to suggest that Petitioner's work injury affected her ability to perform the duties of her employment and the Arbitrator places some weight on this factor.

With regard to subsection (iii) of 8.1b(b), Petitioner was thirty-nine years of age at the time of her accident. Arb. X 1. There is no evidence in the record to suggest how Petitioner's age affects her permanent partial disability and therefore, the Arbitrator places no weight on this factor.

With regard to subsection (iv) of 8.1b(b), Petitioner continued to work without restrictions following her work accident of September 20, 2013 until her intervening incident on January 13, 2014. PX 2, 3. Therefore, the Arbitrator finds that Petitioner's work injury has not impaired her future earning capacity and the Arbitrator places some weight on this factor.

With regard to subsection (v) of §8.1b(b), the Arbitrator finds that as a result of her work accident of September 20, 2013, Petitioner sustained a contusion and pain of her right knee. Petitioner underwent conservative treatment, including an injection in her right knee, which improved her condition. Prior to the incident of January 13, 2014, Petitioner reported suffering pain and tightness in her right knee for which she utilized ice and a knee brace. A physical examination on December 26, 2013 revealed a healed abrasion over the anterior knee, no significant effusion, no ecchymosis or erythema, full extension of the knee, independent straight leg raising, some pain along the medial joint line, no significant pain along the medial or lateral patellar facet, equivocal McMurray's testing, and that Petitioner was ambulating with a limp. PX 2, 3. Based upon the foregoing and the totality of the record, the Arbitrator concludes that Petitioner's evidence of disability prior to the intervening accident of January 13, 2014, namely her complaints through December 26, 2013, are corroborated by her treating records, and as such, the Arbitrator places greater weight on this factor.

Further, as a result of her work accident of September 20, 2013, Petitioner sustained a right heel contusion that resolved and necessitated no treatment subsequent to October 2, 2013. PX 2.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 2.5% loss of use of her right knee, pursuant to Section 8(e) of the Act. The Arbitrator further finds that Petitioner failed to demonstrate that she sustained any permanent disability to her right heel as a result of her work accident and the Arbitrator accordingly denies permanent partial disability benefits to the right foot.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANKAKEE)

☐ 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

Teresa Saxon,

Petitioner,

16IWCC0549

vs.

NO: 14 WC 03593

Shapiro Developmental Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection and permanent partial disability and being advised of the facts and law, modifies the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Decision of the Arbitrator sets forth the undisputed circumstances of Petitioner's accidental injury on October 18, 2013 as well as the history of treatment for that injury and the evidence at arbitration. After reviewing all of the evidence and for the reasons set forth below, we find that Petitioner failed to prove that her current condition of ill-being is causally related to the October 18, 2013 accident and we vacate the Arbitrator's award of 2% loss of use of the left leg.

In support of an award of permanent partial disability, the Arbitrator placed significant weight on Petitioner's testimony with respect to alleged ongoing left shin pain. Neither party offered an impairment rating. Petitioner successfully returned to work in her pre-injury employment and offered no evidence of diminished earning capacity. The Arbitrator placed additional weight on Petitioner's age (46) and physically demanding job as a Mental Health Tech II. The Arbitrator relied on Petitioner's testimony that "her left leg still bothers her today and she sometimes has to ice and elevate her leg. She also has a shooting pain in the left shin and explained that she has to do a lot more walking now. Petitioner also testified that she takes pain medication for her work injury, which is prescribed by her primary care physician Dr. Simon Wu which addresses pain in the leg as well as cancer and other unrelated medical conditions." The Arbitrator found that Petitioner testified credibly and that Respondent failed to offer any rebuttal. (Arbitration Decision, p. 2)

16IWCC0549

The Commission views the evidence differently. On the final date of treatment, November 4, 2013, Petitioner reported that her left leg was much better and almost back to normal. She was discharged from care and released to work full duty. Her self-serving testimony that she would not have been released to full duty work but for her own request to Dr. Panuska is not corroborated by the records. The objective evidence shows that Petitioner's condition improved with several weeks of light duty work and activity restrictions. After her discharge from care, Petitioner never sought additional treatment for her left shin and returned to her usual employment.

We do not find Petitioner's testimony to be entirely credible. We note that she initially denied any injuries to her left leg after October 18, 2013. However, when confronted with evidence of an emergency room visit on December 9, 2013 she acknowledged that she sustained an injury to her left knee on that date. The medical records show that Petitioner presented to the emergency room "sobbing and hyperventilating" after sustaining a fall onto her left knee on December 9, 2013. Petitioner received an opioid injection for severe pain and was diagnosed with a left medial collateral ligament tear. We acknowledge that the December 9, 2013 injury did not directly involve Petitioner's left shin. However, her disavowal of any left leg injury occurring after the October 18, 2013 accident negatively impacts Petitioner's credibility. Furthermore Petitioner denies any residual symptoms from the December 9, 2013 injury, yet claims to have significant ongoing pain in her left shin since the October 18, 2013 accident.

We find that Petitioner failed to prove causal connection between her current condition of ill-being of left shin pain and the October 18, 2013 accident. We note the length of time that has passed since her release from care by Dr. Panuska and her successful return to work. We further note her subsequent left knee injury and concurrent unrelated conditions for which she is under medical treatment and has been off of work since October of 2015. Petitioner admitted that she has pain in her right leg as well as in other parts of her body. On cross-examination, Petitioner admitted that the pain medication she takes is prescribed by her doctor for her other conditions, not for her left shin pain.

In conclusion, we vacate the Arbitrator's award of permanent partial disability as it is not supported by a preponderance of the evidence.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated December 10, 2015 is hereby modified as stated above.

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: AUG 25 2016
RWW/plv
o-7/13/16
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0549

SAXON, TERESA
Employee/Petitioner

Case# **14WC003593**

SHAPIRO DEVELOPMENTAL CENTER
Employer/Respondent

On 12/10/2015, 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 0.53% 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:

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0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

DEC 10 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0549

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Teresa Saxon
Employee/Petitioner

v.

Shapiro Development Center
Employer/Respondent

Case # **14** WC **3593**

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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Kankakee**, on **November 13, 2015**. After reviewing all of the evidence presented, the undersigned Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On October 18, 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* 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 as explained *infra*.

In the year preceding the injury, Petitioner earned $41,085.00; the average weekly wage was $790.10.

On the date of accident, Petitioner was 46 years of age, *married* with no dependent children.

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

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

Respondent shall be given a credit of $0 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

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between her left leg condition and accident at work.

Permanent Partial Disability: Schedule Injury

Respondent shall pay Petitioner permanent partial disability benefits of $474.06/week for 4.3 weeks, because the injuries sustained caused the 2% loss of the left leg, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

December 3, 2015
Date

DEC 10 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Teresa Saxon
Employee/Petitioner

v.

Shapiro Development Center
Employer/Respondent

Case # **14** WC **3593**

Consolidated cases: **N/A**

FINDINGS OF FACT

The issues in dispute at this hearing include causal connection and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[1] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

The circumstances of Petitioner's accident are not in dispute. Petitioner testified that she was injured on October 18, 2013 while working for Respondent as a Mental Health Tech II. Her duties included making sure that individuals were safe and assisting them with activities of daily living such as showering, grooming and feeding.

Toward the end of her shift on the morning of October 18, 2013, Petitioner testified that she was getting residents up for work and making beds. She was in the process of taking items from a resident that liked to steal things from others. Petitioner asked the resident to give her the items and he refused. The resident became agitated and kicked her in the left shin. Petitioner dropped the items and sat on the floor. The resident took the items, went into his room and closed the door.

Petitioner then reported the injury to Brian Miller, the shift charge supervisor, and she was then notified that she had to fill out a report. Petitioner filled out a report indicating that an individual was stealing and she took the items from him after which he kicked her in the left shin. RX1. After work, Petitioner drove herself to the hospital.

Medical Treatment

The medical records reflect that Petitioner presented at Presence St. Mary's Hospital in the early morning on October 18, 2013. PX1, RX3. Petitioner reported that she was kicked in the left leg at work. Id. The triage nurse noted that Petitioner was limping. Id. She was examined by Dr. Kurzejka, who noted her lower left leg was tender upon examination. Id. He administered an injection of Toradol, an anti-inflammatory pain medication, and Petitioner underwent x-rays of the left tibia/fibula. Id. The radiologist noted no fracture. Id. Petitioner was diagnosed with a lower leg contusion, given a prescription for Lodine, another anti-inflammatory pain medicine, and instructed to rest, ice and elevate her leg. Id. Dr. Kurzejka imposed work restrictions and Petitioner was instructed to follow up at Presence St. Mary's Hospital Occupational Health Center. Id.

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

Petitioner testified that she then went to occupational health on Monday. The medical records reflect that she saw Dr. Panuska on October 21, 2013. PX1, RX3. She reported an achy pain in the shin of her left lower leg at a pain level of 5/10. Id. On examination, Dr. Panuska noted tenderness over the anterior portion of her lower left leg and that Petitioner walked with an antalgic gait. Id. Dr. Panuska wrapped her leg with an ACE bandage and prescribed Biofreeze, a pain reliever gel. Id. He also imposed work restrictions with a sitting job and minimum walking until she could be re-evaluated. Id. Petitioner testified that Respondent accommodated her light duty restrictions and she sat and folded laundry. She also testified that while she remained under medical treatment she stayed off of her leg and walked limitedly.

Petitioner returned to Dr. Panuska on October 25, 2013 reporting continued pain and that her left lower leg was still bothering her. PX1, RX3. On examination, Petitioner's left leg was swollen and tender. Id. Dr. Panuska prescribed Ultracet, a pain medication, and maintained Petitioner's work restrictions. Id. Petitioner was scheduled for re-evaluation in one week. Id.

On October 30, 2013, Petitioner reported that she was getting better, but still walking a little slow with continued tenderness. PX1, RX3. Dr. Panuska noted tenderness in the same area of the leg with less swelling. Id. He modified Petitioner's work restrictions to alternate between sitting and standing as needed and scheduled a follow up in one week anticipating a full duty release to work. Id.

When the Petitioner saw Dr. Panuska on November 4, 2013, she was doing much better and her leg was "almost back to normal." PX1, RX3. On examination, Dr. Panuska noted that Petitioner was still a little tender, but her station and gait were normal. Id. Petitioner was released to return to work without restrictions and discharged from care. Id. Petitioner testified that she asked Dr. Panuska to let her go back to work at this time and that she did return to work full duty. She also testified that she had to sit often because of pain in her left shin, that she took pain pills, elevated her leg and applied ice to her left shin.

Additional Information

Regarding her current condition, Petitioner testified that her left leg still bothers her today and she sometimes has to ice and elevate her leg. She also has a shooting pain in the shin and explained that she has to do a lot more walking now. Petitioner also testified that she takes pain medication for her work injury, which is prescribed by her primary care physician Dr. Simon Wu which addresses pain in the leg as well as cancer and other unrelated medical conditions.

Petitioner testified that she had no problems with her left leg before or had prior medical treatment to the left leg. On cross examination Petitioner acknowledged that she did have an injury to her left knee on December 9, 2013 for which she went to the emergency room. *See also* RX3. Petitioner was diagnosed with a medial lateral coligament tear of left knee. Id.

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at hearing as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's current condition of ill-being in the left leg is causally related to the injury sustained at work on October 18, 2013. In so concluding, the Arbitrator relies on the credible testimony of Petitioner which is consistently corroborated by contemporaneous medical records. Moreover, no contrary medical opinion was offered into evidence to rebut the findings of the emergency room physician or Petitioner's treating physician about Petitioner's ongoing condition. Thus, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident at work on October 18, 2013.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Section 8.1b of the Illinois Workers' Compensation Act ("Act") addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. *Id.*

Considering these factors in light of the evidence submitted at trial, the Arbitrator addresses the factors delineated in the Act for determining permanent partial disability.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence by either party. Thus, the Arbitrator considers the parties to have waived their right to do so and assigns no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a Mental Health Tech II at the time of her injury and finds Petitioner's testimony regarding the physical demands of her work on the date of the accident and thereafter to be credible. This evidence is uncontroverted. As a result, the Arbitrator gives significant weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 46 years old at the time of the accident. As a result, the Arbitrator gives significant weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that no evidence was introduced regarding any diminishment in Petitioner's future earning capacity because of her injury at work. As a result, the Arbitrator gives significant weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's emergency room treatment and treatment with Dr. Panuska reflect Petitioner's ongoing symptoms in the lower left leg and shin to include pain, swelling that ultimately subsided and tenderness, which improved. No further treatment was recommended after November 4, 2013 and Petitioner was released back to full duty work. However, Petitioner credibly testified about limited, ongoing symptoms in her left leg including a shooting pain in the shin and the need to ice and elevate her left leg. No contrary medical evaluation or opinion from any physician was offered into evidence. As a result, the Arbitrator gives significant weight to this factor.

Based on all of the foregoing, and in consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner has established that her injury at work resulted in permanent partial disability to the extent of 2% loss of use of the left leg pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

☒ Affirm and adopt	☐ 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

Annette E. Pignon,
Petitioner,

vs.

Illinois State Police,
Respondent.

16IWCC0537
NO: 14 WC 9125

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 27, 2016 is hereby affirmed and adopted.

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

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

DATED: AUG 18 2016
KWL/vf
O-8/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0537

PIGNON, ANNETTE E
Employee/Petitioner

Case# **14WC009125**

13WC010150

ILLINOIS STATE POLICE
Employer/Respondent

On 10/27/2015, 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 0.15% 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:

4494 SGRO HANRAHAN & BLUE
ELLEN C BRUCE
1119 S 6TH ST
SPRINGFIELD, IL 62703

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

5300 ASSISTANT ATTORNEY GENERAL
CODY S KAY
500 S SECOND ST
SPRINGFIELD, IL 62706

2202 ILLINOIS STATE POLICE
801 S 7TH ST
SPRINGFIELD, IL 62703

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

OCT 27 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

16IWCC0537

Annette E. Pignon
Employee/Petitioner

v.

Illinois State Police
Employer/Respondent

Case # 14 WC 09125

Consolidated cases: 13 WC 10150

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on August 25, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On February 7, 2014, 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 $42,713.84; the average weekly wage was $821.42.

On the date of accident, Petitioner was 60 years of age, single with 0 dependent child(ren).

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 amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 16, 17 and 18 for treatment provided to Petitioner in connection with her left carpal tunnel syndrome, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $547.61 per week for five-sevenths (5/7) weeks commencing February 10, 2014, through February 17, 2014 (one and one-sevenths (1 1/7) weeks less the three-seventh (3/7) weeks waiting period).

Respondent shall pay Petitioner permanent partial disability benefits of $492.85 per week for 19 weeks because the injury sustained caused the 10% loss of use of the left hand, as provided in Section8(e) of the Act.

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.

William R. Gallagher, Arbitrator

October 21, 2015
Date

OCT 27 2015

 Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged she sustained repetitive trauma injuries arising out of and in the course of her employment for Respondent. In case number 13 WC 10150, the Application alleged repetitive trauma to Petitioner's right hand and the nature of the injury was "carpal tunnel." The date of accident (manifestation) was alleged as December 24, 2012 (Petitioner's Exhibit 1). At trial, Petitioner's counsel made a motion to amend the date of manifestation to December 13, 2012. Respondent's counsel had no objection and the Arbitrator granted the motion and changed the date of manifestation alleged on the Application to December 13, 2012. In case number 14 WC 09125, the Application alleged repetitive trauma to Petitioner's left hand and the nature of the injury was "carpal tunnel syndrome." The date of accident (manifestation) was alleged as February 7, 2014 (Petitioner's Exhibit 12). In both cases, Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner began working for Respondent on December 1, 2008, as an Office Assistant in the Records Management Section. Petitioner testified that her job duties required her to manage/maintain a significant number of folders that contained reports/records. When Petitioner worked with the folders, she had to review and sort individual sheets of paper, make certain that they had the correct case number, that they were in proper sequence, in correct chronological order, etc. Petitioner would then use a hole punch at the top of each document and, once they were punched, they could be placed on two metal prongs and secured with a metal closure. When Petitioner used the hole punch, she would generally punch approximately 25 sheets of paper at the same time.

Petitioner stated that she would spend approximately six hours of every seven and one-half hour work day performing the aforementioned duties. Petitioner would assemble 75 to 100 folders per day depending upon how many documents were contained in each one.

Kathy Kirk, Petitioner's immediate supervisor, testified at trial. Kirk confirmed Petitioner's description of her job duties. Kirk also identified a printout of data that indicated how many sheets of paper Petitioner had to sort for the last six months of 2011, all of 2012 and 2013, and the first two months of 2014 (Respondent's Exhibit 5). Kirk testified, based on the preceding, that the amount of paper Petitioner had to handle decreased from 2011 to 2014. She also stated that sometime in May, 2013, Petitioner switched to Quality Control, which did not require Petitioner to sort or handle as much paper as she did previously.

The Arbitrator reviewed the data submitted into evidence by Respondent. For the last six months of 2011, Petitioner reviewed 121,048 sheets of paper; for 2012 and 2013, Petitioner handled 156,270 and 71,389 sheets of paper, respectively; and, for the first two months of 2014, Petitioner handled 10,560 sheets of paper (Respondent's Exhibit 5).

Petitioner testified that she started to experience numbness/tingling in her right hand while at work. In particular, Petitioner had these symptoms when she was in the process of removing folders from shelves in the office. She stated that she had problems grasping the folder long enough to get it from the shelf down to the table.

Petitioner initially sought medical treatment from Dr. Lorie Bleyer, her family physician, on December 13, 2012 (the date of manifestation alleged in the Application, as amended). At that time, Petitioner complained of right arm/hand numbness, in particular, numbness of the tips of the right third and fourth fingers. Dr. Bleyer ordered an EMG/nerve conduction study (Petitioner's Exhibit 10).

On December 13, 2012, Petitioner reported to Kathy Kirk that she had sustained a work-related injury to her right arm/hand (Petitioner's Exhibit 2). Kirk subsequently completed a "Demands of the Job" form which stated that Petitioner used her hands for gross manipulation and fine manipulation for four to six hours per day (Petitioner's Exhibit 2).

On December 24, 2012, Petitioner was seen by Dr. David Gelber, who performed an EMG/nerve conduction study on the right upper extremity. At that time, Petitioner informed Dr. Gelber that she had numbness of the right third and fourth fingers for the preceding six months. The EMG/nerve conduction study was positive for moderately severe right carpal tunnel syndrome (Petitioner's Exhibit 3).

Petitioner was subsequently seen by Dr. Mark Greatting, an orthopedic surgeon, on January 17, 2013. At that time, Petitioner was still being treated by Dr. Greatting for a left shoulder problem. In regard to Petitioner's right hand, Dr. Greatting's findings on examination were positive for carpal tunnel syndrome and he noted the positive EMG/nerve conduction study. He recommended Petitioner have a right carpal tunnel surgical release. On February 22, 2013, Dr. Greatting performed a right carpal tunnel release surgery. When Dr. Greatting saw Petitioner on April 8, 2013, her right hand symptoms had "markedly improved." (Petitioner's Exhibit 5; Deposition Exhibit 2).

In late summer/early fall of 2013, Petitioner started experiencing similar symptoms in her left hand. Petitioner again sought treatment from Dr. Bleyer who saw her on January 28, 2014. At that time, Petitioner complained of numbness in the thumb, index and middle fingers. Dr. Bleyer ordered an EMG/nerve conduction study (Petitioner's Exhibit 10).

On February 7, 2014, Petitioner was seen by Dr. Gelber who performed an EMG/nerve conduction study. The EMG/nerve conduction study was positive for moderate to severe left carpal tunnel syndrome (Petitioner's Exhibit 14).

Petitioner was subsequently seen by Dr. Greatting on February 20, 2014. Dr. Greatting's findings on examination were positive for left carpal tunnel syndrome and he recommended Petitioner have left carpal tunnel surgery performed. Dr. Greatting performed left carpal tunnel surgery on April 4, 2014 (Petitioner's Exhibit 15).

Dr. Greatting was deposed on April 22, 2014, and his deposition testimony was received into evidence at trial. Dr. Greatting's deposition was taken in regard to case number 13 WC 10150. In regard to causality, Dr. Greatting testified that he reviewed the report of injury, the Demands of the Job form and Petitioner's performance review for December 1, 2011, to November 30, 2012. When questioned whether there was a causal relationship between Petitioner's work activities

and the carpal tunnel syndrome on the right side, Dr. Greatting stated "I don't know that I could say that her work would directly cause her to have carpal tunnel. I think in a 60-year old female that did that type of work, that potentially, those activities could aggravate her symptoms, or you know, exacerbate her symptoms to the point where they required treatment." (Petitioner's Exhibit 5; pp 19-20).

When Petitioner's counsel began to question Dr. Greatting in regard to the left carpal tunnel syndrome, Respondent's counsel objected on the basis that Petitioner's counsel had not provided him with records regarding same. Therefore, Petitioner's counsel did not ask Dr. Greatting about whether Petitioner's work activities caused or aggravated the left carpal tunnel syndrome condition (Petitioner's Exhibit 5; pp 24-25).

At the direction of Respondent, Petitioner was examined by Dr. William Feinstein, an orthopedic surgeon, on August 26, 2014. Dr. Feinstein examined Petitioner in regard to both her right and left carpal tunnel syndrome conditions and was also requested to provide an AMA impairment rating. In his narrative report dated August 26, 2014, Dr. Feinstein opined that Petitioner had a permanent partial impairment rating of two percent (2%) at the level of the left upper extremity in regard to the "work-related left carpal tunnel syndrome." He also opined that Petitioner had a permanent partial impairment rating of two percent (2%) at the level of the right upper extremity in regard to the "work-related right carpal tunnel syndrome." Dr. Feinstein's report of that date also contained the statement that "There are no pre-existing conditions that contribute to the permanent partial impairment rating." (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Feinstein subsequently prepared a supplemental report dated September 15, 2014, directed to Charlene Shauwitzer, in response to a letter from her. In this report, Dr. Feinstein stated "In your letter, you requested that I specifically address causation regarding Ms. Annette Pignon's bilateral carpal tunnel syndrome and surgeries. After reviewing the records again and the IME report, it is my medical opinion that the bilateral carpal tunnel syndrome is in fact not related to work on the basis of the dates of injury, July 5, 2012 and February 7, 2014. It is more likely, that her conditions were related to diabetes, thyroid problems, age, menopause or insidious in onset. Again, it is my medical opinion that Ms. Annette Pignon's bilateral carpal tunnel syndrome is not work related." (Respondent's Exhibit 3; Deposition Exhibit 3).

Dr. Feinstein was deposed on January 12, 2015, and his deposition testimony was received into evidence at trial. Dr. Feinstein reaffirmed his opinion that Petitioner's bilateral carpal tunnel syndrome was not work-related as well as his AMA ratings of two percent (2%) impairment of the left and right upper extremities (Respondent's Exhibit 3; pp 13-14).

At trial, Petitioner testified that she was able to return to work to her regular job following both carpal tunnel surgeries. Petitioner stated that she still has some complaints of pain and numbness in the tips of her fingers of both hands.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained a repetitive trauma injury to her left hand arising out of and in the course of her employment for Respondent that manifested itself on February 7, 2014, and that her current condition of ill-being is causally related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner's testimony that her job duties required the active and repetitive use of her hands was unrebutted.

While Respondent presented evidence that the amount of paper Petitioner had to handle/sort decreased from 2011 to 2014, Petitioner was still required to handle/sort substantial amounts of same, in addition to her other hand intensive activities.

When Dr. Greatting was deposed, he did not specifically testify in regard to a causal relationship between Petitioner's left carpal tunnel syndrome and Petitioner's work activities. However, Dr. Greatting's deposition testimony in regard to the issue of causality was based on Petitioner's work activities involving both of her hands and, when he testified, Dr. Greatting referred to Petitioner developing "carpal tunnel" and did not specifically limit his response to the right hand.

Irrespective of whether Dr. Greatting's opinion can be read to support a finding of causality in respect to the left hand, Respondent's Section 12 examiner, Dr. Feinstein, initially opined that Petitioner's left hand carpal tunnel syndrome was work-related. It was after he received correspondence from an individual, apparently acting on behalf of Respondent, that he opined to the contrary.

Based on the preceding, the Arbitrator finds the opinion of Dr. Greatting to be more credible and persuasive than that of Dr. Feinstein. Further, the Arbitrator finds that because Dr. Feinstein changed his opinion in regard to causality, it is highly questionable.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibits 16, 17 and 18 for treatment provided to Petitioner in connection with her left carpal tunnel syndrome, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to payment of temporary total disability benefits of five-sevenths (5/7) weeks, commencing February 10, 2014, through February 17, 2014 (one and one-sevenths (1 1/7) weeks less the three-seventh (3/7) weeks waiting period).

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner was temporarily totally disabled during the aforestated period of time.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 10% loss of use of the left hand.

In support of this conclusion the Arbitrator notes the following:

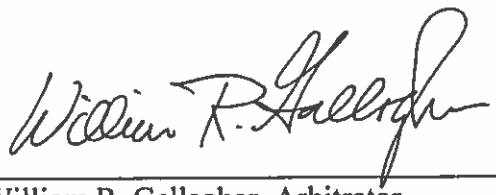
Dr. Feinstein opined to an AMA impairment rating of two percent (2%) permanent partial impairment of the left upper extremity. The Arbitrator notes that the impairment is for the left upper extremity and it is not limited to the left hand. The Arbitrator gives this factor moderate weight.

Petitioner's occupation required the active and repetitive use of her hands. The Arbitrator gives this factor moderate weight.

Petitioner was 60 years of age at the time of the manifestation. There was no evidence that this factor had any impact on Petitioner's left carpal tunnel syndrome or her subsequent recovery. The Arbitrator gives this factor no weight.

There was no evidence that Petitioner's left carpal tunnel syndrome condition will have any effect on her future earning capacity. The Arbitrator gives this factor no weight.

Petitioner was diagnosed with moderate to severe left carpal tunnel syndrome and the condition required surgery. Petitioner made a good recovery after surgery, but still has some complaints consistent with the condition. The Arbitrator gives this factor significant weight.



William R. Gallagher, Arbitrator

STATE OF ILLINOIS	)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF JEFFERSON	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Bryan Johnson,
Petitioner,
vs.

Village of Bonnie,
Respondent.

16IWCC0540

NO: 14 WC 13578

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of nature and extent of Petitioner's permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 8, 2015 is hereby affirmed and adopted.

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

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

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: AUG 18 2016
KWL/vf
O-8/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0540

JOHNSON, BRYAN
Employee/Petitioner

Case# **14WC013578**

VILLAGE OF BONNIE
Employer/Respondent

On 10/8/2015, 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 0.06% 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:

0969 THOMAS C RICH PC
6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF **Jefferson**)

☐ 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 **16IWCC0540**

Bryan Johnson
Employee/Petitioner

v.

Village of Bonnie
Employer/Respondent

Case # **14** WC **13578**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **March 4, 2015**. 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 **Choice of Physician**

16IWCC0540

FINDINGS

On **7/8/2013**, 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*** 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 **$31,200.00**; the average weekly wage was **$531.43**.

On the date of accident, Petitioner was **24** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** 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 **$11,149.92** under Section 8(j) of the Act.

ORDER

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $318.86/week for 62.5 weeks, because the injuries sustained caused the 12.5% loss of the person as a whole, as provided in § 8(d)2 of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,143.00 to Dr. Bradley Drake, $1,836.92 to Cross Roads Hospital, and $6,170.00 to Orthopaedic Center of Southern Illinois, as provided in Sections 8(a) and 8.2 of the Act.

The medical bills of $605.00 to Dr. David Raskas, and $2,300.00 to MRI Partners of Chesterfield are denied pursuant to § 8(a)(3) of the Act because Petitioner exceeded his two choices of physician.

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

9/30/15
Date

ICArbDec p. 2

OCT 8 2015

FINDINGS OF FACT

At the time of the accident, Petitioner was a 24-year-old employee of the Village of Bonnie. He sustained accidental injuries on July 8, 2013, when he injured his back while riding on a tractor. Respondent disputes the nature and extent of the injury and disputes the charges for treatment provided by Dr. Raskas and MRI partners of Chesterfield, claiming that Petitioner exceeded his choices of physician.

Petitioner sought care with his chiropractor, Dr. Drake on 7/10/13. Dr. Drake treated Petitioner with physical therapy and adjustments from 7/10/13 through 11/8/13. Petitioner testified that Dr. Drake's treatment provided limited relief.

Petitioner's unrefuted testimony indicated he then called Respondent's insurance carrier because he felt he was not improving and wanted to see a medical doctor. Petitioner credibly testified that Respondent recommended The Orthopedic Center in Mt. Vernon. Petitioner had no other knowledge of the Orthopedic Center. Petitioner called The Orthopedic Center and they scheduled him an appointment with Dr. Aping Smith. Petitioner testified that he would not have begun treating with Dr. Smith but for the referral from Respondent's workers' compensation coordinator. He admitted, however that Respondent did not order or force him to treat at The Orthopedic Center.

Petitioner first saw Dr. Smith 11/21/13. The medical record reflects self-referral and that "self" requested the appointment. (RX3). Petitioner reported low back pain radiating down the right leg since the July work accident. Dr. Smith placed Petitioner on anti-inflammatory medication and obtained an MRI that revealed partial disc desiccation at the posterior aspect of L3 and a central disc herniation at L3-4. (PX5) Dr. Smith placed Petitioner in physical therapy and recommended cortisone injections; however, these were not approved by Respondent's carrier. (T.15, 16; PX5, 11/21/13, 12/20/13, 12/23/13 request, 1/8/14 request).

Respondent sent Petitioner for a Section 12 examination with Dr. Donald deGrange on 1/29/14. Dr. deGrange diagnosed lumbar strain and L3-4 disc bulge. Dr. deGrange opined that injections would not provide sustained benefit. He opined Petitioner reached maximum medical improvement and that he could continue to work full duty. (RX1).

Petitioner then sought representation and was sent to Dr. David Raskas by his attorney. Dr. Raskas saw Petitioner on 4/15/14, and noted that Petitioner was examined at the request of Respondent by Dr. DeGrange, who told Petitioner that there was nothing wrong with him. (PX6, 4/15/14). Dr. Raskas reviewed Petitioner's MRI and agreed that it showed an L3-4 herniated disc. *Id.* He stated there was not much degenerative change in the disc, likely indicating an acute disc herniation. *Id.* A new, high field strength MRI scan demonstrated an obvious central disc herniation at L3-4 with annular tearing that flattened the thecal sac in that area, which Dr. Raskas believed was the source of Petitioner's present pain radiating into his leg. (PX6, 4/21/14; PX7). Dr. Raskas believed that Petitioner's condition was directly attributable to Petitioner's work injury in July of 2013. (PX6, 4/21/14). Dr. Raskas also recommended injections. *Id.*

Respondent sent Petitioner back to Dr. deGrange 8/6/14. Petitioner reported intermittent low back pain, worse in the evenings or when he drives more than one hour. He had less symptoms when working and staying active. The symptoms occasionally went down the right lower extremity. Dr. deGrange reviewed the new MRI

and compared it to the December 2013 study. He opined the L3-4 herniation progressed and was noticeably larger causing a moderate degree of central stenosis along with congenital spinal stenosis and facet arthropathy. Dr. deGrange opined that the injections would not provide sustained relief. He again stated Petitioner was at maximum medical improvement. (Rx. 2).

Petitioner testified that he currently experiences constant aching and throbbing in his low back with pain radiating into his leg throughout the day. His pain begins above his belt line and goes into his right leg. He also experiences aching when he stands or drives for long periods of time. He does not, however, plan on receiving any injections. Petitioner testified that his sleeping has been adversely affected. He can no longer sleep in his bed; he sleeps on the floor and awakens several times during the night. Petitioner takes Tylenol and Tylenol PM 3 to 4 times per day for his symptoms.

CONCLUSIONS OF LAW

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that Neither party submitted an AMA rating. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes Petitioner currently serves as a tire builder for Continental Tire. He testified that he is required to perform heavy labor in the form of moving wheeled breaker cassettes which weigh up to 800 pounds. Because of the heavy nature of his work, The Arbitrator gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 24 years old at the time of his injury. He is very young and will have to live and work with his disability for a very long time. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. The Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner was a credible witness. Petitioner testified that he currently experiences constant aching and throbbing in his low back with pain radiating into his leg throughout the day. His pain begins above his belt line and goes into his right leg. He also experiences aching when he stands or drives for long periods of time. He does not, however, plan on receiving any injections. Petitioner testified that

his sleeping has been adversely affected. He can no longer sleep in his bed; he sleeps on the floor and awakens several times during the night. Petitioner takes Tylenol and Tylenol PM 3 to 4 times per day for his symptoms.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 12.5% loss of his body as a whole pursuant to §8(d)2 of the Act.

Issue (J): Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Issue (O): Did Petitioner exceed his choices of physician?

The parties agree that the treatment provided by Dr. Raskas or at his referral was reasonable and necessary. Respondent claims, however that Petitioner exceeded his choices of physician under the Act, and that it is therefore not liable for the expenses of Dr. Raskas or any provider in his chain of referrals.

Section 8(a) of the Workers' Compensation Act provides that an employer is obligated to pay all medical, surgical and hospital services provided by any first or second physician chosen by the employee. The employer is also responsible for any for any expenses pertaining to treatment by referrals from either the first or second choice of physicians. *Nabisco Brands, Inc. v. Industrial Commission*, 266 Ill.App.3d 1103 (1994).

It is undisputed that Petitioner initially treated with Dr. Drake. Petitioner testified Dr. Drake was his first choice. The record establishes that when Petitioner did not fully improve with chiropractic treatment he requested a referral from Dr. Drake to see a medical doctor. Petitioner testified that Dr. Drake denied the request and assured him that continued chiropractic care was the appropriate treatment.

Petitioner's unrefuted testimony indicated he then called Respondent's insurance carrier because he felt he was not improving and wanted to see a medical doctor. Petitioner credibly testified that Respondent's carrier recommended The Orthopedic Center in Mt. Vernon. Petitioner had no other knowledge of the Orthopedic Center. Petitioner called The Orthopedic Center and the office scheduled him for appointment with Dr. Aping Smith. Petitioner testified that he would not have begun treating with Dr. Smith but for the referral from Respondent's workers' compensation carrier. He admitted, however that Respondent did not order or force him to treat at The Orthopedic Center. Eventually, Dr. Smith placed Petitioner in physical therapy and recommended cortisone injections. After referring Petitioner to Dr. Smith's office, however Respondent would not approve the treatment he proposed. Following Respondent's refusal to authorize treatment, Petitioner sought representation. Petitioner's attorney sent him to Dr. David Raskas.

The Arbitrator found Petitioner's testimony to be forthright and credible in all regards. The Arbitrator finds that the actions of Petitioner in this case were far from constituting "doctor shopping." Further, the conduct of Respondent in providing Petitioner with the name of The Orthopedic Center when he sought assistance from them in locating a reputable physician, but then denying authorization for the treatment he recommended, was disingenuous. The Arbitrator notes that requiring Petitioner to count Respondent's referral as one of his choices, under the circumstances of this case, creates an opportunity for employers and their representatives to take advantage of the lack of sophistication of pro se Petitioners in order to deny them a rightful choice of physician under the Act. However, because, by his own admission, Petitioner was not

"forced" or "required" to accept Respondent's referral, the Arbitrator finds The Orthopedic Center (Dr. Smith) was Petitioner's second choice of physician.

Based upon the foregoing and the record taken as a whole, the Arbitrator must find Dr. Smith was Petitioner's second choice of physician, making Dr. Raskas Petitioner's third choice. The bills from Dr. Raskas and MRI Partners are therefore denied under Section 8(a)(3).

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ 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

Judy Grant,
Petitioner,

vs.

NO: 14WC 13597

State of Illinois, Southwestern Correctional Center,
Respondent,

16IWCC0553

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 20, 2015, is hereby affirmed and adopted.

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

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

DATED: AUG 25 2016
o081616
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

GRANT, JUDY
Employee/Petitioner

Case# **14WC013597**

SOI SOUTHWESTERN CORRECTIONAL CENTER
Employer/Respondent

16IWCC0553

On 8/20/2015, 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 0.24% 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:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

3291 ASSISTANT ATTORNEY GENERAL
DIANA E WISE
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

AUG 20 2015

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0553

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Judy Grant
Employee/Petitioner

v.

State of Illinois, Southwestern Corectional Center
Employer/Respondent

Case # 14 WC 13597

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **February 25, 2015**. 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. [x] 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 _____

FINDINGS

On the date of accident, **February 23, 2014**, 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 **(reserved)** given to Respondent.

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

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

On the date of accident, Petitioner was **(reserved)**.

Respondent **(reserved)** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$(reserved)** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of $ **(reserved)**.

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

ORDER

Because Petitioner has failed to meet her burden of proving by a preponderance of the evidence that she sustained an accidental injury which arose out of and in the course of her employment, benefits are denied.

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

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

Signature of Arbitrator

8/20/15
Date

ICArbDec19(b)

AUG 20 2015

16IWCC0553

BACKGROUND

The parties have agreed to try this case on the issue of accident only. All other issues are reserved. Specifically, the issue here is whether Petitioner's fall arose out of and occurred in the course of Petitioner's employment.

FINDINGS OF FACT

Petitioner is a Correctional Officer (CO) at Southwestern Illinois Correctional Center. She works the midnight shift, starting work at 11:00 pm and ending at 7:00 am.

On February 23, 2014, Petitioner was leaving work after her normal shift. At approximately 6:58 am. Petitioner exited the building through her normal route. The front door is used by all employees and the general public to enter/exit the building. TX 59. After leaving the front door people can choose to either go down the steps to the sidewalk or go down the concrete ramp to the left of the door. You then cross the sidewalk step off of the curb and onto the parking lot surface. On the date of her fall Petitioner was talking to her co-worker, CO Roger Sherrer as she walked. TX 43, 65. Petitioner went out the front door, down the steps, and across the sidewalk. When Petitioner encountered the curb, she fell onto her hands and knees on the pavement. TX 43-44, 59. Petitioner testified she was not hurrying for any reason. TX 60. She was not carrying anything which contributed to her fall. Although there are some defects on the actual steps leading to the sidewalk, Petitioner, as well as all of the other witnesses, testified that Petitioner fell off of the curb, not the light gray/blue steps. TX 44, 53, 58-59. The Arbitrator notes that the curb, as depicted in RX 14, 15 and 16, has no apparent structural defects, including any crumbling concrete, raised areas, loose gravel, etc.

Petitioner testified that she slipped on the curb causing her to fall. She could not recall wether it had rained or snowed the night before or into the morning of February 23, 2014. TX 60-61. Petitioner testified, "It was wet because when I lifted my pant legs and showed my coworker my pants legs were wet in the knee area and on the right hip area." TX 44. In her 2/24/14 Incident Report Petitioner indicated she slipped on the bottom step of the administration building. RX 1. The document created when Petitioner went to Respondent's Healthcare Unit indicates she slipped on the curb step and fell. RX 3. On 2/26/14 Petitioner called the "1-800 number" as required by Respondent and reported the accident. As a result, an Illinois Form 45: Employer's First Report of Injury was generated which indicates Petitioner stated she was walking downstairs, slipped or misstep and fell down the steps, RX 2. Then, on 2/27/14, Petitioner filled out a Workers' Compensation Employee's Notice of Injury on which she wrote, "Leaving Adm Bld at the end of my shift, fell off last step onto pavement..." and in another section of the report indicated "[f]ell at last step in front of Adm Bldg...." RX 1.

Petitioner saw Dr. Gregory Simmons on 2/24/14. His records indicate "She apparently missed a step, fell, and landed onto both knees." PX 3. On 3/31/14 Petitioner saw Dr. Mathew Gornet. His records indicate Petitioner "...was walking out of work and slipped and fell forward, landing onto her knees and elbows...." PX 7, RX 8, p 3. Petitioner also saw Dr. Granberg of Millenium Pain Management on 6/10/14. His records reflect Petitioner "had a slip outside at work and fell...." PX 10, RX 9.

Four of Petitioner's coworkers testified at trial. Correctional Officer Roger Sherrer, Petitioner's co-worker, testified that "we was walking off the curb and she just took a step off the curb and fell." TX 11. He did not recall coming into contact with any ice or wetness while helping Petitioner stand up. TX 13. He indicated that he did not remember thinking to himself that she had fallen because of ice or because it was wet. TX 13. He had no problem seeing on the day of the fall. TX 67.

