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

Shari Tischler,
Petitioner,

vs.
CDS Office Technologies,
Respondent,

NO: 01 WC 33580

16IWCC0837

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, employer/employee relationship, notice, permanent partial disability, wage rate 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 29, 2016 is hereby affirmed and adopted.

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: DEC 23 2016

MB/mas
o:12/22/16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TISCHLER, SHARI
Employee/Petitioner

Case# **01WC033580**

16IWCC0837

CDS OFFICE TECHNOLOGIES
Employer/Respondent

On 2/29/2016, 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:

2902 LAW OFFICES OF PETER G LEKAS
5357 W DEVON AVE
CHICAGO, IL 60646

1872 SPIEGEL & CAHILL PC
CHRISTINA BAWCUM
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

16IWCC0837

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

SHARI TISCHLER
Employee/Petitioner

v.

CDS OFFICE TECHNOLOGIES
Employer/Respondent

Case # **01** WC **33580**

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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Chicago**, on **July 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. [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. [ ] 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] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] 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 **May 17, 2000**, 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 **$25,620.46**; the average weekly wage was **$769.71**.

On the date of accident, Petitioner was **35** 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 **$3,076.92** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$3,076.92**.

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

ORDER

Petitioner has failed to prove that she sustained an accident arising out of and in the course of her employment for Respondent. Therefore, 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.

Deborah L. Simpson

Signature of Arbitrator

February 26, 2016
Date

FEB 29 2016

16IWCC0837

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Shari Tischler,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 01 WC 33580**
	)	
CDS Office Technologies,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on May 17, 2000, 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 in the year preceding the injuries, the Petitioner earned $25,640.26, and that her average weekly wage was $769.71.

At issue in this hearing is as follows: (1) Did an accident occur that arose out of and in the course of the Petitioner's employment with Respondent; (2) Was timely notice of the accident given to Respondent; (3) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (4) Is Petitioner entitled to TTD; and (5) What is the nature and extent of the injury.

STATEMENT OF FACTS

On May 17, 2000, Petitioner was employed by Respondent and served as an Office Manager in the Naperville, Illinois office. Petitioner began working for Respondent on September 27, 1999. Respondent is a retail service organization that sells and services commercial office communications equipment, including copy machines and printers. (RX 5, 6) The Office Manager position is primarily a clerical position and Petitioner would act as a receptionist, take incoming calls, handle paperwork for sales and service, and transmit that information to Respondent's headquarters in Springfield, Illinois. (RX 5, 8-9)

Petitioner testified that on the morning of May 17, 2000, she arrived at the office before her staff. A copier demonstration was planned for a new sales representative, and the copier was not set up on the sales floor for the demonstration. Since the staff was not there yet, Petitioner went to the warehouse, and pushed the small copy machine, which was on wheels, onto the truck. Once the machine was in the truck, Petitioner then stood sideways to brace herself against the copier and it rolled against her. Petitioner testified that the copier did not hit her foot. The copier hit her body, and her foot became injured because of the way that she was standing.

Petitioner testified that after the incident she felt instant pain, and her foot swelled immediately. Petitioner then drove the truck to the front of the building, when an employee named Lloyd and another Sales Representative pulled up in the parking lot. Petitioner informed them that they needed to take the copy machine off of the truck, and she went into the office to work. Petitioner testified that she worked until 2:00 p.m. that day.

Petitioner claimed that after May 17, 2000, she was unable to return to work due to her injury. She testified that she returned to work for one day in June for a couple of hours. She did not return to work that day for the purpose of returning to full duty. Petitioner testified that she was terminated while she was there that day.

Although Petitioner claimed that she experienced instant pain and swelling up to her calf, and she was unable to work because of the condition, she did not seek medical treatment until May 22, 2000, five days after the claimed accident. On that date, Petitioner presented to Dr. Ozgen at Edward Medical Group. Pursuant to the nursing note from that visit, Petitioner gave a history of right calf pain which started one month ago. Different handwriting from that same visit, presumably from Dr. Ozgen's discussion with Petitioner, states that the pain started one month ago at home. Dr. Ozgen wanted to rule out DVT as the cause for the Petitioner's symptoms. (RX 1, 31)

Petitioner returned to Dr. Ozgen on May 31, 2000. She complained of right foot pain, and reported that she could not walk on it. She stated that it was sore by the end of the day and that the swelling happens at night mostly. Petitioner was referred to Dr. Zygmunt. (RX 2, 32)

Pursuant to Dr. Ozgen's referral, Petitioner presented to Dr. Zygmunt on May 31, 2000. X-rays did not show any obvious stress fracture although one was clinically suspicious. It was recommended that Petitioner undergo a bone scan. (RX 2, 2)

Petitioner returned to Dr. Zygmunt on June 8, 2000. The bone scan was completely negative. A MRI was recommended. (RX 2, 2) Dr. Zygmunt contacted Petitioner on June 21, 2000, and informed her that she should follow-up with her primary care physician since there was no obvious pathology based upon the bone scan or MRI findings of the ankle area. (RX 2, 2)

Per Dr. Zygmunt's recommendation, Petitioner returned to Dr. Ozgen on June 28, 2000 and July 12, 2000. On July 12, 2000, Dr. Ozgen recommended that Petitioner get another opinion from Dr. Vinci. (RX 1, 37)

Petitioner then began treatment with Dr. Durkin's office on July 13, 2000. On that date, Petitioner was seen by Deanna Leach, RN. Petitioner complained of pain and swelling for the last three months. She stated that the swelling is worse after alcohol ingestion. She reported no recent injury or unusual activity. Petitioner informed the nurse that she was previously an Operations Manager for a company and missed three days of work because of pain. (PX 6)

Petitioner was seen by Deanna Leach, RN again on July 19, 2000. It was noted that Petitioner was referred to the office by Dr. Nosek after complaints of chronic right ankle pain. Petitioner stated that approximately three months ago she began experiencing swelling and cramping in her right calf. She denied any trauma or any significant increase in her activity prior to this. Since Petitioner's symptoms started with cast swelling and cramping, Deanna Leach, RN recommended a Venogram of the lower extremity to rule out DVT. Petitioner was also given a prescription for physical therapy. (RX 3)

Petitioner saw Dr. Dirkin for the first time on June 28, 2000. Petitioner complained of pain in her calf and pain down her ankle. Physical therapy was recommended.

Petitioner returned to Dr. Durkin on June 2, 2001, a year later. She reported that she had an injury approximately 13 months ago at work when she felt her ankle snap in a funny way after placing it sideways to brace against an approximately 300 pound copier. She reported that since that time, she has had pain in the ankle with any prolonged activity, pain with walking or even prolonged standing accompanied by swelling. An injection was recommended. (PX 6)

On July 3, 2001, Dr. Durkin recommended work restrictions of minimal walking and light duty. The report states that the restrictions should be in place from May 2000 to present. (PX 6)

Petitioner continued to pursue medical care with Dr. Dirkin due to a diagnosis of severe ankle sprain and peroneal tendonitis. Dr. Dirkin treated Petitioner conservatively with injections and bracing. On May 23, 2002, Dr. Dirkin referred Petitioner to Dr. Simeone. (PX 6)

On July 23, 2002, Dr. Simeone wanted Petitioner to be partial weight bearing for one week, and full weightbearing for two weeks, and she was to resume normal activities after that. Physical therapy was also recommended. (PX 6)

Petitioner was eventually diagnosed with Reflex Sympathetic Dystrophy. She has pursued medical care with Dr. Sosenko, Dr. Zabiega, and Stroger Hospital for a myriad of complaints and conditions including her right shoulder, bilateral knees, back, finger, and depression. She also underwent an IME with Dr. Kelikian.

Petitioner has not returned to work in any capacity since the claimed May 17, 2000 work accident.

CONCLUSIONS OF LAW

The burden is upon the party seeking an award to prove by a preponderance of the credible evidence the elements of his claim. *Peoria County Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 505 N.E.2d 1026 (1987).

Longstanding Illinois law mandates a claimant must show that the injury is due to a cause connected to the employment to establish it arose out of employment. *Elliot v. Industrial Commission*, 153 Ill. App. 3d 238, 242 (1987).

The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

The burden of proving disablement and the right to temporary total disability benefits lies with the Petitioner who must show this entitlement by a preponderance of the evidence. *J.M. Jones Co. v. Industrial Commission,* 71 Ill.2d 368, 375 N.E.2d 1306 (1978)

In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent, the Arbitrator makes the following conclusions of law:

The Arbitrator incorporates the above-referenced findings of fact and conclusions of law as if fully restated herein.

Petitioner testified regarding an unwitnessed May 17, 2000 work accident. Despite her testimony that she experienced immediate pain and swelling which caused an inability to return to work, she did not immediately pursue emergency care. Petitioner instead presented to Dr. Ozgen five days after the accident. She gave a history of sustaining an injury one month ago at home. Consistent with the lack of report of trauma, Dr. Ozgen felt that Petitioner may have DVT.

Petitioner then returned to Dr. Ozgen on May 31, 2000, June 28, 2000, and July 12, 2000. There is no history of work accident in any of these office notes. At Dr. Ozgen's recommendation, Petitioner began treatment with Dr. Zygmunt on May 31, 2000. There is no history of work accident at that visit. She returned to Dr. Zygmunt on June 8, 2000. Again, there was no history of a work accident.

When Petitioner presented to Deanna Leach, RN at Dr. Dirkin's office on July 13, 2000, she reported pain and swelling for the last three months. This is consistent with the Petitioner's original report to Dr. Ozgen in May that the injury occurred one month ago, which would be April of 2000. This is not consistent with the claimed accident date of May 17, 2000. Furthermore, Petitioner informed Deanna Leach R.N. that she had no recent injury or unusual activity. There is no report of a work accident at this office visit.

Consistent with the July 13, 2000 history, when Petitioner returned to Deanna Leach, RN on July 19, 2000, she stated that three months ago she experienced swelling and cramping in her right calf. She denied any trauma or significant increase in her activity.

At the hearing, Petitioner testified that she informed Dave Raymond, Mark Barry, Penny Voyda, and Jay Watson regarding the work accident. She testified that she sat at her desk with her leg propped up while she worked that day. Pursuant to Respondent's Exhibit 12, Petitioner's attorney informed Respondent's attorney that Petitioner would testify that she gave notice to Jay Watson and Penny Voyda. Respondent presented the evidence deposition of Mr. Jay Watson. Mr. Watson is the CEO of CDS Office Technologies and started the company 44 years ago. Mr.

Watson did not recall Petitioner ever giving him notice of a work injury. (RX 5, 10) Mr. Watson was told that Petitioner injured her ankle while attending a sporting event for her child and that she had a fall at the event. (RX 5, 22)

Mr. Watson testified that Petitioner was let go from Respondent because she wasn't performing her duties correctly and she was missing a tremendous amount of work. It was Mr. Watson's testimony that Petitioner was having marital problems and also was having problems pertaining to her children. (RX 5, 12)

Petitioner testified that she was unable to return to work after the claimed work accident. Mr. Watson testified that he personally saw Petitioner working at the office on crutches. Mr. Watson's testimony is consistent with the Petitioner's report to Deanna Leach, RN on July 13, 2000, that she had missed three days of work after the accident. Petitioner did not inform Deanna Leach, RN that she never returned to work. Petitioner's testimony that she never returned to work is in direct contradiction to Mr. Watson's testimony, Deanna Leach's office note, as well as the wage records put into evidence by Respondent.

Penny Voyda is no longer employed by Respondent, and has not worked for the company for the last 7 or 8 years. Respondent presented Mr. Jay Watson's testimony, however, has no control over Penny Voyda, a former employee that has not been employed by Respondent for over 7 years. The Arbitrator notes that Petitioner's trial testimony regarding the individuals that she gave notice to is not consistent with Petitioner's counsel's representations to Respondent's counsel that she would testify that she gave notice to two individuals, Jay Watson and Penny Voyda. Mr. Watson was deposed in March 2015, four months prior to the trial date. Therefore, Petitioner was aware of his testimony, and yet did not attempt to present Penny Voyda, Dave Raymond, or Mark Barry at trial to rebut the testimony of Mr. Watson.

Petitioner testified that she has not done any illegal drugs since the accident. The records of Stroger Hospital from December 10, 2003, reflect that Petitioner did ingest marijuana three months ago.

The first indication of a work accident is a First Report of Injury or Illness which was completed by the Petitioner on November 7, 2000, six months after the claimed accident date. Given that there is no evidence of a work accident until six months after the claimed accident date, the history provided to the medical providers, the testimony of Mr. Jay Watson, and the other inconsistencies presented at trial, the Arbitrator finds that Petitioner is not credible, and her testimony is not to be relied upon. Petitioner has failed to prove that she sustained an accident arising out of and in the course of her employment for Respondent.

In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, whether Petitioner gave timely notice of the accident to Respondent, whether Petitioner is entitled to TTD and the nature and extent of the injury the Arbitrator makes the following conclusions of law:

Petitioner failed to prove that she sustained an accidental injury that arose out of and in the course of her employment with Respondent therefore the above listed issues are moot.

ORDER OF THE ARBITRATOR

The Petitioner failed to prove a compensable accident within the meaning of the Act. Benefits requested pursuant to Section 8 are therefore denied.

Deborah L. Simpson
Signature of Arbitrator

February 26, 2016
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [x] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] PTD/Fatal denied
- [ ] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Chlada,
Petitioner,

vs.

NO. 02 WC 54676

Burke Beverage, Inc.,
Respondents.

16IWCC0781

DECISION AND OPINION UPON REMAND BY CIRCUIT COURT

This matter comes before the Commission on Remand by the Circuit Court of Cook County. The Petitioner had two separate workers' compensation claims against Respondent. In the other case, 02 WC 58819, Petitioner became entitled to a wage differential in the amount of $730.42 per week commencing June 1, 2000, throughout the duration of Petitioner's disability. In the instant case, the Commission found that Petitioner was permanently and totally disabled as of April 22, 2004. The Appellate Court held that Petitioner is entitled to both the wage differential award and the permanent total disability award simultaneously.

On remand the Circuit Court of Cook County directed the Commission to award the permanent total disability award based on an average weekly wage of $699.60 for a weekly award of $466.40. The Commission hereby complies with the mandate of the Circuit Court of Cook County.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay Petitioner the sum of $466.40 per week for the lifetime of Petitioner, pursuant to §8(f) of the Act.

DATED: DEC 5 - 2016

Ruth W. White

David L. Gore

Joshua D. Luskin

RWW/dw
R-11/16/16
46

STATE OF ILLINOIS)
) SS.
COUNTY OF ADAMS)

☐ 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 GRAFF,

Petitioner,

vs. NO: 05 WC 25655

GULLY TRANSPORTATION,

16IWCC0819

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 "Improper issuance of Dedimus Potestatum," and being advised of the facts and law, hereby dismisses Petitioner's Petition for Review.

On September 22, 2015, Arbitrator Dearing granted Respondent's "Motion for Issuance of Dedimus Potestatem," which set the deposition of Dr. deGrange for October 20, 2015. On October 15, 2015, Petitioner filed a Petition for Review on the issue of "Improper issuance of Dedimus Potestatum." Respondent filed a "Motion to Dismiss Petition on Review" on February 1, 2016, which was denied by Commissioner Basurto on November 16, 2016.

We note that Petitioner never filed a brief on Review so oral arguments were denied. Regardless, we find that the Arbitrator's order granting the dedimus potestatum is interlocutory. Therefore, we dismiss the Petition for Review and remand this matter for further proceedings.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review is hereby dismissed.

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

DATED: DEC 19 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 12/6/16
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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KATHY JENKINS,

Petitioner,

vs.

NO: 05 WC 48729

16IWCC0774

JACKSON PARK HOSPITAL,

Respondent.

DECISION AND OPINION ON SECOND REMAND

This matter had previously been heard and the Decision of the Arbitrator had been filed on June 21, 2011. The Arbitrator awarded Petitioner a 40% loss of use of her person as a whole due to "loss of trade." Both parties filed a timely Petition for Review. The Commission affirmed the Arbitrator's ruling on November 5, 2012.

Petitioner subsequently sought review in the Cook County Circuit Court, which reversed the Commission's award, remanding it for a determination of an §8(d)(1) award rather than the §8(d)(2) award. In keeping with the Circuit Courts Order, the Commission awarded §8(d)(1) benefits as requested by Petitioner.

Respondent appealed to the Appellate Court, seeking a reinstatement of the Permanent Partial Disability (PPD) award. Conversely, Petitioner requested an affirmation of the wage differential award that was granted on remand. Alternatively, Petitioner requests that both the PPD and wage differential awards be vacated, and the case be remanded for an additional hearing purposed for determining Petitioner's true earning capacity.

FACTUAL BACKGROUND

Petitioner was employed as a Stationary Engineer by Respondent. She injured her back and knee in a work-related accident on October 25, 2005. She was diagnosed with cervical and

16IWCC0774

lumbar strains, as well as an unstable undersurface tear of the posterior horn of the medial meniscus, chondromalacia of the patella and medial femoral condyle, hypertrophic synovitis and a contusion to the anterior cruciate ligament. Following the accident, Petitioner worked for Respondent in the Finance Department and the Security Department. Her Security position is light duty, as she is not required to confront individuals. She sits in a tower above a parking lot. Due to her ongoing back and knee pain, Petitioner is unable to perform the duties of a Stationary Engineer.

Despite her physical limitations, Respondent continued to pay Petitioner her Stationary Engineer salary while she worked in Security.

ORDER ON REMAND

With there being insufficient evidence in the record to determine Petitioner's earning capacity, the Commission remands the case to the Arbitrator so that a hearing on the same be conducted, for the purpose of determining the proper wage differential award.

IT IS THEREFORE ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for a hearing on Petitioner's earning capacity.

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: NOV 3 0 2016
DLG/wde
O: 11/17/16 (Discussion Only)
45

David L. Gore

Mario Basurto

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Lipsky,

Petitioner,

vs. NO. 06 WC 35883

American Airlines, Inc. & AIG Insurance Company,

Respondent.

ORDER

This matter comes before the Commission on an Amended Petition for Fees pursuant to Section 16a of the Workers' Compensation Act filed by the Petitioner's attorney, Mr. Rittenberg, on July 15, 2016. A hearing was held in Chicago before Commissioner Ruth White on October 27, 2016 and a record was made. Mr. Saunders, an attorney who represented Petitioner for approximately six months and previously filed a Fee Petition, was present and raised no objection to Mr. Rittenberg's Amended Petition. Respondent's attorney, Mr. Storm, was likewise present and raised no objection to Mr. Rittenberg's Amended Petition. The Petitioner, Mr. Lipsky, did not appear at hearing.

In a Decision dated October 5, 2015, the Arbitrator awarded Petitioner wage differential benefits of $272.00 per week. Mr. Rittenberg alleges that notwithstanding the fact that Petitioner agreed pay 20% of the award as attorney's fees, Petitioner continues to neglect to pay fees despite receiving the awarded weekly payments from Respondent American Airlines since October 5, 2015. Mr. Rittenberg alleges that as of the date of hearing Petitioner remitted only two checks to Mr. Rittenberg's office, for a total of $544.00. Mr. Rittenberg alleges an outstanding balance of $2,448.00.

Therefore, Mr. Rittenberg requests the Commission order Respondent American Airlines to issue weekly payment checks under the Arbitrator's award directly to Mr. Rittenberg. Mr. Rittenberg shall be authorized to endorse and take the weekly checks as fees until the past-due balance of attorney's fees is satisfied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Amended Petition for Fees pursuant to Section 16a of the Workers' Compensation Act is hereby GRANTED.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent American Airlines shall send weekly payments under the Arbitrator's award directly to attorney Ivan M. Rittenberg. Mr. Rittenberg shall be authorized to endorse and take the weekly checks as fees until the past-due balance of attorney's fees is satisfied.

IT IS FURTHER ORDERED BY THE COMMISSION that, thereafter, all checks under the award shall be sent to Mr. Rittenberg, with his law firm being authorized to endorse and take every 5th check as fees with 4 of every 5 checks forwarded to Mr. Lipsky. The total fee taken by Mr. Rittenberg and his law firm shall not exceed 20% of the sum which would be due under this Act for 364 weeks of permanent total disability.

IT IS FURTHER ORDERED BY THE COMMISSION that this order shall remain in effect until the maximum allowable attorney's fee has been paid or until Mr. Rittenberg and American Airlines agree to a lump sum payment of Mr. Rittenberg's fee. Thereafter, all checks shall be written and sent to Petitioner directly.

DATED: DEC 23 2016
RWW/plv
r-10/27/16
46

Ruth W. White
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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Zenon Lemanski,
Petitioner,

vs.

NO: 07 WC 35515

16IWCC0812

Bob Red Remodeling, Inc.,
Respondent.

DECISION AND OPINION ON A SECTION 8(A) PETITION

The Commission has previously awarded Petitioner home health care assistance by a qualified provider up to three times per week for 8 hours a day. Petitioner has recently filed a Section 8(a) Petition for current and prospective home health care expenses. More specifically, Petitioner is seeking $136,620.00, which is $22.50 per hour times 24 hours a week times 253 weeks for current home health care costs along with compensation for prospective home health care in the amount of 24 hours per week. The sole issue on Review is whether Petitioner's Section 8(a) Petition for current and prospective home health care expenses should be granted in the amount requested by the Petitioner. The Commission, after reviewing the entire record, finds Petitioner is entitled to $45,540.00, which is 1/3 of the amount for current prospective home health care. The Commission further finds that, in the future, Petitioner is entitled to the previously awarded home health care assistance by a qualified provider for 8 hours a day and up to three times per week or alternatively is entitled to 1/3 of this amount if Petitioner elects to continue to use his spouse's services in lieu of a qualified home health care assistant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Patricia Cline testified she is an expert life care manager. She works for a company that provides care and case management for children and adults who are physically or mentally disabled. She has a Master's degree in social work, is a certified case manager, life care planner, guardian and advanced social work case manager. She is licensed in

16IWCC0812

Illinois and Wisconsin. She has experience with people who have traumatic brain injuries and has dealt with traumatic brain injury people who have been cared for at home. She testified that a lot of the time the people who have been cared for a home have the family providing supervision with supplemental care that comes in from the outside. She opined that constant supervision is the kind of overlying need for a majority of people with moderate to severe traumatic brain injury. The care givers also oversee the activities of daily living.

2. Ms. Cline testified that one of the things her company is asked to do is make an assessment of the home setting by family members. From the information she has in this case without visiting their home and spending the day with Petitioner and his wife, she believes that her company would recommend someone be there around-the-clock for Petitioner's safety issues. Ms. Cline testified that she believes Petitioner is a total care patient. She testified that Petitioner's wife never leaves him alone and is providing 24 hour supervision. When it is time in the morning, she helps him get up. She prepares his meals and clothing for him. She assists him in getting dressed. She supervises his bathing/showering. She washes his hair, washes body parts that are difficult for him to reach, dries him off and re-clothes him. She directs his activities during the day.

3. Ms. Cline testified that her understanding is that Petitioner was granted future home health care of 8 hours per day, 3 times a week. She said her company utilized a standard methodology for obtaining the cost of home care and they looked at the specific geographic region. In the three different agencies in the area where Petitioner lives, the average hourly rate is $22.50 an hour. She said the Petitioner and his wife are talking about moving to England. There the care would average $25-$27 an hour.

4. Ms. Cline testified that a private duty attendant would provide non-medical services. In her opinion Petitioner's wife is providing the level of care that is equivalent to a private duty attendant. She spoke briefly with Petitioner but he was not really interested in talking to her. The majority of her 20-30 minute conversation with the family was with Petitioner's wife. In addition, Petitioner's wife provided her with a list of different type of activities that she does with her husband on a daily basis. Ms. Cline opined that Petitioner's wife's role is primarily supervisory in nature.

5. Ms. Cline testified that in Illinois, in order to be employed as a private duty attendant through an agency, one must pass a criminal background check, pass a drug screen and go through a couple of hours of on-line training. She is unaware of Petitioner's current medical treatment. To her knowledge, Petitioner and his wife have never employed a qualified home health care aid.

6. Petitioner's wife testified via a translator. They have been married for 37 years, have been in the United States since 2003 and have two children. One of the children lives in England and the other lives in Poland. Prior to her husband's July 27, 2007 work accident

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she worked ¾ time in a deli. She stopped working when her husband had his accident. She does not leave her husband alone because of safety issues. Her nephew relieves her approximately once a week/once every two weeks depending on her needs. She opined that Petitioner is not able to care for himself and she stated that she is Petitioner's primary care giver. She received care from a nurse for one month in the spring of 2011. She decided to care for Petitioner herself now and in the future. If they move to England, which they are planning to do, she could get assistance from her sister and brother who live in Poland. They are leaving for England on February 8, 2016. After arriving in England, they will make the decision as to whether they are moving to Poland.

7. Petitioner's wife identified Petitioner's PX2 as a schedule of the tasks she performs for her husband on a daily basis. It is in Polish. Number 1 on her list is assist with morning toiletry and shaving. She testified that Petitioner does not need help urinating but does need help cleaning up after defecating. Number 2 is assisting him in getting dressed. She prepares his clothes for him. He can dress himself but sometimes he does not recognize the clothing is upside down or which is the back or front of the clothing. Number 3 is giving him medication and preparing breakfast if he has not prepared it for himself. He is able to feed himself. She has to help him use a knife and has to supervise his eating so he does not choke. Number 4 is cleaning and preparing him for exercises. Number 5 is exercising to keep him balanced. Number 6 is resting. While he is doing that, she makes dinner. Number 7 is going on a 3-4 block walk. Number 8 is giving Petitioner a light snack. Number 9 is resting followed by a short walk. Number 10 is giving Petitioner a late snack. Number 11 is performing toiletry functions for Petitioner and getting him ready for bed. She testified that she has not been paid for what she does for her husband. She testified that all of their days are quite similar. They differ as to how many times he exercises and what types of exercising he performs. On Saturdays they visit with family and on Sundays they go to church. Petitioner's wife testified that she is not licensed by the state to provide home health care.

The Commission notes that in determining whether an award for home care services is appropriate under Section 8(a) of the Illinois Workers' Compensation Act, the Appellate Court has looked at two things, which are one, the types of duties performed and two, the status of the party rendering these duties. See Rousey v. Industrial Commission, 224 Ill. App.3d 1096 (1992) and Burd v. Industrial Commission, 207 Ill. App.3d 371 (1991).

In Rousey v. Industrial Commission, Id., the Appellate Court found that the question of whether the kind of assistance claimant's spouse provides constitutes maintenance within the meaning of the Act is one of facts for the Commission to determine. The fact that the injury has affected claimant's mental processes, standing alone, is not determinative. In the absence of medical care or active attendance to claimant's basic needs, the Court held that the Commission's determination that claimant's spouse was performing household duties which are not compensable within

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the meaning of Section 8(a) of the Illinois Workers' Compensation Act was not against the manifest weight of the evidence. More specifically, the Court recognized the general rule that shopping, cooking and other household services performed by a spouse or other family members are considered gratuitous and cannot form the basis for an award for attendance care services. The rationale for denying compensation for ordinary household duties when performed by a spouse is that a spouse performs such activities for both parties as part of the marital relationship. For this reason, a distinction has been drawn, for compensation purposes, based on the status of the individual performing those services.

In Burd v. Industrial Commission, Id., the Appellate Court using the same standards articulated above made an opposite finding from Rousey v. Industrial Commission, Id. Namely, the Court held that claimant's fiancée was performing household duties that were separate and apart from medical care and were compensable within the meaning of Section 8(a) of the Act.

The Commission finds that the primary distinction between the two cases lies with the fact that in Rousey the care giver was claimant's wife while in Burd the care giver was claimant's fiancée. The Commission finds that the Courts have drawn a distinction between a spouse by virtue of the marital relationship having an obligation that differs from an individually not legally or otherwise required to perform said services.

Of great importance also was the types of services that the care giver rendered and the amount of independence the claimant had. In Rousey v. Industrial Commission, Id, the Court held while the evidence supports the conclusion that someone ought to be with claimant to watch over him, it is equally clear that the supervision offered is precisely the type which someone might give to a child in the house. Furthermore, there was evidence that claimant is at least partially independent to the extent he is able to travel in the neighborhood, drive a car unsupervised and handle a weapon when hunting. In Burd v. Industrial Commission, Id., the claimant's fiancée once or twice a week assisted the claimant with his bathing routine by placing a bench in the bath tub, getting a board ready to transfer him from a wheelchair into the tub, starting the water and adjusting the shower curtain and washing his legs because he was unable to reach then without him falling over. In addition, she put the dishes and claimant's laundry away, does the cooking, put down the wheelchair portable ramps for claimant to enter and leave the residence and helped him put his shoes and socks on when his feet and ankles were swollen. Lastly, while she continued to hold the same job and work the same hours that she did prior to claimant's accident, she called every 10-15 minutes to check on him and she made visits to his home during the day.

Keeping in mind the standard set by the Appellate Court and based on the evidence above, the Commission finds that it appears that Petitioner's spouse was

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performing very limited maintenance services in the form of dispensing medication, ensuring Petitioner participate in a home exercise program and assisting him in some personal hygiene issues. Rather, Petitioner's spouse's primary tasks revolve around household and supervisory duties. Additionally, there is no evidence provided as to what Petitioner's household duties were prior to the work accident so that the Commission can compare what Petitioner and his spouse's respective roles were pre and post-accident.

Based on all of the above, the Commission awards as follows: The Commission will continue to award the qualified home health care assistance at the same level that the Arbitrator initially awarded. Alternatively, if Petitioner and his spouse still wanted her to continue her role the Commission will award 1/3 of the amount that Petitioner is seeking in his Section 8(a) Petition for both for past and prospective care. In reaching the conclusion, the Commission believes it recognizes Petitioner's spouse's provision of maintenance services, albeit it at a limited level, while discounting the household and supervisory services provided by Petitioner's spouse.

IT IS THEREFORE ORDERED BY THE COMMISSION, that Arbitrator's holding in affirmed. However, if Petitioner and his spouse still wanted her to continue her role the Commission will award 1/3 of the amount that Petitioner is seeking in his Section 8(a) Petition for both for past and prospective care.

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.

DEC 16 2016

DATED:

O: 11/17/16

MB/jm

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Mario Basurto

David L. Gore

Stephen Mathis

STATE OF ILLINOIS)	☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF DUPAGE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rochelle Beets Widow of James Beets deceased,
Petitioner,
vs.

16IWCC0802

NO: 07 WC 40112

Weber Grill,
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 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 16, 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: DEC 15 2016
KWL/vf
O-12/13/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

16IWCC0802

BEETS, ROCHELLE WIDOW OF BEETS, JAMES DECEASED
Employee/Petitioner

Case# **07WC040112**

WEBER GRILL
Employer/Respondent

On 11/16/2015, 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:

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST 26TH FL
CHICAGO, IL 60602

2461 NYHAN BAMBRICK KINZIE & LOWRY
ROBERT HARRINGTON
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

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
FATAL

16IWCC0802

ROCHELLE BEETS, widow of James Beets, deceased Case # **07 WC 40112**
Employee/Petitioner
v.
WEBER GRILL
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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Wheaton, IL**, on **July 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 Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☐ Who was dependent on Decedent at the time of death?

K. ☐ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Other **Survivor Benefits**

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FINDINGS

On the date of accident, **September 10, 2006**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Decedent *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.

Decedent's death *is not* causally related to the accident.

In the year preceding the injury, Decedent earned **$66,999.92**; the average weekly wage was **$1,288.46**.

On the date of accident, Decedent was **48** years of age, *married* with **1** dependent child.

Respondent *has* 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**.

The parties stipulated that Respondent entitled to 8 (j) credit for any and all bills paid by Respondent's group health insurance carrier, if this claim is found compensable.

ORDER

- ***Petitioner failed to prove that a compensable exposure arose out of and in the course of the decedent James Beets' employment with Respondent.***

- ***Petitioner failed to prove that timely notice of the alleged exposure was given to Respondent.***

- ***Petitioner failed to prove that the decedent James Beets' multiple myeloma and death were causally related to a compensable exposure.***

- ***Petitioner failed to prove that she is entitled to survivor benefits.***

THEREFORE, 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.

Signature of Arbitrator

November 12, 2015
Date

NOV 16 2015

ROCHELLE BEETS, widow of James Beets, deceased vs. WEBER GRILL
07 WC 40112

INTRODUCTION

This matter proceeded to hearing on July 20, 2015 before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***E:*** Was timely notice of the accident given to Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to 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? ***O:*** Is Petitioner entitled to survivor's benefits?

Petitioner Rochelle Beets, Randall Waidner, Thomas Sorfleet, and Richard Bryan Gerrish testified at trial. The testimonies of Drs. Seema Singhal, Harry A. Milman, and Todd M. Zimmerman were received by evidence deposition. Ronald Lachman was also called as a witness. Petitioner's Exhibits #1 through #6 were admitted without objection. Respondent's Exhibits #1, #2, #4, #5, and #6 were admitted without objection. Respondent's Exhibit #3 was admitted over objection.

FINDINGS OF FACT

Petitioner Rochelle Beets filed an Application for Adjustment of Claim in this matter on September 7, 2007 pursuant to the Occupational Diseases Act.
The Application alleged exposure to fumes but did not list a date of accident. (Respondent's Exhibit #1) At trial the Request for Hearing (IC9), Arbitrator Exhibit #1, noted the parties' agreement that September 10, 2006 was the date of accident or last exposure.

Petitioner testified that she was married to the decedent, James Beets, on September 5, 1992. A copy of the Certificate of Marriage dated September 5, 1992 was entered into evidence as Petitioner's Exhibit #1. She testified that she had two children, Nick and Adam, from a previous marriage that lived with her and the decedent. Nick was born on January 29, 1986 and Adam was born on July 29, 1989. She testified that at the time of Decedent's death Nick was 18 years old and Adam was 16 years old. She further testified that Adam was listed as Decedent's dependent on income tax returns.

Petitioner testified that the decedent worked as a chef at Respondent's Wheeling, Illinois restaurant. She worked as part-time server at the Wheeling location. She testified that while working at Wheeling she observed the grills get stoked up in the morning. During this process, plumes of smoke would go into the chefs' faces when the lid of the grill was lifted.

Petitioner testified that Decedent originally worked as a chef at the Wheeling location and then began working at the Lombard location in 2002. She testified every day her husband came home from work at Weber Grill with a black face and black clothes.

Petitioner identified Petitioner's Exhibit #2, a video that she took at the Weber Grill Restaurant at State and Ohio Streets in Chicago, Illinois. She did not remember the date she recorded the video was taken but testified at trial that the video was recorded "about a year ago." Petitioner's Exhibit #2 was published at trial and viewed by the Arbitrator.

The Arbitrator notes that a cook or chef in Petitioner's Exhibit #2 opened a grill top with an extended arm. Smoke immediately rose into what was apparently an exhaust system. Petitioner's Exhibit #2 did not show the process of lighting charcoal in the grill. Petitioner's Exhibit #2 does not show any chef of cook placing their face or head in the plume of smoke coming off the grill. There was no showing of any apparent direct exposure of any worker to smoke emanating from any of the grills depicted in Pettioner's Exhibit #2. The Arbitrator also notes that the clothes and faces of the cooks or chefs depicted in the video are clean and not blackened.

Ronald Lachman was called as a witness by Petitioner. During his direct-examination he engaged in verbal arguments with Respondent's counsel when counsel raised objections. Despite being admonished to cease arguing with counsel, Mr. Lachman continued with his disruptive behavior. Mr. Lachman was excused from testifying due to his continued disruptive behavior and his testimony to that point was disregarded by the Arbitrator.

Randall Waidner testified on behalf of Petitioner. He worked as a chef at the Weber Grill Restaurants in Wheeling, Lombard, and Chicago locations from 1991 to 2006. He testified that he did not work at the Lombard location at the same time as did Decedent. He described the Wheeling kitchen as "closed" as opposed to the Lombard kitchen being open. He testified that smoke and heat came out every time a grill was opened. A chef would be exposed to smoke before smoke was expelled through ventilation. He testified the job was hot and sweaty and that he would get covered in grit. He testified he had no knowledge of whether Decedent gave notice of an alleged work-related exposure or accident to anyone at Weber.

Thomas Sorfleet also testified on behalf of Petitioner. He previously worked as an Assistant Manager at the Weber Grill Restaurant in Wheeling and later as a General Manager at the Lombard location. The exhaust system at the Lombard location was more "state-of-the-art" that the Wheeling location. He was terminated from Weber Grill before the decedent got sick. He testified that the kitchens were dirty and dusty. Kitchen workers were exposed to dust and soot during cooking and cleaning.

Mr. Sorfleet testified he had no knowledge of whether Decedent gave notice of any alleged work-related exposure or accident to Weber. He testified that it would be

appropriate to report injuries to Bryan Gerrish or Kathy Esposito or Todd Barber or Neal Gorman.

Petitioner called Respondent's representative, Richard Bryan Gerrish, as an adverse witness. He is currently Executive Vice-President of Weber Grill; he was vice president from 2004 to 2006. Mr. Gerrish testified that he viewed the video published at trial (PX #2). Although it was recorded several years after the alleged date of accident and at a different restaurant, it was representative of the grills at Weber. He pointed out that the video of the grill that was in start mode showed that the smoke did not go into the chef's face when the lid was opened. He also testified that the portion of the video showing a cook actively cooking once the coals were hot demonstrated that there was little smoke during that stage. He further testified that chefs' or cooks' white uniforms and faces were also clean in the video.

Mr. Gerrish testified that Decedent never gave notice to him of an alleged work-related exposure or accident. He had talked to the decedent about his FMLA application after he was diagnosed with cancer. The decedent never told him that he thought his cancer was caused by his exposure to smoke in Respondent's kitchens.

On questioning by Respondent's counsel Mr. Gerrish testified that he is the Executive Vice President of Weber Grill Restaurant and has had that title for four years. He testified that he has worked for Weber Grill Restaurants for 16 years. Prior to that, he worked various other companies in the food and beverage industry since graduating from the University of Minnesota.

Mr. Gerrish testified he was familiar with the decedent and that Decedent's job title in 2004 was Executive Chef. Mr. Gerrish identified Respondent's Exhibit #2 as a true and accurate copy of Respondent's job description for Executive Chef as it existed in and before 2004. He testified Decedent's job duties included many managerial tasks. He testified that the last day Decedent worked for Weber Grill Restaurant was May 3, 2004. He began FMLA on May 4, 2004.

Mr. Gerrish described the ventilation hood systems in detail and testified that they were cleaned every night and also tested and inspected regularly. He was not aware of any violations for smoke levels in the kitchen at either location. Mr. Gerrish testified that he did not agree with the statement that Decedent's job duties required him to be exposed to fumes from charcoal briquettes and charcoal grilled meat for 8 or more hours a day. He testified that doors on any Weber kitchen did not affect air circulation of exhaust of cooking smoke.

Mr. Gerrish testified that the only Kingsford charcoal briquettes were used at Weber Grill Restaurants in and before 2004. He testified that the only fire starter product that was used at Weber Grill Restaurants in and before 2004 was Fire Lighters Solid – Flamego. Mr. Gerrish identified Respondent's Exhibit #3 as a true and accurate copy of the MSDS sheets for Kingsford Briquettes and Fire Lighter Solid Flamego which were supplied by the venders and kept by Weber as required by law, and as part of the ordinary business records.

Mr. Gerrish also identified Respondent's Exhibit #4 to be a true and accurate copy of Decedent's application for long term disability benefits and Respondent's Exhibit #5 as a true and accurate copy of the Notice of Approval for long term disability benefits. Respondent's Exhibit #4 contains 3 Section IV Applications For Long Term Disability Income Benefits signed by physicians in support of Decedent's application for disability benefits. 2 of the Section IV Applications, signed by Dr. Randy Rich and Dr. Lon Petchenik, noted that the illness or injury was not work related. The Section IV Application signed by Dr. Seema Singhal did not mark "yes" or "no" in answer to whether the illness or injury was work related.

Petitioner offered into evidence the decedent's medical records from Dr. Seema Singhal. (PX #4) The Arbitrator notes that there is no causation opinion connection within these medical records.

Seema Singhal, M.D.

Petitioner also offered into evidence Petitioner's Exhibit #5, the transcript of evidence deposition of Dr. Singhal taken October 6, 2014. Dr. Singhal is a medical doctor board certified in internal medicine. She specializes in hematology-oncology, specifically multiple myeloma. She is a Professor of Medicine at the Feinberg School of Medicine of Northwestern University. 100% of her medical practice is devoted to treating cancer patients. She was Decedent's treating oncologist.

Dr. Singhal testified to extensive conversations she had with the decedent about what caused his multiple myeloma. These conversations are not documented in Petitioner's Exhibit #4. She remembered that they took place on 2004. She began her care of the decedent in May 2004. Dr. Singhal testified that Decedent told her had had worked as a chef at Weber Grill for many years. She understood that he had been exposed to burning coal for 20 years. Decedent wanted to know if the fumes of burning coal could have contributed to his cancer. Dr. Singhal replied that the cause or cause of multiple myeloma were unknown. She acknowledged that the contribution of environmental agents was not understood.

Dr. Singhal further testified that some months later Decedent brought in a bag of charcoal which was used on his job which showed that the charcoal had benzene in it. She also testified that the decedent told her that the kitchen he worked in was small and had inadequate ventilation and, particularly, the exhaust fan did not always work.

Dr. Singhal noted that benzene is a known carcinogen but that it is mostly connected with leukemia. She often repeated that she had no scientific proof or that there was no data connecting benzene to multiple myeloma. She noted that benzene is an unknown, unquantifiable risk for multiple myeloma. She testified that "thinking logically" if there is a consistent exposure to something and someone develops an unusual disease at a young that there might be a connection.

On cross-examination Dr. Singhal was shown Deposition Exhibit #3 (also part of RX #4), her signed Section IV Application For Long Term Disability Income Benefits.

She acknowledged that she left the work related question blank and explained that she did not then have an opinion or information. She acknowledged that she was unaware of any published studies noting a causal connection of benzene to multiple myeloma.

On further cross-examination Dr. Singhal was questioned about Deposition #2, an undated letter to Petitioner's counsel. She did not remember when she dictated the letter but acknowledged that it was on or about the date it was faxed, August 6, 2010. Dr. Singhal testified that during the terminal stage the decedent asked her to help his wife. Dr. Singhal stayed in touch with decedent's wife. Petitioner had told her was going to pursue "workmen's comp" and asked that she speak with the attorney, and that she needed a letter from Dr. Singhal. Dr. Singhal talked about the lack of scientific proof to back up the causation opinion.

Harry A. Milman, Ph.D.

Petitioner also offered into evidence Petitioner's Exhibit #6, the transcript of evidence deposition of Dr. Milman taken November 17, 2014. Dr. Milman has a Ph.D. in pharmacology. He specializes in toxicology, pharmacology and, carcinogenesis. He did research in toxicology, pharmacology and, carcinogenesis for the National Cancer Institute from 1970 to 1980. He was a senior toxicologist with the U.S. Environmental Protection Agency from 1980 to 1998 relating the effects of industrial chemicals and cancer. He now is a consulting toxicologist.

Dr. Milman reviewed the expert report of Dr. Todd Zimmerman, the letter from Dr. Seema Singhal, the MSDS for Kingsford Charcoal Briquettes, and the MSDS for Solid Fire Lighters. Dr. Milman also reviewed a number of published scientific studies related to benzene and cancer. Dr. Milman wrote a report May 3, 2013, which was marked Deposition #2.

Dr. Milman opined that James Beets was exposed carcinogens, including benzene and polycyclic aromatic hydrocarbons, while grilling meat over charcoal fires. He further opined that, more likely than not, Mr. Beet's multiple myeloma was caused by his inhalation of benzene in the course of his work as a chef at Weber Grill. He conceded that if the decedent had not been exposed to benzene he would not opine that the smoke fumes caused the multiple myeloma. However, he went to note that benzene, though not listed on the MSDS, was present in the briquettes in concentrations below .1%. Essentially benzene is an impurity in charcoal and paraffin, a component in the fire starter. He testified that Decedent inhaled toxic fumes from burning charcoal briquettes and grilled meat, often for 8 or more hours, daily for more than 15 years.

Dr. Milman testified that the some of the published studies he relied on involved petrochemical workers and another studied show makers. He noted that one study may have included other cancers than multiple myeloma. He further testified that some of the studies only some evidence of a connection between benzene and multiple myeloma and another study only suggested a connection. In the end, based on his review of the

records and published literature, Dr. Milman believed it was plausible that exposure to benzene was a cause of the decedent's multiple myeloma.

On cross examination Dr. Milman testified that he never reviewed a job description for Petitioner or that he was familiar with the layout of Weber Grill Restaurant kitchens, including the types of ventilation hoods.

Dr. Milman admitted that the MSDS for Kingsford Charcoal Briquettes and Fire Lighter Solid Flamego did not identify any presence of benzene. He believed that the products may have contained benzene as an impurity with concentrations of less than .1%.

On further cross-examination Dr. Milman testified that he did not recall if the American Cancer Society website study that he cited actually pertained to a study of colorectal cancer rather than multiple myeloma. He also testified that he did not recall that study found no causal relationship between multiple myeloma and grilling meats at a very high temperature. He also admitted that the charcoal briquettes that were the subject of the *Olsson* study were actually made in Poland from hardwood imported from Scandinavia. He further admitted that Kingsford Charcoal Briquettes were not evaluated in that study. Dr. Milman agreed that the *Fu* study was based on small numbers and therefore needed confirmation from further study.

Dr. Milman also agreed that the *Bergsagel* study he cited actually concluded there is no scientific evidence to support a causal relationship between exposure to benzene or other petroleum products and the risk of developing multiple myeloma. He added that in his opinion is "there is an association between exposure to benzenes and multiple myeloma but that association is not conclusive."

Todd M. Zimmerman, M.D.

Petitioner also offered into evidence Respondent's Exhibit #6, the transcript of the evidence deposition testimony of Dr. Todd Zimmerman, taken December 2, 2014. Dr. Zimmerman is board certified in internal medicine and oncology. He is an Associate Professor of Medicine at the University of Chicago Medical Center. He specializes in the treatment and research of multiple myeloma.

Dr. Zimmerman performed a records review at Respondent's request and prepared a report dated December 19, 2011. Dr. Zimmerman testified that he reviewed medical records of Decedent, correspondence from Dr. Singhal and Dr. Rich, a job description from Weber Grill, and MSDS sheets for briquettes and the starter product that were used in the restaurant. He testified that multiple myeloma is a cancer of the immune system of the plasma cell and is an incurable malignancy still despite significant advances in improvement in the overall survival rate.

He testified regarding his review of the MSDS sheets. He noted that the MSDS sheets did not reveal any evidence of the presence of benzene in those products. He testified that in his experience as a researcher and a physician who has practiced in the

field of multiple myeloma for 16 years, that research has not found a distinct relationship between benzene exposure and the development of multiple myeloma. He testified, "[n]one of the products he has been exposed to or none of the products that we know of have been linked definitively with the development of multiple myeloma."

Dr. Zimmerman reviewed Dr. Milman's report and did not agree with Dr. Milman's opinion of exposure or causal connection. Dr. Zimmerman testified that the basis of his disagreement was because, "there is not clear evidence between the development of benzene exposure and multiple myeloma and also the fact that we have no evidence that benzene was even present in the products that were utilized."

Dr. Zimmerman noted that the job description defined more of a managerial position.

Dr. Zimmerman reviewed Dr. Randy Rich's Application For Long Term Disability Income Benefits for Mr. Beets and a later narrative report by Dr. Rich. Dr. noted on the Application that the decedent's injury or illness was not work related. In the later narrative report, which is not in evidence, Dr. Rich apparently opined that there was a causal connection. Dr. Zimmerman disagreed to the later opinion. The Arbitrator notes that there is no evidence of the bases for Dr. Rich's opinions set forth in the later narrative report.

CONCLUSIONS OF LAW

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

The Arbitrator finds that the Petitioner failed to prove that Decedent sustained an accident or exposure to toxins that arose out of and in the course of his employment by Respondent.

The Occupational Diseases Act provides: "A disease shall be deemed to arise out of the employment if there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the occupational disease. The disease need not to have been foreseen or expected but after its contraction it must be apparent to have had its origin or aggravation in a risk connected with the employment and to have flowed from that source as a rational consequence."

In support of this finding, the Arbitrator notes that Petitioner's Application for Adjustment of Claim did not state a date of accident or exposure. It was only at the time of trial on July 20, 2015 that the date of accident of September 10, 2006 was alleged. (Arbitrator's Exhibit #1) September 10, 2006 is the date of Mr. Beets' death. The Arbitrator further notes that according to the testimony of Mr. Gerrish and the Application for Long Term Disability Benefits (RX #4) completed and signed by Mr.

Gerrish and Decedent, the last day the decedent actually worked for Respondent was May 4, 2004. Mr. Beets could not have been injured in an accident or exposed to toxins in the course of his employment after May 4, 2004.

Petitioner's claim is based on a theory that the decedent James Beets was exposed to the toxin benzene during the course of more than 15 years of employment by Respondent as a chef. There is no dispute that Respondent's signature dining experience included serving meats grilled over a charcoal fire. Petitioner presented evidence that benzene, a recognized carcinogen, was a component of the charcoal and fire starter utilized by Respondent. However, the evidence of benzene as a component of either product was hearsay. The only credible evidence of the compositions of the charcoal and fire starter was with the MSDS sheets ((RX #3) admitted in evidence. This evidence did not confirm the presence of benzene in either the charcoal or the fire starter.

Pettioner offered evidence that the decedent was continuously exposed to smoke emanating from charcoal grills. Petitioner offered her Exhibit # 2, the video recording of operations at Respondent's Chicago restaurant. The video clearly shows that smoke from the grills was immediately evacuated through a ventilation system which did not directly expose any of the workers depicted to the smoke. Moreover, Pettioner did not offer any evidence that benzene was present in any amount in the smoke which emanated from Respondent's grills. The Arbitrator takes note that benzene is a volatile aromatic hydrocarbon which burns. There was no evidence that any benzene which may have been present in the charcoal or fire starter did or did not burn off into byproducts. There was no evidence that any amount of benzene was present in the smoke.

Petitioner also presented evidence that the decedent became covered and caked with dirt and soot in the course of his employment by Respondent. She testified to his appearance at the end of his workday. This was supported by the testimony of Petitioner's witness Mr. Sorfleet. However, Petitioner did not present evidence as to what was the composition of the dirt and grime described. Moreover, Pettioner's evidence was rebutted by the testimony of Mr. Gerrish and also by Petitioner's Exhibit #2.

For all of the reasons stated, the Arbitrator finds that Petitioner failed to prove a September 10, 2006 accident or exposure to toxin arising out of and in the course of Decedent's employment by Respondent.

E: Was timely notice of the accident given to Respondent?

Based on conclusions of law stated above, this issue is moot. However, the Arbitrator takes note that Petitioner failed to prove that notice of the injury or exposure to toxins was given to Respondent in accord with §6(c) of the Act.

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

The Arbitrator finds that Petitioner failed to prove by a preponderance of credible evidence that the decedent's multiple myeloma and subsequent death was causally related to his employment by Respondent.

Petitioner presented causation evidence through the evidence depositions of Drs. Singhal and Milman. The Arbitrator finds that the opinions of Dr. Singhal and Dr. Milman are speculative at best, and are therefore not credible or persuasive.

Both Dr. Singhal and Dr. Milman rely on the syllogism of *post hoc, ergo propter hoc* (it follows, therefore it is caused by) rather than science. Dr. Singhal repeatedly testified that published research did not provide proof of the validity of her opinions. Dr. Singhal' s causation opinion came to light until after Petitioner's Application for Benefits was filed, some 4 years after Mr. Beets died. It is apparent that the opinion was crafted for litigation purposes and, perhaps, to provide some solace to Petitioner. Dr. Milman relied on studies that did not find a relationship between benzene exposure and multiple myeloma or studies that only found "some" relationship or were only "suggestive" of the relationship. In the end, Dr. Milman said it was "plausible" that benzene exposure caused Mr. Beets' multiple myeloma. This does not meet the burden of proving causation by the preponderance of evidence.

Neither Dr. Singhal nor Dr. Milman based their opinion on any qualitative or quantitative analysis of kitchen air quality or the smoke emanating from the charcoal grills because there was no such testing.

Finally, Respondent's Exhibit #4, the long term disability applications from 2004, included 3 different physician reports, 2 of which noted that the illness was not job related. The third report, Dr. Singhal's, was silent in answer to the causation question.

Although not necessary in light of Petitioner's failure of proof, the Arbitrator finds the opinion of Dr. Todd Zimmerman that there is no proven connection between exposure to benzene and the development of multiple myeloma is persuasive.

O: Is Petitioner entitled to survivor's benefits?

Based on conclusions of law stated above regarding accident, notice, and causation, the issue survivor's benefits in this matter is moot.

November 12, 2015

Steven J. Fruth, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☐ 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

TERRANCE ZIEMAN,

Petitioner,

vs.

NO: 07 WC 43032
08 WC 9230

AMERICAN BUILDING,

Respondent,

16IWCC0818

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the McLean County Circuit Court, which on December 17, 2015, ordered:

1) The Decision of the Commission awarding the Petitioner maintenance benefits between July 30, 2009 and October 14, 2009 is reversed as contrary to the manifest weight of the evidence.
2) All other findings including but not limited to the denial of Penalties under Section 19(k) and 19(l) of the Act and Attorney Fees under Section 16 are confirmed. The matter is hereby remanded to the Commission to enter a Decision consistent with this Order.

The Commission finds that, although it appears that both of these cases were appealed to the circuit court, the only case that is affected by the Order is 08 WC 9230, in which the Commission awarded maintenance benefits. However, the 07 WC 43032 case has also been remanded back to the Commission. To make certain that both of these cases are addressed, we are issuing this decision, pursuant to the circuit court's order, to remove the award for maintenance in 08 WC 9230 and hereby restate below the appropriate awards in both cases.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator in 07 WC 43032, filed March 1, 2012, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that, in 08 WC 9230, the Commission's prior award for maintenance benefits is hereby vacated.

16IWCC0818

IT IS FURTHER ORDERED BY THE COMMISSION that, in 08 WC 9230, Respondent pay to Petitioner the sum of $390.40 per week for a period of 20.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 10% loss of use of the right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that, in 08 WC 9230, Respondent pay to Petitioner the related bills as set forth in Petitioner's Exhibit 20 under §8(a) of the Act pursuant 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 $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.

DEC 19 2016

DATED:

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 10/26/16
49

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

CHARLES JOSLIN,

Petitioner,

16IWCC0796

vs.

NO: 07 WC 57597

FREEMAN UNITED COAL MINING,

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 occupational disease, PPD and evidentary rulings, and being advised of the facts and law, reverses the October 24, 2014, Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

The Decision of the Arbitrator, filed with the Commission on October 24, 2014, concluded Petitioner failed to prove that he contracted an occupational disease that arose out of and in the course of his employment with Respondent. Specifically alleged by Petitioner was that the inhalation of airborne debris as a coal miner negatively affected his lungs and/or heart. The presiding arbitrator found the proffered evidence did not support Petitioner's claim. The Commission finds the evidence shows otherwise.

For over thirty-one years, Petitioner worked in a variety of positions while employed as a miner, all of which were underground. Over those years, he was exposed to coal dust, rock dust, and various fumes and vapors. Petitioner last was exposed to a coal mine environment on May 8, 2007.

Petitioner testified that he first began experiencing respiratory symptoms while working as a rock duster in the 1990s. The symptoms manifested themselves as wheezing, shortness of breath, and coughing that produced black sputum. Other symptoms such as exercise intolerance

16IWCC0796

subsequently arose and prevented him from climbing stairs or mowing his lawn without resting. Petitioner also testified that his condition has worsened since he retired in 2007, notably continued exercise intolerance and coughing up phlegm at night. Petitioner treats his cough with an Albuterol inhaler.

Petitioner's medical treatment records were introduced by Respondent to demonstrate Petitioner was seen on multiple occasions at the VA Medical Center and made no complaints concerning his respiratory system. Some of those same records noted physical examination findings of Petitioner's lungs being clear to auscultation. Notice is taken that those records were taken approximately one year apart and provide no picture of Petitioner's health but for those days.

Multiple physicians examined Petitioner to determine if he contracted coal worker's pneumoconiosis. Their findings were equivocal. Dr. Robert Cohen and Dr. Henry K. Smith, both B-readers, found Petitioner's chest x-rays showed evidence of coal worker's pneumoconiosis. Two NIOSH B-readers along with B-readers, Dr. Jerome F. Wiot and Dr. Joseph J. Renn, found Petitioner's various chest x-rays negative for coal workers' pneumoconiosis. There appears to be more of a consensus with respect to other respiratory impairments.

Dr. Dennis Swenie, Petitioner's former primary care physician, testified that Petitioner has COPD, an umbrella condition that includes chronic bronchitis and emphysema. He testified further that Petitioner's COPD was caused by in part or aggravated by Petitioner's work as a coal miner. Dr. Renn, one of Respondent's examining physicians, testified that Petitioner had a mild obstructive ventilatory defect due to chronic bronchitis. He then went onto testify that the exposures found in a coal mine environment can cause bronchitis, obstructive ventilatory defect, and COPD in a susceptible host. The Commission finds Petitioner was such a susceptible host.

The Decision of the Arbitrator notes that Petitioner has a decades-old history of smoking cigarettes and also that Dr. Swenie testified that Petitioner's smoking was the primary cause of his COPD. Dr. Swenie, as noted above, also acknowledged that Petitioner's COPD was either caused in part or was aggravated by Petitioner's working in coal mines. It is axiomatic that employment need be only a cause, not the sole or primary cause, of a claimant's condition. The Commission finds the combination of Petitioner's smoking cigarettes and the exposures he encountered as a coal miner resulted in his symptoms of COPD.

The Commission concludes the evidence demonstrates Petitioner either contracted COPD or experienced a worsening of COPD as result of his employment and continues to experience the effects of COPD to this day. The Commission finds Petitioner's impairment has resulted in a 10% loss of a person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that October 24, 2014, Decision of Arbitrator is reversed and benefits conferred.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $619.97 per week for a period of 50 weeks, as provided in §8(b)2 of the Act, for the reason that the injuries sustained caused the 10% loss of a man as a whole.

16IWCC0796

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 $30,100. 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: DEC 13 2016
KWL/mav
O: 10/18/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0796

JOSLIN, CHARLES
Employee/Petitioner

Case# **07WC057597**

FREMAN UNITED COAL MINING CO
Employer/Respondent

On 10/24/2014, 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:

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

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

16IWCC0796

Charles Joslin
Employee/Petitioner

v.

Freeman United Coal Mining Co.
Employer/Respondent

Case # 07 WC 57597

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 August 21, 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 Sections 1(d)-(f) and 19(d) of the Occupational Diseases Act

FINDINGS

On May 8, 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 $66,739.62; the average weekly wage was $1,283.45.

On the date of accident, Petitioner was 54 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

October 20, 2014
Date

OCT 24 2014

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 May 8, 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 31 years.

At the time of arbitration, Petitioner was 61 years. Petitioner quit high school in his senior year and he got his GED in the Army. He has an Associate's Degree in Aviation Technology. He also has a CDL Class A truck driver's license that he got at Lincoln Land College in 2010. He worked for 31 years in the coal mine with all that being underground. In addition to coal dust, Petitioner was exposed to silica as a rock duster. He was working at the face where they would load rock and slate. Petitioner was exposed to roof bolting glue fumes and diesel fumes.

Petitioner last worked in the mine on May 8, 2007. His last day of actual employment with Respondent was August 1, 2007. He went off work in May 2007 for surgery on his thumb. When he was released to go back to work on August 1, 2007, he decided he did not want to go back to work. His wife did not want him to go back underground, and she talked him into quitting. Petitioner had pneumonia in July 2007, and was in intensive care for 10 days. After speaking with his doctor he decided that going back into coal mining was one of the worst possible jobs he could do after having pneumonia. Petitioner testified that he provided the coal mine with a return to work slip with no restrictions that would have let him go back to full duty.

Petitioner testified that he signed a quit slip on July 31, 2007. He signed up and began receiving his pension as of August 1, 2007. He received a 30 and out pension which means that since he had 30 years of service with the company and the union he qualified to get the maximum pension benefits without being penalized. When he signed the quit slip with the company he severed all of his rights with the company in terms of recall to the mine.

On his last date of exposure, Petitioner was working for Respondent's Crown II mine. His job classification was inby. As an inby he worked at the face loading coal which is where the continuous miners are. He was exposed to a lot of coal dust in that area. He testified that is generally the dustiest part of the mine.

After leaving the coal mine Petitioner became a part-time bus driver for North Mac Community School District in Virden and Girard, Illinois. He has been a bus driver since he got his CDL license in 2010. He makes $11.75 per hour. He has not worked in over a year because they have other subs and are just passing around the work. During that time, he has not looked for other work.

After Petitioner got out of the Army he worked at the insulation plant in Girard, Illinois for 14 months. After that he went to school at SIU for his Associate's Degree in Aviation Technology. He then came home during semester break and the mine was hiring so he put in his application and was hired at Respondent's Crown II mine. His job classifications during his 31 years of mine

employment included trainee, roof bolter, rock duster, brattice man, timberman, utility man, miner operator, inby, shuttle car operator and laborer.

Petitioner testified that he was working as a rock duster when he first noticed his breathing problems in the 1990s. He noticed he was wheezing, short of breath and coughing up black sputum. Petitioner testified he could walk a mile on level ground at normal pace before getting short of breath. He could climb three flights of stairs before he would have to stop and rest. He testified that from the first time he noticed his breathing problems until the last day he worked at the mine, his breathing problems got worse. Petitioner testified that his problems have gotten worse since he left the mine. Petitioner testified that if he were offered a job in the coal mine today, he would not take it because of his health issues and the strain on his body. He coughs up phlegm at night. He takes Albuterol in an inhaler form.

He testified that he cannot swim as well as he used to or run as far as he used to. He uses a push mower to mow his 90 by 170 foot yard. He has to stop and take a break before he can finish it up Petitioner walks a mile or mile and a half about every day for exercise. Since his wife is working, he takes care of the household chores such as vacuuming, laundry and mowing. In activities around the house, he can set the pace which is slower than what he would normally like to do.

Petitioner's treating doctor is Dr. Doshee. His former doctor was Dr. Dennis Swenie. Dr. Doshee is the one who prescribed the breathing medication. Petitioner started smoking when he was 18 in the Army. He smokes less than a pack a day.

Petitioner had not worked anywhere up to the point he obtained his CDL license in 2010. Petitioner went to work for Trans Am Trucking out of Kansas in 2010. He testified that the over the road truck driving job was a full time job for which he got paid by the load. He was out on the road for one week before he quit.

After leaving the coal mine Petitioner became a part-time bus driver for North Mac Community School District in Virden and Girard, Illinois. He has been a bus driver since he got his CDL license in 2010. He makes $11.75 per hour. He has not worked in over a year because they have other subs and are just passing around the work. During that time, he has not looked for other work.

Dr. Robert Cohen was deposed on August 5, 2010, and his deposition testimony was received into evidence at trial. Dr. Cohen is a senior attending physician at Stroger Hospital Cook County. He is the medical director of the pulmonary physiology and rehabilitation section. He is the medical director of the Black Lung Clinic Program at Stroger Hospital and is also the medical director of the National Coalition of Black Lung and Respiratory Disease Clinics, which are the federally funded clinics to take care of black lung throughout the country (Petitioner's Exhibit 1, p 5). Dr. Cohen has been a B-reader since 1998. He has served as a panel member or presenter at NIOSH conferences on B-readings (Petitioner's Exhibit 1, p 6).

Dr. Cohen examined Petitioner on January 23, 2009 (Petitioner's Exhibit 8). Petitioner gave Dr. Cohen a history of daily cough for 10 to 15 years. He also complained of some wheezing for

seven or eight years. Dr. Cohen opined that Petitioner had coal workers' pneumoconiosis caused by his 31 years of exposure to coal mine dust. Dr. Cohen noted emphysema on Petitioner's chest x-ray (Petitioner's Exhibit 1, p 26). He testified that etiology of the emphysema was multi factorial including 31 years of exposure to coal mine dust and 37 years of exposure to tobacco smoke (Petitioner's Exhibit 1, p 27).

Dr. Cohen testified that Petitioner had chronic bronchitis because he not only had a cough but also chronic sputum production for most days of the week for 10 to 15 years. He testified that the chronic bronchitis was also caused by the coal mine dust and tobacco smoke exposure (Petitioner's Exhibit 1, p 27). Dr. Cohen testified that Petitioner had COPD caused by the same two exposures (Petitioner's Exhibit 1, p 28). Dr. Cohen testified that Petitioner could not have any further exposure to coal mine dust without endangering his health (Petitioner's Exhibit 1, p 25).

At the time of Dr. Cohen's examination, Petitioner was on Albuterol nebulizers and by metered-dose inhaler. In the past he had used two other bronchodilators that are used to treat airways obstruction and can help cough as well. On examination of the chest, Dr. Cohen noted Petitioner had decreased air entry and wheeze on forced expiration. He testified that decreased air entry is seen in people who have COPD and that wheezing on forced expiration is also a sign of obstructive airways disease (Petitioner's Exhibit 1, p 34-35).

Dr. Cohen testified that on pulmonary function testing, Petitioner's adjusted diffusing capacity was at the very lower limits of normal. It created the suggestion that he may have early impairment, however, absent prior testing that cannot be proven. The exercise study showed a normal work capacity, but it was submaximal (Petitioner's Exhibit 1, pp 35-36). Dr. Cohen testified that Petitioner had clinically significant pulmonary impairment in terms of his complaints and physical examination of the chest. He opined that the cause of the clinical impairment was his exposure to coal mine dust and tobacco smoke (Petitioner's Exhibit 1, p 37). The only treatment recommendations that Dr. Cohen gave to Petitioner were to engage in regular aerobic exercise and monitor his blood pressure. He also advised him to stop smoking (Petitioner's Exhibit 1, p 43).

Dr. Cohen has examined many individuals through the years for Petitioner's counsel (Petitioner's Exhibit 1, p 43). Dr. Cohen did not review any treatment records regarding Petitioner although he testified the treatment records can be valuable when evaluating a patient for the presence of an occupational disease (Petitioner's Exhibit 1, pp 44-45). Dr. Cohen testified that the history he obtained from Petitioner was complete and was accurately recorded. He testified that he performed a complete focused cardiopulmonary exam and that the findings of significance were contained in his report (Petitioner's Exhibit 1, p 45).

At his examination, Petitioner related that he could do unlimited walking on level ground, but he developed shortness of breath walking up more than a few flights of stairs or walking up a steep grade (Petitioner's Exhibit 1, p 45). Dr. Cohen testified that significant tobacco use can result in cough, sputum and shortness of breath. In the general population it is the leading cause of chronic bronchitis. When pulmonary function is affected by tobacco induced disease, it shows up as an obstruction. It can result in the decline in pulmonary function over time especially with continued

tobacco use (Petitioner's Exhibit 1, p 49). Dr. Cohen would expect a decline in Petitioner's pulmonary function over time with continued tobacco use. He would also expect an increase in his symptoms of cough, sputum and shortness of breath. His continued habit of smoking was injurious to his health (Petitioner's Exhibit 1, pp 49-50).

Dr. Cohen read Petitioner's chest x-ray as a profusion of 1/0. He seriously considered the film as negative. There is no lower profusion the film could have been given and still be considered legally positive for pneumoconiosis (Petitioner's Exhibit 1, p 50). Dr. Cohen testified that when coal workers' pneumoconiosis is present, it is most often seen with round opacities predominantly in the upper lung zones. Once present radiographically, the disease usually does not regress to lower profusion levels. Dr. Cohen testified that based on data from the Coal Workers' X-ray Surveillance Program, which is administered by NIOSH, 3% of the coal miners in the Illinois coal basin develop pneumoconiosis (Petitioner's Exhibit 1, p 51).

Petitioner did not tell Dr. Cohen that he left mining when he did on the advice of a physician due to pulmonary disease. He also did not tell Dr. Cohen that he was unable to perform the duties of his last coal mining job. Dr. Cohen testified that the majority of patients who have coal workers' pneumoconiosis do not progress. Since Dr. Cohen did not have any prior records on Petitioner, he could not make a determination whether the coal workers' pneumoconiosis was progressing (Petitioner's Exhibit 1, pp 55-56).

Dr. Cohen testified that the pulmonary function testing that he caused to be performed on Petitioner was complete for the purpose that it was given and the results were accurately recorded (Petitioner's Exhibit 1, pp 56-57). Petitioner had a work capacity that fell within the normal range for his age, height and gender. Petitioner had no significant pulmonary limitation to exercise. (Petitioner's Exhibit 1, pp 61-62).

Dr. Robert Cohen was deposed again on April 16, 2014, and his deposition testimony was received into evidence at trial. Dr. Cohen testified that there was absolutely no literature to support Dr. Renn's opinion that if someone has two exposures that could result in obstructive impairment that he can tell which exposure caused the impairment. Dr. Cohen testified that people who are sensitive to those toxins develop the disease and people that are not sensitive do not. He testified that there is no evidence that people will be differentially sensitive to either coal dust alone or tobacco smoke alone and therefore one can say that only one of those two toxins caused the impairment (Petitioner's Exhibit 2, pp 5-6). Dr. Cohen testified that the medical literature reviewed by NIOSH in both the current intelligence bulletin and the criteria documents show that the effect of coal mine dust on lung function apparently is relatively equally potent to that of tobacco smoke exposure, or maybe a bit less for each year of underground coal mining compared to one pack year of tobacco smoke exposure (Petitioner's Exhibit 2, p 9). Dr. Cohen testified that chronic bronchitis caused by occupational exposures can resolve when the exposure ceases or the changes in the airways can be permanent and not resolve. He testified that there is no evidence that occupational exposures always resolve and that smoking never resolves (Petitioner's Exhibit 2, p 14).

Dr. Cohen testified that if Petitioner continued to smoke at a rate of a pack a day, he would be at a significant risk for further decline in his pulmonary function (Petitioner's Exhibit 2, pp 17-18). Dr. Cohen testified that the article by Soutar and Hurley does not deal with the issue of being able to say in dually exposed miners that their smoking was the only thing to cause impairment or that their coal mine dust was the only thing that caused impairment (Petitioner's Exhibit 2, pp 18-20).

Petitioner participated in a coal miner health examination conducted on May 7, 2007, in the National Institute for Occupational Safety and Health Mobile Examination Unit. The results of the spirometry testing revealed that the FVC and FEV1 were within normal limits. There was a reduction in the FEV1/FVC% which could indicate possible early airways obstruction. The chest x-ray of the same date showed no definite evidence of pneumoconiosis (Petitioner's Exhibit 11). Records of NIOSH were admitted into evidence. Petitioner's chest x-rays taken on July 8, 2002, were interpreted by two B-readers as having no abnormalities consistent with pneumoconiosis (Respondent's Exhibit 3, pp12-13).

The May 7, 2007, chest x-ray was interpreted by one B-reader as not having any abnormalities consistent with pneumoconiosis and by another B-reader as negative for pneumoconiosis with profusion 0/1 with Q/T opacities in the middle and upper lung zones (Respondent's Exhibit 3, pp 14-17).

Dr. Henry K. Smith, board certified radiologist and NIOSH B-reader, interpreted chest x-ray dated January 18, 2007, as positive for pneumoconiosis category 2/1 with P/S opacities in all lung zones. He made an identical interpretation of the chest x-rays dated July 18, 2007, and July 26, 2007. Dr. Smith interpreted the chest x-ray of October 12, 2007, 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 November 21, 2008 (Petitioner's Exhibit 5).

Dr. Robert Cohen interpreted the chest x-ray of October 12, 2007, as positive for pneumoconiosis, profusion 1/0 with P/Q opacities in all lung zones. He made an identical interpretation of the chest x-ray dated November 21, 2008 (Petitioner's Exhibit 6).

Dr. Jerome F. Wiot was deposed on April 23, 2010, and his deposition testimony was received into evidence at trial Dr. Wiot reviewed chest x-rays of Petitioner dated January 8, 2007, July 18, 2007, July 26, 2007, October 12, 2007, and November 21, 2008. Dr. Wiot testified that the films were of diagnostic quality. All of the films were of quality 1 with the exception of the January 8, 2007, film which was quality 2 (Respondent's Exhibit 1, p 49). Dr. Wiot testified that none of the films that he reviewed showed evidence of coal workers' pneumoconiosis. He testified that the study of January 8, 2007, was within normal limits. The x-ray of July 18, 2007, showed a large loculated effusion posteriorly as well as fluid within the major and minor fissures. The study of July 26, 2007, showed a thoracostomy tube in place and significant drainage of the fluid on the right. The study of October 12, 2007, showed minimal blunting of the posterior costophenic sulcus on the right, which was undoubtedly secondary to the previous pleural disease. Dr. Wiot testified that on the x-ray of November 21, 2008, there was apical pleural thickening bilaterally. On the right there was a questionable ill-defined nodular density superimposed over the right third

posterior interspace. Dr. Wiot testified that this was probably pleural, but a true nodule could not be totally excluded. He testified that this was not a manifestation of coal dust exposure (Respondent's Exhibit 1, p 50).

Dr. Wiot testified that the findings on the films from July 2007, could have been consistent with the presence of a pneumonia, but it was hidden primarily by the extensive pleural disease. Dr. Wiot testified that when one is looking for the presence of an occupational disease such as pneumoconiosis, he is not looking at the pleura but rather at the parenchyma which is the inside of the lung (Respondent's Exhibit 1, p 51). Dr. Wiot testified that the findings on these various films that were of significance were not causally related to a dust exposure. He testified that pleural disease is in no way related to coal dust exposure. Pleural effusions are usually related to an inflammatory process. Dr. Wiot testified that he did not know the clinical history on Petitioner but would bet that relatively close to July 18, 2007, Petitioner developed a pneumonia in his right lower lobe and developed that pleural effusion (Respondent's Exhibit 1, p 52). Dr. Wiot testified that the blunting seen on the October 12, 2007, film would be related to the previous fluid that he had. On the November 21, 2008, film he could not totally exclude the nodule in the lung but thought it was a pleural based lesion which would be a sequela of the pneumonia as well (Respondent's Exhibit 1, p 53).

Dr. Wiot testified that his interpretation of these films were similar to the radiology reports from the January 8, 2007, July 18, 2007, and July 26, 2007, films (Respondent's Exhibit 1, p 54). Dr. Wiot disagreed with Dr. Smith's interpretation of those same films. Dr. Wiot testified that he did not see the P and S interstitial fibrosis involving all the zones with a degree of profusion of 2/1. Also, the radiologist who read the films originally did not see it. On the July 18, 2007, films, Dr. Wiot and the radiologist who read the film originally did not see P and S opacities in all the lung zones as described by Dr. Smith (Respondent's Exhibit 1, p 55).

Dr. Wiot was the past President of the American Board of Radiology and served as an examiner for the board (Respondent's Exhibit 1, pp 11-13). Dr. Wiot was also the past President of the American College of Radiology and a member of the Task Force on Pneumoconiosis, he helped to develop a weekend symposium which eventually became the modern day B-reader program (Respondent's Exhibit 1, pp 13-19). Dr. Wiot has been teaching the B-reading program since the first weekend course was held in 1970 (Respondent's Exhibit 1, pp 37-38). Dr. Wiot has been a B-reader since the program started (Respondent's Exhibit 1, p 27).

Dr. Wiot testified that in reviewing a film for the presence of pneumoconiosis, the reader looks at the profusion or degree of involvement as well as the opacity type (Respondent's Exhibit 1, pp 30-32). Dr. Wiot testified that with coal workers' pneumoconiosis the vast majority of opacities will be round with irregular opacities as a secondary type (Respondent's Exhibit 1, p 32). Dr. Wiot testified that the reader also indicates what lung zones are involved. Coal workers' pneumoconiosis invariably begins in the upper lung fields. When it progresses it will move to the mid and lower lung zones. Dr. Wiot testified that it is almost invariably worse in the top lung zones than in the bottom (Respondent's Exhibit 1, pp 33-34). Dr. Wiot testified that it is very important in reading chest x-rays to understand what is normal before deciding if the minor changes are significant. This understanding only comes with experience (Respondent's Exhibit

1, pp 39-40). Dr. Wiot has read thousands of chest x-rays for occupational disease (Respondent's Exhibit 1, p 41).

Dr. Joseph J. Renn, III, was deposed on June 27, 2013, and his deposition testimony was received into evidence at trial. Dr. Renn conducted a review of medical records and films regarding Petitioner (Respondent's Exhibit 2, p 17). Dr. Renn is board certified in internal medicine, pulmonary diseases, forensic medicine and as a forensic medical examiner. Dr. Renn has been continuously certified as a B-reader since 1981 (Respondent's Exhibit 2, pp 9-10). Prior to his retirement from patient practice in January 2003, 90% of Dr. Renn's time was devoted to patient care. At one time his patient census of coal miners was as much as a third of his practice, but as coal mining in the area declined so did his patient/coal miner population. It was around 25% when he retired (Respondent's Exhibit 2, p 13).

Dr. Renn reviewed 10 chest radiographs ranging in date from January 28, 2007, to November 21, 2008. He testified that the two films of January 8, 2007, were unreadable for pneumoconioses. He testified that one of the films dated July 26, 2007, was unreadable. He interpreted the chest x-rays of July 18, 2007, July 26, 2007, October 12, 2007, and November 21, 2008, as negative for pneumoconiosis. He assigned each of them a profusion category of 0/0 (Respondent's Exhibit 2, p 24).

Dr. Renn was able to glean from the medical records a cardiopulmonary history for Petitioner. The records revealed that on October 25, 1989, Petitioner was admitted to the hospital for treatment of a left spontaneous pneumothorax. He had no respiratory problems until July 16, 2007, when he was admitted to the hospital with right upper lobe and right lower lobe infiltrates as well as cavitary masses in the right upper and right lower lobes. CT scan revealed loculated pleural effusion for which he underwent chest tube drainage (Respondent's Exhibit 2, p 19). As of January 23, 2009, Petitioner was continuing to smoke approximately one pack of cigarettes per day. He began smoking in 1971; thus, he had smoked 38 pack years (Respondent's Exhibit 2, p 20). Between October 25, 1989, and January 23, 2009, Petitioner's respiratory system was examined on myriad occasions. It was found to be normal with exception of diminished breath sounds and hyperresonance when he had his left spontaneous pneumothorax, coarse breath sounds during March and December 2004, a few right basilar crackles when he had pneumonia and decreased air entry with forced expiration wheezing when examined by Dr. Cohen (Respondent's Exhibit 2, pp 20-21).

Dr. Renn also reviewed spirometry studies performed on Petitioner. The graph tracings accompanying the study of August 24, 2007, revealed it to have been performed with poor cooperative effort, thereby rendering it invalid. Dr. Renn testified that the quality control check on that testing denoted that the FVC and FEV1 was graded as "F", which means they failed. The graph tracings accompanying the studies of January 23 and April 3, 2009, revealed the studies to have been performed with good cooperative effort, thereby rendering them valid. The ventilatory function represented by the studies was mild obstruction without significant bronchial reversibility. Lung volumes were performed on one occasion and were normal. The diffusing capacity was normal on the one occasion tested (Respondent's Exhibit 2, pp 21-22).

Resting arterial blood gases were performed on one occasion and resting and exercise arterial blood gases on another occasion. Dr. Renn testified that the resting studies were normal for Petitioner's age at the time performed. The exercise study revealed a slight decrement from that of resting, however, it remained within normal limits. Thus, he had no evidence of interference with gas exchange (Respondent's Exhibit 2, p 22). Dr. Renn testified that during the exercise study of January 3, 2009, Petitioner had a hypertensive response to exercise. At the time of hypertensive response, his breathing reserve was more than adequate to continue the study (Respondent's Exhibit 2, pp 23-24). Dr. Renn testified that on April 3, 2009, in the spirometry performed by Dr. Cohen, Petitioner's forced vital capacity and forced expiratory volume in one second were normal. He had an FEV1/FVC ratio of 61%. For Petitioner in that testing, the lower limit of normal would have been 66%. The reduction of his FEV1/FVC ratio lead Dr. Renn to the conclusion that Petitioner had a mild obstructive ventilatory defect (Respondent's Exhibit 2, pp 24-25). Dr. Renn testified that the testing did not reveal a ventilatory limit to exercise (Respondent's Exhibit 2, p 27). Dr. Renn testified that based upon the results from the objective testing on Petitioner, he was capable of heavy manual labor. Dr. Renn's final impression regarding Petitioner was that he had chronic bronchitis owing to tobacco smoking, and he did not have a pneumoconiosis (Respondent's Exhibit 2, p 29).

Dr. Renn testified that in the April 2009 testing Petitioner had a significant improvement in his FEF25-75 and peak expiratory flow after bronchodilator. This indicates that Petitioner had a reversible airway obstruction. He testified that coal workers' pneumoconiosis is not a reversible disease process (Respondent's Exhibit 2, p 32). Dr. Renn testified that the pattern of a disproportionate reduction of the volumes and flows would be characteristic of a smoke-induced obstruction. If he had an obstruction due to dust exposure, Dr. Renn would expect to see the FEV1/FVC be approximately normal or if there was a proportionate reduction of the FVC and FEV1, it would still stay normal because of the proportionate reduction. One would also expect to see the FEF25-75 and the peak expiratory flow rate be approximately normal. Dr. Renn testified the authority for his opinion is the NIOSH *Criteria Document* 1995 (Respondent's Exhibit 2, pp 33-34).

Dr. Renn testified that if Petitioner continued his habit of tobacco use, he would expect him to have acute episodes of bronchitis, upper respiratory infections and be more prone to pneumonia (Respondent's Exhibit 2, p 35). Dr. Renn testified that the American Thoracic Society prohibition against continued exposure for coal dust in one that has been diagnosed with pneumoconiosis is a relative one. The position that the American Thoracic Society has adopted is that an older worker with a mild pneumoconiosis may be at low risk by continuing to work in the current permissible levels until he reaches retirement age (Respondent's Exhibit 2, pp 35-36).

Dr. Renn testified that Petitioner had a mild obstructive ventilatory defect owing to the chronic bronchitis (Respondent's Exhibit 2, p 38). Dr. Renn testified that exposure to the environment of coal mine can cause chronic bronchitis, COPD and obstructive ventilatory defects. Petitioner's 30 years of exposure to the coal mine environment was sufficient exposure to cause bronchitis, obstructive ventilatory defect and COPD in a susceptible host (Respondent's Exhibit 2, p 40). Dr. Renn testified that the scarring and emphysema of coal workers' pneumoconiosis cannot perform the function of normal, healthy lung tissue. By definition, if one has coal workers'

pneumoconiosis, he would have an impairment of the function of the lung at the site of the scarring and emphysema whether that impairment could be measured or not (Respondent's Exhibit 2, p 52).

The medical records of Springfield Clinic were received into evidence at trial. Petitioner was seen on November 29, 2005, for consideration for colonoscopy. A review of his pulmonary system revealed no cough or shortness of breath. His lungs were clear bilaterally and resonate to percussion (Respondent's Exhibit 5, pp 80-81). On April 30, 2007, a chest x-ray of Petitioner was ordered and the cited reason was "smoker". Dr. Robert Haag compared the study to a prior exam dated January 8, 2007, and noted the lungs remained hyperexpanded, compatible with chronic obstructive pulmonary disease. No acute alveolar infiltrate was identified. Dr. Haag's impression was chronic obstructive pulmonary disease and no acute pulmonary process (Respondent's Exhibit 5, p 46). On May 9, 2007, Petitioner underwent right first digit CMC fusion. During physical examination before surgery, it was charted that Petitioner's lungs and thorax were clear and his respiratory system was negative for any symptoms (Respondent's Exhibit 5, p 38). Petitioner was released to return to full duty as of August 1, 2007, with regard to his CMC joint fusion (Respondent's Exhibit 5, p 12).

The medical records of the VA Medical Center were received into evidence trial. On February 14, 2003, Petitioner had a chest x-ray conducted. The clinical history listed was coal miner and nicotine dependence. The impression was normal. On that same date Petitioner was informed of the risk of tobacco use and encouraged to stop using same (Respondent's Exhibit 6, p 111, 107).

On February 4, 2004, Petitioner was seen for his annual physical. He had no complaints. His chest was clear to auscultation (Respondent's Exhibit 6, pp 101-104).

When seen on March 20, 2006, Petitioner reported no chest pain or shortness of breath. His lungs were clear to auscultation (Respondent's Exhibit 6, pp 94-95).

On March 27, 2007, Petitioner was seen for a physical. He was having some right hand thumb base joint pain from shoveling. He had no chest pain or shortness of breath. He was counseled on smoking cessation and was not willing to stop (Respondent's Exhibit 6, pp 87-91).

On March 21, 2008, Petitioner was examined and stated that he had been diagnosed with black lung. He did not have any chest pain or shortness of breath (Respondent's Exhibit 6, pp 84).

Petitioner was seen on March 20, 2009, for a yearly follow up exam. It was charted that he had black lung. Physical examination of the chest revealed the lungs clear to auscultation and all lung fields with slightly decreased breath sounds. The impression on that date was chronic obstructive pulmonary disease/black lung (Respondent's Exhibit 6, p 71).

On March 15, 2010, physical examination of the chest revealed slightly decreased breath sounds in all lung fields, but clear. Petitioner was continuing to smoke at two packs per day (Respondent's Exhibit 6, pp 60-61).

Petitioner returned on April 22, 2011, for his yearly follow up with no complaints and advised that he was feeling well. It was charted that he had mild COPD with no complaints and no shortness of breath. Physical examination of the chest revealed the lungs clear to auscultation in all lung fields (Respondent's Exhibit 6, p 52).

Petitioner was seen in the office on March 30, 2012. Petitioner related that he felt fine and denied any specific complaints. Physical examination revealed the lungs clear to auscultation with equal air entry bilaterally. The assessment was chronic obstructive pulmonary disease-stable at that time. Petitioner was again counseled to cut down on smoking to make his COPD better (Respondent's Exhibit 6, pp 43-44).

Petitioner was seen on January 24, 2013, at which time he complained of tinnitus in both ears. He denied any other specific symptoms. He brought in with him a physical examination report for his bus driving. Physical examination of the chest revealed the lungs clear to auscultation with air entry equal bilaterally. Following examination the assessment rendered was history of hyperlipidemia, status post hematuria, tinnitus and COPD stable (Respondent's Exhibit 6, pp 19-20).

Petitioner was seen on October 21, 2013, with no specific complaints. Physical examination of the chest revealed the lungs clear to auscultation with the air entry equal bilaterally. He continued to smoke and declined any smoking cessation intervention (Respondent's Exhibit 6, pp 14-15).

The medical records of Memorial Medical Center were received into evidence at trial. Petitioner was admitted to Memorial Medical Center with pneumonia on July 16, 2007. He reported having increase in shortness of breath, cough and wheezing over the last seven to ten days. He had a chest x-ray taken which showed pneumonia in the right upper and mid lung zones (Respondent's Exhibit 7, pp 50-51). During his hospitalization a CT of the chest revealed loculated pleural fluid and pleural thickening throughout the right mid and lower chest. There were also some cavitary masses or pulmonary abscesses within the right upper lobe and right lower lobe. Antibiotic therapy was initiated as well as eventual chest tube for drainage of these cavitary masses. Pathology was negative for cancer. Petitioner was stabilized and discharged home after 10 days in the hospital (Respondent's Exhibit 7, pp 274-275).

Dr. Dennis Swenie was deposed on August 14, 2012, and his deposition testimony was received into evidence at trial. Dr. Swenie practices with Illini Medical Associates. During the course of his practice he had occasion to provide care and treatment to Petitioner (Petitioner's Exhibit 4, p 6). Dr. Swenie testified that Petitioner has had COPD, chronic bronchitis, asthma and/or emphysema. He testified that COPD includes chronic bronchitis and emphysema (Petitioner's Exhibit 4, p 8).

Dr. Swenie testified that the first time he saw Petitioner he listed asthma as the diagnosis. He testified that it probably was a manifestation or an exacerbation of the COPD. Dr. Swenie testified that the COPD was caused in part or aggravated by Petitioner's 30 years of work as a coal miner (Petitioner's Exhibit 4, pp 8-9). Dr. Swenie testified that because of those diseases, if Petitioner had any further exposures to the environment of a coal mine, such would present a risk

to his health in the form of a possible worsening of each and all of those work related pulmonary diseases (Petitioner's Exhibit 4, p 9). Dr. Swenie testified that Petitioner does not have the pulmonary capacity to work full time as a coal miner (Petitioner's Exhibit 4, pp 9-10).

Dr. Swenie first saw Petitioner on August 2, 2011. He knew that Petitioner had been smoking at least 30 pack years. Dr. Swenie saw Petitioner three times from August 2011 to September 2011. He testified that much of what he knows about Petitioner he got from his treatment records (Petitioner's Exhibit 4, pp 13-14). Dr. Swenie advised Petitioner to stop smoking because it would stop damaging his lung function. He testified that smoking is the number one cause of COPD. Smoking is associated with cough, sputum and shortness of breath. Dr. Swenie would expect those symptoms to progress if Petitioner continued to smoke. He testified that it is certainly injurious to his health (Petitioner's Exhibit 4, p 14). Dr. Swenie testified that there were not any x-rays in the chart that contained the diagnosis of black lung (Petitioner's Exhibit 4, p 17).

Dr. Swenie never ordered any pulmonary function tests on Petitioner. He is aware that pulmonary function testing was performed by a board certified pulmonologist. He would defer to that board certified pulmonologist who performed spirometry, lung volumes, diffusion capacity, blood gases as well as exercise testing as to the degree of physiologic impairment that Petitioner has from a ventilatory standpoint (Petitioner's Exhibit 4, pp 21-22).

Delores Gonzalez was deposed on November 26, 2012, and her deposition testimony was received into evidence at trial. Ms. Gonzalez is a vocational rehabilitation counselor (Petitioner's Exhibit 3, p 4). She provides vocational rehabilitation counseling to workers' compensation clients. She served as the clinical educator for Maryville University and Southern Illinois University of Carbondale (Petitioner's Exhibit 3, p 4). She does vocational assessments at the request of injured persons as well as insurance carriers or third party administers (Petitioner's Exhibit 3, p 5).