Sergeant Eugene Smith also testified at trial. Sgt Smith stated that he was already in his vehicle when he saw Petitioner fall of the curb. Sgt. Smith stated that he did not remember anything out of the ordinary at the time Petitioner fell, like it being icy or wet. TX 17. He did not remember thinking to himself that Petitioner had fallen because of ice or because it was wet. TX 17. He does not remember Petitioner ever telling him that she had fallen because it was icy or wet. TX 17. With regard to visibility he indicated it was not total darkness, but the sun was not fully up either. He stated he was maybe 100 feet from Petitioner when she fell, but he had no problem seeing Petitioner clearly. TX 23.

Correctional Officer James Gray also testified at trial. CO Gray testified that when he was coming out the door and going down the stairs he noticed Petitioner on her hands and knees. CO Gray testified that it was light outside when Petitioner fell. CO Gray also testified that he had worked two nights prior to the date of hearing, exactly one year following Petitioner's fall, again leaving work at approximately 7:00 am; CO Gray testified that when he left it was light out and he did not have any problems with visibility when he left. TX 28. CO Gray did not remember Petitioner ever telling him that she had fallen because she had a hard time seeing or because it was dark outside or because it was icy or wet. TX 29-30.

Finally, Major Angela Harlan, Petitioner's supervisor, testified at trial. Major Harlan testified that Petitioner reported the accident to her after the fall, stating that she had fallen off the curb. TX 35-36. Major Harlan testified that she does not remember Petitioner ever telling her that she had fallen because it was icy or wet outside or because it was dark and she could not see, but that if Petitioner had reported icy/wet conditions or darkness, that she would have put it on her report. TX 36-38. The Supervisor's Report of Injury she prepared lists the description of accident as "[f]ell off curb of main entrance to blding and helped up by CO Sherrer." RX 4.

CONCLUSIONS OF LAW

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

In order to obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he/she has suffered a disabling injury which arose out of and in the course of the employment. *Sisbro, Inc. v. Industrial Comm'n,* 797 N.E.2d 665, 671 (2003

"In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n,* 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Industrial Comm'n,* 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro supra.* An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment

and the accidental injury. *Orsini v. Indus. Comm'n*, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work or that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* Exiting an employer's premises is "incidental to employment," therefore, accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. *Mores-Harvey v. Indus. Comm'n*, 804 N.E.2d 1086, 1090 (3rd Dist. 2004). Where an injury occurs as a result of a hazard in an area of Respondent's premises used as a means of ingress and egress, which is provided by and under the control of the employer, the hazard becomes part of the employment and satisfies the "arising out of" requirement of the Act. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC, 990 N.E.2d 284, 291 citing *Litchfield Healthcare Center v. Industrial Comm'n*, 812 N.E.2d 401, 406 (5th Dist. 2004). (emphasis added)

In this case Respondent does not dispute that the fall occurred in the course of Petitioner's employment. The issue in this case is whether, under the facts of this case, Petitioner's fall and resulting injuries can be said to have arisen out of the employment.

While there is no question that Petitioner slipped and fell off of the curb on Respondent's premises on February 23, 2014. The fall occurred in an area open to the general public. There were no structural defects on the curb, such as crumbling cement, uneven surfaces or loose gravel. Petitioner admitted she was not hurrying or responding to an emergency, and was not carrying anything except her empty lunch bag, which she did not believe contributed to her slip and fall.

Petitioner did allege at trial that the pavement onto which she fell was wet and slick. Her testimony in this regard is inconsistent with that of her four coworkers. All of them indicated that they could not recall any dampness and Petitioner had never mentioned to any of them that she had slipped due to dampness. In addition the histories taken by Petitioner's medical providers, while they do mention slipping, do not contain any mention of dampness or any other defect or hazard. There is no evidence in the record that there was any inclement weather, such as ice, snow, sleet or other source of wetness on the sidewalk, curb, or pavement near the time of Petitioner's fall. The Arbitrator finds that Petitioner's fall was not caused by dampness or wetness in the area nor were there any defects or hazards in the area where the fall occurred.

Petitioner also alleges that the amount of light in the area somehow contributed to her fall. Petitioner did not write on any of her injury reports that it was dark outside when she fell. Neither is the amount of light at the time of the fall mentioned in any of the medical records. In addition all of the other witnesses testified that there was ample light outside. The Arbitrator notes that the one witness who indicated it was not yet fully light testified he had no trouble seeing Petitioner from 100 feet away. The Arbitrator finds that Petitioner's fall was not caused by the amount of light present at the time of the fall.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to establish by a preponderance of the evidence that her fall was caused due to any special risk or hazard, such as a defect. Rather, it appears that the Petitioner was simply walking and talking to her co-worker when she mis-stepped on the curb, which caused her to slip and fall.

The Arbitrator here finds this case to be analogous to *Caterpillar Tractor Co., v Industrial Com'n*, 129 Ill.2d 52, 541 N.E.2d 665, 133 Ill.Dec. 454 (1989). In *Caterpillar*, the Illinois Supreme Court found that an employee's fall on a defect-free curb did not arise out of his employment because the injury resulted in a risk which is presented to the general public.

In *Caterpillar*, the claimant completed his shift, left the building through doors normally used by the employees, walked 30 feet toward his car in the employee parking lot, and stepped off the curb onto the driveway. *Caterpillar*, 129 Ill.2d at 57, 133 Ill.Dec. 454, 541 N.E.2d at 666. There was a slight cement slope between the curb and the driveway, and when the claimant stepped off the curb his right foot landed half on the cement incline and half on the driveway. *Id.* The claimant twisted his ankle. *Id.* The driveway was on the employer's premises and was used by employees and the general public. *Id.* There was no evidence of holes, rocks, or obstructions on the pavement. *Id.* As such, the IL Supreme Court found that the condition of the premises was not a contributing cause of the claimant's injury, noting that "[c]urbs, and the risks inherent in traversing them, confront all members of the public." *Id.* at 61-62, 133 Ill.Dec. 454, 541 N.E.2d at 668-669. As such, the IL Supreme Court found that while the claimant regularly crossed the curb to reach his car, there was nothing in the record to distinguish the curb from any other curb. *Id.* at 63, 133 Ill.Dec. 454, 541 N.E.2d at 669. Therefore, the IL Supreme Court held that the claimant's injury did not arise out of his employment because the injury resulted from a risk which is presented to the general public. *Id.* at 62, 133 Ill.Dec. 454, 541 N.E.2d at 669.

Like in *Caterpillar*, the Petitioner's fall on the curb here was defect-free and there were no other special risks or hazards, such as the Petitioner hurrying in response to an emergency or carrying any objects. The curb involved in Petitioner's fall is of standard height; consequently, as in *Caterpillar*, there is nothing here to "distinguish this curb from any other curb."

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to meet her burden of proving by a preponderance of the evidence that she sustained an accidental injury which arose out of and in the course of her employment in that she failed to establish the "arose out of" component. The claim is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ 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

Susan L. Key,

Petitioner,

vs.

NO. 14WC 15272

16IWCC0498

State of Illinois Department of Corrections,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, temporary disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 21, 2016 is hereby affirmed and adopted.

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.

16IWCC0498

Pursuant to §19(f)(1) of the Act, this Decision and Opinion on Review of a claim against the State of Illinois is not subject to judicial review.

DATED: JUL 29 2016
SJM/sj
o-7/7/2016
44

Stephen J. Mathis

Mario Basurto

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KEY, SUSAN L
Employee/Petitioner

Case# **14WC015272**

SOI DEPT OF CORRECTIONS
Employer/Respondent

16IWCC0498

On 1/21/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.37% 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:

2934 BOSHARDY LAW OFFICE PC
JOHN V BOSHARDY
1610 S 6TH ST
SPRINGFIELD, IL 62703

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
GLISSON, RICHARD C
500 S SECOND ST
SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 21 2016

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0498

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

Susan L. Key
Employee/Petitioner

v.

State of Illinois Department of Corrections
Employer/Respondent

Case # 14 WC 15272

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 William R. Gallagher, Arbitrator of the Commission, in the city of Springfield, on November 25, 2015. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On February 24, 2014, 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 $39,714.50; the average weekly wage was $763.74.

On the date of accident, Petitioner was 57 years of age, married with 0 dependent child(ren).

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 amounts paid paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical/ as identified in Petitioner's Exhibit 5 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid by Respondent and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $509.16 per week for eight and six-sevenths (8 6/7) weeks commending November 19, 2014, through January 19, 2015, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $458.24 per week for 26.6 weeks because the injury sustained caused the 10% loss of use of the left hand and 10% loss of use of the left thumb, as provided in Section 8(e) of the Act.

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.

William R. Gallagher, Arbitrator

January 12, 2016
Date

JAN 2 1 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained a repetitive trauma injury arising out of and in the course of her employment for Respondent. The Application alleged a date of accident (manifestation) of February 24, 2014, and that Petitioner sustained repetitive trauma to the "left and right hand/thumb" and that the nature of the injury was carpal tunnel syndrome and carpometacarpal joint arthritis (Petitioner's Exhibit 1). Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner testified that she began working for the Department of Human Services in 2007; but, approximately one year later, Petitioner began working for the Department of Corrections as an office clerk. In 2012, Petitioner was transferred to the Taylorville Correctional Center.

Petitioner initially worked at the Taylorville Correctional Center as a timekeeper and her job duties consisted primarily of recording/keeping the time records of 300 to 350 employees. This was recorded by hand on a cardboard timesheet record.

In February, 2013, Petitioner began working in the mailroom at Taylorville Correctional Center. Petitioner testified in detail about her job duties. Petitioner handled all of the incoming/outgoing mail for the inmates and administrative staff. There are six units with 200 inmates in each unit. Petitioner stated that she would handle an average of 200 to 300 letters per day; however, there were days in which she handled 500 to 600 letters. Petitioner would also handle an average of 15 to 20 boxes per day; however, on Mondays, there could be as many as 150 boxes. Petitioner would also handle an average of 50 manila envelopes per day.

All incoming/outgoing inmate mail was received in the mailroom unsealed and the mail was then removed from the envelope, inspected to ensure that no contraband was being sent/received and then placed back in the envelope. If an inmate received either a newspaper or magazine, it was necessary to search each one page by page to be certain that there was no contraband included. Petitioner stated that individuals would attempt to sneak forbidden items to the inmates such as money, postage, etc.

The only inmate mail that was received or sent sealed and not subject to inspection was legal mail. Even so, this mail still had to be sorted. Mail received or sent by the administrative staff was also sealed; however, this mail also had to be sorted.

Petitioner also had to inspect boxes and parcels sent to inmates. All boxes and parcels were initially x-rayed and then physically inspected. If clothing was sent to an inmate, it was necessary to thoroughly inspect each article of clothing which included turning it inside out.

Petitioner testified that all of the preceding work duties required the active use of both of her hands. Petitioner typically worked seven and one-half hours per day for five days per week.

Ron Butler testified on behalf of the Respondent at trial. Butler stated that he worked at the Taylorville Correctional Center for over 20 years and he worked with Petitioner in the mailroom

for approximately three months. Butler's testimony regarding his work in the mailroom with Petitioner was consistent with her testimony as to Petitioner's work duties.

Petitioner testified that she began to experience numbness in her left elbow and hand in December, 2013. She initially sought medical treatment on February 3, 2014, from Dr. Roger McClintock, her family physician. At that time, Petitioner was seen by Patricia Schneider, a nurse practitioner. Petitioner complained of left wrist pain that had been present for approximately three months. NP Schneider prescribed a wrist splint and referred Petitioner to Dr. Claude Fortin, for EMG/nerve conduction studies (Petitioner's Exhibit 3).

Dr. Fortin performed EMG/nerve conduction studies on February 24, 2014 (the date of manifestation alleged in the Application) which were positive for bilateral carpal tunnel syndrome, moderate on the left and mild on the right (Petitioner's Exhibit 3). Petitioner completed the First Report of Injury on February 26, 2014, which described repetitive trauma to the left hand and an accident date of February 24, 2014 (Petitioner's Exhibit 2).

Petitioner subsequently sought medical treatment from Dr. Mark Greatting, an orthopedic surgeon. On March 6, 2014, Petitioner was seen by Miriam Allen, a Nurse Practitioner in Greatting's office. At that time, Petitioner advised that she performed many repetitive activities at work including opening of mail. NP Allen opined that Petitioner had left carpal tunnel syndrome and osteoarthritis of the first carpometacarpal joint of the left hand (Petitioner's Exhibit 3).

Dr. Greatting saw Petitioner on April 17, 2014, and Petitioner informed him of her job duties in greater detail. Specifically, Petitioner advised Dr. Greatting that she opened and inspected 200 to 300 letters a day and opened, inspected and resealed 300 to 400 packages a week. Petitioner also informed Dr. Greatting that her left hand symptoms were significantly increased while she was at work. Dr. Greatting recommended Petitioner undergo a left carpal tunnel release surgical procedure. In regard to causality, Dr. Greatting opined that Petitioner's work activities could cause, aggravate or contribute to the development of carpal tunnel syndrome (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. James Williams, an orthopedic surgeon, on May 7, 2014. In connection with his examination of Petitioner, Dr. Williams reviewed medical records provided to him by Respondent. Dr. Williams opined that Petitioner had left and right thumb CMC joint arthritis, left worse than right, as well as left carpal tunnel syndrome. In regard to causality, Dr. Williams opined that neither the CMC joint arthritis or left carpal tunnel syndrome were aggravated or caused by Petitioner's work activities. He attributed the conditions to Petitioner's having hypertension, being postmenopausal and having an increased body mass. He did agree that the carpal tunnel release surgery recommended by Dr. Greatting was appropriate (Respondent's Exhibit 1; Deposition Exhibit 2).

Petitioner continued to be treated by Dr. Greatting who performed surgery on November 19, 2014. The surgery consisted of a left carpal tunnel release and an injection in the left thumb carpometacarpal joint. Dr. Greatting authorized Petitioner to be off work and ordered physical therapy. Dr. Greatting subsequently authorized Petitioner to return to work without restrictions effective January 20, 2015 (Petitioner's Exhibit 3).

Dr. Williams was deposed on January 28, 2015, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Williams' testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to causality, Dr. Williams testified that Petitioner had a BMI of 31.3 which is obese and that Petitioner was also hypertensive and postmenopausal. He opined that these were all factors that correlated with carpal tunnel syndrome and CMC joint arthritis. He also noted that Petitioner informed him that she sewed as a hobby and this could also be an aggravating factor for the development of those conditions (Respondent's Exhibit 1; pp 11-15).

On cross-examination, Dr. Williams agreed that the risk factors that he referenced work actually "predispositions" which did not cause or aggravate carpal tunnel syndrome but were frequently found with it. He also agreed that non-occupational predispositions and occupational risk factors could act together to bring about carpal tunnel syndrome. In regard to Petitioner's sewing activity, Dr. Williams stated that his opinion that this may have been a factor was based upon that activity requiring forceful gripping and pinching (Respondent's Exhibit 1; pp 18-21).

Dr. Greatting was deposed on June 29, 2015, and his deposition testimony was received into evidence at trial. Dr. Greatting opined that Petitioner's work activities could cause carpal tunnel syndrome and aggravate carpometacarpal joint arthritis. Dr. Greatting acknowledged that Petitioner had hypertension and was postmenopausal; however, he opined that while these factors may go along with a higher incidence of carpal tunnel syndrome, that they were not causative (Petitioner's Exhibit 6; pp 14-17).

At trial, Petitioner stated that she still has some complaints of her left hand swelling and a lack of grip strength. Petitioner agreed that she was able to return to work to her regular job on January 20, 2015. However, Petitioner subsequently started another job for Respondent and began working for a clinical psychologist. Most of Petitioner's current job duties consist of data entry. Petitioner testified that this data entry also requires the active and repetitive use of both of her hands.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner's current condition of ill-being is causally related to repetitive trauma arising out of and in the course of her employment for Respondent that manifested itself on February 24, 2014.

In support of this conclusion the Arbitrator notes the following:

Petitioner credibly testified in regard to the repetitive nature of her job duties. Further, the testimony of Respondent's witness, Ron Butler, in regard to Petitioner's job duties was consistent with Petitioner's testimony regarding same.

Dr. Greatting opined that Petitioner's job activities could cause, aggravate or contribute to the development of both carpal tunnel syndrome and carpometacarpal joint arthritis. In regard to the

other factors, Dr. Greatting opined the while these factors may go along with carpal tunnel syndrome, that they do not cause it.

While Dr. Williams opined that Petitioner had other "predispositions" for the development of carpal tunnel syndrome and CMC joint arthritis, these could work together with occupational risk factors to bring about carpal tunnel syndrome. Further, Dr. Williams agreed that Petitioner's sewing hobby may have been a factor because it required forceful gripping and pinching; however, Dr. Williams lacked any such specific information regarding the extent of Petitioner's sewing hobby.

The Arbitrator finds the opinion of Dr. Greatting to be more persuasive than that of Dr. Williams.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner is entitled to temporary total disability benefits of eight and six-sevnths (8 6/7) weeks commencing November 19, 2014, through January 19, 2015.

In support of this conclusion the Arbitrator notes the following:

At trial, Petitioner and Respondent stipulated that Petitioner was temporarily totally disabled for the aforestated period of time.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of 10% loss of use of the left hand and 10% loss of use of the left thumb.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked in Respondent's mailroom and this was a job that required a significant repetitive use of both hands for essentially all of Petitioner's work day. Petitioner subsequently

obtained another job for Respondent in which she is not required to handle or sort mail but still does a significant amount of data entry. Petitioner testified that data entry also requires the repetitive use of both hands. The Arbitrator gives this factor moderate weight.

Petitioner was 57 years of age at the time of the manifestation. Petitioner will continue to work performing hand intensive duties for the remainder of her working life. The Arbitrator gives this factor moderate weight.

There was no evidence that this injury will have any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

Petitioner sustained repetitive trauma injuries to her left hand and left thumb which ultimately required carpal tunnel release surgery and an injection in the carpometacarpal joint of the left thumb. Petitioner continues to have complaints consistent with the injury she sustained. The Arbitrator gives this factor moderate weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vidal Maldonado,
Petitioner,

vs.

No: 14 WC 15472

Selin Cabinet and Bath, Inc.,
Respondent.

ORDER

This matter comes before the Commission pursuant to a "Petition for Review" filed by Petitioner, through his counsel John Eliasik. This petition is, in effect, one for reinstatement subsequent to a dismissal order issued by Arbitrator Thompson-Smith at the conclusion of a hearing on September 15, 2015. The Commission, after considering the entire record and for the reasons discussed below, dismisses the instant "Petition for Review" as premature. The Commission further remands this matter to the arbitration level, where Petitioner may present a proper Rule 7020.90 Petition to Reinstate before the Arbitrator.

As background, the timeline of events is as follows:

May 6, 2014:	Original Application for Adjustment of Claim is filed by Attorney Rodney Bashford, alleging injury to Petitioner's lower back incurred on March 31, 2014.
June 25, 2014:	Amended Application filed, serving notice on Injured Workers Benefit Fund in addition to Respondent.
Aug. 29, 2014:	Petitioner's petition for Section 19(b) hearing is filed.
July 20, 2015:	Respondent, through its counsel Robert Dreger, filed a "Motion To Dismiss For Lack of Standing."

July 29, 2015:	Attorney Dreger emailed the Arbitrator regarding the "Motion To Dismiss" and provided a copy of the same. Attorney John Eliasik was copied on the email. (Tr. 4)[1].
Aug. 4, 2015:	Respondent filed a Notice of Motion and Order form, wherein Respondent noticed "Hearing on Motions" for September 15, 2015 at 8:45 p.m. before the Arbitrator. The attached proof of service stated that a copy of this form was "delivered" at 5:00 p.m. to Mr. Bashford and Mr. Eliasik on 8/3/2015, and indicated the street and email addresses of both attorneys. (RX 3).
Aug. 4, 2015:	Also on August 4, 2015, Attorney Dreger transmitted a letter via email at 5:14 p.m. to Attorneys Bashford and Eliasik, which letter also attached Respondent's "Notice of Motion for Hearing on Its Motion to Dismiss for Lack Standing, and its actual Motion to Dismiss For Lack Of Standing." The letter advised that the motion was to be heard on September 15, 2015 at 8:45 a.m. Attorney Dreger also requested that Petitioner's attorneys "explain to him [Mr. Maldonado] that he MUST attend the hearing on September 15, 2015 even if your [imminent] Motion To Withdraw has been approved by the Arbitrator prior to this date." (Tr. 3; RX 4).
Aug. 5, 2015:	Attorney Dreger communicated via telephone with Attorney Eliasik. According to Mr. Dreger, Mr. Eliasik indicated he would appear at the hearing, but he advised he was withdrawing from the case. (Tr. 3).
Sept. 15, 2015:	Hearing was held before the Arbitrator. Only Respondent was present; neither Petitioner nor either of his attorneys attended. The Arbitrator granted dismissal.
Oct. 15, 2015:	"Petition for Review" is filed by Attorney Bashford.
Dec. 17, 2015:	Attorney Eliasik filed formal appearance.
Jan. 19, 2016:	"Petitioner's Statement of Exceptions" is submitted by Attorney Eliasik.

The Commission notes that the Arbitrator did not make any explicit findings of fact at the conclusion of the September 15, 2016 hearing. However, it is apparent that she dismissed the matter for want of prosecution, having elicited from Respondent's counsel information regarding how and when Petitioner's counsel was made aware of the hearing and the purpose of the hearing. Specifically, the Arbitrator requested that Mr. Dreger "state for the record, Counsel, the address where you sent the motion to Mr. Eliasik?" Mr. Dreger responded, "For the record, we sent a Notice of our Motion on August 4th to John Eliasik at 180 North LaSalle Drive, Suite

[1] Citations to the September 15, 2015 hearing transcript and Respondent's Exhibits at hearing will take the following forms "Tr.--" and "RX –", respectively.

3700, Chicago, Illinois, 60601.... We also sent the emails to [email addresses of Mr. Bashford and Mr. Eliasik]." (Tr. 4-5). At the hearing's conclusion, the Arbitrator, without making any explicit findings of fact, stated, "At this time, I'm going to grant Counsel's Motion To Dismiss this case." (Tr. 9).

Insofar as the Arbitrator's dismissal is essentially a dismissal for want of prosecution, the instant Petition for Review is premature. Before a Petition for Review can be filed, a claimant whose case has been dismissed for want of prosecution must file a petition for reinstatement before the Arbitrator in accordance with Rule 7020.90.[2] Such a petition for reinstatement shall, *inter alia*, set forth the grounds relied upon for reinstatement.[3]

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's instant "Petition for Review" is dismissed.

---

[2] This Rule provides:

§ 7020.90 Petitions to Reinstate.

a) Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call. Notices of dismissal shall be sent to the parties.

b) Petitions to Reinstate must be in writing. The petition shall set forth the reason the cause was dismissed and the grounds relied upon for reinstatement. The petition must also set forth the date on which Petitioner will appear before the Arbitrator to present his petition. A copy of the petition must be served on the other side at the time of filing with the Commission in accordance with the requirements of Section 7020.70.

c) Petitions to Reinstate shall be docketed, and assigned to and heard by the same Arbitrator to whom the cause was originally assigned. Both parties must appear at the time and place set for hearing. Parties will be permitted to present evidence in support of, or in opposition to, the petition. The Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied on by Petitioner, the objections of Respondent and the precedents set forth in Commission decisions.

d) A cause shall be reinstated upon stipulation of the parties filed with the Commission, which will docket the stipulation.

[3] In his so-styled "Statement of Exceptions," Mr. Eliasik argued that the Arbitrator erred in proceeding with the hearing on September 15, 2015 on the grounds that: Respondent's Notice of Motion was deficient; Respondent's attorney had not filed an appearance; and Respondent had improperly argued the merits of the case at the hearing. Regarding the latter grounds, Respondent's "Motion To Dismiss For Lack of Standing" did argue that, insofar as Respondent's internal records showed that Mr. Maldonado's last day of employment was March 28, 2014 -- preceding the alleged date of accident -- his alleged injury was not compensable. The Arbitrator did not adopt any of these factual assertions insofar as she made no explicit findings of fact. As noted above, it is apparent that the dismissal was for want of prosecution.

IT IS FURTHER ORDERED BY THE COMMISSION that this matter is remanded to the Arbitrator for consideration of any Rule 7020.90 petition for reinstatement that may be filed by Petitioner within 60 days of this Order.

DATED: AUG 19 2016

Joshua D. Luskin

Charles J. DeVriendt

o-06/22/16
jdl/ac
68

Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Connie Davis,
Petitioner,

vs.

NO: 14 WC 15664

Illinois River Correctional Center,
Respondent.

16IWCC0534

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator McCarthy finding Petitioner sustained an accidental injury arising out of and in the course of her employment on March 20, 2014. As a result, Petitioner is entitled to $1,611.00 in current medical expenses and Respondent is ordered to pay reasonable and necessary medical expenses related to the treatment prescribed by Dr. Rashid. The Issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of her employment on March 20, 2014, whether a causal relationship exists between the alleged March 20, 2014 accident and Petitioner's present condition of ill-being, and if so, whether Petitioner is entitled to prospective medical care along with determining the necessity of Petitioner's current medical care. The Commission, after reviewing the entire file, reverses the Arbitrator and finds Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment on March 20, 2014 and that the same is causally related to her current condition of ill-being.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner, a 52 year old human resource (HR) representative, testified she has worked as an HR representative for Respondent since 1989. Her job duties consist of assisting employees, completing transactions, monitoring staff levels, making projections, preparing reports for the administration, providing necessary forms/letters for employees, completing Family Medical Leave Act(FMLA) packages, leaves of absence, military leaves, posting jobs, submitting requests for filling vacant positions, compiling files from

job positions for interviews, maintaining files, scheduling interviews, sending letters, answering the phone, assisting employees in planning for retiring. She typically works Monday through Friday from 7:00 a.m. to 3:00 p.m. for a total of 7.5 hours. Her work duties vary depending on what is going on and what is the priority. She performs a lot of typing. The amount of typing she needs to do has increased significantly in the last 2-3 years. In between preparing reports, she assists employees. She would estimate that she types 60% of the time. She has to pull out files from a hanging file system using both hands. Her desk is 3-4 feet tall; it hits her above her stomach. Her keyboard sits on the desk. She had maintenance make a wooden platform to put her feet on so that she could pull close. Her arms hit the edge of the desk. The mouse pad is 6" from her wrist and is located on the right side as she is right-handed. When she is typing, her hands are angled a bit. She would agree that her wrists are flexed about 45 degrees when she is typing. Sometime when she types at a 45 degrees angle or higher she feels a tug in her forearm. At times, she places the keyboard on binders which puts the keyboard in a little bit more of an up or down position. This puts her wrists in a flexed position that is greater than 45 degrees. Her chair malfunctions at times, which causing her to be lower and requires her to raise it up. She agreed that her wrists are always in a flexed position when she is typing.

2. Petitioner testified that in February/March of 2014 she was working longer than 7.5 hours. There was quite a bit of overtime during that period due to the number of job postings, interviews and vacancies. She would estimate that on average she worked an additional 6-8 hours a week during which time she was performing more typing. She further testified that each new correctional officer hire requires 27 different forms and each new security staff requires 24-25 forms to be completed. She was also pulling a lot of old files of former employees and was cleaning out a lot of boxes. She primarily mentioned her right hand because she uses it for everything and it bothered her the most, but both hands have problems. Sometimes her hands, especially the right hand, would go to sleep. Sometimes her wrists bothered her when she was driving. The hands were also getting tingly and numb and during February/March of 2014 they were waking her up at night and were progressively getting worse.

3. On February 6, 2014, she sought treatment with Dr. Lancer, her primary care doctor. At that time, she told Dr. Lancer that she had symptoms when she read a newspaper, drove and slept. At that time, she did not correlate her job duties to her hand problems. Petitioner further testified that the majority of symptoms she experienced were at work while she was typing. On March 20, 2014, she completed a Form 45 Injury report after Dr. Lancer told her to schedule an EMG test. On March 20, 2014, she believes that her job duties were causing or aggravating her hand condition.

4. A Central Management System (CMS) Job Description was submitted into evidence. It shows that the human resource position consists of typing correspondence related to mailroom process and procedures 10% of the time. A second job description for that

position was entered into the records and it shows the job consist of spending 30% of the time typing various memos, 20% of the time filing and 10% of the time on data input. A third job description, which is partially cut off, shows 10% of the time is devoted to filing.

5. On February 6, 2014, Petitioner sought treatment from Dr. Lanser. The doctor noted that Petitioner came in today with concerns about numbness in right wrist and hand. She reported that it has been going on more in the past six months but she has experienced problems as far back as 3-4 years ago. She specifically reported that it bothered her to read the newspaper and it woke her from sleep. Dr. Lanser diagnosed Petitioner with paresthesia and he ordered an EMG/NCV test.

6. On March 20, 2014, Petitioner claimed she sustained an accident injury arising out of and in the course of her employment. She reported her accident on that day. A Tristar Workers' Compensation employee's Notice of Injury was completed on that day. It indicated that Petitioner has been experiencing symptoms for the past three years. It further indicated that she noticed symptoms when typing and using a calculator. The next day she completed a Form 45 Report of accident. In the form, she indicated that her date of accident was February 6, 2014. At the outset of the August 5, 2015 Arbitration hearing, she amended that date of accident to March 20, 2014. In the Form 45, Petitioner indicated that she was unsure how her condition began but she believes that it resulted from her typing and running the calculator for so many years with her right hand. The Supervisor's Report on Injury listed a February 6, 2014 date of accident and it indicated that Petitioner routinely types, uses a computer with mouse, uses a calculator and files. In general, she reported a repetitive motion injury.

7. The March 21, 2014 EMG/NCV report indicated that Petitioner is right-handed. She reported pain in the upper extremity with pain greater on the right side than the left. She reported that her right hand sometimes goes to sleep and she has numbness in first three fingers. She reported it began about three years ago and she started experiencing weakness and numbness 1-1/2 years ago. She did not report any specific injury to her upper extremities. She reported that she occasionally awakens with night time pain. She further reported that she uses the computer quite a bit at work. Petitioner was diagnosed as having moderate right median nerve compression at wrist/capral tunnel syndrome (CTS) and mild median nerve compression at the left wrist. The March 25, 2014 workers compensation on the job accident form indicated the accident was caused by repetitive motion, typing, using a calculator and a computer mouse.

8. On July 25, 2014, Petitioner saw Dr. Rashid. She indicated she is a right-handed female. She reports she had been having problems over the last year and her right side is worse than the left side. She reports she has been experiencing these symptoms on and off throughout the year and they are not constant symptoms. She recently had an EMG/NCV test. She reports experiencing symptoms at work when she is typing. She had keyboard

pads to help support her wrist when keyboarding and using a mouse. She also has symptoms when driving and reading the paper. They wake her up at night. She describes a loss of strength in her right hand with pinching and gripping. Dr. Rashid recommend right carpal tunnel release surgery.

9. On December 8, 2014, Dr. Rashid, a board certified orthopedic surgeon, was deposed. She testified that she specializes in treating upper extremity issues including carpal tunnel syndrome. She opined that Petitioner has bilateral carpal tunnel syndrome. She is recommending right carpal tunnel release surgery.

Dr. Rashid testified that Petitioner does not have any co-morbidities associated with carpal tunnel such as diabetes, pregnancy, smoking, uncontrolled hypothyroidism. Nor was she morbidly obese.

Dr. Rashid opined that if Petitioner is typing 60% of the day and she types with her hands in a flexed position these activities would be an aggravating factor because Petitioner is increasing the pressure within the carpal tunnel and thus creating symptoms. She agreed that when one has one's wrist in prolonged positions of extension or flexion it increases the pressure within the nerve. She agreed that the act of resting one's wrist while typing increases the likelihood of developing carpal tunnel because one is in a prolonged extension position. She agreed that hard surfaces can increase the pressure on the median nerve.

Dr. Rashid testified that Petitioner reported she is an HR representative and her job requires her to keyboard most of the time. When Dr. Rashid was asked what "most of the time" meant the doctor said she does not have anything specifics to support what that means. She testified, "I don't inquire a ton of specifics about their job description." When Dr. Rashid was asked how many hours Petitioner worked or how many breaks Petitioner had she was unable to say. She testified that she had not seen Petitioner's work station and Petitioner did not provide her with specifics regarding her work station. Petitioner did tell her that she had keyboard pads that helped. When the doctor was asked what the literature supports the of exact pressure that is needed for this condition, she testified that she cannot say, but she is sure there is research about what angle one's wrists has to be at to create that kind of pressure. Dr. Rashid said that there are multiple studies regarding the mechanics that cause carpal tunnel syndrome. She had read some material that discussed pressure in the carpal canal but she cannot quote the articles directly today. When it was noted that she had mentioned there are articles that address keyboarding as causing carpal tunnel syndrome and that there are articles that do not support keyboarding as causing carpal tunnel syndrome, she answered that there are multiple carpal tunnel studies which suggest multiple etiologies and aggravating factors. She admitted that the literature is all over the board. When she was asked what made her adopt one opinion over another, she answered, "I just do what's right for my patient". She conceded that there has been some literature that suggests that repetitive motion does not

16IWCC0534

necessarily have to be a causative agent. She said that repetitive motion as an aggravating factor is a different story. She opined that the same activities can cause either a temporary or a more chronic aggravation. She opined that if Petitioner was keyboarding, felt pain in her hands and stopped and kind of shook out her hands that over time it could cause a permanent change.

10. Dr. Lewis, a board certified orthopedic surgeon, was deposed on June 1, 2015. She evaluated Petitioner and prepared a report dated January 16, 2015. Based on Petitioner's history, the medical records and her physical examination, she diagnosed Petitioner as having bilateral carpal tunnel syndrome. She further concluded that Petitioner's job did not cause her carpal tunnel syndrome. Petitioner said she uses a keyboard 55-60% of the time; she files 20% of the time and she answers the phone and uses the copier the rest of the time. Based on his understanding of her positioning of her hands, use of those objects would not qualify her for being in an awkward posture.

Based on the above, the Commission reverses the Arbitrator's finding that Petitioner sustained an accidental injury arising out of and in the course of her employment on March 20, 2014 and that her current condition is causally related to the alleged March 20, 2014 work accident. More specifically, the Commission found Dr. Rashid's testimony on cross examination and her statement that she does "what is right for the patient" indicates she lacks a foundational knowledge of Petitioner's job duties and does not have a sufficient foundational basis in which to support her causation opinion. As such, the Commission assigns little weight to Dr. Rashid's testimony overall and specifically her causation opinion.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove she sustained an accidental injuries arising out of and in the course of her employment on March 20, 2014 and Petitioner further failed to prove a causal relationship exists between the alleged March 20, 2014 work accident and Petitioner's present condition of ill-being, Petitioner's claim for compensation is hereby denied.

DATED: AUG 18 2016

Mario Basurto

David L. Gore

Stephen Mathis

MB/jm

O: 7/14/16

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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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDWARD O'BRIEN,

Petitioner,

vs.

NO: 14 WC 16752

ABF FREIGHT SYSTEMS, INC.,

Respondent,

16IWCC0554

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, notice, temporary total disability, medical expenses, and nature and extent and being advised of the facts and law, modifies the Second Corrected Decision of the Arbitrator as stated below and otherwise affirms and adopts the Second Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

Regarding the nature and extent of Petitioner's injuries, the Commission gives less weight to the fifth factor in Section 8.1b of the Act: "evidence of disability corroborated by the treating records." Petitioner testified that he still has pain in his hands "pretty much" on a daily basis with the right hand being a little worse than the left. He has a hard time opening pop bottles, milk cartons, holding a fork or spoon in his hand, and buckling his belt buckle. Petitioner testified that he takes a lot of over-the-counter Aleve every day or every other day. He experiences numbness and tingling in his hands usually at night or with gripping. (T.33-35). Petitioner also testified that he retired earlier than he wanted to because his hands were getting sore again but he never complained to anyone at Respondent about these recurring symptoms. (T.44-45).

Although Petitioner may have been having these symptoms, they are not corroborated by the medical records. The most recent records of Dr. Labana, from March 18 and April 8, 2014, indicate that Petitioner was doing very well and was very happy with the results of his bilateral carpal tunnel surgeries. Dr. Labana testified that he did not believe Petitioner had any ongoing complaints when he was released from care and told to follow up as necessary on April 8, 2014. Petitioner never returned to Dr. Labana about any ongoing or recurrent symptoms. Respondent's Section 12 physician, Dr. Vender, examined Petitioner on September 17, 2014. Dr. Vender noted that Petitioner had "very satisfactory results" from the surgeries and that Petitioner stated he no longer

had numbness and tingling or night symptoms; although he did, at times, have pain in the palms.

Based on the above, we find that the extent of Petitioners current complaints are not corroborated by the medical records and are not consistent with Dr. Labana's testimony. We modify the Arbitrator's decision to find that Petitioner has sustained the loss of use of 10% of the left hand and 10% of the right hand for a total permanent partial disability award of 38 weeks.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,021.51 per week for a period of 8-2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $2,058.10 under §8(j) of the Act for non-occupational disability benefits paid; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $721.66 per week for a period of 38 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 10% loss of use of the right hand and 10% loss of use of the left hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $17,184.53 for medical expenses under §8(a) of the Act, subject to the fee schedule in §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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $51,100.00. 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: AUG 25 2016

Charles J. DeVriendt

SE/
O: 7/13/16
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Ruth W. White

Joshua D. Luskin

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
SECOND CORRECTED

O'BRIEN, EDWARD
Employee/Petitioner

Case# **14WC016752**

ABF FREIGHT SYSTEM INC
Employer/Respondent

16IWCC0554

On 6/19/2015, 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 0.10% 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:

0412 RIDGE & DOWNES
AMYLEE HOGAN SIMONOVICH
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
MATTHEW G GORSKI
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0554

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
SECOND CORRECTED
ARBITRATION DECISION

Edward O'Brien
Employee/Petitioner

v.

ABF Freight System, Inc.
Employer/Respondent

Case # 14WC 016752

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 **David A. Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **4/3/2015**. 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 _____

16IWCC0554

FINDINGS

On 1/14/2014, 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 **$79,678.04**; the average weekly wage was **$1,532.27**.

On the date of accident, Petitioner was **64** years of age, ***married*** with **0** children under 18.

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 **$2,058.10** for other benefits, for a total credit of **$2,058.10**.

Respondent is entitled to a credit of **$2,058.10** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,021.51/week for 8-2/7 weeks, commencing February 15, 2014 through April 13, 2014, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $2,058.10 for temporary total disability benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Medical benefits

Respondent shall pay to Petitioner reasonable and necessary medical services of $17,184.53, as provided in Section 8(a) of the Act and pursuant to the medical fee schedule.

Permanent Partial Disability: Schedule injury

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 47.5 weeks, because the injuries sustained caused the 12.5% loss of the right hand and 12.5% loss of the left hand, as provided in Section 8(e) of the Act.

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.