Ms. Gonzalez performed a vocational assessment of Petitioner on July 13, 2012 (Petitioner's Exhibit 3, p 6). She did not do any vocational testing at that time because Petitioner had an associate's degree. She did review medical records to determine his primary functional limitations and medical problems. In Petitioner's case those limitations were primarily pulmonary (Petitioner's Exhibit 3, p 7). Petitioner was 59 years old. He had a GED and had gotten an associate's degree in applied science in aviation electronics. At the time Ms. Gonzalez saw Petitioner, he was working for two school districts as a school bus driver making $10.75 per hour. Prior to that he had worked for about three and a half months as a custodian earning a similar hourly rate (Petitioner's Exhibit 3, pp 8-9).

Ms. Gonzalez did a transferability of skills analysis and assessed Petitioner's employability (Petitioner's Exhibit 3, p 11). She testified that Petitioner did not have transferable skills because the work skills he had were basically from the mining industry and those would not be transferrable to things in the competitive labor market outside the mining industry (Petitioner's Exhibit 3, p 12). Ms. Gonzalez testified that the medical evidence revealed that Petitioner could not return to any of his past jobs as they all required work to be performed in the medium physical demand level or above (Petitioner's Exhibit 3, p 12). She testified that it was extremely doubtful that he would ever be able to earn what he had been earning and that prospective employers in the

usual course of selecting new employees for jobs that offer significant competitive wages. Further, they would avoid hiring an individual with Petitioner's overall profile in favor of individuals who are younger and more work ready and would have higher academic skills and not have to be accommodated (Petitioner's Exhibit 3, p 13). Ms. Gonzalez testified that although the bus driving job was classified as medium according to the dictionary of occupational titles, it really was more of a sedentary job because he was seated and it was within his residual functional capacity because there was not any manual labor involved (Petitioner's Exhibit 3, p 13).

Ms. Gonzalez testified that when the mine closed and a hundred employees were laid off they were most likely laid off with the same relative skills Petitioner had. For those individuals it is highly unlikely that they would find work that paid them at or near what they were making before (Petitioner's Exhibit 3, p 19).

Ms. Gonzalez testified that Petitioner passed a DOT physical on February 1, 2012, and was working as a bus driver. She testified that possibly he would be able to drive as an over-the-road truck driver. She stated in her report that he was unlimited in the amount he could drive. She testified that it is possible there were jobs out there that would pay him $20.00 an hour as an over-the-road truck driver with no touch load. To her knowledge he did not apply for any of those jobs (Petitioner's Exhibit 3, pp 20-21).

Ms. Gonzalez testified that Petitioner might have a problem with exhaust because of his pulmonary issues which is why he might not be driving a truck. She testified that the tractor trailers probably have worse exhausts than school buses (Petitioner's Exhibit 3, pp 21-22). Ms. Gonzalez did not provide Petitioner any assistance in finding work or developing a vocational plan for him because he was employed (Petitioner's Exhibit 3, pp 22-23).

Ms. Gonzalez testified that she was giving credence to Dr. Swenie and Dr. Cohen as far as Petitioner's problems and what caused them. She did not know if Dr. Swenie treated the Petitioner during the time that he was a coal miner or how many times he actually saw Petitioner (Petitioner's Exhibit 3, pp 23-24). The only medical that Ms. Gonzalez had from Dr. Swenie in her file was the letter from Petitioner's counsel where the doctor wrote in certain responses (Petitioner's Exhibit 3, p 26). Ms. Gonzalez agreed that Dr. Cohen testified that Petitioner's cardiopulmonary exercise tests revealed a normal work capacity. She testified that normal work capacity would not mean sedentary work (Petitioner's Exhibit 3, p 30). She agreed that Dr. Cohen testified that Petitioner was normal in terms of his exercise ability. Her opinions expressed in her report were based upon her assumption that he was limited to sedentary work (Petitioner's Exhibit 3, p 32).

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 May 8, 2007.

In support of this conclusion the Arbitrator notes the following:

Petitioner had a long history of smoking starting when he was 18 years old. Various treating and examining physicians have consistently recommended he cease smoking, but Petitioner refused to do so.

Petitioner was treated at the VA Medical Center for various conditions from February, 2003, through October, 2013. During that time, Petitioner denied having chest complaints and being short of breath. Petitioner was diagnosed with COPD and was counseled to cease smoking which he declined to do.

While Dr. Swenie testified that Petitioner's COPD was aggravated by Petitioner's working in the mine, he agreed that smoking was the number one cause of this condition and that he had no x-rays indicating that Petitioner had black lung. Further, Dr. Swenie never reviewer or reviewed any pulmonary studies.

The Arbitrator finds the B-readings of Dr. Wiot, Dr. Renn, and the NIOSH B-readers to be persuasive.

In regard to disputed issues (L) and (O) the Arbitrator makes no conclusions 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 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Glen Wilson,
Petitioner,

vs. No. 08 WC 1128

Montery Coal Company,
Respondent.

16IWCC0792

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 occupational disease, causal connection, and permanent disability, and being advised of the facts and law, affirms and adopts, with additional findings of fact and conclusions of law, the May 13, 2015 Decision of Arbitrator Maureen Pulia, which is attached hereto and made a part hereof.

Arbitrator Pulia denied Petitioner's claim for compensation, finding he failed to prove by a preponderance of credible evidence that he sustained an accidental injury arising out of and in the course of his employment by Respondent on August 31, 2006, the day he retired.

In 1974, Petitioner began a 33 year career as a miner for Respondent, working various jobs both under and above ground. He testified he was variously exposed to coal dust, roof bolt glue fumes, diesel fumes, exhaust, ash, smoke and dust. Petitioner also had been a pack-a-day cigarette smoker for over 40 years, not quitting until 5 years after he retired.

The primary issue in this case is whether, as a result of occupational exposure, cigarette smoking, or both, Petitioner developed occupational asthma, emphysema, significant pulmonary impairment (chronic bronchitis and chronic obstructive pulmonary disease ("COPD")), coal workers' pneumoconiosis ("CWP"), or any other condition of ill-being.

16IWCC0792

Dr. Glennon Paul, MD., Petitioner's expert, gave these opinions: Petitioner now has simple CWP, caused by exposure to coal mine dust. He also has COPD including emphysema and chronic bronchitis; occupational asthma, and pulmonary impairment. Each of these was caused by exposure to both coal mine dust *and* cigarette smoke. Petitioner also offered into evidence the records from his primary physician, **Dr. Jerome Epplin, MD.**, spanning 28 years, from 1985 to 2013.

Dr. Peter Tuteur, MD, Respondent's expert, gave these opinions following Petitioner's Section 12 examination: Petitioner had no evidence of bronchial reactivity, reactive airways disease or emphysema, either by history, physical exam, pulmonary function studies or other objective testing. Petitioner's COPD was *solely* caused by his chronic inhalation of tobacco smoke. None of his current conditions are in any way related to or aggravated by the inhalation of coal mine dust. Dr. Tuteur opined Petitioner had no evidence of CWP or any coal mine dust induced disease. He opined that while COPD and chronic bronchitis can be multifactorial in etiology, it is possible to determine their etiology.

In affirming and adopting the arbitrator's decision, the Commission also notes that Petitioner testified at arbitration that he experienced shortness of breath, progressively worsening breathing problems since the 1990's, daily coughing, and a need to rest after walking one flight of stairs. Dr. Epplin's records, however, do not corroborate Petitioner's testimony. Dr. Epplin's May 7, 2010 office note reflects that Petitioner reported feeling well, sleeping well, having a good energy level, and had no complaints. On September 1, 2010, four years after he retired, Petitioner told Dr. Tuteur he was able to walk indefinitely on flat ground and climb 2-5 flights of stairs. In light of these discrepancies, the Commission finds Petitioner's credibility lacking.

COPD, Emphysema, Asthma, Bronchitis

The Commission notes Illinois case law holding that causation of these diseases is not unique to occupational exposure; they are diseases found among the general population. The fact that the public in general is exposed to a certain disease lessens the chances that a person's employment causes or aggravates it. *Downs v. Industrial Commission, 143 Ill.App.3d 383, 493 N.E.2d 595, 599, 97 Ill.Dec. 788 (5th Dist. 1986).* Nonetheless, if Petitioner proves he has these diseases and that a work exposure contributed toward causing or aggravating them, then he has met his burden.

The Commission finds the opinion of Dr. Tuteur – that Petitioner has not proven he developed COPD, emphysema, asthma and bronchitis as a result of occupational exposures while working for Respondent – more persuasive than Dr. Paul's contrary opinion.

Dr. Tuteur testified that restrictive ventilatory abnormalities can be caused by other conditions beside coal dust exposure, such as congestive heart failure or a viral infection. In coming to medical causation conclusions, the examiner must consider the totality of available data, not just the patient's pulmonary function studies.

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The basis of Dr. Tuteur's opinion that Petitioner's COPD is solely related to his smoking and not his work exposure is the percentage or odds of him having it; and also, a statistical analysis of the medical literature – "the same type of reasoning that is used daily in the evaluation, management and treatment of patients." Based upon published studies in the medical literature, upon which he relied, Dr. Tuteur opined that COPD due to coal mine dust inhalation occurs very infrequently; perhaps three-tenths of one percent to one percent. Dr. Tuteur also explained why the published studies he disagreed with were flawed: their control groups were "enriched."

Dr. Tuteur provided the basis for his opinion that Petitioner did not have CWP-caused emphysema. Emphysema caused by CWP, or focal emphysema, is a different type than the two types of emphysema caused by the chronic inhalation of tobacco smoke: centrilobular emphysema and panlobular emphysema.

Petitioner's expert, Dr. Paul, acknowledged that heavy smoking can cause permanent bronchitis. He testified that he did not know for sure what caused Petitioner's asthma, and he agreed that cigarette smoking will aggravate it. Dr. Paul's opinions regarding the usefulness of pulmonary function tests are somewhat contradictory: he testified they will not tell you the etiology of a pulmonary abnormality, but then testified that you could tell whether a specific exposure caused impairment in a miner's lungs, if you had serial pulmonary function tests, pre-tests and post-tests to compare.

Dr. Paul admitted Petitioner has not had any lung exposures to coal dust since he retired as a coal miner, but that he did continue smoking cigarettes after that date. He agreed Petitioner's heavy pack-a-day cigarette smoking could increase his risk of developing COPD; could cause bronchitis to become permanent, and could be the cause of Petitioner's cough and obstructive lung problems. Dr. Paul did not know how long Petitioner had been having asthma symptoms, or what caused them. He agreed that smoking is the number one cause in the U.S. of COPD, emphysema and chronic emphysema.

Dr. Paul agreed with Dr. Tuteur's opinion that a determination of the presence and etiology of lung diseases is based on other factors in addition to x-rays and pulmonary function studies. In arriving at his opinion that Petitioner's significant pulmonary impairment was from *both* cigarette smoking and mine exposures, Dr. Paul considered Petitioner's reported, "coughing and pulmonary symptoms." The Commission finds Dr. Paul's opinion unreliable, in that he considered Petitioner's above history, which is contradicted to a large extent by Dr. Epplin's records through 2013 showing that Petitioner had no complaints, treatment or referrals for any chronic cough or lung symptoms.[1]

The arbitrator placed great weight on the fact that Petitioner's primary care physician, Jerome Epplin, MD, made no diagnoses of any lung diseases over a 28 year period between 1985 and 2013. The Commission does likewise. Even after Petitioner's retained expert, Dr. Paul, diagnosed these diseases at his April 11, 2008 exam, Petitioner's treating physician Dr. Epplin reported no such corroborating diagnoses during the next five years. Dr. Epplin's records

[1] Other than infrequent temporary illnesses which completely resolved.

16IWCC0792

document no complaints of, or treatment for, COPD, emphysema, asthma, or bronchitis through 2013 (PX5). They show the opposite: after April 11, 2008, Petitioner specifically denied breathing and lung problems. He denied chest pain, shortness of breath and dyspnea at office visits on 9/11/09, 11/15/11 and 11/26/12. Notably, Petitioner admitted on January 12, 2010 that he was still smoking cigarettes.

Coal Workers' Pneumoconiosis ("CWP")

After reading Petitioner's x-rays, the certified NIOSH B-readers in this case, **Dr. Henry Smith, DO**, for Petitioner, and **Dr. Jerome Wiot, MD**, for Respondent, came to opposite conclusions of whether he has CWP. Neither of these doctors provided testimony or bases for their interpretations. Thus, in determining whether Petitioner developed CWP, the Commission looks to the opinions and testimony of Drs. Paul and Tuteur.

Dr. Paul gave his opinion that Petitioner has CWP, but admitted the x-ray showed the least positive rating ("1/0") in the NIOSH system. He provided little discussion of his bases for that opinion, other than the fact that Petitioner was exposed to coal mine dust. Dr. Paul admitted that there was no way to know who is going to be susceptible to coal dust and will get pneumoconiosis. He testified that Petitioner could have developed CWP one year after his last exposure to coal dust; but again, he gave no basis for that opinion.

Dr. Tuteur, however, provided his basis for his opinion that Petitioner did not have CWP: the findings on Petitioner's September 1, 2010 chest x-rays were of old healed partially calcified granulomatous disease ("OHG disease"), a common finding in 85% of the x-rays he reviews each week. Dr. Tuteur found no evidence of CWP at all. He explained that there is a huge difference between the x-ray appearance of CWP and OHG disease. The difference is regarding the location of the calcification and whether it has taken place and is present in the lung. OHG disease tends to be both in the lung parenchyma and the lymph nodes but located centrally and dominantly around the hilum. OHG disease densities tend to be substantially larger, and CWP is associated with bilateral and rather symmetrical upper lung field peripheral nodular disease of similar size, and a general temporal and morphologic homogeneity. CWP is rarely calcified; OHG disease is almost always calcified for most of the nodular densities, and the difference in patterns is easy to tell apart. Because Petitioner worked in a mine for 30+ years with no radiographic manifestations of CWP, he had resistance to the development of CWP and was less likely to be a susceptible host. Dr. Epplin's extensive records during Petitioner's years of mining and thereafter, in which there was no evidence of CWP, further support Dr. Tuteur's opinion that Petitioner had resistance to developing CWP.

The Commission adopts Dr. Tuteur's opinion that Petitioner did not develop CWP in the course of his employment by Respondent, finding his opinion more persuasive than Dr. Paul's contrary opinion.

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Finally, the Commission finds that Petitioner is not disabled as a result of any occupational exposure issues. Dr. Tuteur opined Petitioner was able to return to work as a coal miner or alternatively, perform work requiring similar effort, because his lungs were at a sufficient level of function to perform that work. Petitioner's level of pulmonary function is neither severe enough to cause disability nor significant enough to contribute to disability from other causes.

For the foregoing reasons, as well as those cited in the Arbitrator's decision, the Commission finds that Petitioner failed to prove by a preponderance of the credible evidence that he sustained an accidental exposure arising out of and in the course of his employment.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 13, 2015, is hereby affirmed and adopted.

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: DEC 8 - 2016

Joshua D. Luskin

Charles J. DeVriendt

Mario Basurto

o-10/05/16
jdl/mcp
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILSON, GLENN M
Employee/Petitioner

Case# **08WC001128**

MONTEREY COAL COMPANY
Employer/Respondent

16IWCC0792

On 5/13/2015, 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 0.08% 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
620 E EDWARDS ST PO BOX 335
SPRINGFIELD, IL 62705

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

GLENN M. WILSON,
Employee/Petitioner

v.

MONTEREY COAL COMPANY,
Employer/Respondent

Case # 08 WC 1128

Consolidated cases: _____

16IWCC0792

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 **Springfield**, on **4/16/15**. 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. ☐ 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 **8/31/06**, 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 **$741.93**; the average weekly wage was **$741.93**.

On the date of accident, Petitioner was **56** 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 **$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

The petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/31/06. Petitioner's 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.

Signature of Arbitrator

5/6/15
Date

ICArbDec p. 2

MAY 13 2015

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 56 year old coal miner, alleges he sustained an occupational disease that arose out of and in the course of his employment by respondent on 8/31/06. Petitioner worked 33 years for the respondent, with the first 30 years underground where he was exposed to coal dust, silica dust, roof bolting glue fields, diesel fumes, and smoke from coal fires on the surface. When petitioner last worked for respondent on 8/31/06, it was in the position of heavy equipment operator. Petitioner was exposed to coal dust on that day. Petitioner retired on 8/31/06 because it was hard for him to complete a shift. He testified that he was worn out and tired by the end of the shift. He also attributed some of his problems to breathing difficulties. Petitioner has not had any alternate employment since he left the mine.

Petitioner started working for respondent in February 1974. His first job was that of an underground laborer. In this capacity he would do whatever was needed to be done. His duties included that of a utility person, shuttle car operator, scoop operator, etc. Petitioner did a little bit of all the jobs in all areas of the mine. Petitioner's dust exposure was dependent upon what job he was working. Petitioner testified that the dirtiest work was the utility work. He testified that the dust would flow down from the face to where he was working.

Petitioner then became a laborer for five years, followed by a continuous miner for 25 years. As a continuous miner, petitioner would cut coal at the face of the mine and load it into a shuttle car. When he began this position he would sit on the machine. Later on, the coal cutting machine was remotely controlled by him as he stood behind it. However, petitioner stated that there is not much difference between sitting on the machines versus standing behind it with a remote control. Petitioner alleges that this is one of the dustier jobs in the mine because dust was created whenever they were mining the coal. For a short time, petitioner worked as a roof bolter, but never operated the bolter with glue. However, as a continuous miner he was exposed to glue that leaked onto the floor of the mine. He testified that the fumes were everywhere and he would smell roof bolt glue as a continuous miner. Petitioner testified that all machinery in the mine was diesel starting in the 1990s, and there would be diesel fumes throughout the mine. At times, when they were doing a long wall move, there would be a blue cloud of diesel exhaust around them.

Petitioner spent the last three years of his work for respondent at the surface as a heavy equipment operator. He would operate dump trucks and haul trucks. In this capacity he could take gob (whatever washed out of the coal) from the mine to the gob hills. Petitioner would push the gob around using a V-6 machine until it formed a mountain of gob. At times he might run a compactor over the gob to compact it. In this capacity petitioner might also use a grater to maintain the road for the haul trucks to run on, or drive a water car that would spray water on the roadways. If petitioner was bringing coal to the coal pile he would use a dozer to push

it out to make it a bigger pile of coal. When he did this there would be some dust, and at times there may be hotspots.

Petitioner testified that he first noticed breathing problems at work in the 1990s. He reported difficulty when moving large hoses. He testified that it would take his breath away. Petitioner's ability to move these hoses decreased over time. He testified that this was part of the reason he transferred to the surface. As time progressed, petitioner testified that his breathing problems continued to get worse. Petitioner can walk 100 yards before he gets short of breath, and can do a flight of steps before he has to rest. Petitioner does not use any breathing medications. However, he can't do things he once did comfortably, such as push a push mower.

Petitioner has heart disease, diabetes, and hypertension. He takes medication for his hypertension, and diabetes, and Lipitor for his cholesterol. In 2004 petitioner had stents put in, and in November 2014 underwent a quadruple bypass. After that petitioner was doing better.

Petitioner offered into evidence the medical records of Dr. Jerome Epplin, his primary care physician. There were 3 sets of medical records through 4/7/09, through 4/23/12, and through 3/4/13. Petitioner has a history of hypertension, diabetes type II, hyperlipidemia, and a pack a day smoking habit. Petitioner gave a family history of heart disease. On 3/30/04 petitioner was found to have significant coronary artery disease due to several cardiac risk factors. He had a stent put in the right coronary and circumflex arteries. Medical records were offered from1985 through 1/13/09. During this period there was only one office note that showed petitioner had a small patch of pneumonia in the right middle lobe on 4/14/03, and a cough and congestion with a normal chest examination on 1/10/85. Other than this, they did not include any complaints of any breathing problems. Additionally, examinations of his lungs and chest were normal. In a group of records from 2/18/09 to 3/26/12, petitioner had nasal congestion complaints on only 2 occasions, 3/14/11 and 3/26/12, both of which were 5 and 6 years after he left the mines.

On 4/10/08 petitioner was evaluated by Dr. Glennon Paul an internist, that has board certifications in Internal Medicine and Pediatrics, as well as Asthma, Allergy, and Immunology. Dr. Paul examined petitioner at the request of his attorney, Bruce Wissore. Petitioner gave a history of working in the coal mines for 33 years, 30 years underground, and 3 years above ground. Petitioner denied any significant shortness of breath, but admitted to some coughing from time to time with upper respiratory tract infections. Petitioner gave a history of hypertension, high cholesterol, and diabetes. He also noted that he had been a heavy cigarette smoker of about 45 pack years over the past 40 years. Dr. Paul performed an examination, and took an x-ray of the chest that showed mild fibronodular lesions throughout both lung fields. He also performed a pulmonary function study that revealed a mild to moderate obstruction with a 20% improvement in the FEV, after bronchodilators. Also

noted was a moderate decrease in the carbon monoxide diffusing capacity. Dr. Paul was of the opinion that these pulmonary function studies suggested emphysema with a significant reverse for an asthmatic component. Dr. Paul's impression was that petitioner had simple coal workers' pneumoconiosis complicated by emphysema with a reversible component. He was also the impression that petitioner suffered from hypertension, diabetes mellitus, and hypercholesterolemia.

On 9/1/10 petitioner underwent a Section 12 examination performed by Dr. Peter Tuteur, board-certified in both internal medicine and pulmonary diseases, at the request of respondent. Dr. Tuteur was asked to evaluate petitioner for the presence or absence of workplace associated pulmonary problem. Dr. Tuteur took a work history from petitioner. He reported that he worked 30 years for respondent as an underground miner with the last three years as a heavy equipment operator above ground. Dr. Tuteur noted that clearly when petitioner retired on 8/31/06, he had been exposed to sufficient amounts of coal mine dust to produce coal workers' pneumoconiosis in a susceptible host. Dr. Tuteur noted that petitioner began smoking cigarettes at the age of 19, and has done so for a total of 41 years at the rate of about a pack a day. Dr. Tuteur was of the opinion that this put petitioner at a substantial increased risk for the development of tobacco smoke associated health problems such as chronic obstructive pulmonary disease (chronic bronchitis/emphysema), arteriosclerotic heart disease and/or lung cancer.

Dr. Tuteur was of the opinion that petitioner's medical history was significant for several major disease entities. The first was when petitioner presented in 2004 with chest pain and severe fatigue that led to a cardiac workup. A stress test was positive and petitioner underwent cardiac catheterization. Severe stenosis at the circumflex marginal branch, as well as in the right coronary artery was noted, and both vessels were stented . At that time petitioner was also found to have hypertension and treatment with a beta blocker was initiated. He was also given Lipitor for hyper cholesterol. Petitioner has had no cardiology follow up since. In 2000 he was diagnosed with diabetes mellitus, and never treated with insulin. Nonetheless, petitioner becomes symptomatic from hypoglycemia when blood sugars are less than 90. From a pulmonary standpoint petitioner had one episode of pneumonia while working, but has never had sinusitis, Gerd, allergies, or asthma. Petitioner reported that he could walk indefinitely on flat ground and climb more than two flights of stairs, but less than five flights of stairs. Petitioner coughs daily, predominantly expectorating clear sputum, which occasionally becomes slightly yellow. Petitioner reported wheezing sounds at night. In April 2008 petitioner was evaluated for "black lung" by Dr. Paul. He also noted that multiple chest radiographs were taken while petitioner was still working and read by NIOSH and found to be negative. Dr. Tuteur noted that Dr. Paul performed pulmonary function studies after bronchodilators that demonstrated no worse than a mild obstructive abnormality.

Dr. Tuteur performed a physical examination, chest radiographs that showed no evidence whatsoever to indicate the presence of changes consistent with coal workers' pneumoconiosis, and pulmonary function studies that showed a mild obstructive ventilatory defect that did not improve following the administration of aerosolized bronchodilator, and is associated with air trapping. Based on these findings Dr. Tuteur opined there is no evidence to support the presence of simple coal workers' pneumoconiosis of sufficient severity and perfusion to produce clinical symptoms, physical examination abnormalities, impairment of pulmonary function, or radiographic change. From a pulmonary standpoint, Dr. Tuteur was of the opinion that petitioner has a fulfillment of criteria for chronic bronchitis associated with a mild obstructive abnormality and air trapping. Dr. Tuteur was of the opinion that pulmonary function tests were supportive of the diagnosis of chronic obstructive pulmonary disease. Petitioner's SpO2 was 99%, which is normal. He was of the opinion that the possible etiologies of this condition can be either coal dust exposure or cigarette smoke, and he opined that the etiology of petitioner's condition was chronic inhalation of tobacco smoke, and not coal mine dust. Dr. Tuteur opined that petitioner has an advanced coronary artery disease requiring multiple coronary artery stents, hypertension well-controlled, hypercholesterolemia, and diabetes mellitus controlled with multiple hypoglycemic agents. He further opined that these conditions are in no way related to, aggravated by, or caused by the inhalation of cold mine dust. Dr. Tuteur opined that although petitioner has impairment of pulmonary function, it is of insufficient severity and extent to account for any disability that he may have.

On 12/6/10 the evidence deposition of Dr. Paul was taken on behalf of petitioner. Dr. Paul is a Senior Physician at the Central Illinois Allergy and Respiratory Clinic where they specialize in allergy and pulmonary diseases, and take care of patients with respiratory diseases, critical care, allergic diseases and some internal medicine problems. Dr. Paul performs and reads about 100 x-rays, and performs 100 pulmonary function tests a week. Back in the 1970s Dr. Paul had the occasion to treat coal miners for coal mine induced lung disease, mostly at the request of the coal company. With respect to his diagnosis of pneumoconiosis, emphysema, reversal component, and chronic bronchitis in the asthmatic range, Dr. Paul was of the opinion that they all blend together because petitioner was exposed to coal mine dust and he was also a smoker. Because of this, Dr. Paul believed petitioner had two reasons for developing emphysema with a bronchitic component. Dr. Paul was of the opinion that Dr. Tuteur's exam was just on a better day because asthma waxes and wanes.

Dr. Paul opined that petitioner has coal workers pneumoconiosis caused by coal dust, has emphysema caused by coal dust and cigarette smoke, and has COPD caused by cigarette smoke and coal dust. He further opined that petitioner has chronic bronchitis caused by coal dust and cigarette smoke, and occupational asthma

probably caused by the environment of the coal mine. He agreed that plant glue and diesel fumes could be a cause of petitioner's occupational asthma.

Dr. Paul opined that diesel fumes are an irritating substance for the wind pipes, and if you irritate them enough, it can cause a permanent reactive airway disease. Dr. Paul opined that the risk of obstructive disease from the environment of the coal mine is the same as the risk of obstructive disease from smoking. He opined that petitioner could not have any additional exposure to the coal mine without endangering his health. Dr. Paul opined that petitioner has clinically significant pulmonary impairment in the form of his coughing and pulmonary symptoms, as well as radiographically apparent abnormalities that are consistent with pulmonary impairment caused by cold dust. Dr. Paul believed that petitioner was only capable of light duty work, and was disabled from coal mining. Dr. Paul opined that if you have coal workers' pneumoconiosis you have some impairment in the function of the lung at the site of the scarring whether it can be measured by spirometer or not, and can be either obstructive or restrictive. He further opined that one can have injury or disease in the lung despite having normal pulmonary function test results, and no shortness of breath. Dr. Paul was of the opinion that silica, diesel fumes, fumes from other petroleum products, smoke and fumes from high sulfur coal fires, smoke and fumes from electrical cable fires, fumes from glues used in the roof bolting process, and welding fumes can injure the lungs. Dr. Paul was of the opinion that inhalation of coal mine dust can result in shortness of breath, chronic cough, emphysema, and chronic bronchitis. Dr. Paul was of the opinion that a CT scan can be adjusted to emphasize certain types of diseases, and at the same time wash out or make it less able to see other diseases.

On cross-examination Dr. Paul did not recall what dates the medical records from Dr. Epplin were that he reviewed. He testified that what he remembered was that petitioner was seen in the emergency room for diesel fume exposure. He believed that symptoms from such an exposure would most likely be on a temporary basis. However, he also believed that some patients could end up getting continuous reactive airway disease for an unknown period of time in the future, maybe permanent. Dr. Paul did not know what petitioner's job was with respondent. He testified that he did not know exactly what jobs petitioner did while working in the coal mine. Dr. Paul admitted that when he examined petitioner he denied any significant shortness of breath. He testified that petitioner told him that he coughed from time to time with upper respiratory tract infections. Dr. Paul admitted that being a heavy cigarette smoker could certainly have been a cause of his cough, a cause of his obstructive problems on his pulmonary function study, and increased risk for developing COPD. Dr. Paul was of the opinion that cigarette smoking aggravates an asthmatic condition. Dr. Paul admitted that if petitioner continued to smoke even after quitting the mine, that smoking could make any emphysema or COPD that he has

worse. Dr. Paul testified that petitioner's physical examination of his chest when he examined him was normal, and petitioner did not give him any history of wheezing. Dr. Paul was of the opinion that the chance of progression of coal workers' pneumoconiosis is a very small percentage, when the individual no longer has exposure to cold dust. Dr. Paul noted that he did not find any evidence of progressive massive fibrosis or cor pulmonale when he examined petitioner. Dr. Paul could not identify what caused petitioner's asthma.

On 12/12/10 Dr. Jerome Wiot, Professor of Radiology, reviewed a PA and lateral chest x-ray dated 9/1/10. He noted that the films were of acceptable quality by ILO standards (quality– 1). Dr. Wiot was of the opinion that these x-rays showed no evidence of coal worker's pneumoconiosis.

On 3/22/12 the evidence deposition of Dr. Peter Tuteur, was taken on behalf of respondent. Dr. Tuteur reviews chest x-ray films and pulmonary function study results on a regular basis, and performs physical examinations. Dr. Tuteur testified that he reviews between 20 and 100 chest x-rays a week, and finds that 85% of them have old healed granulomatous disease. He testified that there is a huge difference between this finding and findings consistent with coal workers' pneumoconiosis, a difference with respect to location, whether or not calcification is taking place, and whether or not it's in the lung or not. Dr. Tuteur was of the opinion that coal workers' pneumoconiosis, when radiographically demonstrable, is associated with bilateral, rather than symmetrical, upper lung field peripheral nodular disease of similar size, typically a millimeter and a half. He also stated that there is general temporal and morphologic homogeneity. With respect to old healed granulamatous disease, Dr. Tuteur was of the opinion that they tend to be both in the lung parenchyma and in the lymph nodes, located centrally and dominantly around the hilum. He was of the opinion that coal workers' pneumoconiosis is rarely calcified, whereas old healed granulomatous is almost always calcified for most of the nodular densities.

With respect to petitioner's pulmonary function studies, Dr. Tuteur was of the opinion that the abnormality identified was not likely associated with the condition of bronchial reactivity. He noted that there was not a condition of asthma. With respect to the arterial blood glass portion of the pulmonary function study, Dr. Tuteur was of the opinion that pO2, pH, and PCO2 were essentially normal. He noted that petitioner's FEV1 was stable during exercise, which supports a finding of no bronchial reactivity in response to exercise. Based on all of Dr. Tuteur's testing, he was of the opinion that petitioner did not have evidence of coal mine dust induced disease, or coal workers' pneumoconiosis. He further opined that petitioner did not have legal coal workers' pneumoconiosis. Dr. Tuteur opined that petitioner did not have bronchial reactivity, or any kind of reactive airway disease, at the time he examined him, or by history. Dr. Tuteur diagnosed chronic bronchitis/COPD, and identified smoking as the number one cause of chronic bronchitis in the United States. Dr. Tuteur also noted

that he did not find any evidence of emphysema or asthma in petitioner. Dr. Tuteur opined that although petitioner has impairment of pulmonary function, it is of insufficient severity and extent to account for any disability.

On cross-examination Dr. Tuteur testified that although he took the B-Reader test, he did not pass. He further testified that having granulomatous disease does not prevent coal workers' pneumoconiosis. He testified that you can have both at the same time. Dr. Tuteur opined that one could have chronic bronchitis from coal mine dust exposure, COPD, and/or smoking at the same time. Dr. Tuteur testified that he specifically disagreed with the table in the Federal Register by Marine and colleagues who found smoking and heavy cold dust exposure causing the COPD or chronic bronchitis at about the same rate. Dr. Tuteur admitted that petitioner had specific exposure, intermittently for less than a year, in standing tracks, and that can cause COPD and chronic bronchitis. Dr. Tuteur agreed that petitioner had sufficient exposure to the environment of a coal mine to cause chronic bronchitis and COPD in a susceptible host. Dr. Tuteur was of the opinion that roof bolting glue can be responsible for chemically induced bronchial reactivity. Dr. Tuteur agreed that even though petitioner was never of roof bolter that used glue bolts, he was not precluded from being exposed to roof bolting glues when he was working in some other capacity in an area where roof bolting with glue bolts may have been occurring. Dr. Tuteur was of the opinion that petitioner demonstrated a degree of resistance to the development of coal workers' pneumoconiosis, and is less likely to become a susceptible host. Dr. Tuteur agreed that a person can have 1/0 simple coal workers pneumoconiosis and not have any symptoms. Dr. Tuteur agreed that a person can start out in their mining career with pulmonary function testing within the range of normal, and due to lung damage or injury, lose up to a third of their breathing capacity by the end of their career, and still be within the range of normal.

Dr. Tuteur agreed that the silica, diesel fumes, welding fumes, smoke and fumes from electrical cable fires, smoke and fumes from fires of high sulfur coal, and fumes from glues used in the roof bolting process, can harm a lung. He further agreed that the inhalation of coal mine dust can cause emphysema. He agreed that chronic inhalation of coal mine dust may produce a clinical picture indistinguishable from cigarette smoke induced chronic obstructive pulmonary disease. Dr. Tuteur was of the opinion that the inhalation of silica dust, as a component of coal mine dust, can cause an obstructive ventilatory defect. Dr. Tuteur testified that CT scans are not recognized by NIOSH for purposes of diagnosing coal workers pneumoconiosis under the B- reading system, but are recognized by everybody else. Dr. Tuteur was of the opinion that the 2002 position statement of the American Thoracic Society is wrong, and he relied on the data of the Attfield & Hodous data, not necessarily their opinions.

On redirect examination Dr. Tuteur was of the opinion that the Federal Register contains a number of articles that are consistent with the NIOSH conclusions regarding coal workers' pneumoconiosis, and some articles that are inconsistent or contrary to that conclusion. Dr. Tuteur was of the opinion that a chest CT scan or a thoracic CT scan is more diagnostically accurate than a chest x-ray when looking for occupational diseases such as coal workers' pneumoconiosis. Dr. Tuteur stated that he has personally used and reviewed chest or thoracic CT scans since before 1980. Dr. Tuteur was of the opinion that the American Thoracic Society and the American Lung Association published statements regarding the prevalence in North America coal miners of occupational lung disease from coal exposure, and found it to be generally about 4%. Dr. Tuteur was of the opinion that there is a generally accepted rate of decline of FEV1 as a consequence of aging alone that is about 28 cc's a year in coal miners that never smoked, and about 30 cc's on average among 15 to 20 studies of the general healthy male population. He was of the opinion that the generally accepted rate of fall of FEV1 among a population of adult cigarette smokers is 50 cc's. He was of the opinion that the difference between the 28 and 50 cc's is due to cigarette smoking.

On cross-examination Dr. Tuteur was of the opinion that if a person was a coal miner who smoked cigarettes and they had COPD resulting from both of these exposures, left the mine, and continued to smoke for four more years, the irreversible damage that had been caused by the coal mine would still be there. However, the effect of constant inhalation or the cessation of the inhalation of coal mine dust, if it is analogous to the experience with cessation of cigarette smoking, would revert to an age alone rate of decrease of FEV1 rather than the accelerated rate that is experienced with continued smoking. Dr. Tuteur was of the opinion that 20% of persons who smoke 40-50 pack years will get COPD as a result of it.

Petitioner offered into evidence X-ray interpretations of Dr. Henry Smith dated 11/8/07 for an x-ray dated 10/16/07. Dr. Smith has been a NIOSH B-Reader since 8/1/87. He rated the film quality as grade 1. He noted mild interstitial fibrosis p/s and all zones with the profusion of 1/0. He noted no chest wall plaques, calcifications or large opacities. Slightly thickened interlobar fissures were noted. Petitioner's heart size was normal. Dr. Smith's impression was early mild pneumoconiosis with interstitial fibrosis p/s and all zones with profusion 1/0 and slightly thickened interlobar fissures.

Petitioner offered into evidence his W-2 for 2005 and 2006. His wages for 2005 were $36,295.43. His wages for 2006 were $27,752.48.

Respondent offered into evidence a wage statement for petitioner for the 52 week period preceding the accident. From 8/22/05 through 8/20/06 petitioner earned $35,969.61.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

It is unrebutted that petitioner worked for respondent for 33 years, with 30 of those years underground. From 2003 until he retired petitioner worked on the surface for respondent. While petitioner worked for respondent he was exposed to coal dust, silica dust, roof bolting glue, diesel fumes, and smoke from coal fires on the surface. Petitioner testified that he retired on 8/31/06 because he was worn out and tired by the end of the shift. He testified that it was hard for him to complete a shift.

Petitioner testified that he first noticed breathing problems in the early 1990's that got progressively worse. However, a review of Dr. Epplin's records from 1985 through 3/4/13 did not show any evidence of any breathing problems in the 1990's. Additionally, a thorough review of all of Dr. Epplin's records through 3/4/13 showed only one occasion where petitioner was noted as having a small patch of pneumonia in the right middle lobe on 4/14/03. Also noted during this period there was only one reference to cough and congestion on 1/10/85,with a normal chest examination, and only 2 reports of nasal congestion on 2/18/09 and 3/26/12. Other than these 4 references, Dr. Epplin's records, over a period of 28 years, include no findings of any occupational lung disease, including coal worker's pneumoconiosis. Additionally, at no point during this period was petitioner ever referred to a pulmonologist, undergo pulmonary function testing, or placed on any breathing medications. Additionally, there is no reference to any complaints or diagnoses consistent with asthma. The arbitrator also finds it significant that petitioner gave a family history of heart disease and on 3/30/04 petitioner was found to have significant coronary artery disease due to several cardiac risk factors that included hypertension, diabetes type II, hyperlipidemia, and a pack a day smoking history. At that time he had a stent put in the right coronary and circumflex arteries. Petitioner testified that after undergoing a quadruple bypass in November of 2014 he felt a lot better.

Despite Dr. Epplins 28 years of medical records that do not support a finding of any occupational lung disease, emphysema, asthma, or any other pulmonary problems, on 4/10/08 Dr. Paul examined petitioner at the request of his attorney and performed pulmonary function studies that suggested emphysema with a significant reverse for an asthmatic component. He also took a chest x-ray that interpreted as showing mild fibronodular lesions throughout both lung fields. He was of the opinion that these findings were consistent with simple coal workers' pneumoconiosis complicated by emphysema with a reversible component. The arbitrator finds it significant that Dr. Paul is not a B-Reader, and that none of his findings are corroborated in Dr. Epplin's records. Additionally, the arbitrator finds it significant that petitioner himself denied any significant shortness of breath, and reported a history of heavy smoking of about 45 pack years over the past 40 years. Although petitioner gave Dr. Paul a history of coughing from time to time with upper respiratory tract infections, the arbitrator finds this

history not corroborated by the 28 years of records of Dr. Epplin, which show that petitioner only reported one episode of cough and congestion, one episode of pneumonia, and 2 episodes of nasal congestion in a 28 year period. The arbitrator finds it significant that Dr. Paul testified that he did not know what petitioner's job was with respondent, and did not know exactly what jobs petitioner did while working in the coal mine.

Petitioner offered into evidence of B-Reading from Dr. Smith of films dates 10/16/07 which he interpreted was being positive for coal worker's pneumoconiosis in a 1/0 profusion.

In the alternative, respondent offered into evidence the opinions of Dr. Tuteur. Dr. Tuteur is not a certified B-Reader. Dr. Tuteur was of the opinion that petitioner's smoking history put petitioner at a substantial increased risk for the development of tobacco smoke associated health problems such as chronic obstructive pulmonary disease, arteriosclerotic heart disease, and/or lung cancer. Dr. Tuteur was of the opinion that the chest pain and severe fatigue petitioner experienced before 2004, resulted in him undergoing the placement of stents in 2004. He was also put on a beta blocker for his hypertension, and lipitor for his high cholesterol. There was absolutely no documented link between petitioner's cardiac issues and his work in the coal mine. Additionally, the arbitrator finds it significant that petitioner had a family history of heart disease. Petitioner told Dr. Tuteur in 2010 that he coughs daily, expectorates sputum, and wheezes at night. However, the arbitrator finds it significant that no such corroborating evidence is found in Dr. Epplins records during that period. Dr. Tuteur was of the of the opinion that petitioner's examination chest x-rays showed no evidence consistent with coal workers' pneumoconiosis. He was of the opinion that petitioner's pulmonary function tests were supportive of the diagnosis of COPD, and the etiology was chronic inhalation of tobacco smoke, and not coal mine dust. Dr. Tuteur was of the opinion that petitioner's impairment of his pulmonary function was not of sufficient severity and extent to account for any disability he may have. Dr. Tuteur noted no evidence of any emphysema or asthma. He was of the opinion that smoking is the number one cause of chronic bronchitis in the United States.

Dr. Tuteur noted that petitioner had undergone multiple chest x-rays that were taken while he was still working that were read by NIOSH and found to be negative.

Dr. Wiot, Professor of Radiology, reviewed a PA and lateral chest x-ray of petitioner dated 9/1/10, on behalf of respondent. He was of the opinion that these x-rays showed no evidence of coal worker's pneumoconiosis.

Based on the above, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by

respondent on 8/31/06. The arbitrator bases this on the fact that both petitioner and respondent had experts read the same PA and lateral x-rays and came up with differing opinions that cancel each other out. Additionally, the arbitrator finds it significant that the history of complaints petitioner provided both Dr. Paul and Dr. Tuteur are not corroborated by the credible medical records of petitioner's treating physician, Dr. Epplin from 1985 through 2013. The arbitrator also bases this opinion on the fact that while working for respondent petitioner underwent multiple chest radiographs by NIOSH that showed no evidence of coal worker's pneumoconiosis, and that Dr. Epplin never diagnosed petitioner with emphysema, asthma, chronic bronchitis, or any other pulmonary or lung disease.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/31/06, the arbitrator finds this issue is moot.

G. WHAT WERE PETITIONER'S EARNINGS?

In support of petitioner's earnings in the year preceding the alleged injury on 8/31/06, petitioner offered into evidence his W2 forms from 2005 and 2006. Since these documents only show the annual earnings for an entire calendar year, the arbitrator finds they cannot be used to accurately determine what petitioner's earnings were in 52 week period preceding the alleged accident date.

In the alternative the respondent offered into evidence petitioner's wage statement for this period. Petitioner did not object to this exhibit being entered into evidence, and offered no credible evidence to rebut the information on the wage statement. As such, the arbitrator uses the wage information of respondent's wage statement to determine petitioner's average weekly wage.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner's average weekly wage in the 52 week period preceding the alleged accident on 8/31/06, was $741.93.

L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury that arose out of and in the course of his employment by respondent on 8/31/06, the arbitrator finds this issue is 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert McLean,
Petitioner,

vs.

No. 08 WC 35994
Consol. with: 08 WC 02385

Chicago Park District,
Respondent.

16IWCC0850

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the First District Appellate Court of Illinois, Workers' Compensation Commission Division, which reversed the circuit court's order in this matter, reversing the Commission's denial of PTD benefits. The appellate court remanded this matter to the Commission, "with directions that it vacate the portion of its decision awarding claimant PPD benefits and determine claimant's entitlement to a wage differential award on the merits."

Petitioner filed two separate claims for work accidents, only one of which (08 WC 35994) is subject to this decision. The subject accident occurred on July 22, 2008, when Petitioner was 48 years old. While digging a hole, Petitioner's foot slipped off of a shovel and he felt a twist and pop in his right knee. Dr. Brian Cole, MD, diagnosed Petitioner with degenerative joint disease, aggravation of a pre-existing condition and a degenerative medial meniscal tear. On November 5, 2008, Dr. Cole performed a right knee arthroscopic medial meniscectomy and debridement of articular cartilage. On July 16, 2009, Petitioner underwent a total right knee arthroplasty by Dr. Bret Levine, MD. On October 9, 2009 he underwent a manipulation under anesthesia. On March 31, 2010, Dr. Levine performed an arthroscopic debridement and manipulation. On September 3, 2010, Petitioner underwent a functional capacity evaluation and was found able to work at a level between Medium and Medium-Heavy.

Petitioner did not return to his prior job as a laborer, and his right knee problems continued. Dr. Levine reported in August 2011 that a bone scan showed loosening of Petitioner's prosthesis. Dr. Levine considered but ruled out revision surgery for the present. Respondent's Section 12 expert, Dr. Ira Kornblatt, MD, opined in January 2012 that Petitioner's improvement had plateaued, and he would need permanent sedentary restrictions.

Petitioner received permanent restrictions which Respondent was unable to accommodate. He has sought other employment without success. Petitioner's vocational rehabilitation expert, Jeffrey Lucas, PhD, opined Petitioner displayed a 4th to 6th grade educational level, despite having a high school diploma. Dr. Lucas opined there was no stable labor market for Petitioner due to his age, his lack of transferrable skills, his physical limitations, the medications he was taking and a limited job market.

Respondent's vocational rehabilitation expert, Jacky Ormsby, opined Petitioner could find sedentary work within his ability, which, based on a July 6, 2012 labor market survey, would pay him an average of $11.83/hour. Respondent also retained Joe Belmonte of Vocamotive, who performed a labor market survey in January 2012. Mr. Belmonte opined that after some additional training, Petitioner could probably earn $11.00/hour.

In a decision dated March 7, 2013, the arbitrator found Petitioner permanently and totally disabled as a result of his July 22, 2008 accident, and awarded him, pursuant to §8(f) of the Act, benefits of $886.85/week for life, commencing December 15, 2012.

Respondent filed a review before the Commission. On December 20, 2013, the Commission issued a Corrected Decision and Opinion in this matter, a copy of which is attached hereto and made a part hereof. In a 2-1 decision, the Commission found Petitioner failed to prove he was permanently and totally disabled, and reduced the arbitrator's permanency award to 60% loss of use of the person-as-a-whole pursuant to §8(d)2 of the Act. The Commission otherwise affirmed and adopted the rest of the arbitrator's March 7, 2013 decision.

Thereafter, Petitioner filed an appeal to the circuit court of Cook County. Following briefs and oral arguments, the circuit court, Judge James McGing presiding, issued an Opinion and Order dated October 2, 2014. In it, the circuit court reversed the Commission's decision of permanent partial disability of 60% person-as-a-whole under §8(d)2, finding that award to be against the manifest weight of evidence.[1] The circuit court remanded the case back to the Commission for further action consistent with its order.

[1] The circuit court consolidated this appeal with the appeal taken on Petitioner's companion claim, number 08 WC 2385, issuing one order for both claims. In the companion claim, for Petitioner's alleged accident of October 19, 2007, the circuit court affirmed the Commission's decision affirming the arbitrator's denial of all benefits in that claim. That companion claim, 08 WC 2385, was not appealed to the First District Appellate Court.

On October 23, 2014, Respondent filed a Notice of Appeal of the circuit court's order to the First District Appellate Court of Illinois, Workers' Compensation Commission Division. On December 23, 2015, that court filed its order in this matter, reversing the circuit court's order reversing the Commission's denial of PTD benefits and reinstating that portion of the Commission's decision. It also directed the Commission to formally consider awarding Petitioner with benefits under §8(d)1, as opposed to benefits under §8(d)2.

Pursuant to the appellate court's mandate, the Commission has now considered on the merits Petitioner's entitlement to a wage differential award under §8(d)1. The Commission finds sufficient evidence has been offered by the parties to establish that Petitioner is entitled to a wage differential award pursuant to §8(d)1 of the Act.

Petitioner offered proof that as of June 1, 2012, the hourly wages for laborers covered by the bargaining agreement with Respondent was $36.20 per hour, or $1,448.00 per 40 hour week. The Commission finds persuasive the opinion of Respondent's vocational rehabilitation expert, Jacky Ormsby, that Petitioner was able to earn, post-accident, an average of $11.83 per hour, or $473.20 per 40 hour week. The Commission thus calculates Petitioner's wage-differential rate pursuant to §8(d)1 of the Act, to be $649.87 per week. This figure represents 2/3 of the difference between what Petitioner proved he could have earned as a union laborer at the time of Arbitration ($1,448.00), and the average amount which the Commission finds Petitioner now able to earn ($473.20).

IT IS THEREFORE ORDERED BY THE COMMISSION that its Corrected Decision of December 20, 2013 is modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award to Petitioner of 60% loss of use of person-as-a-whole pursuant to §8(d)2, made by the Commission on December 20, 2013, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $649.87 per week for the duration of the disability, commencing December 15, 2012, as provided in §8(d)1 of the Act.

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

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

16IWCC0850

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: DEC 28 2016

o-12/06/16
jdl/mcp
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ 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

Mildred Anderson, Widow of Earnest Anderson,
Petitioner,
Vs.

16IWCC0782

NO: 09 WC 8649

Peabody Coal Company, etal,
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 diease, statute of limitation 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 15, 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: DEC 6 – 2016
KWL/vf
11/29/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

16IWCC0782

ANDERSON, MILDRED WIDOW OF ANDERSON, ERNEST
Employee/Petitioner

Case# **09WC008649**

PEABODY COAL COMPANY ET AL
Employer/Respondent

On 12/15/2015, 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 0.58% 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:

5236 CULLEY FEIST KUPPART & TAYLOR
ROMAN P KUPPART
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

2742 HAZLETT & SHORT PC
KEVIN M HAZLETT
1167 FORTUNE BLVD
SHILOH, IL 62269

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
FATAL

16IWCC0782

Mildred Anderson, widow of Earnest Anderson
Employee/Petitioner

v.

Peabody Coal Company, et al.
Employer/Respondent

Case # **09** WC **08649**

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, Illinois**, on **April 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. ☒ 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 Decedent's employment by Respondent?

D. ☒ What was the date of the accident?

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

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

G. ☒ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☐ Who was dependent on Decedent at the time of death?

K. ☐ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☒ Other **Death; Burial expenses**

16IWCC0782

FINDINGS

On the date of last exposure, **March 3, 1989,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Decedent's death ***is not*** causally related to the accident.

In the year preceding the injury, Decedent earned **$25,078.96**; the average weekly wage was **$489.09**.

On the date of death, Decedent was **79** years of age, **married** with **-0-** dependent children.

The Arbitrator finds that Decedent died on **November 26, 2006**, leaving **1** survivor, as provided in Section 7(a) of the Act, including -0- children and 1 surviving spouse.

ORDER

Because Petitioner failed to meet her burden of establishing that Petitioner's decedent sustained an occupationally induced lung disease and further failed to establish that decedent's death was causally related to an occupationally induced lung disease, 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.

Michael K. Nowak, Arbitrator

12/10/15
Date

ICArbDecFatal p. 2

16IWCC0782

FINDINGS OF FACT

Decedent was a coal miner for approximately 44 years. He worked for Cherry Hill Coal from 1945 to 1947. From 1948 to 1955 he worked for Peabody Coal. From 1955 to 1960 he worked for Big Three Coal Company. In 1962 Decedent returned to work for Respondent where he worked above ground until he retired on March 3, 1989. Decedent died on November 26, 2006. Decedent and Petitioner, Mildred Anderson, were married in 1949 and remained so until his death. Decedent was last exposed to coal mine dust while working for the Respondent on March 3, 1989. Petitioner has not remarried since the death of her husband. Decedent's death certificate lists the cause of death as sepsis due to pneumonia and COPD.

Mr. Anderson had a long and significant cigarette smoking history. The medical records indicate he started smoking at age 16 and smoked one to two packs of cigarettes a day for the past 57 years. He discontinued cigarette smoking for about 32 months after his stroke in August 1997, however he soon resumed cigarette smoking and continued to smoke one to two packs of cigarettes a day but stopped again in 2001. At arbitration, Mrs. Anderson testified her husband did not resume smoking after his stroke in 1997.

The medical records further indicate that Mr. Anderson had applied for "Black Lung" benefits but had been rejected for those benefits in the past.

Respondent obtained a medical records review prepared by Dr. Jeffrey W. Selby. Dr. Selby is a board certified internist; board certified pulmonologist and certified B reader. Dr. Selby provided a 63 page report summarizing the medical records in chronological order. Dr. Selby's report provides a detailed and accurate summary of the medical records.

Mr. Anderson had a pulmonary function test on 7/25/86 which was essentially normal but is consistent with the history of cigarette smoking. Office notes from 1991 through 1997 document a diagnosis of COPD associated with cigarette smoking. There are numerous references from the doctors that Mr. Anderson was advised to quit smoking. Mr. Anderson retired and his last date working as a coal miner was 3/3/89. His only exposure to pulmonary irritants after that date was from cigarette smoke. Mr. Anderson suffered a significant stroke on 8/24/97 described as a probable right hemispheric stroke. He was admitted to St. Francis Medical Center from 9/13/97 to 9/30/97. A CT scan of the head showed a large ischemic infarct involving the right postero temporal, postero frontal and parietal lobes. A carotid ultrasound study showed significant stenosis involving the right internal carotid artery. The assessment was that there was a stroke resulting from disease involving the ipsilateral internal carotid artery. He was transferred to a skilled nursing facility on 9/1/97 and to a rehabilitation unit on 9/13/97. His admission to Heartland Regional Medical Center on 3/10/03 confirms he had applied for black lung benefits but had been rejected. The social history section of the record establishes his substantial cigarette smoking history of one to two packs a day from the age of 16 to the age of 73. This record also documents that Petitioner stopped smoking after his stroke but resumed smoking one to two packs a day after the stroke. The medical records of Petitioner's treating physicians as well as his hospitalizations indicate a long history of COPD caused by Petitioner's cigarette smoking. The records establish the physicians were aware of the fact that Petitioner was an above ground coal miner. There is no indication in the medical records that the physicians believed the COPD was caused in any way by Petitioner's employment as a coal miner. Mr. Anderson's final hospitalization began on 11/16/06 at Heartland Regional Medical Center. The observations section of Dr. Selby's report states:

Retired around 1989

7-25-86	normal PFT
2-13-91	normal PFT (1-2 years after retirement)
2-13-92	wheeze first noted
11-4-94	"very active"
8-18-97	CVA
4-11-06	no rales
9-29-06	"led a very active life still attending to his farm... without significant shortness of breath or cough" (after retirement)
11-9-06	"when prednisone is off he easily has exacerbations"

Mr. Earnest Anderson had no objective evidence of coal worker's pneumoconiosis. All chest x-rays, CT scans as read by board certified radiologists are repeatedly negative of any commentary regarding small or large opacities of pneumoconiosis with the exception of one person ...who apparently was not a B-reader per the B-reader form. This was on a chest x-ray dated 7-2-01 and the only positive finding was a B large opacity. In the absence of small opacities a large opacity can't exist. This was simply an error in reading by an inexperienced radiologist apparently. Multiple CT scans and chest x-rays were done after this time up until his death 15 years later and no one else read an x-ray positive for coal worker's pneumoconiosis.

Mr. Anderson had normal pulmonary function testing long after leaving the coal mines even while still smoking. The later spirometry was long after his stroke and multiple pneumonias and likely development of asthma. This was in no way related to coal mining or inhalation of coal mine dust. His calculated smoking history was 55 pack years by Dr. Sanjabi's own history but Dr. Sanjabi tended to minimize this to "over 30 pack years" in his history. Note that smoking history obtained by Dr. Dr. Herman Lyle on 3/10/2003, when the patient's memory would have been more accurate, amounted to approximately 90 pack years. Smoking caused his COPD along with apparent development of asthma long after he left mining. His asthma was being made markedly worse by continuous bombardment of his airways by the thousands of toxins in cigarette smoke. (RX2, Exhibit 3, pp. 62-3)

Dr. Selby's Final Assessment was:

Mr. Earnest Anderson did not have coal worker's pneumoconiosis or any respiratory or pulmonary disease or defect as a result of working in a coal mine or experiencing coal mine inhalation.

At the time of retirement and for several years following Mr. Anderson had the respiratory capacity to do any and all of his previous coal mine duties including his last job in the mine.

If Mr. Anderson had never set foot in a coal mine he would have had the same or worse respiratory function or status.

Smoking and asthma were the only causes of his respiratory symptoms and objective findings. Neither were caused by or exacerbated by being employed as a coal miner of inhaling coal mine dust. (RX2, Exhibit 3, p. 63)

Dr. Selby testified by deposition in this matter. Dr. Selby opined that based upon the absence of any evidence of coal worker's pneumoconiosis, Petitioner's decedent did not suffer from CWP. He felt Mr. Anderson did suffer from asthma, but that it was not related to any exposure at the coal mines. He also pointed out that although there was no defined point where "someone took a detailed history that met the American Thoracic Society criteria for chronic bronchitis..., with the kind of mucus that he was found to have and with his very strong smoking history, I'm suspicious that he had it." (RX 2, p. 16) Dr. Selby explained that chronic obstructive pulmonary disease (COPD) encompasses emphysema, asthma, and chronic bronchitis. (RX3, p. 38) He further testified that Mr. Anderson's condition worsened over time and that he ultimately developed "smoking induced emphysema/COPD. (*Id.*, at 45.) Finally, based on the type of disease he had, the Doctor was able to rule out coal dust exposure at the mines as a cause of his COPD. (*Id.*, at 46)

Dr. Sean McCain also testified by deposition. Dr. McCain was Decedent's treating physician at the time of his death and author of Decedent's Death Certificate. (PX 2, p 6) Dr. McCain is a primary care physician who began treating Mr. Anderson in March of 2005. Dr. McCain drafted a "to whom it may concern" causation opinion letter which the parties agreed was prepared at some point in 2012. In his letter, Dr. McCain noted "He was a coal miner for over 33years and on review of previous records was diagnosed at one time with coal miners' lung prior to leaving the coal mines in 1989." (PX2, Exh. 3) Dr. McCain testified that Decedent had COPD, which was a progressive disease that could progress even after exposure to the insulting agent(s) has ceased. (PX 2, p. 9). When asked the cause or causes of Mr. Anderson's COPD he testified:

> In truth, I believe there's probably three – there was three components. He had a history of apparent – the lung – the coal miner's lung, which added inflammatory and irritation to the lungs over time. He was also a smoker. And then age alone will cause a deterioration of the lung itself. So in truth there's probably three major things that were involved. The age is probably less than the other two components. (*Id.*).

He testified that Decedent's COPD would make him more susceptible to pulmonary infections and pneumonias and that his COPD would make it harder for Decedent to recover from any pulmonary infections or pneumonias. (*Id.*, at 10) According to Dr. McCain's testimony, Decedent's cause of death was a pneumonia that developed secondary to his COPD, which then moved to sepsis. (*Id.*, at 8). It was Dr. McCain's opinion that Decedent's COPD was a causative factor in his death and that his COPD hastened his death. (*Id.*, at 13). It was Dr. McCain's testimony that Decedent died a respiratory death. (*Id.*, at 8). When questioned about the basis for his opinion that the COPD hastened the death, he answered, "So, you know, if he didn't have the COPD, I would imagine he would have lived longer potentially." (*Id.*, at 13-14) When asked if he was referring to pneumoconiosis or COPD when he used the term "coal miners' lung," the doctor responded "I don't know if I could make a distinction between the two because the one causes the other." (*Id.*, at 22) He also testified that "the only that you're ever going to diagnose the coal mining—the coal miners' lung is with tissue sample." (*Id.*, at 29) Dr. McCain admitted that he did not review the voluminous medical records covering prior treatment of Mr. Anderson. (*Id.*, at 14-15) He did not see or review any pulmonary function tests. (*Id.*, at 15) Dr. McCain has not seen any chest X-rays taken before his treatment began. (*Id.*, at 16)He did not know that Mr. Anderson was a surface miner rather than an underground coal miner, and that would make a difference. (*Id.*, at 18)

Dr. William C Houser testified by deposition as well. Dr. Houser is a Board Certified Pulmonologist and Internist. At the request of Petitioner's counsel, he prepared a report dated 02/21/13. Dr. Houser testified

that Decedent had COPD that was caused in part by his former coal mine employment and cited three (3) scientific studies to support his opinion. (PX 3, p. 12-16). Dr. Houser testified that COPD is a progressive disease that can progress even after exposure to the insulting agent has ceased and that COPD can be multifactorial in origin or aggravation. Dr. Houser testified that there was no medical way to rule out Decedent's coal mine employment as a causative factor in his COPD. (*Id.*, at 18). He testified that Decedent's COPD caused him to have hypoxemia, which required Decedent to be on oxygen back to at least 2001. (*Id.*, at 20). Dr. Houser testified that Decedent's COPD was a causative factor in his death and he did not feel that there was any question that Decedent died a respiratory death. (*Id.*, at. 22). Dr. Houser testified that given the severity of Decedent's COPD, it would have been in existence when he left coal mining in 1989. He also stated that there is a note in Dr. Keller's records dated 08/06/81 noting a diagnosis of COPD at that time and that it had been diagnosed by Dr. Choiu in 1979. (*Id.*, at 23). Dr. Houser admitted, however that he would not have made a diagnosis of COPD based upon the findings noted in Dr. Choiu's report. (*Id.*, at 36) Dr. Houser testified Decedent could not be diagnosed with CWP. (*Id.*, at 40, 67) Dr. Houser did not know whether Decedent was an above ground or underground miner at the time he formulated his opinions and admitted he did not know what Decedent's coal dust exposure was. (*Id.*, at 47-52) The studies upon which Dr. Houser relied in the formulation of his opinions primarily involved underground miners. (*Id.*, at 54-55) He never reviewed any CT scans or chest X-rays. (*Id.*, at 59)

Petitioner submitted copies of Decedents check stubs from Respondent for partial years 1987, 1988 & 1989. (PX8, 9, &10) Unfortunately these stubs do not cover the full 52 weeks preceding the date of last exposure. A review of the check stubs show that Decedent's work hours varied over the last three years he worked. It appears he worked between 36.25 hours a week to 38.25 hours a week at an hourly rate of $16.578. Using the 36.25 hours/week this would calculate to an average weekly wage of $600.95.

Respondent submitted a printout from Social Security showing that Decedent's earnings for 1988 were $25,078.96, which Respondent calculates to be an average weekly wage of $482.29.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Decedent's employment by Respondent?

Issue (F): Is Decedent's current condition of ill-being causally related to the injury?

Dr. Houser could not state that Decedent suffered from CWP. Dr. Selby testified that he did not. These witnesses are much more qualified to render such an opinion than Dr. McCain. The Arbitrator finds that Decedent did not suffer from CWP.

Decedent did, however suffer from COPD at the time of his death. All three medical experts who testified in this case agreed on that point. They do not, however agree whether his exposure at the coal mines caused or contributed to cause his condition. It is undisputed that Decedent was an extremely heavy smoker. His cigarette smoking history was documented at one to two packs per day for 57 years, approximately 85 pack years. The medical records document that his treating physicians over the years concluded that his COPD was caused by cigarette smoking. Dr. McCain and Dr. Houser opined that his coal mining caused or contributed to his development of COPD. The Arbitrator notes that neither of these witnesses even knew whether Mr. Anderson worked above or below ground at the mines at the time they formulated their opinions. This is a fact which they both indicated was relevant to determining causation. In addition the studies relied upon by Dr.

Houser deal primarily with underground miners while Mr. Anderson worked above ground while employed by Respondent. The Arbitrator finds the testimony and opinions of Dr. Selby more persuasive in this case.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner failed to prove by a preponderance of the evidence that Decedent had an occupational disease arising out of and in the course of his employment and that his breathing complaints were causally related to dust exposure at the coal mine. Petitioner has failed to prove that the current condition of ill-being, resulting in Decedent's death, was causally related to his employment with Respondent. Benefits are, therefore denied. All other disputed issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

Illinois Workers' Compensation Commission, Insurance Compliance Division,	)	
Petitioner,	)	No. 10 INC 205
v.	)	
Peter Soce, Individually & as Owner, Berwyn Management, L.P.,	)	
Respondent.	)	

ORDER

This matter, after oral request by the Petitioner, The Illinois Workers' Compensation Commission – Insurance Compliance Division, by and through its attorney, the Office of the Illinois Attorney General, is dismissed. The Office of the Attorney General has advised this Commission it no longer seeks to proceed in this matter against Respondents, as the matter has settled.

DEC 23 2016

Commissioner Ruth White

Dated: 12-22-16

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

Mathias Biegel,

Petitioner,

vs. NO: 10 WC 10446

City of Chicago,

16IWCC0807

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 maintenance, permanency 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 11, 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.

16IWCC0807

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: DEC 16 2016
TJT:yl
o 10/25/16
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BIEGEL, MATHIAS
Employee/Petitioner

Case# **10WC010446**
11WC028913

CITY OF CHICAGO
Employer/Respondent

16IWCC0807

On 6/11/2014, 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 0.06% 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:

2221 VRDOLYAK LAW GROUP LLC
MICHAEL P CASEY
741 N DEARBORN ST 3RD FL
CHICAGO, IL 60610

0113 CITY OF CHICAGO LAW DEPT
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

16IWCC0807

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
X Rate Adjustment Fund (§8(g))
[10 WC 10446]
Second Injury Fund (§8(e)18)
None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mathias Biegel
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 10 WC 10446

Consolidated cases: 11 WC 028913

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 **April 25, 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. X What temporary benefits are in dispute?
☐ TPD X 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 26, 2009 and January 14, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current cervical and lumbar spine condition of ill-being ***is*** causally related to the accident of January 14, 2010.

In the year preceding the accident of January 14, 2010, Petitioner earned **$88,281.96**; the average weekly wage was **$1697.73**.

As of the January 14, 2010 accident, Petitioner was **60** 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 **$116,407.68** for TTD, **$0** for TPD, **$131,291.12** for maintenance, and **$0** for other benefits, for a total credit of **$247,698.80**.

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

ORDERS SEE ATTACHED FINDINGS OF FACT, CREDIBILITY ASSESSMENT AND CONCLUSIONS OF LAW

In 10 WC 10446, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $6030 to RX Pain Management, as provided in Sections 8(a) and 8.2 of the Act. PX 10, 16.

In 10 WC 10446, Respondent shall pay maintenance benefits in the amount of $1131.82 per week from September 10, 2011 through the hearing of April 25, 2014, a period of 135 weeks, with Respondent receiving credit for the $131,291.12 in maintenance benefits paid prior to the hearing. Arb Exh 1.

In 10 WC 10446, Respondent shall pay Petitioner permanent and total disability benefits of **$1131.82**/week for life, commencing **April 26, 2014**, as provided in Section 8(f) of the Act.

For the reasons set forth in the attached decision, the Arbitrator awards no benefits in 11 WC 28913.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments in 10 WC 10446, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) 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.

Molly C Mason
Signature of Arbitrator

6/11/14
Date

JUN 11 2014

16IWCC0807

Mathias Biegel v. City of Chicago
10 WC 10446 and 11 WC 28913 (consolidated)

Arbitrator's Findings of Fact Relative to Both Cases

Petitioner turned 65 on the day of the hearing. T. 99. He testified he graduated from high school in 1967 and attended some college classes at Chicago State University for 1 ½ years thereafter. He has no other formal education. T. 27-28.

Petitioner testified he has worked in the construction trade his entire adult life. He has not worked in any other industry. T. 29. After high school, he performed construction work in Georgia for a few months and then returned to the Chicago area. He joined Local 1, the ironworkers' union, and became a full journeyman in 1977. T. 31. He worked for various contractors thereafter until September 4, 1990, when he began working as an ironworker for Respondent. T. 31. Between his hire date and a work accident in 2000, he performed a variety of strenuous physical duties for Respondent. Those duties included "bolting" (using an impact tool to ream holes in I-beams), carrying and connecting galvanized steel beams, planking, installing cables at building perimeters and using an acetylene torch to perform welding. He worked at a variety of levels, from the ground floor on up. T. 34. He wore a belt in which he stored tools and parts. The belt weighed between 25 and 30 pounds. T. 35. He was on his feet the majority of the time but also had to lie down and kneel while working in cramped spaces. T. 39.

Petitioner testified he fell while working on a bridge on November 1, 2000. He hit his head and fractured his wrists in this fall. He was able to resume working as an ironworker for Respondent after he recovered but was restricted to ground level work because he had a tendency to get dizzy when he looked up. He returned to work in Respondent's shop in September 2001 and gradually worked his way up to the position of shop foreman in 2006. T. 40-41. As a shop foreman, he met with general foremen and engineers, arranged for cranes and procured and laid out materials for various jobs. Some of his duties were supervisory in nature but he also had to perform physical tasks such as lifting beams off sawhorses, welding, drilling 80- to 100-pound plates while making bridge supports, using a pry bar to stabilize plates while cutting them and positioning/stacking large metal kegs that contained nuts and bolts. The kegs arrived on pallets that were covered with shrink wrap. Petitioner had to remove the shrink wrap, cut the bands, apply a choker, or metal rope, to a keg and then, using his own strength, rotate the keg to whatever position was necessary. T. 41-49.

The parties agree Petitioner sustained an accident while working for Respondent on October 26, 2009. Arb Exh 3. Petitioner testified he was still employed as a shop foreman at that time. Respondent was short-handed that day so Petitioner was called upon to perform a task that was a "rarity," i.e., working with five other men to carry a lengthy 600-pound piece of tubing. T. 61. The three men who were in the front stepped up on a ledge, causing the weight of the tubing to shift down to Petitioner and the two other men who were bringing up the rear. Petitioner testified he injured his left shoulder when this shift occurred. T. 60. He denied any

previous left shoulder injuries. T. 61. He reported the accident shortly after it occurred. He identified PX 1 as the report he signed. The report reflects that Petitioner complained of pain and numbness in his right leg and left shoulder after helping lift a 23-foot tube at 10 AM on October 26, 2009. PX 1.

Petitioner testified he took the next day, a Friday, off but resumed his regular duties the following Monday. T. 62. He testified he continued having left shoulder and neck problems after the October 26, 2009 accident but did not seek any care between that accident and his next accident of January 14, 2010. T. 62-63.

Petitioner testified that Respondent received a shipment of kegs of bolts prior to his undisputed accident of January 14, 2010. He separated and moved these kegs on January 13 and 14, 2010. [On the day of hearing, he amended his Application to change the accident date in 10 WC 10446 from January 13 to January 14, 2010, with no objection from Respondent. Arb Exh 2.] As he maneuvered one particular keg on January 14, 2010, he felt a stabbing pain shooting through his back, primarily on the left side, and down the front of his left leg. He testified he had never felt this kind of pain before. T. 56-57. He sat down and then called his supervisor, who came to his aid. T. 57.

Petitioner identified PX 2 as a report he completed concerning the January 14, 2010 accident. The report reflects that Petitioner "was moving cans of bolts [when] he bent over and felt a sharp pain in his back."

Petitioner saw Dr. Sheth at MercyWorks on January 14, 2010. The doctor's history reflects that Petitioner had been repetitively moving 40-50 pound kegs for two days when he developed neck pain with occasional tingling in his left arm, intermittent and positional left leg pain with sharp shooting pains to the hamstring and pain in his right lumbar area. T. 63. Dr. Sheth also noted that Petitioner had previously injured his back in December 2009 and had noted increasing back pain with job activities since then, although he had not sought treatment.

On cervical spine examination, Dr. Sheth noted 3+ tenderness of the cervical muscles with mild spasm and a full range of motion with tenderness. On lumbar spine examination, he noted no visible swelling, mild tenderness of the right hip, negative straight leg raising bilaterally, mildly antalgic gait and normal deep tendon reflexes.

Dr. Sheth diagnosed "lumbar and cervical strain with radiculopathy." He prescribed Ibuprofen, Cyclobenzaprine (to be taken at bedtime) and ice applications. He released Petitioner to full duty and instructed him to return on January 20th. PX 4.

Petitioner returned to MercyWorks on January 20, 2010, as instructed, and again saw Dr. Sheth. The doctor noted that Petitioner complained of lower back pain, left arm radicular pain and "right leg radiation pain with tingling." On examination, he noted a weak right hand grip and pain and stiffness with range of motion. He obtained X-rays of the cervical and lumbar

spine. He prescribed a Medrol Dosepak and released Petitioner to light duty. He instructed Petitioner to return to MercyWorks on January 27, 2010. PX 4.

Petitioner testified he remained off work after January 20, 2010 because Respondent was not able to accommodate the restrictions that Dr. Sheth imposed. Petitioner further testified he began receiving weekly benefits as of January 21, 2010. T. 65.

Petitioner saw Dr. Sheth again on January 27, 2010, with the doctor noting that the Medrol Dosepak "did not help much." He recommended cervical and lumbar spine MRI scans. He again released Petitioner to light duty. PX 4.

The MercyWorks records reflect that Petitioner underwent the recommended MRIs at Mercy Hospital on February 2, 2010. PX 4. The MRI reports are not in evidence.

On February 9, 2010, Petitioner returned to MercyWorks and again saw Dr. Sheth. The doctor indicated the lumbar spine MRI showed a left lateral herniation at L2-L3 and facet arthrosis but no nerve root impingement. He also indicated the cervical spine MRI showed degenerative disc disease. He prescribed physical therapy and again released Petitioner to light duty. PX 4.

Petitioner began a course of therapy at Michigan Physical Therapy on February 11, 2010. The therapy notes are not in evidence. Petitioner testified the therapy provided only temporary relief.

On February 25, 2010, Dr. Sheth noted that Petitioner complained of neck stiffness and persistent lower back pain going to both thighs. He instructed Petitioner to finish a third week of therapy. He indicated he planned to refer Petitioner to Dr. Fisher if therapy did not help. He again released Petitioner to light duty. PX 4.

Petitioner testified that, at this point, he elected to see Tian Xia, D.O., a pain physician affiliated with Integrated Pain Management. Under cross-examination, Petitioner testified he learned of Dr. Xia by "word of mouth." T. 106. He is not sure who mentioned Dr. Xia to him. He had never seen Dr. Xia in the past. T. 106-107.

Petitioner first saw Dr. Xia on March 15, 2010. Dr. Xia's note of that date is addressed to Dr. Sheth. Dr. Xia indicated that Petitioner chiefly complained of neck pain and numbness, radiating into his left thumb and little finger, and back pain, worse on the left, and radiating down to both calves. He also indicated that Petitioner initially experienced pain in his back, leg and left shoulder after lifting a 400-pound piece of equipment on October 27, 2009. He noted that Petitioner "had vacation time right after" this accident and did not seek treatment. He further noted that Petitioner's pain "did get incompletely better" before he resumed working in January 2010, when he was reinjured.

On initial cervical spine examination, Dr. Xia noted a full range of motion but with pain reproduction all the way down the left hand with cervical rotation and side bending. On lumbar spine examination, he noted painful flexion at 60 degrees, with radiation down both legs, decreased extension and mild pain with rotation and side bending and positive straight leg raising bilaterally at 60 degrees.

Dr. Xia indicated he reviewed Petitioner's MRI films and reports. He described the cervical findings as "quite minor," noting some stenosis at C5-C6 and C6-C7 bilaterally, probably more on the left. He indicated the lumbar spine MRI showed "a significant disc L2-L3 disc herniation towards the left side," bulges at L4-L5 and L5-S1 and an "HIZ zone at L5-S1, indicating an L5-S1 disc tear, not reported by the radiologist."

Dr. Xia prescribed nine more therapy sessions along with Neurontin, Mobic, Soma and Ultram. He instructed Petitioner to return to him in four weeks. PX 5.

Petitioner returned to MercyWorks on March 19, 2010 and again saw Dr. Sheth. Dr. Sheth noted that Petitioner had seen Dr. Xia and that there was no change in his symptoms or findings. He recommended that Petitioner stay off work and return to MercyWorks on April 19, 2010. PX 4.

Petitioner underwent an initial therapy evaluation at RX Pain Management on March 22, 2010. He continued attending therapy at this facility through January 6, 2011. PX 10.

On April 2, 2010, Coventry Workers' Comp Services sent a letter to Dr. Xia indicating that the additional urgent physical therapy Dr. Xia prescribed [following nine initial therapy visits] was not being certified based on a review performed by Susan Lan, D.O. In an addendum, also dated April 2, 2010, Dr. Lan indicated she had spoken with Dr. Xia via telephone concerning the lumbar spine MRI and the heavy nature of Petitioner's job. Dr. Lan indicated that, based on this additional information, she would certify a shorter, less frequent course of therapy than the course Dr. Xia prescribed. RX 4.

Petitioner returned to Dr. Xia on April 19, 2010. The doctor's handwritten note of that date reflects that Petitioner "c/o left arm and left leg burning numbness but overall much better with the PT." The note also reflects that, despite his ongoing symptoms, Petitioner stated he "would love to try to go back to work without restrictions," indicating the medication made his symptoms tolerable. Dr. Xia indicated it was okay for Petitioner to try to return to work. He refilled Petitioner's medications and instructed Petitioner to return in four weeks, at which point he would discharge him if he was tolerating work well. PX 5.

Petitioner also went to MercyWorks on April 19, 2010, with Dr. Mejia noting the full duty release. PX 4.

Petitioner testified he asked Dr. Xia to release him to full duty as of April 19, 2010 because he was "tired of the pills" and wanted to try to return to work. T. 67-68. Petitioner

testified he resumed his regular shop foreman duties after April 19, 2010 but experienced constant pain.

Petitioner returned to Dr. Xia on May 24, 2010. The doctor noted that the Neurontin helped Petitioner's neck and arm pain but that Petitioner was experiencing bilateral leg pain, with the left leg pain extending all the way to his ankle. He also noted that Petitioner was "lifting over 50 lbs at work." On re-examination, he noted limited lumbar flexion and extension, positive straight leg raising bilaterally and 1/4 knee reflexes. He refilled Petitioner's medications and prescribed a lumbar epidural steroid injection. He released Petitioner to restricted duty with no lifting over 20 pounds. PX 5.

At Respondent's request, Petitioner saw Dr. Graf, a spine surgeon, for a Section 12 examination on July 30, 2010. Dr. Graf is affiliated with the Illinois Spine Institute.

Dr. Graf's report reflects that Petitioner described two work injuries, with the first occurring "in October" when a "piece of iron came down on his shoulder as he and co-workers were attempting to move it." According to Dr. Graf, Petitioner complained of "currently minimal" left shoulder pain "with pain in the left aspect of the palm to the fingers." The doctor described the second accident as occurring on January 13, 2010, when Petitioner experienced left leg pain and numbness while moving large metal kegs containing bridge bolts. He indicated Petitioner currently complained of low back pain radiating through both buttocks and down both legs, with the left-sided pain extending into the lateral aspect of the calf.

Dr. Graf described Petitioner's gait as normal. He noted that Petitioner had no difficulty with toe or heel walking but complained of lower back and right leg pain with squatting and rising from a squatting position.

Dr. Graf noted no abnormalities on cervical spine and bilateral shoulder examination. On lumbar spine examination, he noted limited forward flexion and extension, abnormal sensation in the right lower extremity, with Petitioner complaining of paresthesias on the dorsum of the right foot, and negative straight leg raising bilaterally in both the seated and supine positions.

Dr. Graf did not note any non-organic pain signs.

Dr. Graf indicated he reviewed a MercyWorks note of February 25, 2010, Dr. Xia's first three notes and the MRI reports and films.

Dr. Graf described Petitioner's cervical and arm complaints as having resolved, for the most part. He found Petitioner to be at maximum medical improvement for those complaints.

With respect to the lumbar spine, Dr. Graf noted that Petitioner "does have leg radiculopathy." He interpreted the MRI as showing degenerative changes with moderate canal and lateral recess stenosis at L4-L5 and L5-S1. He indicated "this would be considered an

exacerbation of a pre-existing condition of lumbar degenerative spondylosis and spinal stenosis." Given that therapy had resulted in only partial improvement, he indicated that the injections proposed by Dr. Xia "would be considered reasonable and appropriate in nature." He also found it appropriate for Petitioner to continue with physical therapy. He did not find Petitioner to be a surgical candidate "at the present time."

Dr. Graf found Petitioner capable of performing light duty. He indicated Petitioner should be re-evaluated following the injections. RX Grp Exh 4.

Following Dr. Graf's examination, Petitioner underwent three lumbar injections. Dr. Xia administered these injections at the Fullerton-Kimball Medical & Surgical Center on November 10, December 4 and December 21, 2010. PX 6. Petitioner testified that, of these injections, the last provided the longest period of relief but that his lumbar symptoms eventually returned to baseline.

On November 22, 2010, Dr. Xia noted that Petitioner reported 50% improvement of his back and leg pain but complained of much more apparent left thigh pain. Dr. Xia also noted that Petitioner complained of neck pain radiating down his left arm to his thumb. Petitioner reported that his neck and arm complaints had subsided during therapy but had returned once he discontinued therapy. Dr. Xia assessed Petitioner as having "cervical osteophyte and stenosis" as well as lumbar disc herniation and bulges at multiple levels. He described the cervical condition as "probably degenerative in nature but aggravated by the workers' compensation accident." He recommended that Petitioner undergo a cervical injection as well as additional lumbar injections (PX 5, p. 42) but, in his next note of December 13, 2010, indicated that Respondent declined to authorize the cervical injection based on Dr. Graf's finding that Petitioner was at maximum medical improvement neck-wise. In that note, Dr. Xia again recommended a left C5-C6 and C6-C7 selective nerve root injection. PX 5, p. 38.

On January 3, 2011, Dr. Xia noted that Petitioner reported essentially no back or leg pain but continued to complain of neck pain radiating down his left arm. He also noted that Petitioner indicated he needed to return to full duty in order to pay his bills. The doctor refilled Petitioner's medications, again recommended a cervical injection and released Petitioner to work with no lifting over 20 pounds. PX 5, p. 34.

On January 17 and 26, 2011, Dr. Xia administered left-sided selective nerve root injections at C5-C6 and C6-C7. PX 5, pp. 32, 27. PX 6.

On February 7, 2011, Dr. Xia noted that Petitioner reported improvement. He recommended that Petitioner resume therapy and then undergo work conditioning. He refilled Petitioner's medications. PX 5, p. 26.

Petitioner underwent an initial physical therapy evaluation at Flexeon Rehabilitation on February 14, 2011. The evaluating therapist recorded a detailed history of both work accidents. PX 9, p. 17.

On February 16, 2011, Petitioner saw Dr. Sheth at MercyWorks. Dr. Sheth noted that work conditioning was "on hold." He instructed Petitioner to see Dr. Graft that day for an IME. He also instructed Petitioner to stay off work. PX 4, p. 23.

On March 14, 2011, Dr. Xia noted that Petitioner reported he did not begin work conditioning "due to insurance non-approval." The doctor refilled Petitioner's medications and stated: "cannot go back to work until work conditioning." PX 5, p. 25.

On March 15, 2011, Petitioner returned to MercyWorks and again saw Dr. Sheth. Dr. Sheth noted that Petitioner "had IME with Dr. Graf" but that no report was available yet. [The Arbitrator notes that Respondent did not offer into evidence any February 2011 report authored by Dr. Graf.] Dr. Sheth instructed Petitioner to stay off work and return to MercyWorks after completing work hardening. PX 4, p. 24.

On April 28, 2011, Dr. Patel of MercyWorks reviewed Dr. Graf's IME report and noted that the doctor recommended 3 to 4 weeks of work conditioning, followed by resumption of full duty. Dr. Patel instructed Petitioner to stay off work and return to MercyWorks on May 4, 2011. On May 4, 2011, Dr. Sheth noted that Petitioner was "still waiting for WC approval." He described Petitioner's symptoms as unchanged. He instructed Petitioner to stay off work and return to MercyWorks after completing work conditioning.

Petitioner returned to Dr. Xia on June 6, 2011. Dr. Xia expressed surprise that Petitioner had never started work conditioning. He refilled Petitioner's medications and again prescribed work conditioning. PX 5, p. 24.

On June 8, 2011, Petitioner underwent a re-evaluation at Flexeon Rehabilitation. The evaluating therapist noted that Petitioner was returning to therapy following a "four-month delay due to city prolonging case." He also noted that Petitioner's goal was to "return to work safely for the next 3 years so that he can retire." PX 9, p. 22.

On July 11, 2011, Petitioner returned to Dr. Xia and noted he had been undergoing work conditioning three times a week for four weeks. He reported improvement. On re-examination, Dr. Xia noted a full range of motion in the left shoulder, cervical spine and lumbar spine. Dr. Xia noted that Petitioner's therapist was recommending a functional capacity evaluation. He agreed with this recommendation. PX 5, p. 23.

Petitioner also saw Dr. Sheth at MercyWorks on July 11, 2011. Dr. Sheth noted that Petitioner had finished work weeks of work conditioning. He noted that Petitioner complained of soreness and mild pain with cervical and lumbar spine range of motion testing. He advised Petitioner to stay off work, undergo the recommended functional capacity evaluation and return to MercyWorks "after seeing Dr. Xia after FCE." RX 2.

Petitioner underwent a functional capacity evaluation at Flexeon Rehabilitation on August 8, 2011. The evaluator, Amy Welp, MEd, ATC, indicated that the findings and her clinical observations suggested "the presence of high levels of effort on [Petitioner's] part" and "the presence of fully reliable reports of pain and disability." Welp also indicated she determined the physical demands of Petitioner's target shop foreman job by talking with Petitioner. Her description of Petitioner's shop foreman duties is fully consistent with Petitioner's testimony concerning those duties.

Welp found that Petitioner "was not only limited by objects being too heavy to lift, carry, push and pull but also he was limited by reported pain." She described Petitioner as putting forth "full effort throughout the evaluation" and demonstrating "no inconsistencies." She indicated she conducted a variety of "placebo pain tests" to evaluate Petitioner's reliability, noting that Petitioner "did not complain of inappropriate pain upon any" of these tests. She noted a number of limiting factors relating to lifting, carrying, pushing/pulling and working at low levels. PX 9, pp. 40-60.

Petitioner returned to Dr. Xia on August 22, 2011. The doctor noted complaints relative to the neck, back and right leg. On examination, he noted a "pretty good range of motion of the lumbar and cervical spine." He found Petitioner to be at maximum medical improvement. He described surgery as "out of the question" and did not recommend any further injections since Petitioner indicated his pain was present only when he performed heavy activities.

Based on the functional capacity evaluation, Dr. Xia found Petitioner incapable of resuming his former job. He released Petitioner to work with permanent restrictions of lifting/pushing/pulling less than 25 pounds, carrying less than 20 pounds and no frequent stooping, crouching or bending. PX 5, p. 22. PX 7.

Petitioner also saw Dr. Sheth of MercyWorks on August 22, 2011. Dr. Sheth noted the functional capacity evaluation and Dr. Xia's post-evaluation restrictions and MMI finding. Dr. Sheth released Petitioner to work with no lifting over 20 pounds and no "repeated pushing, jerking or twisting." PX 4, p. 25. RX 2.

At Respondent's request, Dr. Graf re-examined Petitioner on September 28, 2011. He noted Dr. Xia's restrictions. He also noted that, according to Petitioner, "the city could not accept [those] restrictions." He indicated that Petitioner complained of 4-5/10 pain in low back and left leg and 3-4/10 pain in his neck. He also noted that Petitioner had recently traveled to New Orleans in order to attend a football game but, due to back pain, had ended up taking a cab rather than walking back to his hotel.

Dr. Graf described Petitioner's gait as normal. He indicated that Petitioner had no difficulty walking on his toes and heels and could squat and rise from a squatted position.

Dr. Graf noted no abnormalities on cervical spine and bilateral shoulder examination. On neurologic examination of both legs, he noted decreased sensation in the L5 nerve root

distribution on the lateral aspect of the left leg and decreased sensation in the dorsum of the right foot. He described sitting and supine straight leg raising as negative bilaterally.

After reviewing the functional capacity evaluation, Dr. Graf noted that Petitioner described his pre-evaluation pain as only 2/10 and that an athletic trainer, rather than a "trained and certified physical therapist" performed the evaluation. Dr. Graf questioned the validity of the evaluation, noting that multiple tests were terminated based solely on Petitioner's subjective complaints. Dr. Graf cited an addendum report he authored on August 1, 2011. [The Arbitrator notes that Respondent did not offer this addendum report into evidence.] Dr. Graf indicated he described Petitioner as "a 62-year-old overweight individual with multiple medical problems" in the addendum. Based on this description, he indicated he was unable to attribute Petitioner's functional abilities solely to the work accident. He further noted that Dr. Xia's permanent restrictions were "even less than the physical demands demonstrated on the questionable functional capacity evaluation." He found Petitioner to be at maximum medical improvement.

Dr. Graf also reviewed a City of Chicago sheet metal worker job description. RX Grp Exh 4. The Arbitrator notes that no Respondent job description is in evidence.

Petitioner testified that Respondent did not offer him work within his restrictions. He began looking for alternative employment after Dr. Xia imposed permanent restrictions. In conformance with a letter he received from Respondent, he went to City Hall and met with a woman who set up an E-mail account for him. Petitioner testified it was his understanding that Respondent would notify him of City of Chicago job openings via this account. T. 83-85. Because his wife knows how to operate a computer, he asked her to periodically check the account for him. He testified she checked the account for months but no E-mails arrived. T. 84. In January 2012, he received another letter from Respondent directing him to document job contacts on pre-printed forms and turn the forms in weekly at 30 North LaSalle Street. The letter indicated that Respondent would terminate his weekly benefits if he did not complete and turn in the forms. The letter directed him to make ten job contacts per week but he misread the number and made twelve contacts weekly instead. T. 85-86. Respondent did not provide him with job leads. Nor did Respondent provide any training as to how to go about looking for work. T. 86. He found jobs by contacting contractors and acquaintances. He looked for construction-related jobs he felt he could physically handle such as performing estimating or handling safety issues.

Petitioner testified he met with Joseph Belmonte, a vocational rehabilitation counselor, in August 2012. Petitioner testified that Belmonte interviewed him extensively. T. 89. Since he is "computer illiterate," Belmonte recommended he take classes concerning word processing and E-mails. He then waited for Respondent to authorize these classes. Respondent did not "okay" the classes until December 2012. T. 90. While attending the classes, Petitioner underwent instruction as to how to look for work via the Internet and how to open and send E-mails. T. 91. Petitioner testified he had difficulty learning how to use a computer. He kept making mistakes and was frustrated by the slow pace of his progress. T. 95.