David A. Kane

June 19, 2015
Date

JUN 19 2015

Findings of Fact

Mr. Edward O'Brien is a right-hand dominant 66-year-old retiree who worked for ABF Freight System (ABF) as a truck driver from August 23, 2010 until November 28, 2014. (TX pg. 8) Before retiring, he drove nine to eleven hours a day during twelve to fourteen hour shifts. (TX pg. 15) Mr. O'Brien's primary job duty was to haul two trailers at a time between ABF terminals. (TX pg. 17) ABF drivers are assigned equipment on a task-by-task basis and are not regularly assigned the same equipment. (TX pg. 16, 26) Additionally, they must connect and disconnect their trailers. (TX pg. 15-16)

Trailers are connected to each other with a converter gear (AKA "dolly"). To connect a converter gear Mr. O'Brien would: 1) lower the front trailer's legs and disconnect it from his tractor; 2) connect the dolly to his tractor; 3) back the dolly under the rear trailer; 4) disconnect the dolly from the tractor and crank up the rear trailer's legs; 5) reconnect the tractor to the front trailer and raise its legs; 6) back the front trailer up to the dolly; and 7) connect the converter gear to the rear of the front trailer along with the air hoses and cables between the trailers and dolly. (TX pg. 17)

To disconnect the trailers Mr. O'Brien would: 1) crank down the rear trailer's legs and pull a handle on the converter gear's fifth wheel to release the trailer's kingpin; 2) pull the tractor forward, removing the dolly from underneath the rear trailer; 3) disconnect the dolly's airlines and chains from the front trailer; 4) open two locks connecting the converter gear to the front trailer through a simultaneous pushing and pulling motion using both hands; 5) crank down the converter gear's front leg; 6) pull the front trailer forward; and 7) move the dolly off to the side by either physically pushing it

or dropping the front trailer and moving the dolly with the tractor. (TX pg. 19-25)

It could take Mr. O'Brien thirty minutes to one and a half hours to connect or disconnect trailers depending upon the yard conditions and the equipment age. (TX pg. 24) These tasks required extensive use of the hands and grasping. (TX pg. 17-22) Cranking the legs could be a one-handed job or a two-handed job depending on the age and condition of the equipment. (TX pg. 20) When able to crank the legs with one hand Mr. O'Brien would often switch between hands while cranking. (TX pg. 20) Older equipment at times required exertion of more than fifteen pounds of force to accomplish a task. (TX pg. 20) Mr. O'Brien would connect and disconnect trailers two-to-four times a shift. (TX pg. 18)

Mr. O'Brien is approximately 5'4" tall and needed to adjust his seat forward and the steering wheel up and in against the dashboard to be able to reach a truck's pedals. (TX pg. 27-28, 30) His sitting position would often cause him to reach behind him with his right hand to shift the transmission. (TX pg. 28) Mr. O'Brien experienced significant vibrations in the steering wheel and shifter. (TX pg. 27, 35) These vibrations were worse on older equipment. (TX pg. 27)

On July 23, 2013, Mr. O'Brien complained of numbness and pain in his hands to his primary care physician, Dr. Rahmani. (PX. 1) Dr. Rahmani referred Mr. O'Brien for an EMG Nerve test which Dr. Ozcan administered on September 18, 2013. (PX. 1) At a September 30, 2013 followed up appointment, Dr. Rahmani reviewed the EMG results and referred Mr. O'Brien to an expert. (PX. 1) Neither Dr. Rahmani nor Dr. Ozcan discussed the diagnosis and/or cause of the condition with Mr. O'Brien. (TX pg. 10, PX.1)

On January 14, 2014, Mr. O'Brien was evaluated by Dr. Neal Labana, an orthopedic surgeon who is certified in hand surgery. (PX. 2) Mr. O'Brien presented with numbness and tingling in the median nerve sensory distribution, pain in entire hand, and general weakness of grip. (PX. 2) Dr. Labana reviewed the EMG nerve test from September 2013 and made a diagnosis of carpel tunnel syndrome in both hands. (PX. 2) At this appointment, Mr. O'Brien first learned that his duties as a truck driver contributed to his condition. (PX. 2) He was given home exercises to complete and was to follow-up in three weeks. (PX. 2) Following this visit, on January 16, 2014, Mr. O'Brien reported his injury to his supervisor Matt Wolff, an ABF linehaul manager. (TX pg. 11, 51)

On February 4, 2014, Mr. O'Brien returned for his follow-up appointment. (PX. 2) Dr. Labana determined that he would need to undergo a Carpal Tunnel Release for his right hand. (PX. 2) Dr. Labana performed the surgery on February 14, 2014 and Mr. O'Brien had a postoperative follow up on February 18, 2014. (PX. 2) Until the day of surgery, Mr. O'Brien had not missed any days of work because of his carpal tunnel syndrome. (TX pg. 47) Petitioner next saw Dr. Labana on March 4, 2014 and it was determined that he would undergo Carpal Tunnel Release on his left hand. (PX. 2) This surgery was performed on March 14, 2014 with a follow up appointment on April 8, 2014. (PX. 2) Mr. O'Brien was released to return to full duty as of April 14, 2014 and he subsequently did so. (TX pg. 52)

On September 17, 2014, Respondent sent Mr. O'Brien for an Independent Medical Examination with Dr. Michael Vender. (RX 3) Dr. Vender believed that Mr. O'Brien's 2013 symptoms and test results were consistent with carpal tunnel syndrome. (RX 3) In addition, Dr. Vender

stated that Mr. O'Brien responded satisfactorily to his treatment. (RX 3) Dr. Vender also noted that at the time of this examination, Petitioner was still experiencing pain in his palms. (RX 3) Pursuant to the AMA Guides, Dr. Vender assessed Mr. O'Brien with a 2% impairment in each of his left and right upper extremities. (RX 3)

In his report and a February 11, 2015 addendum to his report, Dr. Vender, opined that Mr. O'Brien's carpal tunnel syndrome could not be a result of his driving duties because he spent "the majority of his time driving." (RX 3; RX 4) However, in his addendum, Dr. Vender also opined that Mr. O'Brien's motorcycle use could have contributed to his carpal tunnel syndrome because of the grip force needed and vibrations experienced while driving. (RX 4) As of the date of the hearing, Mr. O'Brien had not owned or ridden a motorcycle since the spring of 2011 when he sold his bike to a co-worker; more than two years before he started experiencing any symptoms in his hands. (TX pg. 31)

Dr. Vender partially based his opinion on an Ergonomic Job Analysis ABF had performed. (RX 4; RX 5) Paige Shafer, Industrial Rehabilitation Coordinator for Accelerated Rehabilitation Centers, performed this ergonomic assessment. (RX 5) This assessment focused upon Mr. O'Brien's task of driving. (RX 5) The report showed that while driving an operator would need to exert a constant grip force averaging 15-pounds of force on the steering wheel over eleven hours with a 24-pound gripping force needed to turn the wheel. (RX 5) The report contained a picture of an operator's driving position that was inconsistent with how Mr. O'Brien would need to set up his driving position given his height and size. (TX pg. 29) The report also lacked details concerning the tasks Mr. O'Brien

performs during the additional four to five hours of work during his shifts. (RX 5)

The job description ABF has for Pickup and Delivery Driver lists twenty-one essential job functions and twenty-five minimum qualifications. (RX6) These include the ability to hook and unhook a converter gear; the ability to push and pull carts and jacks weighing from 196 pounds to 350 pounds with the ability to push or pull them with enough momentum to load them into trailers; an ability to adapt to changing temperatures and climates; the ability to operate a tractor and trailer in both day and night and in unsafe conditions such as "fog, smoke, rain, snow, hail, [and] ice"; the ability to climb into and out of tractor-trailer in all temperatures and climates; and ability to crawl underneath tractor/trailer in all temperatures and climates. (RX 6)

On January 3, 2015 Dr. Labana wrote a narrative report concerning his treatment of Mr. O'Brien. (PX 8) In this narrative report, Dr. Labana disagreed with Dr. Vender and opined that Mr. O'Brien's job duties contributed to and aggravated his carpal tunnel syndrome. (PX 8) During his March 6, 2015 deposition, Dr. Labana testified that the vibrations felt through the wheel while driving and the need to grip the steering wheel alone could contribute causally to carpal tunnel syndrome. (PX 9, pg. 11) Dr. Labana also noted that other repetitive forceful grasping activities truck drivers' normally perform such a hooking and unhooking trailers are other activities that can contribute to a person developing carpal tunnel syndrome. (PX 9, pg. 9-10) Dr. Labana testified that a person can have more than one factor which contributes to their carpal tunnel syndrome and that Mr. O'Brien showed several different factors. (PX 9, pg. 10-11, 16) Dr. Labana testified to a reasonable degree of medical and surgical certainty

that Mr. O'Brien's job duties were a contributing cause to his carpal tunnel syndrome. (PX 9, pg. 12)

On November 28, 2014 Mr. O'Brien retired from ABF because his hands were starting to hurt again and he did not want to work through another winter with the pain. (TX pg. 32-34) Currently, Mr. O'Brien will experience numbness and tingling in his hands at night and pain during the day. (TX pg. 34) He needs to take Aleve if not daily then every other day because of the pain in his hands. (TX pg. 34) He also experiences difficulty with fine motor skills such as buckling his belt. (TX pg. 33)

Conclusions of Law

C/D. With regards to whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, and the date of said accident, the Arbitrator finds as follows:

In August 2010, Petitioner commenced employment as a truck driver for Respondent. He drove a semi-tractor, usually pulling two "pup" trailers. He would have to hook and drop these trailers two to four times per day. With each pickup or drop-off, Petitioner was required to crank down the rear trailer's legs, crank down the converter gear's leg, pull the handle to release the trailer's kingpin, and open two locks connecting the convertor gear. These tasks required significant force of his bilateral hands. If the equipment was in poor condition, it could take him an hour and a half to perform these tasks. The cranking was so exertional, he would have to switch arms to give the other arm a rest.

In addition to the forceful tasks repeated by Petitioner to hook and drop-off his trailers, operation of the semi-tractor required constant gear

shifting and gripping of the steering wheel. Both the gear shift and steering wheel gave off vibrations, worse with the age of the semi-tractor. Significant constant grip force was needed to operate the semi-tractor. Petitioner would drive 500 miles and never let go of the steering wheel. (RX 2, P. 4) Petitioner's hands would "fall asleep" while he was holding the steering wheel. (RX 2, p. 4).

Respondent's Ergonomic Job Analysis and Job Description confirm all of the above job duties and activities of Petitioner. (RX 5; RX 6) Petitioner would have to exert constant grip force of 15-pounds on the steering wheel, 24-pounds in order to turn the semi-tractor, while driving for nine to eleven hours per day. (RX 5).

Prior to commencing work with Respondent, Petitioner had no injury, nor had he sought any medical care, for symptoms in his bilateral hands. His symptoms developed about a year and a half after he commenced work for Respondent. These symptoms progressed such that he sought medical attention with his primary physician on July 23, 2013. An EMG was conducted on September 18, 2013. He was then referred to a hand specialist, and saw Dr. Labana on January 14, 2014.

The Act has been construed to recognize repetitive trauma as an accidental injury. *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 505 N.E.2d 1026, 106 Ill. Dec. 235 (1987). The repetitive trauma, carpal tunnel syndrome claim of a truck driver has been held to be a work accident and to be compensable in *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill.App.3d 186, 825 N.E.2d 773, 292 Ill. Dec. 185 (2005), also in *Fierke v. Indus. Comm'n*, 309 Ill.App.3d 1037, 723 N.E.2d 846, 243 Ill. Dec. 543 (2000), and in *Loveall v. JDC Logistics*, 7 IWCC 265 (Mar. 7, 2007).

There is no evidence that Petitioner engaged in any other repetitive activity which caused his bilateral carpal tunnel syndrome. There is ample evidence of the Petitioner's use of his hands, not only for steering and gear shifting, but also for dropping and hooking trailers.

The phrase "repetitive trauma" was developed in order to establish a date of accidental injury for purposes of determining when limitations statutes, and notice requirements, begin to run. See *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 530-31, 505 N.E.2d 1026, 1028-29, 106 Ill. Dec. 235 (1987). The date of injury in repetitive trauma cases is the date on which the injury manifests itself, meaning the date on which the fact of injury *and the causal relation to work* would have become plainly apparent to a reasonable person. *Three "D" Discount Store v. Indus. Comm'n*, 198 Ill. App. 3d 43, 47, 556 N.E.2d 261, 264, 144 Ill. Dec. 794 (1989) (emphasis added). The categorization of an injury as due to repetitive trauma and the corresponding establishment of an injury date are necessary to fulfill the purpose of the Act to compensate workers who have been injured as a result of their employment. *Peoria County Belwood*, 115 Ill. 2d at 530-31, 505 N.E.2d at 1028-29. The recognition of such a date allows an employee to be compensated for injuries that develop gradually, without requiring the employee to push his body to a precise moment of collapse. *Castaneda v. Indus. Comm'n*, 231 Ill. App. 3d 734, 737, 596 N.E.2d 1281, 1284, 173 Ill. Dec. 402 (1992).

In determining a manifestation date the Arbitrator finds it significant that Petitioner first received notice on January 14, 2014 that his symptoms were causally-connected to his work duties. Respondent has introduced Petitioner's initial Application for Adjustment of Claim filed May 15, 2014 with an Accident date listed of September 30, 2013. Petitioner amended

his Application on July 26, 2014 to reflect an Accident date of January 14, 2014. The initial date listed of September 30, 2013 was a clerical error and reflected the date when Dr. Rahmani referred Petitioner to an expert. However, Petitioner did not gain knowledge that his bilateral carpal tunnel syndrome was related to his work duties until an evaluation was performed by that hand expert, Dr. Labana, on January 14, 2014. As Dr. Labana's records and Petitioner's testimony reflect he did not see this specialist and gain this knowledge until January 14, 2014.

Petitioner testified that when he signed the initial Application with an accident date of September 30, 2013 on April 14, 2014 he did so because he had already been informed by Dr. Labana on January 14, 2014 that his carpal tunnel syndrome and symptoms he was experiencing on September 30, 2013 were related to his work duties. This demonstrates that while Petitioner knew of his symptoms in September he did not actually possess knowledge that his job duties caused those symptoms until January 14, 2014. Therefore the Arbitrator finds that Petitioner's injury manifested itself on January 14, 2014 as reflected in Petitioner's amended application.

The Arbitrator relies on *Three D Discount Stores v. Indus. Comm'n*, 198 Ill.App.3d 43, 49 (1989), where Petitioner's repetitive trauma condition did not manifest itself until he was told he had work-related carpal tunnel syndrome. In *Three D*, the Court found that a reasonable person would have been on notice that his condition was work-related and medically disabling when he was examined by an orthopedic surgeon and prescribed surgery. An employee who continues to work on a regular basis despite his own progressive ill-being should not be punished merely for trying to perform his duties without complaint. *Three D*, 198 Ill.App.3d at 49. See *Oscar Mayer & Co. v. Indus. Comm'n*, 176 Ill.App.3d 607 (1988).

The current case before the Arbitrator is similar to *Oscar Mayer* in that Petitioner was having symptoms prior to January 14, 2014 and had sought initial medical attention for those symptoms but was not informed that those symptoms were causally related to his work duties or would need surgical intervention until January 14, 2014. While Petitioner reported his symptoms to Dr. Rahmani in July 2013; no treatment was undertaken and neither Dr. Rahmani nor Dr. Ozcan informed Petitioner of what his condition actually was nor did either make a medical determination as to the cause of Petitioner's condition. Requiring notice of only a potential disability is a useless act since it is not until the employee actually becomes disabled that the employer is adversely affected in the absence of notice of the accident. *Oscar Mayer*, 176 Ill.App.3d at 611. The date of disablement in this case did not occur until Petitioner consulted with Dr. Labana on January 14, 2014 and was informed that his condition as work-related and could require surgery if it did not improve.

The Arbitrator finds that Petitioner suffered a work accident on January 14, 2014, the date his bilateral carpal tunnel syndrome condition manifested itself.

E. With regards to whether notice was given to the employer, the Arbitrator finds as follows:

The Arbitrator previously found herein that Petitioner suffered a repetitive trauma work injury on January 14, 2014, the date he was first advised he had work-related bilateral carpal tunnel syndrome. Prior to that time Petitioner's diagnosis and any potential relationship to his work duties had not been discussed with him.

Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. 820 ILCS 305/6(c). The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. *Seiber v. Indus. Comm'n*, 82 Ill. 2d 87 (1980). A claim is only barred if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Indus. Comm'n*, 197 Ill.App.3d 640, 651 (1990).

Petitioner testified that after learning for the first time that his bilateral carpal tunnel syndrome was work-related and might need surgery, he gave notice to his supervisor, Matt Wolff, Linehaul Manager. In fact, Respondent's Claims Specialist, Phil Scoggins, took a recorded statement from Petitioner on January 16, 2014. (RX 2) Petitioner informed Mr. Scoggins that he just found out Tuesday when he went to the specialist to find out what was wrong that it was carpal tunnel. (RX 2, p. 4) Petitioner informed Mr. Scoggins that the doctor believe the carpal tunnel syndrome was caused by holding the steering wheel, vibration, and probably through shifting. (RX 2, p. 5)

The Arbitrator finds that timely notice was given to Respondent.

F. With regards to whether Petitioner's present condition of ill-being causally related to the injury, the Arbitrator finds as follows:

As a truck driver for Respondent, Petitioner's duties included not only driving a semi-tractor and trailers nine to eleven hours per day, but also performing forceful physical tasks with his hands to drop and hook his trailers. Prior to commencing employment with Respondent, Petitioner had no injury or condition to his bilateral hands. The symptoms started a year and half after he started driving for Respondent. His hands started

"falling asleep" while driving. When his condition became more painful and he started having problems with activities of daily living, such as opening bottles, he reported the symptoms to his primary physician, Dr. Rahmani, on July 23, 2013. (RX 2, p. 4; PX 1)

An EMG was conducted by Dr. Ozcan on September 18, 2013. (PX 1) There was evidence of moderate-to-severe carpal tunnel syndrome on the right and severe carpal tunnel syndrome on the left. Petitioner returned to see Dr. Rahmani on September 30, 2013 and was referred to a hand specialist. Petitioner was evaluated by Dr. Labana on January 14, 2014, and was advised, for the first time, that he had bilateral carpal tunnel syndrome from driving a truck. Dr. Labana documented in his visit note that driving a truck has at least contributed to his bilateral carpal tunnel syndrome and should therefore be covered under workers' compensation. (PX 2)

Dr. Vender's opinion that Petitioner's bilateral carpal tunnel syndrome is not causally related to his work activities is not credible. Petitioner was seen on September 17, 2014 by Dr. Michael Vender at Respondent's request for an independent medical examination. (RX 3) Dr. Vender confirmed the diagnosis of bilateral carpal tunnel syndrome, however he opined that Petitioner's work activities would not be contributory to the development of bilateral carpal tunnel syndrome, nor an aggravating factor in the progression of the disease. In reaching this conclusion, Dr. Vender assumed that the majority of Petitioner's time is spent driving, and there was no indication of exposure to significant forceful exertions, especially on any regular or repeated basis. (RX 4) However, the evidence Dr. Vender relied upon clearly shows that driving the semi-tractor required a constant

exertion of at least 15-pounds of grip force. Petitioner did this for nine to eleven hours per day, and therefore it was certainly regular and repeated.

While Dr. Vender did not find the constant force required to steer the semi-tractor to be exposure to significant forceful exertion on a regular or repeated basis, he did comment that motorcycle riding contributes to the development of carpal tunnel syndrome because it involves forceful gripping and with an element of vibration. (RX 4) Dr. Vender's admission that gripping a motorcycle with vibration can contribute to the development of carpal tunnel syndrome, but not gripping the semi-tractor steering wheel with an element of vibration, shows that he is not credible. Further, Petitioner's work activities, besides driving, involved significant exertion with each hand to drop and hook trailers, move the convertor gear, each 2-4 times per shift. These activities were completely overlooked by Dr. Vender.

Finally, the Ergonomic Job Analysis relied on by Dr. Vender reflected an operator's driving position that was not consistent with Petitioner's stature. Dr. Vender admits in his addendum of February 11, 2015 that placing the upper extremities and wrists in awkward positions would be a consideration for the development of carpal tunnel syndrome. Petitioner was not able to support his arms and hands on the steering wheel given his size, nor was his right wrist position on the gear shift as indicated since this was actually behind him, and not extended in front of him.

Under the Act, compensation may be awarded for a claimant's condition of ill-being even though the conditions of his or her employment do not constitute the sole, or even the principal, cause of injury. *Lasley Construction Co. v. Indus. Comm'n*, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5, 8, 211 Ill. Dec. 345 (5th Dist. 1995); *Teska v. Indus. Comm'n*, 266 Ill.

App. 3d 740, 742, 640 N.E.2d 1, 3, 203 Ill. Dec. 574 (1st Dist. 1994). In order to constitute an accidental injury within the meaning of the Act, the claimant need only show that some act or phase of the employment was a causative factor of the resulting injury. *Teska*, 266 Ill. App. 3d at 742, 640 N.E.2d at 3; *Mendota Township High School v. Indus. Comm'n*, 243 Ill. App. 3d 834, 837, 612 N.E.2d 77, 79, 183 Ill. Dec. 820 (4th Dist. 1993). Additionally, an injury is considered accidental even though it develops gradually over a period of time as a result of a repetitive trauma, without requiring complete dysfunction, if it is caused by the performance of claimant's job. *Cassens Transport Co. v. Indus. Comm'n*, 262 Ill. App. 3d 324, 330, 633 N.E.2d 1344, 1348, 199 Ill. Dec. 353 (2d Dist. 1994). A non-employment related factor which is a contributing cause with the compensable injury in an ensuing injury does not break the causal connection between the employment and claimant's condition of ill-being. *Teska*, 266 Ill. App. 3d at 742, 640 N.E.2d at 3.

Dr. Vender's identification of other risk factors Petitioner possessed for the development of carpal tunnel syndrome, such as increased body mass index and diabetes, are insufficient to alleviate Respondent of liability under the Workers' Compensation Act. The facts of the instant matter are analogous to the case of *Loveall v. JDC Logistics*, 7 IWCC 265, in which Dr. Vender's opinions on the causal relationship between truck driving and carpal tunnel syndrome were also found to lack credibility.

The Arbitrator finds the opinions of the treating physician, Dr. Labana, to be more persuasive on the issue of causal connection. Dr. Labana testified that vibrations felt through the wheel while driving and the gripping of the steering wheel alone could contribute causally to carpal tunnel syndrome. (PX 9, p. 11) Dr. Labana also considered Petitioner's entire job

tasks, including the repetitive forceful activities required to hook and unhook trailers. (PX 9, p. 9-10) Based upon these considerations, Dr. Labana was able to credibly testify to a reasonable degree of medical and surgical certainty that while Petitioner possessed other risk factors for the development of carpal tunnel syndrome, his job duties were also a contributing cause to the development of his condition. Petitioner's unimpeached testimony concerning his job requirements and the forceful use of his hands in performing these tasks supports Dr. Labana's understanding of Petitioner's job duties.

Based upon the credible testimony of Petitioner and the opinion of Dr. Labana, the Arbitrator finds that a causal connection exists between Petitioner's work activities for the Respondent and the development of bilateral carpal tunnel syndrome.

J. With regards to whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner met his burden of proof that his condition of ill-being is related to his job duties, therefore he is entitled to causally-related medical expenses necessary to relieve him of the effects of this injury.

The Petitioner submitted the following medical expenses, subject to the fee schedule:

Provider	Date of Service	CPT	Charge	Fee Schedule
Premier Orthopaedic &	1/14/2014	99243	$319.00	$180.65

Hand Center				
Premier Orthopaedic & Hand Center	2/4/2014	99213	$127.00	$78.52
Premier Orthopaedic & Hand Center	2/14/2014	64721	$4,801.00	$1,715.62
Premier Orthopaedic & Hand Center	3/14/2014	64721	$4,801.00	$1,715.62
Ingalls Memorial Hospital	2/4/2014	80048	$192.00	$37.98
Ingalls Memorial Hospital	2/4/2014	36415	$40.00	$15.29
Ingalls Memorial Hospital	2/4/2014	85027	$115.00	$32.16
Ingalls Memorial Hospital	2/4/2014	93005	$282.00	$58.82
Ingalls Memorial Hospital	2/4/2014	81001	$97.00	$26.48
Ingalls Memorial Hospital	2/14/2014		$12,590.10	$6,723.08
Ingalls Memorial Hospital	3/14/2014		$10,658.25	$5,685.48
Harvey Anesthesiologists, S.C.	2/14/2014	01810 (63 min)	$1,210.00	$403.45
Harvey Anesthesiologists, S.C.	3/14/2014	01810 (49 min)	$990.00	$322.76
Southwest Laboratory	2/4/2014	80048	$15.30	$15.30

Physicians, S.C.				
Southwest Laboratory Physicians, S.C.	2/4/2014	81001	$21.70	$21.70
Southwest Laboratory Physicians, S.C.	2/4/2014	85027	$21.70	$21.70
Cardiac Consulting Group, S.C.	2/4/2014	93010	$35.00	$35.00
Hanger Prosthetics/Orthotics	2/14/2014	L3908	$87.00	$47.46
Hanger Prosthetics/Orthotics	3/14/2014	L3908	$87.00	$47.46
			$36,490.05	$17,184.53

The Respondent does not dispute that Petitioner received said treatment, nor does Respondent dispute that said treatment was reasonable and necessary. The parties stipulated to the above fee scheduled amount. (TX pg. 4)

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary and that Respondent shall pay to Petitioner $17,184.53 for said services.

K. With regards to what amount of compensation is due for temporary total disability, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner met his burden of proof that his condition of ill-being is related to his employment, therefore, he is entitled to temporary total disability benefits while undergoing necessary medical treatment to relieve him of the effects of this injury.

Petitioner was temporarily totally disabled from February 14, 2014 through April 13, 2014, a period of 8-3/7 weeks. Petitioner collected short-term disability benefits through his union while he was off work. He received a net benefit of $2,058.10.

Section 8(j) of the Act allows Respondent to receive a credit towards the above temporary total incapacity for work. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments.

L. With regards to the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator has carefully considered the entire record in light of the factors enumerated in Section 8.1b of the Act, and finds Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of each hand. The five factors we considered are: (1) the reported level of impairment as assessed pursuant to the current edition of the AMA "Guides to the Evaluation of Permanent Impairment"; (2) the occupation of the injured employee; (3) the age of the employee at the time of the injury; (4) the employee's future earning capacity; and (5) evidence of disability corroborated by the treating medical records.

In the case at bar, Respondent offered into evidence the reported level of impairment pursuant to subsection (a). Dr. Vender reported 2% right upper extremity impairment and 2% left upper extremity impairment. Dr. Vender documented ongoing pain in the bilateral palms.

Petitioner was employed as a truck driver, and following his injury he was ultimately returned to his regular duty job without restrictions. Petitioner was 64-years-old on the date of accident. Petitioner's occupation

as a truck driver required constant use of his bilateral hands. Petitioner ultimately retired in November 2014. Petitioner testified that his ongoing complaints contributed to his decision to retire from ABF.

Petitioner has demonstrated evidence of disability corroborated by the treating medical records. Petitioner's records are clear that he developed bilateral carpal tunnel syndrome through repetitive use of his hands at work. Petitioner sought appropriate treatment for his symptoms, including an EMG which showed evidence of bilateral carpal tunnel syndrome. He eventually underwent bilateral carpal tunnel releases. Petitioner's treatment appears appropriate and the medical records support his complaints.

Petitioner testified to continuing complaints from his repetitive trauma injury. These complaints contributed to his decision to retire from truck driving. He has resumed experiencing night symptoms of numbness and tingling. He experiences pain in his hands during the day. He experiences difficulty with fine motor tasks.

Petitioner does not continue to treat for his carpal tunnel syndrome but he does take Aleve on a regular basis. The Arbitrator finds credible Petitioner's testimony regarding residual pain and functional limitations.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☒ 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

Angela Czyzewski,

Petitioner,

vs.

NO: 14WC 17324
14WC 17343

Norman Sleezer Youth Home,

Respondent,

16IWCC0501

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the petitioner & respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, temporary total disability, and being advised of the facts and law, 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 7, 2015, is hereby affirmed and adopted.

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.

16IWCC0501

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. 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: JUL 29 2016
MJB/bm
o-7/26/16

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

CZYZEWSKI, ANGELA
Employee/Petitioner

Case# **14WC017343**
14WC017324

NORMAN C SLEEZER YOUTH HOME
Employer/Respondent

16IWCC0501

On 12/7/2015, 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 0.41% 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:

4071 FRANCINE B WHITE & ASSOC LLC
321 W STATE ST
SUITE 801
ROCKFORD, IL 61101

0560 WIEDNER & McALUFFIE LTD
PATRICK MORRIS
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF WINNEBAGO)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Angela Czyzewski
Employee/Petitioner

v.

Norman C. Sleezer Youth Home
Employer/Respondent

Case # **14 WC 17343**

Consolidated cases: **14 WC 17324**

16IWCC0501

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 **George Andros** Arbitrator of the Commission, in the cities of **Rockford on 9/23/15 and by agreement in Woodstock on 10/9/15**. 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

FINDINGS 16IWCC0501

On the dates of accident **8/5/13** and **4/11/14** 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 **$24,412.44**; the average weekly wage was **$469.47**.

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

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

Respondent shall be given a credit of **$11,759.09** for TTD, **$272.31** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$12,031.40**.

Respondent is entitled to a credit of **$594.27** under Section 8(j) of the Act.

ORDER

Respondent shall pay for reasonable and necessary medical services totaling **$463.00** to Rockford Health Physicians & **$176.00** to Rockford Radiology , as provided in Section 8(a) & 8.2 of the Act.

Respondent shall be given a credit of **$594.27** for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize in writing and pay for under section 8 of the Act, the surgical procedure prescribed by Dr. Scott Trenhaile of Rockford Orthopedics along with all pre and post surgery exams and follow up therapy as ordered by said doctor. Respondent shall pay any maintenance due during said surgical time off.

It is hereby ordered that temporary total disability is denied herein as follows:
TTD benefits from 12/11/14 – 12/21/14 and 1/2/15 – 9/23/15 are denied.

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.

#01 George J. Andros

Signature of Arbitrator

DEC 7 – 2015

Date December 4, 2015

16IWCC0501

STATEMENT OF FACTS 14 WC 17324 & 14 WC 17343

Petitioner testified on September 23, 2015 that before August 5, 2013, her first accident and injury to her right shoulder, she had never had any accidents or injuries to that right upper extremity and had never had any treatment. Petitioner further testified that since the last accident and injury of April 11, 2014 she has had no new accidents or injuries to that right shoulder.

Petitioner treated with orthopedic surgeon, Dr. Trenhaile, from Rockford Orthopedic Associates and began treatment with him on July 31, 2014. (Petitioner's Exhibit No. 7). Dr. Trenhaile, when he first examined her on July 31, 2014, ordered an MRI arthrogram of the right shoulder with contrast.

This was performed on August 14, 2014 and found at Petitioner's Exhibit No. 3. The MRI arthrogram of August 14, 2014, under the impression, indicated that there were paralabral cysts with labral tear and strong consideration should be given to arthroscopy for definitive evaluation especially if clinical symptoms and/or shoulder instability suggest this diagnosis. Further impression was that there was AC joint arthritis and secondary chronic subacromial impingement on the rotator cuff. (Petitioner's Exhibit No. 3). Dr. Trenhaile, following that arthrogram MRI, made a recommendation that the Petitioner undergo a right shoulder diagnostic arthroscopy distal clavicle excision subacromial decompression and labral repair vs. debridement.

Dr. Trenhaile testified at his deposition on May 27, 2015 that based upon the last office visit with Petitioner of December11, 2014, that she has basically now chronic impingement, symptomatic AC joint and concern for a labral tear with instability of the shoulder. Dr. Trenhaile went on to testify that the incident that the Petitioner described to him as occurring at work when she was injured in April 2014 was the cause of these problems with her right shoulder. Dr. Trenhaile testified that he had not seen the Petitioner since December 11, 2014 because he was waiting for authorization for her to have the surgical procedure that he has recommended. Further, that this surgical procedure is due to the work accident of April 11, 2014. Dr. Trenhaile further testified that Petitioner had not been back to see him because the next appointment would be for the pre-op and to schedule the surgery. (Page 26-29 Dr. Trenhaile's Evidence Deposition Petitioner's Exhibit No. 8)

Dr. Trenhaile also testified that he had reviewed Dr. Bare's IME report of October 27, 2014 examination of the Petitioner. Dr. Trenhaile testified at page 23 of his deposition that he did not agree that the Petitioner has a frozen shoulder, and testified that specifically people with frozen shoulder have limitation of motion in all planes, but classically the one that they have limitations the most is external rotation with the arm at the side. Dr. Trenhaile went on to state that if you look at his note on December 11, 2014 external rotation is 0 degrees, abduction was 80 degrees which is essentially fully and complete. Dr. Trenhaile continued to testify it is impossible to have a frozen shoulder if you have that much external rotation. Dr. Trenhaile went on to testify at page 24 that throughout all three of the office visits he had with the Petitioner and examining her right shoulder, she had a full range of motion in all planes.

Dr. Trenhaile went on the testify at page 25 that he had given the Petitioner restrictions when he last saw her on December 11, 2014, that was to do no work around clients, left arm work only and to avoid repetitive motion. (Page 25, Dr. Trenhaile's evidence deposition, Petitioner's Exhibit No. 8)

Dr. Trenhaile further testified at page 25 of his deposition that he had gotten phone calls from Ms. Czyzewski after the last office visit of December 11, 2014 where she was complaining of increased pain in the shoulder and discomfort and that at the current time waiting for the authorization so she could have the surgery that he had recommended.

Dr. Bare, who examined the Petitioner at the request of the Respondent on October 27, 2014, testified that Petitioner's actual diagnosis is a frozen shoulder and that she should have physical therapy and did not require surgery. He also felt that the Petitioner should have restrictions, but gave her a weight limit of 20 pounds, but no overhead lifting or repetitive lifting. Dr. Bare testified that Petitioner was cooperative when he examined her. His background is noted as well. However, the Arbitrator is charged with finding by a preponderance of the evidence which facts are to be adopted.

Based upon the totality of the evidence including inter alia the testimony of the Petitioner, based upon a careful review of the medical records submitted, Petitioner's Exhibit No. 5, 6, 7 and the testimony of both Dr. Trenhaile and Dr. Bare , Exhibit 8, and Respondent's Exhibit No. 4, the Arbitrator finds that Petitioner did sustain injury to her right shoulder while working for Respondent. Further, based upon Dr. Trenhaile's testimony Petitioner requires surgery to the right shoulder and that surgery as recommended by Dr. Trenhaile, should be authorized by the Respondent.

The Arbitrator in this this particular case gives the far greater weight to the medical opinions to those of Dr. Scott Trenhaile of Rockford Orthopedic Associates. Those opinions are adopted herein as the finding of medical facts in the case at bar. The opinion of Dr. Bare is not adopted. In particular his opinion regarding a "frozen" shoulder is dismissed.

The Arbitrator has studied and taken the opinions of the initial doctors' opinions into account but rely on the board certified specialist at Rockford Orthopedics as the key opinion in the case. The recordation or lack thereof of phone calls at the monolith of Rockford Orthopedics during ongoing workers compensation issues is a red herring so to speak with no probative value. This is especially true on a case denied by an insurance carrier at a certain point.

The testimony of Ms. Cara Williams is adopted regarding the availability to work. Thus, that testimony is adopted and stands as a basis for denying additional temporary total disability than that already paid to date.

16IWCC0501

The medical bills in the Award are awarded for the related medical treatment shown in the record including 463.00 for Rockford Health Physicians and 176.00 to Rockford Radiology. Further, payment under section 8 is ordered for any balance to Dr. Trenhaile.

Temporary Total Disability plus Temporary Partial Disability are found proper as paid and as quantified in the Award.

The Arbitrator orders the prospective medical treatment including diagnostic arthroscopy by Dr. Scott Trenhaile of Rockford Orthopedics along with pre and post arthroscopy office evaluation , pre tests and post treatment and follow up, as needed. Further maintenance benefits during any prescribed lost time is ordered as well.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Brenda Bowman,

Petitioner,

16IWCC0559

vs.

NO: 14 WC 18700

R&B Receivables,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection and prospective medical care and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the credible evidence that she sustained accidental injuries arising out of and in the course of her employment by Respondent on April 25, 2014.

Petitioner was 64-years-old on the date of accident and employed by Respondent as a skip tracer since 2000. She worked 37.5 hours per week. Petitioner testified that her job as a skip tracer involved running investigations and searches on the computer and keying information into the company database. She occasionally took notes by hand, made telephone calls, and pulled files. Petitioner alleged that she began to develop right-sided, and subsequently left-sided, hand numbness with pain in the base of the thumbs and the forearms during the final year of her employment. The alleged date of accident is the last day Petitioner worked for Respondent, April 25, 2014. She filed an Application for Adjustment of Claim on May 29, 2014 however she did not specify the nature of the injury on the form.

The Arbitrator found that Petitioner proved she sustained repetitive trauma injuries to her bilateral hands arising out of and in the course of her employment by Respondent and that she provided timely notice of an injury to Respondent. The Arbitrator found that the frequency and duration of keyboarding necessary to perform her skip traces posed a risk incidental to her employment. The Arbitrator ordered Respondent to pay for Petitioner's medical expenses and authorize prospective medical treatment. For the reasons set forth below, we do not find the Arbitrator's Decision to be

16IWCC0559

supported by a preponderance of the evidence.

Petitioner testified that she performed keyboarding and data entry for 6 to 6.5 hours per day. She described running searches on both subscription and public databases "continuously throughout the day" in order to locate debtors. She researched information such as names, social security numbers, addresses, phone numbers, license plate numbers, property records, vehicle records, and jail records. Petitioner testified that it took between twenty minutes and two hours to locate a debtor. As she gathered information, she typed notes into Respondent's computer program "AS400." Petitioner testified that she used her notes to complete a report in AS400 for each skip trace. Petitioner testified that she usually completed 10 reports per day. Initially she had no quota to reach; during the final month of her employment a quota of 18 reports per day was instituted by Respondent.

When not using a computer, Petitioner occasionally used a pen to take notes. She infrequently made phone calls. She pulled approximately 20 to 25 files each day and whenever she finished the requested skip traces she delivered files to the account representative. On cross-examination, she agreed that pulling files did not involve forceful pinching or gripping. Petitioner testified that she occasionally trained other employees to perform skip tracing. She testified that the process of training took two to three weeks and required her to be available to answer questions. Petitioner testified that the skip tracing department had between one and five skip tracers at a time while she was working for Respondent. As stated, Petitioner testified that she began to experience symptoms approximately one year prior to the alleged date of accident. She testified that "I just let it go. I thought at times I might have arthritis or something, but I really wasn't sure what I had. You just work and do it." (T. 22) On cross-examination, she admitted that she never reported any accident or injury to Respondent during her employment.

On cross-examination, Petitioner agreed that she was involved in one or two "productivity meetings" during the final month of her employment, where she learned about the new quota. She furthermore agreed that Respondent never required her to type at any particular speed. Petitioner denied that she ever expressed job dissatisfaction. She also denied that she was ever counselled regarding her job performance or behavior. She agreed that on April 25, 2014 her employment was terminated. She testified that she was told she was not needed anymore. She testified that she felt "hurt" but denied that she became upset. Petitioner testified that she applied for and was granted unemployment benefits. She denied that she considers herself retired; she considers herself "a senior citizen looking for employment." (T. 46)

Petitioner offered the testimony of Ms. Hanson, a former coworker. Ms. Hanson testified that she has known Petitioner since 2000 and agreed on cross-examination that they are friends. Ms. Hanson's employment by Respondent began in 2000 and ended on August 15, 2014. Although she held other positions, Ms. Hanson worked for Respondent as a full time skip tracer for the final two years of her employment. She testified that Petitioner trained her for the skip tracer position for approximately one week, and that she and Petitioner were the only skip tracers working for Respondent during that time. Ms. Hanson testified consistently with Petitioner that as a skip tracer she performed data entry for 6 to 6.5 hours per day, stating "we were sitting in front of the computer the whole time." She testified that she completed approximately 15 to 20 reports per day, and that she believed they were supposed to

16IWCC0559

complete 18 reports per day.

Respondent offered the testimony of Mr. Miller, the manager of Respondent's recovery department. Before he became the manager he was Petitioner's direct supervisor. On the date of accident, Petitioner's direct supervisor was Mr. Long. Mr. Miller never worked as a skip tracer but he has observed Petitioner and Ms. Hanson on a daily basis as they performed their duties. He testified that skip tracers have an adjustable chair and are allowed to modify their workstations and stand, stretch and move about at will. He explained that skip tracers were expected to complete 10 to 13 reports per day until the quota increased to 18 reports in April of 2014. At that time, Respondent also began to require skip tracers to complete a daily report of their work which was entered into AS400. Mr. Miller doubted that skip tracers could spend 6 to 6.5 hours per day keyboarding and entering data; he explained that much of the time was spent running searches and researching.