Petitioner returned to Dr. Xia on March 11, 2013. Dr. Xia noted he had not seen Petitioner for more than eighteen months. Petitioner reported experiencing flare-ups of neck and back pain during that period. Dr. Xia described Petitioner's examination as unchanged. He refilled Petitioner's prescriptions for Fexmid, Topamax and Tramadol and instructed Petitioner to return to him as needed.

Petitioner went back to Dr. Xia on May 13, 2013, with the doctor noting Petitioner "again needs his disability paper filled." The doctor described Petitioner's examination as unchanged. He refilled Petitioner's medications. PX 5, pp. 18-19.

On June 10, 2013, Petitioner returned to Dr. Xia and reported a recent flare-up of back pain shooting down his left leg with associated numbness and burning. Petitioner denied any new injury. On lumbar spine examination, Dr. Xia noted restricted flexion, positive straight leg raising on the left at 60 degrees in the supine position, ankle jerk of 2/4 on both sides and patellar jerk of 2/4 on the right and 1/4 on the left. Dr. Xia prescribed physical therapy three times weekly for four weeks. PX 5, pp. 16-17. PX 10, pp. 32-34. Petitioner began a course of therapy at RX Pain Management on June 24, 2013. PX 10. Petitioner returned to Dr. Xia on July 15, 2013 and reported some temporary improvement secondary to therapy. He primarily complained of pain in his back and left leg. Dr. Xia again noted limited flexion, positive straight leg raising on the left at 60 degrees in the supine position and patellar jerk of 1/4 on the left side. He recommended a repeat lumbar spine MRI. PX 5, pp. 14-15. The MRI, performed on July 25, 2013, showed severe central canal and moderate biforaminal narrowing at the L4-L5 level, "in part related to anterolisthesis and facet arthropathy," a stress reaction in the left L5 pedicle and moderate left foraminal narrowing at the L5-S1 level related to a foraminal protrusion abutting the exiting left L5 nerve root. PX 8, pp. 4-5.

On July 29, 2013, Dr. Xia noted that Petitioner was still experiencing pain "in the left leg down to ankle." Dr. Xia commented that the repeat MRI "looks better than 3 years ago" but still showed impingement to the left neuroforamen and nerve roots. Dr. Xia recommended continued therapy and left epidural steroid injections at L3-L4, L4-L5 and L5-S1. PX 5, pp. 10-11. PX 10, p. 21. Petitioner attended two additional therapy sessions on August 2 and 7, 2013. The therapist discharged Petitioner from therapy on August 7, 2013, per Dr. Xia's instructions. PX 10, p. 19.

As of August 27, 2013, Dr. Xia's office was still awaiting authorization of the recommended injections. Petitioner's medications were refilled. PX 5, pp. 8-9.

Petitioner testified he is continuing to see Dr. Xia. He is not seeking prospective injections under Section 8(a). Dr. Xia continues to prescribe medication for him. Those medications include Tramadol, Gabapentin, Topiramate and Cycloverzapire. He takes Tramadol daily. He takes Cycloverzapire two or three nights per week, on those occasions when he knows he can sleep in the next day.

Petitioner testified he found the job search process discouraging. It was "frustrating to be constantly denied." T. 96. If his medical records show he expressed frustration and indicated he wanted to be able to retire and "just have this over with," he would not dispute the accuracy of the records. T. 95. As of his January 14, 2010 accident, he did not have enough time in with Respondent to qualify for retirement. He had planned to continue working as long as his health allowed him to do so. T. 96. After the accident, he could not afford to retire and so continued looking for work. He has complied with all of Vocamotive's directives concerning looking for a job. T. 95.

Under cross-examination, Petitioner testified he last discussed his pension payouts with a representative of Respondent sixteen month before the hearing. He does not know what his payouts would be as of the hearing but he knows they would not be large enough to allow him to retire. T. 99. He has not thought about taking his pension while continuing to look for work. T. 99. He has worked for Respondent for 24 years. T. 99. He does not recall informing his vocational rehabilitation counselor, Lisa Helma, that he intended to retire at age 65. He plans to continue looking for work after the hearing. T. 100. In March 2014, he informed Helma he was discontinuing his job search because of the upcoming hearing. He told Helma this because he was "misinformed." T. 100-101. He is right-handed. He has not reinjured his neck, low back, shoulder or either leg since the January 14, 2010 accident. He has not applied for Social Security and is not collecting Medicare benefits. T. 101. His left shoulder hurt after the 2009 accident but he did not seek care. T. 102. He still sees Dr. Xia every two months for medication refills and completion of pension-related paperwork. T. 102, 106. Dr. Xia examines him at each visit. In the summer of 2013, Dr. Xia offered him injections, assuming he could obtain approval. T. 103. [After some discussion, Petitioner indicated he is not seeking authorization of those injections. T. 105-106.] With respect to his 2010 accident, he is not sure whether one specific movement of a barrel brought on his pain or whether his symptoms were cumulative. T. 107. He was moving barrels off of a pallet when his pain started. The barrels were "together." He had to separate them and then grab and roll them, while twisting his body to the left. T. 109-110. He does not know whether Dr. Xia performs surgery. He has not undergone surgery. He was told he is not a surgical candidate. T. 111-112.

Petitioner acknowledged telling Dr. Graf he traveled to New Orleans in order to see a football game. He flew to New Orleans and stayed there three days. He was with friends. They walked to the stadium but he did not stay for the game because the seats that were available were "too high up." He decided he could not handle that. T. 114.

Petitioner testified that, once he started working in Respondent's shop, he worked his way up to the position of shop foreman. He supervised other workers when necessary. T. 114. His 2000 work accident occurred on November 1st. He filed a workers' compensation claim in connection with that accident. The claim was settled. He saw Dr. Hain for dizziness prior to the settlement but was not allowed to return to the doctor after the settlement. He could have used his group health insurance to return to the doctor. He has not seen Dr. Hain since 2001. Dr. Hain told him there was no point in his returning. T. 116.

Petitioner testified he is still a member of Local 1. He has kept his union membership current. T. 116. He initially listed contractors as potential employers on his job search records but stopped because the attorney who previously handled his case told him that Respondent wanted him to discontinue this since he is no longer an ironworker. He has gone to the union hall to look for work. That is indicated in his job search records. T. 117. He completed the job logs marked as RX 8. He looked within the ironwork trade to see if he could secure a safety-related job or a job as a "ground man." T. 119. All of the records in RX 8 reflect that the employers he contacted were not hiring. T. 119. He looked for work by making telephone calls and looking in the newspaper. T. 120. He worked with Workfinders before he started working with Helma. Workfinders sent him to an interview at Everyday Waterproofing. He does not recall telling this company he was not interested in working there. He also does not recall leaving five minutes into the interview. T. 120-121. PX 14. He does not recall trying to reschedule an appointment at a company in Dyer. T. 122. PX 14. He dropped off an application at IMS Security and, per their instructions, later went back for an interview. T. 122-123. His desire is to continue working for Respondent and not change employers. T. 123. He went to City Hall once, at which point he was told he would receive E-mails concerning Respondent job openings, but otherwise did not look for restricted duty with Respondent. T. 124-125. He did not check for jobs on Respondent's website. T. 126. He did not look for work with Cook County, Chicago Public Schools or the Metropolitan Water Reclamation District but he did apply for State of Illinois jobs. T. 126. He was convicted of felonies in the remote past. In 1984, he tried to have a conviction expunged but "it wasn't fully expunged." He was told it cannot be expunged. T. 127. He listed an old conviction on an application even though the instructions indicated he only needed to list convictions that occurred within the last seven years. This was a mistake on his part. T. 128. He never went to the public library to take computer classes. He asked his wife to teach him how to use a computer but she declined because this would have resulted in "too many arguments." T. 129-130. His wife told him she checked his Respondent-created E-mail account for him. He did not know how to check it. T. 131. In 2013, he took a test in order to become a traffic enforcement technician. A good portion of the test involved identifying things on computers. He failed the test. T. 132. RX 5. He worked with various people at Vocamotive. He does not recall telling prospective employers he would leave their employment if Respondent offered him a job. T. 134. He would leave another employer if Respondent offered him a job with better pay and benefits. T. 134. He took a couple of vacations, including one to Florida, even though Vocamotive told him vacations were typically not allowed. T. 135. The only standing-related restrictions he has are dizziness-related restrictions which stem from his 2000 accident. T. 136. He repeatedly told Helma he wants to retire and settle his case. He probably told her he wanted to retire at age 65. T. 137. He worked overtime for Respondent. At one interview, he indicated he did not want to work overtime. At that interview, he was told overtime was optional. T. 138. He does not recall missing job fairs. T. 138. He primarily applies for job online but went into a grocery store the other day to submit an application. T. 139. Vocamotive requires him to make eight to ten job contacts per week. He gets credit for two contacts if he submits an application in writing and completes an application online, even though both contacts involve the same prospective employer. T. 140-141. Most of the job leads he pursues are provided to him by Vocamotive. T. 141. Twice a week he goes to Vocamotive's "lab," where he uses a computer to

go to various websites to look for jobs. T. 141. He also pursues job leads from home. T. 142. He traveled to his sister's house in Michigan in June of 2013 but he met his job search obligations before he took this trip. T. 143. During a job interview, he has been told he comes across as "less than friendly." T. 143. He last met with Helma a week before the hearing. At that time, he was under the impression he would be able to discontinue vocational rehabilitation once the hearing was finished. T. 145. Respondent sent him a letter indicating he would have to continue seeking jobs in order to continue receiving benefits and insurance coverage. T. 148. He does not want to work as a dishwasher but he would not automatically decline an offer of such a job. He would find out if the job met his restrictions. T. 149. He "failed out" of college twice. T. 149. Since his 2010 accident, he has not reinjured his back, neck or shoulder. He considers his neck and shoulder injury to be one and the same thing. T. 151. He is able to drive but he has not sought work as a deliveryman or driver. T. 152.

On redirect, Petitioner testified he met all of his quotas, job-search wise, in order to take the trips he took. T. 153. On only one occasion did Respondent contact him about a light duty position. He had to take a test in order to be considered for this position. He failed the test. T. 154. When he first started looking for work, he found the job search process repetitious and upsetting. Helma told him to smile when he walked through the door to someone's office. She and he had a running joke about this. When he goes to an interview, he is "cordial with everybody." T. 155. He has applied for many minimum wage-type jobs. He does not want to work as a dishwasher but he would accept a dishwasher job if offered. T. 156. He has continued looking for work through the hearing. T. 156.

Under re-cross, Petitioner testified he is looking for work because he has been told to do so. T. 157. His trip to City Hall made him aware of another method (beyond the E-mail account) of obtaining job search assistance from Respondent. T. 158-159.

Lisa Helma testified on behalf of Petitioner, pursuant to subpoena. T. 163. Helma is a nationally certified vocational counselor. She has worked for Vocamotive since December 2008. T. 162. PX 17. Petitioner's first contact with Vocamotive occurred on August 13, 2012. Petitioner met with Vocamotive's president, Joseph Belmonte, on that date. T. 164. Belmonte is also a nationally certified vocational counselor. T. 164. Belmonte interviewed Petitioner concerning his education and work history. Belmonte then generated a report, which Helma relied on. T. 172. Belmonte assigned Petitioner's case to Helma. She oversaw Petitioner's computer training and job search efforts. T. 173-174. Petitioner's progress with computer training was slow but he completed the keyboarding and passed the Windows test. He completed Microsoft Word as well but did not pass that exam. T. 174. Petitioner underwent training in how to prepare a resume, how to look for jobs, how to interview and how to follow up with prospective employers. T. 175. Petitioner looked for work "full-time," meaning Monday through Friday. He was expected to make 40 to 60 contacts per week. T. 175. A contact can consist of a phone call, a field visit, an E-mail or a fax. Petitioner met his obligation of making 40 to 60 contacts per week. T. 176.

Helma testified that, given the situational factors in this case, Petitioner was qualified for unskilled to low semi-skilled job positions, including cashiers, fast food workers and light industrial. T. 177. These jobs typically paid between minimum wage ($8.25 per hour) and $10 per hour. T. 177-178. Helma opined that, if Petitioner could secure a job, that job would more than likely pay minimum wage. T. 178-179.

Helma testified Petitioner typically visited Vocamotive's job search lab twice weekly. At the lab, a Vocamotive representative would review Petitioner's cover letters, provide leads and monitor Petitioner's progress. T. 179. She does not recall Petitioner missing any appointments. T. 180. Petitioner also met with a field job developer, Ms. Moy, when he was not in the lab. Petitioner was expected to look for work independently. T. 181.

Helma testified that, to her knowledge, Petitioner did not decline any job offer. T. 182. In her opinion, Petitioner made a diligent effort to look for work. That effort was unsuccessful. T. 182.

Helma testified that Petitioner's current age, 65, is a negative factor in his employability. T. 183. By Social Security standards, Petitioner is considered to be of "advanced age." T. 183. Age might have been a factor that caused Petitioner frustration with the job search process. T. 184. Petitioner's limited education and "long and narrow" work history are also negative factors. Petitioner spent his adult life doing ironwork and is now being told he has to look for entry-level, unskilled jobs. T. 184. Petitioner may in fact be overqualified for some of those jobs. T. 186. Dr. Xia's 25-pound lifting restriction technically places Petitioner at a light-medium physical demand level but "it's a lot closer to the light level," which involves occasional lifting of up to 20 pounds. T. 186-187. The restriction prevents Petitioner from being able to resume his former heavy ironworker job. T. 187.

Helma testified she was unable to identify any transferable skills for Petitioner. T. 187. Petitioner's remote felony conviction might prevent him from being able to obtain a job handling money or a security job, which usually involves an extensive background check. T. 188.

Helma opined that Petitioner has "pretty much" lost access to any kind of stable labor market, given the various situational factors in his case and the fact he has looked for work for over a year with no success. T. 189-190. She further opined that Petitioner is "totally disabled from finding a job." T. 190.

Under cross-examination, Helma testified that, despite the foregoing opinions, Vocamotive is still helping Petitioner look for work. It is her understanding, per Mr. Belmonte, that Belmonte met with some representative of Respondent who indicated the job search should continue. T. 191. This is not mentioned in any of the Vocamotive reports. T. 191. It is not typical for Vocamotive to continue with vocational rehabilitation for someone who is totally disabled. T. 192. She did not consider further college to be an option for Petitioner given his

advanced age and the fact that further schooling would require him to be away from the work force for more time. T. 193.

Helma testified her opinions are not affected by the fact that Petitioner last worked as an ironworker foreman, not just an ironworker. T. 195. She did not discuss the possibility of Petitioner expunging his criminal record. T. 195. No prospective employer indicated it was not hiring Petitioner due to his criminal record. T. 196. If, however, Petitioner had been able to apply for security jobs, that might have helped him find work. T. 196. Some Vocomative reports reflect that Petitioner has "ADD," or attention deficit disorder, but there is no medical confirmation of this. T. 196. Additional computer training would not have played a big impact in terms of finding work but Petitioner might have been less frustrated had more training been provided. T. 198-199.

Helma testified Petitioner took several vacations despite the fact she told him not to. T. 200. In one instance, Petitioner took a vacation without giving any advance notice. T. 201. Petitioner first took a vacation about four months after starting vocational rehabilitation. T. 201. Given the duration of Petitioner's vocational rehabilitation and the fact he continued looking for work while on vacation, she cannot say that the vacations amounted to non-cooperation. T. 201. In one instance, Petitioner did not complete certain assignments outside of the office. He had to complete them at the office, which detracted from his job search. T. 202. In another instance, Petitioner told a prospective employer he was only willing to work first shift. Vocamotive instructs its clients to make themselves available for all shifts. T. 203. During one week, Petitioner pursued job leads provided by Vocamotive but did not conduct any independent job search. T. 205. Vocamotive provided the majority of leads to Petitioner. T. 205. She told Petitioner he had to smile and be friendlier, based on a comment made by one prospective employer. T. 205. She does not recall whether Petitioner missed any job fairs. If he, that could possibly hinder his search. T. 206. If a person missed a job fair due to a physical therapy appointment, that would be documented in a report. T. 207.

Helma acknowledged that Petitioner repeatedly told her he wants to settle his case and retire. T. 203. That is not the mindset of someone who wants to find work. T. 203. In May, Petitioner indicated he does not want to work after his case settles. A person who was really interested in finding work would not say this. T. 206.

Helma acknowledged she did not review the Workfinders records or records concerning the independent job search Petitioner conducted before he started working with Vocamotive. T. 208.

Helma acknowledged Petitioner expressed dislike for some of the job leads he was given. T. 209. The March 2014 report from Vocamotive reflects that Petitioner did not plan to continue looking for work after his upcoming trial. T. 210. Petitioner lacks interest in working on a computer. T. 211.

On redirect, Helma testified that the appointments Petitioner missed did not result in Petitioner losing out on a job offer. T. 212. Only one prospective employer described Petitioner as unenthusiastic. She discussed this with Petitioner. T. 213.

No witnesses testified on behalf of Respondent.

Arbitrator's Credibility Assessment

Petitioner came across as a "no nonsense" individual who knows his trade inside and out. He came alive when describing his former job duties.

There is evidence indicating Petitioner was convicted of felonies in 1984 and 1989. PX 11. The Arbitrator has limited information concerning the nature of the convictions but there is no evidence indicating the underlying crimes involved violence or dishonesty. PX 14. Respondent argues that the convictions precluded Petitioner from being considered for security jobs. The Arbitrator questions whether, as of the January 2010 accident, Petitioner would have been a candidate for a security guard job based solely on his age. The Arbitrator also notes that the Workfinders records reflect Petitioner did in fact interview for a security guard position but was not hired due to his current pain medication regimen. PX 14.

Petitioner testified he began working for Respondent in 1990. T. 31. The lengthy duration of his employment weighs in his favor, credibility-wise, as does his attempt to resume full duty in April and May 2010. Respondent's examiner, Dr. Graf, did not document positive Waddell's. Petitioner's functional capacity evaluation was rated valid.

Petitioner's job search was not perfect but the imperfections are readily understandable. Respondent initially informed him he would receive notice of light duty jobs within its ranks via a specially created E-mail account. Petitioner testified his wife checked this account for him and told him that no E-mails arrived. Respondent criticizes Petitioner for hanging back, waiting to hear word, rather than actively pursuing light duty City jobs but Petitioner had a reason to believe he would hear something, given that Respondent had provided him with an accommodated shop position years earlier, following his November 1, 2000 work accident. Once Petitioner received a directive from Respondent, via his trip to City Hall, he followed protocol and submitted completed job search records every week for an extended period. RX 9. Petitioner went on to work with different rehabilitation outfits, including Workfinders and Vocamotive, but never received an offer, despite making many contacts. PX 12, 14. While the records from Workfinders describe Petitioner as walking out of one interview after five minutes and volunteering restriction-related information at another interview, they also reflect that two prospective employers expressed interest in him following an initial interview but ultimately hired other individuals. PX 14. The records from Vocamotive reflect that Petitioner "participated fully" in a job seeking skills workshop. They also reflect that Petitioner made slow but steady progress with keyboarding (while simultaneously requiring a great deal of assistance with E-mailing) and applied for many different jobs. PX 11. The job search records in evidence are voluminous. PX 12.

The Arbitrator views Petitioner as credible and as making an adequate effort to find work within his restrictions. That Petitioner, who lost both his original ironworker job and his accommodated shop position as a result of work accidents, and who is now 65, would be less than enthusiastic about the job search process, is readily understandable. That Petitioner remains psychologically tethered to Respondent also makes sense. Petitioner worked for Respondent for much of his adult life, achieving foreman status along the way.

Arbitrator's Conclusions of Law Relative to Both Cases

Did Petitioner establish causal connection?

The Arbitrator finds that Petitioner established a causal connection between his undisputed work accident of January 14, 2010 and his current cervical and lumbar spine conditions of ill-being. In so finding, the Arbitrator relies on the following: 1) Petitioner's credible denial of any low back or neck problems prior to January 14, 2010; 2) Petitioner's credible account of the repetitive keg maneuvering he performed on January 13 and 14, 2010; 3) Petitioner's credible testimony that he experienced an abrupt onset of back pain after moving one particular keg on January 14, 2010; 4) the consistent history recorded in the MercyWorks records of January 14, 2010; 5) the positive cervical and lumbar MRI scans performed in 2010 and the positive repeat lumbar spine MRI performed in 2013 (as described by Drs. Sheth, Xia and Graf); 6) Petitioner's credible denial of any back or neck re-injuries after January 14, 2010; and 7) Dr. Graf's July 30, 2010 opinion that the January 14, 2010 accident exacerbated an underlying lumbar spine condition. Resp Grp Exh 4. While Dr. Graf later opined that he could not attribute Petitioner's functional deficits solely to the January 2010 accident, an injured worker in Illinois is not required to establish that an accident is the sole, or even a significant, cause of his disability. He need only establish that the accident was a cause. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003). That Petitioner has other medical issues, including significant restrictions resulting from his November 1, 2000 work fall, does not defeat his claim.

The Arbitrator further finds, in 11 WC 28913, that Petitioner failed to establish a causal connection between his undisputed work accident of October 26, 2009, and his current conditions of ill-being. Petitioner readily acknowledged he did not lose time from work or undergo any treatment between that accident and his subsequent accident of January 14, 2010.

Is Petitioner entitled to maintenance in 10 WC 10446?

Based on the foregoing credibility assessment and causation finding, and noting Lisa Helma's testimony and the voluminous job search records in evidence, the Arbitrator finds, in 10 WC 10446, that Petitioner is entitled to maintenance benefits from September 10, 2011 through the hearing of April 25, 2014, a period of 135 weeks, with Respondent receiving credit for the $131,291.12 in maintenance benefits it paid prior to the hearing. Arb Exh 1.

Is Petitioner entitled to reasonable and necessary medical expenses in 10 WC 10446?

In 10 WC 10446, Petitioner claims unpaid medical expenses totaling $6,030. These expenses are itemized in PX 10 and PX 16. They relate to therapy rendered by RX Pain Management (Dr. Xia). PX 10. Respondent raised no objection to the admission of PX 10 or PX 16 but argues that the RX Pain Management billing is unclear.

The Arbitrator has carefully reviewed the itemized bills from RX Pain Management. The bills reflect that Coventry denied certain expenses relating to therapy administered in late November 2010, December 2010 and early January 2011. Time-wise, the denial does not correlate with Dr. Lan's non-certification and subsequent modified physical therapy allowance of April 2, 2010. RX 4. The denial is also inconsistent with Dr. Graf's July 30, 2010 exacerbation opinion and recommendation that Petitioner continue therapy for his lumbar spine condition. Dr. Graf did not find causation as to Petitioner's claimed cervical condition but the therapy at issue involved the lower back, at least in part. PX 10.

In 10 WC 10446, the Arbitrator awards Petitioner the claimed $6,030.00 therapy expenses from RX Pain Management, subject to the fee schedule.

What is the nature and extent of Petitioner's injury?

Based on the foregoing causation-related finding, the Arbitrator awards no permanency in 11 WC 28913.

Petitioner seeks an award of permanent total disability benefits in his other case, 10 WC 10446.

There are three ways that a claimant can establish permanent and total disability: 1) by a preponderance of medical evidence; 2) by showing a diligent but unsuccessful job search; or 3) by demonstrating that, due to his age, training, education, experience and condition, there are no jobs available for a person in his circumstances [the so-called "odd lot" category]. ABB C-E Services v. Industrial Commission, 316 Ill.App.3d 745, 750 (2000).

In 10 WC 10446, the Arbitrator finds that Petitioner falls into the "odd lot" category of permanent total disability by virtue of the following:

1. Petitioner's age (65);
2. Petitioner's valid functional capacity evaluation and the permanent restrictions imposed by Drs. Xia and Sheth (with Dr. Sheth, a physician of Respondent's selection, imposing a stricter lifting restriction than Dr. Xia, a physician of Petitioner's selection);
3. Petitioner's limited formal education;

4. Petitioner's "long and narrow" employment history and consequent lack of transferable skills; and
5. The fact that Petitioner has been out of the work force (with the exception of one brief period in the spring of 2010) since January 2010; and
6. The barriers to employment identified by several vocational rehabilitation counselors, namely Jim Boyd, Joseph Belmonte and Lisa Helma.

In analyzing permanency, the Arbitrator also considers the opinions voiced by Dr. Graf, Respondent's examiner. In his last report, issued on September 28, 2011, Dr. Graf criticized the functional capacity evaluation but did not find Petitioner capable of performing either his modified shop foreman job, let alone his previous ironworker job. RX Grp Exh 4.

The Arbitrator awards Petitioner permanent total disability benefits from April 26, 2014 forward and for the duration of his life pursuant to Section 8(f) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Regina Prempeh,

Petitioner,

vs. NO: 10 WC 24806

16IWCC0828

Rush 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 causal connection, medical expenses, temporary total disability, permanent partial 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.

For the reasons set forth below, the Commission modifies the Arbitrator's Decision by awarding temporary total disability, increasing the award of permanent partial disability, and awarding medical expenses.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. One should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the Arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

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On direct examination, the Petitioner testified that on May 16, 2009, she heard a 'pop' sound emanate from her back, and felt pain radiate down her leg after assisting a patient in a wheelchair. The Petitioner reported her work accident a couple of days later, and was seen for treatment by her employer. She was examined on other occasions and prescribed physical therapy. The Petitioner specifically requested that she be discharged from physical therapy because the treatment was not helping her, and she did not want to continue to attend appointments during her lunch time as requested by her employer. (Tr. 11-20)

The Petitioner further testified that she continued to work without treatment for her back and leg condition until May 18, 2010. She was again prescribed physical therapy, which she did complete. The Petitioner ultimately sought care with a chiropractor and was then referred to a neurosurgeon, Dr. Michel Malek. She continued to treat with Dr. Malek who prescribed epidural injections and conditioning program which the Petitioner underwent. (Tr. 20-34)

The Petitioner testified that she was placed on restricted duty and held off work by Dr. Malek during periods of treatment with him. Although Respondent had accommodated the Petitioner previously, Respondent was not able to accommodate the Petitioner's last period of restricted duty beginning on December 13, 2010. The Petitioner continued to be off work, and received her last epidural injection with Dr. Malek on April 15, 2011. She ultimately found new employment in November 2011 as a personal care giver. She continues to have pain in her lower back which radiates into her left leg. (Tr. 34-41)

The Petitioner underwent an MRI on June 15, 2010. The radiologist noted abnormal findings: Mild bulging disc at L4-L5 without significant central canal or foraminal stenosis. At L5-S1, there was mild bulging disc causing minimal left foraminal stenosis. The radiologist's impression was that the Petitioner had minimal degenerative changes in the lumbar spine causing minimal left foraminal stenosis at L5-S1. (Px3)

The Petitioner underwent an EMG/ nerve conduction studies on December 30, 2010. The noted findings were that the Petitioner had bilateral S1 neuropathy, left L4-L5 lumbar radiculopathy with advanced sensory disruptions. (Px4)

The Petitioner's treating neurosurgeon, Dr. Malek, testified via deposition that the Petitioner's symptoms are in the lower lumbar distribution at L5-S1 and more on the left side, which is entirely consistent w/ her condition. He further stated that a foraminal disorder at L5-S1 usually does not create a radicular component in and of itself, but that an injury like what occurred to the Petitioner can aggravate, accelerate, or precipitate that condition to make it symptomatic. (T 14-17)

Dr. Malek further opined that the Petitioner had an underlying degenerative lumbar spine condition commensurate with her age which was asymptomatic and not likely to become symptomatic over her lifetime. But, as a result of her work injury on May 16, 2009, that condition was aggravated beyond the natural progression of her disease absent an injury. Dr. Malek's opinion is that the Petitioner's work related accident irritated her nerve root. At some point during the Petitioner's work injury, there was a temporary contact that triggered a response from the nerve root: "During her injury…the twisting position resulted in some kind of process

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whereby the nerve was touched or stretched a little bit resulting in that inflammation in the background of a narrowed exit where the nerve is coming out of the spine." (T 24-30, 41-44)

Petitioner's exhibit seven contained Dr. Malek's treatment records for Petitioner, as well as her restricted duty certificates. The Petitioner was ordered to remain off work for her condition beginning November 22, 2010 through December 10, 2010, and returned to restricted duty on December 13, 2010. Petitioner's exhibit six contained evidence that Respondent was unable to accommodate Petitioner's restricted duty status effective December 13, 2010. It is further noted that Petitioner's exhibits four, five, and seven contain medical billing records related to Petitioner's treatment for her condition.

The Petitioner was examined by Dr. Michael Kornblatt, an orthopedic surgeon, by means of Section 12 of the Illinois Workers' Compensation Act. Dr. Kornblatt testified via deposition that his interpretation of the Petitioner's June 15, 2010 MRI was that it was "normal." Dr. Kornblatt disagreed with the radiologist's findings. Dr. Kornblatt further opined that although he agrees that the Petitioner had an abnormal EMG finding and doesn't know where the neuropathy is emanating from, he does not attribute it to an abnormal condition in the Petitioner's spine. (T 4-20).

The Commission finds that Petitioner's last period of treatment for her back condition was causally related to her work-related accident. Given the objective evidence of the Petitioner's MRI and EMG/ nerve studies' findings, it is evident that the Petitioner had a persistent issue with her back and radiculopathy in her left leg. Dr. Malek's explanation for the Petitioner's condition is much more plausible than Dr. Kornblatt's dismissive interpretation of the Petitioner's MRI and EMG/ nerve studies' findings.

Based upon the totality of the evidence and the factual findings above, the Commission finds that the Petitioner is entitled to additional workers' compensation benefits. The Commission awards temporary total disability for the period from November 22, 2010 through April 15, 2011. The Petitioner was held off work from November 22, 2010 through December 10, 2010. She was released to work on restricted duty effective December 13, 2010, but Respondent was unable to accommodate the Petitioner's restricted duty. April 15, 2011 was the Petitioner's last appointment with her treating physician.

The Commission further finds that the Petitioner should be awarded unpaid medical expenses for treatment due to her work-related condition incurred through April 15, 2011. The Commission further finds that the Petitioner should be awarded permanent partial disability representing a 5% loss of her person as a whole. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision, filed on March 20, 2015, is hereby modified.

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IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $466.67 per week for a period of 20 and 3/7 weeks (November 22, 2010 through December 10, 2010, and December 13, 2010 through April 15, 2011), 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 $420.00 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 5% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner any unpaid medical expenses for treatment due to her work-related condition incurred through April 15, 2011 under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: DEC 2 2 2016

O: 10/25/16
TJT/gaf
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PREMPEH, REGINA
Employee/Petitioner

Case# **10WC024806**

10WC039633

RUSH UNIVERSITY MEDICAL CENTER
Employer/Respondent

16IWCC0328

On 3/20/2015, 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 0.14% 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:

0491 SOSTRIN AND SOSTRIN PC
HERBERT BLUM
33 W MONROE ST SUITE 1510
CHICAGO, IL 60603

2965 KEEFE CAMPBELL BIERY & ASSOC
TIMOTHY J O'GORMAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0828

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

Regina Prempeh
Employee/Petitioner

v.

Rush University Medical Center
Employer/Respondent

Case # **10** WC **24806**

Consolidated cases: **10 WC 39633**

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 **Chicago**, on **February 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 _____

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FINDINGS

On **May 16, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$36,400.00**; the average weekly wage was **$700.00**.

On the date of accident, Petitioner was **29** 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 **$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

Petitioner's claims for temporary compensation and medical services are hereby denied

Respondent shall pay Petitioner permanent partial disability benefits of $420.00/week for 10 weeks, because the injuries sustained caused the 2% 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.

Signature of Arbitrator

March 18, 2015
Date

ICArbDec p. 2

MAR 20 2015

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Statement of Facts

Petitioner has filed two Applications for Adjustment of Claim. These duplicate filings were consolidated. Case 10 WC 24806 lists a date of accident of May 18, 2009. Case 10 WC 39633 lists a date of accident of May 16, 2009. Pursuant to Arbitrator's Exhibit 1, the date of accident in these consolidated matters is alleged to be May 16, 2009.

Petitioner Regina Prempeh testified that in May, 2009, she was employed by Respondent Rush University Medical Center as a certified medical assistant. She had been employed for five years. Petitioner testified that her job duties included taking patient vital signs, cleaning and stocking rooms, preparing patients to see doctors. She was required to transport patients. Petitioner testified that her job duties required her to stand and walk six hours out of her eight hour shift. She would be required to lift boxes of saline, oxygen tanks, gowns and sheets. Petitioner testified that she needed to push patients in wheelchairs, who could weigh more than 200 pounds.

Petitioner testified that on May 16, 2009, she arrived at work at 6:00 o'clock to begin her shift that started at 8:00 o'clock. Petitioner testified that she was not under care for her back on that date. Petitioner testified that approximately 8:50 A.M., she was putting a patient into Room 19 for Dr. Gezer. The patient weighed over 200 pounds. He was in a wide wheelchair. While pulling the chair, she lifted the back of the chair and heard a pop sound on her back and then pain radiating down her leg.

Petitioner testified that she completed her shift and continuing working the next day. She noticed continued pain. She reported the accident to her supervisor Sharon Munson on May 20, 2009. She was seen at Rush University Medical Center on that date. The records of Rush University Medical Center were admitted as Petitioner's Exhibit 3. The history given on May 20, 2009 states Petitioner was pushing a heavy patient in a wheelchair "two days ago" when she heard a crack in her back. Petitioner complained of back pain which was improved with Ibuprofen. No numbness is reported. No previous history of low back pain is recorded. The diagnosis was a low back sprain. Petitioner was allowed to return to full duty. On May 29, 2009, Petitioner continued to complain of back pain with no numbness or weakness in her legs. She was to start physical therapy. Petitioner testified and the records note that she requested returned to full duty to avoid the use of PTO days for the three day waiting period for temporary compensation.

On June 3, 2009, she was noted to be starting physical therapy. She complained of low back pain without radiating pain. The diagnosis was acute lumbar strain. She was noted to have full range of motion except for limited extension due to pain. Petitioner continued treatment through her discharge at her own request on July

10, 2009. The diagnosis remained strain/sprain resolving. Petitioner testified that during this time she was having pain into her legs and thigh. She testified she requested discharge from care because it was not helping and that she was being required to use her lunch hour for therapy.

Petitioner testified she returned to full duty work and sought no further medical treatment until May 18, 2010 when she returned to Rush University Medical Center. She testified she was having pain in her back radiating all the way down her leg. The May 18, 2010 note reports low back pain started two weeks ago and radiates up mid-back. No paraspinal muscle contraction or spasm is noted. Petitioner has full range of motion and no neurological deficits. The diagnosis is low back pain with no identified incident at work, possible repetitive motion (Px 6).

Petitioner was seen for further follow up with continued complaints in her low back. She returned to physical therapy. The May 28, 2010 therapy evaluation records a diagnosis of myofascial pain. She was noted to present with impaired range of motion, strength, muscle length and pain. Petitioner reported numbness and tingling into her feet which started 3 days ago (Px 6). On June 1, 2010, she denied numbness or tingling (Px 6).

The Rush Medical records confirm her testimony that she was started on pain patches (Px 6). The records reflect issues with whether she had a new injury. None was reported. She also had some personal issues (Px 6). Petitioner testified that she continued to have the same pain in her low back radiating to her leg all the way down. Petitioner had an MRI to the lumbar region on June 15, 2010. The MRI report notes minimal degenerative changes causing minimal left foraminal stenosis at L5-S1 (Px 3). The Rush record of June 16, 2010 notes pain in the low back radiating into the right groin. The assessment notes that the MRI finding would not account for the pain. Petitioner was told that the groin pain may be unrelated and that she should see her personal doctor. Petitioner was advised to continue full duty work. On June 29, 2010, Petitioner reported that she saw her PMD and he referred her to a neurologist. She complained of tingling and numbness into her feet for the last two weeks. The records include statements that Petitioner did not understand why she needed to continue to see the Medical Center. Petitioner continued therapy through July 21, 2010, when the record notes an increase in her pain while doing storage duties. She complained of numbness and tingling in her bilateral lower extremities, left worse than right.

Petitioner was seen for an examination with Dr. Michael Kornblatt at Respondent's request July 12, 2012. Dr. Kornblatt testified by deposition on November 19, 2012 (Rx 1). Dr. Kornblatt testified he reviewed the medical records from Rush University Medical Center through June, 2010 including the MRI scan performed June 15, 2010 which he read as a normal study. He performed a physical examination which he testified did not present

any abnormal findings. His diagnosis was myofascial pain, lumbar myofascitis which is subjective pain without abnormal objective findings. He opined that the diagnosis was not related to the May, 2009 work accident. He opined that Petitioner could perform all normal activities and did not need any formal treatment.

On cross examination, Dr. Kornblatt testified that he believed the complaints of numbness or tingling in Petitioner's feet were referred leg symptomalogy not a radicular component from L4/L5 or L5/S1. His opinion of the MRI differs from the radiologist from Pres. St. Lukes. The range of motion recorded in Dr. Kornblatt's report is less that average. He opined that the loss of motion is a subjective finding that shows the Petitioner was not being forthright. He did not have the EMG study to review at the time of his report. He testified the EMG study is not a normal finding. He testified that his opinions are not changed by any of the questions posed on cross examination (Rx 1).

Petitioner testified that she sought alternative treatment with Advance Physical Medicine on August 16, 2010. She testified she was prescribed therapy twice per week through January 7, 2011 and was referred to Dr. Malek. The August 16, 2010 note contains a history of the accident with petitioner stating that since the incident, she continues to experience radiation of pain into the left leg. Petitioner's complaints were of sharp, shooting pain in the low back radiating into the left leg. She states she has a serious diminution in her capacity to carry out daily activities. Dr. Rosenthal disagrees with Dr. Kornblatt's review of the MRI and diagnoses lumbar disc syndrome, radiculitis, neuritis and lumbalgia (Px 7).

Petitioner was seen by Dr. Malek on August 23, 2010. Partial records were admitted as Petitioner's Exhibit 8 with additional records admitted as part of Petitioner's Exhibit 7. Dr. Malek testified by deposition on June 18, 2014 (Px 1). Dr. Malek testified he received a history of the accident with low back pain radiating down the lower extremities to the feet since then. His examination showed positive straight leg raising, paraspinal tenderness and limitation of range of motion in her lumbar spine. There were no obvious neurological deficits. Dr. Malek diagnosed a lumbar musculoligamentous sprain with a lumbar radiculopathy worse on the left side. He opined that the MRI showed evidence of foraminal narrowing at L5-S1 and bulging and desiccation of the disc at that level. He opined that these findings usually do not create a radicular component, but with this degenerative background, an injury such as suffered by the Petitioner can aggravate, accelerate or precipitate the condition to become symptomatic (Px 1).

Dr. Malek's August 23, 2010 note states that if the symptoms are bothering her to the point where she wants to have something done about it he would consider an epidural injection (Px 8). Petitioner underwent caudal epidural injections on September 27, 2010 and October 22, 2010 with some improvement in her symptoms. She underwent an MRI of the thoracic spine on October 20, 2010 which was read as negative. Petitioner

testified that she continued working her regular job during this period. Petitioner returned on October 25, 2010. Dr. Malek imposed restrictions of part time work with a 20 pound lifting, no bending and twisting, although the Disability Status form lists 15 pounds. He recommended a third injection, a conditioning program and a functional capacity evaluation and MMI. On November 8, 2010, Dr. Malek continued light duty work restrictions and treatment recommendations.

Petitioner testified that she worked full duty through November 8, 2010. She requested part time restricted duty at that time from her supervisor Sharon Munson. Petitioner testified that she was initially accommodated, but thereafter they could not because it was a very busy area. Petitioner returned to Dr. Malek on November 22, 2010 and received an off work slip. On December 13, 2010, Dr. Malek records a history of Petitioner having increased pain after four hour light duty resulting in Petitioner being off work. Dr. Malek provided a light duty restriction. He recommended holding off on the third injection until after assessment of the EMG/NCV (Px 7). Petitioner testified that she faxed the light duty form to Sharon Munson, but was advised that they did not have anything for her.

Petitioner underwent the EMG/NCV at Preferred Open MRI on December 30, 2010. The impression was bilateral S1 neuropathy and Left L4-L5 lumbar radiculopathy (Px 4). On March 14, 2011, Dr. Malek recommended a caudal ESI and an L4-L5 transforaminal injection (Px 1, Px 7). He also recommended a conditioning program and a repeat lumbar MRI (Px 7). He testified that he last saw Petitioner on April 15, 2011 when the third injection was performed. Petitioner testified that following the injection the pain was still in her low back radiating all the way down her left leg.

Petitioner testified that she was not offered light duty by Respondent. She obtained alternate employment in November, 2011 performing home personal care. She assists the patient to doctor's appointments and does errands. Petitioner testified that she still has pain, but not as bad as before. Petitioner identified the unpaid medical bills (Px 5).

Conclusions of Law 16IWCC0828

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

Petitioner's unrebutted testimony is that she suffered an accidental injury arising out of her employment with Respondent while transferring a patient in a wheelchair on May 16, 2009. She has provided this same consistent history to each of her treating medical providers and to Respondent's evaluating physician. The accident report completed by Respondent indicates the accident was on May 18, 2009, but this was recorded after the reporting on May 20, 2009. There has been no evidence admitted to contradict Petitioner's testimony and history that she suffered her injury as described while moving a patient. The Arbitrator finds Petitioner's testimony more persuasive as to the exact date of accident.

The Arbitrator finds that Petitioner has proved that she sustained an accidental injury to her low back arising out of her employment with Respondent on May 16, 2009.

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

Petitioner testified that she reported her accidental injuries on May 20, 2009 to her supervisor Sharon Munson. Petitioner was treated at Respondent's medical facility with a consistent description of the accident. Petitioner's Exhibit 6 includes a Rush report of injury dated May 20, 2009 describing the incident and an Illinois Form 45 dated June 22, 2009 which confirms the description of the accident.

Based upon the unrebutted testimony of Petitioner and the documentation corroborating this testimony, the Arbitrator finds that Petitioner has proved that she provided notice of the accidental injuries sustained on May 16, 2009 to Respondent within the time limits stated in the Act.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

Petitioner sustained a work related accident on May 16, 2009 resulting in an injury to Petitioner's low back. Petitioner's testimony that she had pain in her lower back immediately radiating into her leg is not supported by the medical records. The Rush University Medical Center record (Px 6) of her initial treatment describe pain in the middle of her back. There is no complaint of pain radiating into her leg. The June 3, 2009 note specifically denies radiating pain. Neurological examination is consistently recorded as normal. Petitioner was diagnosed with a low back sprain/strain. Petitioner was allowed to continue her full duty work during her treatment. As of July 9, 2009, she reports doing fine and requested discharge.

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Petitioner then continued full duty work without any further medical intervention for almost a year until May 18, 2010. At that time, in contrast to her testimony and the history she provided to Dr. Malek, she reported low back pain started two weeks ago. Again, the pain is described as mid back. On May 25, 2010, she described non radiating pain. Petitioner then describes pain radiating to the right groin in June, 2010. The June 16, 2010 note indicates the right groin pain may be from a non work related condition. Petitioner's MRI was read as only showing minimal degenerative changes. The record notes that this would not account for her pain.

Petitioner then began treatment with Dr. Malek providing a history pain radiating down her leg ever since the date of accident. While such inconsistent history would raise questions as to credibility in the case of any witness, it is particularly concerning in a case such as this where the Petitioner has a medical background and would be expected to be accurate and precise in describing her symptoms and condition to her treating providers included the Rush Medical Center and Dr. Malek. When coupled with Petitioner's continuing to work full duty until November, 2010, the Arbitrator has to seriously question the validity of the testimony. Petitioner's explanations as to her initial May, 2009 request to continue work, the July 2009 request for discharge from care, her testimony concerning her continued complaints and decisions to follow up with Rush Medical and subsequently seek alternate care are similarly unpersuasive.

Against the backdrop of this evidence, the Arbitrator must evaluate the opinions of Dr. Malek and Dr. Kornblatt. Dr, Malek's opinions are based upon the history received, which is not supported by the treating medical records or the Petitioner's course of conduct in working without restriction performing the job duties including stocking and transporting patients as she has described. The Arbitrator is not persuaded by the subsequent EMG/NCV study since Dr. Malek had already reached his diagnosis and treatment recommendations months before the EMG study was completed. The lack of success of Dr. Malek's treatment as testified to by the Petitioner raises further questions as to the validity of his opinions.

After review of the testimony and the medical evidence submitted herein, the Arbitrator finds the opinions of Rush University Medical Center and Dr. Kornblatt more persuasive that Dr. Malek and more consistent with the recorded symptoms, treating records of Rush University Medical Center and the MRI study.

The Arbitrator finds that as a result of the accident on May 16, 2009, Petitioner sustained a sprain/strain injury to the low back. The Arbitrator finds that Petitioner reach maximum medical improvement as a result of the accidental injuries sustained upon her release from care on July 9, 2009. The treatment thereafter is not causally connected to the accidental injuries sustained on May 16, 2009.

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In support of the Arbitrator's decision with respect to (J) Medical and (N) Credit, the Arbitrator finds as follows:

Based upon the Arbitrator's decision with respect to Causal Connection, the Arbitrator finds that Petitioner's condition of ill being after July 9, 2009 is not causally connected to the accidental injuries sustained on May 16, 2009. Petitioner has submitted unpaid medical bills as Petitioner's Exhibit 5. All of the bills submitted are for treatment rendered after July 9, 2009.

The Arbitrator further notes that, despite the additional testing including the thoracic MRI and the EMG/NCV and the extensive treatment including injections and chiropractic treatment, Petitioner's complaints, symptoms and physical condition has not significantly improved. Based upon the medical evidence submitted and the Petitioner's testimony, the Arbitrator finds that this additional testing and treatment was not reasonable or necessary.

Based upon the Arbitrator's decision with respect to Causal Connection and the records as a whole, the Arbitrator finds that Petitioner has failed to prove that she is entitled to any further reasonable, necessary or causally connection medical expenses. Petitioner's claim for additional medical expenses is denied.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Based upon the Arbitrator's decision with respect to Causal Connection, the Arbitrator finds that Petitioner's condition of ill being after July 9, 2009 is not causally connected to the accidental injuries sustained on May 16, 2009. Petitioner did not miss any time from work before July 9, 2009.

The Arbitrator also notes that Petitioner, despite testifying to ongoing unchanged complaints, was able to perform her regular duties for over a year. Dr. Malek, despite the unchanging nature of her symptoms and findings, alternatively opined her condition allowed full duty, required restricted duty, complete disability and then again restricted duty. Petitioner ultimately returned to alternative employment. The Arbitrator finds the opinions of Dr. Malek with respect to Petitioner's ability to perform work duties inconsistent with the medical evidence and his own evaluations. The Arbitrator finds his opinions on Petitioner's work ability unpersuasive.

Based upon the Arbitrator's finding with respect to Causal Connection and upon review of the record as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that she is

entitled to any compensation for temporary total disability causally related to the accident of May 16, 2009. Petitioner's claim for temporary compensation is denied.

In support of the Arbitrator's decision with respect to (L) Nature and Extent, the Arbitrator finds as follows:

Petitioner's date of accident is before September 1, 2011. Therefore, the provisions of Section 8.1b of the Act do not apply to the assessment of permanent partial disability in this matter.

Petitioner sustained an undisputed injury to her low back for which she received conservative treatment at Rush University Medical Center. She was diagnosed with a sprain/strain injury. Her MRI was read as showing minimal degenerative changes. Petitioner continued full duty work including her described activities of stocking and transporting patients. While the records do document complaints of some increased symptoms with her work activities, Petitioner requested discharge from treatment on July 9, 2009 and did not seek any further care until May 18, 2010. Even then, she was allowed to continue full duty work by Rush University Medical Center and by Dr. Rosenthal. Dr. Malek did not provide restrictions until October 25, 2010 and Petitioner testified she did not request limited duty until November, 2010. As noted above with respect to causal connection, the Petitioner's testimony as to her symptoms and complaints is not supported by the credible medical evidence or her course of conduct in performing her work activities for over a year. Her explanations as to her discharge in July, 2009 and her decision to delay further medical care for almost a year are unpersuasive.

Based upon the Arbitrator's decisions with respect to Causal Connection, Medical and Temporary Compensation, the Arbitrator finds that Petitioner sustained a lumbar sprain/strain as a result of the accidental injuries sustained on May 16, 2009. Based upon the credible medical evidence submitted and review of the record as a whole, the Arbitrator finds that Petitioner has sustained permanent partial disability of 2% loss of use to the whole person.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dan Stevenson,
Petitioner,
vs.

NO: 10WC 49264

Centralia Correctional Center,
Respondent,

16IWCC0776

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, 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 October 8, 2015, 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.

DATED: DEC 2 - 2016
MJB/bm
o-11/29/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

STEVENSON, DAN
Employee/Petitioner

Case# **10WC049264**

CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

16IWCC0776

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:

1580 BECKER SCHROADER & CHAPMAN
TODD SCHROADER
3672 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM H PHILLIPS
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

OCT 8 - 2015

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

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
19(b)

Dan Stevenson
Employee/Petitioner

v.

Centralia Correctional Center
Employer/Respondent

Case # **10** WC **049264**

Consolidated cases: **N/A**

16IWCC0776

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 **3/5/15**. 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 _____

16IWCC0776

FINDINGS

On the date of accident, **12/6/10**, 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 **$55,266.12**; the average weekly wage was **$1,062.81**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **4** 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** 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 meet his burden of establishing that an accident occurred which arose out of and in the course of his employment with Respondent, and further failed to prove that his current condition of ill-being is causally related to his 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

10/1/15
Date

ICArbDec19(b)

OCT 8 2015

16IWCC0776

FINDINGS OF FACT

Petitioner was hired as a correctional officer (CO) in 1999 and worked at Stateville Correctional Center until his 2001 transfer to Centralia Correctional Center. Petitioner alleges he sustained repetitive trauma injuries to his upper extremities on December 6, 2010.

Petitioner worked the 7:00-3:00 shift at Centralia Correctional Center. At the beginning of his shift Petitioner takes 50 cell doors off of dead lock which requires turning a key. Petitioner indicated that he would use his right hand in a pinch grip on the key. Some of the locks were hard to open. Petitioner testified that during this process he would get numbness in his hand and eventually when the numbness got too bad he had to use his left hand instead of his right to open the doors. Petitioner also performed 30-minute wing checks. Each of the four wings has a lock box at the end of the wing. He would use a small key to open the padlock, handwrite the verification, and close the lock. Petitioner testified that he shook down a cell each day. Petitioner testified that during the shake down he would go through each inmate's items, including their personal property box, to look for contraband. Petitioner acknowledged that during a portion of the day Prisoners are granted open movement in and out of their cells, which significantly diminishes the amount of hey turning required of the correctional officers.

Centralia Correctional Center utilizes a duty rotation system, and Petitioner worked in almost every assignment available at the facility. He acknowledged that different assignments required different hand activities and were generally varied in nature. Petitioner indicated that even if he was assigned a relatively hand intensive job; the roster would change every 90 days which would potentially facilitate the change to a different assignment. While working in a control room, officers utilize a three button control board and open the control room door throughout the day. Petitioner confirmed that working in the control room was less hand intensive than working as a wing officer. Petitioner testified that while working as a tower officer "you're looking out a window all day." He did not feel that serving as a tower officer was a hand intensive activity. While working as a health care officer, Petitioner provided security for the medical care personnel. Petitioner stated that working as a health care officer was not a hand intensive activity. Petitioner distributed tools and supplies to maintenance workers while working as a key and tool control officer, but was not required to utilize the tools he distributed. While assigned as an inside grounds officer and a maintenance officer, Petitioner provided security for inmate work crews who were maintaining and improving the premises. During his shifts as a segregation officer Petitioner manipulated large keys to open chuckholes and feed inmates. Petitioner testified that approximately ten of the thirty segregation cells would have shower or yard privileges per day and would be unlocked and moved for that purpose.

Petitioner described operating large Folger-Adams keys, medium sized door keys and small padlock keys during the course of his duties. Petitioner testified that utilizing a key would cause a shocking sensation which would run through his index finger and into the palm of his hand. Petitioner testified that he is right hand dominant. Petitioner has worked full duty work without interruption since 2010.

Petitioner's assignment history was entered into evidence. (RX 8) The history indicates that Petitioner worked approximately twenty-six assignments between 2009 and 2012. (Id) Petitioner was only assigned as a full time segregation officer for two months during the four years prior to his alleged injury. (Id) Robert Stovall

16IWCC0776

testified that he is a shift supervisor at Centralia Correctional Center. Major Stovall confirmed that Centralia Correctional Center keeps a full time locksmith on staff. Major Stovall testified that sometimes correctional officers are required to fill in for absent coworkers, and therefore the assignment history may not accurately reflect what the CO was actually doing.

A job analysis report for the position of correctional officer at Centralia Correctional Center was prepared by Corvel in January of 2011. (RX 5) The report indicates that Centralia Correctional Center is a level 4 medium security facility at which the inmates use their own keys to let themselves in and out of their cells as they go to the yard, gym, school, to meals, the day room, etc. (Id) It further indicates that all the inmates are locked in their cells at approximately 9:30 pm by officers working the 3 pm to 11 pm shift and are not unlocked until approximately 4:30 am by escort officers working the 11 pm to 7 am shift. (Id)

Petitioner initially sought treatment from Felecia Kimbrough, a nurse practitioner at Marshall Browning hospital on May 6, 2010. (PX 1) At that time, Petitioner reported numbness and tingling in his hands bilaterally at night. (Id) On July 8, 2010 Petitioner underwent electro diagnostic testing which was indicated minimal right median mononeuropopathy at the wrist without active denervation. (PX 5) On August 18, 2010 Petitioner saw Richard Morgan MD and was diagnosed with right-sided carpal tunnel syndrome. (PX 2) Dr. Morgan's records indicate that Petitioner's symptoms began approximately 2 years earlier. (Id) Dr. Morgan recommended B6 and a resting hand splint. (Id) Petitioner returned to Dr. Morgan on November 20, 2010 and was diagnosed with bilateral carpal tunnel syndrome; right worse than left. (Id) Dr. Morgan then recommended an open carpal tunnel release. (Id) Petitioner gave notice to Major Robert Mueller on December 6, 2010, shortly after learning his carpal tunnel would have to be surgically repaired. Petitioner saw Dr. Morgan for the final time on December 14, 2010. Dr. Morgan reiterated his surgical recommendation. (Id)

Dr. Morgan testified by deposition. Dr. Morgan reviewed the Corvel Job Analysis and the DVD on the day of his deposition. Dr. Morgan stated that Petitioner never provided him with any specific information regarding his job duties and acknowledged that it would have been useful to know what his job duties were. (Id, at 19-20) Dr. Morgan indicated he was generally familiar with the job duties of a CO because he has been to Shawnee and Vienna Correctional Centers as a consultant. He has never been to Centralia Correctional Center. (Id, at 21) Dr. Morgan testified he felt the activities Petitioner participated in as a correctional officer "could certainly contribute to the onset of carpal tunnel syndrome." (PX 5 at 11) Dr. Morgan recommended an open release of the right carpal tunnel.

Dr. Anthony Sudekum performed a records review at Respondent's request. He too testified by way of deposition. Dr. Sudekum has toured Centralia Correctional Center in the past. He has observed the housing units, cafeteria, healthcare unit, the yard, the gym, administrative areas, and the commissary. (Id, at 17) While touring the facility, Dr. Sudekum utilized each type of key used by correctional officers and performed various other duties including operating control panels, manipulating property boxes, and handling dietary trays. (Id, at 18-19) Dr. Sudekum opined that Petitioner's duties as a CO did not cause or aggravate his mild right-sided carpal tunnel syndrome. (RX 7, at 26, 33) Dr. Sudekum reviewed Petitioner's medical history, the Corvel job site analysis, the DVD, post descriptions, and Petitioner's assignment history. (Id, at 13-16) Dr. Sudekum disagreed that Petitioner suffered left carpal tunnel syndrome, and felt that the diagnosis of right carpal tunnel

syndrome was "extremely weak". (Id, at 44) Dr. Sudekum opined that Petitioner's obesity, hypertension, and tobacco use were potential comorbid factors for the development of carpal tunnel syndrome. (Id, at 29)

Petitioner acknowledged that his upper extremity complains began to manifest in 2008. Petitioner indicated that his hobbies include hunting and fishing and indicated that he is able to fish six to eight times a year and manipulate a shotgun safely.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

These issues are somewhat overlapping, therefore the Arbitrator will address them jointly. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961 (1999) 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*, 509 N.E.2d 1005 (1987)

The Petitioner in this case is relying upon a repetitive trauma theory rather than one of traumatic injury. The Petitioner must still show the injury arose out of and in the course of his employment. *Peoria County Bellwood Nursing Home v. Industrial Commission*, 505 N.E.2d 1026 (1987) In such cases the claimant generally relies on medical testimony to establish causal connection between the claimant's work duties and the condition of ill-being. *Id.* When the question at issue is one specifically within the purview of experts, expert medical testimony is required to show that the 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 due to repetitive trauma has been deemed to fall in the area requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill. 2d 438 (1982) In a repetitive trauma claim arising prior to 2011, a claimant need not establish that work activities are the sole or even the primary cause of his or her condition. It must be proven, however that work activities are at least a cause of his or her condition. The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24 (1977)

Dr. Morgan testified he felt the activities Petitioner participated in as a correctional officer "could certainly contribute to the onset of carpal tunnel syndrome." However, Dr. Morgan indicated that Petitioner never provided him with any specific information regarding his job duties. Dr. Morgan did not review the Corvel Job Analysis, DVD, and other documentary evidence until the day of his deposition. Dr. Morgan indicated he was generally familiar with the job duties of a CO because he has been to Shawnee and Vienna Correctional Centers as a consultant. He has never been to Centralia Correctional Center. The Arbitrator notes the job duties of COs vary widely from facility to facility.

Dr. Sudekum opined that Petitioner's duties as a CO at Centralia CC did not cause or aggravate his mild right-sided carpal tunnel syndrome. Dr. Sudekum reviewed not only the Corvel job analysis report and DVD, but he also reviewed Petitioner's assignment history, toured his worksite personally, and performed the same activities that Petitioner alleges are causative of his current condition.

16IWCC0776

In this case, Dr. Sudekum's knowledge of the job duties of a CO at Centralia is far more extensive than that of Dr. Morgan and therefore, Dr. Sudekum's opinion is given more weight regarding causal connection. The Arbitrator finds the testimony and opinions of Dr. Sudekum more persuasive than those of Dr. Morgan. Further, the multitude of assignments and duties performed by Petitioner is a compelling factor in assessing the repetitive nature of his duties for Respondent. Petitioner himself described his job duties as varied

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to prove that he sustained accidental injuries which arose out of and in the course of his employment or that his condition of ill-being is causally related to his employment. Benefits are therefore denied.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner's unrefuted testimony established he gave notice to Major Robert Mueller on December 6, 2010, shortly after learning, on November 20, 2010, his carpal tunnel syndrome would have to be surgically repaired. Based upon the foregoing and the record taken as a whole, the Arbitrator finds timely notice was given.

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?

Petitioner incurred medical expenses as follows:

Marshall Browning Hospital	$ 290.00
Dr. Amar Sawar	$1,479.00
Southern Orthopedic Associates	$ 262.00
TOTAL:	$2,031.00

The Arbitrator finds these expenses are reasonable and necessary to treat Petitioner's carpal tunnel syndrome. Further, the Arbitrator finds the future treatment recommended by Dr. Morgan is reasonable and necessary. However, because Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment or that his condition of ill-being is causally related to his employment, benefits are denied.

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

Amanda Asberry,
Petitioner,
vs.
Casey's General Store,
Respondent,

NO: 10WC 26081

DECISION AND OPINION ON REVIEW

16IWCC0777

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, 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 $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: DEC 2 - 2016
MJB/bm
o-11/29/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ASBERRY, AMANDA
Employee/Petitioner

Case# **10WC026081**

CASEY'S GENERAL STORE
Employer/Respondent

16IWCC0777

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:

5236 CULLEY FEIST KUPPART & TAYLOR
KREIG TAYLOR
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

0507 RUSIN & MACIOROWSKI LTD
TRICIA J SHELTON
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

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

AMANDA ASBERRY
Employee/Petitioner

v.

CASEY'S GENERAL STORE
Employer/Respondent

Case # 10 WC 26081

Consolidated cases: N/A

16IWCC0777

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 **4/10/15**. 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 _____

16IWCC0777

FINDINGS

On **8/19/2009**, 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 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 **$5,404.18**; the average weekly wage was **$168.88**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **3** 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

Because Petitioner failed to prove she sustained an accidental injury which arose out of and in the course of her employment with Respondent on August 19, 2009, failed to provide proper notice of the alleged accident of August 19, 2009, and further failed to prove a causal relationship between her current condition of ill-being and the alleged accident of August 19, 2009, 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

11/25/15
Date

DEC 7 – 2015

FINDINGS OF FACT 16IWCC0777

Petitioner testified that she began working for Respondent in January of 2009. On August 19, 2009, she was unloading a truck. While carrying a heavy tote, she experienced a pop and felt immediate back pain. She testified that she immediately reported the injury to her manager, Mary Higgs, who was unloading the truck with her at the time of the accident. She was able to complete her shift that day.

Mary Higgs testified that she was Petitioner's manager on August 19, 2009, but she denied that Petitioner ever reported a work injury. She recalled mention of chiropractic care, but not that Petitioner's condition was claimed to be work-related. Ms. Higgs noted that the alleged date of accident was a Wednesday, and Respondent never received grocery/kitchen deliveries on Wednesdays. If a work injury would have occurred and been reported, Ms. Higgs testified that she would have completed an accident report. No such report was on file. An employee being injured on the job is the type of event that she would remember.

Ms. Jacobsen, Respondent's area supervisor, testified that the first notice that Respondent had that Petitioner was claiming a work injury was correspondence received in July of 2010. Petitioner filed her initial Application for Adjustment of Claim on July 9, 2010. (RX10)

Petitioner first sought treatment for her alleged work injury from her chiropractor, Dr. Eaton at DuQuoin Chiropractic Center, on August 21, 2009, two days after the alleged accident. Petitioner had received manipulations from Dr. Eaton on four occasions from April 15-27, 2009 for prior lower back pain with a six week history of pain during which she stated she could barely get out of bed. Petitioner attributed her April pain to having moved a washing machine. (RX1, 5) In August, she again disclosed to the chiropractor a several week history of back pain that was gradually getting worse, but Dr. Eaton's records do not contain any reference to a specific mechanism of injury or a work injury. Petitioner attended seven chiropractic visits from August 21–September 2, 2009 and continued to work for Respondent. (RX1) Jennifer Jacobson, area supervisor for Respondent, testified that Petitioner was fired in late November of 2009 for removing a dollar from a fellow employee's drawer and playing the lottery while on duty. (RX12)

Following her termination, Petitioner returned to Dr. Eaton on December 19, 2009, complaining of low back pain that began the previous evening. (RX5) Dr. Eaton took her off work from December 22-23, 2009. (PX2)

On December 22, 2009, she sought treatment from PA-C Gerald Cameron at Murphysboro Health Center, reporting that her back "went out" the previous Friday. PA-C Cameron noted that Petitioner provided a history of pulling her back while unloading a truck at work, but the records do not include a specific date of injury. (RX4a) The Arbitrator notes that this December 22, 2009 note is the first mention of a work accident that appears in Petitioner's medical records.

Petitioner then resumed care with Dr. Eaton. He took her off work on December 24, 2009 until an MRI could be performed or at least until December 30, 2009. (RX5 & PX2) Petitioner was unable to tolerate an MRI or open MRI ("mentally" according to Dr. Eaton's note) and elected instead to undergo a CT of her lumbar spine on December 28, 2009. (RX7) On January 11, 2010, Dr. Eaton issued a work slip stating the Petitioner would be off work for two more weeks before returning to eight hour days. Dr. Eaton continued to perform

manipulations through September 14, 2010. On October 12, 2010, Dr. Eaton issued a note stating that Petitioner had been unable to work because of low back pain. He recommended an orthopedic consult. (RX5 & PX2)

Petitioner presented to Dr. Mark Austin, DO, at Southern Illinois Healthcare WorkCare on February 10, 2011, complaining of low back pain with left leg radicular symptoms. She provided a date of injury of August 24, 2009, and reported feeling a pop while unloading a truck and lifting heavy totes. Dr. Austin agreed to sedate her for an open MRI and requested that she schedule the test.

Petitioner did not return to Dr. Austin's office until June 22, 2011. She advised the doctor that the MRI had not been approved, and the doctor again recommended an MRI, based in part on her complaints of left leg radicular symptoms. Petitioner testified that her leg complaints began around the time of this appointment with Dr. Austin.

Petitioner continued treating with her primary care physician at Murphysboro Health Center with a diagnosis of lumbar back pain, disc herniation, and muscle spasms. (RX4b). She underwent an MRI of her lumbar spine on October 25, 2011 which revealed a disc bulge and facet arthropathy at L5-S1 and a disc protrusion at L4-5 (RX7, p. 3-4). Her primary care doctor referred her to a neurosurgeon. (RX4b , p. 11).

Petitioner presented to Dr. Mark Fleming at Trinity Neuroscience Institute on August 22, 2012, complaining of low back pain radiating down both thighs to her knees that had been rapidly progressing in the last year and a half. He referred her to Dr. Gerson Criste for pain management. Dr. Criste performed an epidural steroid injection on September 25, 2012 at L4-5. Petitioner presented to Dr. Fleming on October 16, 2012 and reported being much improved following the injection. He recommended physical therapy. Dr. Criste released her from care on October 19, 2012. (RX8a) Petitioner began physical therapy on October 24, 2012. (RX9) She presented to her primary care doctor on November 14, 2012 and reported relief with the injection. (RX4b) She was discharged from therapy with all goals being met on November 29, 2012. (RX9) Petitioner testified that she received relief for only one week following the injection.

Petitioner returned to Dr. Criste on February 1, 2013, reporting that the pain was back. He recommended a medial branch block and rhizotomy. (RX8a) Petitioner continued to present to her primary care physician with complaints of intermittent chronic back pain and pressure. (RX4b,c) She presented to Dr. Criste on November 21, 2013 complaining of left lower extremity numbness and weakness without any such findings upon physical examination. He recommended nerve conduction studies. (RX8b)

Petitioner presented to her primary care doctor on three occasions in 2014 complaining of intermittent back pain. She last presented for treatment for lumbar spine complaints on September 15, 2014. (RX4c) She did not complete the nerve conduction studies.

Petitioner testified that there are no pending treatment and/or surgical recommendations. She is utilizing a medical card to obtain treatment. She testified that she is in constant pain and has trouble playing with her three children. She is on Naproxen, Vicodin and Flexeril. She is currently employed full-time as a manager at O'Reilly Auto Parts. From the time of her termination by Respondent in November 2009 to her hire by O'Reilly in June or July of 2013, Petitioner was unemployed.

16IWCC0777

Although she denied recollection of low back complaints prior to April 2009, Petitioner received treatment for lower back pain from chiropractor Douglas Cochran from November 14, 2008 through January 12, 2009. (RX2) She underwent an x-ray of her lumbar spine on November 17, 2009. (RX2) She did not recall telling Dr. Eaton she could barely get out of bed in April of 2009, she did not recall telling Dr. Eaton that she had been experiencing back pain for several weeks when she presented on August 21, 2009, and she did not recall telling Dr. Eaton on December 19, 2009 that her pain began the previous night.

Dr. Criste was deposed on November 6, 2013. (PX22) He diagnosed Petitioner with degeneration of the disc and lumbosacral spondylosis without myelopathy. (*Id.*, at 8) Petitioner reported good results from the injection provided by Dr. Criste, and he released her from care on October 19, 2012. Petitioner returned with complaints of back pain and headaches in February of 2013. (*Id.*, at 10) He recommended a rhizotomy to provide longer pain relief. (*Id.*, at 18-19) He did not believe that Petitioner was a surgical candidate and did not believe that she exhibited true radiculopathy. (*Id.*, at 11-12, 15) He opined that Petitioner's condition of ill-being could have been aggravated by her work duties for Respondent. (*Id.*, at 8)

Petitioner was examined on August 2, 2011 at Respondent's request by Dr. Robert Bernardi, a board certified neurosurgeon, for purposes of a §12 evaluation. He conducted supplemental records reviews on April 13, 2012 and November 11, 2013. Dr. Bernardi testified by deposition on March 28, 2014. Dr. Bernardi diagnosed Petitioner with congenital lumbar stenosis, L4-5 and L5-S1 disc degeneration, a disc herniation at the L4-5, bilateral L4-5 foraminal stenosis, and back and non-radicular leg pain of uncertain etiology. (RX1 pp.23-24, 37) He testified that Petitioner's symptoms, the progression of her symptoms, and her physical examination findings were not consistent with a disc herniation at L4-5. (*Id.*, at 35) He concluded that Petitioner's condition of ill-being was not causally related to the alleged work injury for the following reasons: the uncertain etiology of her complaints, her prior history of back complaints, and the lack of medical documentation of a work related injury. (*Id.*, at 25-26) He opined that the treatment recommended by Dr. Criste would be of no benefit. (*Id.*, at 42) He opined that Petitioner was not in need of any further treatment related to the alleged work accident. (*Id.*, at 30)

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

Issue (E): Was timely notice of the accident given to Respondent?

When Petitioner presented to Dr. Eaton, for treatment on August 21, 2009, she complained of back pain for several weeks that had gradually been getting worse. She had previously treated with Dr. Eaton for low back pain in April of 2009. Petitioner presented to Dr. Eaton for chiropractic care on seven occasions from August 21, 2009 through September 2, 2009, without any documentation of a work injury or even a specific mechanism of injury.

Petitioner worked for Respondent from January-November of 2009. Petitioner's manager, Mary Higgs, testified that she did not recall Petitioner ever reporting a work injury during her employment with Respondent. If an accident would have been reported, she would have filled out an accident report. An employee being injured on the job is the type of event that she would remember. The Arbitrator finds Ms. Higgs credible.

It is significant to note that according to Ms. Higgs, the type of truck that Petitioner was allegedly unloading at the time of the injury only comes in on Mondays. She testified that she has worked for Respondent for 10 years and she never recalls a truck coming in on a Wednesday.

Petitioner's first mention of a work injury occurred during her visit to her PCP on December 22, 2009, a little less than one month after her termination and more than three months following her last date of treatment for low back complaints. Petitioner advised that her back went out the previous Friday. Although she reported that the pain originally began while unloading a truck at work, there is no documentation of a specific date of injury.

Jennifer Jacobsen testified that the first notice that Respondent had that Petitioner was claiming a work injury was correspondence received in July of 2010, almost one year after the alleged injury. Petitioner's original application for adjustment of claim was filed July 9, 2010.

According to the medical records, it does not appear that Petitioner reported a date of injury until October 5, 2010, when she gave a date of August 24, 2009. Later, she amended her application to reflect a date of injury of August 19, 2009. Petitioner did not report leg pain until February of 2011, which was also the first time that she reported experiencing a pop at the time of the alleged accident.

Petitioner's credibility is at issue. She reported a significant increase in pain in December of 2009, after she was fired and after not receiving treatment for four months. She did not report leg complaints until 18 months later. She denied making any statements to treating providers concerning a several week history of pain prior to the date of accident and she did not remember receiving any treatment for lumbar spine complaints with Dr. Cochran in 2008 and 2009, which is clearly contrary to the documented medical history. Petitioner continued to report significant increases in back pain during the four years that she was not working with constantly evolving symptoms.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove she sustained an accidental injury which arose out of and in the course of her employment with Respondent on August 19, 2009. The Arbitrator further finds that Petitioner failed to provide proper notice of the alleged accident of August 19, 2009.

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

Petitioner's medical records document a history of low back pain dating back to 2008. Although Petitioner denied any significant complaints of back pain prior to the accident at issue, the medical records indicate otherwise. When Petitioner first presented for treatment two days after the alleged accident date, she reported a several week history of low back pain that was progressively getting worse. According to Dr. Bernardi, there is no objective basis for Petitioner's continued complaints and no causal connection between the alleged work accident and said complaints. The absence of leg complaints until 18 months after the alleged date of accident is particularly significant.

The Arbitrator finds the opinions of Dr. Bernardi, a board certified neurologist with a specialty in spinal surgery, more persuasive on this issue than the opinion of Dr. Criste, a pain management specialist.

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Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner failed to prove a causal relationship between her current condition of ill-being and the alleged accident of August 19, 2009.

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): **What temporary benefits are in dispute?**
Issue (L): **What is the nature and extent of the injury?**

The Arbitrator incorporates herein the conclusions set forth above. Based upon the Arbitrator's conclusions on the issues of accident, notice, and causal connection, Petitioner's request for benefits is denied.

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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SHARON DeVINCENT,

Petitioner,

vs.

NO: 10 WC 26762

STOCKTON STATION and
ILLINOIS STATE TREASURER,
as Ex Officio Custodian of the
INJURED WORKERS' BENEFIT FUND,

16IWCC0798

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 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's injuries warrant a permanency award of 12.5% of Petitioner as a whole under §8(d)2 of the Act. In reducing the Arbitrator's award, we note that the last work restriction given to Petitioner on July 9, 2010, by Michelle Wurster, N.P., limited her to lifting to 5 pounds due to "right shoulder pain" and was only valid through August 9, 2010. Therefore, even though there is no formal return to work note, there is likewise no evidence of any valid, current restrictions since no physician has given her any work restrictions since that time. In addition, Petitioner testified that the reason she has not worked since October 2011 was due to a variety of personal reasons including deaths in her family. Finally, we note that the last record of Dr. Dhawan on January 22, 2013, indicates that Petitioner had right shoulder pain in the past but "no pain now."

All else is affirmed and adopted.

16IWCC0798

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $256.00 per week for a period of 62.50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 12.5% of Petitioner as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $9,769.42 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.

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 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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,900.00. 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: DEC 14 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 11/16/16
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
AFTER REMAND

DeVINCENT, SHARON
Employee/Petitioner

Case# 10WC026762

STOCKTON STATION/IL STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

16IWCC0798

On 4/5/2016, 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 0.38% 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:

0312 BOUDREAU & NISIVACO LLC
NINA MARIANO
120 N DEARBORN ST SUITE 1250
CHICAGO, IL 60602

0445 RODDY LAW LTD
303 W MADISON ST
SUITE 1900
CHICAGO, IL 60606

0000 PEKIN INSURANCE
LISA ALBRECHT
2505 COURT ST
PEKIN, IL 61558

4987 ASSISTANT ATTORNEY GENERAL
LAURA HARTIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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 AFTER REMAND

Sharon DeVincent
Employee/Petitioner

v.

Stockton Station/IL State Treasurer, as ex oficio custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # 10 WC 26762

Consolidated cases: _____

16IWCC0798

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, Illinois**, on **9/16/14**. 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 **Mandatory Coverage under the Act and Insurance Compliance**

FINDINGS

On **2/17/10**, 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 **$13,312.00**; the average weekly wage was **$256.00**.

On the date of accident, Petitioner was **47** years of age, ***married*** 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 **$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 of $9,769.42, as provided in Section 8(a) of the Act, or the amount pursuant to the fee schedule, if that is less.
- Respondent shall pay Petitioner permanent partial disability benefits of $256.00/week for 100 weeks, because the injuries sustained caused the 20% loss of the person as a whole, as provided in Section 8(d)2 of the Act.
- The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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.

#001 George Ruden
Signature of Arbitrator

April 1st, 2016
Date

APR 5 - 2016

STATEMENT OF FACTS 10 WC 26762

Petitioner currently resides in Westchester and has two children who were under 18 years old at the time of the work related accident of February 2, 2010. She is married and was born on January 18, 1963, making her 47 years old at the time of the accident. As of February 2, 2010, Petitioner worked at Stockton Station, located at 209 E. North Avenue in Stockton, Illinois, as a cashier and gas station attendant. She began working there in September of 2008, when she was hired by Derrick, a store manager. The nature of the business was storing and selling gasoline in addition to being a convenience store selling hot food and drinks. Petitioner testified that gasoline is a flammable and hazardous material. To her knowledge, Zargham owned the business because she saw his name on business and liquor licenses in addition to the fact that he signed her checks.

Petitioner's job was fast-paced. She tended to customers, cleaned dishes and the bathrooms, filled the soda machine with ice, stocked shelves, and prepared hot food and beverages. She testified that she prepared pizza and gyros, and used a large knife to cut the gyros. She made $8 per hour and worked 32 hours per week on average, making $256 per week on average. She worked three to four days per week and her shifts were approximately 10 hours long. She was paid on Fridays every week, mostly by check, but sometimes in cash. She did not recall receiving a W-2 for 2009 or 2010.

One February 17, 2010, Petitioner filled a large container with ice to fill the soda machine. It weighed about 20 pounds. While on a stepstool lifting the bucket over the machine she heard and felt a pop in her right shoulder and felt pain. She thinks she dropped the bucket. She reported her injury to the manager Derrick and also to Jason who was a senior employee who acted as a manager when Derrick was not around. Petitioner also called the owner Zargham and notified him of the incident. He had nothing to say about it. She was never given an accident report to fill out. She attempted to work the rest of the day, but around dinner time she called Derrick to relieve her of her duties because she was in pain.

Petitioner first sought treatment on April 9, 2010 at Warren Family Medical Center, where she went for all of her general medical concerns. She did not seek treatment until that time because she thought her condition would get better but instead it got worse. On that day, she provided her employer's information for billing purposes. When the owner, Zargham, received that bill, he called the Petitioner and asked why she did not just give the bill to him instead of filing it under workman's compensation because he would have paid her cash.

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On April 9, 2010, Petitioner saw Nurse Practitioner Wurster ("NP Wurster") and gave her a history of the accident. She complained of pain in her right shoulder in addition to pain in the left elbow. Petitioner believed her pain in the left elbow was from overcompensating for not being able to use the right arm as much due to the right shoulder pain. NP Wurster diagnosed her with right shoulder pain, secondary to injury, and left elbow pain. She recommended an MRI of her right shoulder, Vicodin, physical therapy, and light duty work restrictions of no lifting or carrying more than five pounds and no overhead activity with the right arm, and to avoid repetitive activity and movements with both arms. Petitioner underwent the MRI of the right shoulder on April 13, 2010 which showed a small amount of fluid adjacent to the biceps tendon and subscapularis tendon with mild acromioclavicular joint arthritis. She also underwent 5 visits of physical therapy from April 21, 2010 through May 7, 2010, at which time she was discharged.

Petitioner next saw NP Wurster on May 11, 2010. Petitioner reported that she was doing home exercises, which she described as stretching with an elastic band and lifting weights or cans of food with her arms. She continued to have some pain in the shoulder and both elbows in addition to numbness and tingling extending from her right shoulder. She was wearing a tennis elbow brace at work and was working with light duty restrictions. NP Wurster diagnosed her with right shoulder pain and lateral epicondylitis, bilaterally. She recommended that Petitioner continue with work restrictions and wear an arm sling. NP Wurster then referred Petitioner to an orthopedic specialist, Dr. John Gluscic.

Petitioner saw Dr. Gluscic on May 24, 2010. She gave him a history of the accident and reported that she had had pain and discomfort ever since and she was only able to work light duty because of the limitations of her arm. Dr. Gluscic reviewed the MRI of her right shoulder and found that the rotator cuff was intact but that there was fluid and mild degenerative changes in the AC joint. He diagnosed her with a shoulder strain and recommended low weight, high repetition therapy and exercises against resistance as tolerated and over the counter anti-inflammatories. He opined that she should be able to get back to normal activity without restrictions. He advised Petitioner to continue working in a light duty capacity and to increase her duties as tolerated. He did not recommend surgical intervention and he referred her back to NP Wurster.

Petitioner saw NP Wurster in follow up on June 8, 2010. Petitioner reported that she saw Dr. Gluscic and he had her on a strength routine. She reported she was continuing light duty and wearing a brace at work. NP Wurster advised she continue her restrictions and noted that she had made improvements with pain and function of her right shoulder but not with strength.

Petitioner saw NP Wurster again on July 9, 2010. Petitioner reported that her pain on that day was 3/10, but could go as high as 7/10. NP Wurster noted that her right shoulder pain was not improving. She wanted her to see Dr. Gluscic again and to continue restrictions at work. There is no record of Petitioner returning to see Dr. Gluscic.

Petitioner followed up again with NP Wurster on October 1, 2010 and indicated she had shooting pain radiating from her neck to her shoulder and numbness in the right arm as well. She did not feel that the shoulder exercises were helping her. NP Wurster diagnosed Petitioner with radiculopathy and sent her for an MRI of the cervical spine and an EMG. She underwent the cervical spine MRI on October 22, 2010 which showed a central/right paracentral foraminal disc osteophytic complex, which was moderately narrowing the right neural foramen at C6-C7. The EMG done on November 1, 2010 also showed right-sided cervical radiculitis at C6-C7 in addition to moderately severe right carpal tunnel syndrome. Petitioner testified that she suffered from carpal tunnel syndrome in 1993 when she was pregnant, and had not had those same symptoms or any treatment since.

Following the MRI and the EMG, NP Wurster wrote a referral to Dr. Jeffrey Bear for an evaluation of whether the condition Petitioner was suffering from was related to her neck or her shoulder since her condition had not improved. Petitioner was unable to submit herself for this evaluation because she could not pay for the visit. She came to terms with the fact that her condition was something she would have to live with and changed the way she did things to limit her pain.

Petitioner testified that she moved to Westchester, Illinois and started seeing Dr. Dhawan as her primary care physician. She saw him for the first time for her right shoulder and arm on September 14, 2012. She testified that she had not seen a doctor from October 1, 2010 until September 14, 2012 for her right shoulder and arm because she was treating for unrelated conditions and almost died from septic shock. Treatment for her shoulder and arm took a backseat to those occurrences.

When Petitioner presented on September 14, 2012, she told Dr. Dhawan that she was having right shoulder pain and numbness in her arm. She saw him again on January 22, 2013 and Dr. Dhawan reported that she noticed pain in her right shoulder on occasion, but not when she saw him on that day. She testified that the pain was not constant, but would come and go. She testified that she went to see Dr. Dhawan on several occasions for general medical care and that she would report to him what all of her complaints were at the time she saw him because he asked. Since January 22, 2013, Petitioner's medical records do not indicate a report of shoulder, neck, or arm pain to Dr. Dhawan.

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Petitioner testified to what she noticed about herself as she goes through her daily routine. She stated that she has weakness in her right arm and that she occasionally suffers from pain in her right shoulder with radiating pain and numbness into her right arm. She states that she often needs help with groceries and can no longer vacuum and mop. She avoids sleeping on her right side because of numbness in her arm. She avoids heavy lifting and has difficulty emptying a pot of hot water with pasta in it, lifting the laundry basket and scrubbing. Back and forth movements and repetitive activity with her right arm and shoulder cause her pain. She takes pain medication several times during the week, although about half the time it is for unrelated back pain and not shoulder pain. She testified that she uses the hydrocodone which is prescribed for her back pain for her shoulder pain. Her left elbow symptoms have resolved. She never underwent surgery on her right shoulder or neck.

Petitioner testified that she is not currently working for Stockton Station. When she went into work on July 1st, 2010, she was told that there were new owners, and that she would have to re-apply. She received a letter from "Management", Petitioner's Exhibit #8, stating that a new employer, Stockton Gas, Inc. was taking over. Petitioner attempted to contact the owner, Zargham, about how to re-apply, and he told her to talk to Frank, one of the managers. When she called Frank to ask how to re-apply, he told her to call Zargham. She attempted to call for information six times during the month of July, 2010. She was never given information or the opportunity to re-apply and she never saw any new owners when she went to the business. She was the only worker that was not rehired. Petitioner's Exhibit #11, the Corporation File Detail Report from the State of Illinois Website, indicates that Feroze Bukhari was the new agent for what became Stockton Gas on June 21, 2010. Petitioner testified that Feroze Bukhari was Zargham's father, and that she had been introduced to him in the past.

Petitioner attempted to find work in retail shops in the small town of Stockton, but was unsuccessful. She later moved to Westchester, and was unable to work due to caring for elderly family members and deaths in the family. She testified that her disability was not the reason she has not been working, and she has not applied for social security disability.

The last work restrictions Petitioner received were on July 9, 2010, which were no lifting or carrying more than 5 pounds, no overhead activity with the right arm and to avoid repetitive activity and movements with both arms. Before she was terminated, she was working with the light duty restrictions and was avoiding heavy lifting at work. Management was aware of her restrictions. Her husband came and helped with some of the heavier job duties. She also wore an elbow brace at work. She never received a full duty work release.

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Petitioner recalled seeing a doctor for one of her elbows before her work related accident of February 17, 2010, but could not recall for which elbow. The medical records indicate that Petitioner complained of pain in her right elbow on October 20, 2008 to Dr. Cleary. She reported that it spontaneously occurred the week before and Dr. Cleary diagnosed her with lateral epicondylitis and prescribed her a splint and pain medication as needed.

The next time Petitioner sought treatment for this condition was over a year later on November 13, 2009. She reported that she continued to get pain in her right elbow, radiating down to her forearm and has pain with lifting. The doctor recommended she wear a splint at work.

She was working at Stockton Station at the time of both of these visits. Right elbow pain was not her primary complaint following the accident of April 9, 2010, although she did develop both left elbow pain due to overuse of her left arm, which she reported the first time she sought treatment on April 9, 2010 and also right elbow pain, which she reported on May 11, 2010, following physical therapy for her right shoulder.

CONCLUSIONS OF LAW

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

Respondent was operating under the Illinois Workers' Compensation Act by engaging in a business enumerated under Section 3 of the Act. The nature of the business at Stockton Station was storing and conveying gasoline which is a hazardous and flammable material (Section 3(7)). Stockton Station also sold hot food and coffee, which Petitioner testified that she prepared as part of her job duties (Section 3(14)). She also testified that she used a large knife to cut gyros as part of her job duties (Section 3(14)).

Arbitrator finds Petitioner's testimony to be credible and finds that Stockton Station was operating under the Illinois Workers' Compensation Act.

B. Was there an employer-employee relationship?

Petitioner was hired by Derrick, the manager, to work at Stockton Station, which as analyzed above, engages in a business enumerated under Section 3 of the Act in the State of Illinois. Petitioner worked 3-4 days per week at Stockton Station and was paid weekly on Fridays for her service by the owner of that business. She described her job duties in detail which she performed in exchange for $8 per hour, 32 hours per week on average.

Arbitrator finds that there was an employer-employee relationship between Stockton Station and the Petitioner. (5)

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

On February 17, 2010, the Petitioner was loading the soda machine with a bucket full of ice, weighing approximately 20 pounds. While lifting the bucket overhead, she felt a pop in her shoulder and felt pain. Petitioner was performing a duty of her job during work hours when this accident occurred. The act of filling a commercial ice machine is a risk outside of which the general public is exposed. The facts of the accident described were not rebutted by Respondent.

Wherefore, the Arbitrator finds a compensable accident occurring on February 17, 2010.

D. What was the date of the accident?

Petitioner testified that the accident happened on February 17, 2010. The history Petitioner gave NP Wurster on April 9, 2010 is consistent with an accident occurring on February 17, 2010. Respondent presented no evidence to rebut this.

Wherefore, the Arbitrator finds that the date of accident was February 17, 2010.

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

Petitioner testified that she reported the accident and her injury to her manager, Derrick, and the owner of Stockton Station, Zargham, on the day of the accident, February 17, 2010. The Petitioner's testimony was not rebutted by Respondent.

Wherefore, the Arbitrator finds notice of the accident was timely given.

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

The Medical records indicate that Petitioner was suffering from fluid in the area of the right rotator cuff and degenerative changes in the acromioclavicular joint of the right shoulder, which explains the pain in her right shoulder. The MRI of her cervical spine and EMG of her right upper extremity indicated abnormalities at the C6-7 level which explain her symptoms of radiating pain and numbness in the right arm after the accident. While the cervical condition was not diagnosed right away, it is common for radiating pain from the neck to be confused with shoulder and arm pain due to the nature of radiculitis.

The Arbitrator finds the Petitioner forthright and credible in her explanation of the accident and her symptoms thereafter. The Arbitrator finds that her testimony is consistent with the medical records.

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Wherefore the Arbitrator finds a causal relationship between her right shoulder and arm complaints and the accident of February 17, 2010, as the temporal relationship is undeniable.

G. What were Petitioner's earnings?

Petitioner testified that she worked 32 hours a week, on average, and was paid $8 per hour. She worked 3-4 days per week and her shifts were approximately 10 hours long. She made $256 per week, on average. She was paid ever Friday, mostly by check and sometimes in cash. Her checks were signed by the owner, Zargham. She did not receive W-2's for 2009 or 2010. Respondent presented no evidence to rebut Petitioner's testimony.

Wherefore the Arbitrator finds that Petitioner testified credibly and Petitioner's earnings to be $256 per week and $13,312.00 per year. The Arbitrator also notes that Petitioner's permanent partial disability rate is also $256, because while the minimum ppd rate with 2 dependent children is $277.33 for February 17, 2010, the rate cannot exceed her average weekly wage.

H. What was Petitioner's age at the time of the accident?
I.

Petitioner testified that her date of birth is January 18, 1963. This is consistent with the medical records.

Wherefore, the Arbitrator finds that Petitioner was 47 years old at the time of the accident.

J. What was Petitioner's marital status at the time of the accident?
K.

Petitioner testified that she was married and that her husband would help her with her job duties while she was working with restrictions. The medical records list Don DeVincent as her spouse. Petitioner also testified to having two dependent children at the time of the accident.

Wherefore, the Arbitrator finds that Petitioner was married with two dependent children at the time of the accident.

7

L. 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?

M.

After listening to the Petitioner and reviewing the medical records, the Arbitrator finds that the medical bills are reasonable and the services provided were necessary to cure or relieve the Petitioner of the effects of her accidental injuries. Wherefore, the Arbitrator awards the Petitioner $9,659.00 in unpaid medical bills, or the amount according to the fee schedule, if it is less. The Arbitrator also awards the Petitioner $110.42 to reimburse Illinois Department of Healthcare and Family Services for pharmacy expenses paid by them, for a total award of $9,769.42 in medical expenses under Section 8(a) of the Act. The Arbitrator orders the medical benefits above payable to the Petitioner and her attorney.

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

Petitioner testified to the limitations her injury has put on her and to the difficulties she currently has. Petitioner's right arm has never regained full strength and she continues to have pain and numbness occasionally and more with activity although she avoids heavy lifting and repetitive movement with her right arm and shoulder. She testified to household chores she can no longer do, like vacuuming and mopping.

Petitioner never returned to work after she was terminated under what appears to be dishonest circumstances and was not able to find work afterwards in Stockton. She was never provided with a full duty work release and was last given light duty restrictions in July of 2010.

Also see Section "F" regarding the nature of her medical conditions.

The Arbitrator finds that the injuries Petitioner sustained to her right shoulder and neck which resulted in right shoulder pain and radiating pain and numbness down Petitioner's right arm resulted in a loss of 20% MAW under 8(d)(2) of the Act.

O. Mandatory Coverage under the Act and Insurance Compliance

The Arbitrator finds that there was mandatory coverage under the Act because the nature of Stockton Station's business is one of those enumerated under Section 3 of the Act. See Analysis above in Section "A".

The Arbitrator also finds that there is no proof of workers' compensation insurance for Stockton Station, located at 209 East North Avenue in Stockton, Illinois on the date of Petitioner's accident, February 17, 2010. The Arbitrator relies on Petitioner's Exhibit #6, which is documentation from the Insurance Compliance Division of the IWCC regarding Its search of the National Council on Compensation Insurance's online database which found no policy information showing proof of workers' compensation insurance for Stockton Station. Respondent presented no evidence to rebut this.

This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

CONCLUSION

The Arbitrator finds that Petitioner's present condition of ill-being with regard to her right arm, shoulder and neck is causally related to her work accident of February 17, 2010, based upon Petitioner's testimony and the medical records. Thus, Petitioner is entitled to payment of medical expenses that were reasonably and necessarily provided to her and an award of 20% permanent partial disability under section 8d2 of the Act for the injuries which occurred while employed by Respondent.

9

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

Przemyslaw Rudzki,

Petitioner,

vs. NO: 10 WC 33758

American Cleaning & Restoration, Inc.,

16IWCC0808

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, 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 26, 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.

16IWCC0808

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: DEC 16 2016
TJT:yl
o 12/13/16
51

Thomas J. Tyrrell

Kevin W. Lamborn

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PRZEMYSLAW, RUDZKI
Employee/Petitioner

Case# **10WC033758**

AMERICAN CLEANING & RESTORATION INC
Employer/Respondent

16IWCC0808

On 2/26/2015, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
DAVID M BARISH
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
DANIEL CODY
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

16IWCC0808

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

Przemyslaw Rudzki
Employee/Petitioner

v.

American Cleaning & Restoration Inc.
Employer/Respondent

Case # 10 WC 33758

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 **Chicago** , on **January 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. ☐ 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 **Law of the Case**

16IWCC0803

FINDINGS

On **August 22, 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 not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$5080.50**; the average weekly wage was **$508.05**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$1,790.03** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$1,790.03**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $338.70/week for 5 2/7 weeks, commencing August 23, 2010 through September 28, 2010, as provided in Section 8(b) of the Act. Respondent shall be given credit for $1,790.03 for temporary total disability benefits paid under Section 8(b) of the Act.

Petitioner failed to prove by preponderance of the evidence and under the doctrine of the law of the case that he has any condition of ill being causally connected to the accidental injuries sustained on August 22, 2010.

Claims for further temporary compensation, medical expenses and permanent disability are therefore 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

February 26, 2015
Date

FEB 26 2015

ICArbDec p. 2

16IWCC0808

Statement of Facts

The Arbitrator takes judicial notice that this case was previously heard pursuant to Section 19(b) on June 13 and July 13, 2011. An Arbitrator's decision was filed on September 6, 2011. This decision was reviewed by the Commission with a Decision and Opinion being issued by the Commission on November 2, 2012. In that Commission decision, the Commission stated that the Petitioner lacked credibility and pointed to many discrepancies between the Petitioner's testimony and the other evidence in the case. The Commission affirmed the Arbitrator's decision that the Petitioner failed to prove a causal connection between his accident and his present condition and the need for prospective medical care, and that Petitioner suffered only a temporary aggravation of his underlying degenerative disc condition. The Commission affirmed the Arbitrator's decision that temporary compensation and medical were awarded only from the date of accident through September 28, 2010 and that no further temporary compensation or medical care was required to be provided by the Respondent under the Act. The Commission remanded the 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 parties agree that the Commission decision was not further appealed and therefore became the law of the case pursuant to Irizarry v. Industrial Commission, 337 Ill.App.3d 598, 606, 786 N.E. 2d 218, 271 Ill.Dec. 960 (2003).

The Arbitrator has reviewed the transcript of the original hearing in this matter and incorporates the factual findings of the original Arbitrator's decision and the Commission Decision and Order.

The Petitioner testified through an interpreter. He testified that he spoke English very poorly. The prior Commission decision pointed out that the Petitioner had no hesitation in answering questions while speaking with a treating doctor in English. The Stroger Hospital records for subsequent care also reflect this inconsistency (Rx 6, pg. 738).

The Petitioner testified that he had surgery on June 23, 2011. The records from Stroger Hospital indicated that the Petitioner underwent an L5-S1 left laminotomy with microdiscectomy performed by Dr. Cybulski on June 22, 2011. He was released on June 29, 2011 (Px 1). Dr. Cybulski noted that the diagnosis was right S1 radiculopathy secondary to a right L5-S1 osteophyte. On July 11, 2011 the Petitioner followed up and reported that the pain that had gone up to his head had almost completely stopped and that he was now able to dial numbers with his right hand and to walk better. He was better able to control his urine. When the Petitioner followed up on August 5, 2011 the Petitioner was diagnosed with bilateral leg pain and low back pain and the treating doctor noted that the "pain is out of proportion to findings on MRI and surgery report" (Px 1).

16IWCC0808

Petitioner testified that the surgery did not change his condition to any degree. He testified that although he was under pain management treatment at Stroger Hospital, he went to Resurrection Hospital emergency room complaining of an inability to urinate or defecate. The Petitioner testified that from June, 2011 through December, 2012 his condition was getting worse and he was unable to hold back defecating. He testified it was difficult to get up from bed and just hard to function. He further testified he saw doctors at Stroger Hospital for both physical and psychological conditions through January of 2013.

The Stroger records reflect that Petitioner followed up on September 19, 2011 reporting recurrent symptoms following his surgery and was admitted. The Petitioner reported a 1-year history of low back pain with bilateral lower extremity radiculopathy. The doctors noted that there were no objective findings for the Petitioner's subjective pain complaints and the Petitioner was eventually discharged on September 27, 2011. An MRI did show a post-surgical seroma that had reduced in size from the MRI that was completed on August 28, 2011. The medical records from Stroger do indicate that on October 3, 2011 the Petitioner was instructed to avoid heavy physical activity (Px 1).

The Stroger records indicate that on February 2, 2012 the Petitioner was readmitted to Stroger Hospital with complaints of chronic low back pain for years worsening over the last two weeks, and also complaints in his head, neck and mid thoracic spine. He also complained of vision disturbances (Rx 6, pg 45, 84, 131). Petitioner underwent multiple tests and consults including a lumbar myelogram, lumbar and abdominal CT scans, and MRIs of the brain, lumbar, cervical and thoracic spine (Rx 6, pg 500-510). The findings during that admission included leptomeningeal enhancements encasing the thoracic spine but testing for possible malignancy came back negative. The Petitioner was discharged on February 23, 2012. The neurology department specifically indicated that the condition was "of unknown etiology" (Rx 6, pg 201). During his stay he also was seen by Dr. Mancuso of the neurosurgery department who indicated that "there is no indication for a biopsy of the meninges nor any other neurosurgical intervention" (Rx 6, pg 280). The Petitioner also had a urology consult and denied any antecedent trauma or falls before becoming bowel and bladder incontinent. He was diagnosed with a kidney stone (Rx 6, pg 294). The emergency room note indicated that the Petitioner had complaints of chronic back pain and urinary complaints but that the MRI was without any acute change and there was no acute surgical interventions needed and the Petitioner was admitted for pain control only (Rx 6, pg 311). The Petitioner had follow up with Stroger on March 23, 2012 where he reported pain in his middle and low back radiating to his right arm with his whole right side being numb (Rx 6, pg 1039) On March 28, 2012 he reported that his back, left face, right arm and right leg were numb (Rx 6, pg 1026). It was thought the Petitioner may have sarcoidosis but all tests came back negative.

The Petitioner continued follow up with chronic back pain complaints and was eventually readmitted on July 26, 2012 through August 10, 2012. During the neurosurgical consultation he reported pain in the mid back to his head with a shooting sensation down his back. A pain consultation was suggested (Rx 6, pg 826). When he saw the palliative care consult, the chief complaint was pain in his head (Rx 6, pg 863). The diagnosis was intractable headache and diffuse pain. During this admission, Petitioner refused to participate in physical therapy (Rx 6, pg 737). He was noted to be untruthful to the staff. He was reported to be vague with his questions asked and at times offered excessive information on pain and his limitations. The record notes consideration of malingering (Rx 6, pg 738) and consideration of drug seeking behavior (Rx 6, pg 751).

Petitioner had follow up care at Stroger in September, 2012. He was seen in the Emergency Department on September 3, 2012 for a refill on his medication. The physical examination done on that date noted normal back range of motion and a normal neurological exam. He was given medication to hold him until his neurology visit on September 5, 2012. The September 5, 2012 neurology note reflects the diagnosis of pain related to meningeal inflammatory process likely related to sarcoidosis.

Petitioner testified that he saw Sokolowski in May of 2012 Petitioner testified that he proposed a second surgery. The Petitioner indicated that a family doctor referred him to Dr. Sokolowski. The records of Dr. Sokolowski were admitted as Petitioner's Exhibit 2. The records note initial treatment on May 2, 2012. Petitioner noted an inability to bear weight on his right lower extremity and progressive symptoms despite surgical intervention. Dr. Sokolowski indicated that the Petitioner "clearly sustained a significant injury in the course of his occupation and that the work injury aggravated the underlying back condition to the point he developed significant radiculopathy." Dr. Sokolowski felt it was an L4-5 annular tear and an L5-S1 disc herniation and felt that the Petitioner could not work. Petitioner followed up with Dr. Sokolowski on October 15, 2012. Dr. Sokolowski noted the EMG of October 4, 2012 showed no evidence of pathology. Petitioner saw Dr. Sokolowski a final time on December 17, 2012. Petitioner reported remaining entirely dependent on crutches secondary to severe pain. Dr. Sokolowski noted that the Petitioner was going to follow up with another surgeon for a likely fusion.

Petitioner testified that he sought treatment from Dr. Siemionow in December, 2012. He was referred by a friend. The medical records of Dr. Siemionow were admitted as Petitioner's Exhibit 3. Petitioner first sought treatment with Dr. Siemionow on December 4, 2012. Petitioner reported a 2-year history of low back pain going back to an August 20, 2012 work injury. Dr. Siemionow opined that the mechanism of injury that he described certainly could have resulted in a disc herniation. The Petitioner followed up with Dr. Siemionow on January 8, 2013 who felt that the Petitioner's recent MRIs showed advanced degenerative changes at the L5-S1 segment which Dr. Siemionow felt could be responsible for his leg pain.

16IWCC0808

On February 4, 2013 the Petitioner underwent an L5-S1 fusion. It was noted that Petitioner had a previous failed lumbar discectomy with recurrent symptoms and failed conservative management. Petitioner was discharged on February 13, 2013. Petitioner saw Dr. Siemionow on October 22, 2013. The record states that Petitioner had been going to school 3 hours a day. When the Petitioner was seen by Dr. Siemionow on October 29, 2013 the doctor noted that the Petitioner had significant endplate erosion reflected on the CT scan. He felt that the end plate erosion with the instability of L5-S1 was the explanation for the severe low back pain. The record reflects that Petitioner was doing significantly better that prior to surgery. The Petitioner was still reporting symptoms and occasional back pain. He was to return in 6 months (Px 3).

The Petitioner testified that since his February 4, 2013 fusion he was doing better and starting to walk and be able to handle urinating and defecating. He has had regular visits with Dr. Siemionow and physical therapy. He testified that he has to be very cautious because with a lot of activities, the pain gets bad. He testified that in August, 2014 he was released from any further low back treatment but that he was still being seen for a cervical spine issue. Dr. Siemionow's August 14, 2014 office record states Petitioner has done well. He is ambulating and returned to normal function. He is able to carry out his activities of daily living (Px 3).

Petitioner testified that he has worked intermittently as a courier but claims he can only handle a half hour driving or the pain "is incredible." The Petitioner testified that he also tried to work in a store but when he explained his health they did not want to hire him. On cross-examination the Petitioner after extensive questioning admitted he did not keep any job logs. Petitioner testified that the second surgery made him better and he can get dressed, get his own medication or go to church. He can make breakfast but indicated it was difficult for him to cook lunch or dinner because of the standing. He testified he needs friends to assist him with shopping and he is no longer able to play ball or sports.

The Petitioner indicated that he had fallen a week prior to the trial and saw Dr. Siemionow. He testified that he was walking down 5 steps and because his right leg was not 100% the foot just stopped when he was walking up those steps. He just stood on his foot and it twisted and he fell. Petitioner testified that in September, 2014 he was rear-ended and this caused his back to hurt a little bit more. He underwent 4 weeks of therapy before it returned to what it was.

16IWCC0808

Conclusions of Law

In support of the Arbitrator's decision with respect to (O) Law of the Case, the Arbitrator finds as follows:

This matter proceeded to trial pursuant to Section 19(b) of the Act. A final decision of the Commission was entered on November 2, 2012. The findings of law and fact rendered at that time became the law of the case for this matter. Under the law-of-the-case doctrine, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 374, 878 N.E.2d 171, 315 Ill. Dec. 945 (2007). The Appellate court has held that principles underlying the law-of-the-case doctrine should be applied to matters resolved in proceedings before the Commission. *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 786 N.E.2d 218, 271 Ill. Dec. 960 (2003). This doctrine has been specifically applied to determinations of causal connection. Once the first causation finding became a final judgment, it also became the law of the case and was not subject to further review. *Ming Auto Body / Ming of Decatur, Inc. v. Indus. Comm'n*, 387 Ill. App. 3d 244; 899 N.E.2d 365; 2008 Ill. App. LEXIS 1132; 326 Ill. Dec. 148 (2008).

The November 2, 2012 Decision and Order affirmed the Arbitrator's Decision that the Petitioner's condition of ill being is not causally connected to the accidental injuries sustained on August 22, 2010. The decisions state that Petitioner's objective findings preexisted the work injury. The decisions find that Petitioner may have suffered a temporary aggravation of his underlying degenerative disc condition but that no further care is required to be provided by the Respondent under the Act. The only benefits awarded were for lost time and medical services through September 28, 2010. The Arbitrator finds that these issues are questions which are now the law of the case. Therefore, under the law of the case, the Petitioner's condition of degenerative disc disease in the low back is not causally connected to the accidental injuries sustained on August 22, 2010.

The Arbitrator also notes the extensive findings by both the Arbitrator Prieto and the Commission with respect to the Petitioner's lack of credibility particularly with respect to his complaints. Although this finding may not be a finding of fact which would be dispositive under the "law of the case" doctrine, the Arbitrator has reviewed the prior transcript, observed the Petitioner's testimony in the current hearing and reviewed the medical exhibits submitted and finds ample evidence to concur with this finding.

Petitioner's ongoing complaints were not substantiated by his medical records. He testified to an inability to perform many ordinary activities of life while the August 14, 2014 notes reflect that he has returned to normal function. The September 3, 2012 physical examination is basically negative and inconsistent with Petitioner's complaints at that time. The Stroger records also reflect continued behaviors which question the validity of

Petitioner's subjective complaints including his lack of cooperation with the therapists and lack of truthfulness with staff. Questions were raised in the records as to Petitioner's malingering or drug seeking behaviors.

Petitioner was also not honest with his subsequent choices of treating doctors. Both Dr. Sokolowski's and Dr. Siemionow's initial records document that Petitioner's history provided did not include any information of treatment or testing before the work accident, despite the medical evidence to the contrary.

This evidence coupled with Petitioner's demeanor at trial leads this Arbitrator to agree with the Commission's and prior Arbitrator's assessment of Petitioner's lack of credibility.

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

The law of the case includes the finding that the Petitioner's condition of degenerative disc disease in the low back is not causally related to the accidental injuries sustained on August 22, 2010. Petitioner's treatment by Dr. Cybulski, Dr. Sokolowski and Dr. Siemionow was directed to this degenerative disc disease and therefore, is not causally connected to the accidental injury sustained. The Arbitrator notes that, while both Dr. Sokolowski and Dr. Siemionow address the accident and the cause of Petitioner's pain, neither doctor was provided with any information as to the preexisting condition and treatment or comment on the prior MRI which discloses the disc herniation. The opinion of an expert is only as valid as the basis of the opinion. Given the inaccurate histories provided, in addition to the law of the case, the opinions of Dr. Sokolowski and Dr. Siemionow do not meet Petitioner's burden to establish causation by a preponderance of the evidence.

The medical records also include other possible diagnoses for Petitioner's low back complaints including sarcoidosis and the leptomeningeal enhancements encasing the thoracic spine. The evidence does not contain any opinion that these conditions were caused or aggravated by the work injury sustained on August 22, 2010.

The Petitioner also has advanced multiple other complaints during the course of his medical care including headaches, vision disturbances, neck pain, and pain and numbness in the arms. He has undergone extensive workups including MRIs for these other body parts. The medical evidence admitted does not include any opinions that would meet Petitioner's burden that any of these complaints or conditions are causally connected to his low back injury or the accidental injuries sustained by Petitioner on August 22, 2010.

Based on the record in this matter including the testimony and exhibits admitted and under the doctrine of the law of the case, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that any condition of ill being alleged is causally connected to the accidental injuries sustained on August 22, 2010.

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

Based upon the Arbitrator's decisions with respect to the law of the case and causal connection, the Arbitrator finds that Petitioner is not entitled to any further medical care after September 28, 2010. The claim for medical is therefore denied.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

Based upon the Arbitrator's decisions with respect to the law of the case and causal connection, the Arbitrator finds that Petitioner is not entitled to any further temporary total disability after September 28, 2010. Petitioner is entitled to 5 2/7 weeks of temporary total disability from August 23, 2010 through September 28, 2010 previously awarded. Respondent shall receive credit of $1,790.03 for benefits paid.

In support of the Arbitrator's decision with respect to (L) Nature and Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's decisions with respect to the law of the case and causal connection, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he has sustained any permanent disability causally connected to the accidental injuries sustained on August 22, 2010. Petitioners claim for permanent disability is therefore 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

Jose Calderon,

Petitioner,

vs.

NO: 10 WC 42002
11 WC 00164

Valley Crest,

Respondent,

16IWCC0841

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 temporary total disability, causal connection, medical, vocational rehabilitation, maintenance 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 April 29, 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.

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: DEC 27 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

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

CALDERON, JOSE
Employee/Petitioner

Case# **10WC042002**

11WC000164

VALLEY CREST
Employer/Respondent

16IWCC0841

On 4/29/2016, 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 0.40% 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:

2553 McHARGUE, JAMES P LAW OFFICE
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CHICAGO, IL 60602

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16IWCC0841

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ 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)

Jose Calderon
Employee/Petitioner

v.

Valley Crest
Employer/Respondent

Case # 10 WC 42002

Consolidated cases: 11 WC 00164

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Wheaton, IL on November 23, 2015 and Geneva, IL on December 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. ☐ 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**

FINDINGS

On the date of accident, **September 20, 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 **$24,807.13**; the average weekly wage was **$477.06**

On the date of accident, Petitioner was **31** years of age, ***married*** with **3** 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 **$58,065.70** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$58,065.70**.

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

ORDER

- Respondent shall pay reasonable and necessary medical and vocational rehabilitative services, pursuant to the medical fee schedule, all bills claimed by the Petitioner in Arbitrator's Exhibit 1, the request for hearing form, as provided in Sections 8(a) and 8.2 of the Act. Marque Medicos - $5,013.70; Medicos Pain and Surgical Specialists - $7,065.57; Industrial Pharmacy Management - $2,739.54; Alcoa Billing - $672.00; Northshore University Health System - $4,223.71; Naperville Medical Imaging - $2,187.00; Athletico Physical Therapy - $2,927.43; and, Blumenthal and Associates - $1,456.33. Notwithstanding the foregoing, the Arbitrator specifically disallows any charges for nonemergency transportation. Such charges are to be subtracted from the aforementioned order. Note: The aforementioned bills relate to both 10 WC42002 & 11 WC 00164.

- Respondent shall pay Petitioner temporary total disability benefits of $318.19 per week, commencing 10/6/10 through 11/21/10 with respect to the case at bar 10 WC 42002.

- Petitioner's claim to maintenance benefits is addressed in the order related to the companion case, 11 WC 00164.

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.

Jason C. Knott

Signature of Arbitrator

4/21/16
Date

ICArbDec19(b)

APR 29 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSE CALDERON, Petitioner,	)	
	)	**10 WC 420002** *consolidated with*
	)	11 WC 00164
v.	)	
VALLEY CREST, Respondent,	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

This matter was heard on October 23, 2015 in Wheaton, Illinois. The above cases were consolidated for the purposes of trial. A separate decision will be issued for each case.

With respect to the case at bar, the following issues are in dispute:

- Causal connection
- Unpaid medical bills
- TTD
- Maintenance
- Vocational rehabilitation (Arb. 1)

FINDINGS OF FACT
10 WC 42002

Petitioner testified that on September 20, 2010, he was employed by the Respondent, Valley Crest and had been so employed for approximately four years. (Tx.79). Petitioner's work consisted of landscaping and construction, including planting and cutting trees and building patios. (Id. at 80).

The parties stipulated that on September 20, 2010, Petitioner was performing a work related duty when he fell, landing on his buttocks. (Arb. 1) He felt a popping in his low back and was immediately sent by his employer to Dreyer Medical Center. (Tx.81).

Petitioner treated with Dr. Johnston at Dreyer Medical center for approximately two weeks before consulting with Daniel Johnson, DC., on October 5, 2010. (Id. at 82-83). The doctor took the Petitioner off work, ordered a lumbar MRI and recommended physical therapy. (Id.) Petitioner's complaints of right foot numbness and low back pain were noted. (Id.) Dr. Johnson referred the Petitioner to a pain management physician, Dr. Andrew Engel, who performed a series of three lumbar epidural steroid injections in November and December of 2010. (Id. at 84). According to Petitioner, the injections were not particularly helpful. (Id.)

On November 17, 2010, Petitioner underwent a Section 12 examination with Dr. Kern Singh who recommended that Petitioner return to work with restrictions. Petitioner returned to work on November 22, 2010 until December 30, 2010 when he was involved in a second accident. (Id at 85.)

11 WC 00164

On December 30, 2010, Petitioner was involved in a second uncontested work related incident where Petitioner suffered a fractured left wrist after a slip and fall. (Id. at 86-87.) Petitioner has not returned to work for the Respondent since this date. (Id. at 87.)

After the December 30, 2010 accident, Petitioner returned to Dr. Johnson and Dr. Engel, who took him off work, and referred him to a spine surgeon.

On April 15, 2011 spine surgeon, Dr. Robert Erickson, based on the available diagnostics, recommended an L3-4 lumbar discectomy which he later performed on May 20, 2011. (Id.) A planned discectomy at L5-S1 for the same date did not proceed due to synovial cysts compressing the nerve root, which were removed. (Px11). Based upon a lack of improvement with the first surgery, a revision L3-4 discectomy and L5-S1 discectomy was recommended and performed on January 27, 2012. (Id). Petitioner testified that neither of these surgeries was particularly beneficial. (Tx89).

Based upon a continued lack of improvement as of July 2012, hand surgeon Dr. Charles Carroll, recommended a second opinion with spine surgeon, Dr. Mirkovic who later recommended updated diagnostics, including a discogram that was performed on October 21, 2012. (Tx. 90-91.) Based upon Petitioner's condition, and the available diagnostics, Dr. Mirkovic recommended and performed an L3-4 and L5-S1 lumbar fusion on February 6, 2013. (Id.) Petitioner engaged in post-operative physical therapy through September of 2013. (Id.) Based upon the results of physical therapy, Dr. Mirkovic recommended work conditioning, followed by a functional capacity exam ("FCE") which was administered on April 24, 2014. (Id.)

On April 24, 2014, Dr. Mirkovic reviewed the FCE results and issued permanent work restrictions at the sedentary-light physical demand level. (Px7). Petitioner was not offered light duty work by the Respondent at any point after December 30, 2010, including after his discharge from care in the spring/summer of 2014. (Tx94).

Left Wrist

Shortly after the December 30, 2010 accident, Dr. Engel referred Petitioner to Dr. Charles Carroll, who first saw the Petitioner on February 14, 2011 when he diagnosed a scaphoid fracture, recommended a CT scan and noted surgical intervention may be necessary. (Px7). On February 17, 2011, a CT scan noted a fracture of the proximal pole of the scaphoid with possible avascular necrosis of the proximal fracture segment. (Id). Based on his review of the CT, Dr. Carroll recommended a left wrist, open reduction,

internal fixation procedure which he performed on October 4, 2011, after a Section 12 examination concurred with Dr. Carroll's diagnosis and course of treatment. (Id).

Petitioner participated in physical therapy, post-operatively, with continued pain in the hand and restricted range of motion. (Id). Post-operative x-rays in January, February, and April 2012 indicated limited or no healing of the fracture. (Id). On June 6, 2012, Dr. Carroll recommended further surgical intervention consisting of a wrist fusion, a procedure that he performed on August 20, 2013. (Id). Petitioner was later placed at MMI by Dr. Carroll with respect to his wrist on August 6, 2014, with permanent restrictions at the sedentary to light physical demand level pursuant to the functional capacity exam discussed above. (Id). These restrictions include:

- up to fifteen pound lifting (floor to waist) up to 1/3 of the day,
- up to twenty pound lifting (waist to shoulder) up to 1/3 of the day,
- up to fifteen pound lifting (waist to overhead) up to 1/3 of the day,
- bilateral carrying up to twenty pounds for thirty feet up to 1/3 of the day,
- pushing up to fifteen pounds up to 1/3 of the day,
- pulling up to twenty pounds up to 1/3 of the day,
- handling activities up to 1/3 of the day,
- minimizing crouching, climbing, and stooping. (Px9).

Activities After Discharge from Care

Petitioner began looking for work after he was discharged from care. He offered documents related to his job into evidence as Petitioner's Exhibit 15. (Tx94). Petitioner testified that as a result of his job search, he had two job interviews, but did not receive any job offers. (Id. at 96).

Petitioner received TTD benefits throughout his treatment, and maintenance benefits until August 6, 2015, following an appointment with a vocational rehabilitation consultant hired by the Respondent, Mr. Edward Steffan. (Tx96).

Petitioner testified that he is not legally authorized to work in the United States. (Tx97). He is currently undergoing a process of immigration, and has retained counsel, Mr. Mario Godoy, to assist in this process. Mr. Godoy's testimony will be discussed below.

While awaiting the completion of the immigration process, Petitioner has continued vocational rehabilitation efforts with the assistance of a vocational rehabilitation consultant, Mr. Steven Blumenthal whose testimony will be discussed below.

As of the date of hearing, Petitioner continues to experience numbness and an inability to utilize his left hand. (Tx102). He has continued low back pain and right foot numbness. Tx103. Petitioner had no accidents, injuries, or medical treatment for his left wrist or low back prior to the accidents at issue in this case. (Tx104).

Testimony of Mario Godoy

Attorney Mario Godoy testified on behalf of Petitioner. (Tx9). Mr. Godoy practices immigration law and currently represents the Petitioner who is not legally authorized to work in the United States. (Id. at 11). According to Mr. Godoy, the process of applying for permanent residency has multiple steps. (Id. at 13). Presently, Petitioner is waiting for a provisional unlawful presence waiver prior to returning to his home country for a visa interview. (Id. at 14). Mr. Godoy testified he is confident that Petitioner will obtain permanent residency based on Petitioner's family life, lack of criminal history, and his spouse's immigration status. (Id). He believes that the waiver will be granted in February or March of 2016, and that the final step after this is scheduling an interview with the embassy. (Id. at 18). Mr. Godoy could not give a time frame on this last step, stating that "it's really going to be on a case by case basis. It depends on the embassy." (Id). He did state that he is "95 percent" certain that Petitioner will be granted permanent residency and work authorization, and that he is "90-95 percent" certain that this should be completed sometime in 2016. (Id. at 19).

Testimony of Edward Steffan

Petitioner called Mr. Edward Steffan, a professional rehabilitation counselor to testify. Mr. Steffan has a Master's Degree in rehabilitation counseling from the Illinois Institute of Technology. (Rx6 at 5). He is a Certified Rehabilitation Counselor as well. (Id). Approximately seventy percent of his time is spent on workers' compensation cases. (Id. at 6). Mr. Steffan was retained on behalf of the Respondent to perform an initial vocational rehabilitation for Petitioner. (Id). He met with Petitioner on November 21, 2014, prepared an initial evaluation report, and also prepared a Labor Market Sampling. (Id).

Mr. Steffan understood that Petitioner had undergone a lumbar spinal fusion as well as a wrist fusion, and had been discharged with permanent restrictions by both surgeons. (Id. at 11). He acknowledged that Petitioner would not be able to return to his usual employment as a landscaper within his permanent restrictions. (Id. at 14). He noted Petitioner did not have conversational English, but he could understand and respond to simple questions. (Id. at 15). A formal transferable skills analysis was not performed, because, based on Mr. Steffan's experience, a transferable skills analysis would be a waste of time in this case. (Id. at 20). He also stated that aptitude and interest testing would be a waste of time and money. (Id. at 21).

Mr. Steffan prepared a Labor Market Sampling report, dated December 4, 2014. (Id. at 23). A Labor Market Sampling is an attempt to identify potential jobs and potential employers that could hire a hypothetical individual with certain skills, abilities, and restrictions. (Id. at 24). This process attempts to determine whether there is a stable labor market for this hypothetical individual. (Id. at 25). Mr. Steffan contacted an initial twenty-seven employers telephonically. (Id. at 26). Thirteen of these answered enough questions to have some value in the Sampling. (Id). The twenty-seven potential employers were identified through a combination of the Yellow Pages, Indeed and CareerBuilder. (Id. at 27). Mr. Steffan acknowledged that Petitioner did not qualify for a

job with any of the thirteen listed employers, unless the employer was willing to make accommodations for Petitioner's permanent restrictions. (Id. at 50).

Mr. Steffan stated that if he was attempting to place the Petitioner into a job, he would look first at a security monitor position. (Id. at 52). This position would involve reviewing surveillance cameras in stores such as Walmart. (Id). This would allow Petitioner to stand or sit as needed. (Id. at 53). Mr. Steffan would specifically focus on employers in areas with high concentrations of Hispanic individuals, given Petitioner's lack of conversational English. (Id). English as a Second Language (ESL) classes would be beneficial to Petitioner in finding work under this job title. (Id. at 56).

Mr. Steffan testified that in addition to the security monitor position, Petitioner may also qualify for a greeter position, or a machine tender position. (Id. at 58). If Mr. Steffan was attempting to place Petitioner, he would help him apply for these job titles, while simultaneously engaging in ESL classes, GED classes, and possibly basic computer classes. (Id. at 61). He acknowledged that taking ESL and GED classes now, prior to securing permanent residency, would be reasonable in preparation for job placement efforts. (Id. at 63). Mr. Steffen stated that he has worked in the past for individuals who are not legally authorized to work in this county. (Id. at 71). In those circumstances, he would be able to perform many tasks including making a resume and teaching someone how to interview. (Id). He would only be barred from providing job leads and prepping the client for a specific interview. (Id). Finally, Mr. Steffan testified that he believes it is more probable than not that Petitioner would be able to secure employment with the assistance of a certified rehabilitation counselor, but for his current immigration status. (Id. at 76).

Mr. Steffan's second meeting with the Petitioner occurred on August 3, 2015. (Id. at 69). His report of this meeting, discussing Petitioner's immigration status, is dated August 10, 2015. (Id. at 70).

Testimony of Steven M. Blumenthal

Petitioner called Steven Blumenthal, a professional vocational rehabilitation counselor to testify at the hearing. (Tx. 22). Mr. Blumenthal has a Master's Degree in Rehabilitation with specialties in Vocational Evaluation Testing and Rehabilitation Counseling. (Id. at 23). He is a Certified Rehabilitation Counselor and Certified Vocational Evaluation Specialist through the Commission on Rehabilitation Counselor Certification. (Id. at 24). He has been working as a vocational rehabilitation counselor for the last thirty-five years. (Id.)

In preparation for working with the Petitioner, Mr. Blumenthal reviewed medical records, as well as the reports of Edward Steffan. He testified in detail as to the permanent restrictions issued by Dr. Mirkovic and Dr. Carroll. (Id. at 30-34).

According to Mr. Blumenthal, the Petitioner possesses a sixth grade education from Mexico. (Id. at 34). He attended some English classes. (Id.) He has no apprenticeship training, no certifications or licenses other than an Illinois driver's license. (Id. at 35).

He has no computer training, and does not use email. (Id.) Petitioner's work history consists of four years as a landscape laborer, six years as a non-union carpenter, and three years as an assembler. (Id.)

Mr. Blumenthal performed a transferable skills analysis in which he reviewed the skills that Petitioner would have gained in prior employment and education, and then determined whether those skills are useful in any of the 12,700 Department of Labor job titles that Petitioner is physically able to perform. (Id. at 36). In Petitioner's case, he has specific restrictions on the use of his upper extremities and handling, as well as lifting, standing, walking, sitting, etc. (Id. at 40). Based upon Mr. Blumenthal's analysis, Petitioner has effectively no transferrable skills, based on his work history, education, and permanent restrictions. (Id. at 41).

With regard to aptitude analysis, Mr. Blumenthal testified that Petitioner is a good candidate to attend ESL classes, as well as a GED class, followed by new analysis and perhaps computer classes upon completion. (Id.)

Mr. Blumenthal reviewed the two labor market surveys performed by Mr. Steffan. He testified that he disagreed with Mr. Steffan's conclusions. (Id. at 43). Two of the job titles searched by Mr. Steffan are "order picking" and "assembly." Mr. Blumenthal testified that these job titles require frequent to constant use of the upper extremities to perform handling, which is outside of the Petitioner's permanent restrictions for anything more than 1/3 of the day. (Id.) According to Mr. Blumenthal, Petitioner is "very clearly, absolutely, without a doubt" unable to work as an order picker or assembler within his permanent work restrictions. (Id. at 15). Mr. Blumenthal testified that Mr. Steffan's report which identified potential positions as a host or greeter, were not suited to Petitioner as he does not speak, read, or write English and cannot stand on a frequent to constant basis. (Id. at 45-46).

According to Mr. Blumenthal, Petitioner is not qualified for any of the positions identified by Mr. Steffan, regardless of his immigration status. (Id. at 47-48). "[Petitioner] is not employable in any occupation that exists in a stable labor market with his current physical abilities, education, and communication skills." (Id. at 48). However, he opined that Petitioner could improve his chances of obtaining employment while waiting for the immigration process, including the aforementioned ESL and GED classes, and potential computer literacy training. (Id.) A job search would not be appropriate, regardless of immigration status, because Petitioner does not currently have the skills or abilities to perform any job in a stable labor market. (Id. at 50). GED, ESL, and skilled training programs could take longer than three years for Petitioner to develop an employable skillset. (Id. at 52). Without such training programs, there is "no job within a stable labor market that he will be able to access." (Id.)

CONCLUSIONS OF LAW

Causal Connection

The Arbitrator finds that Petitioner's current condition of ill-being, namely permanent restrictions post lumbar fusion and left wrist fusion, is causally related to his work accidents of September 20, 2010 and October 30, 2010. The Arbitrator bases this conclusion on the Petitioner's credible testimony, the medical records of the treating physicians, and the reports of Respondent's Section 12 examiners, with the exception of Dr. Jerry Bauer.
Petitioner credibly testified that he had no prior accidents, injuries, or medical treatment to his low back of left wrist prior to the above-mentioned work accidents. Petitioner's treating physicians, including Dr. Erickson, Dr. Mirkovic, and Dr. Carroll have all opined that his injuries are causally related to these accidents.

Dr. Kern Singh, in his November 17, 2010 report, acknowledged a large central disc herniation at L3-4 and L5-S1 with loss of disc height and foraminal stenosis. He concurred with the diagnosis of a herniated nucleus pulposus at these levels, and did state that there was disc degeneration that predated the accident. He recommended a series of epidural injections at these levels, followed by work conditioning if Petitioner improved. If the epidurals did not work, further evaluation would be appropriate.

Dr. Singh performed a second evaluation on September 21, 2011. In this report, he acknowledged the prior treatment was appropriate, as was the initial surgical intervention. He recommended a revision L3-4 and L5-S1 laminectomy, which would eventually be performed by Dr. Erickson in January 2012. He opined that the conditions were causally related to the September 20, 2010 work accident.

Respondent turned to a new Section 12 examiner for the lumbar spine, Dr. Jerry Bauer, on June 18, 2012. Dr. Bauer acknowledged the herniated disc at L3-4 was related to the accident, but believed that there was no significant pathology at L5-S1 after the September 20, 2010 fall. Dr. Bauer did not discuss the role of the December 2010 fall in any of his findings. Dr. Bauer recommended a lumbar myleogram and post-myleogram CT scan to identify nerve root compression. If no nerve root compression was found, an FCE and work conditioning would be appropriate.

With respect to the wrist, Respondent retained Dr. John Fernandez, who stated in his April 14, 2011 report, "I agree with Dr. Carroll. I first of all believe that Dr. Carroll is an excellent and qualified surgeon and is well suited to take care of Mr. Calderon. A vascularized bone graft can be appropriate, but it should be noted that the prognosis for his recovery is somewhat guarded and almost even poor." Dr. Fernandez further opined, "If a vascularized bone graft works, then he has the best chance possible. If it does not work, he may require further surgery including either a partial or total fusion."

All of the physicians in this case agree that the L3-4 pathology is a related work injury. All of the physicians in this case agree that the left wrist fracture is a related work injury. The only point of contention is that Dr. Bauer disagrees that there was any

significant L5-S1 pathology after the September 20, 2010 fall. His opinion regarding pathology is disputed by Dr. Engel, Dr. Erickson, Dr. Mirkovic, and Dr. Singh, who all diagnosed a herniated disc at L5-S1 after the September 20, 2010 injury.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being, namely permanent restrictions post lumbar fusion and left wrist fusion, is causally related to his work accidents of September 20, 2010 and October 30, 2010. The Arbitrator bases this conclusion on the Petitioner's credible testimony, the medical records of the treating physicians, and the reports of Respondent's Section 12 examiners.

Medical Bills

The Arbitrator finds that Petitioner has received reasonable and necessary care, and is entitled to payment of all unpaid medical bills submitted at trial. An analysis of the unpaid bills reveals that the charges are supported by the records, as well as the opinions of the treating physicians and Section 12 examiners. This finding includes those services provided by Mr. Steven Blumenthal as vocational benefits defined in Section 8(a) of the Act.

The Arbitrator does not award charges for non-emergency transportation services by any provider. Neither Respondent nor Petitioner shall be liable for any such charges.

Temporary Benefits

TTD

The Arbitrator finds that Petitioner is entitled to TTD benefits from October 6, 2010 through November 21, 2010, and December 30, 2010 through August 6, 2014. Petitioner worked light duty after his September accident until he was taken off work by Dr. Johnson at Marque Medicos on October 5, 2010. He returned to work light duty on November 22 pursuant to the Section 12 recommendations of Dr. Singh until his December 30, 2010 re-injury. Petitioner testified credibly that he has not worked in any capacity since that date. He has been on restrictions throughout his treatment, up until his August 6, 2014 discharge from care by Dr. Carroll with permanent restrictions.

Maintenance and Vocational Rehabilitation

The Arbitrator finds that Petitioner is entitled to maintenance benefits from August 7, 2014 through the date of trial, as well as vocational assistance as recommended by Mr. Steven Blumenthal. The Arbitrator bases this finding on the credible testimony of the Petitioner, Mr. Godoy, and Mr. Blumenthal, as well as the application of the facts pursuant to *National Tea*.

Section 8(a) of the Illinois Workers' Compensation Act provides the following:

> The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expense incidental thereto.
>
> Any vocational rehabilitation counselor who provides services under this Act shall have appropriate certifications which designate the counselor as qualified to render opinions related to vocational rehabilitation. Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program and vocational retraining including education at an accredited learning institution. The employer or employee may petition to the Commission to decide disputes relating to vocational rehabilitation and the Commission shall resolve any such dispute including payment of the vocational rehabilitation program by the employer.
>
> The maintenance benefits shall not be less than the temporary total disability rate determined for the employee. In addition, maintenance shall include costs and expenses incidental to the vocational rehabilitation program.

The Illinois Supreme Court, in *National Tea Co. v. Industrial Comm'n*, created a framework of factors to consider in determining whether vocational rehabilitation is appropriate. Factors favoring rehabilitation include:

- The employee has sustained an injury that caused a reduction in earning capacity, and there is evidence that rehabilitation will increase that capacity;
- The employee is likely to lose job security due to the injury; and
- The employee is likely to obtain employment upon completion of rehabilitation training.

In this case, the first two factors clearly favor rehabilitation, with a qualified yes on the third factor. Petitioner's injury has caused a *prima facie* reduction in his earning capacity. He is unable to return to his usual occupation, and is currently earning nothing. Rehabilitation, per the testimony of Mr. Blumenthal and Mr. Steffan, would assist the Petitioner in finding a job, thus increasing his earning capacity. Petitioner has likewise lost job security – he is unable to return to his usual occupation. Finally, he is likely to obtain employment following rehabilitation. Mr. Godoy testified that Petitioner will, to a ninety-five percent certainty, be legally authorized to work in this country sometime in 2016. Mr. Blumenthal testified that rehabilitation through ESL classes, GED classes, and computer classes, could take three years or more.

Factors against rehabilitation include:

- The employee has unsuccessfully undergone rehabilitation in the past;
- The employee has previously received training which would enable him to resume employment
- The employee is not trainable due to age, education, and occupation; and
- The employee already possesses sufficient skills to obtain employment.

The first three factors favor the Petitioner, and the fourth is the subject of a dispute between the experts, Mr. Blumenthal and Mr. Steffan. There is no evidence to suggest that Petitioner has undergone rehabilitation in the past. Both experts agree that Petitioner has no transferable skills, and very limited education and training. Both experts agree that Petitioner is trainable, through ESL, GED, and computer classes.

The experts disagree as to whether Petitioner already possesses sufficient skills to obtain employment. The Arbitrator agrees with Mr. Blumenthal and finds that no stable labor market currently exists for the Petitioner and that he is a candidate for vocational assistance. Mr. Steffan testified that Petitioner is currently employable, for instance, as a greeter, but for his immigration status. The Arbitrator does not find this testimony to be credible. Mr. Blumenthal explained that Petitioner's lack of English, as well as inability to stand on a frequent to constant basis would preclude him from this position. He referred specifically to the need to change positions from standing and sitting on a frequent basis, pursuant to the FCE. Mr. Steffan testified Petitioner would qualify *prima facie* for none of the thirteen jobs identified in his first labor market survey, but that reasonable accommodations could be made. Mr. Blumenthal testified credibly that this assumes all thirteen employers were informed of every single accommodation that Petitioner would need to perform the job, and that they all concurred. There is no indication in Mr. Steffan's reports that this was done. Mr. Blumenthal credibly testified that Petitioner would be able to perform any of the positions identified in either of Mr. Steffan's reports. He specifically rebutted Mr. Steffan's suggestion of a greeter position based on the need to frequently change positions, as well as the lack of conversational English. He rebutted the suggestions of order picking and assembly, based on the FCE's restriction of handling to 1/3 of the day. It is not credible that a reasonable accommodation can be made in such a position, where handling activities constitute the entire job.

Finally, Mr. Steffan acknowledged that Petitioner would meet the *National Tea* factors for rehabilitation, consisting of services up to but not including active job placement, based upon Petitioner's immigration status. Therefore, the Arbitrator finds that Petitioner is entitled to vocational rehabilitation efforts under a *National Tea* analysis. The recommendations of Mr. Steven Blumenthal are adopted, and vocational services are to proceed under his direction, exclusive of an active job search until such time as Petitioner is legally authorized to work in this country.

With respect to the maintenance benefit, Section 8(a) of the Act permits an award of maintenance benefits while a claimant is engaged in a prescribed vocational-rehabilitation program. *Greaney v. Industrial Comm'n,* 358 Ill.App.3d 1002 1019, 295 Ill.Dec. 180, 832 N.E.2d 331,347 (2005). A prescribed vocational rehabilitation program may, but need not, include a job search. *Archer Daniels Midland v. Industrial Comm'n,* 138 Ill.2d 107, 149 Ill. Dec. 253 (1990).

In *Greaney*, the claimant reached MMI on November 4, 1999. He did not formally request vocational rehabilitation services from the Respondent, and initiated an independent job search, gaining employment shortly thereafter. The Illinois Supreme Court held that a formal request for vocational rehabilitation was not needed, and that

the claimant's self-directed job search constituted a sufficient basis to support an award of maintenance.

In the present case, the Petitioner began formal rehabilitation with Mr. Steffan in November, 2014. Both before and after that date, he had been engaged in a self-directed job search. At present, Mr. Blumenthal has laid out a vocational rehabilitation program as described above. So long as Petitioner is actively working to improve his earning capacity, he is entitled to the maintenance benefit. Since reaching maximum medical improvement, Petitioner has engaged in a self-directed vocational rehabilitation program. This has included a diligent, self-directed job search. He has engaged the services of an immigration attorney, Mr. Godoy, to help him obtain authorization to work in this country and increase his earning capacity. He has enrolled in ESL classes at Waubonsee Community College as part of Mr. Blumenthal's rehabilitation plan. Prior to this, Petitioner was working with Respondent's vocational counselor, Ed Steffan, based upon Mr. Steffan's rehabilitation plan. Petitioner has met his burden of showing that he is engaged in a vocational rehabilitation program under *Greaney*, and is therefore entitled to maintenance benefits from May 29, 2014 through November 23, 2015, and ongoing.

The Arbitrator acknowledges that the Petitioner's legal status raises questions as to what activities he can specifically perform as part of vocational rehabilitation. Pursuant to *Tamayo*, the Petitioner could be entitled to a vocational rehabilitation plan that would enable him to seek gainful employment in another country, one in which he is legally authorized to work. *Tamayo v. American Excelsior and Labor World*, 99 IIC 0521. However, the Arbitrator relies on the testimony of Mario Godoy that, to a reasonable degree of professional certainty, Petitioner will be a permanent resident of the United States in 2016. The plan of vocational rehabilitation that Mr. Blumenthal has laid out does not include a job search until significant steps have been taken regarding ESL and GED classes. The Arbitrator finds it more likely than not that by the time Petitioner is ready to undertake a further job search, he will be legally authorized to do so, and that Mr. Blumenthal will be able to assist in this process. The Arbitrator awards vocational rehabilitation under Mr. Blumenthal's direction.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL SOCHA,
Petitioner,

vs.

NO: 10 WC 47091

CITY OF CHICAGO,
Respondent.

16IWCC0789

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 permanent partial disability and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

During Oral Argument, presented before the Commission on November 1, 2016, Petitioner's Attorney orally advised the Commission that he waived his client's right to make a claim for a wage differential award pursuant to Section 8(d)(1) of the Act. That waiver, by Petitioner, constitutes a portion of the Commission's Decision.

Here, Socha suffered an undisputed work-related heart attack on September 17, 2010. As referenced in the Arbitrator's Decision, Socha was provided with permanent work restrictions of: 1) no lifting greater than 25 pounds, 2) not to work in temperatures below 40 degrees Fahrenheit or above 80 degrees Fahrenheit, and 3) to avoid excessive anaerobic activity. Subsequent to the receipt of those restrictions, he participated in vocational rehabilitation efforts.

The Commission notes that Petitioner did not advance an argument that his disability rendered him totally unemployable or that the medical evidence supported a claim of permanent and total disability. Further, the Commission finds no medical evidence supporting a claim of total disability. To the contrary, Petitioner's various doctors stated he could return to work, albeit

16IWCC0789

with varying restrictions.

The crux of Petitioner's argument is that he is permanently and totally disabled under an "odd-lot" theory. While the Commission would not characterize Respondent's Vocational Counselor, Julie Bose's guidance as "positive [and]. inspirational" as did the arbitrator, the Commission does agree with the Arbitrator's analysis and finding that Socha failed to prove that he is permanently and totally disabled under any theory of compensation.

Like the arbitrator, the Commission is not persuaded that Socha performed a diligent but unsuccessful job search: this being a pre-requisite to a finding of permanent and total disability under an odd-lot theory of compensation. Though his search has been characterized as voluminous, the record demonstrates that Socha did not look for work in many recommended labor markets within his restrictions. Petitioner limited his job search to those types of tasks in which he had an interest. But, when offered an opportunity for re-training in something that was within his capabilities, he refused it. Though he agreed to look for certain types of jobs, he thereafter abandoned or ignored that agreement.

The Commission also concurs with the Arbitrator's assessment that Petitioner did not present himself in a favorable light, when he was applying for employment. Socha seemingly felt compelled to list his disabilities when meeting potential employers, much to his apparent detriment. The record contains many inconsistencies between Petitioner's willingness to return to work and the sufficiency of his job search, such that the Commission questions Petitioner's sincerity and motivation to find work. This in turn leads the Commission to question Petitioner's credibility relative to the issue of his job search.

The record reveals that Socha indicated on his applications that he would work first shift only, that he would not work weekends, and that he informed potential employers of his previous heart attack and physical restrictions. As noted by the vocational counselor, Sosha spent an inordinate amount of time discussing jobs beyond his restrictions. The vocational counselor suggested that he focus and spend more time looking for jobs within his restrictions. He did not always apply for jobs within his restrictions and he did not apply to many of the job leads provided to him. Taken as a whole, the Commission is not persuaded that Socha was sincere in his efforts at finding new employment.

The Commission also finds that Petitioner failed to prove that he is not regularly employable in a well-known branch of the labor market because of his age, training, education, experience and physical condition. The Commission finds sufficient evidence that Petitioner was employable in at least one well-known branch of the labor market. He had transferrable skills and relevant experience, training and education. The Commission finds that he did not find work due to the lack of a sincere effort on his part.

Because the Petitioner failed to prove that he is permanently and totally disabled, and he waived his right to a wage differential award under Section 8(d)(1) of the Act and never introduced sufficient evidence to establish a wage differential, the Commission finds that Socha sustained a loss of trade due to his injury. Such a loss is compensable under Section 8(d)(2) of the Act. Accordingly, the Commission finds that Petitioner suffered 50% loss of use of the man-

16IWCC0789

as-a-whole as a result of his injury. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 13, 2016, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURHTER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,077.39 per week for a period of 154-5/7 weeks, September 18, 2010 through September 4, 2013, 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 Petitioner maintenance of $1,077.39 per week for a period of 71-2/7 weeks, September 5, 2013 through January 16, 2015, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 250 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 50% loss of use of the man-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a 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.

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.

DEC 8 – 2016

DATED:

MJB/tdm
O: 11-1-16
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SOCHA, MICHAEL
Employee/Petitioner

Case# **10WC047091**

CHICAGO POLICE DEPARTMENT
Employer/Respondent

16IWCC0789

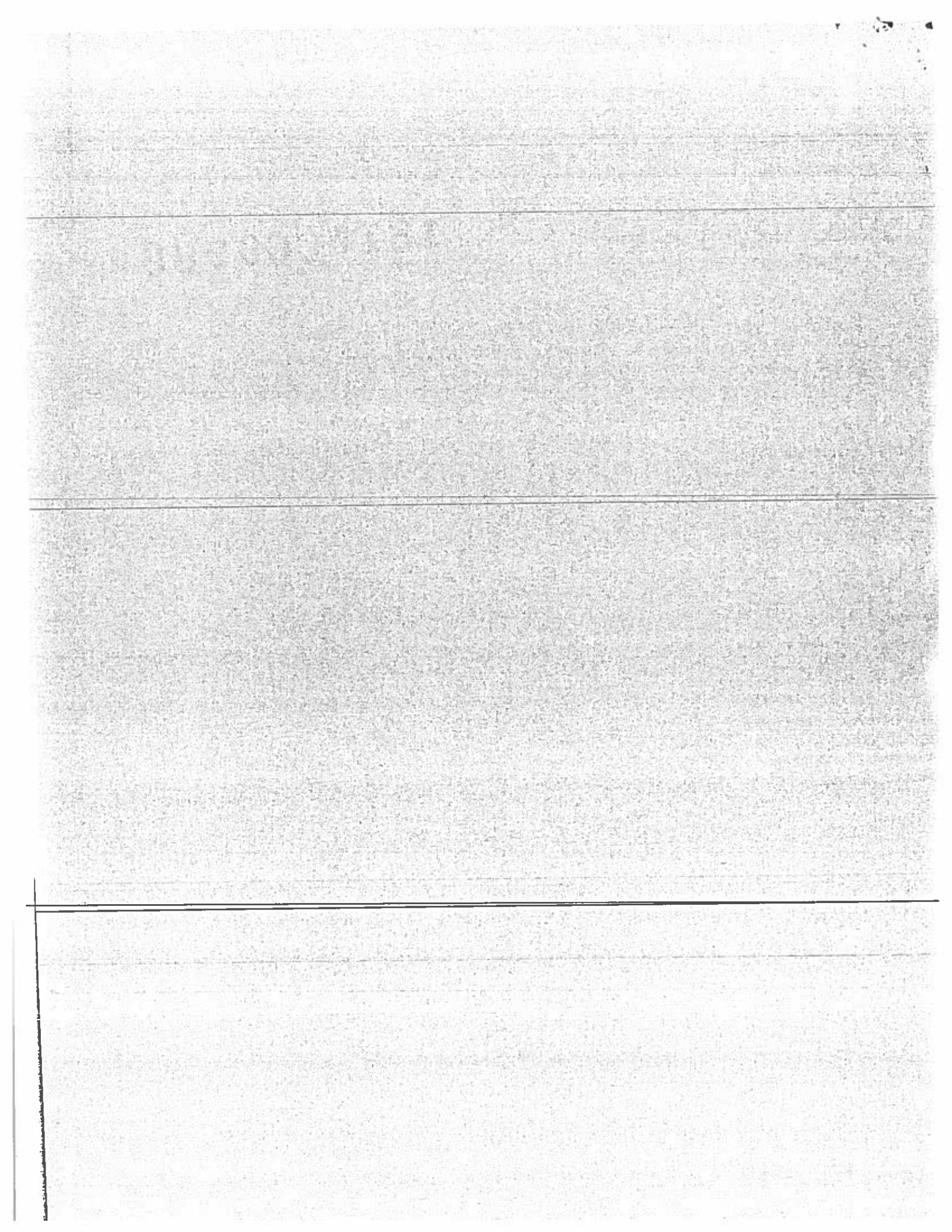
On 1/13/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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:

2208 CAPRON & AVGERINOS PC
ANNMARIE KEATING
55 W MONROE ST SUITE 900
CHICAGO, IL 60603

0766 HENNESSY & ROACH PC
DENISSE PEREZ
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603



☐	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

MICHAEL SOCHA
Employee/Petitioner

Case #10 WC 47091

V.

16IWCC0789

CHICAGO POLICE DEPARTMENT
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 December 16, 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 September 17, 2010, 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.
- On this date, the petitioner sustained 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 $84,036.16; the average weekly wage was $1,616.08.
- At the time of injury, the petitioner was 60 years of age, married with no children under 18.
- The parties agreed that the petitioner received all reasonable and necessary medical services.
- The petitioner agreed that the respondent paid the appropriate amount for all the related, reasonable and necessary medical services provided to the petitioner.
- The petitioner agreed that the respondent paid $166,687.62 in temporary total disability benefits and $128,209.41 in maintenance.
- The respondent agreed that the petitioner is entitled to temporary total disability benefits for 154-5/7 weeks from September 18, 2010, through September 4, 2013, and maintenance from September 5, 2013, through November 10, 2014.

ORDER:

- The respondent shall pay the petitioner maintenance of $1,077.39 per week for 9-4/7 weeks from November 11, 2014, through January 16, 2015, as provided in Section 8(a) of the Act.

- The respondent shall pay the petitioner the sum of $664.72/week for a further period of 175 weeks, as provided in Section 8d(2) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 35% loss of use of the man as a whole.

- The respondent shall pay the petitioner compensation that has accrued from September 17, 2010, through December 16, 2015, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for his cardiac condition was reasonable and necessary and is awarded. 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

January 13, 2016
Date

JAN 13 2016

FINDINGS OF FACTS:

On September 17, 2010, the petitioner, an electrician/audiovisual engineer, began having chest pain moving a heavy desk. He received emergency care at MacNeal Hospital and was treated for an acute anterior wall myocardial infarction with 100% occlusion in his mid left anterior descending coronary artery. Dr. Robert Lichtenberg performed a coronary angiography and placement of an intraaortic balloon pump. The petitioner had a syncope on October 18th; and on October 19th, Dr. Charles Kinder implanted a dual chamber defibrillator. The petitioner followed up with his doctor and engaged in cardiac rehabilitation.

On March 8, 2011, he was evaluated by Dr. Khaled Dajani, whose diagnosis was coronary artery disease and congestive heart failure. He opined that the petitioner sustained a large anterior myocardial infarction resulting in possible irreversible left ventricle dysfunction. On March 13th, Dr. Richard J. Carroll, pursuant to the request of petitioner, opined that his work activity contributed to his heart attack. On April 14th, Dr. Lichtenberg noted that the petitioner still had left ventricular systolic dysfunction. On November 9, 2012, the petitioner was examined pursuant to Section 12 of the Act by Dr. Jason Robin, who opined that the petitioner's heart attack was precipitated by his work activity and caused mild to moderate left ventricular dysfunction and the need for lifelong medications. Dr. Robin advised against jobs that require heavy lifting or exposure to extreme temperatures.

On September 5, 2013, the petitioner began working with Julie Bose at MedVoc Rehabilitation, initially to improve his job-seeking instructions and skills, interviewing and job finding techniques, resume design, job plan and placement expectations and later,

to assist him with job leads. On November 25, 2014, the petitioner elected to have a vocational evaluation by Lisa Helma at Vocamotive. Lisa Helma opined that the petitioner's transferrable skills were limited to audiovisual industry, but due to his physical restrictions, the available positions were front desk clerk, concierge, retail clerk, cashier and other occupations. Lisa Helma provided instructions and workshops on job seeking and some training with Microsoft Word. The petitioner pursued a job search with Lisa Helma's oversight from March 16th through June 3, 2015.

On June 24, 2015, Dr. Christopher Bane limited the petitioner's lifting to no more than 20 pounds, to work environment temperatures below 80 degrees Fahrenheit and to no driving without air conditioning with a heat index above 60 degrees Fahrenheit. On November 18, 2015, Dr. Robin reevaluated the petitioner and opined that the petitioner should avoid working in a temperature below 40 degrees or above 80 degrees Fahrenheit or high humidity and avoid excessive anaerobic activity and lifting more than 25 lbs.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for his cardiac condition was reasonable and necessary and is awarded.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR MAINTENANCE:

The petitioner participated in a job search with MedVoc from November 11, 2014, through January 16, 2015, although he was working the same period with Vocamotive. He is entitled to maintenance from November 11, 2014, through January 16, 2015.

Maintenance for his job search with the assistance of Vocamotive from March 16, 2015, through June 3, 2015, is denied. The petitioner failed to conduct a genuine job

search for year with the guidance of Julie Bose, who was positive, inspirational and believed that he was employable. The petitioner's election of a rehab specialist who supported his belief that he was unemployable was destined to fail and a waste of time. The respondent shall pay the petitioner maintenance of $1,077.39 week for 9-4/7 weeks, from November 11, 2014, through January 16, 2015, as provided in Section 8(b) of the Act.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The occupations available to the petitioner are in the audiovisual industry, in which he has transferrable skills and experience and front desk clerk, concierge, retail clerk, cashier, security and other occupations that are normally in environments between 40 and 80 degrees Fahrenheit and involve work duties that do not involve excessive anaerobic activity or lifting more than 25 lbs. Therefore, the petitioner is not obviously incapable of employment and can perform some form of employment without seriously endangering his health or life.

It is evident from the petitioner's job listings that there are plentiful, dependable, good and stable labor markets for audiovisual positions, desk and retail clerks, concierges and cashiers. The petitioner did not seek employment for any type of security work, nor is there any evidence that there is not a good, dependable and stable security job market. The petitioner's job search with MedVoc was a little over 12 months and with Vocamotive a little less than three months. Almost all the petitioner's job inquires were done on-line. The petitioner's resume, cover letter/e-mails, copies of his applications, correspondences from any employers, rejections letters/e-mails, follow-up letters/e-mails, replies or efforts are not in evidence.

The petitioner failed to prove that he conducted a genuine, legitimate and diligent search for employment. The petitioner's job log is not convincing of a sincere search for employment but shows it was a perfunctory task. There is little evidence of an earnest commitment or motivation to find employment. It is not believable that the petitioner genuinely searched for employment for over a year and the only evidence available to him is a log of mostly on-line applications to employers. Julie Bose's opinion that the petitioner did not find work because he was not assertive and did not present himself in a favorable light is persusive. Moreover, the petitioner's decision to not seek employment in the security job market was not reasonable.

Lisa Helma's preconceived opinions that the petitioner was not capable of finding employment and that a three-month search would be sufficient proof that he would not find employment is not given any probative weight or even credible given that the petitioner had supposedly conducted a year-long search for employment with a rehab specialist who was optimistic that he would find employment. The petitioner's request for permanent total disability benefits is denied.

The respondent shall pay the petitioner the sum of $664.72/week for a further period of 175 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 35% loss of use of the man as a whole.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dan Stevenson,
Petitioner,
vs.

NO: 10WC 49264

Centralia Correctional Center,
Respondent,

16IWCC0776

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, 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 October 8, 2015, 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.

DATED: DEC 2 - 2016
MJB/bm
o-11/29/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

STEVENSON, DAN
Employee/Petitioner

Case# **10WC049264**

CENTRALIA CORRECTIONAL CENTER
Employer/Respondent

16IWCC0776

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:

1580 BECKER SCHROADER & CHAPMAN
TODD SCHROADER
3672 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

4948 ASSISTANT ATTORNEY GENERAL
WILLIAM H PHILLIPS
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

OCT 8 - 2015

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

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
19(b)

Dan Stevenson
Employee/Petitioner

v.

Centralia Correctional Center
Employer/Respondent

Case # **10** WC **049264**

Consolidated cases: **N/A**

16IWCC0776

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 **3/5/15**. 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 _____

16IWCC0776

FINDINGS

On the date of accident, **12/6/10**, 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 **$55,266.12**; the average weekly wage was **$1,062.81**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **4** 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** 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 meet his burden of establishing that an accident occurred which arose out of and in the course of his employment with Respondent, and further failed to prove that his current condition of ill-being is causally related to his 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

10/1/15
Date

ICArbDec19(b)

OCT 8 2015

16IWCC0776

FINDINGS OF FACT

Petitioner was hired as a correctional officer (CO) in 1999 and worked at Stateville Correctional Center until his 2001 transfer to Centralia Correctional Center. Petitioner alleges he sustained repetitive trauma injuries to his upper extremities on December 6, 2010.

Petitioner worked the 7:00-3:00 shift at Centralia Correctional Center. At the beginning of his shift Petitioner takes 50 cell doors off of dead lock which requires turning a key. Petitioner indicated that he would use his right hand in a pinch grip on the key. Some of the locks were hard to open. Petitioner testified that during this process he would get numbness in his hand and eventually when the numbness got too bad he had to use his left hand instead of his right to open the doors. Petitioner also performed 30-minute wing checks. Each of the four wings has a lock box at the end of the wing. He would use a small key to open the padlock, handwrite the verification, and close the lock. Petitioner testified that he shook down a cell each day. Petitioner testified that during the shake down he would go through each inmate's items, including their personal property box, to look for contraband. Petitioner acknowledged that during a portion of the day Prisoners are granted open movement in and out of their cells, which significantly diminishes the amount of hey turning required of the correctional officers.

Centralia Correctional Center utilizes a duty rotation system, and Petitioner worked in almost every assignment available at the facility. He acknowledged that different assignments required different hand activities and were generally varied in nature. Petitioner indicated that even if he was assigned a relatively hand intensive job; the roster would change every 90 days which would potentially facilitate the change to a different assignment. While working in a control room, officers utilize a three button control board and open the control room door throughout the day. Petitioner confirmed that working in the control room was less hand intensive than working as a wing officer. Petitioner testified that while working as a tower officer "you're looking out a window all day." He did not feel that serving as a tower officer was a hand intensive activity. While working as a health care officer, Petitioner provided security for the medical care personnel. Petitioner stated that working as a health care officer was not a hand intensive activity. Petitioner distributed tools and supplies to maintenance workers while working as a key and tool control officer, but was not required to utilize the tools he distributed. While assigned as an inside grounds officer and a maintenance officer, Petitioner provided security for inmate work crews who were maintaining and improving the premises. During his shifts as a segregation officer Petitioner manipulated large keys to open chuckholes and feed inmates. Petitioner testified that approximately ten of the thirty segregation cells would have shower or yard privileges per day and would be unlocked and moved for that purpose.

Petitioner described operating large Folger-Adams keys, medium sized door keys and small padlock keys during the course of his duties. Petitioner testified that utilizing a key would cause a shocking sensation which would run through his index finger and into the palm of his hand. Petitioner testified that he is right hand dominant. Petitioner has worked full duty work without interruption since 2010.

Petitioner's assignment history was entered into evidence. (RX 8) The history indicates that Petitioner worked approximately twenty-six assignments between 2009 and 2012. (Id) Petitioner was only assigned as a full time segregation officer for two months during the four years prior to his alleged injury. (Id) Robert Stovall

16IWCC0776

testified that he is a shift supervisor at Centralia Correctional Center. Major Stovall confirmed that Centralia Correctional Center keeps a full time locksmith on staff. Major Stovall testified that sometimes correctional officers are required to fill in for absent coworkers, and therefore the assignment history may not accurately reflect what the CO was actually doing.

A job analysis report for the position of correctional officer at Centralia Correctional Center was prepared by Corvel in January of 2011. (RX 5) The report indicates that Centralia Correctional Center is a level 4 medium security facility at which the inmates use their own keys to let themselves in and out of their cells as they go to the yard, gym, school, to meals, the day room, etc. (Id) It further indicates that all the inmates are locked in their cells at approximately 9:30 pm by officers working the 3 pm to 11 pm shift and are not unlocked until approximately 4:30 am by escort officers working the 11 pm to 7 am shift. (Id)

Petitioner initially sought treatment from Felecia Kimbrough, a nurse practitioner at Marshall Browning hospital on May 6, 2010. (PX 1) At that time, Petitioner reported numbness and tingling in his hands bilaterally at night. (Id) On July 8, 2010 Petitioner underwent electro diagnostic testing which was indicated minimal right median mononeuropopathy at the wrist without active denervation. (PX 5) On August 18, 2010 Petitioner saw Richard Morgan MD and was diagnosed with right-sided carpal tunnel syndrome. (PX 2) Dr. Morgan's records indicate that Petitioner's symptoms began approximately 2 years earlier. (Id) Dr. Morgan recommended B6 and a resting hand splint. (Id) Petitioner returned to Dr. Morgan on November 20, 2010 and was diagnosed with bilateral carpal tunnel syndrome; right worse than left. (Id) Dr. Morgan then recommended an open carpal tunnel release. (Id) Petitioner gave notice to Major Robert Mueller on December 6, 2010, shortly after learning his carpal tunnel would have to be surgically repaired. Petitioner saw Dr. Morgan for the final time on December 14, 2010. Dr. Morgan reiterated his surgical recommendation. (Id)

Dr. Morgan testified by deposition. Dr. Morgan reviewed the Corvel Job Analysis and the DVD on the day of his deposition. Dr. Morgan stated that Petitioner never provided him with any specific information regarding his job duties and acknowledged that it would have been useful to know what his job duties were. (Id, at 19-20) Dr. Morgan indicated he was generally familiar with the job duties of a CO because he has been to Shawnee and Vienna Correctional Centers as a consultant. He has never been to Centralia Correctional Center. (Id, at 21) Dr. Morgan testified he felt the activities Petitioner participated in as a correctional officer "could certainly contribute to the onset of carpal tunnel syndrome." (PX 5 at 11) Dr. Morgan recommended an open release of the right carpal tunnel.

Dr. Anthony Sudekum performed a records review at Respondent's request. He too testified by way of deposition. Dr. Sudekum has toured Centralia Correctional Center in the past. He has observed the housing units, cafeteria, healthcare unit, the yard, the gym, administrative areas, and the commissary. (Id, at 17) While touring the facility, Dr. Sudekum utilized each type of key used by correctional officers and performed various other duties including operating control panels, manipulating property boxes, and handling dietary trays. (Id, at 18-19) Dr. Sudekum opined that Petitioner's duties as a CO did not cause or aggravate his mild right-sided carpal tunnel syndrome. (RX 7, at 26, 33) Dr. Sudekum reviewed Petitioner's medical history, the Corvel job site analysis, the DVD, post descriptions, and Petitioner's assignment history. (Id, at 13-16) Dr. Sudekum disagreed that Petitioner suffered left carpal tunnel syndrome, and felt that the diagnosis of right carpal tunnel

syndrome was "extremely weak". (Id, at 44) Dr. Sudekum opined that Petitioner's obesity, hypertension, and tobacco use were potential comorbid factors for the development of carpal tunnel syndrome. (Id, at 29)

Petitioner acknowledged that his upper extremity complains began to manifest in 2008. Petitioner indicated that his hobbies include hunting and fishing and indicated that he is able to fish six to eight times a year and manipulate a shotgun safely.

CONCLUSIONS OF LAW

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
Issue (F): Is Petitioner's current condition of ill-being causally related to the injury?

These issues are somewhat overlapping, therefore the Arbitrator will address them jointly. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture*, 99 I.I.C. 0961 (1999) 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*, 509 N.E.2d 1005 (1987)

The Petitioner in this case is relying upon a repetitive trauma theory rather than one of traumatic injury. The Petitioner must still show the injury arose out of and in the course of his employment. *Peoria County Bellwood Nursing Home v. Industrial Commission*, 505 N.E.2d 1026 (1987) In such cases the claimant generally relies on medical testimony to establish causal connection between the claimant's work duties and the condition of ill-being. *Id.* When the question at issue is one specifically within the purview of experts, expert medical testimony is required to show that the 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 due to repetitive trauma has been deemed to fall in the area requiring such expert testimony. *Johnson v. Industrial Commission*, 89 Ill. 2d 438 (1982) In a repetitive trauma claim arising prior to 2011, a claimant need not establish that work activities are the sole or even the primary cause of his or her condition. It must be proven, however that work activities are at least a cause of his or her condition. The right to recover benefits cannot rest upon speculation or conjecture. *County of Cook v. Industrial Commission*, 68 Ill. 2d 24 (1977)

Dr. Morgan testified he felt the activities Petitioner participated in as a correctional officer "could certainly contribute to the onset of carpal tunnel syndrome." However, Dr. Morgan indicated that Petitioner never provided him with any specific information regarding his job duties. Dr. Morgan did not review the Corvel Job Analysis, DVD, and other documentary evidence until the day of his deposition. Dr. Morgan indicated he was generally familiar with the job duties of a CO because he has been to Shawnee and Vienna Correctional Centers as a consultant. He has never been to Centralia Correctional Center. The Arbitrator notes the job duties of COs vary widely from facility to facility.

Dr. Sudekum opined that Petitioner's duties as a CO at Centralia CC did not cause or aggravate his mild right-sided carpal tunnel syndrome. Dr. Sudekum reviewed not only the Corvel job analysis report and DVD, but he also reviewed Petitioner's assignment history, toured his worksite personally, and performed the same activities that Petitioner alleges are causative of his current condition.

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In this case, Dr. Sudekum's knowledge of the job duties of a CO at Centralia is far more extensive than that of Dr. Morgan and therefore, Dr. Sudekum's opinion is given more weight regarding causal connection. The Arbitrator finds the testimony and opinions of Dr. Sudekum more persuasive than those of Dr. Morgan. Further, the multitude of assignments and duties performed by Petitioner is a compelling factor in assessing the repetitive nature of his duties for Respondent. Petitioner himself described his job duties as varied

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has failed to prove that he sustained accidental injuries which arose out of and in the course of his employment or that his condition of ill-being is causally related to his employment. Benefits are therefore denied.

Issue (E): Was timely notice of the accident given to Respondent?

Petitioner's unrefuted testimony established he gave notice to Major Robert Mueller on December 6, 2010, shortly after learning, on November 20, 2010, his carpal tunnel syndrome would have to be surgically repaired. Based upon the foregoing and the record taken as a whole, the Arbitrator finds timely notice was given.

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?

Petitioner incurred medical expenses as follows:

Marshall Browning Hospital	$ 290.00
Dr. Amar Sawar	$1,479.00
Southern Orthopedic Associates	$ 262.00
TOTAL:	$2,031.00

The Arbitrator finds these expenses are reasonable and necessary to treat Petitioner's carpal tunnel syndrome. Further, the Arbitrator finds the future treatment recommended by Dr. Morgan is reasonable and necessary. However, because Petitioner failed to prove that he sustained accidental injuries which arose out of and in the course of his employment or that his condition of ill-being is causally related to his employment, benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF MC LEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID JOST,

Petitioner,

vs.

NO: 11 WC 3769

16IWCC0821

KLEMM TANK LINES,

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 jurisdiction, accident, notice, causal connection and prospective medical, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that the Illinois Workers' Compensation Commission has jurisdiction over this claim pursuant to Section 1(b)2 of the Act. The Commission further finds that David Jost sustained a work-related accident on August 15, 2010 that arose out of and in the course of his employment. Petitioner, however, failed to prove that his current condition of ill-being is causally related to said accident. 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).

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. David Jost has been a truck driver for 35 years. Petitioner testified that he saw a job posting for Klemm Tank Lines while using the internet in his home located in Geneseo, Illinois. His understanding was that the job was not based in Illinois. T.46.

2. Per the Career Builder job posting, Klemm Tank Lines was looking for drivers in the Bettendorf area. The posting indicated that Klemm Tank Lines was one of the largest petroleum carriers in the state of Wisconsin. Their main terminal was located in Green Bay, Wisconsin with terminals in Portage, Madison, Milwaukee, Wisconsin and Rockford and Huntley, Illinois. Drivers had to be at least 23 years old, have a Class A CDL with tanker and hazmat endorsement, have 250,000 verifiable current tractor trailer miles, and a clean driving record. PX.6.

3. Jost testified that he contacted Klemm Tank Lines and then filled out an application. He was then contacted to schedule an in-person interview. The interview took place in October 2008 at a truck stop in Hillsdale, Illinois. T.16. Petitioner then participated in a ride along in Bettendorf, Iowa. T.17. Jost then received a telephone call at his home from Sarah Wulf of Klemm Tank Lines. She offered him the position, which he accepted at that time. T.18.

4. On October 20, 2008, Jost received a letter from Ms. Wulf. The letter stated "Congratulations on your new position with Klemm Tank Lines!" The letter further stated that "Through Orientation, you will meet many of your new co-workers, dispatchers, and other staff members which will be able to assist you with your new employment responsibilities and questions." The letter also stated "Please bring your CDL and Medical Card with you." PX.5.

5. Jost testified that the orientation was mandatory and part of his employment offer. T.50. After they verified his CDL and he completed the orientation, he started working for Klemm Tank Lines. *Id.* He then began working as a local driver driving a 45 foot long 18 wheeler. T.21. He worked 5 days a week, between 12 and 14 hour days. T.22. Jost testified that it was industry standard for companies to make copies of the license and medical card. T.65.

6. Petitioner testified that his job assignment location was in Rock Island, Illinois. T.50. He further testified that his terminal was located in Rock Island, Illinois. T.51. He stated that all the trucks for Klemm Tank Lines are and still at the time were stored at Rock Island, Illinois. *Id.*

7. Jost testified that his right arm and shoulder were fine when he began working on August 15, 2010. T.25. He was making a delivery in Coralville, Iowa when he injured his right arm. As he was exiting the truck cab, his hand slipped off the grab bar causing him to fall

4 feet to the ground. *Id.* He landed face first and on his arms. T.26. Jost stated that he had to exit the truck to swipe his card to access the terminal. T.28. His right arm was generally sore after the fall. T.29.

8. Jost called his dispatcher, Pete Peerenboom in Green Bay, Wisconsin and informed him of his accident. T.30. He advised Pete that he fell and hurt himself. *Id.* Pete advised that he would inform the HR Director. T.31.

9. Jost saw Dr. John Loucks of the Chiropractic Health Center on August 21, 2010. He reported constant pain in the back of his neck that did not radiate. The date of onset was August 15, 2010. He had muscle tightness in the cervical spine, top of the shoulder, and upper thoracic spine. The diagnoses were segmental dysfunction, posterior facet syndrome, myalgia and myositis, and cervicalgia. The assessment was that he was injured in a fall while getting out of a truck. He received spinal adjustments and was to follow-up as needed. PX.4.

10. Petitioner testified that he waited 6 days to treat as he hoped the injury would subside. T.32.

11. Petitioner was seen by Dr. Loucks on August 25, 2010 for pain in the back of the neck with headaches. Movement made his pain worse in the back of the neck, but it did not radiate from the back of the neck. The date of onset was listed as August 15, 2010. He also had intermitted pain in the lower back that was aggravated by movement. It did not radiate from the lower back. The date of onset for this pain was August 24, 2010. He had muscle tightness in the cervical spine and on the top of the shoulder. The assessment noted that he sustained injury during a fall while getting out of a truck. It was further noted that the cause of this condition was unknown and he woke up with pain. Petitioner received trigger point therapy to the trapezius region and the posterior aspect of the shoulder joint. PX.4.

12. Jost testified that he sustained a second work accident on October 31, 2010 to his left knee resulting in a torn meniscus. T.36. He still had shoulder pain, however. *Id.*

13. Petitioner was seen by Christine Sears, RN. of Trinity Family Medical Associates on November 24, 2010. The record does not contain a history section. However, examination revealed tenderness to palpation of the right arm. The assessment was pain elicited by motion of the shoulder. X-rays were ordered. PX.1.

14. Petitioner underwent an x-ray of the right shoulder and right humerus on November 24, 2010. It was reported that Jost had right shoulder pain for several months with no known injury. The x-ray of the right shoulder revealed no acute bony abnormality and the x-ray of the right humerus was negative. PX.1.

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15. Jost was seen by Nurse Sears on November 24, 2010 for continued right shoulder and arm pain with loss of range of motion that had been getting worse for several months. The assessment was pain elicited by motion of the shoulder. PX.1.

16. Petitioner underwent a right shoulder arthrogram on December 24, 2010 at Hammond-Henry Hospital for pain with no known injury. Per the report, there was some contrast that had an irregular contour at the region of the undersurface of the rotator cuff. The impression was a technically successful right shoulder arthrogram with evidence of a rotator cuff tear. PX.1.

17. Petitioner also underwent an MRI of the right shoulder at Hammond-Henry Hospital on December 24, 2010. The impression was a partial thickness tear of the supraspinatus and infraspinatus tendon. The largest tear was noted to be at the infraspinatus tendon. There was a small amount of contrast in the subacromial/subdeltoid bursa suggesting a full thickness tear. PX.1.

18. Jost was seen by Dr. Mark Stewart of ORA Orthopedics on January 6, 2011 for right shoulder pain. He reported continued pain and difficulty lifting. He underwent physical therapy, but his condition was getting worse. He had pain which limited his motion, particularly with reaching around the back. His pain was reported as being between 1 and 3. His pain was aching and radiated. Lying flat bothered him. He had tenderness over the anterolateral corner extending to the deltoid. He could forward elevate to 140 degrees and abduction on the right to 120 degrees. His muscle strength on the right was 4+/5. Dr. Stewart noted the MRI revealed a full thickness rotator cuff tear. He recommended right shoulder arthroscopy. He opined that the injury was work related. PX.3.

19. Petitioner testified that he did not follow-up with Dr. Stewart again until December 11, 2013. He worked full-duty the entire time. T.60.

20. Per the discharge physical therapy summary from Hammond-Henry Hospital dated January 14, 2011, petitioner was discharged from therapy as he had reached the maximal level. He was instructed to continue with shoulder range of motion exercises to maintain range. It was further noted that petitioner had been placed on hold pending an MRI and an appointment with an orthopedic physician. The orthopedic surgeon stated that petitioner had a rotator cuff tear that would require surgery. Petitioner was awaiting workers' compensation to undergo the shoulder surgery. He was being discharged as he plateaued and reached his maximal functional potential. The physician stated he needed surgery at this point. New objective data was not available as it was not known if the petitioner's most recent visit would be his final visit. He continued to have pain and difficulty with reaching overhead and behind his back, and he had pain with driving. He was then off work due to his knee injury. PX.3.

21. Jost was released to full duty in March 2011 relative to his left knee. T.39.

22. Petitioner sustained a third work-related injury in May 2011 to his right knee. He treated and was released in July 2011. T.40. He neither reported nor were any shoulder problems noted.

23. Petitioner was seen by Dr. Loucks, the chiropractor, on September 13, 2011 for intermittent lower back pain with a date of onset listed as September 12, 2011. It was noted that his condition was from working underneath his wife's van. Trigger point therapy was provided to the trapezius region bilaterally. RX.4.

24. Jost was again seen by Dr. Loucks on April 20, 2012 for intermittent low back pain. It was noted that his condition was from working underneath his wife's van and that he was injured while performing yard work. Trigger point therapy was provided to the trapezius region bilaterally. RX.4.

25. Petitioner was seen by Dr. Loucks on August 21, 2012 for pain in the mid upper back and lower middle back. The date of onset was listed as August 16, 2012. It was noted that he was injured while lifting overhead. Trigger point therapy was provided to the posterior aspect of the shoulder joint. RX.4.

26. Petitioner was seen by Dr. Loucks on December 5, 2012 for pain in the mid-upper back and lower middle back. The onset was listed as November 15, 2012. It was noted that he was injured while lifting boxes. Trigger point therapy was provided to the posterior aspect of the shoulder joint. RX.4.

27. Jost was seen by Dr. Loucks on April 10, 2013 for mid upper back and lower middle back pain. The date of onset was April 6, 2013. It was noted he was injured while lifting boxes. Trigger point therapy was provided to the posterior aspect of the shoulder joint. RX.4.

28. Respondent obtained a Section 12 examination from Dr. Nikhil Verma of Midwest Orthopedics at Rush on August 5, 2013. Examination revealed that his full right shoulder range of motion was maintained. His strength was full at 5-/5 with abduction in scapular plane with mild complaints of discomfort. He had very mild discomfort associated with an impingement maneuver. Dr. Verma noted that he did not have the MRI available for review. He diagnosed petitioner with right shoulder impingement, possible rotator cuff tear. He requested the MRI so that he could make an accurate diagnosis, and comment as to the presence of a rotator cuff tear. Petitioner could continue to work full duty as he had been doing since July 2011. RX.1.

29. Dr. Verma authored an addendum on August 23, 2013 following his review of the right shoulder MRI. He did not see evidence of a full thickness tear of the rotator cuff, and reported it to be intact. The labrum appeared normal. His examination findings also

showed full range of motion of the shoulder with maintenance of full strength. Petitioner did not need any further treatment. He could continue working full duty. RX.2.

30. Petitioner was next seen by Dr. Stewart on December 11, 2013 for right shoulder pain. He reported pain, weakness and decreased range of motion of the right shoulder. His pain was between a 5 and 6 out of 10. It did not radiate, but would wake him from his sleep. He had tenderness over the anterolateral corner of the right shoulder. He lacked the last 10 to 20 degrees of full motion in all planes on the right side verses the left. The impression was right shoulder pain. He was to perform range of motion and strengthening exercises, and follow-up as needed. PX.3.

31. Petitioner was next seen by Dr. Stewart on February 10, 2015 for right shoulder pain. He reported that his symptoms have remained unchanged for several years. He had weakness, stiffness and pain that he rated between 2 and 7 out of 10. It was intermittent and did not radiate, but would wake him from his sleep. Resting helped, but lifting bothered him. He reported pain with overhead lifting. Petitioner reported pain with repetitive back and forth motion such as vacuuming and yard work with raking bothering him. He was performing full work activities, but still had pain over the lateral aspect and over the deltoid. Dr. Stewart reaffirmed his prior recommendation for arthroscopy of the right shoulder, evaluation of soft and bony tissue, and correction as indicated. PX.3.

32. At trial, Jost was questioned regarding his sparse medical visits and in particular the visit of February 10, 2015, with Dr. Stewart. On cross-examination he was asked and answered in the following manner:

    Q: Okay. The visit to Dr. Stewart in February of 2015 was in preparation for this trial; is that true?

    A: Yeah. T.61.

33. Jost has not truly followed-up with Dr. Stewart for medical care since the December 11, 2013, and has not had any visit of any kind since February 10, 2015, which visit was had in preparation for trial.

34. Jost testified that he would now like to undergo the surgery that was proposed in 2011. T.42. He alleges that he has more daily pain with certain repetitive movements. Sleeping on his right shoulder is difficult. T.43. His condition has deteriorated since the accident. *Id.* His shoulder has bothered him continuously since the accident. *Id.* He did not have any prior shoulder issues. *Id.*

35. On cross-examination, Jost testified that he has not missed any work due to his right shoulder injury. T.53.

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36. Dr. Verma's evidence deposition was taken January 28, 2015. Verma is a board certified orthopedic surgeon at Midwest Orthopedics at Rush. He stated that Jost's examination was essentially normal. He reviewed the MRI and did not see a specific anatomic lesion. The rotator cuff was intact. RX.3. pg.13. He did not see any evidence of a labral tear. There was no significant fluid above the rotator cuff in the subacromial space. He initially diagnosed Jost with right shoulder impingement, possible rotator cuff tear. However, following his review of the MRI, he eliminated the rotator cuff tear as he did not see a tear on the MRI. His diagnosis was mild impingement. RX.3. pg.14. There was no indication for surgery. RX.3. pg.15. He did not need any further treatment. RX.3. pg.16.

37. On cross-examination, Verma stated that Dr. Matthew Berst, the doctor who first read the MRI, did not actually say Jost had a rotator cuff tear. He only suggested a possible tear, which was due to areas of contrast that indicated there was potential for a full thickness tear. Verma stated that Dr. Berst inferred a tear by the presence of contrast material in two different areas. RX.3. pg.28.

On Review before the Commission, and at trial, the parties' primary focus was whether the last act necessary for the formation of the contract of employment occurred in the State of Illinois. This is one way by which the Commission can acquire jurisdiction over a claim. But, it is not the only way by which jurisdiction is established.

Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made, and including aliens, and minors who, for the purpose of this Act are considered the same and have the same power to contract, receive payments and give quittances therefore, as adult employees." 820 ILCS 305/1(b)(2).

Under section 1(b)(2) there are three bases allowing Illinois jurisdiction: (1) if the contract for hire is made in Illinois; (2) if the accident occurs in Illinois; and (3) if the claimant's employment is principally located in Illinois, regardless of where the contract for hire was made or where the accident occurred.

In the case at bar, the parties failed to acknowledge petitioner's un-rebutted testimony relative to his employment. The parties spent an inordinate amount of time and effort litigating a non-issue. That non-issue is: Where did Jost and the Respondent perform the last act necessary to Jost's hire by Klemm Tank Lines.

The petitioner testified that his job assignment location, his terminal, and all of the Respondent's trucks were located in Rock Island, Illinois. The evidence establishes that petitioner began his day by picking up his work truck from the Rock Island, Illinois terminal and

that he would end his day by returning his work truck to the Rock Island, Illinois terminal. Based upon Petitioner's unrebutted testimony, the Commission reverses the arbitrator and finds that it has jurisdiction over this claim as Jost's employment was principally located in Illinois.

To obtain compensation under the Act, an injured employee must show by a preponderance of the evidence that he suffered a disabling injury arising 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, 278 Ill. Dec. 70 (2003).

The Commission finds that Jost sustained an accident arising out of and in the course of his employment on August 15, 2010 and that he provided notice of the accident. Petitioner testified that he injured his shoulder when he fell while exiting his work truck. He thereafter reported the incident to his dispatcher, Pete Peerenboom. The medical records support that petitioner injured himself when he fell from a truck. The Commission finds that the overwhelming evidence supports notice and accident.

In resolving disputed issues of fact, including issues related to causation, it is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

The Commission finds that, though he proved a compensable accident, Jost failed to prove that his current condition of ill-being is causally related to the work accident. The Commission notes that petitioner underwent treatment to his right shoulder through January 6, 2011. At that point in time, Dr. Stewart opined that the MRI revealed a full thickness tear and that Jost was in need of surgery.

The petitioner nevertheless stopped treatment relative to his right shoulder in January 2011. He did not have any additional right shoulder treatment until December 11, 2013. At time he saw Dr. Stewart only one time and then had another gap in treatment until February 10, 2015. When Jost presented to Dr. Stewart on February 10, 2015, Dr. Stewart reaffirmed his near 4 year old recommendation for surgery, without any additional diagnostic testing. The Commission notes, however, that petitioner only consulted with Dr. Stewart on February 10, 2015, in anticipation of a trial.

While the Commission is fully aware of the MRI findings and the recommendation for surgery in January 2011, the Commission is troubled by the significant gap in medical treatment thereafter. Despite his testimony that his condition has been continuous and has deteriorated since the accident, the chiropractic records between late 2011 and mid-2013 belie his testimony. The chiropractic records reveal that Jost reported several additional injuries as the result of working on his wife's van, performing yard work, lifting overhead, and lifting boxes, to various parts of his body. He was also able to work full duty during this entire period of near 5 years. At no point do the chiropractic records reveal any ongoing right shoulder issue. The Commission

also finds that the activities documented in the records are inconsistent with his testimony of continuous right shoulder issues.