On April 25, 2014, Mr. Miller met with Petitioner and informed her that her employment was terminated. Petitioner was not meeting performance requirements for locating debtors. He testified that the legal department and the president of the company advised him that skip traces were not being completed quickly enough. He testified that he did not personally discuss Petitioner's job performance with her prior to April 25, 2014. In contradiction with Petitioner's testimony, Mr. Miller stated that Petitioner reacted in an angry and upset manner following her termination. The next day, Mr. Miller received an email from Petitioner. Petitioner identified the email during her testimony and agreed she sent it from her home computer. The email describes Petitioner's thoughts and feeling regarding her termination. The email does not mention any physical complaints or injuries, work-related or otherwise. (RX4)

Mr. Miller testified that he did not respond to the email. He denied that Petitioner ever reported a workplace injury or accident during her employment; he learned that she made a workers' compensation claim approximately one month after her termination. Mr. Miller testified that, currently, Respondent employs one part-time skip tracer. (T. 79)

On April 29, 2014 Petitioner was examined by Dr. Qeli. She complained of bilateral hand pain and occasional numbness that was worse on the right. Petitioner reported that this had been happening for about a year and her symptoms included waking up in the night due to pain. Petitioner made no mention of her employment or job duties. On exam, Dr. Qeli noted positive grind test, CTS6, Tinel's sign and Phalen's sign and X-rays showed evidence of bilateral CMC arthritis. Dr. Qeli diagnosed bilateral thumb arthritis and carpal tunnel syndrome; he recommended wrist braces. Petitioner never returned to Dr. Qeli. On January 8, 2015, Dr. Qeli wrote a narrative report at the request of Petitioner's attorney. Petitioner's attorney advised Dr. Qeli that Petitioner's job duties consisted of keyboarding for 5 to 6 hours per day and pulling files. Petitioner's attorney further advised that Petitioner's symptoms arose during the course of her employment, and asked Dr. Qeli to provide a causal connection opinion and recommendations for additional treatment and restrictions. (PX1) Dr. Qeli's narrative report states his opinion that there is a causal relationship between Petitioner's work activities and her diagnosed conditions - conditions he noted "can develop from overuse of the hands." (PX1)

16IWCC0559

On March 26, 2015, Petitioner was examined by Dr. Atluri at the request of Respondent. Dr. Atluri's report notes that Petitioner reported symptoms beginning in June of 2013 that she attributed to repetitive work duties. She reported that her job involved using a computer for 6 to 6.5 hours per day and lifting and carrying various sized files. Dr. Atluri agreed with Dr. Qeli's diagnoses but he did not agree that either condition could be related to Petitioner's employment. Dr. Atluri based his causal opinion on the lack of any reported duties involving regular forceful gripping or pinching, awkward positioning of the hands or heavy lifting by Petitioner during her employment.

At hearing, Petitioner testified that she is currently 66-years-old and she is right-handed. She quit smoking 13 years ago. She testified that she would like further treatment, "I get pain in my hands. My thumbs are really very bad. The bones actually just ache, and that's on a daily basis. I have protruding bones in my wrist. I get shooting pains up into my forearms now, on my left arm also." (T. 29)

It is well settled that in Illinois a claimant alleging a repetitive trauma injury must meet the same standard of proof as a claimant who alleges a sudden injury from a discrete event. Petitioner must therefore be able to show that the condition is work related and not the result of normal degenerative processes. The Commission finds that Petitioner failed to meet the standard of proof. Petitioner worked on a computer for much of the day, which is extremely common in many workplaces. Petitioner did not testify with respect to any continuous repetitive activity, any activity requiring sustained forceful gripping or heavy lifting, or any activity requiring sustained awkward positioning of the hands or exposure to forces such as vibration. Petitioner did not report any such complaints directly to Dr. Qeli, Dr. Atluri or Respondent. Considering the various activities that may be performed for each skip trace - running searches and analyzing data received, note-taking, telephone calls, pulling files, as well as keyboarding and data entry - we are not persuaded that 6 to 6.5 hours of straight keyboarding and data entry is a reasonable and reliable description of Petitioner's job duties. We find that Petitioner failed to prove that her employment placed her at any increased risk of repetitive trauma injuries and failed to show by a preponderance of the credible evidence that her conditions are work-related.

IT IS THEREFORE ORDERED BY THE COMMISSION that the 19(b) Decision of the Arbitrator dated October 2, 2015 is hereby reversed and compensation is denied.

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: AUG 26 2016
RWW/plv
o-7/13/16
46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ Affirm and adopt	☐ 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

Darrel Fraser,
Petitioner,
vs.

16IWCC0538
NO: 14 WC 24511

Olin Winchester,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 22, 2016 is hereby affirmed and adopted.

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 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: AUG 18 2016
KWL/vf
O-8/8/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0538

FRASER, DARREL
Employee/Petitioner

Case# 14WC024511

OLIN WINCHESTER
Employer/Respondent

On 1/22/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.37% 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:

4620 ADWB LLC
JOHN WINTERSCHEIDT
51 EXECUTIVE PLAZA COURT
MARYVILLE, IL 62082

0299 KEEFE & DePAULI PC
MICHAEL F KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ 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)

16IWCC0538

Case # 14 WC 024511

Consolidated cases: n/a

Darrel Fraser
Employee/Petitioner

v.

Olin Winchester
Employer/Respondent

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **September 30, 2015**. 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 _____

FINDINGS

On the date of accident, **07/14/14**, 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 $**74,877.42**; the average weekly wage was $**1,125.65**.

On the date of accident, Petitioner was **54** years of age, *married* with **0** dependent children.

Respondent ***has 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 $**359.36** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $52.77 to Dr. William Bartley, $62.64 to SSM Pain Management, $52.92 to Dr. Falon Maylack and $73.92 to Dr. Bruce Vest, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall further authorize and pay Dr. Vest's future medical treatment of Petitioner's bilateral cubital tunnel syndrome as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $359.36 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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.

Edward Lee
Signature of Arbitrator

12/16/15
Date

ICArbDec19(b)

JAN 22 2016

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION 19 (b) DECISION

DARREL FRASER,
Employee/Petitioner,

v.

OLIN WINCHESTER,
Employer/Respondent

16IWCC0538

Case # 14 WC 024511

MEMORANDUM OF 19 (b) DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner is fifty-five-years-old and has worked in Respondent's ammunition manufacturing factory since February 1992. Surgeons, Dr. Falon Maylack, Dr. Bruce Vest and Dr. Mitchell Rotman have diagnosed him with bilateral cubital tunnel syndrome, with all three physicians recommending surgery for the condition. Petitioner claims that his cubital tunnel syndrome is causally related to his work duties and Respondent denies the allegation.

For about twenty years prior to September 2013, Petitioner held the job of "Group Leader" (and subsequently "Temporary Supervisor" for about six months of that period), which required him to operate a sit-down forklift, among other duties. During the last six months to a year of his Group Leader position, Petitioner operated a sit-down forklift for about two hours a day, five days a week. His left arm controlled a knobbed steering wheel while his right arm operated the machine's control levers. During operation of the machine, both of his elbows were flexed greater than ninety degrees with his right elbow on the hard surface of the forklift's armrest supporting the weight of his arm.

In September 2013, Petitioner transferred to his present job of Adjuster I Trainee (Shotshell) where he continued to work five days a week from forty to sixty hours. Respondent's Physical Demands Analysis for its job of Adjuster I Trainee (Shotshell) was entered in evidence and reveals that Petitioner's job requires machine operation and maintenance, as well as inspection of shotgun shells. The job is described as "heavy" (defined as "lifting 100 pounds maximum with frequent lifting and/or carrying of objects weighing 50 pounds") and requires the use of hand tools, that Petitioner described as including Allen wrenches, screwdrivers, pliers, ratchets, crescent wrenches, hammers, open-end wrenches and mallets, fifty percent of the day. The Physical Demands Analysis states that "reaching," "handling," "right hand control" and "left hand control," "reach above shoulders," "reach over 18'," "reach below shoulders," "reach to floor," "lift from arm level," "lift from floor," and "lift bulky objects" are "essential" to the job. Petitioner's testimony concerning his job duties is consistent with the Physical Demands Analysis and he explained that his job also requires the use of two to four foot-long pry-bars, weighing about twenty pounds, to un-jam machines.

In September 2013, when Petitioner transferred to his present job of Adjuster I Trainee (Shotshell), he had the least seniority in the new department, and was therefore initially assigned to the least desirable jobs. From September through July 2014, he was required to operate a stand-up forklift to transfer and then stack 600 to 800 cases of ammunition by hand for about six hours every day. The cases, ranged in size from about eighteen inches square to the size of a "Kleenex" box and weighed about twenty pounds each. The work required repetitive flexing and extending of the elbows beyond ninety degrees. Since gaining seniority in the new department, Petitioner now operates the stand-up forklift only on occasion.

Jeff Hardesty testified on behalf of Respondent. Mr. Hardesty has been employed by Respondent for about eight-and-a-half years and has held the position of General Foreman of Shotshell since June 2015 where he has supervised Petitioner since that date. Mr. Hardesty testified that Petitioner is an honest and good worker, and that the Physical Demands Analysis entered in evidence accurately reflects Petitioner's present job duties.

However, Mr. Hardesty admitted that he has no knowledge of Petitioner's job duties before June 2015.

Respondent entered two job videos in evidence. The first is three-and-a-half minutes long, titled "Shotshell Adjuster Forklift Job" and depicts an individual operating a stand-up forklift with the individual's left elbow flexed while operating the steering wheel and the right elbow flexed while operating a control. The second video, titled "Shotshell Adjuster I Trainee" is five minutes, twenty-two seconds long and depicts an individual removing shotgun shells from boxes and placing them in a machine, placing unfolded boxes from a pallet into a machine, watching shotgun shells pass on a conveyor, un-jamming a machine with a pry bar, using a socket wrench on a machine and watching the machine after it becomes operational. Mr. Hardesty testified that the videos depict Petitioner's present job duties. Petitioner testified that the videos are accurate, but are not inclusive of all of the job requirements and do not depict the intensity or pace of the job.

After working his new Adjuster I Trainee (Shotshell) job since September 2013, Petitioner began to notice decreased grip strength in his hands, numbness in his fingers and sensitivity in his elbows in February 2014. During the course of a regular, medical check-up with his family doctor, Dr. William Bartley on February 18, 2014, Petitioner told Dr. Bartley about his arm complaints and his new job duties of lifting cartons of shells. On that date, Dr. Bartley recorded, "The job is more physically demanding for him as he has become older. It is repetitious, 600 to 900 times a day he is lifting shelves [sic], some sort of formations of shelves [sic], weight is 10-40 lbs. He is having right shoulder pain, some right thumb pain, both elbows hurt." Dr. Bartley did not prescribe any testing or treatment and allowed Petitioner to continue working without restrictions.

Petitioner continued working, but his condition became worse. On May 13, 2014, he returned to Dr. Bartley who recorded that "[h]e is concerned regarding his job. He is at this time the low man on the totem pole... He has been at Olin for a number of years... [h]e has repetitive work, he has bilateral tendonitis of his elbows and wrists. This has been going on for 4-6 weeks. His left hand becomes numb, this has been going on for a month. His shoulder pain continues, he has been referred to orthopedics for this." Shoulder X-rays

were taken and the orthopedist to whom Dr. Bartley referred Petitioner was Dr. Falon Maylack.

Petitioner initially saw Dr. Maylack on June 2, 2014 at which time his complaints of bilateral hand numbness and weakness were recorded. Dr. Maylack's record of that date states that Petitioner "is a 50-year-old white male who works for Olin, does labor intensive work with forklift and hand stacking 100's of boxes." Dr. Maylack diagnosed bilateral ulnar nerve entrapment at the elbows and ordered nerve conduction studies. The studies were performed on June 23, 2014 at SSMOI Pain Management and Petitioner followed up with Dr. Maylack thereafter on July 14, 2014. Dr. Maylack then informed Petitioner of his diagnosis of bilateral cubital tunnel syndrome and his recommendation for bilateral elbow surgeries.

Aware of Dr. Maylack's diagnosis, Petitioner reported his condition to Respondent's medical department that same day. The department's record of July 14, 2014 records Petitioner's complaints of "pain in bil elbows since March 2014 since working in different dept. Saw PMD Dr. Bartley and referred to Dr. Maylack. Dr. Maylack order NCV testing and went to office today for results and told need to have bil elbow surgery. Thinks pain is caused from driving forklift and stacking cases." Respondent denied Petitioner's claim.

Given the fact that Respondent would not authorize Dr. Maylack's proposed treatment and the fact that Dr. Maylack would not treat him without workers' compensation approval, Petitioner sought treatment with board certified, orthopedic surgeon, Dr. Bruce Vest on September 16, 2014. On that date, Dr. Vest recorded Petitioner's complaints of pain in his hands and elbows bilaterally. Dr. Vest noted that Petitioner "notices the numbness is worse when he works driving a tractor at work" and that as an Adjuster at Olin, "he does a lot of repetitive motion at work, with stacking of bullet shells, that weigh about 10-15 pounds." Dr. Vest diagnosed bilateral ulnar neuropathy of both elbows, recommended ulnar nerve decompression with possible transposition at both elbows and opined the Petitioner's "condition was caused or aggravated by the repetitive use activities of his upper extremities during the course of his work at Olin, as an Adjuster."

Respondent continued to deny treatment authorization and Petitioner continues to see Dr. Vest. As of February 16, 2015, Dr. Vest's diagnosis and surgical recommendation remained the same.

Pursuant to Section 12 of the Act, Respondent had Petitioner examined by board certified orthopedic surgeon, Dr. Mitchell Rotman on December 8, 2014. Dr. Rotman testified on behalf of Respondent and found Petitioner to be pleasant, cooperative and forthright during the course of his examination and noted no evidence of symptom magnification or malingering. Following his examination and review of Petitioner's medical records, Dr. Rotman diagnosed bilateral cubital tunnel syndrome and testified that surgery is a reasonable treatment modality for the condition.

After reviewing Respondent's Physical Demands Analysis for the job of Adjuster I Trainee (Shotshell) and Respondent's job videos, Dr. Rotman testified that Petitioner's job duties are not aggravating factors for the development of cubital tunnel syndrome. He agreed however, that repetitively traumatic job duties can cause cubital tunnel syndrome and that if Petitioner operated a sit-down forklift with his left elbow hyperflexed and his right elbow resting on an armrest, then Petitioner's cubital tunnel syndrome could have been aggravated by this activity.

Board certified, orthopedic surgeon, Dr. Vest testified on behalf of Petitioner. Dr. Vest testified that Petitioner has no significant medical history that could lead to the development of ulnar neuropathy at the elbow, or cubital tunnel syndrome. Dr. Vest reviewed Respondent's Physical Demands Analysis for the job of Adjuster I Trainee (Shotshell) and testified that it is more likely that not that Petitioner's job duties with Respondent caused the development of Petitioner's cubital tunnel syndrome, particularly Petitioner's job duties associated with stacking the cases of ammunition. Dr. Vest further agreed with Dr. Rotman that if Petitioner was required to operate a sit-down forklift for extended periods of time, then that activity could have aggravated Petitioner's cubital tunnel syndrome because of the flexed position of the elbow in the driving position and possibly the resting of the elbow on the armrest. Dr. Vest recommends bilateral elbow surgeries to relieve Petitioner's condition.

As a result of the medical treatment Petitioner received for his bilateral cubital tunnel syndrome, he has incurred medical bills in the amount of $1,870.00. Of that amount, $359.36 was paid by Respondent's group medical insurance carrier, for which it asserts a Section 8(j) credit, Petitioner personally paid $300.00 and a balance of $249.25 remains outstanding.

While Petitioner continues to perform his regular job duties for Respondent, his complaints of numbness and tingling in his ring and small fingers, his loss of grip strength, pain on the anterior aspect of his elbows, and elbow sensitivity, have become worse with time. Petitioner testified that he would like to have the surgeries recommended by Dr. Vest.

CONCLUSIONS OF LAW

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

Petitioner's credible testimony regarding his job duties for Respondent is reflected by Respondent's Physical Demands Analysis for Petitioner's present job of Adjuster I Trainee (Shotshell). Both Petitioner and Respondent's General Foreman, Jeff Hardesty testified to its accuracy. Petitioner testified that these duties required repetitive, bending of his elbows in excess of 90 degrees. Likewise, Petitioner's testimony regarding his sit-down forklift duties associated with his previous job of Group Leader leading up to September 2013 is not contradicted. Additionally, Petitioner's testimony of his work duties that led to his complaints associated with his bilateral cubital tunnel syndrome, dovetails with the activities recorded by his treating physicians, Dr. Bartley, Dr. Maylack and Dr. Vest.

Upon review of the Physical Demands Analysis' and considering Petitioner's credible testimony regarding his present job of Adjuster I and his previous, sit-down forklift duties required by his position as Group Leader, I find that Petitioner's job duties for Respondent were repetitively traumatic. As such, he has proven that he sustained accidental injuries that arose out of and in the course of his employment by Respondent.

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

Both treating, board certified orthopedic surgeon, Dr. Vest and Section 12 examining, board certified orthopedic surgeon, Dr. Rotman agree that repetitively traumatic job duties can cause cubital tunnel syndrome and that if Petitioner operated a sit-down forklift with his left elbow hyperflexed and his right elbow resting on an arm rest, then Petitioner's cubital tunnel syndrome could have been aggravated by his work duties. Dr. Vest reviewed Respondent's Physical Demands Analysis for the job of Adjuster I Trainee (Shotshell) and testified that it is more likely that not that Petitioner's job duties with Respondent caused the development of Petitioner's cubital tunnel syndrome, particularly Petitioner's job duties associated with stacking the cases of ammunition.

Treating surgeon, Dr. Vest was provided with a thorough history of Petitioner's job duties associated with Petitioner's sit-down fork lift operation, his job duties of stacking 600 to 800 cases of ammunition per day and the job duties outlined in the Physical Demands Analysis. None of these job duties were contradicted by Respondent's General Foreman, Jeff Hardesty, or any documentary evidence in the record.

After considering all of the evidence, including the testimony of Drs. Vest and Rotman, I find the testimony of Dr. Vest more persuasive than that of Dr. Rotman. I therefore find that Petitioner's bilateral cubital syndrome is causally related to Petitioner's repetitively traumatic job duties for Respondent.

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

There is no evidence of unreasonable, unnecessary or excessive medical treatment found in the record. Petitioner voiced his hand and arm complaints to his family physician, Dr. Bartley, and when the complaints did not resolve over three month period, Dr. Bartley referred Petitioner to surgeon, Dr. Maylack who ordered nerve conduction studies. Dr. Vest testified to the reasonableness and necessity of the medical treatment he provided

Petitioner for his bilateral cubital tunnel syndrome. Likewise, Dr. Rotman agrees with Dr. Maylack and Dr. Vest that Petitioner is in need of surgery for his condition.

In light of this evidence, Respondent is hereby ordered to pay Petitioner $300.00 for out-of-pocket medical expenses he has incurred for treatment of his work related conditions. Respondent is also ordered to directly pay the providers listed in Respondent's Exhibit 8 for the outstanding medical expenses listed therein, pursuant to the Act's Medical Fee Schedule. Pursuant to Section 8(j) of the Act, Respondent is further granted a credit in the amount of $359.36 for the medical bills paid in that amount through its group medical plan as reflected in Petitioner's Exhibit 8.

Issue K. Is Petitioner entitled to any prospective medical care?

Drs. Maylack, Vest and Rotman have diagnosed Petitioner with bilateral cubital tunnel syndrome, with all three surgeons recommending surgery for the condition. No physician has disagreed with either Petitioner's diagnosis or his need for surgery. Therefore, Respondent is hereby ordered to authorize and pay for Dr. Vest's recommended surgery and treatment of Petitioner's bilateral cubital tunnel syndrome.

Edward Lee

Edward Lee

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michelene Schmidt,

Petitioner,

vs.

NO: 14 WC 24891

Senior Silverado Living,

Respondent,

16IWCC0513

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical both incurred and prospective, notice, temporary total disability and penalties and fees 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 for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Petitioner is not entitled to penalties and fees pursuant to §19(k), 19(l) and §16. Petitioner was seen on November 27, 2014 at the Respondents request by Dr. Kevin Walsh. Although the Commission did not find his opinion as persuasive as that of Dr. Cummins, his opinions provided a reasonable basis for the Respondent to refuse temporary total disability and medical after that date.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $280.00 per week for a period of 24 1/7 weeks, that being the period of

16IWCC0513

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 $4,985.00 for medical expenses under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,300.00. 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: AUG 3 - 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 7/13/16
049

Mark of Mahuta

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

SCHMIDT, MICHELENE
Employee/Petitioner

Case# **14WC024891**

15WC005243
15WC005244

SENIOR SILVERADO LIVING
Employer/Respondent

16IWCC0513

On 9/29/2015, 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 0.10% 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:

1980 LAW OFFICES OF STEVEN J TENZER
20 S CLARK ST
SUITE 700
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
KISA P STHANKIYA
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

16IWCC0513

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

☐ 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)

MICHELENE SCHMIDT
Employee/Petitioner

v.

SENIOR SILVERADO LIVING
Employer/Respondent

Case # 14 WC 24891

Consolidated cases: 15 WC 5244, 5245

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 **Falcioni**, Arbitrator of the Commission, in the city of **Rockford**, on **August 25, 2015**. 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 Injurious practice

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FINDINGS

On the date of accident, **March 18, 2014**, 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 **$21,840**; the average weekly wage was **$420.00**

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$5600.00** for TTD, $ for TPD, $ for maintenance, and **$30,251.96** for other benefits, for a total credit of **$35,851.96**.

ORDER

Respondent shall be given a credit of $5600.00 for TTD.

Respondent shall be given a credit of $30,251.96 for medical benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of an additional $4985.00, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $280.00/week for 24 1/7 weeks, commencing 8-14-14 through 1-29-15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 8-14-14 through 1-29-15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $5600.00 for temporary total disability benefits that have been paid.

Respondent shall pay to Petitioner penalties of **$1229.00**, as provided in Section 16 of the Act; **$3072.50**, as provided in Section 19(k) of the Act; and **$6690.00**, as provided in Section 19(l) of the Act.

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

September 22, 2015
Date

ICArbDec19(b)

SEP 29 2015

STATEMENT OF FACTS

16IWCC0513

The Petitioner, Michelene Schmidt, testified at trial that she was employed by Silverado as a Certified Nurse's Assistant on March 18, 2014. She had been employed there for about a month. Her duties consisted of helping with the residents, changing them, changing their beds, moving them around and getting them in and out of bed. The residents suffer from Alzheimers and dementia. Her normal shift was the afternoon shift, from about 3:30 PM to 11:30 PM. On that date Silverado was short staffed so she offered to work the night shift in addition to her normal afternoon shift, from 11:30 PM to 7:30 AM. During the night shift, she was helping another employee, Karen, turn a resident because he had soiled his sheets. The Petitioner was on the left side of the resident, and Karen was on the right side of the resident. As they began to try and roll him, he grabbed the finger and wrist of the Petitioner very hard. Then he fought her when she tried to roll him over in order to try to move his soiled sheets out of the way. As he fought her and pushed back, she felt immediate pain and heard a pop in her right shoulder. She was able to continue her shift, but notified the receptionist, Jackie, during her shift of her injury. At the end of her shift, she notified her supervisor, Cleme as well. The Petitioner testified that she has never had any issues with her right shoulder before this incident-- no injuries, no treatment and no problems.

Due to her continuing pain at the end of the night shift, she drove to the company clinic, Northwest Community Occupational Health. The records show that she was seen on March 18, 2014 and gave a history of injuring her right shoulder when "she was helping a combative patient at 3 AM today when she heard a pop on her shoulder followed by pain." (Pet. Ex #1). She was examined, given medications, x-rays and a ten pound lifting restriction. The Petitioner continued to work within her restrictions. Since her pain continued, she returned to the company clinic on March 25, 2014 and after another examination, was continued on medication, light duty and referred for an orthopedic evaluation.

The Petitioner continued treatment with the orthopedic surgeon, Dr. Craig Cummins at Lake Cook Orthopedics. She first saw him on April 28, 2014. She testified that she told him about the resident grabbing her finger and wrist as well as fighting her when she tried to turn him. His records indicate a history also of being grabbed by the finger and wrist (Pet. Ex. #2, p. 22). Dr. Cummins examined her, gave her an ultrasound and a steroid injection. He diagnosed her with a right shoulder strain and questionable rotator cuff tear, prescribed physical therapy and continued her on light duty and to return in four weeks. She underwent physical therapy at one of the branches of Advocate Good Shepherd Hospital. When she returned on May 30, 2014, she continued to complain of pain from 2-8/10 and

continuing popping in the shoulder (Id. at p. 20). At that time, he prescribed an MRI. That was performed on June 24, 2014 and showed a full thickness tear of the supraspinatus tendon with retraction as well as a tear of the glenoid labrum (Id. at p. 28-29). When the Petitioner followed up with Dr. Cummins on July 11, 2014, she still continued to complain of 5/10 pain, difficulty sleeping on her right side, difficulty washing her back and reaching. He then recommended arthroscopic acromioplasty and rotator cuff repair of the right shoulder (Id. at p. 18).

The Petitioner testified that the surgery was preapproved by the workers' compensation insurance. She underwent pre-op testing on August 8, 2014 (Pet. Ex. #3, p. 43) and then Dr. Cummins performed surgery on August 14, 2014 at Advocate Good Shepherd Hospital (Id. at p. 62). Dr. Cummins found a rotator cuff tear, biceps tear as well as a labral tear and performed a debridement, acromioplasty, biceps tenodesis and rotator cuff repair (Id.). Ms. Schmidt's first day off of work was the day of the surgery, August 14, 2014. Her first follow up was with Dr. Cummins' Physician's Assistant, Lauren Baruch on August 29, 2014, where it was indicated that Petitioner was doing well but should be wearing her sling more often (Pet. Ex. #2, p. 15). Upon examination, the incisions were healing nicely and she tolerated the gentle range of motion. Petitioner testified that she did wear her sling as instructed. The Physician's Assistant, Lauren Baruch, noted that upon Ms. Schmidt's next visit on September 12, 2014 (Id. p. 13). At that time, she indicated that Ms. Schmidt was still unable to work.

By September 30, 2014, Ms. Schmidt started physical therapy at Advocate Good Shepherd Hospital and continued to undergo her therapy until January 29, 2015 when she attempted to return to work. During that time, she followed up at Lake Cook Orthopedics showing progress from her surgery.

On November 4, 2014, Ms. Schmidt underwent a Section 12 examination with Dr. Kevin Walsh. After his examination, it was his opinion that the mechanism of her injury, the pulling of her finger and wrist, is not typical for a rotator cuff tear (Resp. Ex. #3, p.5). He further opined that the large rotator cuff tear pre-existed her injury and was not caused, aggravated or accelerated by the work injury. He concluded that she was at MMI and needed no further medical care.

By the time Ms. Schmidt had seen Dr. Cummins on December 12, 2014, he had an opportunity to review the report from Dr. Walsh. He commented that based on Ms. Schmidt's history, examination, no prior shoulder pain, the findings and the MRI, "the onset of the shoulder pain was related to the work-related

injury…and as such this does appear to be a worker's compensation injury." (Pet. Ex #2, p. 9). Dr. Cummins continued to keep Ms. Schmidt off of work.

The Respondent stopped paying TTD by December 5, 2014. By January 23, 2015, Ms. Schmidt returned to Dr. Cummins and he agreed that she should continue with her physical therapy and could return to light duty work with no lifting more than 10 pounds, keeping her arm at her side, no overhead use of the right arm, minimum repetitive use of the right arm and "avoid any situations where she would be in contact with a potentially combative patient" (Id. p. 7).

Ms. Schmidt further testified that she received a letter from Blenda Shulken, Assistant Director of Health Services at Silverado, dated January 6, 2015 requesting her to return to work based on the attached Agreement for Temporary Transitional Light Duty Classification form (Pet. Ex. #6). Ms. Schmidt made the appropriate changes pursuant to her treating doctor's instructions indicating that she was to avoid repetitive use and unsafe environments and returned the Agreement to Ms. Shulken on January 11, 2015 (Pet. Ex. #7). By her visit with Dr. Cummins on January 23, 2015, he indicated that Ms. Schmidt was progressing nicely, she should continue with her physical therapy and was capable of returning to light duty of less than ten pounds lifting with her arm at her side, no overhead use of the right arm, minimize any repetitive use and avoid any situations where she would be in contact with a potentially combative patient (Pet. Ex. #2, p. 7). Upon motion by Petitioner's attorney, there was a meeting with the attorneys for the parties and Petitioner on January 28, 2015, at the Waukegan trial call, where it was agreed that Respondent would pay an additional four weeks of TTD, paying her through January 2, 2015 and that the Petitioner would attempt to return to work. Ms. Schmidt testified that she had serious reservations about returning to the combative environment that she had been subjected to previously, but that she would try it.

When Ms. Schmidt returned to work on January 30, 2015 she had not been released from the care of Dr. Cummins. Her job duties were to help out as receptionist at the front desk, answering phones and to see visitors coming in and out of the entrances as well as seeing to it that the residents do not attempt to leave the building. The receptionist helping her on that date was Melody. The shift was the morning shift, from 8 AM to 4 PM. As Ms. Schmidt was sitting at the reception area, a resident, Maria approached her and grabbed her hands together and pled with her to contact her family and get her out of there, that she did not belong there. Ms. Schmidt then told her that she would contact her family. At trial, Ms. Schmidt testified that she felt a "tinge" of pain in her shoulder from that incident. Melody then went on her break

leaving Ms. Schmidt to handle the desk by herself. After she was required to let someone in the back door, she returned to see the same resident, Maria, sitting at her desk. As she approached her, Maria, then quickly reached out to Ms. Schmidt and grabbed both of her wrists and jerked her arms in an upward motion, causing Ms. Schmidt to feel immediate, searing pain to her right shoulder again. She continued to finish out her shift and when her pain increased, she called in that Sunday evening and left a message for the receptionist that she would not be able to come in to work on the following Monday because she got yanked by a resident on the previous Friday. On the next day, Monday, Ms. Schmidt testified that she spoke to Colleen the manager in Human Resources and told her what happened and that she was in increasing pain and unable to come back into work. Ms. Schmidt tried to reach Dr. Cummins over the weekend but his office was closed. When she finally did get through the following week, the first appointment she could schedule was on February 11, 2015. She gave a history to the Physician's Assistant of returning to work and "she had a patient grab her arms and pull on them" causing her right arm pain to return (Id. p. 4). Examination showed a positive impingement sign. She was assessed with a complete rupture of the rotator cuff the cause of which was tied into the Petitioner's work injury where it was stated "she sustained a reinjury at work when a dementia patient pulled on her arm several times." (Id. p. 5). She was taken off of work again.

Another MRI was recommended and performed on March 4, 2015. Ms. Schmidt followed up with Dr. Cummins on March 6, 2015, her last visit. A review of the latest MRI by Dr. Cummins showed a recurrent rotator cuff tear and has recommended another surgery and again, recommended that Ms. Schmidt remain off of work. The workers' compensation carrier has denied any further treatment, including the surgery as well as any further TTD.

Ms. Schmidt was examined again by Dr. Kevin Walsh, on May 26, 2015 pursuant to Section 12. It is his opinion that Ms. Schmidt does have a recurrent tear of the rotator cuff and given that she initially had a large tear, it is not uncommon to have a recurrent tear. However, he continued, the mechanism of her injury as she described to him where she was grabbed by a resident was not likely to result in a recurrent tear and she could return to full duty (Resp. Ex. #4).

On cross examination, regarding her first injury of March 18, 2014, Ms. Schmidt testified that her searing pain was actually caused by the resident fighting her back as she tried to turn him, not when he grabbed her finger and wrist. She also confirmed that she had a prior elbow injury for which she received chiropractic care about 20 years ago, but no treatment to her shoulder. After her injury on March 18,

2014, she had no intervening injuries until her return to work on January 30, 2015. She testified that she did not tell Dr. Cummins that she reinjured her shoulder trying to pick up a pen on her September 12, 2014 visit.

She also testified that she did some things around her trailer home. She moved some tubs that she was required to move. Those appear to be depicted in the photos presented by Respondent (Resp. Exs. #10, 11 and 12). There was no information elicited as to their weight or how high she lifted them. She was also required to move some pieces of timber. She testified that she used mainly her left arm and her legs. The timbers were identified in Resp. Ex. # 13. She also testified under cross examination that she was not working for anyone else but that she did help out doing her neighbor's laundry. Resp. Ex. #14 shows Petitioner hanging laundry on a line. She also walked her neighbors' dogs as indicated in Resp. Ex. # 15. It should be noted that they are small in nature and that she was using her left arm to hold the leash.

Continuing on cross examination, Ms. Schmidt testified that she did not notify Melody of her injuries on January 30, 2015, but she did try to contact Dr. Cummins' office. She also tried calling Dr. Cummins on the following day and the following Monday. On the following Monday, she also spoke to Colleen and discussed the last incident of January 30, 2015.

Colleen Sheahen was present during the proceedings and also testified. She is the business office manager at Silverado and has been there for four years. Her testimony was that there were very few attacks by residents at that location, about four per year. She admitted to having the paperwork for the Petitioner's first injury. She also testified that she called Ms. Schmidt on February 2, 2015 and was told by her that a resident pulled her arm and that she was scared to return, that it happened at lunch time when Melody was at lunch.

The Respondent then offered the testimony of David Maurer, the park manager and agent at South Shore Village, where Ms. Schmidt lives. He testified that he has known her for about two years. He testified that she helped another resident by taking him coffee, food, salting the driveway, did not see her bathe him, but did see her assist him off a kitchen chair. This was during the time period of October, 2014 through January, 2015. He also made reference to a letter from the Village requiring Ms. Schmidt to move some of her items which he said she did in July, 2014, prior to her surgery, while she was still working light duty. However, he did not know how heavy the tubs were that she moved. He did see her use her left arm and right arm when walking the dogs, although the activity as depicted in Resp. Ex. #13

shows Petitioner only using her left arm. He also testified that she performed the task of walking the dogs for cash. He saw her move the wooden planks but he saw her using only her left arm. He also testified that he was the one who took the photos as depicted in Resp. Exs. # 8-16. When asked about whether he saw the Petitioner wear her sling, he testified that he noticed her wearing it after August, 2014.

Petitioner has filed a Petition for Penalties (Pet. Ex. #5) on April 23, 2015. In the Petition, the Petitioner claims that she sustained injuries on March 18, 2014 and January 30, 2015, that she is treating with Dr. Cummins who has taken her off of work and indicated that she needs surgery, that she has incurred medical bills which remain unpaid and that the Respondent has refused to pay the balance of the medical bills, TTD or authorize the necessary surgery. The request is made pursuant to Sections 19(k), 19(l) and 16. There has been no response filed on behalf of the Respondent.

CONCLUSIONS OF LAW

ACCIDENT

The Petitioner testified that while trying to move a resident in his bed, he grabbed her and fought her causing her to feel immediate pain and hear a pop in her right shoulder. She sought medical attention on the same day as the accident at the company clinic and continued to follow up with the orthopedic surgeon once referred. She gave consistent histories to both regarding sustaining a shoulder injury at work while trying to move a resident. Petitioner testified that she had no prior shoulder problems or treatment and there was no evidence contradicting her testimony. The subsequent objective medical testing (MRI) showed a complete tear of the rotator cuff, that Dr. Cummins tied in to her accident. The Petitioner testified in a credible manner and notice was given to the business office manager, Colleen Sheahen, who was present and confirmed receiving notice of the accident. Based on the record as a whole and taking notice of the facts as set forth immediately above, the Arbitrator finds that Petitioner did sustain an accident arising out of and in the course of her employment with Respondent on March 18, 2014 as alleged herein.

CAUSAL CONNECTION

The Petitioner sought medical care on the same day of the accident after she gave notice to Cleme. She gave a history at Northwest Community Occupational Health Services of "helping roll a combative

patient at 3 AM today when she heard a pop on her shoulder followed by pain" (Pet. Ex. #1, p. 28). The record further indicates that "yes" it was a "work related injury" (Id.). On her next follow up a week later to the clinic, it indicated again that "yes" it is a "work related injury" (Id. p. 7). Upon her first visit to Dr. Cummins, the orthopedic surgeon on April 28, 2014, Petitioner gave a consistent history of sustaining an injury to her shoulder at work while caring for a dementia patient at Silverado (Pet. Ex. #2, p.22). He indicated upon the first visit that this was a work related injury (Id.). He suspected rotator cuff tear right away which was confirmed once he reviewed the MRI results (Id. p. 25) as well as when he performed the surgery (Id. pp. 37-43). Respondent approved the pre-op as well as the surgery. Petitioner did not undergo a Section 12 examination with Dr. Kevin Walsh until well after her initial diagnosis and surgery, on November 4, 2014. His opinion is that the Petitioner could not have suffered a torn rotator cuff based on the history of having her fingers pulled and he found no causal connection. It appears that Dr. Walsh either ignored the complete history given, misunderstood or miscommunicated what the mechanism was in forming his opinion. His opinion is not convincing and not credible. The Petitioner has met her burden of proof in proving that there is a causal connection between her work injury and the condition found in her right shoulder.

MEDICAL

The Respondent approved the treatment of the Petitioner from the first day of treatment until well after Petitioner's surgery. The Petitioner testified consistently and the medical records support the Petitioner's testimony. The Respondent has paid all of the Petitioner's medical bills except those listed on Pet. Ex. #4. Those charges incurred prior to the January 30, 2015 claims for injuries that are still due are those from Good Shepherd Hospital, all of which are for physical therapy from September 30, 2014 to January 15, 2015, prescribed by Dr. Cummins after the surgery on August 18, 2014. Those charges amount to $4985. It is the opinion of Dr. Cummins that the treatment of the Petitioner is a direct result of her work injury that it was necessary and it is certainly reasonable to undergo physical therapy to the shoulder for five months after surgery. The opinion of Dr. Kevin Walsh is not considered credible for the reasons given above.

TTD

The Petitioner was unable to work from the date of her surgery, August 14, 2014, until she attempted to return to work on January 30, 2015. That is 24 1/7 weeks. Dr. Cummins had Petitioner off of work after

her surgery in August, 2014 until the December 12, 2014 visit, at which time he returned her to light duty, no lifting over 10 pounds and avoiding repetitive tasks. In addition, he "recommend[ed] against her being placed in any situation where she would be at risk for confrontation in any type of physical manor[sic] that could potentially injure her shoulder." (Pet. Ex. 2, p.9). He gave her the same instructions upon the January 23, 2015 visit (Id. p. 7). By January 11, 2015, Petitioner had received the letter from Blenda Shulken at Silverado requesting her to sign the enclosed form and return it so she could return to light duty (Pet. Ex. #6). She amended the form as indicated by the circle (Pet. Ex. 7) and returned it to Ms. Shulken on January 11, 2015. The added statements which were at the direction of Dr. Cummins were no repetitive use and to avoid unsafe environments. TTD was cut off on December 2, 2014. At the meeting for trial on January 28, 2015, the parties discussed the possibility of Petitioner returning to work. Petitioner testified that she had reservations because the Alzheimer and dementia patients tend to be combative and she was scared of being injured again, especially with her shoulder still healing. However, it was agreed that Respondent would pay another four weeks of TTD ($1120), taking her up to December 31, 2014. It is stipulated that the Respondent has paid a total amount of $5600 in TTD which is for a period of 20 weeks.

At trial, the Respondent attempted to introduce evidence that the Petitioner was employed during the time she has claimed to be unable to work and is claiming a credit for the TTD already paid. The Petitioner denied doing any work for money around her trailer park. However, Respondent's witness, David Maurer testified that he saw Petitioner doing chores and getting paid. Examples he gave were that she would walk the neighbors' dogs, do their laundry and help feed them. Whether Petitioner actually did receive money for these temporary chores or not would still not entitle Respondent to any credit. If the Petitioner is temporarily and totally disabled, then the Respondent shall owe TTD payments. Section 8(b) provides that weekly compensation shall be paid by Respondent as long as the Petitioner's condition of temporary total incapacity lasts. There is no prohibition in the Workers' Compensation Act from earning extra money while on TTD. The fact that the Petitioner may have earned a few extra dollars on the side by helping neighbors does not alleviate the Respondent's responsibility from still paying TTD. There was no evidence that the Petitioner was earning any additional wages during the period of her TTD. Although the Petitioner must show that she is unable to work, "evidence that the employee has been or is able to earn occasional wages or to perform certain useful services neither precludes a finding of total disability nor requires a finding of partial disability", E.R. Moore Co. v. Industrial Commission, 376 N.E. 2d 206, 71 Ill 2d 353 (1978). In the case of Firestone Tire and Rubber Company v. Industrial Commission, 390 N.E. 2d 2907, 76 Ill. 2d 197 (1979), the Petitioner sustained a left elbow injury which precluded him

from returning to full duty. During his time off of work, he spent a couple of days painting a house. The employer claimed credit for the TTD awarded because if he could paint a house, he should be able to return to light duty. The Supreme Court affirmed the award of TTD and referenced the E.R. Moore case in reaffirming that an employee can still earn occasional wages while on TTD and further stated: "For the purposes of 8(f) (section 19(b)), a person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists." (Firestone, 76 Ill. 2d at 203). TTD is payable even if an employee is unable to return to his previous job due to a work injury and he is still driving a school bus twice daily for an hour and a half each time. See J. M. Jones v. Industrial Commission, 375 N.E. 2d 1306, 71 Ill. 2d 368 (1978).

The Petitioner's activity, even if proven to be the case, does not rise to the extent seen in the case of Dolce v. Industrial Commission, 675 N.E.2d 175, 286 Ill.App.3d 117 (1996). The employee in Dolce continued to sell real estate and earned over $20,000 per year in sales. In Ms. Schmidt's case, any money obtained for performing any chores was meager at best—certainly not even enough to pay her rent. Additionally, there is no evidence of what if anything Petitioner did earn performing these tasks. Based on the record as a whole, and noting the above, the Arbitrator finds that Respondent owes the TTD paid and in addition, owes for the time until Petitioner returned to work on January 30, 2015, a period of 24 1/7 weeks. Respondent to be given credit for all TTD previously paid herein.

CREDIT

Respondent made payments for medical in the amount of $30,251.96. It also made TTD payments in the amount of $5600. It is entitled to credit for these payments. The amount still claimed to be owed by Petitioner in the amount of $4985 for unpaid medical is still due and the balance due in TTD for 4 1/7 weeks in the amount of $1160 is still due.

PENALTIES

Petitioner filed a Petition for Penalties and Attorney Fees on April 23, 2015 alleging treatment and medical bills that were not paid by Respondent (Pet. Ex. #5). Said Petition was again provided to Respondent in the Notice for Request For Hearing for this August, 2015 19(b) trial. In support of Petitioner's claim are the medical records of Dr. Cummins (Pet. Ex. #2), the physical therapy records from Advocate Good Shepherd (Pet. Ex. #3) as well as the bills showing the balance due (Pet. Ex. #4). Petitioner has testified as to her treatment at those facilities and as to their necessity. As of the date of

hearing, those bills and the additional TTD have not been paid. Petitioner has sustained her burden of proving all disputed issues in her case. The Respondent has not filed a response to Petitioner's Penalties Petition nor asked for time to present one. Pursuant to Section 19(k), the Arbitrator finds the Respondent to have acted in an unreasonable and vexatious manner in delay of payment of both medical bills and TTD. The amount of the medical due from this injury is $4985 and the amount of TTD due is $1160.00 for a total still outstanding of $6145. Section 19(k) allows for 50% of the amount due to be awarded as a penalty. Therefore, Petitioner is awarded an additional amount of $3072.50 pursuant to Section 19(k). Section 19(l) allows for penalty of $30 per day for each day Respondent fails to pay necessary medical under Section 8(a) and TTD under 8(b). From the last date of treatment on January 15, 2015 until the date of trial on August 25, 2015, 223 days have passed. At $30 per day, total 19(l) penalty comes to $6690. Pursuant to Section 16, the attorney fee awarded due to the unreasonable and vexatious delay of nonpayment of medical bills and TTD ($6145) shall be 20% of the unpaid amounts of medical bills and TTD for a total of $1229.

INJURIOUS PRACTICE

Respondent is claiming that the Petitioner was involved in activities which were injurious to her condition. Testimony was elicited by the Respondent's witness, David Maurer which indicated that she performed various activities around her trailer such as walking a couple of small dogs (Resp. Ex. # 15). He testified that she used both arms, yet the photo that he took indicates her using only her left arm. Other activities he mentioned he did not see her using her right arm, except to hang laundry (Resp. Ex. # 14). A review of that photograph indicates that her left arm was raised above shoulder level and her right arm was at shoulder level. None of the activities that were described to have been performed were contrary to any work restrictions given by her own doctor, Dr. Cummins. Petitioner testified that she wore her sling as instructed after her surgery. Mr. Maurer confirmed this in his testimony. There was a comment by the Physician's Assistant that she should wear her sling more often and upon the next visit, she showed progress. There is nothing in the medical records to indicate that Petitioner had performed any activities to injure herself, nor is there any considered medical opinion that the activities described by Respondent would have been injurious to the medical progression of Petitioner's shoulder condition.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☐ 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KERRY McCARTY,

Petitioner,

vs.

NO: 14 WC 26645

DYNEGY MIDWEST GENERATION,

Respondent,

16IWCC0552

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of nature and extent of Petitioner's 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.

Findings of Fact and Conclusions of Law

1. Petitioner worked as a "shift tech welder" for respondent for twelve years. The job entailed extensive use of hand and power tools. The only issue before the Commission, is the nature and extent of Petitioner's permanent disability.

2. Dr. Mirly performed left carpal tunnel release surgery on February 21, 2014, and right carpal tunnel release surgery on April 2, 2014. Petitioner returned to full duty work at his previous occupation on May 19, 2014.

3. Petitioner testified his hands still bother him if he does strenuous work and that he has a "numb pain" in both hands "kind of where the surgery was at". He estimates he's lost 25% grip strength in both hands, but his range of motion is OK.

4. On cross examination, Petitioner testified that Dr. Mirly released him to full work duty on May 19, 2014, and that he hasn't gone back to see him, or any other doctor, since.

5. Regarding the statutory factors in assessing permanent partial disability awards, the Petitioner has never undergone an AMA rating, and that factor was waived. However, the Arbitrator gave minor weight to Petitioner's occupation, age, and future earning capacity, and major weight to evidence of disability corroborated by the treating medical records.

6. Based on his analysis, the Arbitrator awarded Petitioner 15% loss of the right hand and 12.5% loss of the left hand.

The Commission notes that because the manifestation date is December 11, 2013, the new provisions regarding repetitive trauma awards for hands under Section 8(e)(9) apply. Regarding the right hand, the Arbitrator awarded what is basically the statutory maximum for repetitive trauma carpal tunnel syndrome, absent extraordinary circumstances, resulting from injuries sustained after June 28, 2011.

Here, the Commission finds the maximum award would not appear to be appropriate based on the statutory factors. While Petitioner's occupation does require the intense use of his hands, Petitioner was able to return to work, full-duty. Petitioner has not suffered loss of potential income, and at age 61, will not have much time remaining to work with a disability. Although Petitioner does occasionally get some pain over the right and left palms when he strikes something with them, he otherwise denies ongoing symptoms.

Based on the entire record before the Commission, and our analysis of the statutory factors in assessing permanent partial disability awards, the Commission modifies the Arbitrator's ruling, and hereby decreases the PPD award from 15% to 12.5% loss of use of Petitioner's right hand, and 12.5% to 8% loss of use of Petitioner's left hand.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $721.66 per week for a period of 42.025 weeks, as provided in §8(e)(9) of the Act, for the reason that the injuries sustained caused the loss of the use of 12.5% of the right hand and loss of the use of 8% of the left hand.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,500. 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: AUG 25 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

CJD/dm
O: 08/15/16
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McCARTY, KERRY
Employee/Petitioner

Case# **14WC026645**

16IWCC0552

DYNEGY MIDWEST GENERATION INC
Employer/Respondent

On 12/4/2015, 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 0.41% 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:

0368 WILLIAM L WIMMER
2 PARK PL
SWANSEA, IL 62226

0299 KEEFE & DePAULI PC
NEIL A GIFFHORN
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

16IWCC0552

KERRY McCARTY
Employee/Petitioner

v.

DYNEGY MIDWEST GENERATION, INC.
Employer/Respondent

Case # 14 WC 26645

Consolidated cases: None

The only disputed issue is the nature and extent of the injury. 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 **Edward Lee** Arbitrator of the Commission, in the city of **Collinsville**, on **September 29, 2015**. By stipulation, the parties agree:

On the date of accident, **December 11, 2013**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did 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 earned **$83,200.00**, and the average weekly wage was **$1600.00**.

At the time of injury, Petitioner was **61** years of age, married, with **0**dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$10,819.05** for other benefits, for a total credit of **$10,819.05**.

Respondent is entitled to a credit of $3097.82 under Section 8(j) of the Act for medical bills paid by group insurance.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay for the reasonable, necessary, and causally related medical charges incurred for the treatment provided to the bilateral hands for the carpal tunnel conditions, pursuant to Sections 8(a) and 8.2 of the Act.

Petitioner is awarded 10 1/7 weeks of temporary total disability benefits at the rate of $1,066.67/ week for the recovery from his bilateral carpal tunnel releases, pursuant to Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 52.25 weeks, because the injuries sustained caused the 15% loss of use of the right hand and 12.5% loss of use of the left hand, as provided in Section 8(e) of the Act.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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

12/3/15
Date

DEC 4 - 2015

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

16IWCC0252

ILLINOIS WORKER'S COMPENSATION COMMISSION
ARBITRATION DECISION

KERRY McCARTY
Employee/Petitioner

v. Case No. **14 WC 26645**

DYNEGY MIDWEST GENERATION, INC.
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

Findings of Fact

Petitioner, Kerry McCarty, was hired by Respondent, Dynegy Midwest Generation, Inc., in October, 2003. From that time until the present, he has worked as a Shift Technician in maintenance and operations. He testified that his job required him to repair and maintain heavy equipment and machinery in the power plant as well as clean and remove ash and slag residue from hoppers and taps. These activities required the use of hand tools, including electric and pneumatic impact wrenches, valve wrenches, hammers, screwdrivers, high pressure 2" hoses, poke rods and jackhammers. The tools caused substantial vibration to the hands and wrists and required the repeated extension and flexion of both hands at the wrist many times a day.

Petitioner began experiencing pain and numbness in both hands in 2012 and reported a work related accident to the Respondent on December 11, 2013, after his thumb and two fingers went numb and did not recover following the use of a high pressure hose for an extended period.

Petitioner presented to his family doctor, Lisa Lowry, MD, on December 13, 2013, with complaints of bilateral hand pain. (Px3) Bilateral upper extremity nerve conduction studies were done on December 17, 2013, by Dr. Goldring showing bilateral carpal tunnel syndrome. (Px1) Petitioner was referred to Dr. Harvey Mirly for surgical consultation by Dr. Lowry.

Dr. Mirly first saw Petitioner on February 7, 2014, and diagnosed him with bilateral carpal tunnel syndrome. (Px1) An operative report dated February 21, 2014, outlines Dr. Mirly's surgery for left carpal tunnel release. A nearly identical procedure was done for the right carpal tunnel release on April 4, 2014. (Px1) Following these procedures on May 1, 2014, Petitioner was placed on maximum medical improvement and released to full unrestricted duty on May 12, 2014. (Px1)

Petitioner testified that after returning to work for Respondent he has experienced pain in both hands when performing his job duties and gave an example of using a chain fall the evening before the hearing which required substantial force with both hands and which caused pain to be present in the palms of both hands. Petitioner estimated that since returning to work he has experienced a loss of grip strength of 25% in each hand and gave an example of his inability to disconnect a "Chicago" hose disconnect from one of the 2 inch hoses without help from a co-worker.

Conclusions of Law

Issue (L): What is the nature and extent of the injury:

Petitioner underwent bilateral carpal tunnel releases and was returned to full duty work. Since returning to work for Respondent, Petitioner experienced a loss of grip strength in each hand of 25% and pain in the palm of each hand after performing strenuous tasks at work.

The Arbitrator refers to Section 8.1(b) i, ii, iii, iv, and v of the Act which sets forth the criteria for determining PPD. No consideration was given to (i) because no impairment report was submitted, minor weight was given to (ii), (iii), and (iv). Major consideration was given to (v) because the Petitioner's current complaints of numbness, pain and weak grip were corroborated by the treating records indicating surgery to each hand.

Based upon the foregoing, the Arbitrator finds that Petitioner experienced the 15% loss of use of the right hand and 12.5% loss of use of the left hand, pursuant to Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tina Spoonmore,

Petitioner,

vs.

NO: 14 WC 29766

ILLICO Inc., d/b/a Spring Valley Shell,

Respondent.

ORDER

This matter comes before the Commission on its own Motion for Rule to Show Cause why Petitioner's Petition for Review should not be dismissed for failure to perfect her review.

FACTS AND PROCEEDURAL HISTORY

An Arbitrator hearing was held before Arbitrator Christine M. Ory on September 30, 2015. Arbitrator Ory issued her decision on November 9, 2015, and Petitioner filed a timely Petition for Review of said decision on December 11, 2015.

The Return Date on Review was February 26, 2016. That date came and went without the transcript of Arbitration being authenticated. On March 9, 2016, the Commission issued a Rule to Show Cause why Petitioner's Petition for Review should not be dismissed for failure to perfect the review, setting the matter in front of Commissioner Gore for hearing on May 20, 2016. On March 28, 2016, the transcript was filed with the Commission. However, the authentication page was not signed by either party.

An ex-parte hearing with only the Respondent present was held by Commissioner Gore in Ottawa on May 20, 2016 on the Commission's Motion for Rule to Show Cause. A record was made of the proceedings. As of the date of hearing, the transcript was not authenticated.

FINDINGS OF THE COMMISSION

Section 19(b) of the Illinois Workers' Compensation Act ("Act") mandates that the transcript of evidence of the case on review shall be authenticated by the signatures of the parties or their attorneys. In the case at bar, Petitioner failed to authenticate the transcript by the Return on Review Date of February 26, 2016, or any date thereafter. Accordingly, the Commission is of the opinion that Petitioner's Petition for Review filed on December 11, 2015 should be dismissed for failure to perfect her review.

Therefore, based upon the failure to fulfill the requirements of Section 19(b) of the Act and for the reasons set forth above, the Commission hereby dismisses Petitioner's Petition for Review filed on December 11, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review filed on December 11, 2015 is hereby dismissed.

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: AUG 9 - 2016

TJT/gaf
R: 5/20/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Russell Thomas,
Petitioner,

vs.

No. 14 WC 33501
15 WC 09210

Southern Illinois University - Carbondale,
Respondent.

16IWCC0504

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, and medical expenses both incurred and prospective, modifies the Decision of the Arbitrator as stated below. The Commission 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 this decision, pursuant to *Thomas v. Industrial Commission*, 78 111.2d 327 (1980).

After considering the entire record, the Commission reverses the Decision of the Arbitrator as to his finding that Petitioner sustained a second accident. The Arbitrator found that Petitioner sustained an accident on June 13, 2014, when he slipped while on the job and injured his left knee. The Arbitrator found that Petitioner sustained a second accident on February 27, 2015, whereby his left knee was re-injured when, while exiting police headquarters, his left foot missed a 3-inch concrete step and he landed on his heel with unexpected force. He did not fall. The Arbitrator awarded temporary total disability benefits up through the May 13, 2015 hearing date as well as reimbursement for medical expenses incurred and prospective treatment under Section 8(a).

16IWCC0504

The Commission views the evidence differently. The Commission finds that Petitioner sustained a work-related injury on June 13, 2014 and reached maximum medical improvement on March 17, 2015. Petitioner did not prove a second accident with respect to the February 27, 2015 incident. As Petitioner reached maximum medical improvement by March 17, 2015 from his single compensable accident, Respondent is not liable for medical treatment incurred after that date. The Commission finds that Petitioner's period of entitlement to temporary total disability benefits to be from August 23, 2014 (day of commencement) through March 16, 2015.

FACTS

On June 13, 2014, Petitioner, a 54-year-old public safety officer, was dispatched to investigate the source of a possibly toxic substance in a creek on the campus of Southern Illinois University. While there, he slipped on the creek bank and hurt his left knee. (Tr.40-41)[1]. This slip was witnessed by at least one other employee of Respondent. (RX 3). Petitioner allegedly had immediate pain and swelling in his left knee. (Tr.43). He was placed off work as of August 23, 2014. On January 6, 2015, he received arthroscopy for a torn meniscus and afterwards was recovering well. (PX 4). This was Petitioner's second left knee arthroscopy; his first was done in November 2009. (PX 4).

On February 25, 2015, Petitioner's surgeon, Dr. George Paletta reported:

> "Overall, he is doing much, much better. He states his knee is significantly better than prior to surgery. He notes improvement in his muscle tone. He feels like therapy has been very beneficial. He feels like he is regaining strength.... Clearly the surgery has been highly effective in relieving his meniscal symptoms."

(PX 4). The doctor recommended a couple of additional weeks of physical therapy to optimize strengthening. Dr. Paletta also issued a work status report indicating that Petitioner could return to work with certain restrictions effective that day, February 25, 2015. In that work status report, Dr. Paletta also indicated that he expected Petitioner to be at maximum medical improvement effective March 17, 2015, at which point Petitioner could return to full duty. Dr. Paletta indicated that Petitioner would need no further treatment after that date, and therefore the doctor made no further appointments. (PX 4).

Two days later, according to Petitioner, on February 27, 2015, his heretofore easy recovery was completely derailed by the second alleged accident. According to Petitioner, he re-injured his knee when he missed a 3-inch step and landed hard on his left heel as he was leaving police headquarters with tears in his eyes. Petitioner had been in the office of Chief of Police Benjamin Newman that morning; Chief Newman had arranged this meeting to discuss Petitioner's impending return to work. During this meeting, Petitioner and Chief Newman got into an argument involving, among other topics, improprieties surrounding Petitioner's recent attempts at a film acting career. In

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[1] Citations to pages in the hearing transcript will take the form "Tr. __." Citations to the Petitioner's Exhibits and Respondent's Exhibits will take the form "PX –" and "RX –", respectively.

16IWCC0504

particular, Chief Newman chastised Petitioner for posting a photograph of himself in his police uniform on the internet site for his acting résumé. Petitioner apparently had tried to start this acting career while he was out on his medical leave. The discussion became heated, and, eventually, Chief Newman had to call another officer to escort Petitioner out of the building. (Tr. 25-30, 47-52). Petitioner described what happened as he exited the building:

> "I opened the door, and when I went to step out, I missed a little bitty step, because I haven't been down there that much lately, and there's a little step, as you can see. I missed that. When I did, I hit my heel on the sidewalk, and my knee buckled. At that time I called [Petitioner's attorney]. And I was crying at that point."

(Tr. 52). Petitioner was offended by the Chief's treatment of him, claiming at hearing that he was "very upset, never been done like this ever." (Tr. 52).

Five days later, on March 4, 2015, Petitioner made an unscheduled visit to Dr. Paletta. Dr. Paletta wrote:

> "When [Petitioner] was last seen he was doing quite well and had noted significant overall improvement. A recommendation was made to continue some physical therapy and leave him on restrictions ...until approximately March 17th when he was scheduled to return to full duty.... Unfortunately, he comes in today with increasing complaints of left knee pain following a new injury. On 2/27/15 he was having a meeting with his chief. Apparently the meeting got somewhat confrontational as Mr. Thomas felt that the chief was inquiring about personal issues beyond the scope of work related issues. He states that he was leaving the office he was being escorted out and he missed the first step out the back exit. He states he started to fall but 'didn't go all the way down."

(PX 4). An MRI arthrogram was ordered. Dr. Paletta found it "suggestive but inconclusive" of a recurrent meniscus tear. Dr. Paletta administered an intraarticular injection to treat Petitioner's reported renewed knee pain. According to an office note of May 6, 2015, Petitioner indicated that the injection provided about two weeks' worth of "pretty good" pain relief, but the pain had returned. At that point, Dr. Paletta expressed some perplexity, writing:

> "I explained to Mr. Thomas that this represents a difficult situation. He was doing extremely well after surgery until a re-injury. The MRI scan is suggestive but inconclusive with regard to a recurrent meniscus tear... Options at this point are to consider a second injection, try an unloader brace, or consider arthroscopy and recurrent debridement. Arthroscopy would confirm whether in fact there is a recurrent meniscus tear there... His preference is to consider repeat arthroscopy...I discussed with him the surgical procedure. He is obviously familiar with arthroscopy."

(RX 4).

The Section 19(b) hearing took place one week later, on May 13, 2015. At hearing, Petitioner offered, for the first time, that he also slipped on wet leaves (but caught himself before falling all the way down) in Respondent's parking lot after leaving police headquarters on the day of the second claimed accident. (Tr.53). He explained that he had not revealed this alleged slip in the parking lot at any time before the hearing because, "That wasn't the primary issue." He stated, "When I walked out the door, that's when it [the knee] buckled. That's when it started hurting, right then." (Tr. 67).

DISCUSSION

The Commission finds that Petitioner carried his burden of proving an accident on June 13, 2014, when he slipped on the creek bank. However, contrary to the Arbitrator's determination, the Commission finds that Petitioner reached maximum medical improvement by March 17, 2015, based on the work status report of Dr. Paletta. As the doctor's records noted consistently, Petitioner's recovery post-arthroscopy was progressing well, even "extremely well"; thus Dr. Paletta scheduled Petitioner to return to full duty on March 17, 2015. Dr. Paletta indicated that Petitioner would need no further treatment after that date.

The Commission finds that, with respect to the incident of February 27, 2015, Petitioner has not proven that an "accident" occurred or that a compensable injury followed therefrom. As mentioned above, Petitioner was on the premises that day because Chief Newman had arranged a meeting with him to discuss Petitioner's return to work. Upsetting things were said during this meeting, and Petitioner left the building in an emotionally agitated state. Minutes after leaving the Chief's office, in Petitioner's account, he re-injured his knee when he "missed a little bitty step" outside the building and hit the heel of his left foot with unexpected force. This is the mechanism of injury whereby Petitioner's smooth recovery was purportedly disrupted to the point where he extended his medical leave and now professes a desire for further treatment including a second surgery. Considering the implausibility of the mechanism of injury, Dr. Paletta's documentation of Petitioner's post-surgery progress, and Petitioner's odd testimony during hearing about the slip on wet leaves in Respondent's parking lot, the Commission finds Petitioner's account regarding this second "accident" lacking in credibility.

Further, Petitioner has not demonstrated that his injury "arose out of" his employment. For an injury to "arise out of" one's employment, as required by the Act, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58 (1989).

Petitioner cannot demonstrate that his claimed re-injury was the result of a risk so connected to his employment. In his review brief, he argues that, had he not had tears in his eyes while leaving police headquarters, he would have been more attentive to where he was stepping. He characterized his tears as a "work-related distraction" that constituted an increased risk of injury. This argument is not compelling. Petitioner's facts here bear no resemblance to those staircase fall cases where a compensable accident was found. Petitioner does not claim that he was hurrying, carrying anything in his hands, performing any particular assigned duty, had to traverse these steps many times a day, or anything of that nature.

Nor did he present any evidence that these steps were defective, icy, cluttered with debris, or the like. Petitioner did not even trip or fall. A photograph of the steps shows that the first step was shorter than the second step. (PX 9, RX 11). Petitioner alludes in his review brief to a defect in these steps, stating that they comprise an "irregular landing on Respondent's premises" and that he "did not believe [the steps] to be up to code." This argument as well is not compelling.

In conclusion, the Commission finds that Petitioner suffered a compensable accident on June 13, 2014 and reached maximum medical improvement as of March 17, 2015. He is entitled to temporary total disability benefits commencing August 23, 2014 through March 16, 2015 (or 29 weeks and 3 days). The Petitioner is entitled to medical expenses relating to his left knee through March 16, 2015.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on June 25, 2015, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $ 782.35 per week for the period commencing August 23, 2014 through March 16, 2015, that being the period of temporary total incapacity for work under § 8(b); Respondent shall be given credit for all amounts paid as temporary total disability payments to date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses incurred through March 16, 2015, under § 8(a) of the Act and subject to the medical fee schedule.

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.

16IWCC0504

IT IS FURTHER ORDERED BY THE COMMISSION that this case is remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the later 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: JUL 29 2016

Joshua D. Luskin

Charles J. DeVriendt

o-06/07/16
jdl/ac
68

Ruth W. White

Under the Weather

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

THOMAS, RUSSELL
Employee/Petitioner

Case# **14WC033501**

15WC009210

SOUTHERN ILLINOIS UNIVERSITY OF CARBONDALE
Employer/Respondent

16IWCC0504

On 6/25/2015, 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 0.08% 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:

0969 THOMAS C RICH PC
#6 EXECUTIVE DR
SUITE 3
FAIRVIEW HTS, IL 62208

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 25 2015

RONALD A. RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF **Williamson**)

☐ 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)

Russell Thomas
Employee/Petitioner

v.

Southern Illinois University of Carbondale
Employer/Respondent

Case # **14** WC **33501**

Consolidated cases: **15 WC 09210**

16IWCC0504

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **May 13, 2015**. 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 _____

16IWCC0504

FINDINGS

On the date of accident, **June 13, 2014 and February 27, 2015**, 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 **$61,023.28**; the average weekly wage was **$1,173.52**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **1** dependent children.

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

Respondent shall be given a credit of **$21,386.44** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$see memorandum**.

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

ORDER

Respondent shall pay reasonable and necessary medical services outlined in Petitioner's group exhibit, as provided in § 8(a) of the Act.

Respondent shall be given credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall authorize and pay for the treatment recommended by Dr. Paletta, including but not limited to surgery.

Respondent shall pay Petitioner temporary total disability benefits of $782.35/week for a further period of 8 2/7 weeks, commencing 3/16/15 through 5/13/15, as provided in § 8(b) of the Act. See attached Decision for findings regarding credit.

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

6/19/15
Date

ICArbDec19(b)

JUN 25 2015

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

RUSSELL THOMAS
Employee/Petitioner

16IWCC0504

v.

Case # 14 WC 33501
15 WC 09210

SOUTHERN ILLINOIS UNIVERSITY OF CARBONDALE
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of his accidental injuries, Petitioner was a Public Safety Officer. (T.39, 40). He has been employed with Respondent for over 22 years. (T.40). Since 2009, Petitioner's official title was Emergency Preparedness Resource Officer and Crime Prevention Unit Coordinator. (T.40). On June 13, 2014, Petitioner had just finished a presentation at the student center when he received a call to investigate a green substance and a dead fish in Powless Creek, which ran through the middle of campus. (T.40, 41). Petitioner testified that after he found the source of the complaint and attempted to return to campus, the creek bank gave way, causing him to fall. (T.40, 41). Petitioner testified that he grabbed ahold of a tree in attempt to break his fall; but the tree limb broke, he injured his knee, and he could hardly walk. (T.40, 41). Petitioner testified that he previously injured his left knee in 2009, but he was working full-duty with no restrictions at the time of his June 13th 2014 accident. (T.42). Petitioner reported immediate swelling following the accident and showed his knee to Lt. Ron House. (T.43, 61).

Petitioner called Lieutenant John Allen, who was present on behalf of Respondent. (T.15). Lt. Allen testified that he knew nothing about Petitioner's June 13th 2014 accident and was on vacation in Florida when the accident occurred. (T.17). Petitioner also called Benjamin Newman, Chief of Police and Director of Public Safety. (T.24, 25). He also testified that he had no independent knowledge of the accident on June 13, 2014.

Petitioner reported his injury to Dr. Dale Blaise on July 7, 2014, who noted Petitioner had an immediate onset of pain and swelling which was persistent at the time of the visit. (PX3, 7/7/14). Dr. Blaise administered a Kenalog injection and prescribed a brace. *Id.* Petitioner returned on August 18, 2014, with no improvement in his symptoms. (PX3, 8/18/14). Dr. Blaise prescribed Norco and referred Petitioner for an MRI. *Id.* On August 22, 2014, Dr. Blaise noted

that Petitioner continued to have knee pain, swelling, and difficulty getting out of his car and engaging in activity. (PX3, 8/22/14). Dr. Blaise believed that Petitioner suffered a recurrent tear or sprain of his medial meniscus. *Id.*

On that same day, August 22, 2014, Petitioner completed a Notice of Injury with Respondent (T.68), and he attempted to continue working until he could no longer do so:

> Q: . . . And you were working full duty from the time of June 13th, 2014, until the time you filled that out?
>
> A: Yes. I just couldn't take it anymore. Trying to get in and out of the squad car was really hurting it when I torqued it. When you step out of the car with this leg, when you go like that, it hurts like crazy, and it starts hurting and starts swelling up again. There was just no way out of it. This leg is the one I go out of the door with. I just couldn't do it. (T.69).

Dr. Blaise referred Petitioner for orthopedic specialist for evaluation. (PX3, 9/4/14).

Petitioner saw Dr. George Paletta on September 15, 2014. (PX4, 9/15/14). Dr. Paletta took the following history of the injury, consistent with Petitioner's testimony:

> . . . There was apparently concern about toxic chemicals spilling into a creek on the campus. They were investigating the potential source of these toxic chemicals. They were walking along a creek bed. Unfortunately Mr. Thomas started to slip and states he dropped down about four feet off the edge of the creek bed. He tried to catch himself on a tree branch and suffered an injury to the left knee. He describes impact with some twisting and probable hyperextension of the knee. He states the knee swelled quickly and he had pain. . . . *Id.*

Dr. Paletta noted Petitioner's history of knee injury in 2009. *Id.* He stated, however, that Petitioner "made a full recovery and was back to full duty without any residual problems." *Id.* Petitioner had no pain or swelling in the left knee in the weeks preceding the June 13th 2014 injury. *Id.* Petitioner's physical examination showed medial joint line tenderness and positive meniscal rotary signs. *Id.* His review of Petitioner's MRI revealed joint effusion and a recurrent tear of the medial meniscus with complex tearing of the posterior horn of the mid-body. *Id.* Dr. Paletta also observed underlying pre-existing arthritis that was previously asymptomatic. *Id.* Dr. Paletta recommended surgery. *Id.*

Respondent had Petitioner examined by Dr. August Ritter on October 28, 2014. (RX10). Dr. Ritter stated that he *did* believe that Petitioner's current condition was related to his reported work injury, that Petitioner *did* require further reasonable and necessary treatment, and that Petitioner would be able to work with restrictions. *Id.*

Dr. Paletta performed arthroscopy with subtotal medial meniscectomy, debridement, and chondroplasty of the patella, trochlea and medial femoral condyle on Petitioner's left knee on January 6, 2015. (PX6). Dr. Paletta noted on February 25, 2015, that Petitioner did well postoperatively with surgery, and Petitioner was to be released at maximum medical improvement on March 17, 2015. (PX4, 2/25/15).

Petitioner was called to meet with Chief Newman at Respondent's facility on February 27, 2015, to discuss his return to work and a promotion when a difference arose concerning what Petitioner was allowed to do outside of work while he was under restrictions, and ultimately Chief Newman asked Petitioner to leave. (T.25, 26, 28-30, 48). Lt. Allen testified that on February 27, 2015, he was called down to the Office of the Chief of Police and asked to escort Petitioner out of the building. (T.17). Petitioner and Chief Newman both testified that the difference arose from him using his uniform to audition for and/or play a role as an actor. (T.28-30, 44, 45). While Chief Newman denied including anything in Petitioner's personnel file about their conversations prior to the meeting, this was clearly not true as the file contained a memorandum marked, "TO: PERSONNEL FILE [Return] FROM: CHIEF BENJAMIN NEWMAN." (T.34; RX9).

Petitioner testified that his return to work with restrictions was never discussed with Chief Newman, because Chief Newman wished to discuss Petitioner's divorce and the Chief was upset about Petitioner stage/film acting and potentially retiring before 5 more years elapsed. (T.49, 50). Chief Newman testified that he heard of Petitioner's acting audition through a sergeant who advised him that Petitioner's ex-wife "called and complained about him acting on the side." (T.26). Petitioner testified that his wife advised him that she would contact the police department, and that she was going to "use the police department to force [him] to sign the divorce papers." (T.50). Petitioner testified that he auditioned to be an actor and was not paid any compensation for auditioning. (T.45). He further testified that the auditions were done on Saturday rather than through the typical work-week for which Respondent was paying him compensation. (T.45). Petitioner testified that he neither did anything strenuous nor anything outside of the restrictions placed on his left knee. (T.45). Petitioner candidly testified to playing a role as a governor in one student film for about 2 hours on a Saturday in Chicago. (T.53, 54). He testified that this was the only instance in which he travelled. (T.65). He testified without rebuttal that he was not paid for his role, and the only activity he was engaged in was sitting at a table. (T.54, 65).

After the meeting concluded, Petitioner was chastised; and Petitioner testified that he was very upset and teary eyed after being *escorted* from the building. (T.52). As he was leaving the building, he missed the first step and his left knee buckled. (T.52). Petitioner testified that the landing is abnormal and has a short top step which he did not believe to be to code. (T.55). Lt. Allen testified that Petitioner walked in front of him on the way out; and as Petitioner walked through the door and out of the building, he turned and started back to his office. (T.19). Lt. Allen testified that he stayed on the inside landing as Petitioner walked out of the back door of

the office building and did not see what happened to Petitioner after he walked outside. (T.19, 20, 22, 23). He testified that the area where the incident occurred is still Respondent's property. (T.22). Lt. Allen also testified that Petitioner is a good employee. (T.16, 17).

Petitioner testified that he experienced an increase in left knee pain after his left leg buckled and reported same to Dr. Paletta during an unscheduled visit on March 4, 2015. (T.56; PX4, 3/4/15). Dr. Paletta took a history of the incident consistent with Petitioner's testimony, and noted physical examination findings of limited extension and flexion secondary to pain along with increased tenderness along the medial joint line. (PX3, 3/4/15). Given Petitioner's increased complaints and his physical examination findings, Dr. Paletta recommended a new MRI scan and took Petitioner off work. *Id.* Petitioner's MRI of March 26, 2015, demonstrated evidence consistent with a recurrent meniscus tear. (PX5, 4/2/15; PX7). Dr. Paletta recommended an injection with Dr. Blake, which was performed on April 9, 2015, but did not provide lasting relief or improvement in Petitioner's symptoms. (PX5, 5/6/15). Petitioner's physical examination remained positive for medial joint line tenderness. *Id.* Dr. Paletta recommended repeat arthroscopy.

Petitioner testified that he is currently unable to mow his lawn due to weakness in his knee, and that he is back to using his cane. (T.57-59, 65, 66). He wishes to have the additional surgery recommended by Dr. Paletta. (T.57).

CONCLUSION

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

An injury is compensable under the Act only if the claimant proves by a preponderance of the evidence that his injury arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill.2d 193, 203, 797 N.E.2d 665 (2003). For purposes of an injury being compensable under the Workers' Compensation Act, an injury is said to arise out of one's employment if the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. S.H.A. 820 ILCS 305/1 et seq. *Bassgar, Inc. v. Illinois Workers' Comp. Comm'n*, 917 N.E.2d 579 (3d Dist. 2009). "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." *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (Ill. 1989).

Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received "in the course

of the employment." *Johnson v. Illinois Workers' Comp. Comm'n*, 2011 IL App (2d) 100418WC, 956 N.E.2d 543 (2d Dist. 2011).

14 WC 33501

The Arbitrator finds that Petitioner is a credible witness. Petitioner's account of his injuries on June 13, 2014, is unrebutted and consistent throughout the record. Petitioner was clearly acting in the course and scope of his employment in answering a call to investigate an incident as requested by his employer when his injury occurred. The Arbitrator therefore finds that Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent on June 13, 2014.

15 WC 09210

The Arbitrator finds that Petitioner's account of his second injury on February 27, 2015, is unrebutted as well. Lt. Allen testified that he could not see what occurred beyond the door. Petitioner's medical records further indicate that Petitioner sustained an aggravation or recurrent tear of his medial meniscus on account of this injury. Thus, the incident clearly occurred.

With regard to whether the incident arose out of and in the course of his employment with Respondent, the Arbitrator notes that Petitioner was instructed to return to the premises by his employer to discuss his return to work. Thus, Petitioner arrived at the premises not of his own volition, but at the will of his employer to discuss employment related matters. Thus, it can be said that Petitioner "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." *Caterpillar Tractor Co. supra.*

Additionally, Petitioner testified that the area where Petitioner fell was an irregular landing on Respondent's premises and presented photographic evidence of same. (PX9). The Supreme Court in *Caterpillar Tractor Co v. Indus. Comm'n*, 541 N.E.2d 665 (1989) noted that "liability has been imposed" when "the injury occurred either as a direct result of a hazardous condition on the employer's premises, or arose from some risk connected with, or incidental to, the employment." *Caterpillar*, 541 N.E.2d 665 at 669. The Arbitrator further notes that Petitioner was also subjected to a qualitative increase by virtue of the fact that the confrontational tone and/or nature of his work-related dispute with his employer, and the fact that he was being escorted out of the building as if he had committed some wrong, upset him, caused tearing and distracted from watching his step. Work-related distractions also constitute an increased risk of injury. *See e.g. Randy Kram v. SOI/Vienna Corr. Ctr.*, 15 I.W.C.C. 0286 (2015) (wherein claimant was found to have sustained compensable knee injuries as a result of his attention being diverted from where and how he stepped from a landing by inmates breaking formation.

Consequently, the Arbitrator finds that Petitioner also sustained accidental injuries that arose out of and in the course of his employment with Respondent on February 27, 2015.

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

14 WC 33501 & 15 WC 09210

Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003). [Emphasis original]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *A.C. & S. v. Indus. Comm'n*, 710 N.E.2d 837 (1st Dist. 1999) citing *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Supreme Court's decision in *Sisbro, Inc.* highlighted that even though a workers' compensation claimant has a preexisting condition which may make him or her more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003). Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (Ill. 1982).

The uncontroverted evidence shows that Petitioner was working full duty and required no treatment prior to his initial accidental injury. Respondent's own examiner, Dr. August Ritter, opined that Petitioner's need for his first surgery was causally related to his accident on June 13, 2014. (RX10). Hence, Respondent has no good faith basis for disputing causal connection with regard to Petitioner's first claim. There is no other cause for Petitioner's condition of ill-being in the record. Petitioner clearly sustained two compensable injuries which arose out of and in the course of his employment with Respondent. Petitioner was doing well, until his condition was aggravated by his second compensable accident on February 27, 2015, after which he promptly returned to Dr. Paletta. (PX4, 3/4/15). The Arbitrator thus finds that there is an unbroken causal chain between Petitioner's work accidents and his current condition of ill-being.

Petitioner has met his burden of proof on the issue of causal connection.

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

Issue (K): Is Petitioner entitled to any prospective medical care?

Upon a claimant's establishment of a causal nexus between injury and illness, employers are responsible for the employees' medical care reasonably required in order to diagnose, relieve, or cure the effects of the claimant's injury. *Plantation Mfg. Co. v. Indus. Comm'n,* 294 Ill.App.3d 705, 691 N.E.2d 13 (2000); *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill.App.3d 527, 758 N.E.2d 18 (1st Dist. 2001).

The Arbitrator finds that all of Petitioner's medical care has been reasonable and necessary. Petitioner, however, has clearly not reached maximum medical improvement from his second injury. On his visit with Dr. Paletta on May 6, 2015, Petitioner's physical examination remained positive for medial joint line tenderness, and Dr. Paletta recommended repeat arthroscopy. (PX5, 5/6/15).

Based upon the above findings as to causal connection, Respondent shall pay the medical expenses contained in Petitioner's group exhibit. Respondent shall also authorize and pay for the treatment recommended by Dr. Paletta, including but not limited to surgery. Respondent shall have credit for any medical expenses paid, but shall indemnify and hold Petitioner harmless from any claims pertaining to the payment of medical expenses for which it is receiving this credit, pursuant to § 8(j) of the Act.

Issue (L): What temporary benefits are in dispute? (TTD)

The Parties agreed that Petitioner was paid benefits to March 16, 2015. (T.13). However, Petitioner continues to be off work. (PX5, 5/6/15). Respondent thus continues to be liable for temporary total disability benefits. Additionally, Respondent is only entitled to credit for $26,826.78 of the benefits which it paid through March 16, 2015, which is the net amount paid to Petitioner. Respondent shall therefore pay temporary total disability benefits of 782.35/week for a further period of 8 2/7 weeks for Petitioner's period of temporary total incapacity from March 16, 2015, through May 13, 2015, the date of the hearing.

STATE OF ILLINOIS)
) SS.
COUNTY WILLIAMSON)

☐ 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

Randall Fowler,

Petitioner,

vs.

No. 14 WC 40143

State of Illinois/IDOT,

16IWCC0499

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, maximum medical improvement, medical expenses, prospective medical care 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation, medical benefits or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission modifies the Arbitrator's award of prospective medical care. The Arbitrator awarded prospective medical care for the right knee recommended by Dr. Morgan, "including but not limited to supartz injections and/or any future surgery which may be required." Dr. Morgan noted that ultimately Petitioner would probably need joint reconstructive surgery. Petitioner wanted to put off the surgery for as long as he could. The latest medical records from Dr. Morgan show that he released Petitioner to return to work full duty at Petitioner's request and was maintaining his condition with Supartz injections. The Commission is of the opinion that an award of future surgery is premature. Rather, the Commission awards

the prospective medical treatment prescribed by Dr. Morgan at the time of the arbitration hearing.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2016, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $26,182.00, as set forth in Petitioner's Exhibit 1, pursuant to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide the medical treatment prescribed by Dr. Morgan at the time of the arbitration hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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.