Based upon the above, the Commission finds the opinion of Dr. Verma to be most persuasive. Dr. Verma was of the opinion that Jost did not have a full thickness tear of the rotator cuff. Verma found that Jost had full range of motion of the shoulder with maintenance of strength. Verma was of the opinion that Jost did not need any additional treatment. The Commission finds that Verma's opinion is supported by the record. At the time of the Section 12 examination, Jost had not sought medical treatment to the right shoulder for over two years. Further, the chiropractic records after 2011 do not demonstrate any ongoing complaints to the right shoulder and reveal that he was able to perform normal activities such as working on his wife's van, performing yard work, lifting boxes overhead, and continuously working full-duty. Then, when he finally sought medical treatment in February 2015, it was solely for the purpose of furthering his litigation.

Therefore, based upon Dr. Verma's opinion, the Commission finds that Jost failed to prove that his current condition of ill-being is causally related to his August 15, 2010 work accident. The Petitioner is entitled to all reasonable and necessary medical expenses related to the right shoulder only through August 23, 2013.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on August 28, 2015, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses related to the right shoulder through August 23, 2013 under §8(a) of the Act, and subject to the medical fee schedule.

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.

16IWCC0821

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: DEC 20 2016

Michael J. Brennan

MJB/tdm
O: 11/29/16
052

Thomas J. Tyrrell

Kevin W. Lamborn

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

JOST, DAVID L
Employee/Petitioner

Case# **11WC003769**

KLEMM TANK LINES
Employer/Respondent

16IWCC0821

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:

0412 RIDGE & DOWNES
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101 N WACKER DR SUITE 200
CHICAGO, IL 60606

0264 HEYL ROYSTER VOELKER & ALLEN
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DJH/BLS T2693 - 28232323_1

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

- ☐ 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)

DAVID L. JOST
Employee/Petitioner

v.

KLEMM TANK LINES
Employer/Respondent

Case # 11 WC 03769

Consolidated cases:

16 I W C C 0 8 2 1

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 McCarthy, Arbitrator of the Commission, in the city of Bloomington, on 6/30/2015. 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 Jurisdiction

16IWCC0821

FINDINGS

On the date of accident, **8/15/2010** Respondent ***was not*** 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 **n/a** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident n/a given to Respondent.

Petitioner's current condition of ill-being n/a causally related to the accident.

In the year preceding the injury, Petitioner earned $**60,000.00**; the average weekly wage was $**1,153.85**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **1** children under 18.

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

The Petitioner failed to prove that Illinois has jurisdiction over this workers' compensation claim. The Arbitrator denies all requests for compensation.

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.

D. Dan McCarthy
Signature of Arbitrator

Aug. 18, 2015
Date

AUG 28 2015

ICArbDec19(b)

STATEMENT OF FACTS

The Petitioner, David Jost, filed an Application for Adjustment of Claim alleging accidental injuries to his right shoulder against his former employer Respondent, Klemm Tank Lines, alleging accidental injuries on August 15, 2010. The Respondent denied the Petitioner's claim. The Petitioner's claim proceeded to a 19(b) trial on June 30, 2015, at which time that claim was severed from another claim 11 WC 03768 which was not at issue at the 19(b) arbitration. At the 19(b) arbitration, the Petitioner was seeking authorization for a surgical procedure to repair a rotator cuff tear, recommended by Dr. Mark Stewart.

The Petitioner alleged that while working in Iowa on August 15, 2010, he slipped and fell getting out of his truck, landing face down with his arms crossed underneath him, and sustained an injury to his right shoulder and person as a whole. The Petitioner testified on his own behalf to the circumstances surrounding the commencement of his employment with the Respondent, Klemm Tank Lines. In the fall of 2008, the Petitioner responded to an online ad for employment at Klemm Tank Lines. He understood that Klemm Tank Lines was not based in Illinois. Once he submitted an online application, he was contacted for an interview. The interview took place in Illinois and the Petitioner expressed interest in going on a ride-along with one of Respondent's drivers, which ultimately took place in Iowa. Following the ride-along, the Petitioner received a phone call from Sarah Wulf of Klemm Tank Lines, from her office in Green Bay, Wisconsin. The Petitioner received the call while at his home in Geneseo, Illinois. Ms. Wulf offered the Petitioner a job for Klemm Tank Lines at that time. She also advised the Petitioner that he would be required to attend an orientation in Wisconsin. The orientation was not optional. The Petitioner accepted Ms. Wulf's offer of employment. He subsequently received a letter from her delineating the Respondent's expectations with respect to the orientation, including its requirement that the Petitioner bring his CDL and DOT clearance to the orientation. The Petitioner testified it was industry custom and practice for a driver to produce a CDL and medical card (aka DOT clearance) as part of his employment. Here, the Petitioner was required to bring those items to Wisconsin so that the Respondent could verify the Petitioner's qualifications. The qualifications were specified in the online job posting for the Klemm Tank Line's position for which the Petitioner applied. Once the Petitioner completed this orientation and produced the documents the Respondent requested, he was ready to begin his employment assignment with the Respondent.

On August 15, 2010 the Petitioner was making a fuel delivery to Coralville, Iowa. He pulled up to the delivery location and attempted to access the gate. He was unable to line up his truck to do so, so as he attempted to get out of his truck to activate the gate, he fell from the top step of his truck, approximately 3 ½ to 4 feet to the ground. He fell with his arms crossed underneath him. He felt pain in his right shoulder, but did not seek medical treatment until August 21, 2010. He called his dispatcher Pete, to report that he was injured, and to discuss the details of his delivery and rest of his work shift. He was able to complete the rest of his work shift, and worked full and regular work duties up until the time of the 19(b) arbitration, with the exception of some time off work for unrelated knee injuries, a period of almost five years.

The Petitioner sought treatment for the first time on August 21, 2010 with his chiropractor, John Loucks, D.C. The Petitioner had a long standing history of chiropractic treatment with Dr. Loucks, dating back to 1993. The Petitioner testified that he had no previous problems or injuries or medical treatment to his right shoulder. However, Dr. Loucks' chiropractic records indicate that the Petitioner did have some complaints of pain between his shoulders and in his neck on other occasions prior to the accident. Dr. Loucks addressed these complaints with his various chiropractic treatment modalities, as documented in Respondent's exhibit 4. The

Petitioner saw chiropractor Loucks on four occasions following the August 15, 2010 incident, with the last date of service on September 7, 2010.

The Petitioner did not treat for the right shoulder again until November 24, 2010 when he saw Dr. Loren Soria, his primary care physician. Dr. Soria's records do not document a history of trauma or specific incident involving the right shoulder, but do document complaints of pain in the right shoulder. Dr. Soria prescribed physical therapy, which commenced on December 1, 2010. On that initial visit date, the Petitioner prepared an intake form on which he indicated a three month history of pain in his right shoulder due to a "cause unknown." The Petitioner had the option of stating that the injury was related to a fall or to a worker's compensation injury, but chose not to do so. He underwent a short course of physical therapy, and was ultimately referred to Dr. Mark Stewart, an orthopedic surgeon whom the Petitioner had seen on prior occasions for other orthopedic injuries to his knees. The Petitioner made no complaint to Dr. Stewart relating to his right shoulder until that time, despite the fact that he had seen Dr. Stewart for other orthopedic conditions in the five months following the alleged August 15, 2010 fall.

The Petitioner went two and a half years without any treatment for the right shoulder until he saw Dr. Stewart again in November of 2013. At that time, the Petitioner was continuing to work as a truck driver/dock worker and was, at that time, for a subsequent employer. Dr. Stewart again recommended arthroscopic surgery to address a torn rotator cuff tear to address ongoing pain complaints and limitations in the right shoulder. The Petitioner again did not undergo the surgery. He saw Dr. Stewart for one final time relating to the right shoulder in February of 2015 in preparation for the 19(b) trial. Dr. Stewart again made a recommendation for surgery.

The Respondent had the Petitioner examined by Dr. Nikhil Verma, an orthopedic specialist who concentrates his practice in the treatment of sports injuries, namely shoulders and knees, at the Midwest Orthopedics at Rush in Chicago, Illinois. Dr. Verma testified that the Petitioner could not describe the mechanism of injury to him other to say that he fell from his truck. Dr. Verma disagreed with Dr. Stewart's diagnosis and surgical treatment recommendation, opining that the Petitioner had no appreciable tears on film and required no surgery.

Approximately five years passed between the date of accident and the 19(b) trial. The Petitioner had maintained his position as a truck driver/dock worker for the entire five years following the alleged accident, and at the time of trial, was working for a new employer but with pain and limitations. He testified that he wanted to proceed with surgery as recommended by Dr. Stewart.

FINDINGS ON DISPUTED ISSUES

A. Was the Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

O. Other – Jurisdiction

The Arbitrator finds the following:

The Arbitrator finds that Illinois does not have jurisdiction over this workers' compensation claim because the contract for hire took place in Wisconsin, rather than Illinois. The Arbitrator notes that, generally, Illinois has jurisdiction over workers' compensation claims, including over those claims involving persons whose employment is outside of the State of Illinois, where the contract for hire is made within the State of Illinois. *Chicago Bridge and Iron v. Industrial Comm'n*, 248 Ill.App.3d 687, 691 (1993). The relevant inquiry is whether the last act necessary to establish an employment relationship occurred in Illinois. The issue is one of fact, and the Petitioner bears the burden of proof, as he does with respect to all elements of his workers' compensation claim. In this case, the facts indicate that the last acts to give rise to the Petitioner's employment relationship with the Respondent occurred in Wisconsin.

The Arbitrator finds that the last acts which gave rise to the Petitioner's employment with the Respondent, occurred in Wisconsin, namely the presentation of his CDL, medical card (also referred to as DOT clearance) and attendance at mandatory orientation. The Petitioner offered, as Petitioner's Exhibit #6, the internet job posting of Respondent. The posting clearly specified that a current CDL with certain endorsements was required for the position for which Petitioner applied. Petitioner testified that without that CDL, he would not have gained employment with the Respondent. He was required to present his CDL to the employer in Green Bay, Wisconsin as a requirement for employment. (Petitioner's Exhibits #5 & #6).

The Petitioner testified that the trucking industry practice dictated the presentation of a valid CDL and "medical card", a/k/a DOT clearance. While he believed he could probably have presented the Respondent with a copy of his CDL and DOT clearance, he admitted that the Respondent required him to present it in person in Green Bay, Wisconsin. This requirement was clearly specified in Petitioner's Exhibit #5, and Petitioner acknowledged this requirement and complied with it. If the Petitioner had not presented those items as required, he would not have been given the opportunity to work as a truck driver for the Respondent.

Finally, the Petitioner was required to travel to Green Bay, Wisconsin for the additional purpose of a mandatory orientation. Green Bay, Wisconsin was not the location of his future permanent workplace, but rather only the orientation site, as it is the Respondent's headquarters. The Petitioner would work out of the Quad Cities area when he commenced his full employment responsibilities. The orientation in Green Bay was mandatory before he could commence his official work assignment out of the Quad Cities' terminal. Accordingly, the last acts giving rise to the Petitioner's employment relationship, mainly presentation of his CDL and DOT clearance, as well as mandatory orientation, all occurred in Wisconsin.

The Arbitrator has considered that the Respondent extended an offer of employment from its office in Green Bay to the Petitioner who was located at his home in Geneseo, Illinois, which would support the Petitioner's claim that the employment contract was formed in Illinois. The Arbitrator also acknowledges Petitioner's Exhibit #5, which is a letter to the Petitioner from the Respondent welcoming the Petitioner as Respondent's "newest associate." The Arbitrator finds that while these actions appear to give rise to an employment relationship prior to the Petitioner's attendance in Green Bay, Wisconsin, the Arbitrator finds more

persuasive Petitioner's own testimony that the presentation of his CDL and DOT clearance were conditions precedent to his employment. Had the Petitioner not presented these items as required in Green Bay, Wisconsin, the Arbitrator finds he would not have been an employee of the Respondent.

The Arbitrator's finding with respect to jurisdiction is consistent with case law addressing this issue. In *Cowger v. Industrial Comm'n,* the court found that Illinois did not have jurisdiction over a claim where the last act necessary to give validity to that employment contract occurred in Indiana. 313 Ill.App.3d 364 (5th D. 2000). The Petitioner admitted that if he had failed the drug test in Indiana, he would not have been an employee of Respondent. Therefore, the court found that the last act giving validity to the employment contract occurred in Indiana.

The Arbitrator has also considered *Dhermy v. Illinois Workers' Compensation Comm'n*, a recent Rule 23 Order. 2000 Ill.App. (4th) 130011 WC-U. While not precedential, the Arbitrator notes that the factual circumstances presented in *Dhermy* are similar to those present in the instant case. In *Dhermy*, the Petitioner, a truck driver, was required to complete pre-employment drug testing in Alabama. He admitted that had he not completed and passed the drug testing in Alabama, he would not have been able to drive truck for the Respondent. The *Dhermy* Petitioner, like the Petitioner in the instant case, also received a letter from the Respondent stating "I want to welcome you to Boyd Brothers Transportation (Respondent)" prior to traveling to Alabama for the required drug testing. The *Dhermy* court acknowledged that letter, but still found that the last act giving validity to the employment contract was the completion and passing of the drug testing, which occurred in Alabama because without that successful drug test, the Petitioner would not have been Respondent's employee.

Petitioner relies on the aforementioned *Chicago Bridge and Iron* decision to support his position. In that case, the petitioner was hired by and worked exclusively for the respondent for nineteen years. His job required to him to work in many states on specific jobs. When he began in each state, he would file new employment documents. He was contacted by phone and offered a job in Minnesota. He was told where to go and when and what he would be paid. He accepted. He was injured in an accident enroute to the job. In finding the contract of hire was made in Illinois, the Appellate Court said that a different result may have been obtained if the petitioner had never worked for the respondent prior to receiving the call about the Minnesota job or if he had worked for other employers in the preceding nineteen years. Those two facts are clearly distinguishable from the facts surrounding Mr. Jost's situation. While the Court did not directly say it, it is clear to the Arbitrator that they considered the petitioner to have been continuously employed by the respondent from the point when he was first hired nineteen years earlier. A similar fact pattern distinguishes the other case relied upon by the Petitioner, *Mahoney v. The Industrial Commission, 218 Ill. 2d 358 (2006).*

The instant case presents similar circumstances to those in the *Cowger* and *Dhermy* decisions. Here, this Petitioner was required to travel to Green Bay, Wisconsin to complete orientation and to present his CDL and DOT clearance. Had he not completed those acts in Wisconsin, he would not have been allowed to drive for the Respondent. The Petitioner admitted as much. It is irrelevant to the Arbitrator's analysis that the Petitioner believes he could have presented copies of these materials to the employer, because that simply was not what the Respondent required. Accordingly, the Arbitrator finds that the last acts giving rise to the employment relationship in this case occurred in Wisconsin. Therefore, Illinois does not have jurisdiction over this workers' compensation claim. All requests for compensation are denied.

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

Violet Jasich-Davis',

Petitioner,

16IWCC0805

vs.

NO: 11 WC 6367

City of Chicago,

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. 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 22, 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.

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.

DEC 15 2016

DATED:
KWL/vf
O-12/13/16
41

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

16IWCC0805

JAKSICH-DAVIS VIOLET
Employee/Petitioner

Case# **11WC006367**

CITY OF CHICAGO
Employer/Respondent

On 12/22/2015, 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 0.51% 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:

0222 GOLDBERG WEISMAN & CAIRO LTD
JAMES J NAWROCKI
ONE E WACKER DR SUITE 3900
CHICAGO, IL 60601

0010 CITY OF CHICAGO
MICHELLE BRYANT
30 N LASALLE ST SUITE 800
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
19(b)

16IWCC0805

VIOLET JAKSICH- DAVIS
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # 11 WC 06367

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 **Maria Bocanegra**, Arbitrator of the Commission, in the city of **Chicago**, on **10/13/2015**. 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 _____

16IWCC0805

FINDINGS

On the date of accident, **2/07/2011**, 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 **$63,991.20**; the average weekly wage was **$1,230.60**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **0** dependent children.

Respondent * paid all reasonable and necessary charges for all reasonable and necessary medical services.
***The issue of medical has been reserved to a future hearing.**

Respondent shall be given a credit of **$72,081.57** for TTD, **$36,416.68** for TPD, **$29,535.84** for maintenance, and **$0** for other benefits, for a total credit of **$138,034.09**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act. The parties stipulated that over the pendency of this case Petitioner was paid the amounts listed above. The amounts and time periods prior to 2/01/2015 are not in dispute. Only TTD time in dispute is between 2/02/2015-10/13/2015.

ORDER

Respondent shall be given a credit of $72,081.57 for TTD, $36,416.68 for TPD, and $29,535.84 for maintenance benefits, for a total credit of $138,034.09.

Respondent shall pay Petitioner temporary partial disability benefits of **$812.20/week** for **33-5/7th** weeks, commencing **2/20/2015** through **10/13/2015**, as provided in Section 8(a) of the Act.

Respondent is ordered to pay all necessary, reasonable, and costs associated with treatment at the Rush Pain Center, including epidural injections.

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

12-21-15
Date

DEC 22 2015

16IWCC0805

FINDINGS OF FACT

Violet Jakish-Davis ("Petitioner") and City of Chicago ("Respondent") proceeded to arbitration pursuant to Sections 19(b) and 8(a) of the Act. at trial, the following issues were in dispute: accident, causal connection, temporary total disability and other issues listed included TTD, future medical and causation. The issue of liability for unpaid medical bills was reserved. Ax1. At trial, Petitioner alleged a work accident occurring on 2/7/11 wherein she slipped on ice. Ax2.

On 2/7/11, Petitioner was working at the City of Chicago yard located at 2352 S. Ashland Avenue. While walking, and smoking a cigarette, between two buildings she slipped on the ice. Petitioner was on her way to see her supervisor at the time.

Respondent's Report of Occupational Injury or Illness indicated that "working overtime, swiped in 4:30AM. Walked out back of building was at the landing before stairs, feet came out from under her and she fell down steps (4-6??) flat on my back and bounced down them, landing on ground, sliding under a car front. Slush on landing and steps. Back pain mid and lower back, tail bone, right elbow bruised." Px1.

Chicago Fire Department documented Petitioner's slip and fall in the parking lot at work. she complained of lower back pain. Px2. Petitioner was taken via ambulance to University of Illinois Medical Center and seen by Dr. Gehm. Px2. She reported falling down 5 stairs on her back at work. The record noted that Petitioner had a past herniated disc and laminectomy. She had a history of L3-4, L4-5, L5-S1, two surgeries consisting of laminectomy and microdiscectomy in 2003 due to a work-related injury performed by Dr. Goldberg at Rush. Rx1. Petitioner complained of pain and spasms. The onset of back pain was abrupt and located in the lumbar spine. She had bilateral sciatica symptoms left greater than right and spasms in her back. The functional limitation was minimal. Prior episodes included chronic pain, sciatica, and prior laminectomy. The risk factor was trauma. X-rays of the lumbar spine showed mild narrowing of L4-5 and L5-S1 disc space, sclerosis of the facet joints at L4-5 and L5-S1, and a bony spur at L4. The impression was degenerative changes of the lumbosacral spine. . Diagnosis was acute back trauma status post fall.

On 2/9/11, Petitioner was seen by Dr. Diadula at Mercyworks. Px3. She reported she stepped out on a dock, her feet came out from under her and that she fell flat on her back down 4-6 stairs. She complained of spasms in the middle and lower back. She complained of pain 8/10 in the mid back and lower back, radiating to both legs. Yesterday, she had numbness in the left thigh and still had numbness with tingling in both legs. She experienced pins and needles or marbles rolling feeling in the legs. The pain is worse with sitting more than five minutes, bending over and lying flat. She stated heat created spasms in her back. Objective findings included tenderness in the thoracic spine, tenderness including the perithoracic areas and buttocks, unable to lie down flat, bilateral straight leg raising while sitting elicited pain in the lower back, left tiptoe had difficulty, could not heel stand on left which she stated was due to her 2003 injury. Right elbow showed a 4.25cm x 3cm ecchymosis. The elbow had full flexion and extension with tenderness in the medial epicondyle but was not really complaining of right elbow pain. MRIs of the thoracic and lumbar spine were ordered. Diagnosis was contusion of the mid-back and lower back with bilateral lumbar radiculopathy and right elbow contusion. Petitioner was off work due to work related condition.

On 2/14/11, Petitioner followed up with Dr. Diadula at Mercyworks. The MRIs were reviewed. The findings included at L4-5 there was recurrent or residual disc extrusion, mild lumbar spondylosis, mild thoracic spondylosis, a small T4-5 left paracentral disc protrusion with cord flattening, midback and lumbar spine pain

5/10, radiating to both thighs. She stated that the numbness is confined in the distal part of the left thigh. Thoracic and lumbar spine had limited ROM. She was to see Dr. Goldberg.

On 3/15/11, Petitioner again followed up at Mercyworks. She had not yet seen Dr. Goldberg as authorization was pending. Pain was 5/10, in the midback and lower back radiating to the left leg more than the right with tingling. Numbness comes and goes. The pain was worse with any kind of twisting. Right elbow pain was 7/10 when she grabbed anything. Thoracic spine was still tender. Lumbar spine was still tender, and she had difficulty doing a heel walk on the left from previous foot drop. Right elbow showed full flexion and extension with clicking, tender lateral epicondyle and ulnar nerve. Diagnosis was contusion, midback and lower back, contusion of the right elbow. She was given Vicodin as needed at night, and physical therapy 3 times per week for 3-4 weeks was recommended, follow up with Dr. Goldberg. She was ordered off work and to follow up.

On 4/4/11, Petitioner was evaluated by Ingalls for physical therapy for the contusion of the midback, low back and right elbow. Px6. Treatment diagnosis was right elbow pain status post fall. Petitioner was eventually discharged for this portion of treatment on 8/1/11. On 4/13/11, Petitioner saw Dr. Goldberg. Px5. Records noted a prior left L3-4 and L4-5 hemilaminotomy and discectomy with Dr. Goldberg in 2003 with persistent left foot drop and frequent low back pain since then. Petitioner reported she had been tolerating her symptoms since then with medication management. Doctors noted that on 2/7/11, Petitioner went out for a smoke break and slipped and fell at work resulting in significantly increased low back pain since then. She reported that the low back pain was now "constant" at a 5 or 6 out of 10. Review of the recent MRI showed a "new large herniation with inferior migration." The herniation was "on the left and is likely the cause of her symptoms." Petitioner was referred for therapy and for injections. She was removed from work.

On 4/13/11, Mercy Works noted Petitioner was seen by Dr. Goldberg who recommended ESI to the lumbar. She complained of mid and lower back pain with left radicular pain. she could tip-toe but could not heel walk due to foot drop. Back was positive for tenderness over ht lumbar spine and bilateral SI joints. Decreased range of motion was noted. diagnosis was unchanged. A large left HNP and L4-5 was noted. she remained off of work. On 5/18/11, Dr. Goldberg cleared Petitioner to participate in bocce ball.

On 6/1/11, Petitioner returned to Dr. Goldberg. Px4. She had been in therapy and continued to have some low back pain and achiness in her left leg. She occasionally took Vicodin. She had continued low back pain and spasms. She was doing her home exercises. Her symptoms would worsen over the course of the day. Petitioner was not interested in surgery and Dr. Goldberg agreed since radicular pain had improved. She was referred to Dr. Pang, a physiatrist, for evaluation and treatment non-operatively for a disc herniation at L4-5. "This is all secondary to a work-related accident of 2/7/11." She was kept off work.

On 6/1/11, MercyWorks noted petitioner was referred by Dr. Goldberg to Dr. Pang for pain management as she had a left L4-5 herniation. Petitioner was offered surgery but refused at that time. She also saw Dr. Mark Cohen who diagnosed right lateral epicondylitis and administered a cortisone shot. Therapy for the elbow was ordered. Low back pain was 3 out of 10 with limited flexion and extension. Right elbow was tender over the lateral epicondyle. Diagnosis was unchanged and post traumatic lateral epicondylitis was added.

On 6/1/11, Petitioner was also seen by Dr. Cohen at Midwest Orthopedics at Rush for the right elbow. Px5. He noted her history dated back to February 7, 2011. The mechanism of injury was described. She continued to have right lateral elbow pain. She was initially sent to therapy, with minimal benefit. She has lateral elbow pain, worse during certain loading and gripping maneuvers. She was taking Vicodin and is allergic to morphine. She had no obvious swelling or deformity about the right elbow, but had limited mobility

16IWCC0805

due to pain in extension. Grip strength was diminished at 15 pounds on the right and 55 pounds on the left. She was tender over the epicondyle, with pain with resisted wrist extension. Petitioner was given an injection at her epicondyle. Therapy and Neoprene sleeve were prescribed.

On 6/17/11, Petitioner returned to Mercyworks. Pain was 3-4/10 in the midback and lower back. Right elbow pain was 3/10. The thoracic and lumbar spine was tender. The diagnosis was contusion of the midback and lower back, contusion of the right elbow post traumatic epicondylitis of the right elbow. She was to continue treatment and was off work.

On 7/5/11, Petitioner followed up with Mercyworks. She complained of stiffness in the lower back. She was in physical therapy. Diagnosis was midback and lower back contusion, right elbow contusion. She was to continue physical therapy and was off work.

On 7/5/11, Petitioner began treating with Dr. Thomas Pang at the referral of Dr. Goldberg for non-surgical low back pain. History of the accident and treatment were documented. She complained of ongoing pain, spasm that occurred to her anterior thighs and goes to her knees, resulting in a dull ache. Impression was low back pain secondary to myofascial pain with weak extensors, old L5-S1 weakness, weak core stabilization with exacerbation of symptoms after a fall in February. Dr. Pang believed "that she is neurologically intact up to L4, and is compromised from L5-S1, which had resulted in some over-use of her hamstrings to compensate, resulting in the cramps she experienced. Therapy at Ingalls was continued.

On 7/13/11, Petitioner followed up with Dr. Cohen post traumatic lateral epicondylitis of her right elbow. Px5. Petitioner reported improvement in the elbow following the prior injection. She denied any significant pain, swelling or deformity in the right elbow. It appeared she had developed some left lateral epicondylitis. Regarding her right elbow, she was advised to continue formal therapy and no use of her right arm. As of 8/2/11, she could return to work with her right arm with no restrictions. On 7/18/11, Petitioner was evaluated by Dr. Cohen for the left elbow. On 7/20/11, Petitioner was seen by Dr. Patel for her left elbow. Radiographs did not show abnormality. She wanted to proceed with a cortisone injection, which was performed on this date.

On 8/1/11, Petitioner underwent initial physical therapy evaluation at Ingalls for the low back. She was discharged on 8/29/11. Records show treatment was for right and left lateral epicondylitis and low back pains. Px6. On 8/24/11, Petitioner was re-evaluated by Dr. Cohen for right lateral epicondylitis. She reported recurrent symptoms for approximately one month. She had tenderness over her right elbow at the lateral epicondyle, and her pain worsened on wrist extension against resistance. Grip strength was 40 pounds on the right versus 75 pounds on the left. Another right elbow injection was given. Impression was recurrent right lateral epicondylitis. Follow up and light duty were ordered.

On 9/12/11, Petitioner followed up with Dr. Pang, presenting with post laminectomy syndrome and late effects of nerve root symptoms, which included L5 sensory problems and weakness on the left. She had hit a plateau despite hands-on therapy. She was amenable to trying baclofen and Norco. They discussed possible injections or a discogram. Petitioner was removed from work.

On 9/13/11, Petitioner returned to Mercyworks. She had gotten approval for intensive physical therapy for her back. Dr. Pang recommended a possible discogram. She wanted a second opinion from Dr. Cheng, an orthopedic spine specialist. Pain was 7-8/10 radiating to the left leg with spasms in the back. She had no numbness in the left leg. She had pain in the right elbow 3/10. She could not stay in one position. The thoracic and lumbar spine and elbow were tender. Diagnosis was unchanged. She was off work.

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On 9/20/11, Petitioner again followed up with Mercyworks. She had seen Dr. Pang that day who recommended that she consider a facet block, diagnostic, after which they would determine whether surgery could be avoided. After, a discogram would be considered, then IDET if positive. Petitioner was hesitant about submitting to a discogram, scared. Pain was 4/10 in the midback and lower back radiating to the left leg and back spasm. The right elbow was tender lateral epicondyle. She was to continue treatment and was off work.

On 9/21/11, Petitioner followed up with Dr. Cohen for the right elbow. She continued to report significant soreness to the lateral aspect of the elbow over the epicondyle. She reported pain with extension. She had been working on wrist curl exercises as well as using an elbow sleeve without significant improvement in symptoms. She had a right lateral epicondyle and elbow joint cortisone injection, which offered relief for about one week. Her symptoms returned. She reported tenderness to palpation over the right lateral epicondyle and significant tenderness over the common extensor tendon. She had less tenderness to palpation over the lateral aspect of the glenohumeral joint. She had full ROM of the right elbow, and full forearm rotation. Therapy was continued.

On 10/19/11, Petitioner was seen by Dr. Ali at Mercyworks. She was seen by Dr. Couri who recommended bilateral L5-T12 SEI's with Dr. Robinson at Ingalls and to continue physical therapy 2-3 times per week for 4-6 weeks. She complained of back pain 5-6/10 with occasional radicular pain, and right elbow pain. The left elbow was tender. She was to continue medication, physical therapy, treatment and was off work.

On 10/19/11, Petitioner was seen by Dr. Couri at North Shore University Health Systems. Px7. Problem list included lumbar radiculopathy at L5, left greater than right and L4-5 HNP. The diagnosis included herniated lumbar intervertebral disc, post laminectomy syndrome of the lumbar region, and lumbar radiculopathy. Petitioner complained of lower back pain radiating to the left hip and bilateral legs developed after a fall down the stairs at work. She stated her pain was made worse after the fall. Petitioner stated that prolonged sitting aggravated the lower back and leg pain. Pain was rated between 4-5 out of 10. The plan was to get x-rays of the lumbar spine for flexion and extension, get a copy of the MRI for review, a bilateral L5 TESI, remain off work, continue medication and back to physical therapy if the injection helped.

On 11/2/11, Petitioner followed up with Dr. Cohen. Petitioner reported minimal pain relief following 2 injections to the right elbow, ongoing intermittent pain, right greater than left. She was to continue conservative treatment in form of wrist curls and using an elbow sleeve. On 11/2/11, Petitioner was seen by Dr. Ali by Mercyworks who noted she was given light duty by Dr. Cohen for right lateral epicondylitis and no use of the right hand. There was no change in her complaints from 10/19/11. They were awaiting approval of physical therapy and SEI on her back. Her left elbow was positive for tenderness over the lateral epicondyle. She was to perform physical therapy, and she was off work.

On 11/23/11, Petitioner was seen by Dr. Robinson. Px7. Relevant problem list included lumbar radiculopathy left greater than right at L5, L4-5 left moderate HNP with caudally extruded fragment, L5-S1 left mild bulging disc, L3-4 mild diffuse bulging disc, lumbar spinal stenosis, L4-5 left mild foraminal stenosis and status post right L3-4, left L4-S1 hemi-laminotomies and discectomies. Diagnosis was herniated disc, post-laminectomy syndrome, lumbar radiculopathy, left foot drop, disc degeneration and lumbar spinal stenosis. The plan was to schedule the left L5 TESI as previously recommended by Dr. Couri.

On 12/14/11, Petitioner followed up with Dr. Cohen. He noted she continued to improve in the right elbow and ordered follow up. On 12/14/11, Petitioner was seen at Mercyworks. She had pain 6-7/10 in the midback and lower back radiating to the left leg with back spasms. She had no numbness in the left leg. Right

elbow pain was 3-4/10. On 12/20/11, Dr. Robinson performed and Petitioner underwent a bilateral L5 TESI. Px7.

On 1/3/12, Petitioner followed up with Dr. Robinson following the bilateral L5 TESI reporting improvement/change in symptoms. Px7. Diagnosis was unchanged. After the 12/20/11 injection, Petitioner noted significant improvement of pain, relief at about 30% on the left and 80% on the right. The pain was located in the same region but was less severe. She still had weakness on the left, and did have severe side effects with the steroid with restlessness, inability to sleep, and facial flushing. The doctor ordered physical therapy and follow up. On 1/19/12, Petitioner underwent initial physical therapy evaluation at Ingalls. Px6. Diagnosis was L4-5 left moderate HNP. On 1/25/12, Petitioner attended her final follow up evaluation with Dr. Cohen. She reported improvement on the right and she was released to work within her previous duty. She was advised to follow up as needed.

On 2/17/12, Petitioner followed up with Dr. Robinson complaining of no improvement in low back pain. She did not feel therapy at Accelerated Rehab was helpful and wanted a repeat injection. Assessment and diagnosis was unchanged. The doctor ordered a second injection and moved therapy to Ingalls. On 2/29/12, Petitioner was discharged from outpatient physical therapy at Ingalls. Px6.

On 3/1/12, Dr. Robinson performed a second bilateral L5 TESI. Px7. On 3/15/12, petitioner again followed up with Dr. Robinson. Problem list and diagnosis was unchanged. She reported 60% improvement following the second injection. She found therapy helpful and wanted another injection. Petitioner remained off of work.

On 5/7/12, Petitioner underwent and Dr. Robinson performed a third bilateral L5 TESI. On 5/23/12, Petitioner followed up once again with Dr. Robinson. Px7. Problem list and diagnosis was unchanged. Petitioner reported zero improvement from the injection and was not interested in surgery. Work hardening was ordered.

On 6/29/12, Petitioner attended final follow up with Dr. Robinson. Problem list and diagnosis were unchanged. The doctor noted inconsistencies in the recent FCE and that she had been released to sedentary-light restrictions. Petitioner reported difficulty completing work hardening. Petitioner was released per her FCE and was placed at maximum medical improvement.

On 1/31/13, Petitioner sought follow up with Dr. Robinson for her low back pain and routine psychiatric follow up. Px7. She continued to have wakens in her left greater than right lower extremity with a foot drop to the left. Additionally, she had numbness and tingling. Impression remained herniated lumbar disc. Petitioner was continued to work within the restrictions outlined in the prior FCE. Future injections were held.

Respondent then had Petitioner undergo a job search. Petitioner was able to secure employment in a hair salon and Respondent paid the proper wage differential. However, in September 2013, Respondent found Petitioner a permanent job, within Dr. Robinson's restrictions, at the Department of Finance, as a traffic enforcement technician.

Petitioner's testified her job was to sit in a cubicle and review video taken from the Respondent's numerous speed and red light camera situated through the City of Chicago. Petitioner testified that sitting for long periods tended to aggravate the pain in her low back. Petitioner also testified that standing up and walking around helped her alleviate her back pain. Petitioner testified she initially did this, but was admonished by her

supervisors that other than breaks to use the bathroom she was to remain at her cubicle. Petitioner stated that she had a quota to review 100 potential violation films per hour.

Petitioner testified that the symptoms of her ever present back pain really became elevated in the January 2015 time period, to the point where she could no longer go in to work (2/02/2015). Petitioner testified that she tried getting in to see Dr. Goldberg immediately and due to insurance coverage issues and the doctor's schedule, she could not be examined until 2/20/2015.

On 2/20/15, Petitioner returned to Dr. Goldberg. He reviewed the MRIs finding no compression and indicated she likely suffered from discogenic pain. He did not believe the perineal numbness was due to any lumbar pathology. He recommended she seek an interknit for medication regarding other etiologies and for pain management. No follow up was ordered and she was continued off work.

On 4/30/15, Petitioner was evaluated by Dr. Jesse Butler at the request of Respondent. Rx3. Dr. Butler opined that Petitioner's diagnosis was lumbar degenerative disease and that the treatment for the back has been appropriate and necessary. The doctor also stated that no further testing or treatment was necessary as related to the February 2011 work injury as any need for current treatment is related to the underlying degenerative condition and does not relate to the prior work injury.

Subsequently, on 6/25/15, Dr. Goldberg authored a report documented Petitioner's mechanism of injury and that her low back and left leg radicular pain had significantly increased. He felt the MRI showed postoperative change with a right hemilaminotomy at L3-L4 and a previous left hemilaminotomy at L4-L5, disc degeneration and loss of height was noted at L3-L4, L4-L-5, and L5-S1. Also, there was a large recurrent disc herniation with inferior migration at L4-L5. He opined the recurrent HNP was new.

The doctor's diagnosis was new herniated nucleus pulposus on the left at L4-L5 and an aggravation of degenerative disc disease at L3-L4 through L5-S1. He believed that the mechanism of her fall could result in a new disc herniation and aggravation of degenerative disc disease that predated. He also concluded that the current discogenic back pain in February 2015 is in part due to the accident of 2/7/11. The doctor stated that Petitioner did sustain a new disc herniation at L4-L5. She had pre-existing degenerative disc disease and noted she reported it did increase after an accident of February 2011. In reviewing Dr. Butler's report, he concurred with the analysis of the events but felt that some of her residual back pain at this time is in part caused by the accident of February 2011.

Petitioner's medical history prior to 2/7/11 was introduced into evidence by Respondent. Rx1. Of relevance, records show that in September 2003, petitioner underwent a right L3-4 hemilaminotomy and discectomy (with disk excision), a left L4-5 hemilaminotomy and discectomy (with disk excision and re-exploration) and a left L5-S1 hemilaminotomy (nerve root decompression) and partial facetotomy. Discharging diagnosis was HNP at L3-4 and L4-5. On 9/26/03, petitioner underwent a second surgery on an emergency basis for recurrent left HNP at L4-5. According to the record, these surgeries were in relation to a 2003 work accident with Respondent. Rx1, Rx2. Following surgeries, it appeared some residual left foot numbness and/or drop remained. In 2004, an FCE determined Petitioner's return to work capabilities to be at the light physical demand level. In September 2004, Petitioner was discharged noting some residual motor deficit at the L4-5 level. In 2005, petitioner continued to complain of bilateral leg pain. a new MRI showed scar tissue formation at L3-S1, mild spinal canal stenosis at L3-4, scar tissue attached to the left nerve roots at L4-5 and L5-S1 and scar tissue at L3-4 lying anterior to the thecal sac. Abnormal EMG showed chronic left L5 radiculopathy with evidence of reinnervation and mild left chronic S1 radiculopathy. Petitioner treated for chronic pain syndrome with chronic L5 radiculopathy and milder chronic left S1 radiculopathy. In 2005, Petitioner underwent bilateral

L5-S1 TESI. In 2006, Petitioner and Respondent proceeded to trial on all issues and Petitioner was awarded 33% MAW. Rx2.

The next medical records appear in August of 2007 for low back pain and spasms. Discogenic pain was suspected. Rx1. The next records appear in December 2009, again showing increased low back pain and spasms. MRI in 2009 showed suspected recurrent and/or residual disk herniation at L4-5 on the left compressing the thecal sac and contacting the left L5 nerve root with peripheral per-diskal inflammation. Discharging diagnosis was degenerative disc disease. On cross, Petitioner testified she remembered some of these treatment dates but not all.

John Paul Jael testified on behalf of Respondent. He is the program director in the department of finance for Respondent. He was familiar with Petitioner as working for him. He did recall verbal warning incident regarding Petitioner becoming disruptive during training. He testified he did not counsel her regarding getting up out of her seat. He testified that there is no quota that needs to be filled and that Petitioner would have been free to get up as often as needed to walk around. On cross, Jael stated workers do around 90 speed verifications per hour but that it was not a quota and more like a speed. he said the number is based on the total number of potential violations in the queue for review. He agreed that there have been meetings were he told workers they are not to roam around.

Turana Cochran-Person testified on behalf of Respondent. She is the deputy director for Respondent and is familiar with Petitioner. She testified she has never reprimanded Petitioner for walking around, has no record of same and never directed Jael to reprimand Petitioner for walking around. She agreed there is no quota but there are productivity requirements based on hours and total employees. Petitioner was recalled and testified in rebuttal. Present during both Jael's and Person's testimony, she rebutted their claims that she was not reprimanded for walking around.

FINDINGS OF FACT

ISSUE (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence that he or she suffered a disabling injury that arose out of and in the course of the claimant's employment. *Mores-Harvey v. Industrial Commission,* 345 Ill. App. 3d 1034, 804 N.E.2d 1086 (3rd Dist. 2004).

To ***arise out of*** one's employment an injury must (1) have an origin in some risk connected with or incidental to the employment or (2) be caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment. *Wal-Mart Stores, Inc. v. Indus. Comm'n,* 761 N.E.2d 768, 773, 326 Ill.App.3d 438, 443, 260 Ill.Dec.585, 590 (4th Dist. 2001). An injury that results from a hazard to which an employee would have been equally exposed apart from the employment or a risk purely personal to the employee is not compensable.

An injury is ***in the course of*** employment when it occurs within the period of employment at a place where the employee can reasonably be expected to be in the performance of his duties while he is performing those duties or something incidental thereto. *All Steel, Inc., v. Indus. Comm'n,* 221 Ill.App.3d 501, 582 N.E.2d 240, 242 (2nd Dist. 1991). Injuries sustained by an employee while in the performance of reasonably necessary acts of personal comfort may be found to have occurred in the course of his employment.

Here, evidence established that Petitioner was not on a break but was smoking outside on her way to discuss work with another worker in a location that did not appear to be one to the general public. The Arbitrator finds that Petitioner's accident arises out of her employment in that she was on her way to discuss a work-related matter with another employee and was in an area not otherwise open to the public were snow and/or slush had accumulated. The accident was in the course of that employment by the fact that Petitioner was in a place she could have expected to be in the course of her employment. Thus, the Arbitrator concludes Petitioner suffered an accident arising out of and in the course of her employment with Respondent. *Shack v. Pace Bus, Co.*, 07 IWCC 1036 (Aug. 7, 2007).

ISSUE (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds the following:

It is well settled that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. *Int'l Harvester v. Indus. Comm'n*, 46 Ill.2d 238, 263 N.E. 2d 49 (1970).

The fact that a pre-existing condition is aggravated, exacerbated, or accelerated by an accidental injury will not bar compensation so long as the employment was also a causative factor. The sole limitation to this general rule is that where the employee's health has so deteriorated that any normal daily activity is an overexertion or where the activity engaged in presents risks no greater than those to which the general public is exposed.

Here, Petitioner candidly and credibly disclosed at trial and to various medical providers that she had prior extensive lumbar spine surgery in 2003 that left her with a left foot drop and ongoing low back pain. She was apparently discharged and released to return to work for Respondent. In her most recent work accident of 2/7/11, the level implicated is at L4-5 with recurrent disc herniation, discogenic pain and aggravation of pre-existing degenerative disc disease and of pre-existing left foot drop. Respondent produced no evidence that Petitioner's health as it relates to her lumbar spine had so deteriorated that any normal daily presented a risk of injury. Respondent's doctor, Dr. Butler, found degenerative disk disease but did not feel it was related to her work accident. Dr. Goldberg, on the other hand, found that Petitioner's mechanism of injury/accident resulted in increased low back pain as well as a new large recurrent disc herniation at L4-5 and aggravation of pre-existing disc disease. Dr. Goldberg's assessment is largely echoed by many of Petitioner's other treatment records. In Petitioner's most recent visit, Dr. Goldberg noted that he compared recent MRIs and found that the L4-5 recurrent herniation had resorbed, likely leaving Petitioner with primarily discogenic pain.

The Arbitrator has considered all medical opinions and finds the opinions of Dr. Goldberg to be more persuasive, credible and explanatory than those of Dr. Butler. While Dr. Butler is not incorrect that Petitioner has some degree of degenerative disc disease, he did not explain how, if at all, it was or was not aggravated or increased by the work accident. Based on the foregoing, the Arbitrator concludes that Petitioner's pre-existing lumbar spine condition was aggravated by the work accident and that the recurrent disc herniation at L4-5, discogenic pain and aggravation of degenerative disc disease are also causally related to her work accident.

Regarding Petitioner's right elbow, the Arbitrator finds and concludes that Petitioner's right elbow lateral epicondylitis is causally related to her work accident. Petitioner's right elbow pain began immediately after the fall and pain and treatment to same is well documented in Petitioner's treatment records, which the Arbitrator adopts and relies on. Petitioner was eventually diagnosed with right elbow lateral epicondylitis

which was treated conservatively and appears to have no resolved. Based on the foregoing, the Arbitrator concludes that Petitioner's right elbow lateral epicondylitis is causally related to the 2/7/11 work accident.

In so finding Petitioner's current complaints causally related, the Arbitrator notes that this conclusion also includes Petitioner's complaints from her current accommodated work as a natural and credible consequence from the original injury. The Arbitrator finds Petitioner's testimony more credible on the difficulty and pain experienced while sitting for long periods of time in her current job compared to Jael's and Person's testimonies. Even if she could get up, Jael and Person admitted on cross that a certain level of productivity was expected from a worker like Petitioner. In considering Respondent's witness testimony, the Arbitrator is not persuaded by this testimony on any of the disputed issues. Further, the Arbitrator does not find the testimony credible on the issues discussed. It is clear from both witnesses' testimonies that workers like Petitioner are in fact expected to complete a certain amount of work per hour, whether it be called a quota or productivity. Jael and Person attempted to refute Petitioner's testimony by stating that there were no such things as quotas, instead unconvincingly describing the work as productivity numbers. Even so, it is likely that Petitioner would be expected to be seated to perform this work and that therefore, Petitioner's testimony that her seated work is causing ongoing lower back pain is credible. Aside from the issue or productivity fulfillment, the Arbitrator notes that Petitioner's low back pain, whether she felt she could get up or not, is still causally related. The low back pain is well documented in Petitioner's medical records, which were not rebutted by Jael or Person.

ISSUE (K) Prospective Medical Care

Having found in favor of Petitioner on the issue of accident and causation, the Arbitrator concludes that Petitioner's medical treatment, specifically from Dr. Goldberg, which the Arbitrator has already found to be credible, has not yet concluded that Petitioner's current condition of ill-being as it relates to the lumbar spine has not yet resolved. Dr. Goldberg has referred Petitioner to the Rush Pain Center for possible injections and a discogram. Respondent is ordered to pay all necessary, reasonable, and costs associated with treatment at the Rush Pain Center, including epidural injections. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill. App. 3d 705, 691 N.E. 2d 13, 229 Ill.Dec. 77 (2d Dist. 1997)

ISSUE (L) What TTD benefits Are In Dispute?

Having found in favor of Petitioner on the issues of accident and causation, the Arbitrator finds that Petitioner's lumbar spine condition has not reached a state of permanency. The evidence showed that when Petitioner returned to modified work with Respondent's traffic division, she experienced low back pain and began missing time from work beginning 2/02/2015. On 2/20/2015 Dr. Goldberg took Petitioner off of work until she was examined at the Rush Pain Clinic.

The parties stipulated that over the course of this case's pendency, Petitioner has received various periods of TTD and wage differential payments prior to 2/01/2015 which total $72,081.57 in TTD, $36,416.68 in TPD, and $29,535.84 in maintenance, for all of which the Respondent is allowed a credit. The amounts and time periods paid prior to 2/01/2015 are not in dispute.

Petitioner alleges accrued TTD from 2/02/2015 – 10/13/2015. The Arbitrator is not inclined to award TTD for the period between Petitioner's last date work and up until she was able to see Dr. Goldberg. It is well settled that temporary total disability requires a claimant to show not only that she did not work but that she could not work. The latter was not proven at trial. Respondent shall pay Petitioner temporary partial disability benefits of **$812.20/week** ($1,230.60 x 66% = $812.20) for **33-5/7th** weeks, commencing **2/20/2015** through **10/13/2015**, as provided in Section 8(a) of the Act.

16IWCC0805

Signature of Arbitrator

12-21-15
Date

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

William Stevens,
Petitioner,

vs.

NO: 11 WC 15009

State of Illinois
Illinois State Police,
Respondent.

16IWCC0849

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 temporary total disability and nature and extent of Petitoner's permanent partial disability and being advised of the facts and law, affirms the Decision of the Arbitrator with modifications as reflected below, which Decision is attached hereto and made a part hereof.

This matter involves a State Police Sergeant whose squad car door closed on his leg, injuring his calf and resulting in a DVT, which was treated with a relatively short course of medication. The facts were laid out in the Arbitrator's decision, and are adopted. At arbitration, the Respondent did dispute earnings and incurred medical costs, but did not review those issues, so the Arbitrator's findings are final as to those aspects of the case. The Respondent petitioned for review of the Arbitrator's findings as to TTD benefits and PPD benefits.

Relative to TTD benefits, the Arbitrator awarded one week of benefits, from July 19 through 25, 2010. Pursuant to Section 8(b), the first three days of benefits should have been deducted, as the lost time lasted less than two weeks. As such, the TTD award is reduced from seven days to four. The respondent is allowed credit for any salary continuation, disability or extended benefits paid under the Public Employee Disability Act, but shall hold the petitioner harmless under Section 8(j) for any recoupment efforts regarding same.

16IWCC0849

Regarding PPD benefits, the Arbitrator noted the petitioner did not seek prolonged or invasive treatment, but did describe ongoing symptoms and sensation in the right leg, and awarded 3% loss to the right leg in permanent disability. While the course of treatment was relatively minor, the Commission does not disagree with the Arbitrator's findings in this area, and thus affirms and adopts the Arbitrator's decision on this issue.

IT IS THEREFORE ORDERED BY THE COMMISSION that, other than as stated above, the Decision of the Arbitrator filed August 12, 2015 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of temporary total disability benefits is modified, and Respondent shall pay Petitioner four days' worth of benefits at the rate of $1,095.75 per week, for the period of July 19, 2010 through July 25, 2010 less the three-day waiting period, that being the period of temporary total incapacity from work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $669.64 per week for a period of 6.45 weeks, as provided in §8(e) of the Act, because the injuries sustained caused a 3% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the reasonable and necessary medical expenses of S687.00 as provided in §8(a) and §8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid to or on behalf of Petitioner on account of said accidental injury, but shall hold the petitioner harmless, pursuant to Section 8(j), for any recoupment efforts regarding same.

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: DEC 2 8 2016

o-12/14/16
jdl/jl
68

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STEVENS, WILLIAM
Employee/Petitioner

Case# **11WC015009**

ILLINOIS STATE POLICE-STATE OF ILLINOIS
Employer/Respondent

16IWCC0849

On 8/12/2015, 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:

0412 RIDGE & DOWNES
ZBIGNIEW BEDNARZ
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2202 ILLINOIS STATE POLICE
801 S 7TH ST
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0639 ASSISTANT ATTORNEY GENERAL
CHARLENE COPELAND
100 W. RANDOLPH 13TH FLOOR
CHICAGO, IL 60601

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

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

AUG 12 2015

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

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

William Stevens
Employee/Petitioner
v.
Illinois State Police – *State of Illinois*
Employer/Respondent

Case # **11** WC **15009**

16IWCC0849

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 **4/24/2015**. 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 **7/14/2010**, 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 $**85,468.24**; the average weekly wage was $**1,643.62**

On the date of accident, Petitioner was **42** years of age, ***married*** with **3** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has*** paid ***or will pay*** 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 $**687.00** under Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY REASONABLE AND NECESSARY CHARGES FOR MEDICAL SERVICES OF **$687.00**, AS PROVIDED IN § 8(A) AND § 8.2 OF THE ACT.

RESPONDENT SHALL PAY TO PETITIONER TTD BENEFITS FROM JULY 19, 2010 THROUGH JULY 25, 2010, OR ONE WEEK, AS PROVIDED BY § 8(B) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF **$669.64**/WEEK FOR **6.45** WEEKS, BECAUSE PETITIONER'S INJURIES CAUSED A 3 % LOSS OF USE OF HIS RIGHT LEG, AS PROVIDED BY § 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

August 12, 2015
Date

AUG 12 2015

William Stevens v. Illinois State Police
11 WC 15009

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth on April 24, 2015. Disputed issues were: ***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?

Petitioner testified at the hearing. Exhibit #1 was received in evidence.

STATEMENT OF FACTS

Petitioner, William Stevens, is a 42 year old Illinois State Police Sergeant. He has been an Illinois State Police Trooper for 22 years. His duties have included patrolling the highways, covering accidents, stopping drivers for speeding and other violations as well as correcting accident and field reports. He testified that he works 10-hour shifts.

On July 14, 2010, he was assigned to District 52, which is based out of Springfield, covering dignitaries and insuring their safety. Prior to that day, he never suffered any injuries to nor sought any medical treatment related to his right leg.

He testified that on that date he was exiting his unmarked squad car preparing to take a lunch break when the wind blew his car door shut, striking his right calf. He continued to proceed to PF Chang's restaurant for lunch. When he came into the restaurant he notified his superior, Woody Rollins, of the accident.

However, over the next few days he had increased pain and swelling in his leg. He then went to Bartlett Medical Center (X #1) on July 19, 2010. Petitioner gave a history of a car door striking his right leg. He reported that he had pain the first day with swelling developing later. He denied any history of DVT. A Doppler test performed July 19 revealed thromboses (DVTs) in his right popliteal, posterior tibial and peroneal veins. His physician, Dr. Espinosa, took him off work from July 19 through July 25, 2010. Petitioner was prescribed Coumadin and Lovenox. His Coumadin levels were checked on July 24 and August 4, 2010.

Petitioner took sick time and was off work for one week. Petitioner testified that now his right leg feels like rain is falling down it but he has never complained to his doctor about it nor has he sought any further treatment. He continues performing the same duties as before and has been able to pass a regular physical fitness test required of all state police officers.

CONCLUSIONS OF LAW

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

There was dispute that an accident involving Petitioner arose out of and in the course of Petitioner's employment by Respondent. However, Respondent disputes that the accident caused the injury complained of by Petitioner. Causation may be proved, like any other fact, by circumstantial evidence. A chain of events, depending on the facts, may be sufficient to meet that burden of proof of causation.

Here Petitioner was struck in his right leg when wind caught the door of his vehicle and struck his lower right leg. He had immediate pain in his leg. Over the following days the pain increased and he developed swelling in the leg. Petitioner sought medical care 5 days after he was injured. He was diagnosed at that time with DVTs. Petitioner testified credibly that he never had a DVT or leg injury before July 14, 2010.

Based on the circumstantial evidence established by a chain of events the Arbitrator finds that Petitioner proved that his current condition of ill-being was causally related to the accident on July 15, 2010.

G: What were Petitioner's earnings?

The Request for Hearing stipulation noted that Petitioner claimed his average weekly wage was $1,804.96. Respondent claimed Petitioner's average weekly wage was $1,643.62. Petitioner did not present evidence in support of his claimed average weekly wage. Therefore, the Arbitrator adopts Respondent's calculation of average weekly wage of $1,643.62.

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 was no genuine dispute regarding this issue. Respondent stipulated that it would pay for reasonable and necessary medical services pending the Arbitrator's ruling on causation. The Request for Hearing stipulation reflects that $687.00 of charges from Bartlett Medical Clinic is unpaid. Inasmuch as the Arbitrator found causation in favor of Petitioner the Arbitrator finds that Respondent shall pay the unpaid balance for medical care on July 14 and August 4, 2010 to Bartlett Medical Clinic, adjusted in accord with the fee schedule.

Respondent is due a credit, pursuant to § 8(j) of the Act, of $687.00 as the bill was

paid through Petitioner's group medical plan.

K: What temporary benefits are in dispute? **TTD**

Petitioner was directed by his physician to take off work from July 19 through July 25, 2010. The Arbitrator finds that Petitioner proved that he sustained total temporary disability from July 19 through July 25, 2010, 1 week. Petitioner utilized his sick-time benefits for that week he was off work. However, the evidence suggests that Petitioner, as a sworn police officer, may have been entitled to benefits under the Public Employee Disability Act, 5 ILCS 345. Even so, the Commission is not empowered by the Workers' Compensation to award benefits which Petitioner may be eligible for other than those benefits authorized by the Workers' Compensation Act.

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

Petitioner sustained DVTs to his lower leg as a result of his work accident on July 14, 2010. DVTs present a known risk of causing blood clots to form and then travel to other parts of the body. A blood thinning drug regimen is commonly undertaken to prevent formation of blood clots. That is the course of treatment, limited as it was, the Petitioner underwent. In addition, Petitioner testified credibly that he still has occasional symptoms and sensation that he did not have before the accident.

In consideration of all the evidence the Arbitrator finds that Petitioner sustained a 3 % loss of use of his right leg as a result of his work injury on July 14, 2010.

Steven J. Fruth, Arbitrator

August 12, 2015

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth Ranes,
Petitioner,
vs.

NO: 11WC 17662
16IWCC0801

Galesburg Cottage 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 accident, causal connection, temporary total disability, permanent partial disability, respondent credit, medicaland 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 17, 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:
o120716 DEC 14 2016
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

RAMES, ELIZABETH
Employee/Petitioner

Case# **11WC017662**

GALESBURG COTTAGE HOSPITAL
Employer/Respondent

16IWCC0801

On 9/17/2015, 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 0.26% 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

0560 WIEDNER & McAULIFFE LTD
KHRISTOPHER S DUNARD
INE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

16IWCC0801

STATE OF ILLINOIS)
)SS.
COUNTY OF Rock Island)

☐ 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

Elizabeth Ranes
Employee/Petitioner
v.

Galesburg Cottage Hospital
Employer/Respondent

Case # 11WC 17662

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 **Rock Island on August 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

FINDINGS

On **5/12/2010** 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 **$15,280.92**; the average weekly wage was **$293.85**.

On the date of accident, Petitioner was **41** 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 **$13,066.77** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and $0.00 for other benefits, for a total credit of $0.

Respondent is entitled to a credit of $**32,573.74** under Section 8(j) of the Act.

ORDER

THE RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $237.67/WEEK FOR 25 WEEKS, BECAUSE THE INJURIES SUSTAINED CAUSED 5% LOSS OF A PERSON AS A WHOLE, AS PROVIDED IN SECTION 8(D)2 OF THE ACT.

RESPONDENT IS RESPONSIBLE FOR THE MEDICAL CLAIMED BY THE PETITIONER IN PET. EXHIBIT 13 TO THE EXTENT OF TREATMENT THROUGH AUGUST 25, 2011, THE DATE OF MAXIMUM MEDICAL IMPROVEMENT, PURSUANT TO THE FEE SCHEDULE.

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.

D. D. McCarthy
Signature of Arbitrator

Sept. 11, 2015
Date

SEP 17 2015

Elizabeth Raines v Galesburg Cottage Hospital
11 WC 17662

STATEMENT OF FACTS

The Petitioner, Elizabeth Raines, testified that she was employed by the Respondent, Galesburg Cottage Hospital, on May 12, 2010. Her position with the Respondent was a certified nurse's aide. Her job duties included lifting, helping patients to the bathroom and assisting them with their daily living. On May 12, 2010, the Petitioner and another nurse were attempting to pull up a patient from a bed. They counted to three and the Petitioner began to pick up the patient. The person helping the Petitioner did not. At that point, she noticed a sharp pain in her lower back and left SI joint area. The Petitioner attempted to work through the pain but was unable to do so. Following the accident, the Petitioner informed her nurse supervisor of the work accident and an injury form was filled out. On May 27, 2010, she saw her primary care doctor, Dr. Hershkowitz at Galesburg Clinic. The medical records from that visit indicated that the Petitioner injured herself pulling a patient up using a sheet. Further, she indicated that she had chronic low back pain and had a previous MRI and epidural steroid injections. His examination revealed pain in the lower back at the midline, and just to the right and left of the spine. She also had left leg pain with the straight leg raise test and with dorsiflexion of the left foot. The diagnosis was lumbar strain with radiculitis. The doctor's records indicated that he was going to seek workers' compensation approval for an MRI and for physical therapy.

The Petitioner further testified and submitted records indicating that she had problems and treatment on her back prior to the date of accident. Initially, she testified that her treatment was in 2002. Later she said that she had treatment through 2009. The Petitioner indicated that she had no low back pain from 2010 until the date of this accident nor did she miss any work from 2010 up to the date of accident.

The Petitioner underwent a lumbar MRI on June 16, 2010. The MRI indicated that she had mild bulging disc at the L5-S1 and L2-L3 area. Further, the MRI indicated that the disc at the L5, S1 was displacing the right nerve root. The Petitioner returned to Dr. Hershkowitz on July 22, 2010 with persistent back and left leg pain. She requested an epidural steroid injection as she had received some with success over the past couple of years. The doctor agreed, and she underwent epidural steroid injections on August 2, 2010 and August 23, 2010 from Dr. Afram of Pain Management Associates. (PX 2, 5)

Petitioner had been working for the Respondent since her alleged accident on a light duty basis, but testified that she was laid off on August 27, 2010. She has not worked for the Respondent since that date.

On September 21, 2010, Dr. Hershkowitz's records indicated that the Petitioner continued to have low back pain going into the left leg. He ordered an EMG. This occurred on October 22, 2010. Dr. Nickolov, who administered the test, interpreted the findings as indicating a chronic L4-L5 radiculopathy on the left. Dr. Hershkowitz, after reading the nerve conduction study, recommended another epidural steroid injection. This occurred on November 5, 2010. On November 22, 2010, the Petitioner returned to see her doctor stating that her back was getting worse. The doctor than referred the Petitioner to see a neurosurgeon, Dr. Fassett. Further, he ordered an FCE to see if there is any malingering.

The Petitioner was examined by Dr. Fassett on January 6, 2011. Dr. Fassett reviewed the MRI from June 16, 2010 and the EMG. He noted that while the EMG study suggested some L4-5 involvement, the MRI did not reveal any evidence of compression upon those nerve roots. He did not feel surgery was indicated. He recommended weight loss, chiropractic therapy and acupuncture and also suggested referral to Dr. Feather, a pain specialist, for consideration of a dorsal column stimulator trial.

The Petitioner underwent a functional capacity evaluation on February 16, 2011. It indicated that she gave maximum effort and there was no indication of symptom magnification. The evaluation indicated that she should not lift weight substantially in excess of 50 pounds. It was also noted that her official job description indicates that she must be able to lift at least 50 pounds. She said that lifting up to 100 pounds might be required, though she would have help using a Hoyer lift and co-workers. (PX 11)

Following the functional capacity evaluation, the Petitioner, once again, saw her primary care doctor who also discussed the stimulator. He indicated that the Petitioner should see Dr. Feather as well.

On April 11, 2011, the Petitioner saw Dr. Feather, who was associated with the Illinois Regional Pain Institute. Dr. Feather noted that the Petitioner had pain on the left side. His assessment, following the examination, was sacroiliitis on the right, fibromyalgia and radiculopathy at the left L4-L5, along with degenerative disc disease. He recommended an SI joint injection to alleviate problems in that area as well as a L4-L5 transforaminal injection. He further indicated that he would likely recommend physical therapy and work hardening. The medical records indicated that the Petitioner's stimulator trial was to see if the L4-L5 area was the primary source of the pain.

The Petitioner underwent two injections. At her follow-up visit on May 11, 2011, the Petitioner reported a 50% relief of the low back pain primarily on the left but no relief of the leg pain.

At the Petitioner's follow up at the Illinois Regional Pain Institute on July 25, 2011, the Petitioner reported no numbness but pain into the thigh on the left. She noted that her low back pain had improved with the greatest pain now being in the left knee. The doctor's examination concentrated on her left knee, as she had reported pain at only level 2, with no numbness into the left thigh. At the petitioner's request, he gave her a referral to Dr. Kube regarding the sacroiliac joint. (PX 4)

The Petitioner was examined by Dr. Kube on August 8, 2011. Dr. Kube ordered work conditioning as the Petitioner was doing alright following the SI joint injection. At this time, the Petitioner was still undergoing physical therapy which had started on May 16, 2011. She continued with physical therapy until August 4, 2011, when it was discontinued. At that time, the therapist's records indicated that the Petitioner had no pain in the SI joint area but continued physical therapy through

August 25, 2011. The Petitioner attempted to return to work at the facility in Galesburg after she was discharged from therapy.

On September 20, 2011, the Petitioner was examined by Dr. Lange, an orthopedic surgeon, at the request of the Respondent. Dr. Lange testified by deposition. Initially, he noted that the Petitioner reported that she had prior lumbar problems ending in 2003 but records of treatment showed that in fact she had problems with extensive diagnostic testing in the lower back and left side in 2009. (RX 5 at 19) His examination was basically negative, and his diagnosis was residual subjective low back pain with vague, mild left lower extremity symptoms. He did not feel her condition at the time of the exam was causally related to her accident. He felt she reached a point of maximum medical improvement in February 2012 when she had her FCE. (Id at 37)

The Petitioner followed up with Dr. Kube on October 13, 2011, stating her SI joint pain had returned. He ordered X-rays and a CT scan. On October 18, 2011, the CT scan revealed mild osteoarthritis at the SI joint. Dr. Kube reviewed the CT scan and discussed with the Petitioner possible treatment options. This included a fusion versus an ablation procedure.

On October 31, 2011, the Petitioner, once again, returned to see Dr. Feathers. She went there for medication. Dr. Feather's records indicate that the Petitioner was being seen by Dr. Kube for a disorder of the sacrum and for left lower extremity pain being increased.

On June 4, 2012, the Petitioner underwent a left SI injection at the request of Dr. Kube. She reported that the injection kicked in two days later. Dr. Kube stated that it was not consistent with an SI joint dysfunction and he recommended physical therapy. The Petitioner began physical therapy at Azer Clinic on June 12, 2012. She continued through therapy through July 9, 2012. The Petitioner last saw Dr. Kube on August 18, 2012. He ordered a work conditioning and a functional capacity evaluation. The Respondent did not authorize either.

Dr. Kube also testified by deposition. He said that he initially thought the Petitioner's symptoms were related to an SI joint problem on the left, and in fact initially recommended surgery for that condition. However, he changed his diagnosis after the injection he performed did not provide immediate relief. He concluded that she had back pain, recommending another FCE and/ or work hardening. (PX 12 at 19) He testified that her condition was causally related to her accident because of the contemporaneous onset of symptoms, but he acknowledged that he was unaware that she had any pre-existing symptoms after 2002. (Id at 27, 28, 37)

The Petitioner indicated at the hearing that she works as a CAN on a full time basis at Seminary Manor . She indicated that she still has persistent pain while lifting and walking. She also has pain when sitting or standing for long periods of time. She said the pain or pressure is present over her lower left side. She continues to take medication for the pain.

In support of the Arbitrator's decision relating to:

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

The Petitioner testified clearly that she injured her low back while attempting to lift a patient on May 12, 2010. She testified without rebuttal that she reported the accident immediately and filled out an accident report. While she had a long history of prior lower back treatment, the last record of a doctor's examination was October 23, 2009, at which time she had back pain with rotational motion of the trunk. She was at that time on Oxycontin for back pain, and she admitted that she was trying to stop the medication at the time of her accident. Dr. Hershkowitz' first office note following the accident on May 27, 2010 contained evidence consistent with a recent event. She gave a history consistent with her trial testimony, and had positive exam findings, along with a doctor's diagnosis of a lumbar strain. While the Arbitrator is bothered by the Petitioner's failure to tell her treating and examining physicians the fact that she had symptoms and treatment thorough 2009, her testimony concerning accident has sufficient corroboration to satisfy her burden of proof on the issue.

(F) Is Petitioner's current condition of ill-being causally related to the injury and what medical treatment is the Respondent's responsibility?

The evidence shows that the Petitioner suffered a lumbar strain with some temporary radiculopathy on the left side as a result of her accident. Dr. Hershkowitz made that diagnosis initially, and none of the diagnostic testing which followed established any other conditions of ill being. The initial MRI showed disc problems affecting the uninvolved right side, and Drs. Herskowitz, Fassett, Lange and Kube all said that there was no evidence of nerve root compression on the left. Dr. Kube initially suggested a left SI joint problem, but it was ruled out after her atypical response to his injection. She had consistent treatment from her initial visit through her physical therapy at IMPR, which ended on August 25, 2011. On that date she reported she was returning to work, had normal range of motion and strength and was able to perform all activities of daily living. (PX 10) The Arbitrator feels that would be her date of MMI. The Arbitrator further feels that the treatment by Dr. Kube was not reasonably necessary to cure or relieve her from the effects of her accidental injury, and is not the Respondent's responsibility. As stated above, she saw Dr. Kube at her own request through Dr. Feather. His treatment began only one week after she was found to be basically asymptomatic by her physical therapist. The Arbitrator believes her current complaints of pain are consistent with the diagnosis referenced above. The Respondent is responsible for the medical bills through the date of MMI only. The remaining bills include medication which she was taking prior to her accident and charges generated by Dr. Kube.

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

As stated above, the Petitioner sustained a lumbar strain with some left radiculopathy as a result of her accident. While she continues to have some symptoms of pain, her last therapy note of August 25, 2011 was relatively benign. The Arbitrator awards 5 % Person As A Whole in permanency.

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

Kent Burdine,
Petitioner,

vs. NO. 11 WC 18897

University of Illinois at Chicago,
Respondent.

ORDER

This matter comes before the Commission on Petitioner's Petition for Penalties, Attorneys' Fees and Costs as well as Respondent's Motion to Dismiss Petitioner's Petition for Penalties, Attorneys' Fees and Costs. After due consideration, the Commission denies Petitioner's Petition for Penalties, Attorneys' Fees and Costs and grants Respondent's Motion to Dismiss Petitioner's Petition for Penalties, Attorneys' Fees and Costs for the reasons set forth below.

1. Petitioner filed an Application for Adjustment of Claim on May 16, 2011 which listed a date of accident of April 2, 2011 and alleged injuries to his right arm/shoulder while pushing patients at work. The claim was initially assigned to Arbitrator Pulia, but was subsequently re-assigned to Arbitrator Carlson.

2. Arbitration hearing was held on July 2, 2015. In his Decision filed August 28, 2015, Arbitrator Carlson found that Petitioner sustained accidental injuries arising out of and in the course of his employment on April 2, 2011 and that Petitioner's condition of ill-being was causally related to that accident. The Arbitrator found that Petitioner was temporarily totally disabled from April 6, 2011 through July 2, 2015, date of the arbitration hearing, a period of 221-27 weeks at $467.03 per week. The Arbitrator awarded medical expenses contained in Px5 (no amount stated). The Arbitrator found Petitioner entitled to prospective medical care and ordered Respondent to pay for all reasonable and necessary charges incurred with a surgical evaluation of Petitioner's right shoulder to assess his current need for surgery or other viable treatment options.

3. Respondent filed a Petition for Review on September 14, 2015. Oral arguments were held on March 24, 2016. In its Decision and Opinion on Review dated May 17, 2016, the Commission affirmed and adopted the Arbitrator's Decision.

4. On July 8, 2016, Petitioner's attorney filed Petitioner's Petition for Penalties, Attorneys' Fees and Costs. In his Petition, Petitioner's attorney noted the above and indicated that Respondent had received legally sufficient notice of the Commission's Decision and Opinion on

Review and had failed to file a timely appeal to the Circuit Court. Petitioner's attorney also indicated that Respondent had also failed, neglected and refused without good cause to pay the award. Petitioner's attorney requested §19(l) penalties of $30.00 per day, §19(k) penalties of 50% of the total TTD benefits due and unpaid medical expenses and §16 attorneys' fees and costs. The matter was set to be heard on September 28, 2016.

5. On August 24, 2016, Respondent filed its Motion to Dismiss Petitioner's Petition for Penalties, Attorneys' Fees and Costs. In its Motion, Respondent's attorney noted the above and indicated that on July 19, 2016, a copy of the Commission's Decision and Opinion on Review was received. Respondent's attorney attached a copy of a signed receipt dated July 19, 2016 indicating the Commission's Decision and Opinion on Review had been received on that date. Respondent's attorney also noted that on August 3, 2016, a written request to the clerk of the circuit court to issue summons had been filed. Respondent's attorney attached a copy of the written request for summons. A judicial review with the circuit court of Cook County was timely filed. Respondent's attorney argued that since the Commission's Decision and Opinion on Review is being appealed and thus payment is not due, until the Decision becomes final, it cannot be said that Respondent has refused to pay the award. Respondent's attorney requested Petitioner's Petition for Penalties, Attorneys' Fees and Costs be denied.

6. A hearing on these matters was held before Commissioner Basurto on September 28, 2016. Petitioner's attorney presented Petitioner's Petition for Penalties, Attorneys' Fees and Costs and it was admitted into evidence as CommX#1. Respondent's Motion to Dismiss Petitioner's Petition for Penalties, Attorneys' Fees and Costs was admitted into evidence as CommX#2. Petitioner's attorney indicated that the Commission's Decision and Opinion on Review was dated May 17, 2016 and subsequent thereto, he was contacted by someone at the Commission and advised he could come to the Commission and pick up the Decision, signing a receipt for same. Petitioner's attorney stated he then waited for two and a half months and did not receive payment of the award or notification of an appeal to the Circuit Court by Respondent, so he filed Petitioner's Petition for Penalties, Attorneys' Fees and Costs. Petitioner's attorney argued that the 20 day period to file an appeal of the Commission's Decision with the Circuit Court began to run when Respondent received notice of the decision of the Commission, §19(f)(1). Petitioner's attorney did not know why Respondent would not get notice at the same time he did. Petitioner's attorney acknowledged that if Respondent's attorney was not given notice of the Decision of the Commission at the same time he was, then Respondent's Motion to Dismiss is well taken.

Respondent's attorney indicated that she had received Petitioner's Petition for Penalties, Attorneys' Fees and Costs and after reviewing same, realized she had not received the Commission's Decision and Opinion on Review. Respondent's attorney did not receive a phone call or email from anyone that the Decision and Opinion on Review was available. Respondent's attorney indicated she contacted Commissioner Basurto's administrative assistant and then came to the Commission the next day on July 19, 2016 and obtained a copy of the Decision and Opinion on Review, signing a receipt for same.

When a delay in paying compensation has occurred, the employer bears the burden of justifying the delay. *Board of Education of City of Chicago v. Industrial Commission*, 93 Ill.2d 1, 9, 442 N.E.2d 861, 865 (1982); *Smith v. Industrial Commission*, 170 Ill.App.3d 626, 632, 525 N.E.2d 81, 85 (1988). Whether the employer's conduct justifies the imposition of penalties is to be considered in terms of reasonableness and is a factual question for the Commission. *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 297, 302, 412 N.E.2d 468, 470 (1980); *Boker v. Industrial Commission*, 141 Ill.App.3d 51, 57, 489 N.E.2d 913, 918 (1986).

The Commission finds that there was no delay in Respondent paying the award as no award was due and owing because an appeal of the Decision and Opinion on Review was timely filed by Respondent. §19(f)(1) states, "A proceeding for review (appeal) shall be commenced within 20 days of the receipt of notice of the decision of the Commission." Here, Respondent's attorney received notice of the decision of the Commission on July 18, 2016, when she contacted the Commission and was informed that the Decision and Opinion on Review could be obtained by her. Respondent's attorney obtained the Decision and Opinion on Review the following day on July 19, 2016. There is no evidence presented that Respondent's attorney received notice of the Decision and Opinion on Review prior to July 18, 2016. On August 3, 2016, a written request to the clerk of the circuit court to issue summons had been filed and this was within the 20 day period. Therefore, no award is owed pending appeal and there has been no delay in payment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties, Attorneys' Fees and Costs is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Petitioner's Petition for Penalties, Attorneys' Fees and Costs is hereby granted.

DATED: DEC 16 2016
MB/maw
r09/28/16
43

Mario Basurto

Stephen J. Mathis

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ireneusz Grzelak,
Petitioner,

v. Case No. 11 WC 19322

Unlimited Maintenance Corp.,
Respondent.

ORDER

This matter comes before the Commission on a Petition for Attorneys' Fees pursuant to §16 of the Act filed by Petitioner's former attorney, William B. Meyers, of the firm of William B. Meyers & Associates. Petitioner's current attorney, Ursula B. Babicz, of the firm of Ursula B. Babicz & Associates, P.C., objected to the matter being heard by the Commission arguing that the Commission lacked subject matter jurisdiction. Due notice having been given, this cause came before Commissioner Thomas J. Tyrrell for hearing on August 11, 2016, September 22, 2016 and October 10, 2016 in Chicago, Illinois. Following a review of the record and in consideration of the relevant case law, the Commission overrules the objection and finds that it has jurisdiction to decide the fee dispute in question, for the reasons set forth below.

1. The record shows that an "Application for Adjustment of Claim" and "Attorney Representation Agreement" was filed in this matter on 5/18/11. These documents reflect Ursula B. Babicz as Petitioner's attorney on behalf of the law firm of William B. Meyers & Associates.
2. On 10/6/15 a "Stipulation to Substitute Attorneys" was filed with the Commission showing Attorney Meyers and his firm as withdrawing and Attorney Babicz and the firm of Ursula B. Babicz & Associates, PC entering her appearance as attorney of record. Attorney Meyers subsequently filed a Petition for Fees pursuant to §16 of the Act.
3. A Lump Sum Settlement Agreement was eventually approved in this matter by Arbitrator Fruth on 2/29/16. Petitioner's attorney is shown as Attorney Babicz and her law firm on the agreement in question. The agreement also shows that the parties agreed the fee petition will be resolved after settlement contract approval.

4. Attorney Meyers filed a "Notice of Motion and Order" requesting a hearing on his Petition for Attorneys' Fees on 6/9/16. Attorney Babicz filed a "Response to the Petition for Attorney's Fees" on 8/26/16 arguing, in part, that "... pursuant to *Ferris, Thompson & Zweig, Ltd. V. Esposito*, and the Act, the forum with the proper jurisdiction and the authority to hear a breach of contract dispute concerning referral fees between Meyers firm, and former associate, Ursula Babicz, shall be the Illinois Circuit Court of Cook County, where an action has already been pending."
5. On 9/22/16 a hearing was held on the matter before Commissioner Tyrrell. Subsequent hearings were held on 10/12/16 and 11/10/16. The parties were thereupon informed that the matter would be taken under advisement and that an appealable order would issue on the question of whether the Commission had jurisdiction to hear the fee dispute. The Commissioner agreed to provide an appealable order based on the mutual request of the parties and in the interest of judicial economy, given the multiple fee petitions pending before the Commission and circuit court involving the same attorneys herein.

Based on the above, and the record taken as a whole, the Commission finds that it has subject matter over the parties to decide the question of the division of attorneys' fees in this case.

§5(a) invests exclusive jurisdiction with the Commission to determine damages for employees covered under and subject to the Act. With respect to disputes as to attorneys' fees, §16a(j) provides that:

> "***Any and all disputes regarding attorneys' fees***, whether such disputes relate to which one or more attorneys represents the claimant or claimants or is entitled to the attorneys' fees, or a ***division of attorneys' fees*** where the claimant or claimants are or have been represented by more than one attorney, or other disputes concerning attorneys' fees or contracts for attorneys' fees, ***shall be heard and determined by the Commission*** after reasonable notice to all interested parties and attorneys." (Emphasis added).

Attorney Babicz notes that she and Attorney Meyers entered into a written referral fee agreement in 2009 that was later verbally modified as to the percentage of attorney fees. She argues that the current fee dispute can only be characterized as a breach of that referral agreement, and as such would be properly heard before the circuit court, citing *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 4 N.E.3d 1126, 378 Ill.Dec. 754 (2nd Dist. 2014).

The Commission disagrees. The Commission notes that while the fee dispute in *Ferris, Thompson & Zweig, Ltd.*, supra, did indeed involve a referral agreement, it did not involve two (2) practicing workers' compensation attorneys and the division of fees based on "services" performed in relation to the workers' compensation claim itself. Instead, the court in *Ferris, Thompson & Zweig, Ltd.* essentially viewed the dispute as a matter of contract interpretation better suited for the circuit court. Here, the Commission's unique expertise in resolving workers' compensation disputes speaks to

the fact that jurisdiction properly lies with the Commission, and not in the circuit court, on questions of the division of fees for "services" provided in relation to the resolution of the claim itself, irrespective of the existence of any referral agreement.

Accordingly, the Commission finds that it retains jurisdiction to decide the division of fees in this case, and Attorney Babicz's objection to same is hereby overruled. As a result, Attorney Babicz's request to dismiss the fee petition in question is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Attorney Babicz's request to dismiss the aforementioned fee petition for lack of subject matter jurisdiction is hereby 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: DEC 1 - 2016

r-11/10/16
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	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FILADELFA JAIMES,

Petitioner,

vs. NO. 11 WC 21364

FRESH START BAKERIES,

16IWCC0794

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 of 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 notes that Petitioner has demonstrated by a preponderance of the evidence that she sustained a permanent, functionally disabling injury to both her left and right shoulders. The medical evidence supports that Petitioner's left shoulder became symptomatic within weeks of the surgery performed by Dr. Bush-Joseph to treat the direct work injury to Petitioner's right shoulder. The increased post-operative reliance by Petitioner on her left upper extremity in her activities of daily living combined with necessary physical therapy that worked both her right and left shoulders increased Petitioner's symptomatology in her left shoulder.

The medical records in evidence reflect that Petitioner's left shoulder pain has been an ongoing problem for years. The lack of success in surgical treatment of Petitioner's right shoulder has led to reluctance by Petitioner's physician to treat Petitioner's left shoulder other than symptomatically and conservatively. Functionally, both of the Petitioner's shoulders are now equally impaired following the work injury and subsequent treatment. The Commission finds that Petitioner has thus sustained a loss of 30% of the person as a whole

16IWCC0794

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $330.00 per week for a period of 9-1/7 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 $330.00 per week for a further period of 150 weeks, as provided in §8(d) 2 of the Act, for the reason that the injuries sustained caused the loss of 30% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $251.80 for medical expenses under §8(a) and 8.2 of the Act.

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

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

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: DEC 13 2016
d-11-3-16
SM/msb
44

Stephen Mathis

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

JAIMES, FILADELFA
Employee/Petitioner

Case# **11WC021364**

16IWCC0794

FRESH START BAKERIES
Employer/Respondent

On 4/13/2016, 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 0.35% 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:

4642 O'CONNOR & NAKOS
MATT WALKER
120 N LASALLE ST 35TH FL
CHICAGO, IL 60602

0532 HOLECEK & ASSOCIATES
FRED NORMAN
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

16IWCC0794

☐	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

FILADELFA JAIMES
Employee/Petitioner

Case #11 WC 21364

V.

FRESH START BAKERIES
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 March 30, 2016. After reviewing all of the issues, the stipulations of the parties and the evidence, it is hereby found and ordered as follows:

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 January 19, 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.
- On this date, the petitioner sustained 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 $26,062.40; the average weekly wage was $501.20.
- At the time of injury, the petitioner was 38 years of age, married with three children under 18.
- The respondent agreed to pay the balance bill of Midwest Orthro at Rush up to $251.80 and only pursuant to the fee schedule or negotiated rate.
- The petitioner agreed that the respondent paid $3,007.17 in temporary total disability benefits.
- The respondent agreed that the petitioner is entitled to temporary total disability benefits for 9-1/7 weeks, from September 12, 2011, through November 14, 2011.

ORDER:

- The respondent shall pay the petitioner the sum of $330.00/week for a further period of 100 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 20% of the person as a whole for the injury to her right arm.

- The respondent shall pay the petitioner compensation that has accrued from January 19, 2011, through March 30, 2016, 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.

Robert E. Williams

Signature of Arbitrator

April 13, 2016

Date

APR 13 2016

FINDINGS OF FACTS:

The petitioner, a machine operator, sustained a right shoulder injury while making bread on January 19, 2011. The petitioner received immediate treatment at Concentra Medical Centers for a right shoulder strain. Physical therapy and work restrictions were prescribed. At follow-ups through March 1st, bicipital tenosynovitis and then cervical strain were the additional diagnoses. On March 11th, Dr. Giannoulias at Concentra noted that the petitioner's duties required her to lift, push and pull bread a lot overhead. His diagnosis was shoulder impingement. He gave the petitioner an injection into her right shoulder and prescribed therapy. An MRI on March 31st revealed supraspinatus tendinopathy with a superimposed small partial thickness bursal surface tear in the far anterior fibers of the distal supraspinatus tendon, an interstitial tear/intramuscular ganglion cyst in the infraspinatus at the myotendinous junction with an associated small ganglion cyst along the superior margin of the proximal infraspinatus tendon, mild degenerative changes at the acromioclavicular joint and subacromial/subdeltoid bursal inflammation. On April 8th, Dr. Giannoulias opined that the MRI revealed a partial-thickness rotator cuff tear and gave the petitioner a second shoulder injection. Dr. Erling Ho at Orthopedic Associates of Riverside saw the petitioner on May 6th and diagnosed right shoulder pain secondary to a high-grade partial-thickness tear. Dr. Ho recommended surgery and imposed restrictions of no lifting greater than five pounds and no over-the-shoulder work.

The petitioner saw Dr. Charles Bush-Joseph of Midwest Orthopedics at Rush on August 16, 2011, who also recommended surgery. On September 12th, the petitioner had a right shoulder arthroscopic debridement, subacromial decompression and bursectomy.

The petitioner began post-op follow-ups and therapy on September 20th. On October 4th, the petitioner reported left shoulder symptoms, for which therapy was started. On October 25th, Dr. Bush-Joseph gave the petitioner a subacromial injection into her right shoulder. A right shoulder MRI on December 29th revealed a high-grade partial-thickness articular surface tear with mild superimposed tendinopathy of the supraspinatus tendon, moderate infraspinatus tendinopathy, moderate subacromial/subdeltoid bursitis and mild osteoarthritic changes at the acromioclavicular joint. On January 17, 2012, Dr. Bush-Joseph opined that the petitioner was at MMI. An FCE on February 9th demonstrated physical capabilities in the light-duty category. On February 15th, Dr. Bush-Joseph opined that the petitioner was unable to return to her previous work duties and was restricted to light duty per the FCE. On February 21st, Dr. Bush-Joseph opined that the petitioner's symptoms were consistent with rotator cuff tendinosis and noted that her permanent restrictions were no lifting in excess of 20 pounds and no frequent lifting and carrying greater than 10 pounds.

On July 3, 2012, the petitioner reported continued bilateral shoulder symptoms of difficulties with overhead activities, pain in her scapulothoracic areas and other symptoms. Dr. Bush-Joseph noted left impingement symptoms and bilateral scapulothoracic dysfunction with painful trigger points and snapping scapula of the left shoulder. Dr. Bush-Joseph opined that the petitioner had not benefited from surgery and injections in the right shoulder and was hesitant to proceed with surgery for her left shoulder. Dr. Bush-Joseph prescribed physical therapy, medication and a home exercise program. On April 2, 2013, Dr. Bush-Joseph reexamined the petitioner at the request of the respondent. The petitioner had full range of motion of her shoulders, moderate diffuse

tenderness over the anterolateral acromion, vague rotator cuff snapping but no instability and pain-related weakness to forward elevation and abduction. The doctor reiterated the petitioner's prior permanent restrictions.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of daily bilateral shoulder pain. She takes Ibuprofen three times a day for her pain. She has difficulty reaching overhead and sleeping. Her sleep is adversely affected by the pain in her bilateral shoulders. Her bilateral shoulder symptoms interfere with her daily chores and personal care. She has permanent lifting and carrying restrictions for her right arm and is precluded from repetitive overhead activities.

The respondent shall pay the petitioner the sum of $330.00/week for a further period of 100 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 20% of the person as a whole for the injury to her right shoulder.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leigh Anne Rosich,
Petitioner,

vs.

NO: 11 WC 28220

16IWCC0779

State of Illinois, Department of Human Services,
Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Pulia finding Petitioner sustained an accidental injury arising out of and in the course of her employment on May 26, 2010. As a result, Petitioner was temporarily totally disabled from September 22, 2011 through October 10, 2011 for 2-6/7 weeks, is entitled to all reasonable and necessary medical expenses related to the bilateral hands and right arm from May 6, 2010 (sic) through November 7, 2011 and Petitioner permanently lost 12.5% of the use of her right hand, 5% loss of use of her left hand and 12.5% use of the right arm. Pursuant to the Arbitrator's order language, Respondent shall receive a credit of $19,305.20 for temporary total disability benefits that were already paid. The issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of her employment on May 26, 2010, whether there is a causal relationship between the alleged May 26, 2010 work accident and Petitioner's present condition of ill-being, and if so, the necessity of the medical expenses 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 she sustained an accidental injury arising out of and in the course of her employment on May 26, 2010 and Petitioner further failed to prove her current condition of ill-being is causally related to the alleged May 26, 2010 work accident, for the reasons set forth below.

16IWCC0779

1. Petitioner, a 42 year old right-handed caseworker, testified she started with Respondent on February 4, 1998 as a public-aid specialist (now titled human service caseworker). Her job duties consist of determining initial and ongoing eligibility for people on public assistance programs and at one time she also dealt with long term care and supportive living facilities. She performs her job duties by interviewing applicants in person or on the telephone and reviewing their eligibility by looking at their income and assets. She then entered everything that is asked into the computer. She generally imputed the information into the computer during the interview. They used to have to provide monthly reports for the SNAP benefits/food stamps. The reporting periods were changed to quarterly, semi-annual and now are moving to annual. They would also process any changes in the computer. In addition to the computer, she used copy and fax machines. At one time, they performed filing but now they are paperless. Her daily hours are 7.5 hours a day and 37.5 hours a week. She has a 30 minute lunch and two 15 minute breaks. On a typical job she would sign into various computer systems. She would then process applications or redeterminations at her desk. If a new application came in and it was her turn, she would then take the new applicant's information. In determining ongoing eligibility, she would certify their SNAP and Medicaid benefits for an additional time period by entering any changes into the computer. In re-determining eligibility she would review the information with the recipient who lived in the home and make the necessary changes. She would review the income, medical expenses and housing and enter any changes into the computer. Most of the time, she typed the information into the computer during the interview. If she was hurried, she would write down notes and enter the notes into the computer at a later time. In typing, they would type a narrative and write a lot about the client's life story. Until recently the majority of her caseload was TANF claims that could be several typed pages long. The TANF assessments are also single spaced. On her desk was her telephone, computer, two monitors a keyboard and a mouse. She would estimate that she typed 70% of her day. During the other 30% of the day, she would talk on the telephone with clients, perform filing and copying. The amount of time she types has decreased since 1998. She agreed her typing was intermittent. At present, they have a system where there is not as much typing. The process is more one of clicking the mouse to drop down the menus. They had the new system for 2-3 years now.