Pursuant to §19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

DATED: JUL 29 2016
o-07/14/2016
SM/sk
44

Stephen Mathis

Mario Basurto

David L. Gore

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

FOWLER, RANDALL
Employee/Petitioner

Case# **14WC040143**

IL DEPT OF TRANSPORTATION
Employer/Respondent

16IWCC0499

On 1/15/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.47% 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:

0969 THOMAS C RICH PC
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FAIRVIEW HTS, IL 62208

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2101 S VETERANS PARKWAY
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CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JAN 15 2016

RONALD A.RASCIA, Acting Secretary
Illinois Workers' Compensation Commission

16IWCC0499

STATE OF ILLINOIS)
)SS.
COUNTY OF **Williamson**)

- ☐ 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)

Randall Fowler
Employee/Petitioner

v.

Illinois Dept. of Transportation
Employer/Respondent

Case # **14** WC **40143**

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Herrin**, on **April 10, 2015**. 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 **Has Petitioner reached maximum medical improvement?**

FINDINGS

On the date of accident, **February 27, 2014**, 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 **$58,764.68**; the average weekly wage was **$1,130.09**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

Respondent ***has 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 **$any medical bills paid through group** under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services of $26,182.00, as set forth in Petitioner's exhibit 1, as provided in § 8(a) and § 8.2 of the Act.

Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in § 8(j) of the Act.

Respondent shall authorize and pay for the treatment recommended for Petitioner's right knee by Dr. Morgan, including but not limited to supartz injections and/or any future surgery which may be required.

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

Michael K Nowak, Arbitrator — **1/12/16** Date

ICArbDec19(b)

JAN 15 2016

FINDINGS OF FACT

Petitioner is a highway maintainer for the Illinois Department of Transportation, and has been so employed on a full time permanent basis for approximately 4 years. The Parties stipulated that Petitioner sustained accidental injuries arising out of and in the course and scope of his employment on February 27, 2014, when while cutting and dragging brush on a State right-of-way, he sustained two incidents. The first incident occurred when he was walking up an embankment to return to his truck. His foot slipped and he fell on his kneecap. He felt some pain, but kept working. Later Petitioner was back down the embankment dragging brush that was being cut into the tree line. While doing so, his foot became entangled in some undergrowth and he fell forward and to the right twisting his right knee. He again felt immediate pain. As the day progressed, Petitioner's right knee started swelling and hurting more.

Petitioner testified that prior to this accident he had sustained no injuries, had no workers' compensation claims, and had underwent no diagnostic testing or treatment involving his right knee. Petitioner acknowledged that 9 years prior, he had a sprained ligament in his left knee, wore a brace for a couple of weeks, and the problem was resolved.

In 2011 Petitioner was hired permanently by Respondent. Prior to his permanent employment Petitioner was hired annually as full time temporary employee in the winter. He took and passed a pre-employment physical every time. Full time temporary means seasonal employees for plowing snow; however, he also patches pot holes, picks up dead animals, cuts brush and works from October until March.

Following the incident, Petitioner sought treatment from his family physician, Dr. Partridge on 3/4/14. Dr. Partridge ordered an x-ray, gave him a Medrol Dosepak, and referred him for physical therapy. He was to return in two weeks. (PX3, 3/4/14). When Petitioner returned on 3/19/14, he indicated his condition was much worse. He told Dr. Partridge, "It is so bad that he doesn't think he can stand it anymore." Dr. Partridge noted that despite his recommendation for physical therapy early on and the consistent history of the accident, physical therapy had not been started. Dr. Partridge noted crepitus, and palpable effusion. Because Dr. Partridge suspected internal derangement and Petitioner had intractable pain, he took Petitioner off work, demanded that he start therapy, and return back to see him. Petitioner returned on 4/2/14, and reported that physical therapy had helped somewhat. He noted less swelling; however, exertion caused the swelling to return. Going up and down stairs was still unstable. Dr. Partridge still suspected internal derangement and recommended an MRI. This was done on 4/16/14, and showed a complex tear of the medial meniscus posterior horn with an essentially complete vertical radial component of the tear. The radiologist also noted tricompartmental degenerative changes with full thickness cartilage loss in the patellofemoral joint medial and near full thickness loss in the medial femoral tibial compartment. There was also a significant finding of moderate to large knee joint effusion.

After the MRI, Dr. Partridge referred Petitioner to Dr. Richard Morgan, who saw him on 5/6/14. Dr. Morgan took a history of the injury, noted that Petitioner's swelling had almost resolved, but that he was still having ongoing medial compartment pain with some catching. Dr. Morgan's examination showed trace effusion, positive medial McMurray's and tenderness over the medial joint line. X-rays showed bilateral early medial compartment narrowing, and Dr. Morgan agreed that the MRI demonstrated a complex tear of the posterior horn of the medial meniscus with early degenerative changes. Dr. Morgan recommended arthroscopy and debridement with post-op viscoelastic supplementation. He stated "ultimately, he will probably need joint

reconstructive surgery but he'd like to put that off for as long as he can."(PX6 at 12) He continued Petitioner off work.

Surgery was performed on 5/21/14, and Dr. Morgan's post-operative diagnosis was a posterior horn tear of the medial meniscus, tear of the lateral meniscus, and degenerative arthritis. He performed both medial and lateral meniscectomies. Following surgery, Dr. Morgan recommended viscoelastic supplementation therapy. Petitioner had 5 injections, the last being on 7/25/14. On that date Dr. Morgan instructed Petitioner to return in 4 to 6 weeks to evaluate the benefit of the supartz series. Petitioner returned on 9/5/15, and the doctor noted that the meniscectomy in May improved Petitioner's condition, but the viscoelastic therapy did not help much. Dr. Morgan performed additional x-rays, which showed early medial compartment disease suggestive of post-meniscectomy arthrosis. He continued Petitioner on medication. Petitioner returned on 10/17/14, and had improved enough that Dr. Morgan released him to return to work light duty. As early as 10/17/14, Dr. Morgan discussed the need for a total knee replacement. A physician's report dated 11/11/14, and signed by Dr. Morgan, outlined Petitioner's restrictions.

Petitioner continued to work over the winter. Petitioner returned to Dr. Morgan on 1/16/15, and Dr. Morgan noted that he was working light duty and believed he could go back to work full time. He also rescheduled him for repeat supartz injections after the 1st of February. These were begun in March of 2015, and Petitioner has had two injections as of the date of hearing.

On 11/26/14, Respondent had Petitioner examined by Dr. Michael Nogalski pursuant to §12. Dr. Nogalski's opinion was that while Petitioner's lateral and medial and meniscus tears were related to the accident, the operative findings described by Dr. Morgan were consistent with advanced changes in the knee, which would pre-exist Petitioner's injury. (RX6 at 15-16) He also stated that the incidents on 2/27/14, neither aggravated nor accelerated Petitioner's right knee degeneration (*Id.*, at 16) He believed that the supartz injections Petitioner had been undergoing were unrelated to the accident. (*Id.*, at 16-17)

On cross-examination, Dr. Nogalski acknowledged that the objective findings in Petitioner's operative report showed cartilaginous flecks floating in and about the knee with tricompartmental chondromalacia and synovitis. (*Id.*, at 25) Dr. Nogalski acknowledged that Petitioner had no prior treatment, x-rays or MRIs to either knee before the accident. (*Id.* at 26) Dr. Nogalski testified that Petitioner stated that prior to the accident "he had some soreness in the knee prior to this time but nothing like this. And he had had stiffness as well." (*Id.*, at 32) He also acknowledged that since the accident Petitioner has continued to have symptoms in his right knee. He did not feel, however that there was a link between his current symptoms and the accident. (*Id.* at 27) Dr. Nogalski agreed that before a total knee replacement would be done, he would try viscosupplementation injections.

Petitioner's treating physician, Dr. Richard Morgan, also testified by way of deposition. (PX8). He testified that Petitioner was referred to him by his family physician, Dr. Partridge. Dr. Morgan reviewed the MRI personally, took the history of injury, and based on the history, clinical examination, intake notes, and review of the films, had arrived at a diagnosis of meniscal tears of his knee. Dr. Morgan described Petitioner's pre-existing arthritis as "not terrible but some." (*Id.*, at 7)

Dr. Morgan also described Petitioner intraoperative findings as:

> Intraoperatively – let me get to that. His – first of all, his arthroscopy was done May 21st of 2014 here at SIOC. On exam – intraoperative exam on entry to the knee he had a myriad of cartilaginous flecks floating about in the knee. He had hemorrhagic synovitis of the knee. He had tricompartmental chondromalacia of the knee. The medial meniscus demonstrated a radial tear of the posterior horn of the medial meniscus. The lateral meniscus also demonstrated chondromalacia, and he also had a small radial tear of the third of the lateral meniscus. The ACL/PCL complex was normal. (*Id.* at 8-9)

Dr. Morgan indicated that he had examined Petitioner's uninjured left knee as well as the right. The left knee showed some early degenerative arthritis, but he had no symptoms. On his right knee, however, Dr. Morgan believed that the need for surgery, the cartilaginous injections and follow-up visits along with physical therapy were related to the accident. (*Id.*, at 10) Dr. Morgan testified that "my prognosis is that I think for a period of time, hopefully for a few years, we can maintain him on viscoelastic therapy and mitigate his symptoms with that. But in time my prognosis is that he'll probably need a knee replacement." (*Id.* at 10-11)

Dr. Morgan also indicated the accident aggravated Petitioner's pre-existing degenerative changes in his right knee. He stated "Yes, I think they did. The meniscus is a guardian of the femoral condyle. I think it's irrefutable he had some early degenerative changes at the time of his accident, although asymptomatic, just like his left knee is at this point. But without the protective meniscus in place the chondromalacia is going to get worse in the medial femoral condyle because it's unprotected." (*Id.* at 11) Assuming that Petitioner has no other incidents, Dr. Morgan believed that any future knee replacement would be related to the incident at work. (*Id.*, at 11-12)

CONCLUSIONS

Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?
Issue (K): Is Petitioner entitled to any prospective medical care?
Issue (O): Has Petitioner reached maximum medical improvement?

Respondent agrees that the right knee meniscal tears are causally related to the undisputed work accident. Respondent also does not dispute past medical care, which has been related to addressing the meniscus. The central dispute as to causal connection is whether Petitioner's current arthritic condition is causally related to the accident, and whether Petitioner is entitled to prospective medical care for same.

The Workers' Compensation Act is a humane law of a remedial nature that should be liberally construed to achieve its purpose. *Hagene v. Derek Polling Const.*, 902 N.E.2d 1269, 1273 (5d Dist. 2009). When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 864 N.E.2d 266, 272-273 (5th Dist. 2007).

Accidental injury need not be the sole causative factor, or even the primary causative factor, as long as it is *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003). [Emphasis original]. "Petitioner need only show that some act or phase of the employment was a

causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 723 N.E.2d 846 (3d Dist. 2000). Employers are to take their employees as they find them. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *A.C. & S. v. Indus. Comm'n*, 710 N.E.2d 837 (1st Dist. 1999) citing *General Electric Co. v. Indus. Comm'n*, 433 N.E.2d 671, 672 (Ill. 1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672 (Ill. 2003); *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967); *see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 362 N.E.2d 339 (Ill. 1977).

The Supreme Court's decision in *Sisbro, Inc.* highlighted that even though a workers' compensation claimant has a preexisting condition which may make him or her more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003). The Supreme Court specifically held that where a work-related injury is shown to be an *actual* causal factor in bringing about an employee's disabling condition, recovery should *not* be denied simply because a normal daily activity *could have* brought on claimant's disabling condition. *Id.* at 674-75, 76-77.

It has also been determined that causal connection between work duties and the condition of ill-being may be established by the chain of events, including a claimant's ability to perform duties before the date of accident and inability to perform those duties following the date of accident. *Darling v. Indus. Comm'n of Illinois*, 176 Ill. App. 3d 186, 530 N.E.2d 1135 (1st Dist. 1988). Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n,* 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Industrial Comm'n,* 93 Ill.2d 59, 442 N.E.2d 908 (Ill. 1982).

The record demonstrates that Petitioner was not under any care for his right knee prior to the accident. Following the accident, however, Petitioner had an immediate onset of pain, and has had persistent complaints since. The Arbitrator finds it significant that Petitioner's left knee, which was not injured in his accidents, but shows evidence of degeneration, is entirely asymptomatic. Petitioner's right knee findings following the accident revealed marked evidence of acute injury, including flecks of cartilage and swelling. Given the totality of the evidence, the Arbitrator finds that Petitioner sustained trauma to his knee sufficient to aggravate his underlying arthritis in this undisputed accident. Further, the Arbitrator finds the testimony and opinions of Dr. Morgan more persuasive than those of Dr. Nogalski. Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the undisputed accidents that occurred on 2/27/14.

As of the date of hearing Petitioner was to follow up with Dr. Morgan for treatment of his knee condition. The Arbitrator finds that Petitioner has not reached maximum medical improvement.

There is no real dispute between the parties as to Petitioner's need for ongoing care for his right knee condition. Rather, the dispute was whether or not the condition is causally related to the accident. Dr. Nogalski did not dispute that Petitioner requires care for his condition. Respondent shall pay reasonable and necessary medical services of $26,182.00, as set forth in Petitioner's exhibit 1, as provided in § 8(a) and § 8.2 of the Act. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this

credit, as provided in § 8(j) of the Act. Respondent shall further authorize and pay for the treatment recommended for Petitioner's right knee, including but not limited to supartz injections and/or any future surgery which may be required.

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

Ruby Franklin,

Petitioner,

vs.

NO: 14 WC 41953

16IWCC0520

City of Chicago,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by both parties herein and notice given to all parties, the Commission, after considering the issues of nature and extent and medical expenses, and being advised of the facts and law, grants Petitioner's "Motion to Amend Petition for Review" and affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner, a 63 year old motor truck driver, testified that she had worked for Respondent for 25 years driving a variety of trucks. (T.10). She noted that on June 11, 2013 she slipped as she was getting on the truck and jammed her right hand on the steering wheel. (T.14-15). She indicated that she felt pain in her whole hand at that time as well as locking and triggering in her two middle fingers. (T.34-35). Petitioner is right hand-dominant. (T.18-19).

The record shows that on June 13, 2013 Petitioner visited MercyWorks. (PX1). At that time x-rays were taken and she was referred to Dr. Heller at Midland Orthopedics. (T.17). Petitioner noted that on July 8, 2013 she received an injection in her hand, but only experienced temporary relief. (T.17). She subsequently followed up with Dr. Heller on July 15, 2013 and received another injection. (T.18).

Petitioner returned to Dr. Heller on July 22, 2013 at which point she had returned to work. (T.18). As she continued to work she noticed that her hand was still hurting and she had

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difficulty using it. (T.18). Specifically, she noted that it was difficult for her to hold or grip the steering wheel, and that her hand would lock and she could not open it. (T.19).

Petitioner testified that the people at MercyWorks then suggested she see a specialist, Dr. Mark Cohen at Midwest Orthopaedics. (T.19). She visited Dr. Cohen on October 18, 2013 and received a low dose cortisone shot which she noted helped temporarily. (T.19-20). Petitioner followed up with Dr. Cohen on December 4, 2013, at which time she received another shot, with no improvement in her symptoms. (T.20). Petitioner did not see Dr. Cohen again until April 11, 2014. (T.20).

Petitioner returned to Dr. Cohen on June 6, 2014 at which time she noticed that the pain was "... unbearable. It didn't stop, and the usage was getting less and less. It was locking up on me." (T.21). Dr. Cohen then recommended surgery. (T.21).

On July 1, 2014 Petitioner underwent surgery in the form of right middle and right ring trigger digital releases through separate incisions. (PX3). The pre and post-operative diagnosis was right middle and right ring finger stenosing tenosynovitis. (PX3).

Following surgery Petitioner started physical therapy at AthletiCo on July 15, 2014. (T.22). She indicated that therapy continued through October 28, 2014. (T.23). Petitioner thereupon followed up with Dr. Cohen in August, September and October of 2014 at which time she noted that she was making improvement, enough so that she was released to return to work in October of 2014. (T.23). However, she noted that she did not have full usage of her right hand at that time and could not lay it flat, which she said she still cannot do. (T.23). In addition, she noted that it is difficult for her to grip the steering wheel tightly, but that her pain has been alleviated. (T.23). She also indicated that she drops things, and that it's hard for her to pick up things and open jars and car doors. (T.23-24).

Petitioner testified that she worked from October of 2014 until she retired on June 30, 2015. (T.24-25,39-40). She stated that she had "... intended to work longer, but because of the usage [she] was afraid – [she] didn't want to get into another accident. So [she] felt like it's better that [she] do[es]n't take a chance on doing this." (T.25). Petitioner also testified that her right hand "looks deformed" and that she cannot flatten it or wear her rings. (T.25-26). In addition, she noted that she has numbness in the morning on a regular basis, which clears up after she gets in the heat of the shower. (T.27). She also wears a device that Dr. Cohen's office gave her that she wraps her hand in which seems to help sometimes. (T.27). She noted that she also occasionally takes Tylenol, maybe once a month. (T.27-28). However, she indicated that she does not have a whole lot of severe pain, just numbness, and that her hand does not lock up on her anymore. (T.28). She noted as well that she has trouble driving for long periods, and that after an hour or longer it gets stiff. (T.28). As a result of these symptoms she noted that she uses her left hand more. (T.41).

In a report dated May 11, 2015, Dr. Cohen noted that Petitioner complained of functional difficulties such as gripping and opening jars as well as swollen fingers and an inability to wear rings or place her hand completely flat on the table. (PX3). Upon examination, Dr. Cohen observed that that the hand "appears benign", that there was no gross swelling or deformity and

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that she had "slight enlargement of her interphalangeal joints." (PX3). Dr. Cohen noted that "[f]ortunately, she has full digital extension and full digital flexion. She lacks hyperextension of the middle and ring finger metacarpophalangeal joints. At the very most, she may have less than a 5-degree contracture across the proximal interphalangeal joints of those digits. Her grip strength measures 40 pounds bilaterally. No catching or locking is noted during digital motion." (PX3).

Dr. Cohen concluded that Petitioner was "... now 10 months out from right middle and ring finger trigger digit releases... We did send her to therapy to obtain a home program. I believe she would benefit at least from Coban taping of her finger during sleep. This may lead to a more rapid resolution of some of the fullness about her middle and ring finger interphalangeal joints. Other than that, we have only recommended a home program." (PX3).

Petitioner testified that she has not seen Dr. Cohen since her last visit in May of 2015. (T.29). She indicated that she has no plans to see him, yet, and that she is not doing another surgery, although she conceded that another surgery has never been discussed. (T.29). Instead, Dr. Cohen recommended that she do home physical therapy exercises, which she claims that she is doing. (T.30).

On cross examination, Petitioner agreed that the surgery relieved her pain fully, and that she has no more pain in her fingers. (T.38). She indicated that Dr. Cohen released her to return to full duty work in October of 2014 and that she returned to work as a motor truck driver at that time. (T.38). She agreed that she followed up with Dr. Cohen one last time on May 11, 2015. (T.38). Petitioner indicated that she worked full duty as a motor truck driver from October of 2014 through her retirement on June 30, 2015. (T.40).

In a decision filed January 11, 2016, Arbitrator Thompson-Smith found that "Petitioner's condition of ill-being is causally related to her accident as it relates to her right middle finger, right ring finger and her right hand. The medical records correlate the accident to the stenosing tenosynovitis that occurred in her two fingers, which ultimately led to surgery on those fingers." (Arb.Dec., p.4). In addition, the Arbitrator found that "Respondent has paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator finds the utilization review persuasive and finds that there was no necessity of further formal physical therapy and denies the remaining bills of AthletiCo. In so finding, the Arbitrator finds that the dates of service that remain outstanding to AthletiCo as submitted by Petitioner are not reasonable and necessary treatment. This does not find that the services already paid for by Respondent were unreasonable or unnecessary, as that is clearly established. Only the outstanding dates of service as addressed by the utilization report are denied." (Arb.Dec., p.5). Finally, the Arbitrator found, based on the five (5) factors enumerated in §8.1b, that "Petitioner sustained an injury which caused of [sic] 25% loss of use of a right hand." (Arb.Dec., p.6).

Following the issuance of the Arbitrator's decision, both parties filed Petitions for Review, with Petitioner filing its petition on February 2, 2016 and both parties raising nature and extent as the sole issue in dispute.

16IWCC0520

On 4/20/16, Petitioner filed a motion to "Amend Petition for Review of Arbitrator's Decision" alleging medical expenses as an additional issue on review.

Based on the above, and the record taken as a whole, including the utilization review admitted at RX1, the Arbitrator hereby grants Petitioner's motion to "Amend Petition for Review of Arbitrator's Decision" and otherwise affirms and adopts the decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 11, 2016 is hereby affirmed and adopted.

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

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

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: AUG 4 - 2016
o: 7/11/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

FRANKLIN, RUBY
Employee/Petitioner

Case# **14WC041953**

CITY OF CHICAGO
Employer/Respondent

16IWCC0520

On 1/11/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% 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:

2988 CUDA LAW OFFICES LTD
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6525 W NORTH AVE SUITE 204
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0113 CITY OF CHICAGO
NANCY SHEPARD
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

16IWCC0520

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

RUBY FRANKLIN
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **14** WC **41953**

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **11/20/15**. 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 Compensation for Loss of Trade

16IWCC0520

FINDINGS

On **6/11/13**, 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 **$70,543.40**; the average weekly wage was **$1354.00**.

On the date of accident, Petitioner was **63** years of age, ***single*** with **0** dependent children.

Petitioner has received all reasonable and necessary medical services.

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

ORDER

Respondent had paid all reasonable and necessary medical services, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner $812.40 for 51.25 weeks as the injury sustained resulted in 25% loss of use of a right hand, as provided in Section 8(e) of the Act.

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.

16IWCC0520

FINDINGS OF FACT

Ms. Ruby Franklin, ("Petitioner"), was employed on June 11, 2013, by the City of Chicago, ("Respondent"). She testified that she had been employed by the respondent for twenty-five (25) years and was employed at that time, as a motor truck driver. She testified that she drove very large vehicles and would travel from job site to job site dropping off crews and equipment.

Petitioner testified that on June 11, 2013, she suffered an injury when she slipped getting into the truck and jammed her right hand on the steering wheel. She further testified that she experienced immediately pain and advised her foreman of the injury. She was sent to MercyWorks Occupational Clinic. Petitioner testified that she was sent to MercyWorks on the same day as the injury but the medical records reflect that she actually saw a doctor at MercyWorks two days later, on June 13, 2013.

On June 13, 2013, she advised the doctor at MercyWorks that she had jammed her hand on the steering wheel and was experiencing pain, six out of ten (6/10), particularly to the second and third metacarpal joints. She had noticed triggering of the right middle finger as well as some swelling. She was diagnosed with strain of the right hand; and trigger right middle finger. She was referred to Dr. Heller and kept on full duty work, per her request. PX1.

Petitioner saw Dr. Heller on July 8, 2013. At that time, she complained of pain in her right hand and that her long finger was locking. She was diagnosed with third finger stenosing tenosynovitis and given an injection to that finger. She continued to follow-up with Dr. Heller and he advised that due to continuing locking, she would require surgery. She advised she wanted to hold off on surgery and stopped treatment with Dr. Heller, on June 22, 2013. Petitioner testified that she still had pain at that time and issues using her right hand. PX2.

Petitioner did not seek treatment again until October 18, 2013, when she saw Dr. Cohen, complaining of triggering of the right middle finger; and for the first time, occasionally triggering of the right ring finger. She advised Dr. Cohen that the initial injection gave several weeks of relief but the pain did return. He diagnosed her with stenosing tenosynovitis in the right middle finger and possible early stenosing tenosynovitis in the right ring finger. He recommended another injection to her right middle finger. Petitioner followed-up with Dr. Cohen on December 4, 2013, when he performed an injection to her right ring finger. PX3.

Petitioner did not follow-up with Dr. Cohen again until April 11, 2014, when she returned with continued complaints of triggering in the right middle and right ring fingers. He gave her a third injection to the right middle finger. She returned to Dr. Cohen on June 6, 2014 with no real relief from the injection; and continued complaints of limited functional ability, due to the stenosing tenosynovitis. He recommended surgery.

Petitioner underwent surgery in the form of a trigger digit release of the right middle and ring fingers, on July 1, 2014. She followed-up with Dr. Cohen, who recommended physical therapy, which she underwent. On October 24, 2014, Petitioner followed-up with Dr. Cohen, who documented some soreness but minimal swelling in Petitioner's fingers; and full digital flexion and extension with no mechanical problems. He released her to return to work in a full duty capacity, at that time. PX3.

Petitioner did follow-up one last time with Dr. Cohen on May 11, 2015, when she complained of functional difficulties opening jars and swollen fingers. There was no mention in this note about difficulty with her job duties. Upon examination, Dr. Cohen indicated that her hand appeared benign and that there was no swelling or deformity. She did have a slight enlargement of the interphalangeal joints, but retained full digital extension and flexion. He felt she did lack hyperextension in the right and middle fingers that may be less than five degree contracture. Her grip strength measured the same bilaterally. He recommended a home exercise program and Coban taping that she could use during sleep, which he felt may help with some of the fullness. There is no mention of numbness in any of the medical records presented. PX3.

At hearing, Petitioner testified that the pain in her right fingers was alleviated but that she does have problems with gripping. She indicated that she could not grip the steering wheel and is forced to use her left hand more. She testified that she experiences significant numbness in the morning. She also testified that her hand was deformed but did not specify what the deformity was in her right hand. She testified that she retired from the City in June 2015 as a result of her hand dysfunction but that she did work, in a full duty capacity, since her release from Dr. Cohen in October 2014.

Respondent submitted a Utilization Report that indicated the "patient has completed substantial amount of PT. There are no exceptional factors to justify additional 8 visits on top of the 24 sessions previously completed. The residual limitations could be adequately addressed by HEP." Further, during the peer to peer contact, the utilization review doctor indicated that he "spoke with PA Rena and she noted patient has good functional ROM with no real need for additional PT at this time." RX1.

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner's condition of ill-being is causally related to her accident as it relates to her right middle finger, right ring finger and her right hand. The medical records correlate the accident to the stenosing tenosynovitis that occurred in her two fingers, which ultimately led to surgery on those fingers.

J. Were medical service that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds that the Respondent has paid all appropriate charges for all reasonable and necessary medical services. The Arbitrator finds the utilization review persuasive and finds that there was no necessity of further formal physical therapy and denies the remaining bills of AthletiCo. In so finding, the Arbitrator finds that the dates of service that remain outstanding to AthletiCo as submitted by Petitioner are not reasonable and necessary treatment. This does not find that the services already paid for by Respondent were unreasonable or unnecessary, as that is clearly established. Only the outstanding dates of service as addressed by the utilization report are denied.

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

The Arbitrator finds that the date of injury in this claim takes place after the amendments to the Act went into effect, therefore the Arbitrator will take into account the five factors as required by Section 8.1b of the Act.

The AMA impairment rating: No impairment rating was provided by either party therefore, the Arbitrator gives no weight to this factor.

The occupation of injured worker: The Petitioner's usual and customary employment was that of motor truck driver. This is a job that Petitioner was able to return to full duty following her release from care from Dr. Cohen. However, Petitioner testified that she retired earlier than her anticipated date, due to ongoing complaints in her hand. Her medical records do not document any significant restrictions or make any mention of difficulties with work duties. The Arbitrator gives some weight to the fact Petitioner was able to return her prior employment following treatment, with no restrictions.

The age of the injured worker: Petitioner was sixty three (63) at the time of the injury and considered to be in the twilight of her working career. Although she was able to return to work following her work related injury, she testified in a credible and unrebutted manner, that she did not feel that she could safely perform her job in the manner she had before the accident, therefore she retired. The Arbitrator puts some weight on the age of the Petitioner.

The employee's future earning capacity: The petitioner was able to return to work full duty following her injury. The Petitioner also testified in a credible and unrebutted manner, that she would have continued to work but that she could not physically perform her job in the manner she had before the accident; therefore she opted to retire at approximately the age of sixty-five (65), following her return to work. The petitioner did not present evidence of any potential loss of earnings due to the injury. Therefore, the Arbitrator gives some weight to this factor.

Evidence of Disability: Petitioner testified that she has continued numbness in her hand in the morning and that she cannot flatten her hand and has limited strength in it. She cannot open car doors or jars. The medical records make no mention of numbness however, Dr. Cohen's last office note specifically indicates that there is some fullness and she did advise him of issues gripping and opening jars. The office note does not document any issues with her work duties at that time. The medical records clearly document an injury and demonstrate that there are some residual permanent effects of the injury such as fullness and possibly a five degree contracture across the interphalangeal joints of the middle and ring finger. The medical records document full digital extension and full digital flexion however, Petitioner continues to have numbness in the mornings. She is unable to use her right, dominant hand, as she once was able to use it. Her grip has significantly lessened and she cannot hold a steering wheel for a long duration. Petitioner has had to learn to use her non-dominant left hand, for those tasks she finds difficult or unable to perform using her right hand.

This injury led to Petitioner's earlier than desired retirement. But for the Petitioner's sustained injury, she testified that she would have continued working as a motor truck driver for the City of Chicago. Petitioner testified that after sustaining the aforementioned injury, she was no longer able to grip the steering wheel of the 26,000-pound electrical truck and for safety concerns; she had no choice but to retire earlier than she desired. It is evident that due to the Petitioner's sustained work injury, she no longer had the capacity to work as a motor truck driver for the City of Chicago. She was unable to grip the steering wheel, which is a material aspect of her duties as a motor truck driver. Her lack of grip on the steering wheel would have been a safety concern and would have put both she and her crew in danger. Having limited ability to grip the steering wheel and fear of future accidents caused Ms. Franklin to leave her job as a motor truck driver for the City of Chicago, thus ceasing her capacity to earn in her occupation.

According to her unrebutted, credible testimony, Ms. Franklin's hand injury caused her to be physically incapable of gripping the steering wheel of the truck as her hands were subject to continuous vibrations coming from the truck. This prevented her from continuing to work for the respondent for which she had worked for over twenty-five (25) years. The Arbitrator finds that the Petitioner sustained an injury which caused of 25% loss of use of a right hand.

16IWCC0520

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC42953
SIGNATURE PAGE

Signature of Arbitrator

January 11, 2016
Date of Decision

JAN 11 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☒ 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

Michelene Schmidt,

Petitioner,

vs.

NO: 15 WC 05244

Senior Silverado Living,

16IWCC0514

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical both incurred and prospective, notice, temporary total disability and penalties and fees and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 2015 is hereby affirmed and adopted.

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

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

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: AUG 3 - 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 7/13/16
049

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

SCHMIDT, MICHELENE
Employee/Petitioner

Case# **15WC005244**

14WC024891
15WC005245

SENIOR SILVERADO LIVING
Employer/Respondent

16IWCC0514

On 9/29/2015, 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 0.10% 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:

1980 LAW OFFICES OF STEVEN J TENZER
20 S CLARK ST
SUITE 700
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
KISA P STHANKIYA
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

16IWCC0514

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

- ☐ 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)

MICHELENE SCHMIDT
Employee/Petitioner

v.

SENIOR SILVERADO LIVING
Employer/Respondent

Case # **15** WC **5244**

Consolidated cases: **14WC24891,15-5245**

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 **Falcioni**, Arbitrator of the Commission, in the city of **Rockford**, on **August 25, 2015**. 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 Injurious practice, prospective medical care

FINDINGS

On the date of accident, **January 30, 2015**, 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 **$21,840**; the average weekly wage was **$420.00**

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

ORDER

Petitioner failed to prove that she sustained an accident which arose out of and in the course of her employment.

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

9/22/15
Date

ICArbDec19(b)

SEP 29 2015

FACTS

Petitioner alleges the same set of facts for this case as stated in the case of 14 WC 24891. The specific injury that Petitioner is alleging for this accident is when she returned to work on January 30, 2015 and while working at the receptionist counter, a resident by the name of Maria approached her and held her hands together in hers pleading to contact her family. The Petitioner did not notify anyone at Respondent of this incident nor mention it to her treating doctor.

ISSUES AND CONCLUSIONS

Petitioner did not meet her burden of proof in establishing that she sustained an injury which arose out of and in the course of her employment as a result of the first incident on January 30, 2015 where she was grabbed by the hands by one of the residents. There is no need to rule on any further issues. Compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

☐ 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michelene Schmidt,

Petitioner,

vs.

NO: 15 WC 05245

Senior Silverado Living,

Respondent,

16IWCC0515

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical both incurred and prospective, notice, temporary total disability and penalties and fees 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 for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission finds that Petitioner is not entitled to penalties and fees pursuant to §19(k), 19(l) and §16. Petitioner was seen on June 14, 2015 at the Respondents request by Dr. Kevin Walsh. Although the Commission did not find his opinion as persuasive as that of Dr. Cummins, his opinions provided a reasonable basis for the Respondent to refuse temporary total disability and medical in regard to this date of accident. Although the Commission did not find their testimony as persuasive as the Petitioner's, Coleen Sheahan and David Maurer's testimony provided a reasonable basis for Respondent to dispute the accident on January 30, 2015.

All else is affirmed.

16IWCC0515

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $280.00 per week for a period of 27 1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,180.00 for medical expenses under §8(a) of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that 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.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,900.00. 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: AUG 3 - 2016

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

HSF
O: 7/13/16
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHMIDT, MICHELENE
Employee/Petitioner

Case# **15WC005245**

14WC024891
15WC005244

SENIOR SILVARDO LIVING
Employer/Respondent

16IWCC0515

On 9/29/2015, 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 0.10% 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:

1980 LAW OFFICES OF STEVEN J TENZER
20 S CLARK ST
SUITE 700
CHICAGO, IL 60603

0507 RUSIN & MACIOROWSKI LTD
KISA P STHANKIYA
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

16IWCC0515

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MICHELENE SCHMIDT
Employee/Petitioner

v.

SENIOR SILVERADO LIVING
Employer/Respondent

Case # **15** WC **5245**

Consolidated cases: **14WC24891,15-5244**

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 **Falcioni**, Arbitrator of the Commission, in the city of **Rockford**, on **August 25, 2015**. 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. [x] 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. [x] Was timely notice of the accident given to Respondent?
F. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [x] Other Injurious practice, prospective medical care

FINDINGS

On the date of accident, **January 30, 2015**, 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 **$21,840**; the average weekly wage was **$420.00**

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

ORDER

Respondent shall pay reasonable and necessary medical services of an additional $2180.00, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $280.00/week for 27 1/7 weeks, commencing 1-31-15 through 8-25-15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 2-11-15 through 8-25-15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay to Petitioner penalties of **$1868.00**, as provided in Section 16 of the Act; **$4670.00**, as provided in Section 19(k) of the Act; and **$5190.00**, as provided in Section 19(l) of the Act.

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

9/22/15
Date

ICArbDec19(b)

SEP 29 2015

FACTS

The Arbitrator notes the facts and finding contained in the decision issued in 14 WC 24891 and incorporates them by reference thereto herein as the facts in this last accident, on January 30, 2015.

ISSUES AND CONCLUSIONS

ACCIDENT

The Petitioner testified that when she had returned to work on January 30, 2015, the person who was training her, Melody, had gone on a lunch break. It was at that time that Petitioner went to the rear door to let someone in and when she returned to her station, a resident had taken up her seat and grabbed her arms up in a jerking motion, reinjuring her right shoulder. The first medical care that she received was the next available appointment with Dr. Cummins, who she was still seeing from her original injury on March 18, 2014. That was on February 11, 2015. She gave a history at that time which is consistent with her testimony. The notes indicate: "Patient works at assisted living facility with dementia patients. On her first day back to work with restrictions she had a patient grab her arms and pull on them. This happened 1 ½ weeks ago. This caused her to wake up with returned pain in the right shoulder." (Pet. Ex. #2, p. 4). The Petitioner testified in a credible manner and her testimony is unrebutted. Based on this evidence and the record as a whole, the Arbitrator finds that Petitioner sustained an accident arsing out of and in the course of her employment with Respondent as alleged herein on January 30,2015.

NOTICE

The January 30, 2015 accident occurred on a Friday. The Petitioner testified that she called on that Sunday night to the Respondent and left a message with the receptionist that she was in too much pain and would not be able to come in on the next day, which was Monday. When Monday came around, Petitioner continued to testify that she notified Colleen Sheahen about the injury in a telephone call. Ms. Sheahen was present at the hearing and she confirmed Petitioner's testimony that they did, in fact have a conversation on that Monday whereupon the Petitioner notified her of the new injury. The Petitioner has satisfied the notice requirement.

CAUSAL CONNECTION

The Petitioner testified that her condition had been improving after her last visit with Dr. Cummins in January, 2015, just prior to her return to work on January 30, 2015. The doctor notes confirm her improved condition where he indicated "The patient is progressing appropriately" and clearing her for light duty (Pet. Ex. #2, p.7). The first visit after her January 30, 2015 injury, a history was taken that was consistent with the Petitioner's testimony, "first day back at work with restrictions she had a patient grab her arms and pull on them" (Id. p. 4). She was assessed with a complete rupture of rotator cuff which was then confirmed by the subsequent MRI taken on March 4, 2015 (Id. p. 25). There is no evidence of any other injuries or activities that caused this recurrent tear. Dr. Walsh, who did confirm the recurrent tear, opined that recurrent tears are common in those who have had previous tears and again, the mechanism of lifting of the arms would not cause the recurrent tear. Given the chronological connection between the alleged injury and immediate onset of symptoms, the Arbitrator can do ought other than find that Petitioner has met her burden of proof relative to causal connection between said accident and her recurrent shoulder rotator cuff tear.

MEDICAL

Subsequent to her January 30, 2015 injury, the Petitioner sought attention with her treating doctor immediately. The soonest she could get in was February 11, 2015. Another MRI was prescribed which confirmed the new rotator cuff tear and surgery has been prescribed as of the last visit on March 6, 2015 (Id. p. 2). Ms. Schmidt has been to see Dr. Cummins twice since her January 30, 2015 accident and incurred bills in the amount of $380 from him as well as $1800 for the additional MRI, for a total of $2180.00 that is still due and not paid by Respondent. Based n the above findings regarding Accidnet notice and causal connection, the Arbitrator finds that services provided for which these bills were incurred are reasonable and necessary to cure or relieve the condition existing in Petitiner's shoulder and awards same pursuant to the medical fee schedule.

TTD

The Petitioner has testified that she has been unable to work since the January 30, 2015 accident. Dr. Cummins has confirmed that she has been unable to work and is in need of further surgery. Although Dr. Walsh opined that Ms. Schmidt can return to work, his opinion is given little weight for reasons cited

above. Petitioner did not receive an off work slip from her treating physician until February 11, 2015, therefore . The Respondent shall pay TTD from February 11 2015 through the date of trial, August 25, 2015, or 27-1/7 weeks at a TTD rate of $280.

PENALTIES

The treatment by Dr. Cummins of the Petitioner confirms that she was reinjured on January 30, 2015. His records (Pet. Ex. #2) along with the second MRI support the Petitioner's testimony of how she was reinjured. Respondent denies that Petitioner was injured the way she testified, but there is no evidence in the record which even implies that she was injured any other way. Respondent has attempted to use the opinion of Dr. Walsh in support of its position, but even he did not offer any further explanation for her recurrent tear other than it is known to happen to those who experience the first tear (Resp. Ex. #4). Dr. Cummins has had her off of work since the first visit after her injury and bills of his two visits along with the bill for the MRI, totaling $2180.00 still remain due. Respondent has refused to pay. Petitioner has been unable to work from January 31, 2015 until the trial date of August 25, 2015 and ongoing and again, the Respondent refuses to pay. Petitioner has filed its Petition for Penalties and Respondent has not filed any response or requested any time to do so. It is clear that its behavior is unreasonable and vexatious. As there is no defense to Petitioner's Petition, penalties are awarded. Pursuant to Section 19(k), the Respondent is determined to have acted in an unreasonable and vexatious manner in delay of payment of both medical bills and TTD. The amount of the medical due from this injury is $2180 and the amount of TTD due is $7160.00 (29 4/7 weeks) for a total of $9340.00. Section 19(k) allows for 50% of the amount due to be awarded as a penalty. Therefore, Petitioner is awarded an additional amount of $4670.00 pursuant to Section 19(k). Section 19(l) allows for penalty of $30 per day for each day Respondent fails to pay necessary medical under Section 8(a) and TTD under 8(b). From the last date of treatment on March 6, 2015 until the date of trial on August 25, 2015, 173 days have passed. At $30 per day, total 19(l) penalty comes to $5190. Pursuant to Section 16, the penalty awarded due to the unreasonable and vexatious delay of nonpayment of medical bills and TTD ($9340) shall be 20% of the unpaid amounts of medical bills and TTD for a total of $1868.