2. Petitioner testified that while she performed her job duties, her hands/wrists and later on her right elbow would ache. She started noticing these problems around 2010. It would cause her to wake up in the middle of the night. It got to the point where it was happening more and more. When she was off for a weekend she did not have as many problems. She saw Dr. Day in April of 2010 and he referred her to Dr. Barnhart who she saw on May 26, 2010, which is the date of accident she placed on her Application for Adjustment of Claim. Dr. Barnhart asked her what she did for a living and they talked about it.

3. Katy McCance testified she is a retired Caseworker 4. (It was the different title when she held the position but it is the same position now). She performed this job for 19 years. In

1999, she became a human service case worker and local office administrator. She worked with Petitioner in 2010. The human service case worker/public aid worker's role is to interpret the policy, explain it to residents, determine their eligibility and aid anyone that is applying for assistance. During the work day, the case workers handle questions, work with customers, answer telephone calls, see people in person and perform paperwork. This is in addition to entering items into the computer. She did not ask the workers to keep track of the number of people they talked to, but every time the caseworkers had customer contact they were supposed to document what occurred. Their narratives could range from three words to a page. She testified that almost everything is on the computer now. She would estimate that caseworkers would spend at least 50% of their day documenting everything on the computer. It would be tough for her to disagree with Petitioner's statement that she typed approximately 70% of the time. She knows that caseworkers were on the phone a lot and they were not typing the whole hour at a time. The discussions and documentation caseworkers performed was intermingled. Depending on the day, it is possible that caseworkers could spend 70% of their time typing. However, she still believes that on average the caseworkers typed approximately 50-60% of the day.

4. On April 28, 2010, Petitioner saw Dr. Day at Graham Medical Group. Dr. Day noted that Petitioner presented with numbness and tingling in both hands for the past two years. She reported her condition is getting worse and her right hand is getting weak and it also wakes her up at night. She weighs 292 pounds and she is 5'6". Dr. Day indicated that she should be evaluated for carpal tunnel syndrome.

5. On May 26, 2010, Petitioner saw Dr. Barnhart at Graham Medical Group. She reported to him that she was experiencing pain, numbness and weakness with her grip. She reports she has been experiencing the numbness/tingling for the past two years. She stated that she experienced numbness/tingling while driving and talking on phone. It also wakes her up at night. She reports she has been a full time caseworker for IDPA for 12 years. She reported that the vast majority of the day involves keystroking. Dr. Barnhart diagnosed her with right cubital tunnel and bilateral carpal tunnel syndrome. He ordered an EMG/NCV test. He opined that her condition certainly seems to be related to or exacerbated by her current work conditions.

6. The June 4, 2010 EMG/NCV test indicated Petitioner had a moderate degree of right carpal tunnel syndrome, right cubital tunnel syndrome and mild left carpal tunnel syndrome.

7. On April 11, 2011, Petitioner saw Dr. Marshall at the Peoria Surgical Group. The doctor noted that Petitioner comes in after a Lap Band procedure that took place on June 28, 2007. She is being seen three years and ten months after the surgery. Her pre-operative weight was 244 pounds and her weight today is 231 pounds.

16IWCC0779

8. On August 3, 2011 Petitioner complete a job description in which she estimated that the approximate number of times she repeatedly used her hands and arms at work was for 50 minutes every hour, 7.5 hours a day, 5 days a week.

9. On August 26, 2011, Dr. Barnhart noted that Petitioner has failed to get better with conservative care and he would be proceeding with a right carpal tunnel release. On September 22, 2011 Petitioner underwent right carpal tunnel and right cubital tunnel surgery.

10. On November 4, 2011, Dr. Barnhart noted Petitioner is six weeks post-surgery. She is doing great and feels much better. She no longer has pain in her elbow and she only has some occasional tingling in the pointer and middle fingers. She is still under a five pound weight restriction at work and she needs a note that she has no restriction. He instructed her to work on progressive range of motion and strengthening exercises in physical therapy, to resume her activities as tolerated and to return to full duty work on November 7, 2011. Lastly, she was instructed to follow up with him as-needed.

11. Petitioner testified she was off of work for two weeks for the surgery. When she returned to work she was given weight restrictions of no lifting over 5 pounds. She was subsequently released without restrictions. After she returned to work she noticed she still did not have her strength back. She helped coach her daughter's softball team and she noticed when she tried to throw a ball it did not go in the direction she was aiming for. She notified the doctor of this and he sent her for physical therapy at Advanced Rehabilitation. Petitioner further said she has not received any treatment since the physical therapy.

12. On March 19, 2012, Petitioner telephoned Graham Medical Group and reported she is experiencing some right elbow range of motion issues. She reported she had had carpal and cubital tunnel surgery last year. Petitioner was seeking a referral to Advanced Rehabilitation so that she could undergo some strengthening exercises with a physical therapist. Per her request, Dr. McCarthy referred Petitioner to Advanced Rehabilitation.

13. From March 23, 2012 through April 16, 2012 Petitioner underwent physical therapy at Advanced Rehabilitation and Sports Medicine. The April 16, 2012 discharge entry from the physical therapist indicated that Petitioner was doing great and the Petitioner feels that she had made excellent progress. The Petitioner reported she is able to throw without difficulty and she has returned to her full activity with full strength. The therapist noted that Petitioner has made excellent progress and met all short term and long term goals. She has resolved all range of motion limitations and her strength on her right side had surpassed that on the left side. She is also able to throw without any restriction.

14. Dr. Barnhart, a board certified orthopedic surgeon, was deposed on April 23, 2012. Petitioner reported she has been a full time caseworker for IDPA for the last twelve years. She described her job duties and it appears that they seemed to have worsen her symptoms. Petitioner reported that the vast majority of her work day involved typing, key stroking, mouse and computer work.

Dr. Barnhart was asked by Petitioner's attorney to assume that Petitioner was employed in a job in which she was engaged in data entry, specifically using a computer keyboard to entered information into a computer system approximately 70% of the day. Further assume she worked five days per week approximately 7-1/2 hours per day and has been so employed from in this position from 1998 to April of 2010. She is right hand dominant and she also writes approximately 10% of the day. The remaining of her day is spent on the telephone or filing. She receives two 15 minute breaks and one 30 minute lunch. Having assumed these facts, Dr. Barnhart was asked whether these work activities were either a causative or aggravating factor in her condition of ill-being. Dr. Barnhart relied that there was a possibility that this was a contributing factor. He stated that his opinion is based on the chronic positioning of her hands in the typing position and what he calls ulnar/side deviated along with hyperextended position, which make the carpal tunnel smaller and with less volume. He testified that the splints were used to try to hold the hand in a neutral position, to take the pressure off of the nerve and to make the volume of the carpal tunnel larger.

Dr. Barnhart testified that there is some controversy whether keyboarding contributes to carpal tunnel syndrome or not. He noted that there are some studies that say yes and others that say no, but typing seems to be at least a possible risk factor associated with carpal tunnel syndrome. He agreed that the cubital tunnel syndrome is more a chronic compression on the nerve which is found when someone is in a seated position or something like that and the nerve is directly resting on an armrest. If Petitioner used the arm rest to hold her arms while she keyboarded, it is possible that is what caused her cubital tunnel syndrome. Cubital tunnel is cause more by someone compressing against something or having the arm chronically in a fixed position. So there are possibilities that holding her hands and arms in a fixed position during keyboarding could have lowered the volume of the carpal tunnel, put tension on the ulnar nerve and compressed the ulnar nerve.

Dr. Barnhart testified that typically three months after the carpal and cubital tunnel release surgery a patient has reached maximum medical improvement. He agreed that a reasonable date to be used for maximum medical improvement would be the date Petitioner completed her physical therapy. Dr. Barnhart testified that he does not have any specific knowledge regarding the physical therapy she received in March of 2012 since he did not evaluate her at that time. He did agree that the treatment up to the point of his final evaluation was definitely necessary. He once again said he believed Petitioner's work activities could be a causative factor of her condition.

When Dr. Barnhart was asked if Petitioner ever provided him with a description of her job duties, he stated he did not specifically recall. All he had was just what Petitioner described to him in the office visit. He further testified that he did not recall ever seeing a specific paper with Petitioner's job duties listed out. In one of her notes Petitioner discussed how long she had been there, that she was a full-time worker, and that the vast majority of her day involved key stroking. Dr. Barnhart was asked to review the CMS job description which noted that the job required the employees to use their hands for fine manipulation, typing, good finger dexterity for 4-6 hours a day. He agreed that that correlated to his understanding of what her job duties were. He believes the topic of whether keyboarding causes carpal tunnel syndrome is controversial. He thinks there is some data that goes both ways. He thinks there are some good studies that show there is no direct correlation between typing and carpal tunnel and there are some good studies that show a direct correlation between the two. He cannot name any of the studies off the top of his head since he last reviewed them for his boards which he took in 2005 and 2007. He did not specifically ask Petitioner if she had a broken/split/anatomic keyboard or not. The only other risk factor she had was her body mass index (BMI). When he last saw her she has some occasional pain in the elbow and some occasional tingling in the index and long finger but overall she was doing great and felt much better. Typically, there is not any permanent disability with these conditions. Most people do have a little bit of numbness around the incision at the elbow because the small skin nerves were stretched or had to be cut in order to move the nerve. With moderate to severe carpal tunnel, which Petitioner had according to her NCV test, some people can have some small areas of continued numbness and tingling that is permanent in the tips of their fingers or small area in their hand. He testified that he generally does not give his patients any restrictions once their muscles/wounds are healed and they have gained back their strength and range of motion. In responding to whether keyboarding can caused her cubital tunnel syndrome, the doctor said a chronic flexed position that has the nerve out stretch for long periods of time can be one of the biggest risk factors associated with cubital tunnel syndrome. In Petitioner's case, it depends on whether she had her arms out while keyboarding or if she had her arms up close and had her elbow in a flexed position for the majority of the day. The other issue is whether her arm was resting on the chair arm. The Petitioner did not provide him with a history as to the position of her arms. He does not know if her weight was a causative factor for the cubital tunnel syndrome. He does not know any study off of the top of his head that directly relates weight as a risk factor for cubital tunnel syndrome. Anecdotally, the vast majority of his patients with cubital tunnel syndrome are actually thin because the nerves are superficial, exposed and easily compressed. Her BMI was 38.41 at the August 2011 visit. He believes that 35 and above is obese. He did testify that just because one has a higher BMI does not mean that they will get carpal tunnel but people with carpal tunnel do have a higher BMI as a risk factor.

15. Dr. Williams, a board certified orthopedic surgeon, was deposed on August 2, 2012. He testified that he holds an additional CAQ in hand and upper extremity surgery. He evaluated Petitioner and issued a report on January 5, 2011. Based on what Petitioner explained to him about what her job duties involved and based on the current, up-to-date literature which have looked at risk factors of carpal tunnel syndrome, he does not believe that there is either causative and/or aggravating between her carpal and/or cubital tunnel diagnosis and her work. Rather, he feels her condition could be either idiopathic and/or related to her increased BMI and the fact that these conditions are more commonly seen in females than males. Petitioner told him she basically typed. She was on the computer 70% of the day and was writing 10% of the day. The rest of the time she was on the telephone and filing. Dr. William testified that he does not believe based on the most recent literature that those jobs duties are or have been found to be a cause of or an aggravation to the carpal tunnel. Dr. Williams agreed that there has been literature in the past which has said carpal tunnel is related to typing activities. However, the more recent literature has proven that not to be the case. This position has been stated by multiple articles. He noted that Dr. Barry Simmons who heads up the hand surgery at Brigham & Women's Hospital and multiple other doctors as well as well as the Mayo Clinic study all show that carpal tunnel is not related to typing. Dr. Williams opined that Petitioner increased BMI of 36.3 is her other risk factor for carpal tunnel. An increased risk is over 30 and Petitioner is well over that number.

Dr. Williams testified that in the past he opined that a person's carpal tunnel was aggravated by typing only if they typed more than six hours a day and their typing was constant and without any rest breaks. This would have to be his threshold before he would relate a carpal tunnel condition to typing. Petitioner told me she is on a computer 70% of the day. In Petitioner's cases, she reported she gets two 15 minute breaks and a 30 minute lunch. So that would be barely seven hours at work in total. So Petitioner testifying that she typed 50 minutes per hour does not meet the six hour threshold. He did agree that the number of years that a person has been doing this can be important. When he was asked if he knew that Petitioner testified that she had been doing the same job of typing 50 minutes per hour for 7-1/2 hours each day since February of 1998, he said that information was important and he was aware of it. He testified he would differentiate between rote typing of more than 6 hours per day and intermittent typing consisting of entering a little data from statements on a form. He testified that the latter is what he understood that Petitioner did in her job. When one is doing data entry from a Medicaid assistance application, one is filing in date of birth, age, address. That is all broken up. The person is pointing, clicking and entering in data. That type of typing is not the same as rote typing. The former involves a rest break when entering different spaces, tabbing or using a mouse to move to another line. That's different. It is not the same type of typing as doing rote dictation like the court reporter is doing as we are sitting here speaking and she is typing every word. He agreed that wrist position is very important and stated that he was not allowed to review any sort of ergonomic study for Petitioner.

At the February 17, 2016 Arbitration hearing, Petitioner testified that she has not had any surgery for her left hand. In regard to her right arm/hand, she still has some numbness in her elbow but she does not have the pain like she did prior to the surgery. She testified that her right hand is better. She just does not have the strength she used to have. She struggles to open jars and use a can opener. She has some occasional numbness and tingling going down her right elbow. She is not as strong as she used to be. She cannot lift as much. Her range of motion is not what it used to be but it did improve with physical therapy. Her left hand still falls asleep on occasion. She can only bowl one game now before her arm aches. She does not coach her daughter's softball team anymore. She used to play baseball with her kids but she does not do this as much because her right elbow hurts. She still wears her splints on her left hand but she does not do this very often. Her left wrist does not bother her as much as the right wrist. She wears the left hand splint 3-4 times a year. If it bothers her, she takes an Ibuprofen.

Given all of the above and noting that in order to prove up causation in repetitive trauma claims one generally needs to rely on an experts opinion, the Commission looked at the basis for Drs. Barnhart's and Williams' causation opinions.

The Commission notes that Dr. Barhart was asked to express his causation opinion twice during his deposition. On one instance Dr. Barnhart states that there is a possibility that Petitioner's work was a contributing factor to her condition of ill-being. On the second occasion, he indicates that Petitioner's work activities could be a causative factor. More specifically, in reviewing Dr. Barnhart's deposition it is evident that his testimony is based strictly on Petitioner's limited history of her job duties that needed to be fleshed out through a hypothetical posed by Petitioner's attorney. Petitioner's testified she typed 70% of her work day and she noted in her job description that she typed 50 minutes per hour. The latter would mean that she was typing over 80% of the time in a given hour. On cross-examination, Dr. Barnhart was shown a CMS job description which showed Petitioner needed to use her hands for fine manipulation, typing and good finger dexterity for 4-6 hours a day, which is between 53-80% of Petitioner's work day. The Commission notes that the CMS job description does not contain any notations as to exactly how long Petitioner was typing in a given day as opposed to performing other tasks that required manipulation and good finger dexterity. Lastly, Kathy McCance testified that Petitioner was typing 50-60% of the day. Thus, the evidence shows that Petitioner was typing anywhere from 3.5 to approximately 6 hours a day. Thus, qualitatively the issues becomes is Petitioner's typing anywhere from 3.5 to approximately 6 hours a day sufficient to cause carpal tunnel CTS and cubital tunnel syndrome. The Commission believes this quantitative analysis should also be view in light of the fact that Dr. Barnhart was not shown Petitioner's work station and did not know what position Petitioner placed her arm in while typing. Additionally, the Commission views this analysis in light of the fact that Dr. Barnhart acknowledged that the topic of whether typing causes carpal tunnel/cubital tunnel is "controversial" in nature and that the scientific studies show that the data supports both

sides of the issue. Nor could the doctor name any of the studies off the top of his head that support a finding of a positive causation between an individual's typing and the onset of and/or aggravation of carpal tunnel syndrome as he has not reviewed this issue himself in the last 9 to 11 years.

In summary, the Commission finds the evidence supports the fact that Petitioner was typing approximately 3.5 to 6 hours a day, with Dr. Barnhart being unaware of the physical set up of Petitioner's work station and Petitioner's actual positioning of her hands/arm while typing and basing his causation opinion on a readily acknowledged controversial topic in which he has not explored in a decade or so. In summation, the Commission finds Dr. Barnhart's causation opinion is weak at best and is not well supported by the evidence in the record. As such, the Commission places little weight on his testimony.

In reviewing Dr. Williams' causation opinion, the Commission finds, contrary to the Arbitrator, that a review of Dr. Williams' IME report demonstrates it is readily apparent that Dr. Williams was provided with and reviewed Petitioner's job description. It is further evident that he has drawn a demarcation line of 6 hours of continuous typing prior to finding that the same is causally related to one's work. He, as did Dr. Barnhart, acknowledged that there has been controversy in this area. Yet, he testified that the latest scientific studies have supported the fact that typing does not cause carpal tunnel syndrome. Like Dr. Barnhart he was not privy to the layout of Petitioner's work station or the way in which Petitioner positioned her hands while working. Using his demarcation of 6 hours, it appears from the evidence that Petitioner's typing time may fall short or just meet the minimal amount of time necessary to find causality. Additionally, using Dr. William's criteria that Petitioner's typing needs to be continuous in nature, it also appear that Petitioner's testimony does not support continuous typing. Namely, Petitioner testified that her typing was intermittent in nature and that it has decreased over the years and most recently been more in line with clicking on and entering data into drop down boxes.

Given all of the above, the Commission finds that it appears that Dr. Williams' testimony should have been given greater weight by the Arbitrator and that there is a necessity to re-assess the same on review.

Having reviewed both doctors' causation opinions and the basis for each opinion, the Commission assigns greater weight to Dr. Williams' opinions than to Dr. Barnhart's opinions. Thus, the Commission finds Petitioner failed to prove she sustained an accidental work injury on May 26, 2010 and further failed to prove that her current bilateral carpal tunnel condition and right arm cubital tunnel condition is causally related to the alleged May 26, 2010 work accident. The Commission finds Dr. Barnhart's possibility/could opinion without his knowledge of Petitioner's work station and hand/arm position and a lack of scientific information to support the fact that typing causes carpal tunnel syndrome

falls short of reaching the level of medical and scientific certainty that is needed to allow this case to be compensable.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on May 26, 2010, her claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that since Petitioner failed to prove a causal relationship exists between the alleged accident of May 26, 2010 and Petitioner's condition of ill-being, her claim for compensation is hereby denied.

DATED: DEC 2 - 2016

Mario Basurto

MB/jm

Stephen Mathis

O: 10/6/16

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DISSENTING OPINION

I respectfully dissent from the majority decision and would affirm the Arbitrator's well reasoned decision in its entirety. Petitioner, a 42 year old caseworker, testified that she started work with Respondent as a public-aid specialist on February 4, 1998. Petitioner testified that she worked 7.5 hours a day, 37.5 hours a week with a 30 minute lunch and two 15 minute breaks. Petitioner testified that she typed 70% of her day with the other 30% comprised of filing, typing and speaking on the phone with clients. Petitioner completed a job description in which she estimated that she repeatedly used her hands and arms at work 50 minutes every hour, 7.5 hours a day, 5 days a week. Petitioner testified that around 2010 she noticed that her hands/wrists and later her right elbow, would ache while performing her job duties. Respondent presented Katy McCance to testify. Ms. McCance testified that she performed the caseworker job for 19 years. Ms. McCance stated that caseworkers would spend at least 50% of their day typing but she couldn't disagree with Petitioner's statement that she typed 70% of the day.

Petitioner was referred to Dr. Barnhart who diagnosed her with right cubital tunnel and bilateral carpal tunnel syndrome. On September 22, 2011 Petitioner underwent right carpal tunnel and right cubital tunnel surgery. At deposition, Dr. Barnhart was posed with a hypothetical consistent with Petitioner's testimony. Further Dr. Barnhart indicated that he reviewed records which included Petitioner's job description indicating the use of her hands for

fine manipulation and typing for 4-6 hours per day. Based upon his examination and treatment of Petitioner, review of her records and the consistent hypothetical posed to him, Dr. Barnhart opined that Petitioner's condition was related to or exacerbated by her work.

Respondent presented the testimony of Dr. Williams who agreed with the diagnoses of bilateral carpal tunnel syndrome and right cubital tunnel syndrome but opined that Petitioner's condition was caused by her BMI (36.3) and not her job duty of typing. Although Dr. Williams noted that recent literature suggests that typing is not a cause of or an aggravation to the carpal tunnel, he acknowledge that there is literature that suggests that typing can cause or aggravate carpal tunnel. Dr. Williams opined that a person's carpal tunnel is only aggravated by typing if they typed more than 6 hours continuously a day without a break.

The majority seemingly takes issue with Petitioner's testimony of the time she spent typing. However, it must be noted that Respondent's witness', Katy McCance, testimony is consistent with Petitioner's testimony in regard to the job duties and the amount of typing a caseworker performed. Accordingly, Petitioner has proven by a preponderance of the evidence that she sustained an accidental injury to her bilateral hands and right arm due to repetitive work activities that arose out of and in the course of her employment.

The majority also takes issue with the fact that Dr. Barnhart was not shown Petitioner's work station and did not know the position petitioner placed her arm in while typing. However, the majority acknowledges that Dr. Williams was not privy to the layout of Petitioner's workstation or the way in which Petitioner positioned her hands while working either. Although both physicians acknowledged the existence of medical literature both supporting and disputing the link between typing and carpal tunnel, Dr. Barnhart explained how typing and keyboarding can cause compressive neuropathy at the median and ulnar nerve. In contrast, Dr. Williams provided a blanket opinion that no typing can cause and/or aggravate carpal or cubital tunnel unless it is performed continuously for six hours a day. Dr. Williams provided no medical or scientific basis for his demarcation line of 6 hours of continuous typing being required prior to finding a causal relationship between repetitive typing and carpal tunnel. The Arbitrator appropriately assigned greater weight to Dr. Barnhart's opinions than to Dr. Williams' as Dr. Barnhart's opinion was more persuasive. Accordingly, for the foregoing reasons, I would affirm the Arbitrator's well-reasoned decision in its entirety.

David L. Gore

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dwight Clowers,

Petitioner,

vs. NO: 11 WC 29443

Chicagoland Quad Cities Express, Inc.,

Respondent.

16IWCC0829

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, maintenance, vocational rehabilitation, and penalties, 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 Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. HISTORY OF THE CASE

A) 5/9/14 Corrected §19b-1 Decision

The Arbitrator found that as the result of accidental injuries arising out of and in the course of his employment on 5/6/11, Petitioner was temporarily totally disabled from 8/23/11 through 2/25/14, for a period of 131-1/7 weeks as provided under §8(b). (Arb.Dec.[§19b-1], p.2). In addition, the Arbitrator found that Respondent was entitled to a credit of $44,753.56 for TTD paid from 8/23/11 through 6/5/13. (Arb.Dec.[§19b-1], p.2). The Arbitrator also found that Petitioner was entitled to "... reasonable and necessary medical services of $25,258.25, as provided in Section 8(a) of the Act." (Arb.Dec.[§19b-1], p.2). Furthermore, the Arbitrator "...

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awarded the prospective medical treatment plan of Dr. Douglas Evans and Loyola University Medical Center as it relates to the right arm and shoulder, including biceps tenotomy and the sequelae thereto." (Arb.Dec.[§19b-1], p.2). Finally, the Arbitrator awarded "... penalties of $8,624.00, as provided in Section 16 of the Act; $21,560.01, as provided in Section 19(k) of the Act; and $17,550.00, as provided in Section 19(l) of the Act." (Arb.Dec.[§19b-1], p.2).

The Commission notes that Respondent filed a Petition for Review with respect to this prior §19b-1 decision and thereafter voluntarily dismissed said review.

B) 12/8/15 §19b Decision

With respect to the present §19(b) decision currently on review, the Arbitrator found that Petitioner was temporarily totally disabled from 2/26/14 through 3/26/15, for a period of 56-2/7 weeks as provided under §8(b). (Arb.Dec.[§19b], p.2). In addition, the Arbitrator found that "Respondent shall provide a written plan for vocational rehabilitation and pay Petitioner maintenance benefits of $471.82 from 5/21/15 to 9/25/15" as provided under §8(a). (Arb.Dec.[§19b], p.2). Finally, the Arbitrator found that "Penalties and attorney's fees are not awarded, as provided by Sections 16, 19(k) and 19(l) of the Act." (Arb.Dec.[§19b], p.2).

Both parties filed Petitions for Review with respect to this decision.

II. FINDINGS OF FACT

A hearing was held with respect to the present §19b petition on 9/25/15. Petitioner testified that since the previous §19(b-1) hearing held on 2/25/14 he was finally able to follow up with his treating physician, Dr. Evans, on 9/25/14. (T.11). Dr. Evans ordered a repeat MR arthrogram and subsequently recommended a third surgery on Petitioner's right shoulder, which was performed on 12/19/14. (T.12).

On 12/19/14, Petitioner underwent surgery consisting of 1) right shoulder arthroscopy; 2) arthroscopic debridement of articular cartilage flaps and wear and debridement of labral fraying; 3) removal of labral sutures; 4) microfracture chondroplasty of the humeral head; 5) open subpectoral biceps tenodesis. (PX2). The post-operative diagnosis was right shoulder bicipital tendinopathy with labral and chondral degeneration, as well as the traumatic chondral defect on the humeral head. (PX2).

Petitioner followed up with Dr. Evans post-operatively and underwent physical therapy at ATI Physical Therapy. (T.12-13). On 2/17/15, Petitioner returned to Dr. Evans at which time he was given light duty restrictions of no lifting greater than five pounds, no overhead work and no repetitive work. (T.13).

In a letter to Petitioner dated 3/12/15, Coventry Workers' Comp Services vocational case manager Tineta Wall stated that "[w]e have used the restriction guidelines provided by [Dr. Evans] to identify an appropriate temporary, transitional light duty work assignment for you... This assignment is an extension of your employment with Chicago Quad Cities for the work-related injury. Chicago Quad Cities will be assigning you to work offsite at a Non-Profit facility,

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Caring Hands Thrift Store, in a temporary capacity... You will be expected to return to work at this offsite assignment on Thursday, March 26, 2015 at 9:00 am..." (RX3).

Petitioner acknowledged receiving this letter from Coventry offering him a transitional position while he was doing therapy. (T.14-15). Petitioner noted that no one from Chicagoland Quad Cities Express (hereinafter "CQCE") contacted him regarding this program, that the program was not at the CQCE facilities and CQCE neither sent him the letter nor was it copied thereto. (T.15-16). In addition, He noted that he was never contacted by phone or in writing and offered a light-duty position with his actual employer, CQCE. (T.16-17). He agreed that the letter listed his physical restrictions as involving no lifting over five pounds; however, he noted that it did not mention his restrictions of no overhead or repetitive work. (T.16). Petitioner testified that when he did not participate in this program his TTD benefits were terminated on 3/29/15. (T.18).

On cross examination, Petitioner agreed that the aforementioned letter indicates that CQCE had requested Coventry to set something up for him. (T.31-32). He also agreed with the letter if it indicated that the job assignment was to have started 3/27/15, although he could not recall if the letter indicated CQCE would be paying him. (T.33). He was then shown the letter and agreed that it indicated he would be paid by CQCE. (T.34). He also agreed that this letter stated he would remain an employee of CQCE while working at this "off-site transitional work assignment." (T.34-35).

Petitioner returned to Dr. Evans on 4/9/15 at which time the latter recommended a work-conditioning program and authorized Mr. Clowers to remain off work. (T.18-19; PX1). Petitioner noted that he did not begin to receive TTD again at that time. (T.19). Petitioner began work conditioning at ATI Physical Therapy on 4/13/15. (T.19).

In a "Return to Work" note dated 4/20/15, Dr. Evans' nurse, Therese Heywood, indicated that Petitioner "...began his work conditioning program with physical therapy on Monday, 4/13/1545 [sic]. This program is scheduled for 5 days a week for 4-6 weeks. He is unable to work during this time." (PX1).

Petitioner completed a Functional Capacity Evaluation ("FCE") on 5/14/15. (T.19). This evaluation was found to be valid and noted that Petitioner demonstrated capabilities consistent with the medium physical demand level. (PX3). It was determined that Petitioner was capable of occasionally lifting 55.6 pounds from floor to chair, 62.4 pounds from desk to chair, 25.8 pounds above shoulder level (60 in.), carrying 47 pounds with the right arm and 88.4 pounds with the left arm. (PX3). In addition, Petitioner demonstrated significant strength differences when comparing his right and left upper extremity with all unilateral lifts, including lifting 30.6 pounds with his right arm and 46.6 pounds with his left arm desk to chair. (PX3). In addition, it was noted that he lifted 10.8 pounds which his right arm and 35 pounds with his left arm above shoulder. (PX3). Finally, the report indicated that Petitioner had been employed as a warehouse worker and that although a specific job description was not provided such a position would be considered medium physical demand level. (PX3).

On 5/21/15, Petitioner followed up with Dr. Evans to go over the results of the testing.

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(T.19). Petitioner indicated that he was released from Dr. Evans' care at that time and was told that he was as good as he was going to get. (T.19). He stated that he was given a note with permanent restrictions at that time reflecting occasional lifting of 55 pounds from floor to chair, 62 pounds from desk to chair, 25 pounds with both arms above shoulder level, carrying 47 pounds with the right arm and 84 pounds with the left arm, as well as no lifting greater than 10 pounds above the shoulder with his right arm. (T.20). Petitioner indicated that his job at CQCE required him to lift more than 25 pounds with both arms above shoulder height, and that he in fact was unloading a 50-pound bag of product overhead when he injured himself in the first place. (T.20). Petitioner testified that his employer CQCE has never offered him work within these permanent restrictions. (T.21).

In his office note dated 5/21/15, Dr. Evans indicated that Petitioner "... had completed work conditioning and had his functional capacity evaluation. At this point, I would give him permanent restrictions based on the [FCE]. His job requires a lot of lifting and reaching, which he feels that he will be unable to do. In addition, his job description was not provided to the author of the [FCE], so the specific requirements for his job are not entirely clear. I will give him permanent restrictions based on his capabilities demonstrated at the [FCE] and he will have to work with his employer as to what he is capable of doing at this point. I will follow up with him as needed if he has further difficulties with his arm or wishes to be reevaluated." (PX1).

In a separate "Return to Work/School" note dated 5/21/15, Dr. Evans indicated that "[b]ased on the FCE, [Petitioner] is capable of occasionally lifting 55 lbs from floor to chair, 62 lbs from desk to chair, 25 lbs with both arms above shoulder (60 in) and carry 47 lbs with his right arm and 84 lbs with his left arm. No lifting greater than 10 lbs above the shoulder with the right arm." (PX1).

Petitioner indicated that he had worked at CQCE for "[p]robably about 16 years" before his injury, having started in August of 1994. (T.22-23). He testified that "[p]robably around half" of his work day would involve him being on a forklift, even though his job title was "warehouse" and not "forklift operator." (T.22). He noted that at the time he was working with his father's company rehabbing the building and CQCE was renting part of the space. (T.23). He indicated that the manager got to know him and one day on a whim Petitioner asked him if they had any full-time positions open, and the next day he was offered the position. (T.23-24). As a result, Petitioner noted that he never did any sort of formal job search or application to find that job, and had not done any job searching prior to getting the position at CQCE. (T.24). He noted that he has some familiarity with Microsoft Word, but has never used it for a job, and that he "really do[es]n't know" how to put together a resume, stating that he knows "... some of the points in there, but how they really need to be in there and worded, I do not." (T.24-25). However, he noted that he had put a resume together "quite a number of years" ago, or "well before" working for Respondent. (T.25). He indicated that he does not know how to put together a cover letter or locate job leads. (T.25). He also stated that he had never used an on-line job search engine, although he has heard of Monster.com and CareerBuilder. (T.25). He testified that he does not have a LinkedIn profile and could not recall the last time he completed an application for work, although he agreed it was "[e]asily" prior to 20 years ago when he started at CQCE. (T.26). He has also never done an on-line application and did not know how often one would follow up with a potential employer or whether it is supposed to be done by phone or email. (T.26).

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Petitioner testified that the last time he went on an interview was "... well prior to when [he] started working at Chicagoland." (T.26-27). He indicated that he would like to go back to work, but that he did not feel he has the skills to locate a job within his physical restrictions. (T.27). He also agreed that Ms. Stafseth prepared a plan to help him acquire the skills to locate a job within his physical restrictions, but as far as he knows said plan has not been authorized. (T.27). In addition, Petitioner agreed that he has not received any benefits since 3/29/15. (T.27).

Petitioner agreed that he worked for CQCE for approximately 18 years, noting that he started working with a forklift in his first year with the company. (T.36). He also agreed that if half his day was spent working with the forklift, and he worked a 40 hour work week, then he was working 20 hours a week on a forklift. (T.36). In addition, he indicated that forklift operation requires certification that he did it through the company. (T.38). When asked whether he ever communicated with his attorney to see if the transitional work program was still open to him, Petitioner responded "[n]o, because [he] was given a note by [his] doctor as to, not to work during [his] therapy." (T.41). He indicated that he has not walked up to anyone else, like he did when he was first hired by Respondent and asked if they were hiring. (T.46-47). However, he noted that he called CQCE "...to find out if they had been informed of [his] restrictions to see if [he] was going to indeed come back." (T.47).

Petitioner acknowledged that he had previously received a letter that said there was no light or modified duty job available, but noted that that "... was a number of years ago. Situations can change, and [he] had called to see if they could accommodate [him], and the response [he] got back from Terry Wintermute was she was not contacted by the insurance company and she hung up the phone on [him]." (T.48). However, he conceded that he has not reached out to any other company. (T.48). He noted that he is a member of a union, but he indicated that he has not reached out to anybody at the union hall about jobs "... because [he] had to withdraw so that [he] wouldn't have any fees pulled from [him] because [he] wasn't working." (T.48-49).

When asked about his daily routine, Petitioner testified that he "... see[s] the wife and daughter out the door. [He] do[es] get cleaned up. [He] ha[s] some breakfast, watch[es] some TV while [he's] eating that. Then if [he] ha[s] to run around and do any errands, [h]e do[es] them." (T.49). He agreed, however, that he does not have a routine were he gets up and goes out the door every morning to go somewhere. (T.49). He noted that CQCE is located in Bridgeview, Illinois. (T.50). The Application for Adjustment of Claim indicates that Petitioner resides in Plainfield, Illinois. He did not know how far it is from CQCE to the airport. (T.50).

On re-direct examination, Petitioner indicated that he did not know whether the certification he received through CQCE to operate a forklift was portable to another company. (T.51). He also noted that when he was undergoing post-operative rehabilitation he was getting out of the house three (3) days a week for physical therapy and five (5) days a week for work conditioning. (T.51-52).

At the request of his attorney, Petitioner underwent a vocational evaluation with Kari Stafseth, CRC of Vocamotive on 7/7/15. Ms. Stafseth issued a rehabilitation plan dated 7/9/15 wherein she noted that "[i]t is the opinion of this consultant that Mr. Clowers does not have any transferable skills" and that "... the vast majority of his work consisted of warehousing related

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duties" which "... requires physical capacity at the Medium level of physical demand", or lifting up to 50 pounds on an occasional basis and 25 pounds on a frequent basis." (PX4). Ms. Stafseth noted that a review of Petitioner's restrictions "... indicates that the position of Warehouse Worker could require lifting up to 70 pounds occasionally and 50 pounds regularly. However, his ability to lift overhead is more consistent with the Light level of physical demand." (PX4). Ms. Stafseth indicated that since current job openings as a warehouse worker could require lifting up to 70 pounds occasionally and 50 pounds regularly, "... it would appear that Mr. Clowers has lost access to some portion of this labor market." (PX4). In addition, she noted that "[f]or those warehouse positions that require lifting up to 50 pounds, it is unknown if lifting overhead is a requirement. According to Mr. Clowers, this was a requirement of his recent line of employment with Chicagoland Quad Cities." (PX4). As a result, Ms. Stafseth was of the opinion that Petitioner "... has lost access to his usual and customary job of Warehouse Worker with Chicagoland Quad Cities." (PX4). However, Ms. Stafseth was of the opinion that Petitioner remained employable" and that he should be offered vocational rehabilitation services. (PX4). Ms. Stafseth opined that said services "... should include comprehensive vocational testing by a Certified Vocational Evaluator in order to complete the most thorough assessment of aptitude, interest, and temperament." (PX4). She also noted that "[a]dditional services would include on-site development of computer literacy to level of marketable skill, facilitation of on-the-job training opportunities, assistance with letter development, completion of mock interviews and participation in self-directed and supervised job search." (PX4).

Ms. Stafseth testified by way of evidence deposition on 8/27/15. (PX5). At that time Ms. Stafseth reiterated her opinion that Petitioner did not have any transferrable job skills "... based upon review of his work history and his education along with his physical capacity..." (PX5, p.12). Furthermore, while she believed that he had lost access to his usual and customary job of warehouse worker for Respondent, Ms. Stafseth indicated that Petitioner remained employable. (PX5, pp.14-15). Along these lines, Ms. Stafseth noted that "... based upon [Petitioner's] educational background he would quality for up to semi-skilled employment. With his restrictions, he would have access to some medium-level jobs as long as overhead lifting was not required within the medium level of physical demand." (PX5, p.15). When asked to identify the type of jobs or areas that Petitioner could work in, Ms. Stafseth testified that "[t]he most probable job targets that I would consider would include a forklift operator, shipping and receiving clerk, dispatcher, warehouse manager, security guard, and similar positions. I also indicated that there may be some other warehousing-type positions that could be available for him ... along the lines of like a picker, packer." (PX5, pp.15-16). She also indicated that Petitioner would have a probable wage-earning potential of $10 to $13 per hour, compared to the $19.35 he had been earning with Respondent, and that Chicago's planned minimum wage of $13 per hour would not affect his earning capacity because the City of Chicago would not be in the geographical area that would be considered given that he resides in Plainfield, Illinois. (PX5, pp.16-18).

In addition, Ms. Stafseth stated that she "... would recommend that [Petitioner] undergo vocational testing under the direction of a certified vocational evaluator in order to assess what his current aptitude, skills, and work temperament is... We would also recommend that he undergo computer training... Once computer training is complete, it would be my recommendation that he be assisted with job-seeking-skills instruction, development of a resume,

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and other job-seeking correspondence ... I would also recommend that he be assisted with mock interviews... And then we would assist him with identification of job leads, following up with employers after the initial contact. And then also assist him with field placement, going to employers with him, trying to get him in the door." (PX5, pp.21-22). Ms. Stafseth believed that this type of training would increase Petitioner's odds of obtaining an appropriate position, that he had a long worklife expectancy and was motivated to undertake vocational services, and that he was likely to obtain employment upon completion of the program. (PX4, p.24-25).

In addition, with respect to the "training program" offered by Respondent in the form of working at a thrift shop, Ms. Stafseth opined that "... there wouldn't be any applicable skills that he would have obtained moving forward with any of the positions that were identified." (PX4, pp.44-45). However, on cross examination, Ms. Stafseth agreed that working in the thrift shop "... could assist with somebody getting into a routine as far as having somewhere to go. But as far as transferable skills, that's where my question would be." (PX5, pp.49-50). She also noted that the skills learned at the thrift shop are not only not transferrable to warehousing but "... to anything else that would be suggested for him." (PX5, p.50).

III. CONCLUSIONS OF LAW

A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity. *National Tea Co. v. Industrial Commission*, 97 Ill.2d 424, 454 N.E.2d 672, 73 Ill.Dec. 575 (1983).

Furthermore, a claimant is not required to request vocational rehabilitation before being entitled to an award of maintenance, and there is no rule prohibiting claimant-created and directed vocational rehabilitation programs. *Greaney v. Industrial Commission*, 358 Ill. App. 3d 1002; 832 N.E.2d 331; 295 Ill. Dec. 180 (1st Dist. 2005); citing *Roper Contracting v. Industrial Commission*, 349 Ill.App.3d 500, 505-06, 812 N.E.2d 65, 285 Ill.Dec. 476 (2004).

In the present case, the Commission finds that the record shows Petitioner has suffered a reduction in his earning capacity as a result of his work-related injuries, and the permanent restrictions imposed by Dr. Evans, and that the evidence strongly suggests rehabilitation will increase his earning capacity, based on the credible testimony of certified rehabilitation counselor Ms. Stafseth. The Commission notes that Respondent submitted no opinion to rebut Ms. Stafseth's testimony along these lines, and in fact the Arbitrator correctly ruled that the employer failed to satisfy its duty under Rule 7110.10 of the Act. However, the Commission finds that the Arbitrator erred in refusing to order the implementation of the sole rehabilitation plan submitted into evidence. The Commission finds that the plan in question was entirely reasonable and more than adequately addressed the needs and obstacles facing Petitioner in obtaining suitable alternative employment, given that his prior position as a warehouse worker for Respondent is no longer available to him based on his current restrictions, particularly his inability to lift the required weight overhead.

Furthermore, the Commission finds Respondent's proposed "transitional" job to be wholly inadequate for purposes of vocational rehabilitation, and that Petitioner was under no

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obligation to participate in same. More to the point, the Commission finds that the offer of this menial labor position was not a good faith rehabilitation effort on the part of the Respondent. Indeed, as Ms. Stafseth noted, other than forcing Petitioner to establish a "routine", something he had already shown he could do during the 18 years he had worked for Respondent, the job at the thrift store in question offered no discernible skill or other training benefits, particularly in comparison to the vocational plan outlined by a trained rehabilitation specialist.

Therefore, based on the above, and the record taken as a whole, the Commission modifies the decision of the Arbitrator to find that the vocational rehabilitation plan proposed by Vocamotive's Ms. Stafseth was reasonable and necessary and hereby orders that Respondent authorize and implement same.

In addition, the Commission finds that Petitioner is entitled to TTD from 2/26/14 through 5/20/15, for a period of 64-1/7 weeks, and maintenance benefits from 5/21/15, when Dr. Evans released Petitioner with permanent restrictions and essentially found him to be at MMI, through 9/25/15, the date of arbitration, for a period of 18-2/7 weeks. Once again, the Commission finds that Petitioner was not obligated to attend the "transitional" job arranged by Coventry on behalf of CQCE at Caring Hands Thrift Store, a non-profit entity in no way affiliated with Respondent and offering little if any benefit in terms of vocational or rehabilitation training. As a result, the Commission finds that Petitioner was entitled to ongoing temporary total disability benefits until such time as his condition had stabilized, or through the date of Dr. Evans' release. See *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 142, 337 Ill.Dec. 707, 923 N.E.2d 266, 271 (2010) ("It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement").

Furthermore, the Commission finds that Petitioner is entitled to additional compensation pursuant to §19(k) in the amount of $6,067.51 (50% of unpaid TTD [$30,263.88 - $26,756.43] and maintenance [$8,627.57], or .5[$12,135.02]) and pursuant to §19(l) in the amount of $5,400.00 ($30/day x 180 days, from 3/30/15 through 9/25/15), and attorneys' fees pursuant to §16 of the Act in the amount of $1,213.50 (20% of §19[k] award), for the reason that Respondent's refusal to pay benefits in this matter -- including TTD, maintenance and vocational rehabilitation -- was unreasonable and vexatious. The Commission notes that Respondent has continued to show a pattern of delay and obstructive conduct in the defense of this matter, as evidenced by the Commission's previous imposition of penalties in the prior §19(b-1) award and its current refusal to pay TTD and maintenance as well as authorize the recommended rehabilitation plan outlined by Ms. Stafseth. The Commission finds that Respondent's insistence that Petitioner participate in so-called "training" at a thrift store was both unreasonable and not in good faith and as such warrants the imposition of penalties.

Finally, in its "Response to Petitioner's Statement of Exceptions and Supporting Brief", Respondent requests that the Commission take judicial notice of several rejected exhibits. The Commission finds that Respondent waived the issue of judicial notice by failing to raise said issue in either its Petition for Review or Statement of Exceptions and Supporting brief pursuant to Ill. Adm. Code title 50, § 7040.70(d). See *Jetson Midwest Maintenance v. Industrial Commission*, 296 Ill.App.3d 314, 694 N.E.2d 1037 (1998).

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All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 12/8/15 is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $471.82 per week for a period of 64-1/7 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 for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $471.82 per week for a period of 18-2/7 weeks, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and implement the vocational rehabilitation plan proposed by Vocamotive's Ms. Stafseth pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation in the amount of the sum of $6,067.51, as provided in §19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation in the amount of the sum of $5,400.00, as provided in §19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to the attorney for the Petitioner legal fees in the amount of $1,213.50 as provided in §16 of the Act; the balance of attorney fees to be paid by Petitioner to his attorney.

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.

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Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. 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: DEC 2 2 2016
o:11/1/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

CLOWERS, DWIGHT
Employee/Petitioner

Case# **11WC029443**

CHICAGOLAND QUAD CITIES EXPRESS INC
Employer/Respondent

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On 12/8/2015, 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 0.53% 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:

0412 RIDGE & DOWNES
AMYLEE HOGAN SIMONOIVCH
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

1505 SLAVIN & SLAVIN
PATRICK SHIFLEY
100 N LASALLE ST SUITE 2500
CHICAGO, IL 60602

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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)

DWIGHT CLOWERS
Employee/Petitioner

v.

CHICAGOLAND QUAD CITIES EXPRESS INC.
Employer/Respondent

Case # **11** WC **029443**

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 **Arbitrator Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **09/25/2015**. 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 _____

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FINDINGS

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services however, Respondent has not paid for all necessary and reasonable vocational services.

Respondent shall be given a credit of $ **26,756.43** for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $26,756.43.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $471.82 for 56 2/7 weeks, commencing February 26, 2014 through March 26, 2015, as provided in Section 8(b) of the Act.

Respondent shall provide a written plan for vocational rehabilitation and pay Petitioner maintenance benefits of $471.82 from May 21, 2015 to September 25, 2015, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $26,756.43 for temporary total disability benefits paid to Petitioner from February 26, 2015 through March 29, 2015, as provided in Section 8(b) of the Act.

Penalties and attorney's fees are not awarded, as provided in Sections 16, 19(k) and 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.

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FINDINGS OF FACT

This matter was previously tried on February 25, 2014, pursuant to section 19(b-1) of the Illinois Workers' Compensation Act, (the "Act") and in a decision of May 8, 2014, the Arbitrator awarded temporary total disability benefits ("TTD"), unpaid medical expenses totaling $25,258.25; prospective medical care and penalties and fees in the amount of $47,734.01.

Currently, this matter has been tried under Section 19(b) of the Act and the disputed issues are: 1) TTD; 2) maintenance; 3) penalties; 4) attorney's fees; and 5) whether the petitioner is entitled to vocational rehabilitation services. *See*, AX1.

Since the last hearing, Petitioner followed-up with Dr. Douglas Evans on September 25, 2014. Since it had been a year since Dr. Evans last recommended the third right shoulder surgery, he recommended a repeat MR arthrogram to re-evaluate the condition of the right shoulder. Petitioner was continued on restrictions of no lifting greater than twenty (20) pounds, no overhead work, and no repetitive work. PX1.

Petitioner reviewed the results of the MR arthrogram with Dr. Evans on November 6, 2014, which was noted as showing dye still leaking into the subacromial space, signal change at the superior labrum but no clear leakage of the dye underneath the superior labrum; no signs of impingement, no clear rotator cuff tear but some signal change in the rotator cuff. Based on the dye leakage, Dr. Evans continued his recommendation for a biceps tenotomy/tenodesis. However, given Petitioner' stiffness, he recommended some physical therapy prior to scheduling surgery.

Petitioner was started in pre-operative physical therapy at ATI Physical Therapy, on November 14, 2014. On December 19, 2014, Dr. Evans performed surgery at the Loyola Ambulatory Surgery Center at Oak Brook. The post-operative diagnosis was right shoulder bicipital tendinopathy with labral and chondral degeneration, as well as the traumatic chondral defect on the humeral head. Dr. Evans performed (1) right shoulder arthroscopy, (2) arthroscopic debridement of articular cartilage flaps and wear and debridement of labral fraying, (3) removal of labral sutures, (4) microfracture chondroplasty of the humeral head, and (5) open subpectoral biceps tenodesis. PXs 2 & 3.

Post-operatively, Petitioner started physical therapy on December 22, 2014 and followed-up with Dr. Evans on December 30, 2014. He was restricted to no use of the right arm. When Petitioner followed-up with Dr. Evans on February 17, 2015, his restrictions were changed to no lifting greater than five (5) pounds, no overhead work, and no repetitive work.

Petitioner testified that at the time of his injury, he was an employee of Respondent and had been for approximately eighteen (18) years. Petitioner testified that prior to being employed by the respondent,

he was working as a laborer with his father; when he approached an agent of the respondent, on a whim, inquiring if there were openings, and received a position in the warehouse.

It was Petitioner's testimony that his job duties required him to drive a forklift for approximately 50% of the time, that he worked in excess of forty (40) hours a week; and that he had three (3) weeks of vacation per year. Petitioner testified that he had received a forklift certification from his employer, and acknowledged that he was a skilled forklift operator. Petitioner testified that his experience of forklift operation had not required him to use Microsoft Word, or other computer software.

Petitioner further testified that he received ordered treatment from his physician, Dr. Evans, including a third shoulder surgery. Petitioner also testified that he had received physical therapy from ATI. No medical records, treatment, or bills are in dispute in this matter.

After surgical treatment and physical therapy but prior to reaching maximum medical improvement ("MMI"), he received a letter from Coventry Workers' Comp Services, dated March 13, 2015. Petitioner testified that he did not know the company nor did he recognize the letter as correspondence from Respondent.

On cross-examination the Petitioner admitted that the letter explicitly states that it was sent on behalf of Respondent, that the letter stated he was to continue as an employee of Respondent working offsite, and that he was to be paid by his employer. Petitioner testified he had previously read the letter in question. Petitioner further acknowledged that he was aware of the name of the law firm representing his employer, and that the letter of March 13 had been sent to both his attorney and to the attorney for his employer.

The letter of March 13, 2015, admitted as Petitioner's exhibit 6 and Respondent's exhibit 3, stated that Chicago Quad Cities (Respondent) requested Coventry Health Care coordinate an offsite light duty work assignment, as an extension of his existing employment. Petitioner was to present himself for employment at an offsite non-profit thrift store on March 26, 2015. Pursuant to the letter, Petitioner was to work Monday – Friday 9:00 am – 5:00 p.m. Any medical or physical therapy appointments related to the work injury would be accommodated. Petitioner was to continue to be paid as an employee and the position was referred to as "an extension of [his] employment".

The letter notes Petitioner's medical restrictions as no lifting over five (5) pounds. The job duties suggested are as follows: 1) meet and greet customers in store; 2) provide general information about donated items; 3) place small donated items on shelves; 4) assist with placing clothes on hangers; and 5) assist with pricing items when needed. RX3.

Respondent's exhibit 4(a) indicates that a copy of the March 13, 2015 letter from Coventry Workers' Compensation Services was sent to Petitioner's counsel on March 13, 2015 at 9:30 a.m. and that there

was a reply on March 13, 2015 at 9:41 a.m., requesting confirmation that the Petitioner's restrictions of no overhead work and no repetitive work would be accommodated. RX4b.

The exhibits indicate that on March 17, 2015 the Petitioner's counsel emailed Respondent's counsel with the assertion that transitional employment programs had been addressed by Arbitrator Kane in *Richard Lee v. Fluid Management*. Petitioner's counsel then restated her exception to the program on the grounds of Petitioner's restrictions. RX4c.

On March 20, 2015, Respondent's counsel responded to the Petitioner's counsel by email and denied that the case addressed by Arbitrator Kane was on point or that there was binding precedent on this topic known to him.

The respondent's attorney replied to the email of March 13, 2015 on March 20, 2015 at 8:47 a.m. that he was in receipt of confirmation from the supervisor at the off-site facility and that the Petitioner's restrictions were known and would be complied with.

On March 23, 2015, Respondent's counsel sent a letter advising Petitioner's counsel that they required him to attend the transitional program and reaffirmed that the program would comply with the restrictions. Counsel stated that TTD benefits would be terminated if the petitioner did not attend. RX4d.

The Petitioner reported that he did not report for duty on March 26, 2015 and that the last period for which he had received TTD ended March 29, 2015. He testified that in the middle of May he was given permanent restrictions by Dr. Evans and that he was released with those restrictions and permitted to return to work, beginning the middle of May.

On June 8, 2015, Respondent's counsel sent an email to the Petitioner's counsel stating that the petitioner was required to attend the transitional work-program. Respondent's counsel stated that the Respondent was reviewing Petitioner' FCE and permanent restrictions and formulating a response. RX4e.

On July 10, 2015, Petitioner's counsel forwarded to Respondent's counsel a copy of the July 9, 2015 rehabilitation plan of Vocamotive. The letter accompanying the plan included a request for vocation rehabilitation. PX 7.

On August 3, 2015 Respondent's counsel sent a letter to the Petitioner's counsel stating that the respondent declined to provide the requested rehabilitation services and provided three justifications for the denial, stating that the plan does not comply with *National Tea*. Finally, the Respondent reaffirmed its offer of a transitional work program. RX4f.

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The petitioner testified to having basic computer skills, including the ability to type with both hands; send emails, use online forms; and use the Yahoo website. The petitioner testified that he has not made any effort to find employment since he was placed on permanent restrictions; and that he has not used any online resources to seek employment, including the jobs section of the Yahoo website. The petitioner testified that he has not used print resources to seek employment and has not approached his former Union about returning to employment, either formally or informally. The petitioner testified that he has made no effort to approach employers or associates regarding employment.

The petitioner testified that he currently has no routine to his day and watches television. He assists his family with basic housekeeping and parenting tasks, but does not have a routine set of activities which he participates in every day.

Petitioner testified that he met with Ms. Stafseth at Vocamotive, Inc. for an interview regarding vocational services and that he reviewed her plan to assist him in seeking jobs. Petitioner testified that her plan included training him to work as a forklift operator, security guard, or dispatcher. The Petitioner testified, on-cross examination, that he was already capable of driving a forklift; and that Vocamotive did not have the facilities to teach him to operate a forklift.

The petitioner testified that he knows that when he meets in a formal setting with individuals, he should be appropriately dressed so dressed for his meeting with Ms. Stafseth. He testified further that he was aware of the requirement to speak and behave appropriately when meeting and that he did so when meeting with Ms. Stafseth. The petitioner testified that he was unaware if the transitional employment position was still open to him.

Testimony of Kari Stafseth, CRC

Ms. Stafseth testified that she is a certified rehabilitation counselor working at Vocamotive, Incorporated and that she had evaluated Petitioner on July 7, 2015, upon referral of his attorney. Ms. Stafseth took a history from him regarding to his current physical abilities, education, work history, and job interests. Ms. Stafseth testified that, during his interview, Petitioner appeared appropriately dressed, made appropriate eye contact, had an appropriate vocabulary, and was able to sit for the duration of the appointment. PX5 pp. 4, 7, 30.

Ms. Stafseth considers Petitioner to be an unskilled laborer, without any skills which he could transfer to other industries. On cross-examination she admitted that he had a certification to operate a forklift, and possessed the requisite skills to be a forklift operator. PX5 pp. 12, 32, 56.

On July 9, 2015, Ms. Stafseth issued a report stating that it was her opinion that Petitioner was generally employable despite his injured condition, but that that his prior employment was no longer

open to him. She testified that Petitioner could be placed in a position as a forklift operator, shipping and receiving clerk, dispatcher, warehouse manager, or security guard. PX5 pp. 14, 15-17, 32.

Ms. Stafseth testified Petitioner's place of employment was in Bridgeview Illinois, outside of the city of Chicago and that she was aware that the city of Chicago (the "City") had increased the minimum wage which would reach $13 per hour as of July 1, 2019. Ms. Stafseth testified that the City's minimum wage increase would not affect Petitioner's earning potential in any way, because the City is outside the geographical area in which Petitioner would return to work. She testified that when determining the geographical area in which a client returns to work, she considers a 30 mile radius. On cross-examination Ms. Stafseth admitted she did not know the distance between the Petitioner's home and the City's border, or between his home and his place of employment with Respondent, or between his place of employment and the City. PX5 pp. 18, 38.

Ms. Stafseth testified that warehouse workers in the Chicago Metropolitan area were paid $12.54 per hour. This figure was given as a mean and was reported as being sourced from a May of 2014 report including the Chicago Metropolitan area, including Chicago, Joliet and Naperville. PX5 p. 19.

Ms. Stafseth testified on cross-examination that the May of 2014 report from which she derived the $12.54 figure, was prepared in advance of the increase to the City of Chicago minimum wage and agreed that when an updated report was prepared, the wage data for the entire metropolitan area would change. Ms. Stafseth recommended that her company offer vocational services for Petitioner; and that those services would include keyboard training, Microsoft Word and Excel, job seeking instruction, and mock interviews. Ms. Stafseth testified that she could not state, to a reasonable degree of rehabilitation counseling certainty, that her efforts would increase Petitioner's earning capacity; or that his injury would result in a decrease to his job security.

In addition, Ms. Stafseth testified, to a reasonable degree of rehabilitation counseling certainty, that training Petitioner in computer skills would probably not increase his earning capacity as a warehouse worker, or as a forklift operator. She also testified that he was able to type with both hands, send emails, browse the internet; and fill in reports and forms on a computer screen. Ms. Stafseth testified that she was unable to assess the possibility of Petitioner obtaining a job as a forklift operator, shipping and receiving clerk, dispatcher, warehouse manager, or security guard, with or without her services. Computer training would increase his earning potential as a security guard, but that his earning potential would be limited to $10.50 - $12 per hour, which was lower than he would earn as a forklift operator. Ms. Stafseth testified that as a dispatcher, he would generally earn approximately $13 per hour; and that as a warehouse manager he would earn up to $15 per hour. Ms. Stafseth testified that the Petitioner had been offered employment training by Respondent's workers' compensation carrier. On cross-examination, Ms. Stafseth testified that the employment training offered by Respondent could assist in acquiring behavioral self-management skills such as developing

a routine of attendance and that the employment training would help Petitioner develop skills appropriate for a minimum wage retail job within the City. PX5 pp. 20-54.

CONCLUSIONS OF LAW

K. Is Petitioner entitled to vocational rehabilitation training?

Awards for vocational rehabilitation are granted pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)), which provides that an employer shall compensate an injured employee for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee. *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 981 N.E.2d 25, 366 Ill. Dec. 960 (2012). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education. 820 ILCS 305/8(a) (West 2010).

Before entering an order for rehabilitation, the evidence must show that rehabilitation is appropriate. *Amoco Oil Co. v. Industrial Comm'n*, 218 Ill. App. 3d 737, 751, 578 N.E.2d 1043, 161 Ill. Dec. 397 (1991). When determining whether rehabilitation is appropriate, certain factors must be considered. *Id.* "The factors favoring rehabilitation include (1) that the employee's injury caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity, (2) that the employee is likely to lose job security due to his injury, and (3) that the employee is likely to obtain employment upon completion of rehabilitation training." *Id.* Additional factors to be considered are the costs and benefits to be derived from the program; the employee's work-life expectancy; his ability and motivation to undertake the program; and his prospects for recovering work capacity through medical rehabilitation or other means. *Id.*

Commission Rule 7110.10(a) (50 Ill. Admin. Code § 7110(a) (eff. June 22, 2006) provides that:

> The employer or his representative, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs. 50 Ill. Admin. Code § 7110(a) (eff. June 22, 2006).

The employer has not satisfied its duty under Rule 7110.10. Petitioner, pursuant to advice of counsel, investigated a rehabilitation plan and as of yet, has not been paid maintenance benefits. Petitioner has requested that Respondent provide a vocational rehabilitation plan on numerous occasions and

Respondent has not responded or paid maintenance benefits. The Arbitrator directs that the respondent prepare a written assessment of the course of rehabilitation required to return the injured worker to employment. In addition, Respondent is to set a vocational rehabilitation program in place, to assist the petitioner is finding appropriate employment. In the Arbitrator's opinion, based the testimony of Ms. Stafseth, her plan for Petitioner may not be the best available. However, there is a suitable job market available for which the petitioner is qualified and he should be working.

L. What temporary total disability is in dispute? What maintenance is in dispute?

Respondent disputes Petitioner entitlement to TTD after March 26, 2015, because of Petitioner's refusal and failure to present himself to work that this Arbitrator opines, was within his restrictions, the petitioner has been without benefits since March 29, 2015. Then, after the Petitioner is released to return to work within his restrictions, which the respondent admittedly cannot accommodate, the respondent does not make any attempt to provide Petitioner with vocational rehabilitation or maintenance. It is clear to this Arbitrator that there was a profound lack of communication and co-operation between counsels, to the detriment of the petitioner. The Arbitrator concludes that Petitioner was entitled to TTD from February 26, 2014 to March 29, 2015 and maintenance benefits from May 21, 2015 to September 25, 2015.

M. Should penalties or fees be imposed upon Respondent?

Illinois courts have refused to assess penalties under sections 19(k) and (l) of the Act where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the compensation withheld. *See, Board of Education v. Industrial Commission*, 93 Ill.2d 1, 442 N.E.2d 861 (1982); *See also, Avon Products, Inc. v. Industrial Commission,* 82 Ill. 2d 297 (1980) and *Brinkmann v. Industrial Commission*, 82 Ill. 2d 462 (1980). "Where a delay has occurred in payment of workmen's compensation benefits, the employer bears the burden of justifying the delay, and the standard we hold him to is one of objective reasonableness in his belief." *Id. See also, City of Chicago v. Industrial Commission*, 63 Ill. 2d 99 (1976).

The Illinois Supreme Court has explicitly found an obligation on the part of Respondents to diligently obtain information regarding a Petitioner's claim in *Board of Educ. v. Industrial Comm'n*, 93 Ill. 2d 1, 66 Ill. Dec. 300, 442 N.E.2d 861 (1982). In *Board of Educ.*, the court found that the Chicago Board of Education "had or should reasonably have had in its possession" sufficient evidence, that "would have disclosed that the grounds for challenging temporary total disability liability were insubstantial at best," and therefore fees and penalties were warranted. The Supreme Court also found that the Board's "failure to obtain that information did not entitle the Board to assert later that it acted in good faith because it was ignorant of the evidence in favor of the employee." *See, Board of Educ. v. Industrial Comm'n*, 93 Ill. 2d 1, 66 Ill. Dec. 300, 442 N.E.2d 861 (1982).

Petitioner seeks penalties and attorney's fees as provided in Sections 19(K), 19(l) and 16 of the Act. The Arbitrator finds and concludes that penalties are not warranted in this matter.

16IWCC0829

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
11WC29443
SIGNATURE PAGE

Signature of Arbitrator

December 8, 2015
Date of Decision

DEC 8 - 2015

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

James C. Williams,
Petitioner,

vs. NO: 11 WC 29736

16IWCC0815

Interstate Cleaning Corp.,
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 temporary total disability, permanent partial disability, medical expenses, prospective 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 February 2, 2016 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the petitioner the sum of $466.13 per week for life, commencing November 15, 2013, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

16IWCC0815

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: DEC 16 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-12/06/16
jdl/wj
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILLIAMS, JAMES C
Employee/Petitioner

Case# **11WC029736**

INTERSTATE CLEANING CORPORATION
Employer/Respondent

16IWCC0815

On 2/2/2016, 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 0.46% 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:

1551 STOKES LAW OFFICES
GARY J STOKES
200 N GILBERT
DANVILLE, IL 61832

1454 THOMAS & ASSOCIATES
ROBERT HOFFMAN
500 W MADISON ST SUITE 2900
CHICAGO, IL 60661

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

James C. Williams
Employee/Petitioner

v.

Interstate Cleaning Corporation
Employer/Respondent

Case # 11 WC 29736

16IWCC0815

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 Urbana, on December 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. ☒ 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 27, 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 causally related to the accident.

In the year preceding the injury, Petitioner earned $13,167.96; the average weekly wage was $253.23.

On the date of accident, Petitioner was 53 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 $47,285.76 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $47,285.76. (Includes TTD paid pursuant to the 19(b) Decision).

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 Exhibits 3, 4, and 5 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 $245.33 per week for 18 weeks commencing July 12, 2013, through November 14, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent total disability benefits of $466.13 per week for life, commencing November 15, 2013, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) 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 30, 2016
Date

FEB 2 - 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on December 27, 2009. The Application alleged that Petitioner lifted a 55 gallon trash can and sustained an injury to the lower back (Arbitrator's Exhibit 2).

This case was previously tried in a 19(b) proceeding on July 11, 2013, before Arbitrator Nancy Lindsay. Arbitrator Lindsay's Decision was filed with the Commission on September 9, 2013, and she awarded Petitioner 112 6/7 weeks temporary total disability benefits commencing May 11, 2011, through July 11, 2013, and prospective medical treatment as recommended by Dr. Ivan Santiago, Petitioner's primary treating physician. Arbitrator Lindsay also ordered that Respondent pay penalties and attorneys' fees.

Petitioner's counsel filed a review of Arbitrator's Lindsay's Decision to the Commission in which he sought penalties and attorneys' fees in addition to those awarded by Arbitrator Lindsay. The Commission's decision was entered on July 25, 2014, and the Commission declined to award the additional penalties and attorneys' fees sought by Petitioner's counsel, but affirmed the award of temporary total disability benefits and prospective medical treatment. The case was remanded to the Arbitrator for further proceedings (Petitioner's Exhibit 2).

When this case was tried on December 10, 2015, on the Request for Hearing (Stipulation), Respondent disputed accident, but noted that a ruling was previously made in respect to this issue in the 19(b) proceeding. Respondent also disputed causal relationship; however, Respondent's counsel did not note that this issue had previously been ruled upon in the 19(b) proceeding. Petitioner claimed that Respondent was liable for unpaid medical bills and prescription medications. Respondent stipulated and agreed to its liability for same. In regard to temporary total disability benefits, Petitioner claim to be entitled to the period of temporary total disability awarded in the 19(b) decision of 112 6/7 weeks commencing May 11, 2011, through July 11, 2013, and an additional period of temporary total disability benefits of 18 weeks, commencing July 12, 2013, through November 14, 2013. Respondent disputed its liability for the additional period of temporary total disability claimed by Petitioner. Finally, Petitioner claimed that he was permanently and totally disabled as of November 15, 2013 (Arbitrator's Exhibit 1).

At trial, Petitioner testified that he worked for Respondent as a janitor and sustained a low back injury on December 27, 2009. Petitioner stated that Dr. Santiago subsequently imposed permanent work restrictions of no bending or twisting as well as a 15 pound lifting restriction. He also stated that Dr. Santiago had been his primary treating physician since the prior hearing of this case in July, 2013.

Petitioner testified that, as of the date of trial, there had been no change in his pain symptoms and that he continued to be treated by Dr. Santiago, having just been seen by him on December 8, 2015. Petitioner described the treatment provided by Dr. Santiago since the July, 2013, hearing as being pain medications, "blocker" shots and ablations. Petitioner stated that the shots and ablations only provided him with some temporary pain relief and that he continued to take prescription medications on a daily basis. Petitioner stated that his pain is primarily in the low

back, right hip and right leg. Petitioner said that if he did not take the pain medication, the pain was intolerable which he rated as a 9/10. Petitioner testified that he is unable to stand for a very long period of time and is totally unable to bend over. He stated that Dr. Santiago has continued to impose the permanent work/activity restrictions.

Dr. Santiago's treatment records for care he provided to Petitioner from May 30, 2013, through October 26, 2015, were received into evidence at trial. The records were consistent with Petitioner's testimony regarding the treatment Dr. Santiago provided to him (Petitioner's Exhibit 3).

Dr. Santiago prepared a medical report directed to Petitioner's counsel dated December 1, 2014. In this report, Dr. Santiago reaffirmed his opinion that Petitioner had permanent work/activity restrictions of no twisting, no repetitive bending and lifting and no lifting more than 15 pounds (Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. James Kohlmann, an orthopedic surgeon, on November 14, 2013, and on July 9, 2015. Dr. Kohlmann was deposed on September 17, 2015, and his deposition testimony was received into evidence at trial. In regard to his examination of November 14, 2013, he opined that Petitioner had permanent back pain but could work in a light to medium physical demand level or, at least, at a sedentary level. He also noted that Petitioner was still being actively treated (Respondent's Exhibit 1; pp 9-10).

In regard to his examination of July 9, 2015, Dr. Kohlmann testified regarding Petitioner's work/activity restrictions in greater detail and opined that Petitioner could sit up to four hours per day, stand up to four hours per day, walk up to four hours per day and drive up to four hours per day. In regard to lifting, Dr. Kohlmann opined that Petitioner could lift continuously one to 10 pounds, continuously 10 to 20 pounds, occasionally 20 to 50 pounds and never more than 50 pounds. He also opined that Petitioner was at MMI as of his examination of July 9, 2015 (Respondent's Exhibit 1; pp 16 – 17).

On cross-examination, Dr. Kohlmann agreed that Petitioner's condition did not improve at all between his two examinations of him. He further stated that Petitioner's condition was permanent and was unchanged between his two examinations of him (Respondent's Exhibit 1; pp 34, 46).

At the direction of Petitioner's counsel, Petitioner was evaluated by David Patsavas, a vocational rehabilitation consultant, on July 22, 2013. Patsavas reviewed medical records regarding Petitioner's treatment and interviewed Petitioner regarding his education and employment history. Patsavas prepared a very thorough and comprehensive report regarding his evaluation of Petitioner and opinions regarding same dated July 22, 2013, which was received into evidence at trial. Patsavas opined that Petitioner was unable to return to work to his prior occupations of janitor, janitorial supervisor and automobile mechanic given his physical capabilities and restrictions. He also opined that given the fact that Petitioner lacked a high school education, he lacked readily transferable skills. Patsavas further opined that Petitioner was not a candidate for vocational rehabilitation services and that there was not a stable labor market in which Petitioner could seek or obtain employment (Petitioner's Exhibit 7).

Stephanie Powers, a vocational rehabilitation counselor, testified on behalf of the Respondent at trial. Powers never met with Petitioner and her opinions were based solely upon information derived from a note of Dr. Kohlmann and information regarding Petitioner's prior employment history as stated in a job application completed by Petitioner in September, 2007. Powers opined that Petitioner was employable and that there was a stable labor market available to him. This was based, in part, on the fact that Petitioner was self-employed for a period of time and had supervisory skills.

On cross-examination, Powers stated that she had just been retained by Respondent six days prior to trial and that the only information she had regarding Petitioner's employment history was what was contained in the application completed by Petitioner in September, 2007. Powers did not prepare any type of written report, she had no knowledge as to what restrictions had been imposed by Petitioner's treating physician, she did not know the physical requirements of Petitioner's jobs, she did not perform a transferable skills analysis and she did not complete a labor market survey.

Charles Wolf, Respondent's Vice-President of Operations, testified on behalf of Respondent at trial. He stated that Respondent had a contract with Kmart to provide janitorial services and that Petitioner was working at a Kmart at the time of the accident. Respondent provided work to Petitioner that conformed to his work/activity restrictions through May, 2011, but, at that time, Petitioner was terminated by Respondent. Wolf testified that the reason Petitioner was terminated was because he was accused of theft of a food item and that Kmart did not want him to work there any longer. He confirmed that Respondent did not have any other work to offer to Petitioner.

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 is causally related to the accident of December 27, 2009.

In support of this conclusion the Arbitrator notes the following:

The prior 19(b) Decision, as affirmed by the Commission, found that there was a causal relationship between the accident of December 27, 2009, and Petitioner's condition of ill-being.

Petitioner credibly testified that there had been no change in his symptoms since the time of the 19(b) hearing in July, 2013.

Respondent's Section 12 examiner, Dr. Kohlmann, examined Petitioner on November 14, 2013, and July 9, 2015, and opined that there was no improvement in Petitioner's condition between the two examinations.

There was no evidence that Petitioner sustained any intervening accidents.

In regard to disputed issue (L) 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 3, 4 and 5 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes following:

At trial, Respondent stipulated as to its liability for payment of the aforementioned medical bills.

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

The Arbitrator concludes that Petitioner is entitled to an additional payment of temporary total disability benefits of 18 weeks, commencing July 12, 2013, through November 14, 2013.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator finds that Petitioner was at MMI as of November 14, 2013, when Dr. Kohlmann examined him for the first time. While Dr. Kohlmann did not opine that Petitioner was at MMI until the second examination of July 9, 2015, he testified that Petitioner's condition at the time of both examinations was permanent and unchanged.

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

The Arbitrator concludes that Petitioner is permanently and totally disabled and has been so disabled since he was found to be at MMI on November 14, 2013.

In support of this conclusion the Arbitrator notes the following:

Petitioner's primary treating physician, Dr. Santiago, has imposed permanent work/activity restrictions of no twisting, no repetitive bending and lifting and no lifting of more than 15 pounds.

While the work restrictions suggested by Respondent's Section 12 examiner, Dr. Kohlmann, are not as significant as those imposed by Dr. Santiago, Dr. Kohlmann opined that his work restrictions limited Petitioner to performing duties at the light to medium physical demand level.

The Arbitrator finds Petitioner's testimony regarding his current symptoms to be credible and he also finds the opinion of Petitioner's primary treating physician, Dr. Santiago, regarding Petitioner's work/activity restrictions to be more persuasive than that of Respondent's Section 12 examiner, Dr. Kohlmann.

Petitioner's vocational expert, David Patsavas, reviewed Petitioner's medical records and interviewed Petitiofsner regarding his education and employment history. Based on the

preceding, Patsavas opined that Petitioner was unable to return to work to any of his prior occupations, lacked transferable skills, was not a candidate for vocational rehabilitation and that there was not a stable labor market for which Petitioner could obtain employment.

Respondent's vocational expert, Stephanie Powers, was retained by Respondent six days before trial and conducted, at best, an extremely limited analysis of Petitioner's employability. Powers never met with Petitioner, had an extremely limited amount of information, or no information at all, regarding Petitioner's physical condition, restrictions, education and work history.

The Arbitrator finds the opinion of Petitioner's vocational rehabilitation consultant, David Patsavas, to be only evidence regarding Petitioner's employability that has credibility.

The opinion of Respondent's vocational expert, Stephanie Powers, was based on an extremely limited amount of information regarding Petitioner that her testimony, while admissible, has little or no probative value.

The Arbitrator concludes that Petitioner is permanently and totally disabled because he falls within the category of an "odd-lot" permanent total disability.

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

Donald Margraff,
Petitioner,

16IWCC0833

vs.

NO: 11WC 29996

State of Illinois,
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 wage calculations, nature and extent, duration of disability, maintenance, 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 November 3, 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.

DEC 23 2016

DATED:
o121416
CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0833

MARGRAFF, DONALD
Employee/Petitioner

Case# **11WC029996**

STATE OF ILLINOIS
Employer/Respondent

On 11/3/2015, 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:

2194 STROM & ASSOC LTD
NEAL B STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
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

NOV 3 2015

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

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

16IWCC0833

DONALD MARGRAFF
Employee/Petitioner

v.

STATE OF ILLINOIS
Employer/Respondent

Case # **11** WC **29996**

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 **3/27/2015 and 9/30/2015**. 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. ☒ What temporary benefits are in dispute?
☐ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury? [Respondent views the case as ripe for a permanency award]
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. X Other **Is Petitioner entitled to vocational rehabilitation and an award of Thomas Grzesik's bill in the amount of $2,300?**

16IWCC0833

FINDINGS

On **June 18, 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 **$78,002.13**; the average weekly wage was **$1,625.04**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

Petitioner *has* not received all reasonable and necessary medical services.

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

The parties stipulated Petitioner was temporarily totally disabled from July 14, 2011 through December 31, 2011 and that Respondent is entitled to credit in the amount of $15,471.59 for TTD benefits it paid.

ORDER

Temporary Total Disability

Based on Dr. Cole's records, and consistent with Interstate Scaffolding v. IWCC, the Arbitrator finds that Petitioner was temporarily totally disabled from January 1, 2012 through February 27, 2012, a period of 8 2/7 weeks. The Arbitrator awards temporary total disability benefits at the rate of $1,083.36 per week during this period, based on the average weekly wage analysis set forth in the attached decision.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $1,083.36/week from May 26, 2012 through June 6, 2012, a period of 1 5/7 weeks, and from January 2, 2013 through February 26, 2015, a period of 112 2/7 weeks, as provided in Section 8(a) of the Act.

Vocational Rehabilitation

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner is entitled to six months of vocational rehabilitation, in the form of an assisted job search, and maintenance. The Arbitrator declines to award open-ended vocational rehabilitation based on Petitioner's age, permanent restrictions and current complaints.

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$241.00 (PX 9) and $9,407.11 (PX 10)** as provided in Section 8(a) of the Act. Respondent shall also pay vocational rehabilitation evaluation expenses of **$2,300.00** (PX 11).

16IWCC0833

Molly C Mason

Signature of Arbitrator

11/3/15
Date

NOV 3 - 2015

Donald Margraff v. State of Illinois
11 WC 29996

Summary of Issues

There is no dispute as to accident, notice, causation or temporary total disability from July 14, 2011 through December 31, 2011. Nor is there any dispute that the accident resulted in the need for a permanent 25-pound lifting restriction. The disputed issues include earnings/average weekly wage, medical and vocational expenses, maintenance from January 1, 2012 through September 30, 2015 and whether Petitioner is entitled to vocational rehabilitation and an award of his vocational expert's bill. Arb Exh 1.

Arbitrator's Findings of Fact

At the initial hearing, held on March 27, 2015, Petitioner testified he finished high school and completed a one-year carpentry apprenticeship at Washburne Trade School. T. 17. He also obtained a CDL license after passing various tests required by the Illinois Department of Transportation. T. 18.

Petitioner testified he worked for Respondent State of Illinois for 20 years. T. 18. He worked as a carpenter for about 6 years before being hired by Respondent. T. 17. At Respondent, he started out working as a maintenance equipment operator at the Elizabeth Ludeman Center for Developmental Disabilities [hereafter "Ludeman"]. He was a member of the Teamsters union. After 7 years, he transferred to the Howe Center for Developmental Disabilities, where he continued working in the same capacity. After Howe closed, he resumed working at Ludeman. T. 15. He was required to have a valid CDL license while working for both Ludeman and Howe. T. 15-16.

Petitioner testified his maintenance equipment operator duties included driving residents to medical appointments, delivering food, commodities and mail to residential houses, driving a bus while taking residents on field trips, and operating various kinds of heavy equipment while digging water mains, removing snow, cutting grass and performing other tasks at the centers. The equipment he operated included backhoes, front end loaders, Bobcats, excavators and air hammers. T. 20.

Petitioner testified he averaged about 70 hours per week. He was regularly required to work overtime. He did not always work on Saturdays and Sundays but much of the maintenance took place on those days. The collective bargaining agreement he was governed by contains a section called "overtime." This section provides that he was required to work overtime. T. 24. [The relevant section defines the "normal workday" and states that workers "shall" work "reasonable overtime as necessary." PX 7. See further below.] His bosses at Ludeman (originally John Reidy and, for the last seven years, Michael Spicker) addressed overtime with him and his co-workers on a daily and sometimes hourly basis, as the need arose. For example, Spicker would call him into his office and tell him he would be taking residents to

the United Center at 4 PM the same day, via bus. Petitioner testified he "didn't really say no unless [he] had a valid excuse" because he could get written up for declining overtime. On many occasions he did not want to work the overtime but he had to accept it per the union contract. T. 27-28.

Petitioner testified that, with respect to overtime, Respondent worked off of a list of employees. When an employee worked overtime, he received "credited hours." At any given time, the employee with the lowest number of credited hours was the first employee to whom Respondent directed an overtime assignment. T. 28.

Petitioner identified PX 7 as the collective bargaining agreement that was in effect from July 1, 2012 through June 30, 2015. He testified that the previous agreement contained the same provisions containing overtime as PX 7. Section 8.3 of PX 7 states that an employee "shall" work reasonable amounts of overtime when overtime is available and that overtime assignments shall be distributed as equally as possible among qualified personnel. Section 8.3 also states that overtime records are to be maintained and posted. T. 30-31.

Petitioner testified he worked overtime during the year preceding his June 18, 2011 accident. T. 31.

Petitioner testified that June 18, 2011 was a Saturday. T. 21. On that date, he was pulling up the door of a 26-foot straight truck, while making a food delivery, when one of the rollers on the door broke and became lodged in the door. The door abruptly stopped moving. Petitioner testified he felt pain in his shoulders and stomach when this happened. T. 33. Petitioner denied having any problems with his shoulders or stomach before the accident. T. 33. At Respondent's direction, he went to Advocate Medical Group the same day. T. 33.

An occupational medicine treatment form in the Advocate records (PX 1) reflects that Petitioner was pulling an object up from below knee level when the object "got caught." The form also reflects that Petitioner experienced intense abdominal pain and bilateral shoulder pain when this occurred but that his abdominal pain had since subsided. The examining provider, Dr. Imlach, noted a large, reducible umbilical hernia and tenderness in both shoulder in the acromioclavicular and bicipital tendon regions. Dr. Imlach imposed restrictions of no heavy lifting and no bending, stooping or twisting. He instructed Petitioner to immediately go to an Emergency Room if his hernia pain returned. PX 1.

Petitioner next sought treatment on June 27, 2011. On that date, he saw Dr. Raiker at Munster Family Health Center. The handwritten note of June 27, 2011 reflects that Petitioner developed a hernia and experienced bilateral shoulder pain while pulling a door at work the previous Saturday. Petitioner complained of 5-6/10 pain in both shoulders. On bilateral shoulder examination, Dr. Raiker noted a full range of motion but painful abduction and flexion. He also noted a large umbilical hernia. He ordered bilateral shoulder X-rays and prescribed Ultracet and Skelaxin. He referred Petitioner to Dr. Dempsey and noted that Petitioner was

scheduled to see this doctor the following day. He released Petitioner to desk duty. PX 2. T. 34.

The shoulder X-rays, performed on June 27, 2011, showed minimal acromioclavicular joint osteoarthritis in both shoulders. PX 2, pp. 10-11.

Petitioner saw Dr. Dempsey, a surgeon, on June 28, 2011. The doctor recorded a history of the work accident. PX 3, p. 6. He diagnosed an incarcerated umbilical hernia and imposed a 10-pound lifting restriction pending surgical repair. PX 3, p. 2.

Petitioner returned to Munster Family Health Center on July 5, 2011 and reported he was scheduled to undergo hernia surgery later that week. He expressed anxiety about this surgery. He also complained of bilateral shoulder pain. Dr. Raiker prescribed Xanax and physical therapy. PX 2, p. 6.

Petitioner underwent a hernia repair with mesh placement at Community Hospital in Munster, Indiana on July 7, 2011. T. 37. Dr. Dempsey performed the surgery. PX 3, pp. 31-32. Petitioner followed up with the doctor thereafter, with the doctor eventually releasing him to full duty as of September 19, 2011. PX 3, p. 26. Petitioner testified he worked between September 19 and November 1, 2011. T. 40.

On August 15, 2011, Petitioner saw Dr. Brian Cole, an orthopedic surgeon. Petitioner testified he chose to see Dr. Cole. T. 37. On initial examination, Dr. Cole noted weakness in the left shoulder and impingement signs in the right shoulder. He prescribed a left shoulder MRI and imposed restrictions of no overhead work with either arm and no lifting/pushing/pulling more than 10 to 20 pounds. PX 4, p. 28. The MRI, performed on August 23, 2011, showed a near full-thickness tear of the distal supraspinatus tendon at the articular surface, a partial tear of the subscapularis tendon at the distal insertion with moderate associated tendinosis and a macerated appearance of the superior labrum. PX 4, p. 29.

Petitioner testified he saw Dr. Cole's associate, Dr. Zelazny, for a second opinion on August 23, 2011. Petitioner testified that Dr. Zelazny recommended left shoulder surgery. On September 8, 2011, Dr. Cole saw Petitioner again, reviewed the MRI and recommended an arthroscopic rotator cuff repair. He noted that Petitioner was "hoping to retire soon" and expressed a desire to proceed with the surgery. PX 4, p. 23.

On October 17, 2011, Dr. Raiker cleared Petitioner for left shoulder surgery. T. 40. PX 2, p. 7.

On November 2, 2011, Dr. Cole operated on Petitioner's left shoulder at Rush. T. 40. He performed the following procedures: intra-articular debridement, subacromial decompression and biceps tenotomy.

At the first post-operative visit, on November 11, 2011, Dr. Cole recommended physical therapy and released Petitioner to desk duty, with no use of the left arm and continued sling usage, as of November 16, 2011. PX 4, pp. 20, 50-51. Dr. Cole indicated he planned to release Petitioner to full duty "at six weeks post-operative." PX 4, p. 20.

Petitioner testified he presented Dr. Cole's restrictions to Mike Spicker on November 16, 2011. Spicker told him that once he underwent an operation, he had to be able to resume 100% duty in order to return to work. T. 47. Petitioner testified he then asked Spicker how he was going to support himself. Spicker said, "you best retire." T. 50. Spicker did not tell him he might be entitled to workers' compensation benefits. T. 50.

Petitioner testified he presented the same restrictions to Debbie Helsel the same day. Helsel repeated what Spicker had told him, i.e., that he could not return to work unless he was "100%." Then Helsel told him to wait a minute. She called someone in Springfield and then again told Petitioner that he could not resume working unless he was 100%. Helsel told him there was "no way" he was going to be allowed to return to work with his shoulder like that "and tear it up again." T. 48-49. He asked Helsel whether he would remain on workers' compensation. She told him no and recommended he submit his retirement papers at the end of the year. She told him his workers' compensation would stop on December 31, 2011 and he would not be covered thereafter. He pressed further and asked if he could be assigned to the same light duty, i.e., filing medical reports, he had performed after the hernia repair, while he was awaiting the shoulder surgery. She told him no, indicating there was a "state law" that a worker has to be 100% to return to work once surgery is over with. T. 52-53.

Petitioner testified he called Respondent's retirement board at some point during the week of Thanksgiving in 2011, after speaking with Spicker and Helsel. The board sent him an application for retirement benefits and he completed and submitted it. He felt it was his "only option." T. 55. He never received a letter from Respondent explaining why his workers' compensation benefits were terminated. T. 58. Respondent never offered him vocational rehabilitation or retraining. T. 60.

Between November 16, 2011 and February 27, 2012 Petitioner participated in 39 physical therapy sessions at Dr. Cole's direction. PX 4, pp. 68-69. He saw Dr. Cole on occasion during this period. T. 49.

On December 19, 2011, Dr. Cole recommended continued therapy and released Petitioner to work with no pushing/pulling over 5 pounds and no overhead lifting. PX 4, p. 48.

Petitioner testified that Dr. Cole eventually released him to work with permanent restrictions of no overhead lifting over 25 pounds and no lifting, pushing or pulling over 25 pounds with the left arm. T. 43-44. Records in PX 4 show that Dr. Cole intended these restrictions to go into effect four weeks after January 30, 2012, with Petitioner continuing therapy in the interim. PX 4, p. 47.

Petitioner testified he wanted to return to work because he was able to earn "good money" and wanted to "boost [his] retirement." After he retired, he went to a Secretary of State facility to inquire about a CDL waiver and was told he could not get one. T. 60.

At his attorney's request, Petitioner met with Thomas Grzesik, a vocational rehabilitation counselor, on July 3, 2014. Grzesik interviewed Petitioner on that date and also administered vocational testing. On September 29, 2014, Grzesik issued a report opining that Petitioner is unable to resume his former occupation with Respondent but is a candidate for participation in a vocational program. PX 18 at 7. Grzesik Dep Exh 2. [See below for a summary of Grzesik's deposition testimony.]

On June 16, 2015, after the initial hearing, Thomas Grzesik testified by way of evidence deposition. PX 18. Grzesik testified he is a certified rehabilitation counselor. He has worked in the vocational rehabilitation field for over thirty years. PX 18 at 5. He has a master's degree in counseling. PX 18 at 6. He has worked as a vocational expert for the Social Security Administration since 1977. PX 18 at 6. Grzesik Dep Exh 2. He is licensed in Illinois. He has performed consultations for both claimants and respondents. PX 18 at 7.

Grzesik testified he reviewed a number of medical records and Central Management Services records, along with the Dictionary of Occupational Titles, in connection with his evaluation of Petitioner. PX 18 at 10. As of his July 3, 2014, meeting with Petitioner, Petitioner was 66 years old. Petitioner was appropriately groomed and cooperative. PX 18 at 11. Petitioner related he graduated from high school in 1966, served a tour of duty in Viet Nam, receiving an honorable discharge and completed a carpentry apprenticeship in 1976. PX 18 at 11-12.

Grzesik testified that Petitioner told he attempted to return to work following his surgeries but was told by Respondent he could not resume working until he was 100% fit for duty. According to Petitioner, Respondent advised him to retire. PX 18 at 14.

Grzesik testified that Petitioner reported being able to bend, stand for at least two hours, walk three miles on a treadmill, climb stairs and ladders and use his dominant right arm for reaching. Petitioner also indicated his ability to use his operated left arm typically decreased during the day. Petitioner reported being able to use a computer but indicated he would develop left shoulder and biceps pain while sitting in front of a computer. PX 18 at 17. Petitioner stated he has no days when he is free of pain. He experiences constant pain in his left shoulder. PX 18 at 19. Cold and damp weather tended to cause this pain to increase. Petitioner also indicated he was experiencing mild depression. PX 18 at 20.

Grzesik testified that Petitioner denied any substance abuse and any felony arrests or convictions. Petitioner indicated his hobbies include shooting, fishing, golfing, camping, playing cards and hunting. PX 18 at 21.

With respect to his work history, Petitioner related he drove a tow truck and worked as a journeyman carpenter before beginning to work as a maintenance equipment operator for Respondent in 1991. PX 18 at 23. Grzesik opined that Petitioner's restrictions would prevent him from resuming work as either a carpenter or a maintenance equipment operator. PX 18 at 25-26, 31. Petitioner's carpentry skills are not transferable due to his restrictions. PX 18 at 24, 38.

Grzesik described the results of the tests he administered to Petitioner. On the Wide Range Achievement Test [WRAT] 4, Petitioner scored in the average range for word recognition, in the above average range for sentence comprehension, in the slightly below average range for spelling and in the superior range for math computation. Petitioner's reading composite score was 104, which is average. PX 18 at 29. Petitioner expressed a preference for mechanical types of activities, "working with things rather than people." PX 18 at 30.