INJURIOUS PRACTICE

There was no testimony from either the Petitioner or either of the Respondent's witnesses that the Petitioner engaged in any form of activities that were injurious to her medical condition. A review of the evidence submitted by both parties fails to reveal any injurious activity either. Since there is not proof or suggestion that Petitioner injured herself in any manner other than how she testified, the Respondent's claim for such behavior this is denied.

PROSPECTIVE MEDICAL

The Petitioner's testimony is credible and supported by the medical. Her two visits to Dr. Cummins subsequent to her January 30, 2015 work accident indicates that she tore her rotator cuff again as a result of being pulled by a resident (Pet. Ex. #2, pp. 4, 2). Her MRI substantiates this condition (Id. p. 28). His recommendation is that she undergo surgery for the tear. Petitioner has not undergone the surgery because Respondent has not approved it. Respondent is ordered to authorize the surgery of Petitioner's shoulder as Dr. Cummins has prescribed and consistent with the overwhelming evidence in this case.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☒ 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

Kim Ballard,

Petitioner,

vs. NO. 15WC 10818

16IWCC0496

Ameren IL

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19b having been filed by the parties herein and proper notice given, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses, prospective medical care, penalties and fees, and evidentiary rulings, and being advised of the facts and law, 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. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 6, 2016 is hereby affirmed and adopted.

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.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $21,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUL 29 2016
SJM/sj
o-7/14/2016
44

Stephen J. Mathis

David L. Gore

Mario Basurto

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

BALLARD, KIM
Employee/Petitioner

Case# **15WC010818**

16IWCC0496

AMEREN IL
Employer/Respondent

On 1/6/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.50% 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:

5364 PATRICK JENNETTEN LAW OFFICE
4711 N PROSPECT RD
PEORIA, IL 61616

0080 WINNE LAW OFFICE LLC
JOE WINNE
416 MAIN ST SUITE 300
PEORIA, IL 61602

16IWCC0496

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

- ☐ 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)

Kim Ballard
Employee/Petitioner
v.
Ameren IL
Employer/Respondent

Case # **15** WC **10818**

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Bloomington**, on **October 28,2015 and Peoria on November 17, 2015**. 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

FINDINGS

On the date of accident, **February 9, 2015**, 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 **$86,700.52**; the average weekly wage was **$1,667.32**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$4,017.08** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$4,017.08**.

Respondent is entitled to a credit for all medical bills that have been paid as provided under Section 8(j) of the Act.

ORDER

Pursuant to a stipulation between the parties, the Respondent is entitled to a credit for all medical bills that have been submitted as provided in Section 8(j) of the Act. The Petitioner is entitled to reimbursement of out-of-pocket expenses paid in the amount of $1,510.94.

Respondent shall pay Petitioner temporary total disability benefits of **$1111.55**/week for **20 3/7** weeks, commencing **2/9/15** through **3/9/15**, **3/16/115**, **4/3/15** through **4/24/15**, and **7/14/15** through **10/15/15**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of **$555.78**/week for **1 1/7** weeks, commencing **3/10/15** through **3/13/15** and **3/17/15** through **3/20/15**, as provided in Section 8(a) of the Act.

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

December 29, 2015
Date

JAN 6 - 2016

FACTS:

On February 9, 2015, Petitioner was in Orland, Florida, attending a conference on behalf of her employer. But for the industry conference, Petitioner would not have been in Orlando, Florida on February 9, 2015. Petitioner was walking into the lobby of the hotel on the evening of the start of the conference when she slipped in water by the entryway. The Petitioner remembers stepping onto a polished marble floor, when she slipped due to water on the marble. Petitioner testified the floor was very slippery, and she fell landing very hard on her left wrist. The videotape of the incident depicts the Petitioner walking into the hotel, stepping off an entry rug onto a tile floor, when she immediately slipped falling on her left side. (Px. 8).

Petitioner was taken via ambulance to Florida Hospital Celebration where she was diagnosed with a distal radius fracture of the left wrist. (Px. 6). Petitioner went to Indiana Hand Center, where she had previously treated for left wrist problems, for evaluation of her left wrist. Petitioner treated with Dr. Peck who diagnosed her with a left distal radius fracture on February 10, 2015. Dr. Peck recommended surgical repair for the Petitioner's condition. (Px. 7).

Dr. Peck performed surgery on February 12, 2015, at Indiana University Health Methodist Hospital. Surgery performed included open reduction and internal fixation of the left distal radius fracture, including placement of K-wires and an Acu-Loc standard distal radius plate. Petitioner's post-operative diagnosis remained left distal radius intra-articular fracture. (Px. 8).

Petitioner followed with Dr. Peck on March 3, 2015, where she continued to complain of left wrist pain, with range of motion limited due to moderate swelling. Petitioner was told to follow up in three weeks. Handwritten notes from March 17, 2015, from Dr. Peck reveal the Petitioner had continued pain in the wrist, as well as mild pain over the FCR and mild pain over the distal radioulnar joint (DRUJ). Petitioner's follow up on March 24, 2015, showed continuing pain. On April 14, 2015, Dr. Peck noted continued pain, including pain over the distal radial ulnar joint. Dr. Peck noted instability in the distal radial ulnar joint.

Petitioner sought a second opinion with Dr. Alex Meyers on April 6, 2015, at Reconstructive Hand to Shoulder of Indiana. Dr. Meyers noted Petitioner had surgery for a distal radiounlar stabilization procedure in 2006, with a recent injury in February of 2015. Since that time, Petitioner's distal radioulnar joint (DRUJ) had become more and more painful. Physical examination revealed pain consistent with Petitioner's DRUJ dislocation. Dr. Meyers reviewed an x-ray which revealed dorsal displacement. Dr. Meyers indicated time was needed to recover, however, multiple surgical procedures were an option including a prosthesis. Dr. Myers diagnosed a dislocation of the distal radioulnar joint. (Rx. 25).

Petitioner sought a third opinion with Dr. Timothy Dicke at OrthoIndy on April 13, 2015. Dr. Dicke took a history of Petitioner having a previous open repair of the left wrist triangular fibrocartilage/DRUJ in 2006. Petitioner had mild grade chronic pain at the ulnar wrist, with symptoms aggravated with an acute injury to the left wrist with a fall on February 9, 2015. Petitioner had surgical fixation for her left distal radius fracture, but had increased pain at the left ulnar wrist with restricted supination. Dr. Dicke reviewed x-rays of the left wrist from January of 2015 with x-rays

since her recent wrist fracture, which he felt showed a dissociation of the radioulnar joint (DRUJ) compared to previous x-rays. Dr. Dicke diagnosed distal radioulnar joint sprain and instability of the wrist. Dr. Dicke opined the distal radioulnar joint/arthrosis was exacerbated after the distal radial fracture. Dr. Dicke felt Petitioner could improve over time, however, if symptoms persisted surgery could be warranted. Petitioner had an appointment again with Dr. Dicke on May 26, 2015, with continued diagnosis of DRUJ sprain and instability of the wrist joint. Dr. Dicke recommended surgery, with Petitioner noted as a candidate for the Sheker implant based on her history, which was offered as first choice of surgical intervention in his opinion. (Px. 8).

Petitioner was referred by Dr. Peck on May 26, 2015, to Dr. Kleinman within the Indiana Hand to Shoulder Center due to continued pain in the distal radial ulnar joint (DRUJ). Dr. Peck noted the DRUJ continued to be unstable on the left side. Dr. Kleinman saw Petitioner on May 27, 2015. He noted the history of TFC repair he performed nine years earlier, with the recent history of a fall while working in February. Dr. Kleinman diagnosed significant degenerative changes of the distal radial ulnar joint, marked ulnar plus variance, with lunate evidence of ulnocarpal abutment syndrome. Dr. Kleinman recommended surgery to the left wrist with a Scheker distal radial ulnar joint arthroplasty due to her work-related incident. Dr. Kleinman wanted to schedule surgery once the workers' compensation carrier accepted liability for the work-related accident. (Px. 7).

Petitioner underwent surgery by Dr. Kleinman on July 14, 2015, for left distal radial ulnar joint instability with arthrosis, with a procedure performed with a left Scheker DRUJ arthroplasty and removal of the left distal radius hardware. (Px. 10). Petitioner testified that she was off work following the surgery through October 15, 2015 when she returned to one handed work.

Petitioner testified that she currently continues to experience pain in her left wrist, as well as difficulty lifting, and that she wants to continue to treat with Dr. Kleinman.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

Petitioner was attending a conference in Orlando, Florida, on behalf of her employer. Petitioner was away from home attending work, therefore she was a "traveling employee" as set forth in the Act and defined by the Illinois Courts. Petitioner competently testified to her fall on a wet floor in the lobby of the hotel where she was staying, which is confirmed by the video placed into evidence. Slipping on a wet floor has been deemed an accident that arises out of and in the course of employment. The Arbitrator finds that the Petitioner sustained an accident arising out of and in the course of her employment with the Respondent.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

The Petitioner suffered from a distal radius facture of the left wrist as a result of the fall on February 9, 2015. Her resulting medical care, including surgery with Dr. Peck and resulting therapy, were reasonable and necessary as a result of the fall.

The disputed issue raised by Respondent is whether or not the distal radial ulnar joint (DRUJ) condition is causally related to the fall. Respondent relies upon the opinions of Dr. Rotman.

Dr. Rotman refused to diagnose the Petitioner with distal radial ulnar joint disorder. Dr. Rotman refused to find a dissociation or dislocation of the distal radial ulnar joint, and Dr. Rotman noted that if Petitioner truly had a disassociated or dislocated joint then a plate and prosthesis would be appropriate (Rx. 21, p. 37). Dr. Rotman acknowledged that he had a completely different diagnosis than Dr. Dicke or Dr. Kleinman (Rx. 21, pp. 38-9). Dr. Rotman acknowledged that a fall such as that suffered by Petitioner could aggravate a condition of the distal radial ulnar joint; however, Dr. Rotman did not believe the Petitioner suffered from a condition requiring a Scheker implant in the left wrist. Dr. Rotman agreed that he reviewed the same x-rays as Dr. Dicke, however, he had a very different review of the x-rays. (Rx. 21, p. 49). Dr. Rotman agreed that a dislocation or a dissociation of the distal radial ulnar joint would be consistent with a fall, and further would give reason for a Sheker implant in the wrist. (Rx. 21, p. 50).

The Petitioner was seen by Dr. Peck who diagnosed an unstable DRUJ (Px. 7), Dr. Myers who diagnosed a dislocation of the DRUJ (Rx. 25), Dr. Dicke who diagnosed a dissociation of the DRUJ (Px. 8), and Dr. Kleinman who diagnosed significant degenerative changes of the distal radial ulnar joint (Px. 8). Dr. Rotman stands alone, despite the opinions of four treating orthopedic hand surgeons, in finding the Petitioner had no significant problem of the DRUJ requiring surgical intervention. Dr. Rotman's opinions are further diminished by the very fact the Petitioner had a wrist arthrosis procedure in the form of a Scheker implant, a procedure that Dr. Rotman did not believe was reasonable or necessary.

The Arbitrator finds the opinions of Dr. Kleinman persuasive, and adopts his opinion that the Petitioner's DRUJ condition was casually related to the fall. Dr. Rotman agreed a fall could have aggravated such a condition, but refused to acknowledge the Petitioner suffered a significant problem with the DRUJ.

The Arbitrator finds the Petitioner's condition of DRUJ problems, whether significant changes as diagnosed by Dr. Kleinman, or dissociation or dislocation as diagnosed by Dr. Myers and Dr. Dicke, are causally related to the fall. The Arbitrator declines to substitute Dr. Rotman's opinions for that of four other orthopedic hand surgeons. The subsequent medical treatment and care is determined as reasonable and necessary, including surgical intervention with a Scheker implant, to treat the DRUJ problem in the Petitioner's left wrist.

In Support of the Arbitrator's Decision relating to (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, and (N.), Is Respondent due any credit, the Arbitrator finds and concludes as follows:

Petitioner has received reasonable and necessary medical treatment and care as outlined in the exhibits. Per the stipulation of the parties, the Respondent has paid all applicable medical bills under a self-insured policy of group health insurance and is entailed to a credit for those payments subject to Section 8(j) of the Act. The Arbitrator finds that the Petitioner's medical treatment and care outlined in the exhibits are reasonable and necessary as a result of the February 9, 2015, work accident. Per the stipulation of the parties, the Respondent is thus responsible for outstanding out-of-pocket expenses incurred by the Petitioner's out of pocket expenses totaling $1,510.94 as outlined in Px.13.

In Support of the Arbitrator's Decision relating to (K.), Is Petitioner entitled to any prospective medical care, the Arbitrator finds and concludes as follows:

The Petitioner is continuing to treat with Dr. Kleinman, and has not reached a point of maximum medical improvement. Respondent is responsible for ongoing medical treatment and care as it relates to the Petitioner's left wrist.

In Support of the Arbitrator's Decision relating to (L.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The evidence shows the Petitioner is entitled to temporary total disability benefits from February 9, 2015 through March 9, 2015, March 16, 2015, April 3, 2015 through April 24, 2015, and July 14, 2015 through October 15, 2015, representing 20 3/7 weeks. The Petitioner is also entitled to temporary partial disability benefits from March 10, 2015, through March 13, 2015 and March 17, 2015 through March 20, 2015, with Petitioner working half days during this time period over a period of 1 1/7 weeks. Petitioner is entitled to benefits in the amount of $22,707.38 in TTD benefits and $1,270.34 in TPD benefits. Respondent is entitled to a credit of $4,017.08 in TTD benefits paid.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

Chris Fry, claims adjuster with Corporate Claims Management, testified on behalf of the Respondent. Mr. Fry testified that he was the adjuster assigned to the Petitioner's case and that the case was initially accepted and medical treatment with Dr. Peck, including surgery, was authorized. Mr. Fry testified that the Petitioner's case was not denied until March of 2015, and that denial letters were issued after March 27, 2015. Mr. Fry testified that the Petitioner's case was denied starting at the end of March of 2015 based upon her refusal to see Dr. Moody for an examination as requested by the Respondent. The Petitioner testified that she did refuse to see Dr. Moody because when she went for her examination she was asked to sign a consent for treatment form which she refused to

do. Mr. Fry testified that the Petitioner's claim was also denied due to "numerous red flags" which were discovered during the investigation of the claim, including a suspicion that the Petitioner may have been intoxicated at the time of her injury.

While the Arbitrator specifically finds that there was no credible evidence admitted into the record from which to conclude that the Petitioner was intoxicated at the time of her injury, the Arbitrator declines to find that the Respondent's failure or refusal to pay benefits in the instant case was objectively unreasonable given the totality of the circumstances surrounding the Petitioner's accident and her course of medical treatment and the opinions of Dr. Rotman. Thus, the Arbitrator declines to award any penalties or fees in the instant matter.

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

Michael Neubauer

Petitioner,

vs. NO. 15WC 21469

Orland Fire Protection District

16IWCC0566

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, causal connection, prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 4, 2016 is hereby affirmed and adopted.

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.

No bond is required for removal of this cause to the Circuit Court. 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: AUG 30 2016
SJM/sj
o-8/25/16
44

Stephen J. Mathis

Mario Basurto

David L. Gore

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

NEUBAUER, MICHAEL
Employee/Petitioner

Case# **15WC021469**

ORLAND FIRE PROTECTION DISTRICT
Employer/Respondent

16IWCC0566

On 2/4/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.46% 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:

4128 RUBENS AND KRESS
FRANK D KRESS
134 N LASALLE ST SUITE 444
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS LTD
G STEVEN MURDOCK
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)SS.

COUNTY OF Cook)

16IWCC0566

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael Neubauer,
Employee/Petitioner

v.

Orland Fire Protection District,
Employer/Respondent

Case # **15** WC **21469**

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 **Kurt Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **11-06-15**. 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. [x] 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. [x] 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. [x] 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 _____

16IWCC0566

FINDINGS

On the date of accident, **08-06-14**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$74,000.00**; the average weekly wage was **$1,423.08**.

On the date of accident, Petitioner was **26** years of age, ***married*** with **2** dependent children.

Respondent ***has*** paid all reasonable and necessary 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 claims of Petitioner are denied on the basis that the arbitrator finds that Petitioner has failed to prove that he was involved in an accident that arose out of his employment with Respondent. The arbitrator also finds that Petitioner failed to prove that a medical causal connection exists between the condition of ill-being and the alleged work accident. (See the Addendum to Arbitration Decision attached hereto and incorporated into this Arbitration 19(b) Decision.

For that reason, the Arbitrator does not award past, present or future medical benefits be paid by Respondent to or on behalf of Petitioner for the Petitioner's right knee condition as it pertains to the alleged accident of August 6, 2014 and hereby dismisses this claim.

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

02-03-16
Date

ICArbDec19(b)

FEB 4 - 2016

16IWCC0566

RE: Michael Neubauer vs. Orland Fire Protection District 15 WC 21469

ADDENDUM TO ARBITRATION 19(b) DECISION

FINDING OF FACTS

It was stipulated by the parties that on August 6, 2014 the petitioner, a 26--year-old, who was married with two dependent children and who was earning $1,423.08 per week, was an employee of the respondent, Orland Fire Protection District. Although the respondent denies that an accident occurred that day involving the petitioner and arising out of and in the course of his employment, the respondent admits it received timely notice of the alleged accident within the provisions of the Act, and the parties agree that the petitioner's initial medical bills were paid by the respondent up to March 13, 2015. The petitioner lost no time from work, so no TTD or TPD benefits have been claimed or paid.

This matter proceeded to trial on November 6, 2015 pursuant to Sections 19(b) and 8(a) of the Act with the claimant seeking an award for payment of prospective medical expenses. The issues at the time of trial were whether the petitioner suffered an accident arising out of and in the course of his employment with the respondent on August 6, 2014 and whether the petitioner's condition of ill-being for which he seeks medical treatment is medically causally related to the work accident.

During the course of his testimony, the petitioner confirmed that he is currently employed by the respondent as a Firefighter/Paramedic and has been employed in that capacity with the respondent for the past three years. Prior to this, he was employed in a similar capacity for three years with the Rolling Meadows Fire Protection District.

On August 6, 2014, the petitioner, along with other employees, was engaged in EMS simulation training in Orland Park. The training session was scheduled to last approximately 45-60 minutes, during which time the employees were being trained on handling a victim in full respiratory arrest. While performing this training exercise in the morning hours of August 6, 2014, the petitioner recalls having to be in a crouched position to work on the "victim," who was on the floor, adding that he was in a crouched position for at least 15 minutes at the time. When he rose up from the crouched position, the petitioner felt a popping sensation and a sharp pain in his right knee. He had no prior problems or treatment for his right knee. The petitioner went on to complete the training exercises and worked the rest of the day. At approximately 3:40 p.m., he was evaluated per company protocol by South Cook County EMS, but refused treatment or transport for the same.

The petitioner instead presented at the request of his employer to Palos Community Hospital Primary Care Center at approximately 4:00 p.m. on August 6, 2014 for evaluation and treatment. (PX. 1) The records reflect a consistent description as to the onset of the petitioner's right knee pain stating that after being in a squatted position for 15 minutes, the petitioner rose and felt a pop and pain in the right knee. The records indicate that the petitioner had full range of motion

of the right knee, no swelling or edema, no tenderness and negative orthopedic testing of the right knee. An x-ray examination failed to reveal any acute fracture, dislocation or subluxation. The petitioner was diagnosed with a right knee strain and released from care with a full-duty release for work. (PX. 1) The petitioner testified that he has continued to work full-duty since August 6, 2014.

The petitioner testified that he called his primary care physician as instructed by the medical providers at Palos Community Hospital Primary Care Center to schedule a follow up appointment, but was told he should go to an occupational clinic if this was an industrial injury.

The petitioner, at the time of this alleged accident, resided in Beecher, Indiana, so he presented next to Working Well-Franciscan Hammond Clinic's Occupational Medical Clinic on the recommendation of his primary care physician. (PX. 2) The petitioner did not first present to this clinic until December 11, 2014 when he was examined by Dr. Patricia Young. The petitioner presented at that time with complaints of pain and weakness in the right knee, informing the doctor that while in a crouching position for approximately 30 minutes on August 6, 2014, his right knee gave out and he felt a "dagger -like" pain when he stood up. At the time of his examination with Dr. Young, the petitioner rated his pain 3/10. There is not noted positive findings on clinical examination, not even a reduced range of motion. Dr. Young diagnosed the petitioner with a sprained knee "currently appearing controlled." (PX. 2, p. 7) She recommended, however, an MRI scan of the right knee and released the petitioner to return to work without any restrictions in the interim.

The Petitioner went on two downhill skiing trips between December of 2014 and April of 2015. The first trip was a three day trip to Breckenridge, Colorado, where he skied approximately four hours each day on what he indicated were blue intermediate slopes. The second trip was to Boyne, Michigan for five days, but he testified that he only skied one of the five days. The record is unclear about the exact dates of these vacations.

On January 31, 2015 the petitioner presented to St. Margaret Mercy North in Hammond, Indiana, where the petitioner had his right knee MRI scan. According to the report, this scan revealed findings consistent with low grade chondromalacia of the patellofemoral joint. (PX. 2, p. 2)

The petitioner did not return to Dr. Young until March 13, 2015. (PX. 2, pp. 10-11) His history was unchanged, although he indicated he may have tweaked his knee recently while skiing. He complained that when the pain was present, he would get a sharp pain 10/10, and he complained that he experienced a lot of stiffness as well. Dr. Young noted that the MRI films failed to reveal any abnormalities and was normal. A clinical examination of the right knee was also normal. The diagnosis remained unchanged, and Dr. Young discharged the petitioner from care at MMI with a 0% PPI rating and released the petitioner to return to work without any restrictions. (PX. 2, p. 11)

The petitioner then presented on April 20, 2015 to Dr. Sherwin Ho at University of Chicago Medicine Orthopedic Surgery & Rehabilitation Medicine Department on referral from a family friend. (PX. 3) The petitioner presented as a new patient and provided a consistent history of accident. The petitioner reported recurrent symptoms, particularly any time that he has to squat

for a prolonged period of time and reported that the symptoms were increasing over last 2-3 months. He reported he had continued to perform his full and regular work duties without too many problems, but stated that when he has a "catching episode" it is quite painful. The petitioner reported being very active playing basketball, biking and skiing. On clinical examination, Dr. Ho noticed some tenderness to palpation along the lateral joint line of the right knee and a slight decrease in range of motion when compared to the other knee. He reviewed the MRI and diagnosed the petitioner with a hypermobile lateral meniscus. Dr. Ho indicated the petitioner described what appeared to be mechanical symptoms, and Dr. Ho believed the petitioner might have some chondral damage on the lateral side of the knee but that the underlying problem is likely a hypermobile lateral meniscus. Dr. Ho recommended a right knee diagnostic arthroscopy. The petitioner was released to return to work without any restrictions while they awaited authorization for surgery. (PX. 3) The petitioner testified that he has not returned to see Dr. Ho or see any other physicians

In a narrative report secured by the claimant's attorney and attached to Petitioner's Exhibit 3, Dr. Ho states that he believes the claimant's condition of ill-being in the right knee, diagnosed as "right knee pain with possible hypermobile meniscal tear," resulted from the claimant's squatting and lifting activity as described by the claimant and that surgery to explore the right knee and repair any tear is reasonable and necessary. (PX. 3) Petitioner has not had any physical therapy, injections or other conservative treatment for his right knee. Petitioner testified that generally day-to-day he has no issues with his right knee, but with certain movements and activities, he has an increase in his symptoms.

At the request of the respondent pursuant to Section 12 of the Act, Dr. Joseph Monaco examined the petitioner on May 21, 2015. (RX. 2) (The report is dated June 1, 2015.) In addition to his examination of the petitioner, Dr. Monaco reviewed the records from Palos Community Hospital Primary Care, Working Well, and Dr. Ho in addition to the right knee MRI report of January 31, 2015. At the time of the IME, the petitioner then stated that during the training on August 6, 2014, he was in a squatted position for 40-45 minutes and felt a sudden sharp pain in his right knee lasting 3-5 seconds when he stood up. The petitioner provided a consistent history of treatment and intermittent worsening of his symptoms with certain activities, adding that he had continued to ski the previous winter generally doing "okay." The petitioner also stated that he was still able to play basketball occasionally, but with sudden flexion would feel pain in the knee. (At trial, the petitioner stated that he had not been able to continue this particular activity following the alleged accident.) On examination, Dr. Monaco noted full range of motion, negative drawer signs, Lachman's test, Pivot-shift test and McMurray's test and no evidence of joint line tenderness or effusion. (RX. 2, p. 8) Dr. Monaco reviewed the MRI films and concluded this revealed findings consistent with normal appearing anterior and posterior cruciate ligaments, no evidence of bony edema or bruising, articular cartilage in generally good condition and no evidence of a meniscal tear or suspicions for a discoid meniscus. (RX. 2, p. 9) Dr. Monaco noted that his examination findings were very similar to those of Dr. Young back in December 2014 and that Dr. Monaco did not agree with the findings that Dr. Ho reported on the MRI films relative to articular cartilage changes. (RX. 2, p. 10) Dr. Monaco concluded that the claimant may have internal derangement of the right knee, but he was unable to relate this to the described work incident of August 6, 2014. Instead, Dr. Monaco believed that the medical records support that the petitioner may have had a strain of the right knee on the day in question

that was resolved when he saw Dr. Young approximately four months later. (RX. 2, p. 11) Dr. Monaco noted normal objective findings during his examination of the petitioner and did not believe that, based upon what was seen on the MRI films, the petitioner to be a candidate for the surgery recommended by Dr. Ho. (RX. 2, pp. 11-12). While a diagnostic arthroscopy may have some benefit, the need for it would not be related to the incident occurring at work on August 6, 2014. Dr. Monaco had some express concerns regarding the procedure suggested by Dr. Ho to include a micro fracture of the patella, when there is nothing to suggest any pathology involving the patella. (RX. 2, p. 12) Dr. Monaco concluded that he believed the petitioner had reached MMI for a right knee strain, that no further treatment was necessary and that there was no basis to restrict the petitioner's activities. (RX. 2, p. 13).

CONCLUSIONS OF LAW

With respect to the Arbitrator's Decision on the issue of: C. Whether the petitioner was involved in an accident arising out of and in the course of his employment on August 6, 2014, the Arbitrator finds as follows:

In order to find a claim for workers' compensation benefits to be awarded, the Illinois Workers' Compensation Commission is required to receive evidence that proves by a preponderance of the evidence that the described accident arose out of and in the course of the petitioner's employment with the respondent. It is the burden of the petitioner to prove by a preponderance of the evidence all elements of his claim that are in dispute, which in this case includes accident and medical causal connection.

The alleged accident can be summarized quite succinctly as follows: On August 6, 2014 the petitioner and other employees of the respondent were performing a training exercise. During the training exercise, the petitioner was squatting anywhere from 15-45 minutes from the history and testimony he provided. At some point during the training, as he arose from a squat position, he felt a pain in his right knee. He completed the training exercise and his work for the day. The arbitrator finds that this does not meet the burden of proving by a preponderance of the evidence an accident arising out of the petitioner's employment with the respondent. The arbitrator finds that the incident in question did occur in the course of the employment because it was an employer sanctioned training conducted during regular work hours and at the employer's training facility.

In order for an accident to arise out of the employment, it is essential that the petitioner show that he was exposed to a risk greater than that of the general public such that the employment activity was the proximate cause of the accident and resulting injury. In this case, the "activity" was the training exercise and the "risk" was the squatting performed by the petitioner during that training. The exact amount of time the petitioner had been in a squatted position before he stood up is not clear. In his initial medical history and even in his testimony, he stated he was squatting for about 15 minutes when he stood up and felt a pain and popping sensation in his right knee. There is no evidence that he was lifting any equipment at the time or wearing any special equipment or gear, but simply that he stood up from a squatting position and felt a pain and pop in his right knee.

Somewhat analogous to this fact pattern is the fact pattern in *Bryan Steidinger v. Forrest Redi-Mix No.*, 12 W.C. 16806, No. 14 I.W.C.C. 0928 October 28, 2014. Petitioner testified that on April 21, 2011, around 2:10 pm, a break time, he crawled out from underneath a trailer on which he was working. As he stood up from a kneeling to standing position, he heard and felt his right knee "pop." Petitioner testified that he then stood there for a while, was unable to walk at first, then walked to the break table and sat down. Petitioner testified he informed his employer that something had happened to his knee, and he finished working the rest of his shift, which ended at 3:30 p.m. The Commission reversed the Arbitrator's Decision and found that the petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with the respondent.

In another case, *Hansel & Gretel Day Care Center v. The Industrial Commission et al. (Susan A. Calvert, Appellee),* 215 Ill.App.3d 284, 574 N.E.2d 1244, 158 Ill.Dec. 851 (Third Dist. 1991). The claimant testified that at on January 3, 1984 she attended a staff meeting. The claimant sat at a short children's table with her legs under the table and in a chair used by small children. When she stood up, she turned her legs to the right side and lowered them a little to get them from under the table and in a position such that they were away from the table. As she stood up, she felt a sharp pain in her right knee, and could not stand up all the way. The right knee remained flexed, and as she attempted to straighten it, she felt a "catching." She remained seated and a little while later tried again to stand, but the pain was still there and the right knee still felt like it was caught. She could not straighten the right leg. Finally, with her right knee in the bent position, she "hopped" over to awaken her pupils from their nap. She continued to work that day.

It was determined by the court that the claimant has not established that she was exposed to a risk not common to the general public. The finding was due in part on the basis that the claimant had a prior history of problems with her knee and that this locking could have happened at another time as is had in the past outside of work. But regardless, the court did not find that the act of sitting in a child's chair during a meeting to be an increased risk to which the claimant was exposed as the result of her employment duties. Finally, it appears from Dr. Ho's records that Petitioner could have a hypermobile lateral meniscus, but there was no evidence that the event caused the meniscus to become hypermobile; only that the pain symptoms were reproducible upon squatting. As a result, it seems more likely that the Petitioner's hypermobile meniscus pre-existing and not caused by the squatting at work.

As in the present case, there is nothing specific about the employment activities of the petitioner that seem to have placed him at a greater risk than the general public for an injury to his right knee. The claimant was in a squatted position for some time between 15 and 45 minutes, he was not quite sure, but the act of squatting for 15 minutes is not such that it is one to which the claimant was or is exposed to a greater degree than a member of the general public. The Arbitrator finds that the petitioner failed to prove that he was involved in an accident arising out of his employment for the respondent on August 6, 2014, and for that reason the arbitrator concludes that the claimant is not entitled to receive benefits under the Illinois Workers' Compensation Act for his alleged injuries resulting from the August 6, 2014 incident at work.

With regard to the Arbitrator's Decision pertaining to: **F. Whether the petitioner's condition of ill-being is medically causally related to the work accident**, the Arbitrator finds as follows:

The petitioner refused medical treatment after the August 6, 2014 incident at work as documented by EMS personnel. The petitioner continued to complete the training exercises and his shift for the day before going to Palos Community Hospital Primary Care facility later that afternoon. There he was diagnosed with a right knee strain after what appears to have been a completely normal clinical and x-ray examination of the right knee and released the petitioner to return to work without restrictions. The petitioner did not see a doctor again until December 11, 2014 when Dr. Patricia Young examined the petitioner's right knee and noted no positive clinical examination findings and diagnosed the claimant with a right knee sprain and released the petitioner to return to work without restrictions as well. She ordered an MRI, which on January 31, 2015, failed to reveal any abnormalities. Dr. Monaco, who examined the claimant at the request of the employer on May 21, 2015, also found no objective findings on clinical examination, concluded that the MRI was negative, and like Dr. Young diagnosed the petitioner with a right knees strain. Dr. Monaco concluded that the petitioner had reached MMI for a right knee strain by the time Dr. Young examined the petitioner in December 2014 and that he required no further medical treatment and no restrictions. The petitioner has continued to work full-duty since August 6, 2014.

The record reflects that the Petitioner knee condition became materially worse after downhill skiing.

It is only Dr. Ho, after examining the claimant on only one occasion in April 2015 after the petitioner had been on two ski trips, who found positive clinical examination findings and possible cartilage damage on review of the MRI films. Dr. Ho has not recommended any treatment aside from surgery.

It is the burden of the petitioner to show by a preponderance of the evidence all elements of his claim, including a medical causal relationship between the accident and the condition of ill-being. In this case, the petitioner has failed to meet that burden. The evidence clearly supports a finding that the petitioner sustained a strain or sprain of the right knee on August 6, 2014 as indicated in all of the treating medical records with the sole exception of Dr. Ho's single examination report. Dr. Ho's conclusions have no supporting foundation aside from his subjective clinical findings on examination. The MRI radiology report and the opinions of Dr. Monaco regarding the MRI films do not support Dr. Ho's opinions as to the nature of the injury caused by the August 6, 2014 incident.

The Arbitrator finds that as the result of the activity on August 6, 2014, the petitioner sustained a strain to his right knee and that condition was fully resolved at the time of the initial examination by Dr. Young on December 11, 2014. The arbitrator finds that there is not sufficient evidence to support a finding of causal connection between the condition diagnosed by Dr. Ho and the incident that occurred at the petitioner's place of employment on August 6, 2014 and therefore finds that there is no medical causal connection between the condition diagnosed and treatment recommended by Dr. Ho on April 20, 2015 and the work activity of August 6, 2014. For this reason, the arbitrator finds that the claimant is not entitled to any further medical benefits beyond what respondent has paid prior to the hearing in this case (RX. 4) and including, but not limited to, the prospective surgery that Dr. Ho has recommended.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

☐ 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

Matthew Weimer,

Petitioner,

16IWCC0547

vs.

NO: 15 WC 22795

Dream Builders,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, employment, medical expenses, temporary disability and being advised of the facts and law, changes 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.

As indicated above, this matter was arbitrated under §19(b) of the Act. The Arbitrator found that Petitioner failed to meet his burden of proving an employee-employer relationship. The Commission affirms that finding. However, in the "ORDER" section of the decision, the Arbitrator included the language that "in no instance shall this award be a bar to subsequent hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any." Because the claim was denied in its entirety, the matter will not be remanded for determination of any additional benefits and therefore the decision does bar subsequent awards. Therefore, the Commission strikes the above quoted language from the "ORDER" section of the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2015 is hereby affirmed and adopted with the changes noted above.

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.

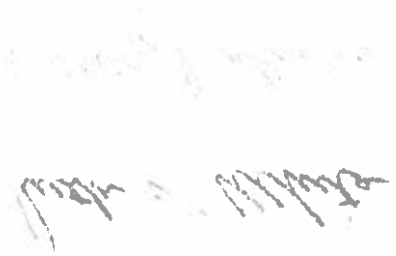
The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:
o8/15/16 AUG 25 2016
RWW/rm
46

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin



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

16IWCC0547

WEIMER, MATTHEW
Employee/Petitioner

Case# **15WC022795**

DREAM BUILDERS
Employer/Respondent

On 12/10/2015, 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 0.53% 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:

1937 TUGGLE SCHIRO & LICHTENBERGER
ROWAN E THEMER
510 N VERMILION ST
DANVILLE, IL 61832

0445 RODDY LAW LTD
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16IWCC0547

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MATTHEW WEIMER,
Employee/Petitioner

v.

DREAM BUILDERS,
Employer/Respondent

Case # **15** WC **22795**

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Urbana**, on **11/16/15**. 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. [x] Was there an employee-employer relationship?
C. [x] 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] 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. [x] 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. [x] Is Petitioner entitled to any prospective medical care?
L. [x] 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 _____

FINDINGS

On the date of accident, **5/6/15**, 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.

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

On the date of accident, Petitioner was **31** years of age, ***single*** with **2** dependent children.

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

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that an employee-employer relationship existed between petitioner and respondent on 5/6/15. Petitioner's claim for compensation is denied.

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

5/4/15
Date

ICArbDec19(b)

DEC 10 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 31 year old laborer, alleges he sustained an accidental injury to his left foot and left arm that arose out of and in the course of his employment by respondent on 5/6/15. The primary issue in this case is whether or not an employer/employee relationship existed between respondent and petitioner on 5/6/15. Dream Builders is a company that performs a vast array of construction type jobs.

It is unrebutted that petitioner had previously worked for respondent from 2007-2009, and during that period an employer/employee relationship existed, he was on the payroll, and respondent paid petitioner with a paycheck. Petitioner testified that he left his employment with respondent in 2009 for a better paying job. Petitioner offered into evidence 17 payroll checks he received from respondent when he was an employee of respondent's from 2007-2009. Petitioner testified that these were the only stubs he could find. At that time petitioner was paid $12 an hour. Between 2009 and July 2014 petitioner worked other jobs, including construction and landscaping, and was always paid in cash for the jobs he did.

Petitioner testified that he returned to work with respondent in July 2014. He testified that the work he did for respondent from July 2014 through 5/6/15 was the same as that he did from 2007-2009. Petitioner testified that since returning in July 2014 he was paid in cash. He testified that he was paid $15 an hour, and kept a log of the hours he worked each week. Petitioner testified that each Friday he would let Phil Cook, owner of Dream Builders, know how many hours he worked and then he would be paid in cash. Petitioner never received a W-2 or 1099 from Dream Builders. Cook testified that he does not issue W-2s for independent contractors. He also testified that he does issue 1099s for all work that was paid by check.

Cook testified that when petitioner came back to work for him in July of 2014 he and petitioner had a discussion. Cook testified that since petitioner had come from a job where he worked prevailing wage, he told him that if he put him on the payroll as an employee his wage would be too low because many deductions would need to be taken out of his check. Cook testified that he and petitioner discussed this and both agreed that petitioner would work for him as an independent contractor and be paid in cash, thus allowing him to earn more money. Petitioner admitted that he had random conversations on work sites with Cook about his employment status with the company, but was did not lay a proper foundation to identify the specifics of these conversations.

Cook testified that during one week in October of 2014 and November of 2014 he had a city job to complete. Since this job required prevailing wage he hired petitioner as an employee for these two weeks

and paid him the prevailing wage for the work he did on this job. Petitioner was issued pay stubs dated 10/3/14 and 11/14/14. At no other time from July 2014 through the date of injury was petitioner ever again paid with a check. Cook testified that he and petitioner agreed that he would only be an employee for the city job, and remain an independent contractor for all other work from July 2014 through 5/6/15. Petitioner agreed that he was only on respondent's payroll for these two pay periods. Petitioner worked 20 hours for the pay period 9/27/14-10/3/14 and earned $560.00. For the period 11/8/14-11/14/14 petitioner worked 38 hours and earned $1,624.00. Petitioner received a W-2 form from Dream Builders for 2014 that only included the gross pay of $1,624.00 for the period ending 11/14/14. It did not include the 20 hours worked from 9/27/14-10/3/14 in the gross amount of $560.00.

Petitioner testified that his work for respondent varied every day, and included such things as roofing, electrical work, concrete work, snow removal and cleaning up the shop. Petitioner testified that Cook told him what he was to do each day either the night before or via text message in the morning. Petitioner testified that he usually worked 40 hours a week.

Petitioner testified that he never signed an independent contractor agreement with respondent. He testified that he had his own hand tools and pouch, as well as his own hammer, tape measure, drill gun and 8 foot ladder. Petitioner testified that if additional tools were needed for the job he did not provide them. However, petitioner did not state what materials were provided by respondent on what jobs. He did not lay a proper foundation for this testimony. Petitioner testified that he could not come and go as he pleased, and was not free to do the work in any appropriate manner, but again did not lay a proper foundation to support testimony regarding when Cook prevented him from coming and going as he pleased, and when he was not free to do the work in any manner he felt was appropriate.

Petitioner made general comments with respect to Cook providing him with tools and materials, Cook directing the work to be done and the manner in which it had to be done, Cook directing when he was to be at work and when he could leave, and Cook coming to the job site and checking the job. However, when respondent presented a foundation objection, petitioner was did not lay a proper foundation with respect to any of this testimony.

Petitioner testified that he kept a job log book where he kept a log of the hours he worked each day. This log book contained only days of the week and months, and the petitioner would have to circle the correct month and enter the correct date of the month on each page. However, the actual calendar dates of the week that were entered were at times entered on the wrong day of the week, thus making the calendar dates of the week and the days of the week not match. Petitioner testified that this occurred

because his daughter entered some of the dates incorrectly. Petitioner also admitted some weeks he worked were left blank because he forgot to log his hours, and would just give Cook on Friday a list of the hours he worked that week. Petitioner also testified that in addition to logging his hours in the book, he would at times separately log the hours his brother worked. Petitioner testified that all entries after 5/6/15 were hours his brother Michael Weimer worked for respondent. Although petitioner began working for respondent in July of 2014 he did not begin logging his hours until 8/25/14. Additionally, petitioner would indicate some days he was off work or left work for various appointments. There were other off work notations that indicated that he did not work because of rain.

On 5/6/15 petitioner was working on a roofing job. He testified that he was contacted about the job by Cook on 5/5/15. Petitioner performed the roofing job on 5/6/15, and as he attempted to get off the roof using his own 8 foot ladder at the end of the day, about 5 pm, he fell 7-8 feet to the ground, injuring his left elbow and left foot. Petitioner testified that as he placed his foot on the top rung of his ladder, the ladder slipped on the gutter and he fell off the ladder to the ground. Following his injury petitioner called Cook on the phone.

Cook testified that on 5/6/15 he called petitioner and told him he had a roofing job that needed to be done. He told him it needed to be stripped and reshingled. Cook testified that petitioner told him he had some help he was going to bring. Cook testified that petitioner told him he was going to do the job with this help. Cook testified that he was not even on the job site on 5/6/15. Petitioner did not rebut that Cook was not even at the job site on 5/6/15. Cook testified that he did not state when the job was to completed, and did not set a start and end times each day, but that he and petitioner may have agreed to a start time. Cook testified that he did not schedule petitioner's breaks or lunchtime, and did not tell him what time to stop work. He also testified that he never told petitioner how to do the job.

Petitioner was taken to the emergency room at Passavant Area Hospital. He was examined and x-rays were taken. He was diagnosed with a left calcaneal fracture and radial head fracture. In the emergency room he was given Zofran, Morphine, Dilaudid, and Tramadol. He was discharged and given a prescription for Norco and Zofran.

On 5/11/15 petitioner returned to the emergency room at Passavant Area Hospital due to increasing pain. Petitioner was treated and discharged with a new prescription for Tramadol.

On 5/13/15 petitioner presented to Dr. Leutz, on a referral from the emergency room. Petitioner underwent x-rays of his left heel that showed a severely comminuted displaced and displaced calcaneal

fracture. X-rays of the left elbow revealed nondisplaced radial neck fracture impacted and in good alignment and good positioning. Following an examination and review of the x-rays Dr. Leutz assessed a heel fracture, radial neck fracture, and closed fracture of the calcaneous. Petitioner was placed in a boot and directed to be non-weightbearing. Dr. Leutz referred petitioner to Dr. Ben Stevens for surgical evaluation.

On 5/15/15 petitioner presented to Dr. Stevens for evaluation of his left calacaneous fracture after falling off a roof. He recommended an open reduction and internal fixation with allograft bone grafting. Dr. Stevens noted that petitioner was at a higher risk for wound breakdown, necrosis and ultimately amputation given his nicotine dependence.

On 5/20/15 petitioner underwent a left calcaneal open reduction and internal fixation and allograft bone grafting performed by Dr. Stevens. His post-operative diagnosis was left tongue-type calcaneous fracture and nicotine dependence. Petitioner followed-up post-operatively with Dr. Stevens. This treatment included physical therapy from 8/25/15 through 10/2/15.

Petitioner followed up post-operatively with Dr. Jonathan Rueter on 6/9/15 and 6/16/15 for surgical wound incision check. Following an examination on 6/16/15 Dr. Rueter was of the opinion that petitioner was stable. He removed the remaining stitches. Petitioner was instructed to work on range of motion of the tibiotalar, subtalar joint and toes.

On 6/22/15 petitioner followed-up with Dr. Leutz for his left radial head fracture. No swelling was noted of the left elbow joint. An x-ray of the left elbow showed a healing fracture of the radial neck nondisplaced with callus. An x-ray of the left heel showed a healed os calcis fracture with intact hardware. Left elbow joint stiffness was noted. Petitioner had no left elbow bone pain and no radicular pain on the outer side of the arm. Petitioner reported numbness of the left arm and hand.

On 7/17/15 Dr. Rueter noted that petitioner was tolerating his pain well. He noted that petitioner continued to be nonweightbearing. An xray of the left heel showed a healed os calcis fracture with intact hardware. Following his examination, Dr. Rueter was of the opinion that petitioner was stable 6 weeks post-operative. He continued petitioner nonweightbearing. Petitioner was instructed to return in 4 weeks.

On 7/30/15 petitioner's attorney, Rowan Themer drafted an email to respondent's attorney Mike Powalisz requesting temporary total disability benefits for his client.

On 8/21/15 Dr. Rueter progressed petitioner to weighbearing with therapy in the boot 30 pounds every three days. Petitioner was given a prescription for antiinflammatory medication.

On 10/2/15 petitioner most recently followed-up with Dr. Rueter. Petitioner noted that he was still having discomfort, and was progressing into a regular shoe. Petitioner was using a cane. A physical examination showed the left lower extremity was neurovascularly intact; that petitioner walked with an antalgic gait; the skin incision was well healed; moderate edema was noted; and there was subtalar motion with no crepitation, but some restriction that was improving. Dr. Rueter continued petitioner in physical therapy for 6 more weeks. He noted that petitioner had not yet reached maximum medical improvement. Petitioner's x-rays showed that everything was stable. Work restrictions were imposed. Petitioner was instructed to follow-up in 6 weeks for new films.

Petitioner testified that he had no problems with or treatment for his left foot or elbow before the injury on 5/6/15. He further testified that he had not sustained any new injuries to his left elbow or foot since the injury on 5/6/15. Petitioner testified that he had not been released to work and had not received any TTD. He testified that all medical had been paid through the state.

Petitioner testified that he is in pain everyday and walks with a cane. He stated that his normal routine has been turned upside down and he wants to continue treating.

Petitioner called his brother Michael Weimer and Joshua Weimer to testify on his behalf. Michael is petitioner's twin brother and started working with respondent in December of 2014. He testified that he found out about work the day before or on the day of the work. He usually found out about the work from Cook or the petitioner. He testified that he worked 100s of jobs for Cook, and worked full time Monday through Friday. Michael worked for respondent through the middle of July 2015. Michael also testified that did some jobs for Clegg Builders, but could not remember any specific jobs other than a deck he did at Clegg's house. He testified that he learned about the jobs from Cook. Michael said he was also paid by Cook. Michael also used his own tools that included hammers, tape measures, handsaw and drills. He testified that he did not use his own larger power tools. Michael testified that when he arrived at the roofing job on 5/6/15 the shingles were there.

Joshua Weimer testified that he started working with respondent in April of 2015. He testified that the roofing job on 5/6/15 was the second job he did with respondent. Prior to that day he worked one other roofing job. Since 5/6/15 he has worked on 5 or 6 other jobs with respondent. Joshua also used his own tools for the job including his hammer and knife. He also stated that the shingles were there on

5/6/15 when he arrived at the job site. Joshua never discussed his job status with Cook. He also testified that he never did any work for Clegg.

Riley Powell was called as a witness on behalf of petitioner. Powell is the younger brother of petitioner's girlfriend. Powell saw petitioner fall on 5/6/15. Powell testified that he worked for respondent before and after petitioner's injury on 5/6/15. Powell testified that when he worked with petitioner he did not use his tools. Powell could not recall when the roofing job started or how long it lasted. He testified that when he arrived at the job site he thinks the shingles were already there. Powell testified that the roofing job where petitioner was injured on 5/6/15 was on Sunset Dr. He testified that he believed there had been water leaking in the house and they did a little repair. He testified that they put rubber on the flat part of the roof and replaced a little of the siding. He could not recall who did the repair, but he was helping.

Cook testified that his business consists of general construction projects in residential and light commercial settings. Cook testified that the only job he hired petitioner as an employee for after July 2014 was the city job he performed 9/27/14-10/3/14 and 11/7/14-11/14/14 because it was a prevailing wage job and any workers who performed it had to be employees. Cook testified that petitioner knew these were the only two weeks he was an employee between July 2014 and 5/6/15, and that at all other times during this period he was an independent contractor. Cook testified that other than for this job he had no employees. Cook testified that he does not issue W-2s for independent contractors, and only issues 1099s for independent contractors if they are paid by company check. No 1099 was issued for those paid in cash. Other than for the prevailing wage job for the city, Cook testified that from July 2014 to 5/6/15 petitioner was only paid with cash. Cook testified that he only paid petitioner for the hours he worked. He also testified that if he was not happy with petitioner's work he could stop giving him work.

Respondent also called Arnold Clegg as a witness on its behalf. Clegg is a carpenter who works for himself. At one point he did have a company that is no longer in existence. Clegg testified that he hires other contractors to help him complete jobs. He testified that he works independently as a project manager and rounds up guys that want to help. He stated that he has helped Cook out on different jobs and Cook has helped him out on different jobs. Clegg testified that he has 10 other contractors that he works with.

Clegg testified that he knows petitioner and Cook told him petitioner did roofs. Clegg was not sure when petitioner last work with him, but thought it was may have been in the Spring of 2015. He noted that petitioner helped him quite a bit in 2014. He stated that in the summer of 2014 petitioner and his

brother Michael built a dog fence at his house. He testified that he paid petitioner for the job. Clegg further testified that petitioner helped with a concrete pouring job and roof repair at his brother's farm. Clegg testified that his brother paid him and he paid petitioner. Petitioner denied that he was ever paid for a job by Clegg. He testified that he was always paid by Cook.

B. WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP?

In determining whether an employee-employer relationship exists, the courts have looked at a number of factors including, the control the employer had over the manner in which the person performed his work; the method of payment; right to discharge the person; skill the work required; whether or not the employer withholds taxes from the person's pay; and whether or not the employer supplies the person with the materials and equipment to perform the various duties, with the employers control over the person usually being the factor that carries the most weight.

It is unrebutted that petitioner had previously worked for respondent from 2007-2009, and an employee-employer relationship existed at that time. During that period petitioner was paid by check and taxes were withheld by respondent. Thereafter, petitioner left his employment with respondent for a better paying job. Between 2009 and July of 2014 petitioner worked various other jobs and was always paid in cash.

In July of 2014 petitioner approached Cook about returning to work for him. Cook testified that when petitioner came back to work for him in July of 2014 he and petitioner had a discussion. Cook testified that he told him that if he put him on the payroll as an employee his wage would be too low because many deductions would need to be taken out of his check. Cook testified that he and petitioner discussed this and both agreed that petitioner would work for him as an independent contractor and be paid in cash, thus allowing him to earn more money. Petitioner admitted that he had random conversations on work sites with Cook about his employment status with the company, but did not lay a proper foundation to identify the specifics of these conversations.

Other than the two weeks Cook worked on a prevailing wage job for the city and was paid by check, petitioner was always paid in cash for the work he performed. Cook testified that in order to get the two week job for the city he had to pay prevailing wage. Cook testified that he and petitioner had a discussion regarding that specific job and it was decided that Cook would hire petitioner as an employee only for the two weeks he worked on the prevailing wage job with the city. He told petitioner that he would be paid by check for this job, and receive a W-2 at the end of the year for these two weeks worked as an employee.

Petitioner testified that Cook controlled the manner in which he performed his work. However, when a foundational objection was made and sustained, petitioner did not provide a proper foundation. Petitioner did not provide any specific instances where Cook controlled the manner in which he worked. In fact, when Cook contacted petitioner about the roofing job on 5/6/15, it was petitioner who told Cook that he had some help he was going to bring to perform the job. Additionally, it is unrebutted that Cook was not even present on 5/6/15, the day petitioner was working on the roof with his brothers and his girlfriend's brother. Other than testifying that Cook contacted him on 5/5/15 about the roofing job on 5/6/15, petitioner did not provide any credible evidence to support a finding that Cook directed the manner in which the roofing job on 5/6/15 was to be performed and what tools he was to use. In fact, petitioner testified that the only material Cook provided for the job was the shingles. He also testified that Cook was not even present on 5/6/15 and did not direct any break times or when the work should be completed. Petitioner was unable to lay the proper foundation for any other jobs where Cook controlled the manner in which the job was performed, or provided him with the materials or equipment needed. Cook did testify that he and petitioner may have agreed to a start time for the job on 5/6/15.

With respect to control, petitioner also testified that he would get a text message from Cook the day before, or the day of a job regarding the job. However, he did not lay a proper foundation for when Cook was at the job, directing the manner in which the work was performed, the tools Cook provided, or when he could take breaks or leave for the day.

Although petitioner testified at trial that Cook provided him with tools and materials, directed the manner in which the work should be done, and when it should be done, when he was faced with a foundational objection that was sustained, he did not provide any specific examples to support his claim. Additionally, petitioner testified that he had a log book where he kept a log of the hours he worked each week, and he would report those hours to Cook at the end of the week. Additionally, petitioner would log when he would be off work due to rain, doctor appointments, or for other reason not detailed in the log. There is no credible evidence to support a finding that Cook had any knowledge of the hours petitioner worked each day, or what time he took off each week, until petitioner provided him with that information each Friday. Based on this evidence, the arbitrator reasonably infers it was petitioner that kept track of the hours he worked and the work he did each week, and not Cook.

The arbitrator notes that the log petitioner kept was less than accurate in that the dates that were manually entered for each month often did not match the appropriate day of the week. Also, there were

many days where petitioner testified that he worked but forgot to log in the hours for that day, and would just recall it at the end of the week when he gave his hours to Cook.

With respect to the materials and equipment, including tools, petitioner testified that he had his own hand tools and pouch, as well as his own hammer, tape measure, drill gun and 8 foot ladder. He testified that if additional tools were needed for the job Cook would provide them. When respondent presented a foundational objection that was sustained, petitioner did not offer any specific job wherein Cook provided him with additional tools that he needed. Other than having the shingles at the job on 5/6/15, petitioner did not offer into evidence any other materials or equipment that Cook provided for the jobs he performed. Additionally, the arbitrator finds it significant that the ladder petitioner fell off when he was injured on 5/6/15 was his own ladder, and not provided by Cook.

Petitioner admitted that he was paid in cash for all work other than the two week prevailing wage job for the city. He admitted that he did not receive a W-2 or 1099 for the weeks he was paid cash.

With respect to discharging petitioner, Cook testified that if he did not like the work petitioner performed he would not give him any more jobs to perform, just like he would do with any other independent contractor.

The arbitrator notes that it is the petitioner that has the burden of proof, beyond a preponderance of the credible evidence to prove all elements of his claim. Based on the above, as well as the credible evidence, the arbitrator finds that with respect to this claim, the petitioner has failed by a preponderance of the credible evidence that an employee-employer relationship existed between him and respondent. The arbitrator finds that petitioner was unable to lay a proper foundation with respect to the various factors needed to prove an employee-employer relationship. The only specific job petitioner was able to lay a proper foundation for with respect to the factors needed to prove an employee-employer relationship was the job he performed on 5/6/15. The arbitrator finds that on that date petitioner decided who he would bring to help him with the job, decided when he and his workers would take breaks and end work for the day, decided the manner in which the work was performed that day, and provided the tools needed for the job, including the ladder he fell off. There is no credible evidence to support a finding that Cook was even present at the job site on 5/6/15, and as it relates to materials and equipment, only provided the shingles. The arbitrator further finds petitioner's memory lacking and his record keeping less than complete. Absent any other credible evidence on these factors, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that an employer-employee relationship existed between petitioner and respondent on 5/6/15.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?
F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
G. WHAT WERE PETITIONER'S EARNINGS?
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?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that an employee-employer relationship existed between petitioner and respondent on 5/16/15, the arbitrator finds these remaining issues moot.

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

Fidencio Rodriguez,
Petitioner,

vs.

NO: 15 WC 29769

Abc Plumbing Heating Cooling & Electric Inc,
Respondent,

16IWCC0564

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, medical, prospective medical, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 26, 2016, is hereby affirmed and adopted.

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 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.

AUG 30 2016

DATED:
O082516
DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

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

RODRIGUEZ, FIDENCIO
Employee/Petitioner

Case# **15WC029769**

ABC PLUMBING HEATING COOLING & ELECTRIC INC
Employer/Respondent

16IWCC0564

On 2/26/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.45% 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:

1067 ANKIN LAW OFFICE LLC
JOSHUA E RUDOLFI
162 W GRAND AVE
CHICAGO, IL 60654

1120 BRADY CONNOLLY & MASUDA PC
SURABHI SARASWAT
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

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

16IWCC0564

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

FIDENCIO RODRIGUEZ
Employee/Petitioner
v.
ABC PLUMBING HEATING COOLING & ELECTRIC, INC.
Employer/Respondent

Case # 15 WC 29769

16IWCC0564

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO**, on **DECEMBER 14, 2015 and JANUARY 14, 2016.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **prospective medical**

16IWCC0564

FINDINGS

On **9/2/15**, 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.

In the year preceding the injury, Petitioner earned **$46,800.00**; the average weekly wage was **$900.00**.

On the date of accident, Petitioner was **34** years of age, ***single*** with **1** dependent children.

Having found no accident occurred, the remaining disputed issues of notice, causal connection, liability for unpaid medical bills, temporary total disability and prospective medical care are **MOOT**.

ORDER

Petitioner failed to prove an accident occurred on 9/2/15 arising out of an in the course of his employment with Respondent. All other issues are rendered ***moot***. All further claims for compensation are hereby ***denied***.

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

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

Signature of Arbitrator

2-26-2016
Date

FEB 26 2016

FINDINGS OF FACT

Fidencio Rodriguez, Jr. ("Petitioner") was employed by ABC Plumbing Heating Cooling & Electric, Inc. ("Respondent") as a warehouse supervisor. Petitioner testified that his duties included managing employees, conducting inventory loading and unloading trucks, completing PO's, ordering equipment and parts for the warehouse including water heaters, furnaces, air conditioning units, coils, faucets and tools. Petitioner was hired in March of 2015 and was only employed with the Respondent for approximately 6 months.

At trial, Petitioner testified that he injured his low back when lifting a furnace from the ground onto another furnace to stack it for inventory purposes on 9/2/15. The furnace weighed approximately 100 pounds. Petitioner was not wearing any harness or assistive device when lifting the furnace. He testified that he felt a pop in his low back along with sharp shooting pain down the left buttock to his hamstring at the time of the accident. Petitioner testified that he reported his injury to Matthew Schroll on 9/2/15. In his Application for Adjustment of Claim, Petitioner indicating that he notified the employer of the accident in writing. Px1. Petitioner stated he never filled out an incident report and did not even know the time that the alleged work accident occurred.

Petitioner explained that when lifting furnaces, he usually had an assistant but on 9/2/15, he testified that he did not have an assistant and did not use a forklift to lift the furnace. Petitioner said he was able to continue working the remainder of the day hoping the pain would go away. He continued to work until the date he was fired by Respondent, on 9/4/15. During this time, he testified, he was performing his regular duties but in pain. Petitioner testified on direct examination that he was terminated without any reason. On cross, he admitted he had prior conversations with his supervisors, including Mathew Schroll, regarding his poor work performance.

Regarding prior workers' compensation claims, Petitioner denied that he filed any prior claims. On cross, however, Petitioner confirmed prior claims with prior employers. Petitioner did not recall filing a claim against Auto Truck and did not recall that the case was settled for 2% man as a whole.

On 9/4/15, Petitioner saw Dr. Glenn Weiss with a complaint for "upeer [sic] and lower." Px3. The doctor noted Petitioner lifted weights four times per week and drank "65 cans of soda per day." Diagnosis was low back pain. Radiographs were negative for scoliosis and fractures. On 9/14/15, MRI of the lumbar spine showed mild degenerative disc disease at L4-S1 with broad-based left disc protrusion at L4-5 causing left lateral recess stenosis. The history indicated back pain that radiated into the left lower extremity with injury one week ago. Px3, Px4. On 9/18/15, Dr. Weiss ordered Petitioner off of work due to back pain and would remain off work until the cause of the low back pain could be determined. Px3.

On 9/21/15, Petitioner was referred to Dr. Juan Alzate. Px3, Px5. On his registration form, Petitioner indicated he was employed as a warehouse manager and that his last date worked was 9/4/15. Petitioner presented with a history of lower back pain after lifting. The pain radiated to the left lower extremity in the L4-5 dermatome. Antalgic gait was noted. Assessment was spondylosis and L4-5 disc protrusion, responsible for his symptoms. Physical therapy and a lumbar injection were recommended. Under procedure code, "work comp" appeared. Petitioner was to return P.R.N. Petitioner testified that he was placed off of work following this encounter.

On 9/22/15, Petitioner saw Dr. Martin Lanoff for pain management. Px5, Px6. Petitioner related a low back pain, left leg pain following an onset "W/C" on 9/13/15 after lifting a furnace and A/C unit. Px5. Dr. Lanoff administered a caudal epidural steroid injection and ordered follow up. On his registration form, Petitioner listed the onset date as 9/3/15 and explained that the injury occurred 9/4/15. Px6. He also indicated

that he was employed full-time as a warehouse manager. On 9/24/15, Petitioner began physical therapy with Athletico. Px5, Px7. The registration form's workers compensation section was completed, listing a work injury date of 9/3/15. Under the question asking how did your problem(s) begin, "lifting heavy equipment" was noted. Therapists noted Petitioner presented with lumbar spondylosis following a "work injury lifting a furnace weighing about 100# from the floor to waist beginning 9/3/15." He complained of low back pain radiating down the left side. Therapies continued through 10/21/15.

On 10/6/15, Petitioner underwent a second lumbar epidural steroid injection. Px6. He reported a 20% improvement after the first injection. The date of injury listed was 9/2/15. He was to return in two weeks for a possible repeat injection. On 10/21/15, Petitioner followed up with Dr. Alzate for persistent low back pain with radiation to the left leg with tingling and numbness. Px5. Dr. Alzate noted that Petitioner had tried epidural injections and physical therapy without any improvement. Dr. Alzate recommended an L4-5 microdiskectomy. The doctor removed Petitioner from work pending lumbar surgery, scheduled for 11/17/15 at Advocate Condell.

Petitioner testified that he has not seen any physician since 10/21/15, when Dr. Alzate recommended a microdiskectomy for the low back. Petitioner testified that his pain was the same on the hearing date and radiated down his left buttock. He testified that he wanted the microdiskectomy recommended by Dr. Alzate. He also testified that he had not received any benefits while off of work and to his knowledge his medical bills have not been paid. Petitioner admitted outstanding bills in the amount of $7,319.81 into evidence. Px2, Ax1. On cross-examination, Petitioner admitted that since being fired, he did not provide any off work slips to Respondent nor did he feel the need to submit any off work slips to Respondent.

Testimony of Matthew Schroll

Respondent witness, Matthew Schroll, ("Matthew") testified that he is employed with Respondent as a plumbing division manager. He oversees the dispatch department and the warehouse. He recalled he interviewed and hired Petitioner in March of 2015. At that time, he communicated the Respondent's policy regarding reporting work injuries as contained in the employee handbook. Petitioner signed and acknowledged that he received and reviewed the employee handbook, including the accident reporting policy. Rx1.

Matthew testified that all work accidents have to be reported immediately regardless of how minor they may be to the direct supervisor. Then, the direct supervisor ensures that the employee gets any required treatment and that the human resource department is informed of the work accident.

Matthew testified that Petitioner never informed him of a work accident or any low back pain or injury at any time. He said that had Petitioner reported a work accident, Matthew would have followed procedure and sent Petitioner for treatment and a drug test. Further, Matthew observed Petitioner on 9/2/15 and 9/3/15 and noted Petitioner was able to perform his work duties without any difficulties or pain.

Matthew testified that on 9/4/15, he had planned a termination meeting with Petitioner. Another employee, Eric Noack, join him in the meeting as a witness to the termination. This meeting occurred at 11:42 a.m. and Petitioner was advised that his services are no longer required. Matthew stated that at that meeting, Petitioner did not report any injury, pain or work accident. Matthew explained that the reason for the termination was that Petitioner had not been performing as expected and was previously warned of his performance on 8/2/15. Matthew acknowledged Petitioner made some improvements within the 24 hours following the 8/2/15 meeting but ultimately it did not meet Respondent's expectations. Petitioner was fired because a replacement had been found days earlier. Petitioner was given severance pay.

According to Matthew, after Petitioner was terminated, he first received notification from Petitioner's attorney that Petitioner was claiming a work injury. Regarding the lifting and carrying of furnaces, Matthew testified that all furnaces weigh over 125 pounds and require two people to lift or with a forklift.

Testimony of Deborah Schroll

Respondent witness, Deborah Schroll ("Deborah"), testified that she is employed as the accounts payable and warehouse manager. She was Petitioner's direct supervisor. She said she first learned Petitioner was claiming a work injury in a letter from Petitioner's attorney. She testified Petitioner never reported an accident or any injury or pain to her. Deborah testified that it is Respondent's policy that when a work accident occurs, the employee must report it within 24 hours to the direct supervisor, who then reports to the Human Resource Department about the accident. In this particular case, Deborah noted that there was no report made of an accident as Petitioner failed to report any accident.

Deborah also had several meetings with Petitioner regarding his poor performance and his failure to accomplish the tasks he was specifically hired to do. She said Petitioner was warned that he would be terminated. Deborah observed Petitioner on 9/2/1515 and 9/3/15 and did not note Petitioner having any difficulties performing his job.

Testimony of Eric Noack

Respondent witness, Eric Noack ("Noack") testified that he is employed as the HVAC service manager for the Respondent. He observed Petitioner on 9/2/15 and 9/3/15 and felt that Petitioner was able to perform his work without any difficulty. He said Petitioner never reported any low back pain, injury or accident to him. Following the testimony of Respondent's witnesses, Petitioner did not testify in rebuttal.

CONCLUSIONS OF LAW

ISSUE (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
ISSUE (D) What was the date of the accident?

The Arbitrator, having carefully considered all testimonial evidence, along with all documentary evidence submitted at trial, concludes that Petitioner failed to prove by a preponderance of the evidence that an accident occurred arising out of and in the course of his employment with Respondent on 9/2/15.

First, the Arbitrator notes that Petitioner's testimony of the date his accident occurred is not corroborated in any of his treatment records. At the initial evaluation with Dr. Weiss, no date of accident is listed; no mechanism of injury is noted. In the 9/14 MRI record, a notation of lifting one week ago was made, which would place that date at 9/7/15. No information is given on where the injury occurred or how it occurred. At the 9/21 initial visit with Dr. Alzate, no date of injury or occurrence is listed on either the registration form or the doctor's note. All that is noted is lifting. At the 9/22 visit with Dr. Lanoff, three potential dates of 9/3, 9/4 and 9/13 are listed for an occurrence involving lifting a furnace. Petitioner's first injection medical record lists a date of injury of 9/2/15. At the 9/24 visit with Athletico, a 9/3 date of occurrence involving heavy lifting was cited.

Second, and as noted above, nearly all of Petitioner's medical records fail to identify a work accident or clear mechanism of injury. Dr. Weiss' records fail to indicate any work accident or mechanism of injury. Dr.

Weiss stated he wanted to determine the cause of Petitioner's low back pain. The MRI record lists only lifting. Dr. Alzate's records note lifting and the phrase "work comp" but nothing more is identified and again, no date is given. Dr. Lanoff's medical record does note lifting a furnace but this cannot be reconciled with the three dates listed in the same record and further, there is no indication where the incident occurred. The Arbitrator does note that Athletico's records indicate lifting a furnace at work.

Third, Respondent witnesses credibly testified that the events that transpired before and after the alleged occurrence support a conclusion that Petitioner failed to prove any accident occurred. Matthew, Deborah and Noack all explained Petitioner had performance issues, had been warned of those and was ultimately terminated as a result and only after a replacement was found. Petitioner was observed by all three witnesses completing his normal work duties and in no apparent pain or discomfort. All three testified that at no time did Petitioner report a work accident. Deborah stated no accident report was completed, indicating to her that perhaps protocol regarding the reporting of accidents was not followed. Respondent's witnesses' testimonies were all unrebutted as Petitioner did not testify following this testimony.

Fourth, Petitioner's credibly must be questioned in light of the evidence. Petitioner testified he told Matthew of a work accident but indicated on his application for adjustment of claim that he notified Respondent in writing. His allegations in his application regarding notice were credibly rebutted by Respondent witness testimony. Petitioner also testified he had no prior workers' compensation injuries and only admitted to them when confronted with his prior injuries under cross examination. In another example, Petitioner testified he was taken off of work by Dr. Alzate but no such off-work note is in the doctor's record. Petitioner testified he was fired for no reason but failed to rebut any of Respondent's witness' testimonies that he was fired for poor performance. Finally, the timing of Petitioner alleging a work accident at or near the time of his firing, coupled with the multiple discrepancies in his medical records and the fact that he did not attempt to refute any of Respondent's witnesses' testimonies support the Arbitrator's conclusions on this issue.

For the foregoing reasons, the Arbitrator concludes Petitioner failed to prove an accident occurred on 9/2/15 arising out of an in the course of his employment with Respondent. All other issues are rendered moot. All further claims for compensation are hereby denied.

ISSUE (E) Was timely notice of the accident given to Respondent?
ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury?
ISSUE (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
ISSUE (K), (O) Is Petitioner entitled to any prospective medical care?
ISSUE (L) What temporary benefits are in dispute?

All other issues are rendered moot. All further claims for compensation are hereby denied.

Signature of Arbitrator

2-26-2016
Date

IBIMCC0289

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Gregory,
Petitioner,

vs.

NO: 15 WC 15332

16IWCC0561

Caterpillar, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of permanency 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 notes that in determining the level of permanent partial disability, the Arbitrator correctly considered the five factors enumerated in Section 8.1(b) of the Illinois Workers' Compensation Act. The Commission agrees with the Arbitrator's findings and the weight assigned to the first four factors along with the weight she assigned to the fifth factor. The Commission only differs from the Arbitrator on its viewing of the evidence of disability as it is corroborated by the medical records. The Commission finds that an award of 25% man as a whole under Section 8(d)2 of the Act is more in line with prior Commission findings for the same or similar disabilities.

IT IS THEREFOR ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $652.39 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 25% loss of a man as a whole.

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

16IWCC0561

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $81,600.00. 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: AUG 29 2016

MB/jm

O: 8/25/16

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Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GREGORY, ROBERT
Employee/Petitioner

Case# **15WC015332**
15WC015331

CATERPILLAR INC
Employer/Respondent

16IWCC0561

On 12/4/2015, 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 0.41% 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:

2333 WOODRUFF JOHNSON & PALERMO
CASEY WOODRUFF
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

2851 CATERPILLAR INC
ELIZABETH Z LeBARON
PO BOX 348 A-11
AURORA, IL 60507

16IWCC0561

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

ROBERT GREGORY
Employee/Petitioner

v.

CATERPILLAR INC.
Employer/Respondent

Case # **15** WC **15332**

Consolidated cases: **15 WC 15331 issued in a separate decision**

The only disputed issue is the nature and extent of the injury. 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 **Geneva**, on **November 5, 2015**. By stipulation, the parties agree:

On the date of accident, **September 29, 2013**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did 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 earned **$56,540.12**, and the average weekly wage was **$1,087.31**.

At the time of injury, Petitioner was **64** years of age, ***married*** with **0** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

The Parties agree that TTD was paid for lost time in the companion case of *Robert Gregory v. Caterpillar Inc.*, 15 WC 15331 handled in a separate decision. ARB EX 2.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$652.39**/week for a further period of **150** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **30% loss of the person as a whole for a right shoulder injury.**

Respondent shall pay Petitioner compensation that has accrued from **September 29, 2013** through **November 5, 2015**, and shall pay the remainder of the award, if any, in weekly payments.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected 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 M. Doherty

Signature of Arbitrator

11/30/15
Date

ICArbDecN&E p.2

DEC 4 - 2015

FINDINGS OF FACT

Petitioner presented two consolidated matters for trial. At issue in case 15 WC 15331 is the nature and extent of Petitioner's injury to his left shoulder. In case 15 WC 15332 is the nature and extent of Petitioner's injury to his right shoulder. The parties stipulated to all remaining issues in both cases. ARB EX 1 and ARB EX 2.

The 64 year old Petitioner testified that he worked 39 years for the Respondent Caterpillar Inc. and that in 2013 he worked as a welder building tractor wheels. The parties stipulated and agreed that the Petitioner sustained repetitive left shoulder injuries with a manifestation date of August 20, 2013 and repetitive right shoulder injuries with manifestation date of September 29, 2013. ARB EX 1 and ARB EX 2. The parties further stipulated that proper notice was given to Respondent of these injuries. ARB EX 1 and 2.

Petitioner was initially seen at the in-house medical department at Caterpillar for his left shoulder and specifically by Dr. Neu. Initial physical therapy was carried out at the Caterpillar plant medical department. When Petitioner did not improve following therapy, he was referred by Dr. Neu to Dr. Saleem at Castle Orthopaedics. PX 1. He commenced treatment with Castle Orthopaedics on March 20, 2014 at which time he complained of pain and symptoms in both his left and right shoulders with pain greater in the left shoulder. PX 1. . On April 2, 2014 the Petitioner underwent a left shoulder MRI revealing moderate to severe supraspinatus and infraspinatus tendinosis with high-grade partial thickness articular surface tearing of the infraspinatus tendon and minimal adjacent subacromial subdeltoid bursitis. The MRI further revealed moderate subscapularis tendinosis, mild tendinosis intra-articular long head biceps tendon extending to the biceps tendon anchor, degeneration of the anterior superior, superior, and posterior superior glenoid labrum and moderate to severe acromioclavicular joint arthrosis. PX 1. Dr. Saleem diagnosed a left shoulder rotator cuff partial tear, impingement and AC arthritis. On 5/21/14, Dr. Saleem performed surgery to the left shoulder consisting of arthroscopic rotator cuff repair, subacromial decompression, distal clavicle resection and biceps tendon tenotomy. PX 1. Following the left shoulder surgery, Petitioner attended physical therapy for his left shoulder in house at Caterpillar. Petitioner's last left shoulder treatment was on August 7, 2014. No additional treatment was recommended for the left shoulder.

In his follow up left shoulder visits to Dr. Saleem, Petitioner continued to complain of right shoulder pain. PX 1. On 8/14/14, Petitioner underwent a right shoulder MRI which revealed a full thickness tear of the distal supraspinatus tendon, mild infraspinatus and moderate subscapularis tendinosis, full thickness cartilage loss superior lateral aspect of the humeral head, glenoid fraying, adhesive capsulitis, mild tendinosis long head biceps tendon and AC joint arthritis. PX 1. Dr. Saleem initially performed a right shoulder arthroscopy on 9/24/14 consisting of "debridement of massive cuff tear, biceps tenotomy, capular release and open reduction of intraoperative shoulder dislocation with Hill-Sachs lesion." PX 1. In the operative report, Dr. Saleem noted "I did not feel it was reasonable to proceed with any further decompression or even a distal clavicle resection as this patient is likely a candidate for a reverse shoulder replacement." PX 1. On 11/3/14, Dr. Saleem performed a right reverse shoulder replacement surgery.

Following his surgery, Petitioner attended physical therapy. On 5/19/15, Petitioner was returned to work with restrictions of no pushing or pulling with his right or left shoulders over 5 pounds. PX 3. Respondent accommodated these restrictions with a job as a safety champion which required no physical labor. Petitioner testified that he was able to perform this job within his restrictions although he had difficulty with the required standing and walking. Petitioner testified that he worked this job until he retired on July 1, 2015. Petitioner

testified that his retirement was initially discussed with Respondent prior to his injuries. Subsequent to his injuries, Petitioner began receiving social security in April 2014 with a plan to retire in June 2014. However, Petitioner postponed his retirement until after he was done treating for both arm injuries and eventually retired on July 1, 2015. Petitioner finished treating for his right shoulder in August 2015. At that time, Dr. Saleem recommended yearly return for x-rays of the right shoulder and to continue home exercises and therapy.

At trial, Petitioner testified to his current left arm condition. Petitioner testified that he has great difficulty with every day activities such as showering and acts of personal comfort. He is unable to sleep on his left side and has intermittent pain while sleeping and with weather change. He is unable to perform household chores as he experiences pain from the top joint of his left shoulder down his arm. Petitioner uses an ice pack machine, pain medicine and rest for his left arm pain which he rated at 7-9/10.

With regard to his right arm Petitioner testified that this right arm pain is worse than his left arm pain. Petitioner testified that he is unable to raise his right hand over his head and is unable to participate in any sport. He is unable to drive by himself as his right arm falls asleep and cannot apply any weight to his right arm. He testified that he experiences pain from the top of his right shoulder down to the elbow and wrist.

Petitioner's wife Hattie Gregory testified at trial. She testified that prior to his injuries, Petitioner was able to work around the house and was very active in sports, travel, socializing and working on cars. After the injuries, she observed that Petitioner is no longer able to participate in these activities. She helps Petitioner with his personal grooming. She further testified that Petitioner sleeps on a recliner when he has pain at night in his shoulders and that he provides him with a heating or ice pad for pain. When that fails, she gives him Norco as prescribed by his doctors.

CONCLUSIONS OF LAW

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

The following conclusions pertain to Petitioner's right shoulder injury in case 15 WC 15332. Petitioner's left shoulder injury at issue in case 15 WC 15331 is handled in a separate decision.

WHAT IS THE NATURE AND EXTENT OF PETITIONER'S INJURY?

Pursuant to Section 8.1b of the Illinois Workers' Compensation Act, permanent partial disability shall be established using five enumerated criteria with no single factor being the sole determinant of disability. The five factors are 1. the reported level of impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment; 2. the occupation of the injured employee; 3. the age of the employee at the time of the injury; 4. the employee's future earning capacity; and 5. evidence of disability corroborated by the treating medical records.

Neither party submitted an impairment rating and therefore the Arbitrator gives this factor no consideration or weight. With regard to Petitioner's occupation, age and future earning capacity, the Arbitrator notes that Petitioner worked 39 years for Respondent as a welder and was 64 years old at the time of his repetitive injury manifestation in both shoulders. The Arbitrator notes that Petitioner was returned to work in May 2015 with significant restrictions of no pushing or pulling over 5 pounds with either arm. PX 3. Thus, the Arbitrator concludes Petitioner could not return to his welding job. However, Respondent accommodated these restrictions with the safety champion job at the same rate of pay. The Arbitrator further notes that Petitioner

testified he spoke to Respondent prior to his injuries about retirement but postponed the retirement, with Respondent's agreement, until after his treatment was completed. Petitioner testified that he was able to perform the accommodated job of safety champion but in fact chose to retire after briefly working this position and upon completion of his treatment. The Arbitrator finds that Petitioner's retirement was for reasons unrelated to his injuries. Based on the foregoing, the Arbitrator places little weight on Petitioner's age, occupation and future earning capacity in deciding permanent disability.

Lastly, the Arbitrator placed the most significant weight on the evidence of disability for Petitioner's right arm injury supported by the medical records and Petitioner's testimony. The medical records regarding Petitioner's right shoulder injury and treatment indicate that Petitioner underwent surgery to repair a massive rotator cuff tear followed by a reverse right shoulder replacement in November 2014 deemed necessary by the intraoperative findings noted by Dr. Saleem during the first right shoulder surgery. Petitioner finished treating for the right shoulder in August 2015 and was recommended for yearly follow up and x-ray of the right shoulder. Petitioner was also to continue with home exercises and therapy for the right shoulder. At trial, Petitioner testified that his current right arm pain is worse than his left arm pain. Petitioner testified that he is unable to raise his right hand over his head and is unable to participate in any sport or leisure activity. He has trouble sleeping. He is unable to drive by himself as his right arm falls asleep and cannot apply any weight to his right arm. He testified that he experiences pain from the top of his right shoulder down to the elbow and wrist. His wife will occasionally give him Norco for pain in addition to elevation of his arm and heat or ice treatment.

Based on a consideration of all of the foregoing factors, the Arbitrator finds that Petitioner sustained injuries to the extent of 30% loss of a person as a whole for a right shoulder injury.