Based on his evaluation and the test results, Grzesik opined that Petitioner would be "limited to work that would fall into the sedentary to light physical demand level," based on Dr. Cole's restrictions. PX 18 at 32. In his report, he identified a variety of jobs within this range that might be suitable for Petitioner. The starting hourly salary for these jobs ranged from $8.72 (fast food worker) to $12.00 (customer service representative). PX 18 at 32-34.

Grzesik testified that Petitioner told him he intended to continue working. Petitioner reported having earned $100,000 per year (including overtime) while working for Respondent. PX 18 at 35. Petitioner told him he had applied to several "big box" stores and had applied to be a greeter at Wal-Mart. Petitioner told him he had not been successful in securing a job. PX 18 at 35.

Grzesik opined that Petitioner is a candidate for vocational rehabilitation. Petitioner "was motivated" to participate in such a program and would need assistance in securing work. PX 18 at 37. Due to Petitioner's age, such a program would be focused on job placement. Petitioner would be given a protocol as to how many job contacts to make each week and would meet with a certified vocational counselor to review his progress. PX 18 at 38. The program he envisions would cost Respondent about $1200 to $1500 per month. PX 18 at 39. In his opinion, it is "very possible that [Petitioner] would remain unemployed" without the intervention of a vocational rehabilitation counselor. PX 18 at 39.

Grzesik testified he billed $2,300 for the services he provided. His bill has been paid. PX 18 at 40.

Under cross-examination, Grzesik testified that Petitioner's attorney originally contacted him in mid-June 2014 and asked him to conduct a vocational assessment of Petitioner. PX 18 at 41. His certification results from the fact he has a graduate degree in counseling, has practiced under the tutelage of a certified vocational counselor, has passed an all-day examination and has participated in continuing education. PX 18 at 41. He has to be re-certified every five years. PX 18 at 42. He was last re-certified in 2014. PX 18 at 42. He became certified in 1979.

PX 18 at 42. He has obtained about 250 graduate school hours since being certified. PX 18 at 43. 99% of his clients are individuals who were injured on the job. PX 18 at 43-44. He obtains referrals from attorneys and insurance carriers. PX 18 at 44. He relies on the most current edition of the Dictionary of Occupational Titles. This edition was published in 1991. PX 18 at 47. He is aware that Petitioner retired. He did not see Petitioner until three years after Petitioner retired. PX 18 at 48. He did not call Respondent to inquire as to exactly what Petitioner was told when he attempted to return to work. PX 18 at 48. He would classify Petitioner's job at Respondent as skilled. PX 18 at 49. Petitioner told him he wants to work despite his constant pain. PX 18 at 52. If Petitioner worked with a vocational counselor, the counselor could screen out jobs that exceeded his restrictions. PX 18 at 53. He is looking at non-CDL jobs for Petitioner because Petitioner would have to pass a DOT examination in order to renew his CDL. PX 18 at 54. A light truck driver does not need a CDL. PX 18 at 58. Ideally, a person looks for potential employers who are actually hiring. A counselor could help Petitioner target such employers. PX 18 at 60. He classifies Petitioner's carpentry job as heavy rather than medium because he went through a carpentry apprenticeship and knows exactly what work is required. PX 18 at 60. One piece of ¾-inch plywood weighs over 50 pounds. Toolboxes can exceed 50 pounds. PX 18 at 61. This is why he disagrees with the Department of Labor's categorization of a carpenter job as medium. PX 18 at 61. He spent about seven hours with Petitioner. PX 18 at 62. He charges $200 per hour. His $2300 bill includes charges for scoring Petitioner's tests and writing a report. PX 18 at 63. It probably took him 3 ½ hours to write and proofread the report. PX 18 at 63. About 75 to 80% of the people he meets with take the same tests Petitioner took. PX 18 at 65.

Petitioner testified he experiences a stinging sensation in his abdomen about once a week. He experiences this sensation if he turns a certain way. His doctor told him this was due to the mesh plug. T. 55. He experiences pain in the top of his unoperated right shoulder when he extends his right arm behind his body. T. 57. With respect to his operated left shoulder, he feels throbbing pain in the area of the biceps surgery and on the top of the shoulder. He feels this pain about four to five times per week.

Petitioner testified he has spent the last two years looking for work. He has not had success finding a job. He kept job contact logs. T. 61. Those logs document contacts made during the following three periods: May 26, 2012 through June 6, 2012 (PX 13); January 2, 2013 through December 30, 2013 (PX 12); and January 2, 2014 through February 26, 2015 (PX 13). The logs concerning the first period reflect that Petitioner made 16 contacts (with 5 of those in person), seeking work as an associate, counterperson, stocker, cashier and driver. During the second period, Petitioner logged 150 contacts, applying for work as a driver, salesperson, installer and carpenter. During the last period, Petitioner logged 180 contacts, with some duplication of effort. Petitioner testified he met with Tom Grzesik at the direction of his attorney. Grezesik interviewed him and administered vocational testing in July 2014. T. 62.

Based on PX 7, Petitioner testified he would be earning $35.11 per hour if he still worked for Respondent. He accessed this information by performing a job title search on a Respondent website. T. 64-65.

Petitioner testified he printed PX 15 off of a Respondent website called "accountability.illinois.gov." This website shows the amounts he earned from 2009 forward. In 2009, he earned $103,981.59. About 40% of this amount represents overtime earnings. For average weekly wage calculation purposes, he would add his gross straight time earnings of about $70,000 to his overtime earnings reduced to straight time rate to arrive at $92,654.39. T. 70. In 2010, he earned $102,949.61. Of this amount, about $71,000 represents his gross straight time earnings. For average weekly wage purposes, his 2010 earnings would be $92,299.74, including his overtime earnings reduced to straight time rate. In 2011, the year of his accident, he earned $54,486.50. This figure includes some post-accident earnings. T. 74. Between January 1, 2011 and his accident, he worked overtime. He did not work any overtime after the accident. T. 75. He guesses that his overtime earnings in 2011 equaled about $15,000. T. 76. For purposes of average weekly wage calculation, his earnings in 2011 before the accident, including his estimated overtime at a straight time rate, would have been about $49,496.40. In 2012, he did not work but he received $17,000, representing vacation time, etc. T. 78. [At this point in the hearing, Petitioner's counsel amended the Request for Hearing form to claim an average weekly wage of $1,778.84. T. 78. Arb Exh 1.] This figure represents approximately $92,500 divided by 52 weeks. T. 79-81.

Under cross-examination, Petitioner testified he worked light duty after the hernia repair but not after the shoulder surgery. T. 82-83. Specifically, he worked light duty between approximately September 20 or 21, 2011 and November 1, 2011. T. 85. He received full pay during the time he performed light duty. T. 84. To his knowledge, Dr. Cole did not tell him on November 11, 2011 that he would able to resume full duty. T. 88. No one at Ludeman explained any light duty rules to him. T. 90. He does not know whether he used up all of his allotted light duty before the day he discussed his restrictions with Mike Spicker and Debbie Helsel. T. 91. He believes he did because neither Spicker nor Helsel would allow him to keep working. T. 92. He believes his overtime was mandatory because Ludeman has hospital status and operates 24 hours per day, every day. He did not begin looking for work right after he retired because he was hurt and undergoing therapy. T. 93. During his job search, he tried to look for ads by employers that were hiring. T. 94. He wrote down what the prospective employers told him. T. 96.

On redirect, Petitioner testified he felt depressed after being told he was not being allowed to continue working. T. 97. He had worked for Respondent for twenty years and was surprised he was not accommodated. In 2012, he only looked for work for two weeks. He felt "not good" when employers turned him away. At the urging of his attorney, he later took a more aggressive approach. T. 98. No doctor has released him to full duty. T. 99.

Under re-cross, Petitioner testified he is subject to permanent restrictions. T. 100.

Michael Spicker testified on behalf of Respondent. Spicker testified he has held the position of assistant chief engineer at Ludeman since 2006. T. 102. He is responsible for all mechanical and landscaping issues and also oversees the transportation department. T. 102.

Before he worked at Ludeman, he worked in the same capacity at Howe for six years. He met Petitioner at Howe and saw Petitioner on a daily basis there. T. 103. Petitioner transferred to Ludeman in approximately 2009 or 2010. He then became Petitioner's supervisor. T. 104. He saw Petitioner daily. He and Petitioner had a cordial work friendship. T. 104. A dispatcher typically gave Petitioner his assignments. T. 104. When Howe closed, in late 2010, he and Petitioner discussed Petitioner's wife's future. Petitioner told him he was waiting for his wife to be offered another position, at which point they would make a decision as to when to retire. T. 109. Petitioner told him he could not wait to retire and move out of the Chicago area. Petitioner anticipated moving to his "summer home," which is in southern Illinois or Indiana. T. 117. He told Petitioner he was envious. T. 118. He and Petitioner also discussed retirement later, after Petitioner injured his shoulder. T. 123. Petitioner told him he was "unhappy because he was hurt and he couldn't retire." He told Petitioner that Respondent could not force him to continue working if he wanted to retire due to being hurt. He told Petitioner to "go see workers' comp." T. 120. Specifically, Petitioner told him he was unhappy that he could not retire until his shoulder was completely healed. He told Petitioner he could do what he like, retirement-wise, but that he did not know exactly how to go about taking retirement. He advised Petitioner to talk to someone else. T. 122. Spicker also recalled a third conversation, at some point prior to the work accident, during which Petitioner told him he was "ready to retire" and "could not wait to retire." T. 130.

Spicker testified there was no such thing as "mandatory overtime" at Ludeman between June 2010 and June 2011. T. 131. During that same time period, when overtime became available, it was offered to "the most senior person." That person had the option to work the overtime or "pass" on it. If that person opted not to work the overtime, the overtime was offered to the next most senior person. Spicker testified he would "work his way down a list" of employees until someone opted to work the overtime. T. 131-132. If a worker declined overtime, he was not written up or penalized. T. 132.

Spicker testified he had a conversation with Petitioner concerning Petitioner's restrictions at some point after Petitioner underwent shoulder surgery. T. 135-136. This conversation took place in building 1 at Ludeman. No one else was present. Petitioner asked he could return to work and he told Petitioner he could not do so "without talking to human resources." He also told Petitioner he "had to have a release" in order to be put back to work. T. 137.

Under cross-examination, Spicker acknowledged having testified previously. At some point he was charged with possession of stolen property. He pled guilty to this charge. He could not recall his exact sentence but knew it did not involve jail time. Respondent did not suspend him as a result of the charge. T. 139. The stolen property was not property owned by Respondent. T. 139-140. Spicker also acknowledged being suspended by Respondent due to omitting information from his job application at the time he was hired. T. 140-141.

Spicker testified he did not socialize with Petitioner outside of work. It was not up to either the dispatcher or him to assign overtime. There was "required overtime" at Respondent

but not in the sense that he could tell a worker he could not go home and had to perform the overtime. T. 142. He did not know how to answer a question asking whether the "required overtime" applied to Petitioner. T. 143.

Spicker testified that, in late 2010, the closure of Howe was a "daily topic" of discussion at work. Employees were considering their options, including retirement. T. 146-147. He personally was not worried because he was already at Ludeman. T. 147. When he talked with Petitioner in late 2010, Petitioner was very concerned about his wife's future at Howe. He guesses that their conversation lasted about ten minutes. T. 148. Petitioner never submitted any retirement papers to him. T. 149.

Spicker acknowledged his department did not accommodate any worker but this was not his decision. T. 150. Around November or Christmas, after Petitioner's shoulder surgery, Petitioner asked him if he could come back to work. No one else was present. He told Petitioner he could not return to work with restrictions "without going to human resources." It was up to human resources, not him or his department. T. 154, 161.

Spicker testified he belongs to Local 399. Managers can be union members. T. 154. He works overtime. There is no set overtime schedule but, if someone is absent, he has to fill in. There is no choice about it. T. 155. His own overtime hours are mandatory. He does not know about Petitioner's union. Petitioner belongs to a different union, Teamsters Local 700. T. 157. Petitioner's collective bargaining agreement states that workers "shall" or "should" work equal amounts of overtime. T. 158. When confronted with Section 8.3, which states that "employees shall work reasonable amounts of overtime when overtime is necessary," Spicker testified that, when overtime is necessary, the whole department is required to perform it. T. 160.

Spicker acknowledged that Petitioner worked a lot of overtime. Petitioner worked overtime whenever it was available to him. Petitioner was "happy to work." T. 158.

Spicker testified that Local 700 employees are limited to 60 days of light duty. T. 160.

Spicker denied being sued in federal court. T. 161-162.

Spicker testified he recalled discussing retirement with Petitioner between February and March 2011. The conversation lasted about ten minutes. Petitioner was unhappy he could not retire before his workers' compensation case was finished. Petitioner could not understand why he could not retire. Spicker acknowledged he could not recall this conversation as "clear as day." T. 164.

Spicker testified he did not volunteer to testify. He received two calls from Respondent's attorney in early and mid-February 2015 and told her what he could recall. He told her he knew that Petitioner wanted to retire and was upset that he could not retire due to his injury. T. 178-179. Deborah Helsel called him beforehand, in January 2015, and told him what the attorney was going to inquire about. T. 168. Helsel asked him what he knew about

Petitioner's injury and told him he might get a call. He told Helsel he had known Petitioner for a long time and believed Petitioner to be a good guy. T. 174. On the morning of the hearing, he and Helsel met with Respondent's counsel in her office. During this meeting, he learned from Respondent's counsel that Petitioner had restrictions and could not go back to work. T. 190.

On redirect, Spicker testified there was no mandatory overtime for workers such as Petitioner between June 2010 and June 2011. Petitioner volunteered for overtime virtually every time it was his turn. Petitioner's turn came up based on his cumulative hours. T. 192.

Under re-cross, Spicker testified he is sure there is no mandatory overtime under the "hospital status title" for Local 700 members. If, however, the Local 700 collective bargaining agreement required Petitioner to be included in "hospital status eligibility" to work, and that entailed working more than the regular eight hours, that would be required overtime. T. 195-196.

Deborah Helsel also testified on behalf of Respondent. Helsel testified she is a registered nurse and also the workers' compensation coordinator at Ludeman. She has been the workers' compensation coordinator since May 2010, always at Ludeman. T. 198. Her duties include handing out workers' compensation packets to injured employees, coordinating the care injured employees receive and interacting with the nurse case manager and claims examiner. T. 198-199.

Helsel testified she became acquainted with Petitioner in 2011, when Petitioner had a claim. T. 199. Petitioner came to her office in June or July 2011 and reported an injury. She did not recall exactly what they each said during this conversation. T. 201. She recalled giving Petitioner a workers' compensation packet. T. 201-202. In November 2011, Petitioner called her and said he "had had enough and was going to retire." Petitioner asked her if he could retire while he was off work. She told him she had "no idea" and referred him to Ludeman's personnel department. T. 205-206. From time to time, Petitioner would bring in documentation from his doctor visits. They would converse about subjects unrelated to workers' compensation. T. 207.

Under cross-examination, Helsel testified she recalled Petitioner performing light duty at some point. Petitioner had two injuries: a hernia repair and a shoulder surgery. Ludeman does not accommodate workers with permanent restrictions. She is not familiar with all aspects of the collective bargaining agreement. T. 208. She does not know what the agreement provides with respect to overtime. T. 209.

Helsel testified she discussed Petitioner's claim with Spicker on two occasions. She cannot recall the dates of these conversations. On the first occasion, maybe sometime in the last 2 ½ months, she had just spoken with someone in the Attorney General's office about Petitioner's claim. She asked Spicker if he remembered Petitioner and Spicker told her he remembered Petitioner very well. She told Spicker he might have to testify. T. 210-211. On the second occasion, March 17, 2015, she and Spicker were summoned to the facility director's

office and questioned about Petitioner. It was Reginald Booker, the human resources director, rather than the facilities director, who ended up questioning them. T. 213. Mr. Booker never told her he received a subpoena to appear in the case. T. 214. She wrote out a statement as to what she knew about Petitioner's retirement and gave it to Booker. T. 216. She has never looked at Petitioner's personnel file. T. 217. Petitioner did not submit retirement papers to her. T. 218. She is now aware of the Act's provisions concerning vocational rehabilitation. She was not previously aware of these provisions. T. 220. She does not remember Petitioner having permanent restrictions. T. 221. She would have to look at Petitioner's workers' compensation file. No one instructed her to bring that file to the hearing. T. 222. She never contacted anyone in Springfield to discuss Petitioner returning to restricted duty. She did not tell Petitioner he could not return to work because he might "tear up" his shoulder again. T. 223. As the workers' compensation coordinator, she is typically the person who reviews a workers' restrictions to see whether they can be accommodated. T. 223. She thinks Petitioner might have worked light duty at one time. It is possible she could recall if she had access to the file. T. 224. She does not know when Respondent stopped paying workers' compensation benefits to Petitioner. T. 225. She cannot recall whether Petitioner ever asked her about returning to light duty. T. 226. She is non-union and does not know whether Petitioner's union contract addresses light duty. T. 227. Ludeman, where Petitioner worked, is a medical care facility that is open 24/7. T. 227. She is a nurse and can only speak to nurses' work schedules. Nurses work at Ludeman 24/7. T. 228.

On redirect, Helsel testified she has no idea where retirees' files are stored. T. 228.

Two additional witnesses testified at the second hearing, held on September 30, 2015.

Valerie Hollinger, Ludeman's payroll manager for the last nine years, testified she handled Petitioner's retirement. Her duties include processing information for employees who are classified as "IOD" or disabled. She processes that information on a data base and communicates the information to human resources. She is not sure whether the information is provided to the comptroller.

Hollinger identified RX 1 as a wage-related document entitled "Comptroller History Browser." The document reflects pay rate, overtime earnings and deductions. RX 1 does not reflect whether the overtime was voluntary or mandatory. She does not input a worker's overtime hours. The timekeepers who work in her department perform this task. RX 1 reflects that Petitioner worked on November 16, 2010, a holiday.

Under cross-examination, Hollinger testified she printed out RX 1 from her computer at the request of Reginald Booker, Ludeman's human resources director. She was not aware that Booker was served with a subpoena in December 2014. Booker never discussed this with her. She does not know whether Petitioner's personnel file is stored in the human resources department. She knows that Petitioner transferred from Howe but she does not know how much Petitioner earned while working at Howe. She conceded that Petitioner's W-2 forms (PX 16) would be more reliable than the documents compromising RX 1. She is not familiar with

the State's wage-related "transparency" website. The excerpt from this website relates to Petitioner. It shows that Petitioner grossed over $54,000 in 2011 and $103,981.00 in 2009. She is not familiar with Petitioner's union contract. She cannot recall when she scanned RX 1 to Booker's E-mail address. The term "time worked," as used in RX 1, relates to a two-week period. As she peruses the wage information she printed out, she is not seeing any weeks during which Petitioner was off work. Some pages relating to Petitioner's 2011 earnings are not accurate in that they reflect $0 earnings in the year to date. It is not until April 2011 that Petitioner's year to date earnings are reflected. The system is automatic and she cannot personally vouch for the accuracy of the figures shown in RX 1.

Philip Caputo testified on behalf of Petitioner. Caputo testified he knows Petitioner and previously worked with Petitioner at Howe. He was a dispatcher at Howe. He dispatched Petitioner to various assignments. At Howe, Petitioner was classified as a "MEO," meaning maintenance equipment operator. Petitioner ran equipment, including backhoes. Petitioner was also responsible for snow removal, which was performed as needed. Petitioner was called in to work after regular hours. Either he called Petitioner to come in to work or his boss called Petitioner.

Under cross-examination, Caputo testified he has worked at Howe for 27 years. He can only comment on the work Petitioner performed at Howe because he never worked at Ludeman. He was one of Petitioner's supervisors at Howe. At Howe, seventeen to eighteen drivers, including Petitioner, were on a list. He and his boss compiled this list based on the drivers' seniority. Whenever overtime was needed, the driver who was "up next" on the list was the driver they called. If that driver was not available, they called the next driver on the list. If a driver worked two overtime hours, he was "charged" with that amount. It was not just snow removal that gave rise to the need for overtime.

On redirect, Caputo testified he worked with Petitioner at Howe throughout Petitioner's entire time at that facility. Howe and Ludeman serve the public in the same way. Both facilities provide services to developmentally disabled individuals. The job titles at both facilities overlap.

The Arbitrator admitted the following exhibits at the September 30, 2015 hearing: Petitioner's W2 forms (PX 17), Thomas Grezsik's deposition and bill (PX 18) and the Comptroller History Browser (RX 1). Respondent raised no objection to the admission of PX 17 and PX 18. The Arbitrator overruled Petitioner's foundational objection to RX 1.

Arbitrator's Credibility Assessment

Petitioner was a likeable, forthright witness. The Arbitrator finds credible his testimony that he regularly worked a good deal of overtime. His former supervisor, Michael Spicker, confirmed this. Also credible was Petitioner's testimony that, on some occasions, he did not learn until the middle of his shift that he had to stay late and work overtime. This makes sense, given that Ludeman provides an array of services to developmentally disabled individuals

whose medical and transportation needs might not always be foreseeable. Deborah Helsel, who serves as a both a nurse and a workers' compensation coordinator at Ludeman, confirmed that the facility operates 24 hours a day, 7 days a week.

Petitioner testified he had to have a very good excuse in order to decline overtime and that he would have been written up had he refused overtime on a regular basis. Spicker claimed overtime was strictly voluntary. On this issue, the Arbitrator finds Petitioner more believable than Spicker. Spicker was less than credible overall. He acknowledged being convicted of possessing stolen property and being suspended by Respondent due to a discrepancy in the information he provided on his job application.

Helsel hedged as to some issues. For example, she acknowledged it was her job to determine whether an employee's restrictions could be accommodated yet she claimed she could not recall whether Petitioner was accommodated. She admitted she might have been able to respond to this line of inquiry had Petitioner's file been available. Petitioner's counsel attempted to secure the contents of this file by personally serving a subpoena on Reginald Booker, Ludeman's director of human services, on December 18, 2014. Booker failed to respond to the subpoena.

The Arbitrator finds credible Petitioner's testimony that, on November 16, 2011, Helsel told Petitioner his temporary total disability benefits would end as of December 31, 2011. As of mid-November 2011, Dr. Cole was anticipating that Petitioner might be able to resume full duty in six weeks. As it turned out, however, Dr. Cole never released Petitioner to full duty.

Arbitrator's Conclusions of Law

What is Petitioner's average weekly wage?

At the initial hearing, Petitioner claimed earnings of $92,500.00 and an average weekly wage of $1,778.84 while Respondent claimed earnings of $65,994.00 and an average weekly wage of $1,269.11. Arb Exh 1. Both parties revised their calculations in their proposed decisions, with Petitioner asserting earnings of $78,002.13, a divisor of 48 weeks [based on RX 1] and an average weekly wage of $1,625.04, and Respondent claiming earnings of $74,429.29, a divisor of 52 weeks and an average weekly wage of $1,431.33.

There is no dispute that Petitioner worked "a lot" of overtime during his time at Ludeman. There is also no dispute that Ludeman's operational needs could not be met by a staff that worked only 40 hours per week. The dispute lies in whether Petitioner's admittedly substantial overtime earnings should be included, at a straight time rate, in his average weekly wage calculation.

Section 10 of the Act explicitly states that overtime is to be excluded in calculating average weekly wage but the statute fails to define the term "overtime." In Edward Hines Lumber Co. v. Industrial Commission, 215 Ill.App.3d 659 (1990), the Appellate Court held that

"overtime" consists of compensation for hours beyond those regularly worked and extra hourly pay above the normal hourly wage. The evidence in that case established that the claimant was required to work whatever hours his employer demanded and that, at a minimum, he worked 10 hours per day, 6 days a week. The Court found that the claimant averaged 67 hours a week and held that his average weekly wage should be based on his earnings for 67 hours per week, 215 Ill.App.3d at 666-667. In Ogle v. Industrial Commission, 284 Ill.App.3d 1093 (1996), the evidence established that the claimant's normal work week consisted of 48 hours, that his union contract made overtime mandatory and that it was not until he had worked 48 hours or more that he was not required to work any additional overtime. The Court based his average weekly wage on his earnings for 48 hours per week. In Edward Don Co. v. Industrial Commission, 344 Ill.App.3d 643, 657 (2003), the Court declined to include 77 hours of overtime when calculating average weekly wage, despite the fact the claimant had worked some overtime in 15 of the 16 weeks preceding his injury because there was no evidence that he was required to work overtime or that he consistently worked the same amount of overtime each week. Applying similar logic, the Court excluded overtime earnings in Freesen, Inc. v. Industrial Commission, 348 Ill.App.3d 1035, 1042 (2004). The Court also excluded overtime earnings in Airborne Express, Inc. v. IWCC, 372 Ill.App.3d 549 (1st Dist. 2007), despite evidence showing that the employer's operational needs required overtime work by its drivers, because the claimant acknowledged he was not obligated to work overtime, but could request it based on seniority, and because he worked varying amounts of overtime each week.

Based on the foregoing credibility-related findings, and having considered the collective bargaining agreement, the wage-related documents and the relevant case law, the Arbitrator includes Petitioner's overtime earnings, at a straight time rate, in her calculation of average weekly wage and adopts Petitioner's calculations. The word "shall," as used in the collective bargaining agreement (PX 7), supports Petitioner's testimony that he was required to work overtime, at least to a "reasonable" degree, with the agreement providing no definition of the term "reasonable." There is no dispute that Ludeman's 24/7 operational needs gave rise to the need for overtime. Nor is there any real dispute that those needs could arise on an hour to hour basis, secondary to emergencies, weather conditions and transportation requirements. Spicker's suggestion that a worker could, mid-shift, decline to stay late with no penalty attached is not persuasive. This suggestion, taken to its illogical conclusion, would mean that Petitioner could drive a group of developmentally disabled adults to a location for a "field trip" near the end of his shift yet decline to bring them back to the facility after his shift ended. Petitioner did not claim to work the same amount of overtime each week but Respondent's own evidence (RX 1) shows he worked overtime in all but one (approximately 15-day) pay period during the year before the accident. That same evidence shows that Petitioner earned more than $1000 in overtime in eight pay periods and more than $500 in overtime in sixteen pay periods during the same year.

The Arbitrator finds Petitioner's earnings during the year preceding the accident to be $78,002.13 [$68,874.34 in regular earnings plus $9,122.79 in overtime earnings at a straight time rate]. The Arbitrator relies on the figures reflected in RX 1 in arriving at $78,002.13. The Arbitrator has also considered Petitioner's 2009-2012 W2 forms but those forms contain no

breakdown of regular versus overtime earnings. Petitioner attempted to secure more detailed wage documents via a subpoena served on Reginald Booker but Booker failed to comply. The Arbitrator uses a divisor of 48 weeks because RX 1 reflects earnings in 48 weeks. The Arbitrator finds Petitioner's average weekly wage to be $1,625.04 [$78,002.13 divided by 48]. This gives rise to a temporary total disability/maintenance rate of $1,083.36.

Is Petitioner entitled to maintenance?

Petitioner seeks maintenance benefits from January 12, 2012 through September 30, 2015. Respondent claims Petitioner retired voluntarily and is not entitled to maintenance. Respondent views this case as ripe for a permanency determination.

The Arbitrator, having considered the testimony of Petitioner and Respondent's witnesses, finds that Petitioner's retirement in late 2011 was not voluntary. The Arbitrator finds credible Petitioner's testimony that he presented Dr. Cole's restrictions to Spicker in November 2011 and was told he could not be accommodated and "best retire." Spicker did not truly contest Petitioner's testimony on this point. Rather, he asserted it was not up to him to decide whether Petitioner was going to be accommodated. The Arbitrator finds it very plausible that Petitioner would have presented these restrictions rather than simply removing himself from the workforce because he had presented restrictions following his hernia surgery earlier the same year and had been provided with work of a clerical nature. The Arbitrator also finds it believable that Petitioner wanted to continue working as long as possible, given his access to substantial overtime and resultant high income, but feared that his then-current source of income, i.e., temporary total disability, would expire on December 31, 2011, based on what Helsel told him. While there is evidence that Petitioner welcomed the idea of retirement, as many older workers do, that does not mean he planned to retire in the very near future, especially given the precarious nature of his wife's employment with Respondent.

The Arbitrator next addresses the issue of Petitioner's entitlement to weekly benefits after he retired. [The parties stipulated Petitioner was temporarily totally disabled through December 31, 2011. Arb Exh 1.]

As a preliminary matter, the Arbitrator awards Petitioner weekly benefits in the form of temporary total disability rather than maintenance from January 1, 2012 through February 27, 2012. Dr. Cole's records reflect Petitioner remained under active care, participating in shoulder therapy, through February 27, 2012. Dr. Cole's permanent restrictions did not go into effect until Petitioner completed therapy. There is no dispute as to the causal relatedness of Petitioner's left shoulder condition of ill-being. Arb Exh 1. The Arbitrator views Petitioner's causally related left shoulder condition of ill-being as unstable from January 1, 2012 through February 27, 2012, a period of 8 2/7 weeks. Interstate Scaffolding, Inc. v. IWCC, 236 Ill.2d 132 (2010).

The Arbitrator further awards Petitioner maintenance from May 26, 2012 through June 6, 2012, a period of 1 5/7 weeks, based on the job search records in PX 13. Those records show

Petitioner made sixteen job contacts, with five of those contacts in person, within a twelve-day period. The Arbitrator finds the contacts appropriate based on Petitioner's permanent restrictions and lack of formal job search assistance.

The Arbitrator also awards Petitioner maintenance from January 2, 2013 through February 26, 2015, a period of 112 2/7 weeks, based on the job search records in PX 12 and PX 13.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the following unpaid medical bills: 1) Advocate, $241.00, 6/18/11 [D/A] (Dr. Imlach) (PX 9); and 2) Munster Community Hospital, $9,407.11, 10/11/11, lab work and 11/18/11 – 2/27/12, various physical therapy charges (PX 10). Respondent disputed these bills (Arb Exh 1) but the basis of the dispute is unclear, given the stipulation to accident and causation. Respondent put forth no evidence suggesting that the underlying treatment was unreasonable or unnecessary.

The Arbitrator awards Petitioner the $241.00 bill from Advocate, subject to the fee schedule. This bill relates to treatment rendered on the date of the accident. The bill does not reflect any workers' compensation payments or adjustments. The Munster Community Hospital bills, in contrast, reflect balances after various workers' compensation adjustments. The Arbitrator awards the Munster Community Hospital expenses in the amount of $9,407.11, subject to the fee schedule and with Respondent receiving credit for any amounts it has paid toward said amount.

Is Petitioner entitled to vocational rehabilitation? Is Petitioner entitled to the expenses associated with Thomas Grezesik's vocational evaluation?

The Arbitrator, having considered Petitioner's age as of the last hearing (67), Thomas Grzesik's opinions and the factors set forth in National Tea v. Industrial Commission, 97 Ill.2d 424 (1983), finds that Petitioner is entitled to a limited, six-month period of vocational rehabilitation consisting of a monitored job search, consistent with Grzesik's testimony. The Arbitrator declines to award open-ended vocational rehabilitation because of Petitioner's relatively advanced age, permanent restrictions and the amount of time he has been out of the work force. Petitioner is willing to work and his lengthy tenure with Respondent speaks to his motivation but as of the second hearing of September 30, 2015, he had been away from work for almost four years. The restrictions involve Petitioner's non-dominant left arm but Petitioner testified his left shoulder causes him constant pain.

The Arbitrator awards a six-month period of vocational rehabilitation and maintenance so as to allow enough time for Petitioner to become acclimated to a regulated job search but also so as to limit Respondent's liability, given the factors enumerated in the preceding paragraph. The Arbitrator notes that Respondent was put on notice of Petitioner's claim for vocational rehabilitation no later than the initial hearing of March 27, 2015 (and likely earlier,

given that Grzesik issued his report on September 29, 2014) and could have initiated that process at that point. At no time did Respondent prepare a vocational assessment, as required by Rule 7110.10 of the Rules Governing Practice Before the Workers' Compensation Commission. In Ameritech Services, Inc. v. IWCC, 389 Ill.App.3d 191, 208 (1st Dist. 2009), the Appellate Court held that this rule "requires the preparation of a written assessment even in circumstances where no plan or program of vocational rehabilitation is necessary or appropriate." Under Ameritech, Respondent was obligated to prepare the initial assessment as well as the subsequent updates, at four-month intervals, regardless of its voluntary retirement defense. At no time did Respondent contest Petitioner's restrictions. Respondent argues that Petitioner never requested vocational rehabilitation [although he certainly did so at the initial hearing] but, under Roper Contracting v. Industrial Commission, 349 Ill. App.3d 500, 505-506 (5th Dist. 2004) he was not required to make such a request.

The Arbitrator awards Petitioner the vocational rehabilitation consultant bill of $2,300.00 (PX 11).

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

☐ 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

LAURIE MARTIN,

Petitioner,

16IWCC0795

vs.

NO: 11 WC 42884

DEPARTMENT OF HUMAN SERVICES,

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 accident, medical expenses, and notice and being advised of the facts and law, reverses the April 5, 2016, Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

The Decision of the Arbitrator concluded that Petitioner proved that she sustained a repetitive trauma injury, bilateral carpal tunnel syndrome, as result of her employment with Respondent. In arriving at this conclusion, the Arbitrator, despite raising credibility issues, found Petitioner's testimony as to her work activities and the opinion of Dr. Corey Solman, Petitioner's treating physician, to be credible enough for Petitioner establish that the conditions of her wrists arose out of and in the course of her employment. The Commission, upon reviewing the evidence presented arrives at the opposite conclusion.

The crux of Petitioner's complaints is related to her handling of medication, specifically removing the medication from its packaging as well as grinding the medication into a powder for delivery via G-tubes. In both instances, Petitioner's testimony is devoid of any complaints that either activity caused her wrists to be symptomatic. Furthermore, the job descriptions provided by Petitioner and by her attorney often conflict with each other to such an extent that neither can be regarded as being an accurate accounting of Petitioner's work activities. Neither accounting,

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however, demonstrates Petitioner's claimed symptomology is credibly relatable to her work activities.

The handling of medication was addressed by both Petitioner and, by way of a letter to Dr. Solman, by Petitioner's attorney. Petitioner testified that she frequently removed medication from its packaging, sometimes by pushing the medication through foil backing and sometimes by opening childproof containers. She offered no testimony that either action was difficult to perform or required any significant pinching or force to obtain the medication from its packaging, yet the Arbitrator found significant pinching was required to remove the medication from the packaging. Petitioner's testimony provides no reason to adopt the inference made by the Arbitrator with respect to how easy or how difficult removing the medication from the packaging might have been for Petitioner. Significantly, Petitioner gave no testimony that removing the medication from either type of packaging caused her to experience symptoms in her wrists.

The Commission also notes at least two occasions in which Petitioner's testimony indicates she did not necessarily handle the medication alone. She testified "we are popping pills." She later testified to "the medications already in my cart." The former statement indicates that she removed the medication with the help of at least one other individual. The latter statement indicates that there were times in which she wasn't involved in the unpacking of medication at all. This testimony is found to undercut the impression Petitioner performed this task alone.

Petitioner's attorney wrote a letter to Dr. Solman in which he indicated Petitioner spent between one and three hours a day removing medication from foil-back packing. Petitioner, herself, provided a handwritten job description that addressed the number of pills that were distributed on a daily basis. Her own job description is notable because she provided no indication that she was personally responsible for preparing the medication for distribution and, more importantly, provided no indication of how long it took to prepare the medication for distribution. Her testimony, however, claims that four hours or more of her work day was taken up by removing pills from their packaging, a minimum twenty-five percent increase in preparation time over what her attorney believed her to perform. The Commission finds the inconsistency between the number of hours Petitioner's attorney claimed Petitioner performed daily and the number of hours Petitioner, herself, claims she performs to be significant, particularly given Petitioner's testimony, as noted above, of the assistance she received with respect to unpacking medication.

Similar conflicting evidence was offered by Petitioner and her attorney with respect to her use of a pestle and a mortar to grind medication. She testified to using a pestle and mortar all day long whereas her attorney wrote to Dr. Solman that a pestle and mortar were used between two and eight hours per shift. Petitioner's handwritten job description indicates that six patients, over three units, required their medication to be ground. That same job description indicated that these six patients, collectively, required a total of approximately seventy-five pills to be ground over the course of two medication passes per day. The Commission finds it unlikely that it took Petitioner all day, as testified to, or up to eight hours, as her attorney claims, to grind seventy-five pills. The Commission also notes the absence of any testimony or written claim that the grinding activity caused Petitioner's wrists to become symptomatic.

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The Commission finds a similar disconnect between the frequency Petitioner claims to use G-tubes and the frequency her attorney claims to use the same. She testified, at that time of the arbitration hearing, to having two patients that required G-tubes for feeding and medication delivery and gave no indication if this number was historically consistent or an anomaly. Petitioner's attorney, in his letter to Dr. Solman, indicated that Petitioner provided feeding and medication via G-tubes twice a day for upwards to twenty-five patients with each handling of the G-tubes taking twenty minutes. The Commission finds Petitioner's attorney's estimates lead to a finding that Petitioner exclusively engaged in handling G-tubes for over sixteen hours per shift, an amount of time that is irreconcilable with the claims that Petitioner also spent hours a day removing medication from its packaging.

The Commission recognizes that both parties retained the services of physicians, with Petitioner retaining Dr. Solman and Respondent retaining Dr. Anthony Sudekum, and that both physicians concluded Petitioner was positive for bilateral carpal tunnel syndrome. The two physicians disagreed as to what brought the condition about. Dr. Solman attributed the condition to Petitioner's work activities, whereas, Dr. Sudekum attributed Petitioner's condition to physiological factors specific to Petitioner. The Arbitrator found Dr. Solman to be the more credible of the two physicians. The Commission disagrees.

Dr. Solman's testimony is deficient as it failed to offer any evidence indicating that he knew how much force was necessary to remove the medication from the foil-backed packaging, to grind the medication into a powder, or to administer food and medication via G-tubes. Nor did he reasonable speculate as to how much force was necessary to accomplish these tasks. To the extent he offered any opinion during his testimony, he indicated that handling a G-tube would require "a lot of force" and that a "fair amount" of force would be necessary to grip the pestle when grinding medication. These general statements are insufficient to convince the Commission Dr. Solman had adequate knowledge of Petitioner's activities on which to base a reasonable opinion.

The Commission finds Dr. Solman's understanding of Petitioner's work activities to be grounded in the letter he received from Petitioner's attorney rather than what he learned from Petitioner after personally meeting with her. He indicated that he discussed the letter with Petitioner but never indicated that he corroborated the work activities as described in the letter with Petitioner. As such, the Commission finds Dr. Solman simply adopted what was written in the letter. His failure to corroborate what he read in that letter with Petitioner, in light of Petitioner's self-penned job descriptions, leads to the conclusion that Dr. Solman was not adequately familiar with Petitioner's actual job activities.

The opinion of Dr. Sudekum, Respondent's examining physician, according to the Arbitrator, was equivocal because he once testified in an unrelated workers' compensation claim that pushing pills from foil-backed packaging could contribute to carpal tunnel syndrome. The Arbitrator fails to acknowledge that Dr. Sudekum, in the report that followed his Section 12 examination of the worker who filed said claim, indicated that he would have to examine the packaging to determine if it was contributory to that worker's claimed carpal tunnel syndrome

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symptoms. Dr. Sudekum indicated that he later had the opportunity to examine the packaging and found pushing the medication through the foil backing to be very easy. Dr. Sudekum's testimony of handling the foil-backed packaging is noted to be the only testimony that addresses the ease or difficulty of extracting the medication from the foil-backed packaging. Revisiting Petitioner's testimony, she only testified to performing this action, not to ease or difficulty that she found in doing so.

Dr. Sudekum offered an explanation to explain Petitioner's carpal tunnel symptoms that the Arbitrator mentioned in passing, noting only that "Petitioner clearly had several comorbidities . . . which were likely causative or contributory." The Commission finds these comorbidities to better explain the presence of Petitioner's carpal tunnel symptoms than does Petitioner's claim that it was her work activities.

The Commission notes Dr. Sudekum testimony that Petitioner's age, gender, and obesity are factors that could result in contraction of carpal tunnel syndrome symptoms. Dr. Solman also noted age, gender, and being significantly overweight to be factors that could predispose one to carpal tunnel syndrome. Dr. Sudekum noted Petitioner being positive for hypothyroidism increased the likelihood of deposits forming and resultantly compress the nerves in the carpal tunnels. He also noted Petitioner being positive for hypertension would increase pressure throughout the vascular system, including in the distal upper extremities. No opinion was offered by Dr. Solman to counter Dr. Sudekum's opinions concerning hypothyroidism and hypertension.

The Commission is convinced Petitioner's comorbidities, rather than her work activities, account for Petitioner's carpal tunnel syndrome symptoms given Petitioner's May 6, 2011 complaints to Dr. Joon Ahn. At that time, Petitioner complained of nocturnal pain and numbness to her fingers as well as the same being present when she drives. As noted above, complaints of pain and numbness to her fingers were not complained of as being present when Petitioner recounted her work activities.

Petitioner credibly testified to extensive usage of her hands and fingers but exaggerated to the extent they are used over the workday. She, however, never complained that this usage of her hands and fingers caused her to experience any symptoms in her hands either to her physicians or in her arbitration hearing testimony. Petitioner's failure to implicate her work activities as causing her any problems with her wrists, hands or fingers precludes the Commission from finding that her work activities have caused or have contributed to her carpal tunnel syndrome symptoms. The Commission, therefore, finds Petitioner failed to carry her burden of proving, by a preponderance of the evidence, that her claimed bilateral carpal tunnel condition was caused by, aggravated by or accelerated by her work activities.

IT IS THEREFORE ORDERED BY THE COMMISSION that the April 5, 2016, Decision of the Arbitrator is reversed as it pertains to 11 WC 042884 and compensation denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the April 5, 2016, Decision of the Arbitrator as it pertains to the finding that Petitioner failed to prove any condition involving the bilateral elbows or bilateral shoulders are causally related to Petitioner's claimed May 6, 2011, accident is affirmed and adopted.

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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: DEC 13 2016
KWL/mav
O: 10/18/16
42

Kevin W. Lamborn

Michael J. Brennan

DISSENT

While Petitioner indeed suffered from several comorbidities, the evidence supports the Arbitrator's determination that Petitioner's work activities involved a significant amount of fine pinching involving her hands and thumbs and as such were a contributing factor in her development of bilateral carpal tunnel syndrome. As a result, I would have affirmed the Arbitrator's well-reasoned and thoughtful decision in claim 11 WC 42884, and for that reason I dissent.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

16IWCC0795

MARTIN, LAURIE
Employee/Petitioner

Case# **11WC042884**

13WC020299

DEPT OF HUMAN SERVICES
Employer/Respondent

On 4/5/2016, 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 0.38% 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

APR 5 - 2016

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

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
19(b)/8(a)

16IWCC0795

LAURIE MARTIN
Employee/Petitioner

v.

DEPT. OF HUMAN SERVICES
Employer/Respondent

Case # 11 WC 42884

Consolidated cases: 13 WC 20299

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **February 4, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 6, 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 **$42,073.06**; the average weekly wage was **$809.09**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **4** 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

The Petitioner sustained accidental injuries arising out of and in the course of her employment on May 6, 2011.

The Petitioner has proven that her bilateral carpal tunnel conditions are causally related to the May 6, 2011 accident.

The Petitioner has failed to prove that any condition involving the bilateral elbow or bilateral shoulders are causally related to the May 6, 2011 accident.

Respondent shall pay reasonable and necessary medical services of $3,170.00, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have credit for any of these bills that were paid prior to hearing.

Respondent shall authorize bilateral carpal tunnel release surgeries, as recommended by Dr. Solman.

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

April 1, 2016
Date

ICArbDec19(b)

APR 5 - 2016

STATEMENT OF FACTS

Petitioner began working for Respondent at the Murray Center in 2000, first as a mental health technician for a year and a half, then as a Licensed Practical Nurse (LPN) from 2002 to present. She initially reported hand and arm problems to the Respondent on May 6, 2011 and sought out treatment with Dr. Ahn that same day. A workers' compensation Employee's Notice of Injury (Rx2) verifies she notified the Respondent of her injury in May, 2011. She reported a 6 month history of bilateral arm pain with numbness and tingling to Dr. Ahn. She testified that as of May 6, 2011 she believed her condition as diagnosed by Dr. Ahn was causally related to her work for Respondent. She had not been previously diagnosed with carpal tunnel syndrome.

Respondent's Exhibit 2 contains various May, 2011 documentary injury reports relative to this claim. They essentially indicate Petitioner's reporting of bilateral wrist and elbow pain, as well as the right shoulder, with numbness and tingling, all of which she attributed to her repetitive job duties. The "Workers' Compensation Form", which appears to have been signed by Petitioner, indicates: "This is progressive. I am a nurse woke up one day with wrists hurting, now elbows hurt too." The "Workers' Compensation Employee's Notice of Injury" states: "This has been progressive began with both wrists hurting and now involves both elbows hurting with shoulder numbness and tingling dropping things (sic)." The Petitioner requested that Respondent authorize her treatment, but this was denied, and Petitioner continued to work her regular job duties without further treatment. The Respondent's documentation confirms the Respondent's denial of the work related injury claim. (Rx2). Petitioner testified that she eventually sought legal counsel, and on April 26, 2013 again notified her employer of her ongoing upper extremity problems. Her employer completed paperwork at that point regarding her claimed work injury, and she sought treatment with Dr. Solman on or about July 18, 2013.

The Arbitrator notes that, on cross examination, the Petitioner confirmed that her symptoms began about 6 months prior to May 6, 2011, and that she first noticed them while at work and working with medications. This is not consistent with the documentation in Rx2 ("Workers Compensation Form") indicating she woke up one day with symptoms.

In 2011, the Petitioner indicated she often worked more than 40 hours per week. Her duties as an LPN involved direct patient care of mentally handicapped clients, including assistance with their daily living tasks, medical care, administering medications and anything else that was required. With regard to the Respondent's written job description (see Rx2), the Petitioner agreed with the description that she lifts one to 10 pounds up to two hours per day, 11 to 20 pounds up to two hours per day, 21 to 30 pounds up to two hours per day, 31 to 40 pounds up to two hours per day, and 41 to 50 pounds up to two hours per day on a variable basis. The Petitioner also agreed with the job description's indication that she had to push a 200 pound hand truck / cart for six to eight hours per day. She also agreed with the job description that indicated she used her hands for gross manipulation, grasping, twisting, and handling for 6 to 8 hours per day, as well as for fine manipulation, typing and good finger dexterity for 6 to 8 hours per day. There was limited overhead reaching of three times per week, and it appears that this mainly involves obtaining medications from a cabinet area, although on cross examination Petitioner noted that this varied. The Arbitrator notes that he has reviewed the noted job description, and it is consistent with the testimony.

The Petitioner testified that she would make two "med passes" per shift, meaning she would distribute medication twice per shift, and it would take about two hours each time. Among her regular tasks in doing so, she testified that she had to frequently pop pills out of their packaging, grind pills to powders, and push the up to 200 pound medication cart. The Petitioner demonstrated, and the Arbitrator observed, Petitioner pushing pills through a metallic-type backing on the packaging, similar to what you would find in the packaging of many over-the-counter medications, and using both thumbs to do so. She testified that some required the lining on the

back to have to be pulled off before then pushing the pills through. The Petitioner also demonstrated, and the Arbitrator observed, how she would grind pills with a mortar and pestle. She testified that some of the pills are harder and have to be initially broken up by hammering them while inside the packaging with the pestle, and then put the broken up pills putting into the mortar to grind them further. The Petitioner testified she also would have to open child proof bottles and retrieve various medications throughout the course of her shift.

Some of the patients the Petitioner cared for used gastric tubes, or "G tubes", which were implanted into the stomach to provide them with food and medication. The Petitioner would use a large syringe to provide the food and medication, inserting it into the G tube with one hand while using the other hand to operate the plunger. Petitioner noted that some medications get clogged in the bottom of the tube, and when they do she has to use her right hand and fingers to manipulate the plunger from side to side or up and down. Sometimes it is harder than others to push the plunger, and she has to use her whole hand to do so when needed.

Petitioner testified she would have to position a patient to administer suppositories on a daily basis, noting the patients weighed anywhere from 70 to 200 pounds. When asked about the manner in which she has to lift patients, she testified she helps technicians lift patients, and that she and a co-worker would have to lift anywhere between five to 10 patients without a mechanical device each week. It appears to the Arbitrator that her testimony was that she, at least at times, was able to administer suppositories by rolling a patient on their side.

Petitioner prepared her own job description (see Px1, pp. 93-95), indicating what she typically does in an 8 hour shift, listing the number of pills, suppositories, Accu-Cheks, blood pressure checks, insulin shots, treatments and G tube activities. The Petitioner testified that she worked a lot of 16 hour shifts during and before 2011.

Dr. Ahn's May 6, 2011 report notes Petitioner is right hand dominant, and complained of a 6 month history of bilateral hand numbness and tingling, night waking and dropping objects. (Px2). She also noted some pain would shoot up to the elbow and shoulder area, particularly on the right. Dr. Ahn diagnosed right shoulder rotator tendinopathy/bilateral carpal tunnel and cubital tunnel syndromes. He prescribed anti-inflammatory medication, therapy, splinting and EMG/NCV testing, noting the shoulder complaints were too mild to consider injection. The Petitioner was advised to follow up in 6 weeks. (Px2). The Petitioner agreed during cross examination that she did not obtain the recommended EMG in 2011, and testified that she didn't get the test because the Respondent would not pay for it, but she agreed that at least some of her medical expenses to date had been paid via her group health insurance.

Petitioner saw Dr. Solman for evaluation at her attorney's request on July 17, 2013. (Px1). A May 30, 2013 letter from her attorney to the doctor included a description of Petitioner's job duties and symptoms, and requested a causation opinion. (Px1, pp. 90-92). The Petitioner complained of bilateral shoulder pain, elbow pain, and bilateral wrist pain and numbness in the hands going back to December, 2010. Dr. Solman noted the Petitioner's job duties, and it appears that what he notes was taken directly from the letter from her attorney. The job duties including passing out medications to patients, removing pills from bubble packaging, grinding up pills, filling G tubes, typing, writing, and unlocking medication doors up to 50 times per day. He noted the medication grinding occurs from two to eight hours per shift, using a hammer and grinder type device. Petitioner noted she initially did the grinding with her right hand, but started using her left hand more when she started to develop her problems. Dr. Solman also reported that Petitioner spends one to three hours per shift popping hundreds of pills per day out of vacuum pack containers. Patients with G tubes involved her performing the noted G tube process twice for each patient per day, each time taking about 20 minutes. This could include up to 25 such patients per shift. Dr. Solman diagnosed bilateral shoulder AC joint arthrosis, bilateral shoulder biceps tenosynovitis, bilateral elbow cubital tunnel syndrome, bilateral elbow lateral epicondylitis, and bilateral wrist

ulnar tunnel and carpal tunnel syndromes. (Px1). He opined the Petitionoer's upper extremity compressive neuropathies are related to cumulative trauma with the work she has done for Respondent for the last 11 years, and he recommended EMG/NCV studies. (Px1).

On September 9, 2013, EMG/NCV testing was performed by Dr. Doll. (Px3). His report noted Petitioner complained of ongoing pain and numbness throughout both arms from the shoulders down, but primarily in her wrists and hands, and that her symptoms worsened in 2011. The EMG/NCV study revealed mild to moderate bilateral carpal tunnel, and was otherwise negative, specifically noting no evidence of cubital tunnel, peripheral polyneuropathy or cervical radiculopathy. (Px3).

Both Dr. Solman, Petitioner's treating physician, and Dr. Sudekum, Respondent's examining physician, were noted to be board certified surgeons with specialties that include the upper extremities. Both appear to the Arbitrator to have solid CV's, and thus both are considered by the Arbitrator's to be experts in their fields.

Dr. Solman testified via deposition on April 22, 2014. (Px1). He first evaluated Petitioner on July 17, 2013, as noted above, and saw Petitioner in follow up on September 20, 2013 and October 30, 2013. Dr. Solman concluded Petitioner's main issues are her bilateral carpal tunnel and elbow pain as well as AC joint arthritis and biceps tendonitis of both shoulders. He confirmed the nerve conduction study by Dr. Doll revealed mild to moderate bilateral carpal tunnel syndrome, but was otherwise read as normal. When he last saw her on October 30, 2013, he recommended bilateral carpal tunnel releases, possible bilateral cubital tunnel releases, and possible shoulder and elbow injections. (Px1).

Dr. Solman understood that Petitioner had worked as an LPN for the Respondent since 2002, and that her work activities include popping pills out of bubble wrap, grinding pills with a mortar and pestle, filling G tubes with syringes along with some typing, writing, unlocking medication doors. (Px1). He testified that he had personally seen LPN activities, including popping pills out of packaging as Petitioner described, grinding medications and filling G tubes. He indicated he had performed G tube activities himself, and indicated that it can be difficult to push the thick fluids into a patient's stomach via the tube, so it can require a fairly moderate amount of force on the hand. Additionally, he believed that removing pills from bubble packaging is significant when performed on a regular basis, as it involves constantly pinching your thumb and forefinger together. Over time it fatigues the muscles, creating inflammation and swelling with the carpal tunnel. He opined that using force to open child-proof bottles could also aggravate her symptoms. With regard to the use of a mortar and pestle to grind the medication down to a powder for G tube feedings, Dr. Solman testified this activity involves a fair amount of force while gripping to crush the pill. (Px1).

Dr. Solman noted that written job descriptions can be generalized and may not accurately describe what many employees actually do on a day-to-day basis. To determine if activities are causative factors of a pathology, he looks at the specific activities that are being performed and how much force they place on a body structure, including how many times a day a certain task is performed, and how long each activity is sustained. He also considers how long a person has been doing an activity over the course of their career. (Px1). He testified that whenever someone is doing any gripping, grasping, pressing, pinching and compressing with the hand, these are things that can cause or aggravate carpal tunnel syndrome. (Px1). The pushing of multiple pills out of the bubble wrap, using the mortar and pestle, and even pushing on the G tube can cause chronic or constant force on the thumbs and fingers and can serve to aggravate her carpal tunnel condition over time when done on a repetitive basis. He stated that there is no magic time frame where it becomes causative, you just have to take into account the length of time the patient has done the activities and use that to help formulate causation and diagnosis. (Px1).

With regard to the elbows, he testified that any type of repetitive activity, lifting, gripping, grasping, pushing objects and lifting objects can cause inflammation in the elbow over time. The more common activity that causes elbow problems is gripping. (Px1). He opined that the force required to push the G tube syringes and fill the G tubes is sufficient to cause the elbow pain where Petitioner is using the hand and thumb in a stretched out position when filling the G tube. He concluded that in Petitioner's case, her work activities were enough to aggravate her elbow problems. (Px1).

With regard to Petitioner's shoulders, Dr. Solman opined that her overall activities using her arms could aggravate the shoulders. (Px1).

Based on his discussions with Petitioner, his review of the medical reports, review of the radiographs and physical examination, Dr. Solman testified that he diagnosed carpal tunnel syndrome and cubital tunnel syndrome, right elbow lateral epicondylitis and bilateral shoulder tendonitis of overuse inflammation of her AC joints. (Px1). Because of her work-related duties and potential causative factors, he opined that her work-related duties were a contributing factor to aggravate her carpal tunnel condition along with any other premorbid problems. (Px1). He also related cubital tunnel and the right elbow lateral epicondylitis and her shoulders to her work duties. (Px1). Dr. Solman acknowledged that carpal tunnel can have an idiopathic origin, but based on Petitioner's work-related duties and her premorbid conditions, the carpal tunnel syndrome and cubital tunnel syndrome in Petitioner are not idiopathic, and that the work duties at least played a part in the development of the conditions. (Px1).

Dr. Solman recommended surgical releases of Petitioner's bilateral carpal and cubital tunnel conditions. He also recommended a possible cortisone injection for her shoulder at the time of surgery if indicated, for diagnostic and therapeutic purposes. (Px1). Without carpal tunnel surgery, he believed the Petitioner would continue to have pain and numbness, likely progressive weakness and even potential atrophy of the hand muscles. (Px1). With regard to failing to treat the elbows and shoulders, Dr. Solman indicated it would be speculative as to whether she would get worse or better. (Px1).

On cross-examination, Dr. Solman testified Petitioner's development of cubital tunnel syndrome could be a "dynamic" problem based on her work-related activities. He agreed that she had subjective symptoms, but that there was no objective (i.e., EMG/NCV) evidence of the condition. He testified that dynamic meant: ". . . an EMG may be normal, but when somebody performs the type of activities that she does, she may have just enough tightness around her nerve or just enough bands of tissue around the nerve that when she's active, that nerve gets compressed and pinched and swollen and causes symptoms. And then when she stops doing those activities, those symptoms go away." (Px1, pp.48-49). He agreed Petitioner's work activities involve a variety of different motions, but use some of the same muscles. Based on the factors he testified he takes into account, each case must be analyzed individually to determine whether or not the activities a person is doing are going to cause or not cause the pathology they have. (Px1). There was nothing in his evaluation of Petitioner to indicate she was being less than truthful regarding her level of symptoms. Dr. Solman also opined that he did not believe Petitioner's symptoms were related to her cervical spine. (Px1).

Dr. Solman testified that he considered Petitioner's other risk factors, including hypothyroidism, hypertension, obesity, advancing age and female gender. Noting he agreed with Dr. Sudekum, he testified that if an individual has some of these other risk factors, it can predispose that person to developing carpal tunnel syndrome, and it could take less force and repetitive trauma to those predisposed nerves to develop the conditions relating to the carpal tunnel and cubital tunnel conditions. (Px1).

Dr. Sudekum testified via deposition on January 22, 2015. (Rx4). Petitioner was evaluated on September 30, 2013. Dr. Sudekum testified that he obtained an NCV study which showed moderate bilateral carpal tunnel syndrome, and x-rays revealed some arthritic changes and chronic tendinopathy/calcific tendonitis of the elbows, and right thumb basilar joint arthritis. (Rx4). He noted that when Petitioner was seen for her upper extremity problems, she reportedly requested an increase in her narcotic pain medication. He believed Petitioner's complaints of 8 out of 10 pain, which is quite severe, were excessive, as while carpal tunnel syndrome generally causes numbness, the pain involved is usually relatively mild. (Rx4). Dr. Sudekum noted the Petitioner is morbidly obese, hypothyroid, hypertensive, has a chronic pain syndrome with opiate dependence, is a post-menopausal female, and is over 40 years old, that these are all known risk factors for carpal tunnel syndrome, and that all made her more likely to develop carpal tunnel syndrome. He also believed that people like Petitioner who have used opiates on a long term basis tend to be more sensitive with regard to feeling pain. (Rx4, explained on pp. 31-36). He agreed that Petitioner has carpal tunnel syndrome, but believed that conservative treatment should be attempted, including the optimization of treatment for her relevant comorbitities, before surgery should be performed. (Rx4).

Dr. Sudekum testified that he also has witnessed and/or performed many of the same tasks as Petitioner. He agreed that the force required to operate a syringe / G tube can vary depending upon what you are trying to do and what type of material you are trying to dispense into the G tube. He believed that the process is relatively smooth if you prepare the dispensed material properly, and the medication typically moves through easily so long as you avoid getting the tube plugged. (Rx4).

Dr. Sudekum noted his review of the Respondent's written job description indicated that approximately 30% of her job duties involved collecting and recording recipient data for assessment, reassessment, assist physician, registered nurse with physical exams or other treatment and collects specimens, transcribes physician orders, administers medication, documents medication administration, observes and records recipient response to medication administered, provides health and medication teaching to residents. He testified that this was different than Petitioner's description of her job activities to Dr. Sudekum, which reflected that her medication duties were a much bigger part of her job. The job description indicated that the remaining 70% of her duties are less hand intensive or more supervisory or observational in nature. (Rx4).

Dr. Sudekum opined that human hands are designed to be used to hold and grip things, that such activities thus are generally benign, and its only in very rare cases where such activities will be causative of a hand/wrist pathology. In determining causation, his approach is medical, not legal, and for an activity to be causative, it has to impact the pathology itself, not just result in symptoms. Much of his testimony in this case revolved around whether the development of symptoms while performing an activity actually caused or aggravated a pathology versus the activity resulting in symptoms. The analogy used by Dr. Sudekum noted that a person with existing hip arthritis might have symptoms when they walk, but this in itself does not prove that walking is causing the arthritic pathology. (Rx4).

Dr. Sudekum agreed that the frequency, intensity and duration of an activity are relevant factors to assess when determining causal connection between the activity and the development of carpal or cubital tunnel syndrome. When asked about Petitioner's activities using a mortar and pestle and punching out pills, he acknowledged that there are different kinds of pill packs, and that the ones provided to him in a prior case were very thin foil membranes that allowed the pills to be removed easily. He believed that using the mortar and pestle to grind pills for an hour or two per day would not be causative, but that it could depend on the duration and frequency, and it could be contributory if performed for 8 hours per day. He did not believe punching 200 pills out of a blister pack per shift would cause any pathology, but that there could be some symptoms associated with any activity, including that activity. (Rx4).

Dr. Sudekum testified that he determines causation on a medical basis, and that this is a much stricter approach regarding causation than the legal determination. Accordingly, when he talks about causation, he is only referring to causing a pathology, not experiencing symptoms. He did agree with Dr. Solman's testimony that the frequency, intensity, duration and the quality and quantity of force involved in an activity are relevant factors to assess when determining causal connection between an activity and the development of carpal or cubital tunnel syndrome. (Rx4).

Dr. Sudekum agreed a repetitive activity can have some effect on the development of certain pathologic conditions of the upper extremities, including carpal tunnel syndrome, so long as the activity is actually "repetitive", as defined in his report. He indicated that Petitioner's description of her job was different than that provided by her employer. (Rx4). While he agreed that punching out the pills is the type of activity that could result in a symptom being experienced, he did not believe it was causative of the actual carpal tunnel pathology. He also did not believe comorbid conditions, like the Petitioner had, make one more susceptible to the developments of the conditions as it relates to the pathology, but that patient will be more susceptible to symptoms. (Rx4). Again, Dr. Sudekum does not believe that where a certain activity renders a condition symptomatic, that it has aggravated the condition. In a previous workers' compensation case (Rx4, p.71; see also exhibits attached to Rx4 re: Joyce Bievenue), Dr. Sudekum testified the punching out of pills, while not causative of carpal tunnel, would be the type of activity which could potentially be an "aggravating factor" in carpal tunnel syndrome.

Here, Dr. Sudekum seemed to testify in an equivocal fashion. While he could not initially recall if he had written a report in the Joyce Bievenue case prior to actually trying to remove pills from packaging himself, or after he wrote the report, but testified at this point that he believed he offered the noted aggravation opinion in that case prior to doing so, and that after doing so he again opines that only the symptoms would have been aggravated, not the condition itself. (Rx4).

The Petitioner testified she has ongoing numbness and tingling in her fingers bilaterally, and extreme pain, that is especially in the bilateral thumbs. She also noted pain that radiates to her elbows and into her shoulders, with numbness and tingling there, and she drops things often. She takes Vicodin as needed, six times a day or prn and has since 2002 for a back condition. Despite her ongoing problems, she has continued to perform her full work duties. She did testify that she no longer works overtime due to an unrelated medical condition.

The Petitioner testified that the medical expenses contained in Petitioner's Exhibit 4 have been paid by her group health insurance coverage.

The Arbitrator notes that Lisa Marcum, the director of nurses at Respondent's Murray Center, was present at the hearing but did not testify.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT; ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT; AND ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner has proven a cumulative trauma injury to the bilateral hands/wrists which arose out of and in the course of her employment.

The Arbitrator finds that the Petitioner's testimony supports the finding that her work duties involved a significant amount of fine pinch gripping in order to push pills out of packaging with her thumbs, and while using a syringe to inject materials into G tubes. She also had to use forceful gripping with a mortar and pestle in order to grind pills into powders, and opening child-proof medication bottles. While these activities were not repetitive in the sense that they were similar to a factory line worker who does the same action over and over, the Petitioner's testimony with regard to the amount of time she performed these activities was essentially unrebutted. The Respondent's general job description, as noted by Dr. Sudekum, noted activities only in a very general sense, and the Petitioner's testimony was in opposition to some of it. Additionally, the Arbitrator takes note and finds it significant in this determination that when the Petitioner testified her symptoms developed in December, 2010, she also testified that she was often working 16 hour shifts. Again, the Respondent offered no evidence to rebut this testimony.

The Arbitrator's findings are supported by the testimony of Dr. Solman. While Dr. Sudekum opined that he did not believe that Petitioner's pushing of pills through the packaging membrane was the type of activity that could result in a compressive neuropathy, his opinion in a separate case contradicted this determination, as he made clear in that case that the activity itself could, in fact, contribute to such conditions. His testimony that the duration and frequency of the activity is relevant is acknowledged, but the Arbitrator finds that the greater weight of the evidence supports the finding that the Petitioner sustained accidental injuries arising out of and in the course of her employment on May 6, 2011.

The courts have provided a framework for determining when a repetitive trauma injury manifests. In ***Peoria Co. Bellwood Nursing Home v. Industrial Commission***, 115 Ill.2d 524, 530, 505 N.E.2d. 1026 (1987), the Supreme Court concluded the manifestation date of an injury is the "date on which the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." The Supreme Court noted that in cases of repetitive motion that are not traceable to a specific date of accident, the Court will look to the purpose behind the Workers' Compensation Act and note that it is best served by allowing compensation where an injury has been shown to be caused by the performance of claimant's job and developed gradually over time. ***Peoria Co.***, at 1028. The Court went on to note that in similar cases, the "Act should be liberally construed to accomplish its purpose and objects." ***Peoria Co.***, at 1028.

In ***Durand v. Illinois Industrial Comm'n*** 224 Ill.2d 53; 862 N.E.2d 918 (2006), the Supreme Court further defined "manifestation date" occurring either on the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities. The Court also noted a condition can manifest once an employee seeks medical treatment and is advised by her doctor of the medical condition and its causal relationship to work. ***Durand***, at 929-930. The Court noted that the facts must be closely examined to ensure fair results for both faithful employees and employers' insurance carriers. ***Durand***, at 929.

Petitioner's unrebutted testimony indicates she began having some problems with her upper extremities in late 2010. She first sought medical treatment on May 6, 2011, at which time she was diagnosed with bilateral carpal and cubital tunnel syndrome, and right shoulder tendinopathy. She testified that prior to seeing Dr. Ahn on May 6, 2011, she did not have a diagnosed condition and had not sought out medical treatment. May 6, 2011 is the first date Petitioner sought out medical treatment, date of first diagnosis and date when she came to believe her diagnosed condition to be related to her work for Respondent. Respondent was timely notified on that date and had, and did, investigate her claim, finding it unrelated to her work. Respondent is not prejudiced by using May 6, 2011 as the manifestation date and Petitioner is not punished for continuing to perform her usual work duties.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds difficulty in this case because it appears that there are some level of credibility issues on both sides. The testimony of the Petitioner, her written description of her job, her attorney's written job description to Dr. Solman, and the Respondent's job description are all inconsistent with each other to some degree. That said, as noted above, the Arbitrator believes that the Petitioner had to do a significant amount of pinching with her hands to push out pills from their packaging, and forceful gripping of a pestle in order to grind pills. The Arbitrator also believes that the Petitioner had to use some forceful and awkward pinch-type hand use when performing G tube activities. It appears that at the time she developed symptoms, she was sometimes working 16 hour shifts. Dr. Solman's testimony, and he is noted by the Arbitrator to be a solidly qualified doctor, supports a causal relationship to bilateral carpal tunnel.

Dr. Solman's opinions with regard to the causation of cubital tunnel and shoulder problems, on the other hand, were weaker. For example, he testified that performing the G tube activity with the hand and thumb in a stretched out position could be causative of cubital tunnel. The Arbitrator notes that he nowhere really describes the position of Petitioner's hand and thumb in relating the G tube activities. Additionally, it appears to the Arbitrator that Dr. Solman does not really know with certainty whether the Petitioner has cubital tunnel syndrome. The Petitioner's specific initial complaints were of pain and numbness radiating from the wrists to the elbows to the shoulders. Dr. Solman noted that the only findings of ulnar nerve issues were subjective, as the EMG/NCV was negative in this regard, and was not certain if there was compression at the elbow or the wrist (ulnar tunnel). He also testified that the problem could be "dynamic", in that Petitioner would only have symptoms when performing a causative work activity. This sounds to the Arbitrator very similar to the testimony of Dr. Sudekum that, the fact that an activity may cause symptoms does not mean it is causative of a pathology. Here, the Arbitrator believes that the greater weight of the evidence supports the finding that the Petitioner has failed to prove she has cubital tunnel syndrome, and thus there is no need to determine causation with regard to such alleged condition. He also testified that any determination of whether the Petitioner's elbow, or shoulders for that matter, would worsen without treatment is speculative. Dr. Sudekum opined that Petitioner did not have cubital tunnel syndrome.

His testimony with regard to the shoulders indicated only that Petitioner's "overall activities" could have aggravated her shoulders. This does not provide a very specific determination. The same applies to possible lateral epicondylitis. Thus, while the Arbitrator accepts and adopts his opinions with regard to carpal tunnel, the Arbitrator does not do so with regard to the Petitioner's elbow or shoulder conditions.

Dr. Sudekum, while also a solidly qualified doctor, indicated in a prior case (see Rx4) that the pinching involved in the removal of pills from packaging could contribute to carpal tunnel syndrome. Thus, the Arbitrator believes his causation testimony regarding carpal tunnel in this case was equivocal, as he indicated that it would depend on how often this was performed, while consistently going back to his opinion that the rise of symptoms with an activity does not automatically mean that activity caused or contributed to a pathology. The Arbitrator relies on the fact that he indicated the activity could be contributory, and relies of the opinion of Dr. Solman that the amount of time the Petitioner performed this activity was sufficient to find that the activity contributed to the development of bilateral carpal tunnel syndrome.

The Arbitrator, however, believes Dr. Sudekum was more credible with regard to his opinions about the shoulders and possible cubital tunnel. As noted, he opined that the Petitioner does not suffer from cubital tunnel syndrome. This is supported by the negative EMG, and the fact that Dr. Solman could not pinpoint where any

possible compression of the ulnar nerve was located. Dr. Sudekum also testified that the Petitioner had findings of arthritis in the shoulders and the elbows, but no other significant findings were noted via x-rays or examination. It appears to the Arbitrator that, based on the greater weight of the evidence, the Petitioner likely had some level of degeneration in the elbows and shoulders, and, as testified to by Dr. Sudekum, simply resulted in some level of symptoms with activity, as opposed to the activities being causative of the pathology.

While the Arbitrator notes that his findings may be viewed as conflicting in some ways, as he relies on different doctors for different things, the Arbitrator again notes his impression that all of the parties involved in this case (Petitioner, Dr. Solman and Dr. Sudekum) gave some level of impression to the Arbitrator of problems with their credibility in terms of relying on a point of view that helped their side of the case. As noted, there are some discrepancies in the various job descriptions and Petitioner's testimony, and while the Arbitrator believes the amount of time the Petitioner spent on the noted medication activities was sufficient to prove a causal connection of her carpal tunnel conditions, the Arbitrator believes her testimony seems to indicate that the medication activities were a greater part of her job than the job descriptions, which reflect many other required activities, lead the Arbitrator to believe. As to Dr. Solman, while he only had solid objective evidence of carpal tunnel syndrome, diagnosed other conditions without offering enough medical support to show that the other conditions existed. Dr. Sudekum clearly opined in another case that the specific activity of pushing pills through the packaging was the type of activity that was sufficient to contribute to carpal tunnel syndrome. Here, in his testimony, he appeared to the Arbitrator to be consistently pushing the idea of an aggravation of symptoms versus an aggravation of pathology. While this is a valid opinion, he was asked several times whether the activity itself could be sufficient to aggravate carpal tunnel, but didn't specifically answer the question, going repeatedly back to this statement of symptoms versus pathology instead. The resulting determinations made by the Arbitrator reflect an attempt to weigh the evidence as fairly as possible for both parties. Additionally, with regard to causation, the Arbitrator notes that the finding with regard to carpal tunnel reflects that the work activities likely aggravated the condition, or were a contributing factor, as the Petitioner clearly had several comorbidities, as noted by Dr. Sudekum, which were likely causative or contributory. Under current law, the work activities need only be a causative factor in the condition, not the primary or most significant cause.

WITH RESPECT TO ISSUE (H), WHAT WAS THE PETITIONER'S AGE AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

While the parties stipulated that the Petitioner was 48 years old at the time of the accident (see Arbx1), the Arbitrator notes that the Request for Hearing form covered two alleged accident dates (see 13 WC 20299, consolidated with this matter, 11 WC 42884). Based on the Applications for Adjustment contained in Arbitrator's Group Exhibit 2, and the Arbitrator's discretion to make findings which conform to the proofs that are in evidence, the Arbitrator finds that the Petitioner's age at the time of the May 6, 2011 accident was actually 46, not 48.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based upon Petitioner's Exhibit 4, the Arbitrator finds that the Petitioner is entitled to payment from the Respondent for medical expenses totaling $3,170.00. The Respondent's liability for these expenses is limited to that allowable under the Fee Schedule pursuant to Section 8.2 of the Act.

The parties have stipulated that the Respondent has not paid any of the Petitioner's medical expenses. However, the Petitioner's own summary of bills (Px4) indicates that workers' compensation has paid some of the expenses. The bottom line is that the Petitioner is not entitled to have his bills paid twice. Therefore, the Respondent is entitled to credit for any bills that it paid prior to hearing.

The Petitioner testified that at least some of her medical expenses were paid through group health coverage through her employer. The Request for Hearing form (Arbx1) indicates, however, that Respondent is not claiming any credits pursuant to Section 8(j) of the Act. Thus, unless the parties have a separate agreement outside of the record of evidence regarding such credit being applicable, the Arbitrator notes that the Respondent is not entitled to credit under Section 8(j) of the Act.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings, above, with regard to accident and causation, the Arbitrator finds that the Respondent shall authorize bilateral carpal tunnel release surgeries as recommended by Dr. Solman. Based on these same findings, the Arbitrator further finds that the Petitioner is not entitled to prospective medical treatment with regard to her elbows or shoulders.

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

Katrina Krus,
Petitioner,
vs.

NO: 12WC 000393

Peoria Public School Dist.,
Respondent,

16IWCC0835

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 October 9, 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: DEC 2 3 2016
MJB/bm
o-12/19/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KRUS, KATRINA
Employee/Petitioner

Case# **12WC000393**

PEORIA PUBLIC SCHOOL DISTRICT
Employer/Respondent

16IWCC0835

On 10/9/2015, 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:

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

5354 STEPHEN P KELLY
2710 N KNOXVILLE AVE
PEORIA, IL 61604

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

Katrina Krus
Employee/Petitioner

Case # **12** WC **393**

v.

Peoria Public School District
Employer/Respondent

16IWCC0835

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 **August 14, 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

16IWCC0835

FINDINGS

On **March 22, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$19,240.00**; the average weekly wage was **$370.00**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **1** dependent child.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of **$222.00**/week for **12.5** weeks, because the injuries sustained caused the **2.5%** 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.

Arbitrator Anthony C. Erbacci

October 6, 2015
Date

OCT - 9 2015

FACTS:

16IWCC0835

On March 22, 2011 the Petitioner sustained an undisputed accidental injury arising out of and in the course of her employment with the Respondent as a cafeteria manager. The Petitioner testified that she lifted a tote filled with food and felt a "pop" in her low back. The Petitioner testified that the next morning she reported her back pain to the Respondent and was directed to obtain treatment at IWIRC.

The Petitioner was seen at IWIRC on March 23, 2011and gave a consistent history of injury. She was diagnosed with a lumbar strain, prescribed medication and physical therapy, and given light duty work restrictions. The Petitioner followed up at IWIRC on April 1, 2011 and reported improvement in her symptoms. On April 6, 2011 the Petitioner returned and reported that her symptoms had worsened since her last visit and that she now had constant shooting pain down her left leg and numbness in her great toe. Examination was noted to demonstrate inconsistencies and hyper-exaggerations and it was noted that her symptoms could not be explained by a mechanical back problem. An MRI was ordered to rule out an occult malignancy or other cause and the assessment included symptom magnification.

An MRI was completed on April 20, 2011 and was reported to demonstrate mild levoscoliosis of the lumbar spine, mild diffuse disc bulging throughout the lumbar spine, and mild bilateral foraminal stenosis at L4-5.

On April 21, 2011 the Petitioner returned to IWIRC with continuing complaints of stabbing pain in her low back, constant throbbing down her left leg, and numbness in her big toe. The Petitioner reported her pain as being 10/10 and she also complained of urinary incontinence. The MRI was reportedly reviewed with the Petitioner and was noted to demonstrate no significant nerve root impingement, spinal stenosis, or cauda equine syndrome. The Assessment continued to be lower lumbar muscle strain and exam inconsistencies and hyper-exaggerations were again noted. It was also noted that the Petitioner's current symptoms and urinary incontinence could not be explained by the MRI. It was again noted that the Petitioner was symptom magnifying and she was directed to see her primary care physician to find the cause of her urinary incontinence which was indicated to be not work related. The Petitioner was released from care and directed to return to unrestricted work.

The Petitioner testified that she continued working for the Respondent through the end of the 2011 school year and that she then sought treatment with her primary care physician at Methodist Family Practice. The Petitioner testified that she then underwent testing for multiple sclerosis which was ruled out. The Petitioner continued to be treated at Methodist Family Practice during the summer of 2011 because of her back complaints.

The records of Methodist Medical Group demonstrate that the Petitioner was seen there by Dr. Karen Gellada on April 22, 2011 and reported a one year history of bilateral lower extremity pain, which were worse with activity, and difficulty walking. The Petitioner also reported that "3 months ago, Picked up something, hurt back". The Petitioner was noted to have complaints of bilateral lower extremity pain and numbness as well as headaches, numbness in both feet and hands, and urinary incontinence. The Petitioner was assessed as having lower extremity pain, sensory deficits, and urinary incontinence and she was referred for a neurological assessment to rule out multiple sclerosis.

The Petitioner returned to Methodist Medical Group on May 10, 2011 and was noted to have chronic low back pain which was exacerbated after lifting a heavy object at work. It was also noted that the Petitioner reported that "in the last few months" she noted low back pain with radiation into both feet which was worse with sitting or activity. She was assessed as having low back pain with radiation and she was prescribed Norco and physical therapy. The Petitioner returned on May 13, 2011 with complaints of worsening low back pain radiating into both feet. It was noted that a lumbar MRI showed disc bulges and the Petitioner was noted to have positive straight leg raise tests bilaterally with shooting pains of the outer feet at 20 degrees. The Petitioner was referred to the pain clinic and her dosage of Norco was increased. The Petitioner followed up again on May 23, 2011 and was again assessed as having low back pain.

On June 11, 2011, the Petitioner was seen at the Emergency Room at Methodist Medical Center for complaints of chronic pain. It was noted that the Petitioner reported a history of having pain in her lower lumbar spine for three years. The Petitioner also reported taking Norco and "going through" epidural injections for her back pain. The Petitioner was given an injection of Toradol in her right gluteus, provided Percocet, and discharged with instructions to obtain follow up care.

On June 13, 2011, the Petitioner returned to Methodist Medical Group complaining of uncontrolled bowel movements and low back pain. The Petitioner also reported increased left leg weakness and increased radiating pain on the left leg as compared to the right leg. The Petitioner was assessed as having back pain with radiation and fecal incontinence and an MRI was ordered. The Petitioner underwent the MRI of the lumbar spine that same day and the history noted by the radiologist was low back pain for three years and recent steroid injection. The Petitioner was noted to have numbness in the left foot, hypesthesia in the left leg and bowel incontinence. The MRI was reported to demonstrate minimal facet joint hypertrophy at L5-S1 and no acute findings.

On June 27, 2011, the Petitioner returned to Dr. Gellada with complaints of extreme back and left leg pain which was worse after a "back injection" 3 days earlier. It was noted that the Petitioner had been seen at the pain clinic and had received epidural shots and Topamax as well as Norco. It was further noted that the Petitioner rated her pain as 10/10 and that the duration of her pain was "3 yrs". The Petitioner was also noted to be working at Hucks as a cashier.

On September 13, 2011, the Petitioner went to Methodist Medical Center due to her back pain. The Petitioner reported that her left leg had given way and she fell and hit her left cheek The Petitioner was noted to report a two year history of chronic low back pain, for which she was being seen at the pain clinic, and that she "does a lot of lifting in her job". It was also noted that the Petitioner had undergone a left sacroiliac joint injection on September 9, 2011. The Petitioner indicated that she wanted a surgical consultation and she was requesting Norco. It was noted that the Petitioner had no signs of disc herniation or neurological compromise of the lower extremity and, objectively, hypersensitive skin reaction to palpation, straight leg raise bilateral to 75 degrees with no tingling or parasthesis, and good sensation. The Petitioner was directed to follow up with the pain clinic.

On September 19, 2011 the Petitioner underwent another MRI of her low back as well as an x-ray of her left hip. The history noted in the report of the MRI indicates that the exam was requested through the emergency room and that the Petitioner reported that she had fallen on September 11, that she had back pain in both buttocks which radiated into the left leg, and that since September 17 she had bowel and bladder incontinence. The MRI was reported to demonstrate no acute findings,

no disc herniation or spinal stenosis; normal appearance to the lower thoracic cord and conus medullaris; and mild facet degeneration. The left hip x-ray was reported to demonstrate calcification adjoining the roof of the acetabulum, which had increased from the Petitioner's previous study from May 6, 2009, but no fracture or significant narrowing of the joint space.

A nerve conduction study was then completed on October 24, 2011 and was reported to demonstrate a left mid and lower lumbar and sacral radiculopathy. Physical therapy was recommended for the Petitioner but she declined therapy at that time. The Petitioner was next seen by Dr. Rians at Great Plains Orthopedic on November 14, 2011. Dr. Rians' diagnosis was an L5 radicular pain with a normal MRI exam and a normal EMG. Dr. Rians recommended that the Petitioner be referred to a neurosurgeon to evaluate her condition given her history of incontinence. Dr. Rians took the Petitioner off work for a month at that point and suggested that she might need a CT myelogram to address the cause of her L5 radicular pain. Dr. Rians referred the Petitioner to Dr. Fassett at Illinois Neurological Institute.

On December 21, 2011, the Petitioner returned to Great Plains Orthopedic with continuing complaints of low back pain with left sciatica at the L5 distribution. The Petitioner reported that Dr. Fassett felt that he could not do anything for her given that her MRI was normal and did not show a nerve root impingement. Dr. Rains noted that her MRI did show some mild mass effect of the right L5 but that her symptoms were on the left. The Petitioner was then referred to Dr. Kube, pursuant to her request. Dr. Rains also recommended a CT myelogram and that was to be held off until the Petitioner saw Dr. Kube.

On December 29, 2011, the Petitioner saw Dr. Kube who took the Petitioner off work, ordered an MRI of the left hip, and recommended an SI joint injection.

On February 20, 2012, Dr. Fassett generated a report for Dr. Rians. Dr. Fassett reviewed the MRI of the Petitioner's low back which he noted to be completely normal. Dr. Fassett indicated that the Petitioner's left lower extremity pain was of unknown origin and that no neurosurgical interventions could alleviate the Petitioner's symptoms.

On February 27, 2012 a lumbar CT was completed and reported to demonstrate no significant findings.

On March 5, 2012 Dr. Rians noted that the CT myelogram was normal and that the lumbar spine could be ruled out as the source of the Petitioner's problems. Dr. Rians indicated that hip and SI problems were possible sources and he diagnosed possible femoral acetabular impingement.

An MRI of the left hip took place on April 5, 2012, and was reported to demonstrate a small amount of edema in the left paraspinous muscle which could be related to the steroid injection versus a muscle injury such as a strain. On April 19, 2012 the Petitioner underwent an SI joint injection by Dr. Kube and on May 1, 2012, Dr. Kube noted that the Petitioner reported that she had good results from the injection. The Petitioner then commenced a course of physical therapy and underwent a second SI joint injection on May 7, 2012. At a follow up visit with Dr. Kube on May 15, 2012, Dr. Kube noted that the Petitioner reported only temporary relief from that injection and he then recommended an SI joint fusion. Dr. Kube also placed the Petitioner on sedentary work restrictions. Thereafter, the Petitioner continued treating on and off with Dr. Kube or one of his assistants through November 13,

2012, when she was taken off work completely. As of the date of hearing, the Petitioner has not had the SI joint fusion recommended by Dr. Kube.

The Petitioner testified that she currently has difficulty walking and that she is unable to lift greater than five pounds. She testified that lifting anything greater than five pounds or "standing the wrong way" causes an increase in her pain. She testified that walking any distance causes her back to "pop".

On cross-examination, the Petitioner acknowledged that she told Dr. Kube that she did not have any problems with her low back prior to February 23, 2011 and she initially testified that she had no treatment for her low back prior to February 23, 2011. She later testified that she could have had treatment for her low back prior to February 23, 2011but she could not remember. The Petitioner testified that she did not remember treating with Dr. Capecci in May of 2009 or treating for complaints of severe back and leg pain in July of 2009. The Petitioner also testified that she did not recall receiving injections in her back or physical therapy prior to February 23, 2011. The Petitioner initially testified that she did not remember if she worked after the end of the 2011 school year but then acknowledged that she worked for Peoria Charter in the summer of 2011 and at a Huck's for four to five weeks in 2011. The Petitioner testified that she could not remember which Huck's she had worked at and that she did not remember if she worked anywhere else after May of 2011.

At the request of the Respondent, the Petitioner was examined by Dr. Gunnar Anderson on February 23, 2012 and again on October 22, 2013. Dr. Anderson's deposition testimony of November 20, 2013 was admitted into the record as Respondent's Exhibit 1. Dr. Anderson testified as to his examination findings and the medical records he reviewed relating to the Petitioner. Dr. Anderson noted that the Petitioner had treated with Dr. Capecci at Great Plains Ortopaedics in May of 2009 for complaints of bilateral leg pain and pain in her thigh and hip and was thought to have sciatica. He noted that a lumber MRI was performed on the Petitioner on June 18, 2009 and was reported to show no evidence of central canal stenosis or disc herniation but mild narrowing on the right side in the foramen at L5-S1 secondary to facet arthropathy and spurring. Dr. Anderson also noted that it appeared that the Petitioner had been treated with epidural steroid injections for complaints of low back pain with right leg pain in August of 2009. Dr. Anderson further noted the treatment rendered to the Petitioner at IWIRC and Methodist Medical Group, and the treatment rendered to her by Dr. Hauter, Dr. Fassett, Dr.Liu, Dr. Rians, and Dr. Kube.

Dr. Anderson opined that the Petitioner sustained a lumbar strain injury as a result of the March 22, 2011 work accident and that she reached maximum medical improvement from that injury by April 14, 2011. Dr. Anderson diagnosed the Petitioner as having pain complaints without any specific underlying physical diagnosis and he noted that the Petitioner has no objective medical findings to support her subjective complaints of pain. Dr. Anderson opined that the Petitioner has developed a chronic pain syndrome with significant psychological and emotional components and should be evaluated by a psychiatrist or neuropsychiatrist or psychologist specializing in pain syndromes. Dr. Anderson opined that the Petitioner's chronic pain syndrome is unrelated to her work accident and that there is no causal relationship between the Petitioner's work injury and her current condition of ill-being.

The August 19, 2013 deposition testimony of Dr. Kube was admitted into the record as Petitioner's Exhibit Number 9. Dr. Kube testified as to the care and treatment that he rendered to the Petitioner and he opined that the treatment was reasonable and necessary. Dr. Kube testified that

the Petitioner should remain at a sedentary work status and that she would benefit from the SI joint fusion which he continues to prescribe for the Petitioner. Dr. Kube testified that he was not aware of any pre-existing complaints or problems with medical treatment to the Petitioner's SI joint or her lower lumbar spine that pre-dated the March 22, 2011 accident and that he was not aware of any subsequent or intervening accident. Dr. Kube indicated that the Petitioner's lumbar radiculopathy was a function of SI joint inflammation which was causally related to the accident of lifting the totes. Dr. Kube noted that the onset of the Petitioner's symptoms was very contemporaneous to her accident without intervening issues. He further noted that the Petitioner had no previous problems or difficulties with her SI joint.

At the request of the Respondent, a review of all of the Petitioner's medical records was performed by Dr. Martin Lanoff and he issued a report dated January 30, 2014. The May 4, 2015 deposition testimony of Dr. Lanoff was admitted into the record as Respondent's Exhibit 2. Dr. Lanoff testified as to the medical records he reviewed and he opined that, as a result of her work injury, the Petitioner may have sustained a lumbar strain that should have improved within six to eight weeks of the injury. Dr. Lanoff indicated that the Petitioner current complaints of pain were out of proportion with her objective findings and he opined that her current back problems were unrelated to her work injury. Dr. Lanoff further opined that no treatment or testing six to eight weeks after the work injury was medically indicated and he testified that the sacral fusion recommended by Dr. Kube was neither reasonable nor necessary.

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 Respondent stipulated that on March 22, 2011 the Petitioner sustained accidental injuries that arose out of and in the course of her employment and that timely notice of the accident was provided to the Respondent. The Petitioner sought medical treatment the following day and was diagnosed as having a lumbar strain. She initially reported improvement in her condition but a few weeks later she reported that her symptoms had worsened and that she now had constant shooting pain down her left leg and numbness in her great toe. Examination was noted to demonstrate inconsistencies and hyper-exaggerations and it was noted that her symptoms could not be explained by a mechanical back problem. An MRI was ordered to rule out an occult malignancy or other cause and the assessment included symptom magnification. Thereafter the Petitioner began a long course of medical treatment with various physicians, none of whom found and objective basis for the Petitioner's complaints. Ultimately, the Petitioner came under the care of Dr. Kube who diagnosed her as having a lumbar strain, sacroiliac dysfunction and chronic pain from trauma. Dr. Kube injected the Petitioner's SI joint on two occasions and recommended a SI joint fusion for the Petitioner.

The Arbitrator notes that of all of the physicians who treated the Petitioner, Dr. Kube is the only physician that has opined that a causal relationship exists between the Petitioner's work injury and her current condition of ill-being. The Arbitrator finds Dr. Kube's opinion to be unpersuasive. In so finding, the Arbitrator notes that Dr. Kube was unaware of the Petitioner having received any treatment for her lower back or having any lower back complaints prior to her work injury. The Petitioner acknowledged that she told Dr. Kube that she did not have any treatment for her low back prior to her work injury and the medical records clearly demonstrate that the Petitioner had treated for

her low back prior to her work injury. Further, the medical records demonstrate that the Petitioner had complaints of pain radiating into both of her legs prior to her work injury. Dr. Kube testified that he was not aware of any pre-existing complaints or problems with medical treatment to the Petitioner's SI joint or her lower lumbar spine that pre-dated the March 22, 2011 accident.

The Arbitrator also notes that the Respondent's examining physician, Dr. Anderson, and the Respondent's record review physician, Dr. Lanoff, both opined that the Petitioner sustained a lumbar strain as a result of her work injury and that she reached maximum medical improvement from that injury within a relatively short period of time thereafter. Both Dr. Anderson and Dr. Lannoff testified that the Petitioner's pain complaints were not supported by any objective findings and they both indicated, as did the physicians at IWIRC when she was seen there in April of 2011, that the Petitioner was symptom magnifying. Both Dr. Anderson and Dr. Lanoff indicated, as did Dr. Fasset, that the Petitioner's MRI-findings did not support the Petitioner's continuing complaints of pain. Both Dr. Anderson and Dr. Lanoff opined that there was no causal relationship between the Petitioner's work accident and her current condition of ill-being.

The Arbitrator further notes that the Petitioner's testimony on cross examination demonstrated that the Petitioner's memory of her prior medical care and treatment as well as her work history was so poor as to cause the Arbitrator to have serious doubts as to the reliability of the Petitioner's testimony.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that her current condition of ill-being is causally related to the work injury of March 22, 2011. The Arbitrator adopts the opinions of Dr. Anderson and Dr. Lanoff and finds that as a result of the work injury of March 22, 2011, the Petitioner sustained a lumbar sprain from which she reached maximum medical improvement by April 14, 2011.

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 findings and conclusions of the Arbitrator relating to the issue of Causation are adopted and incorporated herein.

The Arbitrator has adopted the opinions of Dr. Anderson and Dr. Lanoff and found that as a result of the work injury of March 22, 2011, the Petitioner sustained a lumbar sprain from which she reached maximum medical improvement by April 14, 2011. The Arbitrator finds therefore, that the Petitioner failed to prove that any of the medical care and treatment she received subsequent to April 14, 2011 was reasonable, necessary and causally related medical treatment for which the Respondent is responsible.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due the Arbitrator finds and concludes as follows:

The findings and conclusions of the Arbitrator relating to the issue of Causation are adopted and incorporated herein.

The Arbitrator has adopted the opinions of Dr. Anderson and Dr. Lanoff and found that as a result of the work injury of March 22, 2011, the Petitioner sustained a lumbar sprain from which she reached maximum medical improvement by April 14, 2011. The Arbitrator finds therefore, that the Petitioner failed to prove entitlement to any period of Temporary Total Disability after April 14, 2011.

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:

The findings and conclusions of the Arbitrator relating to the issue of Causation are adopted and incorporated herein.

The Arbitrator has adopted the opinions of Dr. Anderson and Dr. Lanoff and found that as a result of the work injury of March 22, 2011, the Petitioner sustained a lumbar sprain from which she reached maximum medical improvement by April 14, 2011. The Petitioner testified that she continued to work for the Respondent through the end of the 2011 school year and that thereafter she worked for Peoria Charter in the summer of 2011 and at a Huck's for four to five weeks in 2011. Based upon the diagnosis of a lumbar strain, the Arbitrator finds that the Petitioner sustained a 2.5% disability to her whole person as a result of the work injury of March 22, 2011.

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

Santacruz, Abel,
Petitioner,
vs.

NO: 12WC 18489

Harrahs Casino,
Respondent,

16IWCC0822

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 10, 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: DEC 20 2016
MJB/bm
o-12/13/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SANTACRUZ, ABEL
Employee/Petitioner

Case# **12WC018489**

HARRAHS CASINO
Employer/Respondent

16IWCC0822

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:

1067 ANKIN LAW OFFICE LLC
JOSHUA E RUDOLFI
162 W GRAND AVE
CHICAGO, IL 60654

1139 NOBLE & ASSOCIATES PC
JOHNATHAN SVITAK
1979 N MILL ST
NAPERVILLE, IL 60563

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
ARBITRATION DECISION

Abel Santacruz
Employee/Petitioner

v.

Harrah's Casino
Employer/Respondent

Case # **12** WC **18489**

Consolidated cases: _____

16IWCC0822

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 **New Lenox**, 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

16IWCC0822

On **02/13/12**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$24,794.12**; the average weekly wage was **$476.81**.

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

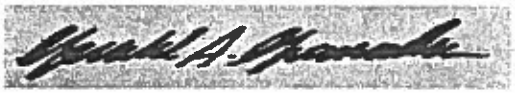
Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proof with regard to the issue of causation. Therefore 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.



Signature of Arbitrator

12/7/15
Date

DEC 10 2015

16IWCC0822

FINDINGS OF FACT

This claim involves a Petitioner alleging injuries to his right shoulder and back sustained while working for the Respondent on February 13, 2012. The issues in dispute are: 1) causation, 2) medical expenses, 3) TTD, and 4) nature and extent.

Petitioner has been employed by Respondent for six years as a Heavy Duty Steward. At the time of the injury, he worked the night shift from 11:00PM to 7:30AM performing sanitation and cleaning duties. He currently works in the same position performing the same duties as he did at the time of the accident.

Petitioner testified that on February 13, 2012 at approximately 5:00AM he was performing his usual duties as a Heavy Duty Steward. As part of his duties, Petitioner was pulling a cart stacked with floor mats from inside an elevator. He testified that as he was pulling the cart from inside the elevator, the elevator door closed, striking his right shoulder. Petitioner testified that he felt pain in the right shoulder. He reported the injury to his supervisor, filled out an accident report, and demonstrated the injury to one of his supervisors at the scene of the alleged accident.

Petitioner presented to Provena St. Joseph's Medical Center on February 13, 2012 complaining of right shoulder pain, where he was seen by Dr. Daniel Magdziarz, who noted Petitioner's chief complaint was "back discomfort." (PX 2). Petitioner reported to Dr. Magdziarz that an elevator door closed on the side of his back at work. (PX 2). Petitioner complained of back discomfort in the thoracic region and denied any radiation of pain. (PX 2). Petitioner was diagnosed with a back contusion and discharged from care. (PX 2). No right shoulder complaints were noted. (PX 2).

On February 14, 2012 Petitioner presented to Physicians' Immediate Care and Dr. Ronald Gregus. Petitioner indicated to Dr. Gregus that he was backing into an elevator when the "door closed on his mid back." (PX 3). Petitioner's chief complaint was low back pain. (PX 3). Petitioner underwent x-rays of the lumbar spine which demonstrated no evidence of narrowing of the disc spaces or arthritic changes, no spondylolysis or spondylolisthesis and no facet arthritis or sclerosis. (PX 3). Petitioner was assessed with a back contusion and placed on work restrictions of no lifting greater than 10 pounds. (PX 3). The records from this visit do not note any right shoulder complaints. (PX 3).

Petitioner continued to follow-up at Physicians' Immediate Care on February 20, 2012. (PX 3). He complained of pain in the right posterior shoulder and back area. (PX 3). Petitioner demonstrated full range of motion in the right shoulder with no evidence of impingement. (PX 3). On February 29, 2012 Petitioner was seen by Dr. Jon Price at Physicians' Immediate Care for a recheck of his back and shoulder. (PX 3). Examination of the shoulder revealed no tenderness in the shoulder joint. (PX 3). Petitioner's discomfort was not located in the shoulder joint area, but in the thoracic paravertebral muscles. (PX 3).

On March 2, 2012 Petitioner returned to Dr. Jon Price complaining of an increase in right shoulder pain. (PX 3). Petitioner demonstrated pain with motion of the right shoulder, but the pain was all in the trapezius muscle and rhomboid area of the right upper back. (PX 3). Petitioner was provided a prescription for physical therapy. (PX 3).

On March 7, 2012, Petitioner presented to Dr. Lawrence Lieber of M&M Orthopedics for an independent medical evaluation. (RX 3). Petitioner complained of both mid and upper back pain and occasional posterior right shoulder pain. (RX 3). Upon examination, Petitioner's right shoulder demonstrated no AC tenderness, no

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sign of impingement, and normal strength and range of motion. (RX 3). As a part of his evaluation, Dr. Lieber viewed video surveillance of the alleged accidence on February 13, 2012. (RX 3). Dr. Lieber noted Petitioner struck his upper back against the elevator door. (RX 3). Based upon his examination of Petitioner and review of the video surveillance, Dr. Lieber found no evidence of any functional impairment of Petitioner's mid, lower back, or shoulder area in association with the alleged accident of February 13, 2012. (RX 3). Dr. Lieber found no causal connection between Petitioner's complaints on March 7, 2012 and that of the alleged accident on February 13, 2012. (RX 3). Dr. Lieber opined that Petitioner required no further treatment and no work restrictions in association with the alleged work accident on February 13, 2012 and placed Petitioner at maximum medical improvement. (RX 3). Dr. Lieber also noted that Petitioner's subjective complaints were not consistent with the mechanism of injury, as viewed on the surveillance video, and found evidence of significant symptom magnification in relation to his objective findings. (RX 3).

On April 13, 2012 Petitioner presented to Parkview Orthopedic Group complaining of right shoulder and back pain. (PX 5). Upon physical examination, Petitioner demonstrated mild tenderness over the mid thoracic region. (PX 4). Petitioner demonstrated pain with right shoulder abduction and internal rotation consistent with a positive impingement sign. (PX 4). An MRI of the thoracic spine and right shoulder were ordered. (PX 4).

On April 23, 2012 Petitioner underwent an MRI of the right shoulder and thoracic spine. (PX 5). A moderately sized full thickness tear of the supraspinatus tendon was found as well as mild degenerative disk disease of the thoracic spine, but no significant disk bulge, protrusion or stenosis. (PX 5). On May 9, 2012 Petitioner followed up with Dr. William Farrell for treatment of his rotator cuff tendon tear in the right shoulder. (PX 5). Dr. Farrell recommended an open repair with acromioplasty. (PX 5). Petitioner testified that from February 13, 2012 through June 18, 2012 Harrah's was accommodating his light duty restrictions.

On June 18, 2012 Petitioner underwent an open rotator cuff tendon repair with acromioplsty at Silver Cross Hospital performed by Dr. William Ferrell. (PX 7). Petitioner testified that he was off work from June 18, 2012 through September 19, 2012. Petitioner began physical therapy at Functional Therapy & Rehabilitation, P.C. on July 5, 2012. (PX 6). Petitioner attended therapy from July 5, 2012 through November 23, 2012. (PX 6). Petitioner testified that he was not receiving treatment for any back condition during this time.

Petitioner testified that he was released to returned to work without restrictions on September 19, 2012 by Dr. Farrell (see also PX 6). Since returning to work on September 19, 2012, Petitioner testified to no issues or problems with either his back or right shoulder while performing his regular duties. Further, other than occasional pain in the right shoulder, Petitioner testified that he has not experienced any issues that restrict him in performing any activities outside of work due to the back injury. Petitioner confirmed that he has not had any new medical prescriptions since his last appointment with Dr. Farrell. Finally, Petitioner testified that since October of 2012, he has not returned to any doctor or physician for any back or right shoulder treatment.

On cross examination, Petitioner identified a voluntary account form provided to him by Harrah's security. (RX 1). Petitioner admitted to providing a written statement of the alleged accident and verified that he provided his signature on the account form. (RX 1). Petitioner confirmed that the account indicates the elevator door "hit the middle back." (RX 1). Petitioner also admitted that nowhere on the account does he indicate the elevator door struck his right shoulder. (RX 1). During cross examination, Respondent presented Respondent's Exhibit #2, a surveillance recording of the alleged accident. (RX 2). Petitioner identified himself in the video and confirmed that the video was accurate as to the time and location of the alleged accident. The video depicts the Petitioner pulling a cart out of an elevator. As he is exiting the elevator, the elevator door appears to be closing on his left side. The video does not depict the elevator door coming into contact with Petitioner's right shoulder.

CONCLUSIONS OF LAW

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1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has not met his burden of proof. This finding is supported by the lack of credibility in Petitioner's testimony in light of the investigative and medical evidence. Petitioner's testimony was clearly rebutted by the video surveillance, his initial accident report and the medical records. Petitioner testified that he was struck on his right shoulder by a closing elevator door as he was pulling a cart out of the elevator. However, the video surveillance clearly shows that the Petitioner could not have been struck on his right shoulder or anywhere on his right side. In viewing the video closely, it clearly shows the door closing on Petitioner's left side as he was walking backwards out of the elevator, while pulling the cart. This would most likely explain why Petitioner's accident report and the initial medical records make no mention of him injuring his right shoulder during the alleged incident. Furthermore, the treating medical records are devoid of any indication that any of the Petitioner's alleged medical conditions are causally related to his alleged February 13, 2012 incident. Given these facts, the Arbitrator is persuaded by the opinions of Dr. Lieber, who concluded that the Petitioner's physical complaints regarding his shoulder and back are not causally related to the alleged February 13, 2012 incident. Accordingly, the Arbitrator concludes that the Petitioner's current condition of ill-being is not causally related to his alleged February 13, 2012 incident.

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

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

☒ 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

Sara Ortega,
Petitioner,

vs.

NO: 12 WC 19127

16IWCC0814

American Buildings, Co.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 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, permanent partial disability, medical expenses, prospective 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. The Commission hereby 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 October 20, 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.

16IWCC0814

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: DEC 16 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-12/06/16
jdl/wj
68

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

ORTEGA, SARA
Employee/Petitioner

Case# **12WC019127**

AMERICAN BUILDINGS CO
Employer/Respondent

16IWCC0814

On 10/20/2015, 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 0.11% 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:

1824 STRONG LAW OFFICES
SEAN OSWALD ESQ
3100 N KNOXVILLE AVE
PEORIA, IL 61603

1337 KNELL LAW LLC
CHARLES D KNELL ESQ
504 FAYETTE ST
PEORIA, IL 61603

STATE OF ILLINOIS)
)SS.
COUNTY OF McLEAN)

☐ 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)

SARA ORTEGA
Employee/Petitioner

v.

AMERICAN BUILDINGS CO.
Employer/Respondent

Case # **12** WC **19127**

Consolidated cases: **N/A**

16IWCC0814

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 **Arbitrator Douglas McCarthy**, Arbitrator of the Commission, in the city of **Bloomington**, on **September 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. ☐ 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 **Prospective medical**

16IWCC0814

FINDINGS

On **March 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 of carpal tunnel syndrome ***is not*** causally related to the accident; her current condition of a right wrist sprain with forearm involvement is causally related to her specific trauma.

In the year preceding the injury, Petitioner earned **$19,718.40**; the average weekly wage was **$379.20**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **1** children under 18.

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

Denial of benefits

The arbitrator denies prospective medical based on the fact the petitioner failed to prove causal connection between the incident of March 13, 2012 and the petitioner's condition of ill-being, that being right carpal tunnel syndrome.

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

D. Dylan McCarty

Signature of Arbitrator

10/14/15
Date

OCT 20 2015

16IWCC0814

STATEMENT OF FACTS

The petitioner testified that on March 13, 2012 she was married with one son who was 12 years old. The petitioner began work for the respondent on October 31, 2010. Her job duties consisted of that of being a painter. The petitioner would use a spray gun with a hose. At times she would clean debris and also spray paint clips. A spray gun was pressurized.

The petitioner would sweep the spray gun from left to right using her right hand. She testified that she used 2 fingers rather than all four fingers when she used the spray gun. She would use her index and middle finger. The petitioner testified there would be 4 individuals who would work in the department. There were 2 painters, one individual who would hang the part and another individual who would assist in the movement of the part. The Petitioner testified that she spent about 1 minute spray painting. She further said that the part was then changed and that took about three to four minutes. After that, the line started back up and the process was repeated. It required about 60 repetitions for one part. Some parts are 5 feet wide and 20 feet long. Other parts are 18 inches wide, 5 feet long.

The petitioner said that while the part is being changed; i.e. when the line is stopped, she used a slightly heavier spray gun to paint parts on the ground. She was painting one of those parts when she sustained her accidental injury. She said that she was holding a paint gun away from her body with her right hand. As she pulled the gun back towards her body, she felt a pinch at the base of her palm. She said this occurred about 1:30 p.m. on March 13,2012 , and that she reported it immediately to her group leader.

She went to OSF Occupational Health and saw Dr. Chow. She was referred to physical therapy. She testified therapy did help her right hand. Her history of accident to both Dr. Chow and the physical therapist was consistent with her arbitration testimony concerning the specific event.

The petitioner was off work for an unrelated injury to her left hand for a period of time. The petitioner testified she has missed no time from work involving her right hand.

She went to see Dr. Blair Rhode on her own and saw him on May 30, 2012. Dr. Rhode referred her to Dr. Trudeau where she had an EMG and nerve conduction study performed on June 19, 2012.

The petitioner testified she was examined by Dr. James Williams on September 5, 2012. The petitioner testified Dr. Williams spent a great deal of time in the evaluation asking her about her work activities and did a thorough evaluation of her physical condition.

The respondent introduced into evidence as Respondent's Exhibit #6 a job video. That was shown by Marc Weers. Mr. Weers is the Production Manager at American Buildings and has worked there 33 years. He is familiar with the job as a painter. He testified when they are painting inside the job and painting large steel

16IWCC0814

beams the weight of the spray run is 1-1/2lbs. When they are spraying outside the booth area the weight of the gun is 2lbs. because of the size of the hose that is used.

Mr. Weers testified that the job video accurately portrayed the physical activities of the petitioner as a painter. The petitioner testified the video accurately portrayed jobs that the petitioner performed when she was a painter.

The job video and paint line video narration and description as set forth in Respondent's Exhibit #4 reveals that the painting operation in an 8 hour day is about 27% of the total work day. Hanging and unhanging pieces represents approximately 58% of the 8 hour work day.

At arbitration the petitioner said that her right hand aches all the time. She said it cramps up if she paints. She said that when she wakes up in the morning, her hand is numb up to her elbow. Finally, she testified that her hand fatigues easily when she plays catch with her son or uses squeeze bottles at home.

She is seeking payment of past and future medical, including the surgery proposed by Dr. Rhode.

Conclusions of Law

I. What was Petitioner's marital status at the time of the accident?

Based on the petitioner's testimony the arbitrator finds that at the time of the alleged occurrence, that being March 13, 2012 the petitioner was married with one child under the age of 18.

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?

The petitioner testified that on March 13, 2012 while she was painting she felt a pinch in her right hand/wrist below the palm of her right hand. She was seen on March 23, 2012 at OSF Occupational Health Network. The history she gave at that time was consistent with her testimony. The history she later gave to her physical therapist was also consistent with her testimony. Based on this history the arbitrator concludes that the petitioner sustained an accident that arose out of and in the course of the employment.

The petitioner also testified at length about the nature of her job as a painter, and is alleging a repetitive trauma injury which is causally related to her right carpal tunnel syndrome, for which Dr. Rhode has prescribed surgery. The dispute arises as to the causation of that medical condition.

In order to sort out the causation issue, the Arbitrator must first determine what injuries were proven by the evidence. When the petitioner was seen initially at OSF, she complained of pain and numbness in all of her fingers. She said that her wrist would cramp when she used her spray gun. The doctor's examination revealed

16IWCC0814

mild tenderness and swelling at the ulnar aspect of the wrist. The Petitioner had negative Tinel and Phalen signs. She showed mild tenderness of the thenar eminence on the medial aspect of the hand. The diagnosis was a sprain of the right wrist. She was advised to wear a brace and do exercises. When she returned on April 6, she felt her pain was traveling from her wrist into her right elbow. With her wrist extended, she complained of wrist pain on the top and ulnar side. She denied numbness and tingling. Her exam and diagnosis remained the same. (RX 2) At her initial therapy visit on April 30, she complained of pain on the top of the forearm and radius, reaching a level of 5 on a 10 point scale. She denied paresthesias or numbness. Her exam was significant for pain at the posterior wrist, with her hand falling asleep when the ulnar nerve was compressed at the elbow. (PX 3) The diagnosis was a possible nerve compression at the elbow. She had fifteen therapy visits through June 1, 2012. The progress notes during that time showed no change in the diagnosis. The final note showed she had slight pain when gripping repetitively. (Id) On May 31, Dr. Chow noted pain in the forearm from the wrist to the elbow. Her exam showed tenderness on the ulnar aspect of the wrist and forearm. The diagnosis was right wrist sprain with right forearm pain. She was referred to Dr. Newcomer, though it is unclear whether she ever saw him. A note in the Champion Fitness records indicates that the respondent's workers comp carrier denied further therapy after June 1, 2012. (RX 2)

The petitioner first saw Dr. Rhode on June 2, 2012. Her symptoms and exam findings were different from those seen earlier. She complained of numbness and tingling in the first three fingers of the right hand. She said she had to shake her hand to wake it up. She now had a positive sign for both the Tinel's and Phalen's tests. Dr. Rhode diagnosed a right carpal tunnel syndrome. (PX 4) Dr. Trudeau's electrical studies showed a moderately severe right carpal tunnel. When injection therapy proved ineffective, Dr. Rhode recommended surgery.

Based upon the facts above, the arbitrator concludes that the petitioner sustained a sprain of the right wrist and forearm as a result of her specific trauma on March 13, 2012. The treatment she received at OSF and Champion was appropriate for the condition. She appears to have reached a point of maximum medical improvement for the condition on or about June 1, 2012. As there was no evidence offered to suggest a causal relationship between the specific trauma and the carpal tunnel syndrome, and as the petitioner's symptoms, exam findings and diagnoses prior to her seeing Dr. Rhode are inconsistent with that condition, the arbitrator finds no causal relationship between the specific trauma and carpal tunnel.

With respect to the repetitive trauma claim, the petitioner failed to prove an accident arising out of her employment which is causally related to her right carpal tunnel syndrome. Her description of her job duties was essentially the same as the description provided by the respondent's witness, Mr. Weers. She did use her

right hand to sweep her paint gun back and forth across the beams which she was painting. As she swept in each direction, she compressed the trigger of her paint gun with her fingers. She did, however, testify that she released her grip after each sweep, regripping before she went back in the opposite direction. She did not paint nonstop, as Dr. Rhode assumed, because she painted one beam for about a minute out of every four or five minutes, as indicated in the statement of facts. While she testified that she did go off line and paint other parts while her co-workers were removing and reloading a part on the line, she did not provide any testimony as to the

number of parts she painted nor how long she maintained her grip on the paint gun during that process. After watching the job video and hearing the testimony, the arbitrator concludes that her work did not involve continuous gripping of the paint gun for any extended periods of time during the work day. Dr. Rhode's opinion provides little help to the arbitrator as he did not show any real understanding as to the petitioner's job duties. While Dr. Williams correctly pointed out that fact in his first narrative, his opinions are also not particularly persuasive. He concluded that she worked at a slow pace, but did not explain what that meant in terms of possible causation between the job and carpal tunnel.

The arbitrator could presume that the petitioner's condition was causally related, but, by the evidence presented, the opposite presumption could just as likely be made. The petitioner bears the burden of proof on the issue, and the arbitrator finds that burden was not met by the evidence presented.

Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

O. Other **Prospective medical**

Based on the arbitrator's findings as set forth in Section C and F the arbitrator denies the petitioner's claim for the prospective treatment recommended by Dr. Rhode. The Arbitrator finds the treatment at champion Fitness was reasonable under the Act, along with the other treatment received at OSF. The Respondent is ordered to paid for said treatment pursuant to the fee schedule, to the extent it remains unpaid.

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

ALBERT MONTGOMERY,

Petitioner,

vs.

NO: 12 WC 19390

MEGABUS USA, LLC,

16IWCC0799

Respondent,

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Cook County, which in its Opinion and Order dated March 10, 2016, ordered:

A. The decision of the Illinois Workers' Compensation Commission is reversed.
B. The dissenting decision of Commissioner Charles J. DeVriendt is adopted.
C. This matter is remanded to the Commission for the calculation of benefits due.

As background, this case involves Petitioner, a bus driver for Respondent, who fainted while exiting the bus he had driven from McLean, IL to Chicago. Respondent argued that Petitioner had a seizure. The Arbitrator found that Petitioner's loss of consciousness episode stemmed from an idiopathic condition and fell under the category of personal risk because "standing" was not a greater risk than that to which the general public is exposed. The Commission affirmed with Commissioner DeVriendt dissenting.

The circuit court found that: 1) the finding of an idiopathic fall or seizure was not supported by the record; and 2) "standing" was not the inherent risk of driving a bus but, rather, sitting for extended periods of time was. It was this sitting for an extended period, which caused a pooling of venous blood in his legs, that caused him to experience the syncopal episode and pass out when he stood up.

Based upon the remand order from the circuit court finding that Petitioner sustained an accidental injury arising out of and in the course of employment, we find that he is entitled to temporary total disability benefits for 42-2/7 weeks from May 23, 2012 through March 14, 2013. Based on the May 23, 2012, discharge note from Rush University Medical Center, Petitioner argued that he would have been able to return to work a few days after his accident. However, Respondent would not take him back as a driver until he underwent a series of medical clearances. Petitioner testified that he eventually returned to work for Respondent on March 15, 2013. We find that

16IWCC0799

Petitioner is entitled to temporary total disability benefits during this period. Petitioner is further entitled to medical expenses of $33,264.25, which are contained in Petitioner's Exhibit 5, subject to the fee schedule in Section 8.2 of the Act.

On the issue of permanency, in his brief on Review, Petitioner requested 2% loss of use of the person as a whole under Section 8(d)2, presumably for the syncopal episode. Analyzing this issue under the five factors in Section 8.1b, we find that no impairment report from a physician was submitted by either party. Petitioner was able to return to his previous occupation as a bus driver and there is no evidence that this accident affected his future earning capacity. We also find that his age is not a factor in determining disability and there is absolutely no evidence of disability corroborated by the treating medical records. In fact, Petitioner's testimony and the medical evidence shows that this was a one-time syncopal event, from which Petitioner has shown no ill effects, and he is not at any increased risk for future problems. Therefore, Petitioner's request for a permanency award is denied. We note that Petitioner also testified that he had hurt his left elbow and left knee in the accident but that those were both fine after two to three weeks and they don't bother him anymore. We find that he is not entitled to any permanency for these injuries under the five factors in Section 8.1b of the Act.

We also deny Petitioner's request for penalties and attorney's fees. Although Respondent did not take him back to work right away and did not pay workers' compensation benefits, Respondent's argument that Petitioner had an idiopathic fall that could have been a seizure was not unreasonable or vexatious since the medical records do reference a witness indicating convulsive behavior while Petitioner was on the ground and Dr. Kehinde initially opined that he could not rule out a seizure. Therefore, we find that it was not unreasonable for Respondent to dispute accident and causation in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $395.44 per week for a period of 42-2/7 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 pay to Petitioner $33,264.25 in 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 $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: DEC 14 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 10/26/16
49

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert Walch,
Petitioner,
vs.

NO: 12 WC 19485

16IWCC0842

Freeman United Coal Mining 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, evidentiary error, 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 June 13, 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: DEC 27 2016
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DLG/mw
045

David L. Gore

Mario Basurto

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WALCH, ROBERT
Employee/Petitioner

Case# **12WC019485**

FREEMAN UNITED COAL MINING CO
Employer/Respondent

16IWCC0842

On 6/13/2016, 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 0.43% 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

16IWCC0842

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

ROBERT WALCH
Employee/Petitioner

v.

FREEMAN UNITED COAL MINING CO
Employer/Respondent

Case # **12** WC **019485**

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 **Mt. Vernon, Illinois**, on **June 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 **Sections 1(d)-(f) and 6(c) of the Act**

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 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 **$85,034.56**; the average weekly wage was **$1,635.28**.

On the date of accident, Petitioner was **59** 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 establish that he has an occupational disease which arose out of and in the course of his employment, failed to establish that his current condition of ill-being is causally related to his employment with Respondent, and further failed to establish a timely disablement as defined in Section 1(e) of the Occupational Diseases Act, 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

5/31/16
Date

JUN 13 2016

FINDINGS OF FACT

Petitioner was 67 years old at the time of arbitration. He worked in the coal mine for 30 years with all of those years being underground. In addition to coal dust, Petitioner was regularly exposed to silica dust, roof bolting glue fumes, diesel fumes and smoke from coal fires. Petitioner's last day at Respondent's coal mine was August 29, 2007 when he was 59 years old. His classification on that last day was repairman and he was exposed to coal mine dust. Petitioner testified that was his last day of coal mining because the coal mine shutdown. Petitioner did not look for work in a coal mine after his mine shutdown.

Petitioner began working for Respondent in 1977 as a laborer. In that job he put up stoppings for air shafts and did a lot of shoveling on the belt. He testified that the shoveling was a pretty dusty job. His next job was as a bratticeman which was ventilating the air and moving it around. In that job he was exposed to the silica dust and rock dust. After that Petitioner became a repairman. In that job he repaired the equipment right where it broke down in the mine. After working as a repairman for about 10 years, Petitioner went to roof bolting. In that job the silica rock dust was falling on top of him as he drilled holes into the ceiling. Petitioner eventually returned to the job of repairman.

Petitioner first noticed his breathing problems two or three years before the mine closed while working as a repairman. He noticed that he was short of breath all the time and could not exert himself without panting. Petitioner testified that from the time he first noticed breathing problems until he left the mine they probably got a little worse. He testified that since leaving the mine his breathing problems are quite a bit worse. Petitioner testified that he could walk three city blocks on level ground before becoming short of breath. He testified that he has a flight of stairs in his house with 13 or 14 steps and by the time he gets to the top of them he wants to sit down and catch his breath.

Petitioner was not taking breathing medication at the time of arbitration. He testified that his breathing affects activities such as walking with his wife. He used to love splitting wood and cannot do that anymore. Petitioner testified that he has spoken with his treating doctor, Dr. McFarlin, about his breathing problems. Petitioner testified that he smoked for about two and a half years when he was 19 or 20 before he went to work in the mine. It has been over 40 years since he smoked. Petitioner testified that about two and a half months prior to arbitration he had six-artery bypass surgery. He reported that he was slow but healing. He also takes medication for hypertension. He had a fusion in his neck right before his heart surgery and takes pain medication related to that.

Petitioner testified that if he had not been laid off when the mine closed on August 29, 2007, he would have showed up for his next shift. Petitioner worked for Agri-Tech for about two years after he left Respondent. During the first year he picked up lawnmowers and delivered them for repairs. In the second year he worked for Agri-Tech, he did some motor repairs. He testified that his plan to work on old cars after his retirement never came to anything. Petitioner has not worked since he worked for Agri-Tech.

Petitioner saw Dr. Houser at the request of his attorney. He testified that when he was examined by Dr. Houser he was honest in answering Dr. Houser's questions about his breathing problems. Petitioner testified that while employed as a coal miner, he underwent NIOSH screening for black lung. Petitioner testified that before his bypass he was not able to do very much. Petitioner testified that for hobbies currently he has a lawnmower he is restoring. He goes to see his grandkids play ball.

Petitioner was seen by Dr. William Charles Houser on June 26, 2012. (Petitioner's Exhibit No. 1, p. 7). Dr. Houser is a pulmonary specialist. The nature of his practice is to see and treat patients who have various forms of lung disease including occupational asthma, asbestosis, coal workers' pneumoconiosis, silicosis and siderosis. Dr. Houser estimated that 15 to 20% of his practice deals with the care and treatment of coal miners. Dr. Houser has been the medical director of the Black Lung Clinic at Deaconess Hospital since it started in 1979. (Petitioner's Exhibit No. 1, pp. 3-4). Dr. Houser has performed 3,000 to 4,000 black lung exams over the last 34 years. Dr. Houser is board certified in internal medicine, pulmonary disease and critical care medicine. (Petitioner's Exhibit No. 1, Petitioner's Exhibit No. 1 to Deposition). Dr. Houser saw Petitioner on one occasion. Dr. Houser took the B-reader course and test to be certified as a B-reader, but he failed the examination. (Petitioner's Exhibit No. 1, p. 53).

Petitioner complained to Dr. Houser of shortness of breath for at least the last two to three years. He also reported having a fairly persistent cough of approximately one year. He normally did not have sputum production. Petitioner smoked for approximately two years between 1975 and 1977, up to one pack per day. (Petitioner's Exhibit No. 1, pp. 7-8). On examination Petitioner's chest was clear to percussion and auscultation. There were no rales, rhonchi, wheezing, pleural rub or bronchial breath sounds noted. (Petitioner's Exhibit No. 1, p. 10). Dr. Houser testified that the spirometry performed as part of his examination was normal. (Petitioner's Exhibit No. 1, p. 10). On Petitioner's chest x-ray of January 31, 2012, Dr. Houser noted P/P opacities in both the upper and mid lung zones, category 1/0 pneumoconiosis. Dr. Whitehead noted Q type opacities in both upper and the left mid lung zone, category 1/0 pneumoconiosis. Dr. Whitehead is a board certified radiologist and B-reader. (Petitioner's Exhibit No. 1, p. 10).

Dr. Houser's assessment included coal workers' pneumoconiosis. He testified that Petitioner had sufficient occupational exposure of approximately 31 years and chest x-ray findings appropriate for the diagnosis of coal workers' pneumoconiosis category 1. He further testified that since Petitioner had evidence of coal workers' pneumoconiosis he should avoid additional exposure to coal and rock dust. He testified that additional exposure would increase the likelihood of additional progression of the disease process. (Petitioner's Exhibit No. 1, p. 11). Dr. Houser testified that the screening test for coal workers' pneumoconiosis is not a physical examination but an x-ray. The screening test for COPD is not a physical exam but a pulmonary function test. (Petitioner's Exhibit No. 1, p. 12). Dr. Houser testified that when a coal miner has coal mine dust deposited in his lungs and develops coal workers' pneumoconiosis, a tissue reaction to the coal dust is required. Dr. Houser testified that the hallmark of coal workers' pneumoconiosis is the dust macule, which is a small area of dust deposition with associated scarring and fibrosis. He testified that the scarring of coal workers' pneumoconiosis is permanent and cannot perform the function of normal healthy lung tissue. (Petitioner's Exhibit No. 1, pp. 13-14). He testified that by definition, if a person has coal workers' pneumoconiosis, he has an impairment in function at the site of the scarring whether it can be measured or not. (Petitioner's Exhibit No. 1, pp. 13-14). Dr. Houser testified that with category 1 coal workers' pneumoconiosis, the most likely finding is normal pulmonary function. (Petitioner's Exhibit No. 1, p. 16).

Subsequent to his examination of Petitioner, Dr. Houser reviewed medical records concerning Petitioner. After his review of the records, Dr. Houser's findings and conclusions remained that Petitioner had evidence of coal workers' pneumoconiosis, category 1. (Petitioner's Exhibit No. 1, p. 27). Dr. Houser testified that the cause of Petitioner's coal workers' pneumoconiosis was his 31-year history of coal mine employment.

(Petitioner's Exhibit No. 1, p. 29). Dr. Houser testified that assuming that Petitioner was last occupationally exposed in 2007 and Dr. Houser examined him in June 2012, based on the natural history of the disease, it is certainly quite likely that the pneumoconiosis would have been present at the time Petitioner left the coal mines and possibly 10 to 15 years prior to that. (Petitioner's Exhibit No. 1, p. 30).

Dr. Houser testified that Petitioner provided him with an insufficient history of cough and sputum to diagnose chronic bronchitis. Petitioner dated the onset of his shortness of breath to 2009, 2010. (Petitioner's Exhibit No. 1, p. 40). Dr. Houser testified that upon his review of the medical records of Dr. McFarlin, it appeared that Petitioner's chronic cough began around February 14, 2011. (Petitioner' Exhibit No. 1, p. 43). The office note of February 28, 2011, is the first note where Petitioner complained of shortness of breath. (Petitioner's Exhibit No. 1, pp. 42-43). Dr. Houser agreed that in his review of the records from Dr. McFarlin there were no pulmonary complaints or pulmonary abnormalities found on any of the physical exams prior to February 14, 2011. (Petitioner's Exhibit No. 1, pp. 44-45). Dr. Houser testified that exertional dyspnea and cough can be due to many different things. He testified that deconditioning is a common cause of exertional dyspnea. (Petitioner's Exhibit No. 1, p. 45). Dr. Houser testified that most individuals exposed to coal mine dust do not develop pneumoconiosis. (Petitioner's Exhibit No. 1, p. 46). Dr. Houser testified that the incidents of disease among coal miners in the Illinois coal basin is about two percent. Dr. Houser testified that for those who have developed disease and cease their exposure to coal dust, there is a 95% chance that the pneumoconiosis will not progress. (Petitioner's Exhibit No. 1, pp. 47-48). Dr. Houser could not say within a reasonable degree of medical certainty that Petitioner fell within the five percent whose disease was progressing. (Petitioner' Exhibit No. 1, pp. 47-48). Dr. Houser testified that individuals with coal workers' pneumoconiosis can have additional exposure and their disease not show a measurable progression. (Petitioner's Exhibit No. 1, p. 48).

Petitioner did not tell Dr. Houser that he left mining at the time he did due to respiratory disease. He did not tell Dr. Houser that he left his work at the mine at the time he did on the advice of a physician over concern for his respiratory health. Petitioner was not taking any medications for his breathing. He did not tell Dr. Houser that he was unable to perform the last duties that he had at the coal mine. (Petitioner's Exhibit No. 1, p. 50).

Dr. Henry K. Smith, board certified radiologist and B-reader, interpreted chest x-ray of Petitioner dated May 7, 2007, as positive for pneumoconiosis, category 1/1 with P/S opacities in all lung zones. Dr. Smith made an identical interpretation of the chest x-rays dated January 31, 2012, and March 12, 2012. (Petitioner's Exhibit No. 3).

Dr. Michael Alexander, board certified radiologist and certified B-reader, interpreted chest x-ray of May 7, 2007, as positive for pneumoconiosis, profusion 1/0 with P/P opacities in all lung zones. Dr. Alexander interpreted the March 2, 2012, chest x-ray as positive for pneumoconiosis, profusion 1/1 with P/T opacities in all lung zones.

Interpretations by NIOSH of chest x-rays taken as part of the Coal Workers' Health Surveillance Program were admitted into evidence. Petitioner underwent a chest x-ray on May 7, 2007. One B-reader found the film to be quality 3 due to overexposure, artifacts, improper position, poor contrast and fog. The B-reader found no abnormalities consistent with pneumoconiosis. The other B-reader found the film to be quality 2 due

to artifacts, improper position and poor processing. This B-reader also found no abnormalities consistent with pneumoconiosis. (Respondent's Exhibit No. 3).

At the request of counsel for Respondent, Dr. Cristopher A. Meyer reviewed chest x-rays of Petitioner dated May 7, 2007, January 31, 2012, and March 2, 2012. Dr. Meyer testified that the May 7, 2007, film was quality 2 due to poor contrast, and scapular overlap. The January 2012 film was underexposed with poor contrast and he gave it a quality 3 rating. The most recent examination from March 2012 was quality 1. (Respondent's Exhibit No. 1, p. 40). Dr. Meyer testified that underexposure means the film is light and tends to accentuate the pulmonary vasculature. Dr. Meyer's interpretation of the May 7, 2007, film was that there was a calcified granuloma in the right mid zone and left costophrenic angle and that the lungs were otherwise clear with no findings of coal workers' pneumoconiosis. Dr. Meyer's interpretation of the January 31, 2012, examination again commented on the calcified granuloma. The examination was otherwise unremarkable. Dr. Meyer testified that his interpretation of the March 2, 2012, chest x-ray was similar. (Respondent's Exhibit No. 2, pp. 40-41). Dr. Meyer testified that it can be very useful to look at films in a chronological order because of the findings on chest x-ray may be acute, meaning they developed abruptly, or they may be more chronic. Dr. Meyer testified that pneumoconiosis would be a more chronic process. (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 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 the 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 a 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, pp. 21-23). 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's practice included treating patients with occupational lung disease, including 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).

Dr. Castle reviewed chest x-rays dated May 7, 2007, January 31, 2012, and March 2, 2012. Dr. Castle found no parenchymal abnormalities consistent with pneumoconiosis on those films. He testified that there was evidence of calcified granulomas. (Respondent's Exhibit No. 2, p. 33). Dr. Castle testified that after a very thorough and extensive review of all of the submitted medical data including the medical histories, physical examinations, radiographic evaluations, physiologic testing and other records, he concluded that Petitioner does

not suffer from coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 34). Dr. Castle noted that the problem list from Petitioner's physician included a diagnosis of asthma. Dr. Castle, however, did not see any definitive evidence of this process in the medical that he reviewed. He testified that Petitioner did not demonstrate any consistent findings indicating the presence of an interstitial, pulmonary process. Dr. Castle testified that Petitioner did not have a consistent finding of rales, crackles or crepitations. The majority of his evaluations were normal. (Respondent's Exhibit No. 2, p. 35). Dr. Castle testified that the valid physiologic studies were obtained by Dr. Houser on June 26, 2012. These studies were entirely normal showing no evidence of obstruction or restriction. Dr. Castle testified that Petitioner did not have any physiologic impairment from any cause. (Respondent's Exhibit No. 2, p. 36). Dr. Castle testified that Petitioner did not suffer from coal workers' pneumoconiosis or any pulmonary disease or impairment occurring as a result of his occupational exposure. (Respondent's Exhibit No. 2, pp. 36-37).

Dr. Castle testified that a latency period in onset of shortness of breath or cough of two years or more after an individual left his exposure at the coal mine would not be expected. Dr. Castle testified that if such a latency exists, those complaints would be due to something other than occupational exposure. (Respondent's Exhibit No. 2, pp. 37-38). Dr. Castle testified that based upon the testing performed by Dr. Houser, strictly from a pulmonary standpoint, Petitioner was capable of heavy manual labor. (Respondent's Exhibit No. 2, p. 38). Dr. Castle testified that coal workers' pneumoconiosis is trapped coal dust in a part of the lung which ends up wrapped in scar tissue and can be accompanied by emphysema around it. (Respondent's Exhibit No. 2, pp. 54-55). Dr. Castle testified that if a person has coal workers' pneumoconiosis, he would have an impairment of the function of his lung at the site of the scarring and emphysema. (Respondent's Exhibit No. 2, p. 55). Dr. Castle testified that the scarring of coal workers' pneumoconiosis does not return to normal healthy lung tissue. He testified that there is no cure for coal workers' pneumoconiosis. (Respondent's Exhibit No. 2, p. 63). Dr. Castle testified it would be extremely unlikely for a simple coal worker's pneumoconiosis to progress once the exposure ceases. Dr. Castle agrees with the position taken by the American Thoracic Society that an older worker with a mild pneumoconiosis may be at low risk from working in currently permissible exposure levels until he reaches retirement age. (Respondent's Exhibit No. 2, pp. 74-75).

Dr. Roger McFarlin has a family practice in Hillsboro, Illinois. He treats people of all ages including people with lung disease. Over the years he has had occasion to provide care and treatment to coal miners and former coal miners. Dr. McFarlin takes patient histories and conducts physical examinations. He has also had the opportunity to review chest x-rays. (Petitioner's Exhibit No. 2, pp. 4-6). Dr. McFarlin has provided care and treatment to Petitioner. According to his records the first time he saw Petitioner was in 1970. He has treated him continuously since then. (Petitioner's Exhibit No. 2, p. 6).

Dr. McFarlin testified that he has read x-rays concerning Petitioner. He believed that those x-rays were consistent with coal workers' pneumoconiosis. (Petitioner's Exhibit No. 2, p. 7). Dr. McFarlin testified that Petitioner's pneumoconiosis was more likely than not in existence when he ended his coal mine employment. He testified that if Petitioner continued his work in the coal mine underground there would be more risk to his health in the form of increased potential progression of pneumoconiosis. Dr. McFarlin testified that Petitioner does not have the pulmonary capacity to perform the heavy manual labor of a coal miner. (Petitioner's Exhibit No. 2, p. 9).

Petitioner had a history of chest pain in 1986. He was admitted to a hospital and treated for acute cardiac arrhythmia with multiple premature ventricular contractions. He had heart problems going forward. He had a cough and acute bronchitis in 1988. He had sore throat and congestion in 1989. He had chest pain in 1990 and was sent for a treadmill test which was interpreted as normal. (Petitioner's Exhibit No. 2, pp. 11-12). Petitioner reported sinus drainage and cough in October 1991. From1974 to October 1992 he was never diagnosed with pneumoconiosis. (Petitioner's Exhibit No. 2, pp. 12-13).

On July 12, 1993, Petitioner related to Dr. McFarlin cough, sore throat and sore tongue as well as sinus drainage. (Petitioner's Exhibit No. 2, p. 18). On September 30, 1994, Petitioner was seen for routine follow up. His lungs were clear on that date. (Petitioner's Exhibit No. 2, pp. 19-20). His lungs were clear on May 14, 1995, when seen for follow up. (Petitioner's Exhibit No. 2, p. 20). On February 23, 1996, Petitioner was seen for complaints of sore throat, cough, nausea and diarrhea. (Petitioner's Exhibit No. 1, p. 22). On April 25, 1997, Petitioner was seen for a recheck and related occasional diarrhea which the doctor thought might be related to his heart medication. He had no shortness of breath or other medical problems, and his lungs were clear. (Petitioner's Exhibit No. 2, p. 25). On February 26, 1999, Petitioner related coughing, chest congestion, sore throat, sinus drainage and chills. He was diagnosed with sinusitis and bronchitis. His lungs were clear to auscultation on that date. (Petitioner's Exhibit No. 2, pp. 31-33). Petitioner was seen on October 1, 1999, for hypertension and neck pain. At that point he did not have any shortness of breath. His lungs were clear to auscultation. (Petitioner's Exhibit No. 2, pp. 35-36). Petitioner was seen on December 13, 2000, for neck pain. He had no shortness of breath, and his lungs were clear. (Petitioner's Exhibit No. 2, p. 41). On December 22, 2000, Petitioner complained of sinus drainage and cough. His lungs were clear. Petitioner denied shortness of breath on March 9, 2001. (Petitioner's Exhibit No. 2, p. 42). Petitioner was seen for neck pain on April 15, 2003, July 21, 2003, October 16, 2003, and July 13, 2004. His lungs were clear on all of those dates. (Petitioner's Exhibit No. 2, pp. 45-46). Petitioner was diagnosed with bronchitis on March 16, 2005. (Petitioner's Exhibit No. 2, pp. 48-49). On October 7, 2006, Petitioner was seen for routine follow up. His lungs were clear, and he had no shortness of breath. (Petitioner's Exhibit No. 2, p. 53). On October 19, 2007, Petitioner had no shortness of breath. (Petitioner's Exhibit No. 5, p. 56).

Up to October 19, 2007, Dr. McFarlin had never diagnosed Petitioner with pneumoconiosis. He had never restricted him from work for any sort of occupational disease. On that date his lungs were clear. (Petitioner's Exhibit No. 2, p. 57). Petitioner had no shortness of breath, and his lungs were clear when seen on August 11, 2008, October 7, 2008, January 28, 2009, and April 30, 2009. (Petitioner's Exhibit No. 2, pp. 59-61). On February 14, 2011, he had a cough. Dr. McFarlin noted that he was taking Lisinopril. He took him off of that medication to see if it would help the cough. On that date his lungs were clear. Dr. McFarlin's diagnoses were acute bronchitis, hypertension, rhinitis and sinusitis. (Petitioner's Exhibit No. 2, p. 65). Petitioner returned two weeks later stating that he still had the cough and could not get rid of it. From then on Petitioner continued to complain about a persistent cough. Dr. McFarlin testified that that was not something he had before that time. Dr. McFarlin diagnosed Petitioner with bronchitis and rhinitis. (Petitioner's Exhibit No. 2, p. 66). February 14, 2011, was the first time that Dr. McFarlin charted a complaint of shortness of breath by Petitioner. Petitioner was seen on April 29, 2011, complaining of allergies and cough and trouble breathing at times. On that date his lungs were clear. Dr. McFarlin's diagnoses included rhinitis and sinusitis. (Petitioner's Exhibit No. 2, pp. 67-68). On July 1, 2011, Petitioner still complained of shortness of breath. It was noted that the shortness of breath came and went. (Petitioner's Exhibit No. 2, p. 68).

Dr. McFarlin had spirometry performed on Petitioner on January 11, 2012. Dr. McFarlin testified that this particular test was flagged for the caution of only one acceptable maneuver. Dr. McFarlin did not know how many acceptable maneuvers were required by the American Thoracic Society to be considered a valid test. (Petitioner's Exhibit No. 2, pp. 71-72). On March 2, 2012, Petitioner had the testing repeated. Dr. McFarlin testified Petitioner's numbers fell within obstruction abnormality. (Petitioner's Exhibit No. 2, p. 72). On March 2, 2012, Petitioner had a cough, but he did not have sputum. (Petitioner's Exhibit No. 2, p. 73).

Dr. McFarlin testified that he did not hold himself out to be an expert in reading films for black lung. He testified that he is not a pulmonologist and does not hold himself out to be an expert in pulmonology. Dr. McFarlin agreed that Petitioner's complaints from time to time of cough, shortness of breath and dyspnea could be due to something other than pneumoconiosis. (Petitioner's Exhibit No. 2, pp. 78-79). Dr. McFarlin testified that his opinion that Petitioner did not have the pulmonary capacity to perform heavy manual labor was based on the spirometry. Dr. McFarlin testified that Petitioner's physical problems were primarily due to his neck and back injuries. He would not be able to do heavy manual labor with those conditions. (Petitioner's Exhibit No. 2, p. 80). Dr. McFarlin testified that over the years Petitioner experienced problems with cough, dyspnea, wheezing, shortness of breath, trouble breathing and sinus drainage. Dr. McFarlin could not say that one thing or more than one thing caused his problems. He testified that these symptoms could possibly be caused by lung disease, virus, bacterial infection or allergies. (Petitioner's Exhibit No. 2, pp. 82-83). Dr. McFarlin testified that he did not think Petitioner had chronic bronchitis. (Petitioner's Exhibit No. 2, p. 88).

Medical records from McFarlin Medical Clinic were admitted into evidence. Petitioner was seen on October 29, 2013, with concern that he might have Lyme disease. On that date his lungs were clear. (Respondent's Exhibit No. 4, p. 99). Petitioner was seen by Dr. Michael Pick on November 12, 2013, complaining of generalized pain and weakness. Review of systems respiratory showed occasional shortness of breath, coughing and wheezing. Physical examination of the lungs showed that they were clear to percussion and auscultation. The assessment was chronic widespread pain syndrome. (Respondent's Exhibit No. 4, pp. 104-106). Petitioner was seen by Dr. John Watson at The Orthopedic Center of Illinois on June 19, 2014. His review of systems respiratory was positive for shortness of breath and wheezing. (Respondent's Exhibit No. 4, pp. 95-97). Petitioner returned to Dr. Watson on July 15, 2014. His review of systems respiratory on that date was negative. Physical examination showed that the respirations were non labored and non dyspneic. (Respondent's Exhibit No. 4, pp. 92-94). Petitioner was seen by Dr. McFarlin on August 4, 2014 at Memorial Medical Center. Physical examination of the lungs showed that they were clear to auscultation. Review of systems respiratory was negative. (Respondent's Exhibit No. 4, p. 7). On October 13, 2014, Petitioner was seen by Dr. Robert Trask. Review of systems respiratory revealed that Petitioner denied chronic cough. On examination the chest was clear to auscultation. (Respondent's Exhibit No. 4, pp. 65-67). Petitioner was seen by Dr. Joseph Blaser on October 28, 2014. Review of systems respiratory was negative. Physical examination showed his respiratory effort was normal, and auscultation of the lungs were also normal. (Respondent's Exhibit No. 4, pp. 62-64). Petitioner was seen on February 17, 2015. He reported that he had been out in the cold weather and began experiencing chest pain and almost did not make it back to his house. Physical examination of the lungs showed that they were clear, however, there were diminished breath sounds. Spirometry testing was performed. The FVC was 86% of predicted. The FEV1 was 80% of predicted and the FEV1/FVC was 69%. This was interpreted as a normal study. (Respondent's Exhibit No. 4, pp. 10, 45). Petitioner was seen by Dr. Trask on February 18, 2015. Review of systems respiratory showed Petitioner denied

chronic cough. He did indicate to Dr. Trask that he had some shortness of breath. Physical examination of the respiratory system showed no intercoastal retraction noted. The chest was clear to auscultation. (Respondent's Exhibit No. 4, pp. 36-39). Chest x-ray was taken at St. John's Hospital on March 5, 2015. Same showed chronic scarring or atelectasis noted near the lung bases. Otherwise, the lungs were clear. (Respondent's Exhibit No. 4, p. 20). On March 6, 2015, Petitioner underwent coronary artery bypass graph times six. (Respondent's Exhibit No. 4, p. 19). Petitioner was seen for follow up on April 6, 2015. Review of systems respiratory showed he denied any chronic cough. On examination his chest was clear to auscultation. (Respondent's Exhibit No. 4, pp. 5-8). Petitioner was seen by Dr. McFarlin on April 24, 2015. On that date he reported shortness of breath on exertion. Physical examination showed that the lungs were clear to auscultation bilaterally. (Respondent's Exhibit No. 4, p. 2).

CONCLUSIONS

Issue (C): Did an occupational disease occur that arose out of and in the course of Petitioner's employment by Respondent?

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

The Arbitrator finds the x-ray interpretations by Drs. Meyer and Castle and NIOSH to be more persuasive than the interpretations by Drs. Houser, Smith and Alexander. The negative readings of the chest x-ray of May 7, 2007, by Drs. Castle and Meyer were confirmed by two independent NIOSH B-readers. The arbitrator finds the NIOSH readings to be persuasive as NIOSH is truly independent. The NIOSH B-readings confirm that Petitioner did not have x-ray evidence of pneumoconiosis approximately two months before he left coal mining. Dr. Smith's interpretations of the chest x-ray from May 7, 2007 and March 12, 2012, were identical. Given that the chest films were read by NIOSH as negative in 2007, the changes seen by Dr. Smith were not pneumoconiosis. The Arbitrator finds that Petitioner failed to prove that he has coal workers' pneumoconiosis. No physician made a finding of any other occupational disease in Petitioner.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease arising out of and in the course of his employment. The Arbitrator further finds that Petitioner has failed to prove by a preponderance of the evidence that his breathing complaints are causally related to his coal mine dust exposure. Petitioner has failed to prove that his current condition of ill-being is causally related to his employment with Respondent.

Issue (O): Other: Whether Petitioner proved timely disablement pursuant to Section 1(e) and 1(f) of the Occupational Diseases Act.

Section 1(e) of the Act defines disablement as an impairment or partial impairment, temporary or permanent, in the function of the body or any member 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. Petitioner testified that from the time he noticed breathing problems at work until he left coal mining his breathing problems worsened. He testified that his breathing problems have continued to worsen since he left coal mining. Petitioner complained to Dr. Houser of onset of shortness of breath for the two or three years prior to his examination which would have been in 2009 or 2010. Petitioner reported to Dr. Houser having a fairly consistent cough for approximately one year. Petitioner did not relate to Dr. McFarlin any complaints of chronic cough until February 2011. Dr. McFarlin testified that that was not something

Petitioner had before that time. Dr. Castle testified that if there was a latency of shortness of breath and/or cough for Petitioner for two or more years after he was last exposed to coal mine dust, the etiology of same would not be coal dust exposure. Dr. Castle testified that based upon the testing performed by Dr. Houser, Petitioner would be capable of heavy manual labor.

The Arbitrator finds that Petitioner has failed to prove a timely disablement as defined in Section 1(e) of the Occupational Diseases Act.

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

Ernesto Mota,
Petitioner,

vs.
State of IL DJJ IYC Joliet,
Respondent,

NO: 12 WC 29111

16IWCC0836

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, temporary total disability, causal connection, medical, waiver/estoppel 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 5, 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.

No bond or summons required for State of Illinois cases.

DATED: DEC 23 2016

MB/mas
o:12/15/16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MOTA, ERNESTO
Employee/Petitioner

Case# 12WC029111

16IWCC0836

STATE OF IL DJJ IYC JOLIET
Employer/Respondent

On 5/5/2016, 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:

0924 BLOCK, KLUKAS & MANZELLA PC
MICHAEL BLOCK
19 W JEFFERSON ST
JOLIET, IL 60432

4980 ASSISTANT ATTORNEY GENERAL
COLIN KICKLIGHTER
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

MAY 5 - 2016

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

16IWCC0836

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
ARBITRATION DECISION

ERNESTO MOTA
Employee/Petitioner

v.

STATE OF IL DJJ IYC JOLIET
Employer/Respondent

Case # **12** WC **29111**

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 **NEW LENOX**, on **MARCH 4, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **10/25/10**, 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. SEE DECISION

In the year preceding the injury, Petitioner earned **$47,757.32**; the average weekly wage was **$918.41**.

On the date of accident, Petitioner was **31** 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 **$34,373.84** for TTD, **$0** for TPD, **$0** for maintenance, and $ 0for other benefits, for a total credit of **$34,373.84**.

Respondent is entitled to a credit under Section 8(j) of the Act to the extent such payments were made.

ORDER

Medical benefits

Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injuries pursuant to Sections 8 and 8.2 of the Act. Respondent shall be given a credit for group payments made 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.

Permanent Partial Disability: Person as a whole (For injuries before 9/1/11)

Respondent shall pay Petitioner permanent partial disability benefits of **$551.05**/week for 5 weeks, because the injuries sustained caused the 1% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $551.05/week for 51.25 weeks, because the injuries sustained caused 25% loss of use 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.

Carolyn M. Doherty

Signature of Arbitrator

5/3/16
Date

ICArbDec p. 2

MAY 5 - 2016

FINDINGS OF FACT

Petitioner, a 31 year old correctional officer for the Department of Juvenile Justice, testified that on October 25, 2010 at about 6:45 a.m. he was bringing a line of inmates out for breakfast when two were acting suspicious, and nodded to the effect of "let's do it". One pulled a metal object later determined to be a fan motor with a cord, and started swinging it around like a gladiator, hitting Petitioner in the left shoulder and back of the head. Petitioner also testified that in course of the altercation he was hit in the face with his radio suffering injury to his jaw and chipping teeth. Petitioner further testified that while fighting with one of the inmates he struck his left hand on the wall after swinging at one of the inmates and missing. The parties stipulated to the issues of accident and notice. ARB EX 1.

Petitioner testified that prior to this accident, he had cut his left wrist when he was 16 years old and that he received stitches to the left wrist with no further follow up. He testified that he had no numbness or tingling in the left wrist following that incident. He further testified that he was hired by Respondent in March 2010 passing a physical exam with no problems in his left hand. Petitioner further testified that in September 2010, he was at work when several inmates began to fight. Petitioner testified that he used pepper spray to break up the fight and that he slipped on the floor covered with pepper spray landing on his left elbow and left hand suffering a sprain to his left little finger. Petitioner was seen at the ER on 9/12/10 with a history of a fall. He underwent x-rays to his left elbow which showed no fracture. He underwent x-rays of his left hand which revealed normal joint alignments of the carpal bones and carpometcarpal joint. Soft tissue swelling was noted but no fracture seen. PX 7, p. 43. Petitioner testified that he took a few days off and then returned to work full duty.

Dr. Vera's records indicate that on 9/17/10, he saw Petitioner for complaints of a "sprained finger" and other general complaints of insomnia and allergies. Dr. Vera noted that Petitioner was seen in the ER for his finger and had x-rays and a splint applied. He noted that the finger was better although still slightly swollen and that range of motion was "almost back to normal." He was diagnosed with "sprain of metacarpophalangeal joint of hand, resolving, patient to follow up if symptoms persist." PX 1. Petitioner followed up for a "swollen pinky" on 10/7/10 with Dr. Vera. Dr. Vera noted, "The problem is fluctuating. The pain is sharp. Context: there was an injury. The pain is aggravated by movement. The pain is relieved by rest. Associated symptoms include decreased mobility, swelling and tenderness. Pertinent negatives include crepitus, numbness, popping or weakness. Additional information: discussed need for immobility and repeat x-rays." PX 1. On exam, Dr. Vera noted swelling on the proximal portion of the left digit # little finger with moderate severity. Comments: pain with ROM." The assessment was sprain of metacarpophalangeal joint of hand, Acute. Pt shown how to tape finger. Follow up in 7-10 days. Effusion of hand joint. Acute. Await repeat x-ray." PX 1.

Petitioner testified that on October 25, 2010 after the fight he was taken by staff car to Provena St. Joseph Medical Center, where the history of the presenting illness was left hand swelling, right jaw pain and right knee pain after an assault at work 30 minutes prior to arrival, having been hit with a metal object and punched (Pet's. Ex. 4, p. 14). The exam records jaw pain but no "significant trauma to patient's dentition or oral anatomy. The right [sic] hand is moderately tender and mildly swollen over the left 5th digit." The diagnosis was mandible pain, left hand pain and right knee pain. He was given pain medication and a finger splint for his left little finger. PX 4. X-rays of the jaw and right knee were normal. X-rays of the left hand were compared to x-rays of the left hand taken on 9/12/10, approximately 6 weeks prior to the accident of October 2010. The 10/25/10 x-ray findings read, "there is no evidence of acute fracture or dislocation. There is small lucency ulnar aspect subarticular proximal phalange near the proximal interphalangeal joint of the 5th digit. This is stable when compared to previous study. This could represent the residual of prior trauma. A small marginal erosion would

be difficult to exclude. Accessory ossicle is noted near the base of the proximal phalange 3rd digit at the radial side. Carpal bones are intact. ..." The impression reads, "there is no evidence of acute fracture in the hand. Lucency ulnar side proximal phalange at the proximal interphalangeal joint is stable when compared to previous study and therefore of uncertain significance as described above." PX 4. Petitioner was told to follow up with his physician. PX 4.

Petitioner followed up with his primary physician, Dr. Vera, on 10/28/10, Dr. Vera's reason for visit lists, "this 31 year old male presents for injury." The history indicates, "the onset was 4 days ago. Trauma was due to direct blow location is left face. The second location is left back-upper/shoulder. Status improvement, gradual. ... Pt had defend himself against prison inmate attack. Seen in ER. Face, L shoulder, L upper back and R knee with contusions. Pain controlled with Motrin but back stiff. Trouble sleeping as he relives the attack as he tries to fall asleep." Petitioner was assessed with a contusion of the back, shoulder region and face, scalp and neck. He was taken off work and told to rest. PX 1.

Petitioner testified that in early November, he traveled to Juarez, Mexico, which is near the Texas border, as his mother was sick. There he treated with Dr. Calvillo, a dentist, who gave him an occlusal guard, performed root planeing and scaling, and fixed four chipped teeth with a composite resin surface (Pet's. Ex. 5, p. 1). The history on the form is "assaulted by inmates 10/25/10."

November 9, 2010 Petitioner returned to Dr. Vera, with a complaint of chest discomfort and jaw pain, noting he had seen a dentist and was diagnosed with cracked teeth and required treatment. Petitioner also treated for acute back ache and was ordered PT. Petitioner returned to Dr. Vera, November 15, 2010, noting that physical therapy was helping his back muscle spasms. Petitioner requested a return to work in one week. PX 1.

November 24, 2010, Petitioner returned to Dr. Vera complaining of mid back pain and pain in the left hand (pinky finger) which Petitioner reported as constant. Petitioner reported that the finger pain was aggravated by movement and that associated symptoms included decreased mobility, swelling and tenderness. Under additional information Dr. Vera listed persistent pain and swelling, x-rays normal. PX 1. Swelling on the mid portion of the left little finger with moderate severity was noted. Petitioner was referred to an orthopedic physician for his finger and was kept off work to continue with 2 weeks of PT for his back pain. PX 1. Petitioner was again referred to an ortho for his finger on 12/8/10 and PT was continued for his back complaints. Petitioner was kept off work.

Petitioner saw Dr. John H. Lee of Midwest Bone and Joint Specialists on 12/9/10. X-rays ordered for the left pinky taken on 12/9/10 indicate no acute fracture or dislocation. PX 6, PX 7. At the visit of 12/9/10, Dr. Lee noted Petitioner's complaints of left hand pain starting on 10/25/10 when he jammed his left hand at work. No previous left hand problems were reported. On exam, Dr. Lee noted associated symptoms of bruising, decreased mobility, difficulty going to sleep, numbness, spasms, swelling, tingling in the arms, tenderness and weakness and instability. At the left little finger PIP joint was noted mild swelling and diffuse tenderness with decreased range of motion and decreased strength. Dr. Lee assessed Petitioner with "left hand 5th pip joint pain due to crush injury to the 5th proximal phalanx lateral condyle." He advised Petitioner to work on the range of motion of the pip joint and that he may never obtain full extension and flexion at the 5th pip joint with continued swelling of the joint. He noted "regular work activity is recommended but no prisoner contact. F/u in 3 weeks." His diagnosis was IP joint sprain/strain. PX 7.

On 1/3/11, Dr. Lee started work conditioning noting a crush injury to the 5th proximal phalanx lateral condyle "since he works a high security jail" (Pet's. Ex. 7, p. 17). Petitioner returned to Dr. Lee, January 17, 2011. X-rays of 1/17/11 ordered by Dr. Lee indicated some cortical irregularity at the ulnar side of the proximal phalanx

of the fifth digit at the level of the PIP joint. The report reads, "it is unclear if this is post traumatic or if it represents some small erosions." PX 7. Dr. Lee interpreted the most recent x-rays as showing an intraarticular osteochondral fracture involving the lateral condyle of the proximal phalange which had healed. Dr. Lee described a healed fracture with associated symptoms including decreased mobility, stiffness, numbness, swelling, tenderness and weakness. Dr. Lee recommended light work and a follow up in one month. If the condition did not improve, Dr. Lee noted that he would consider a second opinion with Dr. Shin, the hand surgeon of that group. Petitioner returned to modified duty and complained of pain and swelling of the little finger with activity.

Petitioner saw Dr. Shin on 6/3/11. PX 8. Dr. Shin recommended continued PT, light duty and additional x-rays to evaluate the PIP joint. Petitioner was to return to the office on 6/14/11. Petitioner underwent additional x-rays on 7/26/11 which at the visit of 8/1/11 Dr. Shin noted revealed traumatic arthritis involving left small finger PIP joint. Dr. Shin noted the condition was "directly related to the injury dated October 21, 2010." He scheduled Petitioner for an arthrodesis of the PIP joint of the left small finger on 8/23/11. PX 8, PX 9.

Petitioner testified that since the recommended surgery was a fusion, he sought a second opinion from Dr. Kronen of Mid America Hand to Shoulder Clinic on 9/11/11. PX 7, p. 30. Dr. Kronen noted the injury at work in October 2010 and Petitioner's continued complaints since that time. He also noted the arthrodesis recommendation. Dr. Kronen noted swelling at the left 5th PIP joint with tenderness to compression of the joint and inability to adduct to the small finger and a normal active range of motion. He diagnosed PIP joint traumatic arthritis left 5th digit and tendon rupture left 5th digit. Dr. Kronen recommended a tendon transfer to bring the finger closer to the ring finger. He also recommended an option other than a fusion which was a soft tissue reconstruction arthroplasty of the joint. Although not a permanent solution it was an alternative to a fusion which would eliminate motion at the joint. He told Petitioner he was not a candidate for joint replacement as this would "not hold up given his occupation." Petitioner chose to proceed with soft tissue reconstruction. Petitioner then elected to proceed with the joint reconstruction and the surgery was performed October 19, 2011 at Christ Medical Center (Pet's. Ex. 14). Petitioner underwent a tendon transfer reconstruction extensor mechanism left 5th digit and joint replacement left 5th digit in the PIP joint with Ascension implant. PX 14. Petitioner was kept off work and placed in PT following surgery. PX 7.

Petitioner had an additional surgery on March 27, 2012, by Dr. Kronen described as a secondary reconstructive procedure consisting of reconstruction of central slip for boutonniere deformity post arthroplasty. PX 19. The need for the second surgery was based on Petitioner's continued inability to fully extend the finger. PX 7.

At a follow up visit on 5/7/12, Petitioner reported being pleased with the range of motion after the second surgery although reported some limited motion at the PIP joint. PX 7. Therapy was continued as was right hand only duty with a splint. PX 7. On 6/18/12, Petitioner reported some limitation of motion due to scar tissue but improvement in range of motion. Dr. Kronen continued right handed duty "with the left assisting at 5 to 10 pounds at this time." PX 7. Occupational therapy was continued for three to four weeks and then discharge to a home program. The possibility of a third surgery to eliminate scar tissue from the tendon was discussed. PX 7. The tenolysis to further improve range of motion of the finger was again discussed at the visit of 7/13/12.

Petitioner attended a Section 12 exam with Dr. Vendor at Respondent's request on 9/7/12. RX 3. Dr. Vendor noted Petitioner's two surgeries on the pinky finger as well as the accident of October 25, 2010. He noted the complaints of loss of motion of the left small finger and pain with certain activities along with a numbness in the ulnar aspect of the palm extending into the ring and small fingers. He concluded that Petitioner's complaints were consistent with his evaluation and that Petitioner had a significant loss of motion in the finger, both at the PIP and DIP joints. He noted the recommendation for further surgery, a tenolysis, in an attempt to

improve flexion but noted a guarded prognosis. He noted that Petitioner's finger anatomy was very abnormal and that Petitioner would not respond to another surgery with significant improvement. He recommended removal of the arthroplasty and fusion of the PIP joint. He concluded that the "condition of his small finger can be considered a continuation of the problems sustained form his reported injury in October 2010." RX 3. He felt since Petitioner was right hand dominant he could perform the job activities but if specific difficulties were encountered he would need restrictions.

With regard to the sensory complaints and weakness on exam, Dr. Vendor concluded that Petitioner had an ulnar nerve abnormality which needed electrodiagnostic studies and possible treatment but would not be related to the small finger injury. RX 3. Subsequent studies revealed ulnar neuropathy at a distal level not related to the injury of the small finger or to the small finger surgeries. RX 3.

Petitioner continued to follow up with Dr. Kronen while waiting for third surgery authorization. On 11/27/12, Petitioner attended his own Section 12 exam with Dr. Coe. He reviewed Petitioner's medical records, including those records from September 2010 cited above documenting Petitioner's left finger sprain and condition prior to the accident of October 2010. Dr. Coe concluded that as a result of the fight on October 25, 2010, Petitioner sustained, "dental fractures, facial and jaw contusions, and osteochondral fracture of the left fifth proximal interphalangeal joint with the development of tendon adhesions and posttraumatic arthritis." He also noted there was "associated swelling of Mr. Mota's left fifth proximal interphalangeal joint and sensory change of the left fifth finger consistent with his injury and multiple surgeries." He agreed with the recommended third surgery and work restrictions of limited forceful gripping with his left hand. PX 21.

The third surgery was approved and was performed on 9/10/13. Dr. Kronen performed the prescribed tenolysis surgery to the fifth finger. PX 19. After post surgical occupational therapy, Petitioner was returned to full active duty by Dr. Kronen as of 2/13/14. PX 12.

Petitioner returned to Dr. Coe on March 26, 2015. PX 21A. At that time, Petitioner complained of postoperative scarring, pain and stiffness of this left fifth finger and left hand weakness of grip and burning and tingling of the finger with cold exposure. He complained of some crepitus and sensitivity of the jaw and occasional upper back spasms with exertion. Petitioner advised that he transferred with Respondent to the position of program counselor. Dr. Coe opined that Petitioner's complaints were supported by his examination and that Petitioner's osteochondral fracture at the left fifth proximal interphalangeal joint, complicated by the development of posttraumatic arthritis, stiffness, tendon, muscle and capsular tightening with localized adhesions is causally related to the accident of October 25, 2010 as was the associated left hand weakness to grip. PX 21 A.

Petitioner attended another Section 12 exam at Respondent's request on 7/14/15 with Dr. Fernandez. RX 4. Dr. Fernandez noted Petitioner's treatment and his residual complaints of left small finger pain and stiffness with an inability to fully close the hand. He also has residual complaints of numbness and tingling in the ring and small finger with associated weakness of hand to pinch and grip. Following his exam of Petitioner he diagnosed "left small finger PIP joint pain and stiffness post pyrocarbon implant with resorption and left hand numbness and tingling, ring and small finger, EMG positive ulnar neuropathy, possible wrist level, possible acute on chronic." Dr. Fernandez commented that he did not "have the previous x-rays to review and I only have the x-rays that were taken in our office, which demonstrates the postoperative findings. Based on the records, it appears that there was some kind of lucency noted after his initial follow up. It is not clear whether this was acute traumatic process or more of a chronic process. However, based on his history and the fact that he had no prior history of similar injury or treatment for similar problems in the past, I would state that within a reasonable degree of medical and surgical certainty, a small finger injury and its needed treatment would be related to the work

injury. Of course, this opinion could change if there was information to the contrary or if the history was significantly different."

He goes on to opine that the left hand numbness and tingling and specifically the ulnar neuropathy "lacks causality with regards to the work injury" noting no significant neurologic injury or complaints presented with the initial evaluation and treatment. He states, "it was not until January [2011] that there was any mention of those complaints documented in the records and this was while off work and after the injury. In addition, there was previous history of an injury that may have caused or contributed abnormal EMG findings and or current symptoms or complaints. The ulnar neuropathy and/or ulnar nerve symptoms would therefore not be treated as work related."

Dr. Fernandez found Petitioner to be at MMI from the small finger work related injury and able to work at full duty. He notes that Petitioner does have limitations with regard to the small finger including loss of motion and pain and that he may require future treatment to the small finger. He noted the options were to live with the condition or proceed with the PIP joint fusion. He added that Petitioner's subjective complaints correlated well with the objective findings. RX 4.

At trial, Petitioner testified that with a master's degree in criminal justice, and being bilingual, in his opinion he was a good candidate to serve as an officer for the Border Patrol, and he had actually started the process. However, in light of his injury, he was quite certain that he could not pass any rigorous physical test requiring activities such as self-defense or handcuffing drills nor could he pass a medical exam. He also had applied for or was in the process of applying to other agencies such as the FBI, ATF and the Oak Lawn Police Department. The Oak Lawn Police Department went so far as to give him a preliminary test, but it advised him that subsequent testing would include handcuffing drills, and in Petitioner's opinion he could not pass the drills or a medical examination.

Petitioner currently works as a counselor for Respondent. He testified that his job is administrative and that he currently earns more than he did as a juvenile officer. He testified that he has no grip strength in his left hand and has loss of strength and numbness in his left forearm. He has difficulty with pinching as his little finger does not touch his thumb and his finger is hooked. He is unable to golf, play baseball, shovel snow or cut grass. He experiences stiffness and lack of movement with the little finger and numbness and tingling at the base of his ring finger. His teeth are sensitive to cold and his jaw cracks when eating solid food.

CONCLUSIONS OF LAW

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

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

Based on a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner's conditions in his jaw, teeth, and left fifth finger, are causally related to the undisputed fight at work on October 25, 2010. In so finding, the Arbitrator notes that Petitioner clearly sustained jaw and dental injuries during the fight as documented in his dental records reflecting dental repair to 4 cracked teeth. Petitioner testified that he did not have problems with his jaw or teeth prior to his involvement in the undisputed fight at work on 10/25/10. The Arbitrator further notes that Petitioner sustained an initial low back injury which resolved quickly with minimal conservative treatment.

Petitioner's primary injury stems from his left little finger. The Arbitrator takes note of Petitioner's fall onto his left arm and hand in September 2010, 6 weeks before the fight at work on 10/25/10, as documented in the medical records. However, the Arbitrator notes that Petitioner's small finger injury was treated conservatively and that Petitioner testified that he was working full duty at the time of the fight on 10/25/10. On that date, it is undisputed that Petitioner was involved in a physical altercation wherein he was hit with metal objects about the head and body and struck his left hand against a wall. At the ER on 10/25/10, Petitioner was noted to have swelling in the left hand after an assault at work 30 minutes prior to arrival, having been hit with a metal object and punched. The exam records that the right [sic] hand is moderately tender and mildly swollen over the left 5th digit." Petitioner was given pain medication and a finger splint for his left little finger. PX 4.

It is not lost on the Arbitrator that the left hand x-rays taken in the ER were read to show no change from those taken prior to 10/25/10 or that Petitioner's left hand complaints to Dr. Vera were first made one month after the accident in November 2010. However, the Arbitrator notes that Petitioner's treatment for his left hand began in earnest after his initial back and dental treatment and continued consistently thereafter through 3 surgeries until his release to work in February 2014. Furthermore, based on the medical records it is clear that Petitioner's strike of the wall with his left fist during the undisputed fight at work on 10/25/10 was sufficient to aggravate any preexisting left little finger condition to the point where continuous surgery became necessary.

Based on the opinions of Drs. Shin, Lee, Vendor, Coe and Fernandez, the Arbitrator further finds causal connection for Petitioner's injury to his left fifth finger including the stiffness, lack of motion, grip weakness and sensitivity to cold. To the extent the treating and/or examining doctors reference ulnar symptoms, the Arbitrator places greater weight on the opinions of Drs. Vendor and Fernandez in finding no causal connection for those symptoms and the accident of 10/25/10 based on the nature of Petitioner's injury to the little finger and the medical evidence in its entirety.

Lastly, the Arbitrator notes no dispute as to the period of TTD paid to Petitioner or to the amounts paid. ARB EX 1. Respondent stipulated that there exists no overpayment or underpayment of benefits to Petitioner during the TTD periods alleged. ARB EX 1. To the extent Respondent's causal connection/liability dispute impacts the issue of TTD paid to Petitioner, the Arbitrator finds that Petitioner was owed TTD during the amounts reflected as paid on ARB EX 1 based on the findings on the issue of causal connection. Respondent shall receive credit for amounts paid.

J. Were the medical services provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based on the Arbitrator's findings on the issue of causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of Petitioner's causally related conditions including treatment to his low back, dental, jaw and left fifth finger injuries pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive a credit for amounts paid.

L. What is the nature and extent of Petitioner's injury?

The Arbitrator initially notes that the accident preceded the 9/1/11 amendments to the Act and that no AMA impairment rating was offered or admitted at trial. With regard to Petitioner's jaw and dental injuries, the Arbitrator finds notes that Petitioner sustained 1% loss of use of a person as a whole under Section 8(d)(2) of the Act. Petitioner testified that his teeth are sensitive to cold and his jaw cracks when eating solid food. The Arbitrator further notes that Petitioner sustained an initial low back injury which resolved quickly with minimal conservative treatment.

No testimony was provided with regard to any low back difficulties and no permanency is awarded for the low back.

With regard to the left little finger, Petitioner testified that following his three surgeries, he has no grip strength in his left hand and has difficulty with pinching as his little finger does not touch his thumb and his finger is hooked. He is unable to golf, play baseball, shovel snow or cut grass. He experiences stiffness and lack of movement with the little finger and numbness and tingling at the base of his ring finger. Although Petitioner asserts that the injury to his little finger prohibits him from pursuing a further career in law enforcement, the Arbitrator finds that the preponderance of credible evidence at trial supports an award for loss of use of the left hand only without consideration for Petitioner's asserted loss of trade. In so finding, the Arbitrator notes that he currently works as a counselor for Respondent earning more than he did as a juvenile officer and that Petitioner's testimony alone is not sufficient to support an award that includes a loss of trade. The Arbitrator further notes that Drs. Coe, Fernandez and Vendor all concur that Petitioner sustained substantial damage to his little finger as a result of the accident, that he continues to sustain significant loss of use of the finger affecting his hand and that he may need a PIP joint fusion should he chose so in the future. Accordingly, the Arbitrator finds that Petitioner sustained 25% loss of use of the left hand under Section 8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ 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 Howard,

Petitioner,

vs.

NO: 12 WC 29209
13 WC 23529

Precision Brand Products, Inc.,

Respondent.

16IWCC0826

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 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.

The Commission issued an Order dated May 26, 2016 in response to Petitioner's Petition for Additional Compensation Pursuant to Section 19(k) and Attorney's Fees Pursuant to Section 16 of the Act. In that Order, the Commission found that both claim numbers associated with the above captioned Petitioner were the subject of Respondent's Petition for Review due to the claims' permanency awards being inextricably linked even though the Petition for Review only listed one claim number. As such, the Commission retained subject matter jurisdiction with respect to both claim number 13 WC 23529 and 12 WC 29209. Accordingly, this Decision in its entirety refers to both claim numbers listed herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 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.

16IWCC0826

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 $68,000.00. 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: DEC 2 2 2016

O: 11/1/16
TJT/gaf
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOWARD, ROBERT
Employee/Petitioner

Case# **12WC029209**

13WC023529

PRECISION BRAND PRODUCTS INC
Employer/Respondent

16IWCC0826

On 1/5/2015, 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 0.13% 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:

0412 RIDGE & DOWNES
AMYLEE HAGAN SIMONVICH
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
LINDA ARUN ROBERT
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

16IWCC0826

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

Robert Howard
Employee/Petitioner

v.

Precision Brand Products, Inc
Employer/Respondent

Case # 12WC 029209

Consolidated cases: 13 WC 023529

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Wheaton**, on **June 5, 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

On **March 29, 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 **$43,825.86**; the average weekly wage was **$842.80**.

On the date of accident, Petitioner was **58** 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 **$9,551.79** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$9,551.79**.

Respondent is entitled to a credit of **$42,019.70** for both cases under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $561.87/week for 30-5/7 weeks, commencing April 7, 2012 through August 3, 3012, and December 29, 2012 through March 24, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $9,551.79 for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay $61,952.41 for the reasonable, necessary and related medical services provided, pursuant to as Section 8(a) and subject to Section 8.2 of the Act. Respondent is entitled to a credit for medical bills previously paid.

Respondent shall be given a credit of $42,019.70, for both cases as provided in Section 8(j) of the Act.

Permanent Partial Disability: Person as a whole

The Arbitrator renders one PPD award for the sum of the injuries caused by the accidents claimed in 12WC 29209 and 13WC 23529. Respondent shall pay Petitioner permanent partial disability benefits of $505.68/week for 75 weeks, because the injuries sustained caused the 15% 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.

Signature of Arbitrator

December 29, 2014
Date

JAN 5 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ADDENDUM

Robert Howard

v. Case # 12 WC 29209 & 13 WC 23529

16IWCC0826

Precision Brand Products, Inc.

Statement of Facts:

Robert Howard ("Petitioner") works for Precision Brand Products, Inc. ("Respondent") as a lead person in the shipping department. He is required to pack products that a tool room or a maintenance crew member would use. Such products weigh from 1 to 150 pounds, although most items do not exceed 70 pounds. While lifting boxes on the morning of Thursday, March 29, 2012, Petitioner testified, he developed an ache in his low back that became worse by the end of the day. Petitioner testified that he could not recall the specific box he lifted on the morning of March 29, 2012 that brought about the back pain. Petitioner further testified that on Friday morning, his back pain was even worse, and by Monday morning, April 2, 2012, his back pain and leg pain were so bad that he could hardly walk.

Prior to March 29, 2012, Petitioner had not previously experienced such low back or right leg pain.

On Monday, April 2, 2012, Petitioner reported his low back pain to his supervisor, Larry Masters.

Petitioner testified that he did not report the injury until April 2, 2012 because he wanted to see if his condition got better.

On April 2, 2012, Petitioner presented to his primary care physician, Dr. Edward Michl, at DuPage Medical Group. (P.E. 3) Petitioner complained of right hip and leg pain. Dr. Michl's note indicated "no back pain." Nevertheless, Dr. Michl ordered x-rays of both the right hip and the lumbar spine, as well as CT scans of the right hip and lumbar spine. While Dr. Michl's note also stated "no obvious injury," he also indicated "occurred at work on Thurs." Dr. Michl's physical exam revealed a positive straight leg raise at 30 degrees on the right and decreased range of motion of the back. The clinical indication on the lumbar spine x-ray report was "pain along the right side going down right leg." Dr. Michl authorized Petitioner to remain off work for three days and prescribed Norco and Naprosyn. (P.E. 3)

The following day, a CT scan of the lumbar spine revealed multi-level degenerative changes within the lumbar spine, particularly at L3-L4 and L4-L5. The findings were most significant at L3-L4 where there is a prominent right-sided foraminal/extra foraminal disc protrusion that appears to be compressing the traversing right L3 nerve root. Clinical correlation was recommended to evaluate for right-sided L3 radiculopathy. According to the radiologist, these findings may account for the patient's right-sided symptoms. Mild disc bulge and minimal central canal stenosis was noted at L4-L5. After reviewing these images, Dr. Michl recommended that Petitioner follow up with Ortho Spine and Pain Clinic.

On April 5, 2012, Dr. Stephen R. Arndt of the DuPage Medical Group evaluated Petitioner. (P.E. 4) Dr. Arndt noted the "Reason for Visit" was "Hip Pain" and added: "right hip pain radiating down the leg since 3/29/12; not sure of injury; xrays on file; ref to Dr. Michl." In the History of Present Illness section, Dr. Arndt wrote, in pertinent part, the following:

"Robert Howard comes to see me today for his right thigh. He has evidence of degenerative changes in his thigh on CT and x-ray as well as some mild hip arthritis. He said he is having pain that radiates really from his right lower back and kind of down in the L3 distribution on the leg. It does not quite reach his knee."

Dr. Arndt wrote that Petitioner "is hobbling around certainly because of this." The pain was a 6 out of 10 to 8 out of 10 in intensity. Dr. Arndt felt that he should continue his appointment with the spine center, as he would be a possible candidate for injections. He also wrote that if Petitioner's hip gets worse or travels into his groin, he is to return to the clinic as that may be hip arthritis. (P.E. 4)

On April 12, 2012, Dr. John Gashkoff of the Rolling Ridge Pain Specialty, DuPage Medical Group, evaluated Petitioner. (P.E. 5) Dr. Gashkoff wrote that Petitioner has new onset low back pain radiating to the right upper leg. The lumbar CT showed HNP L3-L4 impinging right L3 nerve root. He also has lumbar foraminal stenosis at the L4-L5 level. Dr. Gashkoff noted Petitioner has been unable to work secondary to his pain since April 2, 2012. He works in a warehouse, which involves constant lifting. Dr. Gashkoff recommended Petitioner remain off work until his next visit in two weeks. In the interim, he is to undergo right L3 and L4 epidural steroid injections. (P.E. 5)

Also on April 12, 2012, Christine M. Daniels, N.P., wrote, in pertinent part, the following:

"Patient presents with right hip pain that radiates through the right anterior thigh/right hamstring to the knee. Patient states he has had these sx for approx. 2 weeks, and he thought it was arthritis but he went to see Dr. Michl and he was given medications (2 meds) that did not last very long and he was sent for CT and then sent here for eval." (P.E. 5)

On April 13, 2012, Larry Masters completed the Supervisor's Report of Accident. (P.E. 1) The date of injury is listed as March 29, 2012 and occurred in the "a.m." in "shipping." The detailed description provided that Petitioner was "working on packing order (linear tool) and lower back started to hurt, thought it was arthritis related and kept working. Came to work Friday and worked until 11:45 am and went home. Returned to work Monday in pain and scheduled primary care doctor's appointment. X-rays Monday, 4/2 and CT 4/3/12." The "cause" was listed as "unsafe loading, placing, mixing" and "explanation" stated "unsure but lifting boxes to pallets suspected." Petitioner and Mr. Masters both signed this form. (P.E. 1)

Also on April 13, 2012, Debbie Boor, Executive Secretary/HR for Respondent completed OSHA's Form 301 Injury and Illness Incident Report. This form indicates that Petitioner was lifting boxes on March 29, 2012 and injured his "back and right leg – two bulging discs." Further, Ms. Boor also completed an Illinois Form 45 Employer's First Report of Injury or Illness form with the same information. (P.E. 1)

After undergoing right L3 and L4 transforaminal epidural steroid injections on April 12 and May 1, 2012, Petitioner did not report significant relief when he followed up at the Pain Center on May 22, 2012. (P.E. 5) Dr. Paul Manganelli recommended holding off on the third injection and seeking a surgical evaluation. Dr. Manganelli also authorized Petitioner to remain off work at that time. (P.E. 5)

On May 29, 2012, Dr. Nicholas Mataragas of the Spine Center, DuPage Medial Group, evaluated Petitioner. (P.E. 6) Physician's Assistant Adam Molsen and Dr. Mataragas wrote of possible surgical intervention to address the L3-L4 right-sided foraminal disc herniation. Yet, Petitioner had an abdominal aortic aneurysm that needed to be repaired first. This was an

incidental comorbidity found during the course of Petitioner's imaging studies after the accident. Petitioner underwent a procedure to repair this on May 30, 2012.

On July 5, 2012, Petitioner underwent a Section 12 examination by Dr. Frank Phillips. (R.E. 1) During such examination, Petitioner provided a history of developing groin and anterior thigh pain on March 29, 2012 while at work. The pain became progressively worse over the next few days and persisted since that time. Petitioner denied a specific traumatic event, although he described the pain as "beginning while at work." Petitioner denied back pain in the past. Dr. Phillips felt that Petitioner presented with lumbar radiculopathy in an upper lumbar distribution. Given this presentation, Dr. Phillips felt it did appear that his symptoms began while he was at work. Dr. Phillips felt that Petitioner had underlying stenosis with possible superimposed herniated disc. He recommended a CT myelogram to make a more precise diagnosis as to the source of his lumbar radiculopathy. Dr. Phillips also felt that the CT myelogram would discern whether he, in fact, just had underlying degenerative stenosis or had any type of superimposed acute herniated disc. Dr. Phillips also wrote: "Final opinions regarding causation as well as pathology would be based on the CT myelogram." In any event, Dr. Phillips felt that Petitioner had become a surgical candidate, but only for a decompression procedure. He found Petitioner's symptoms to be acute radiculopathy, but felt that there is absolutely no indication for a fusion surgery. (P. E. 1)

Petitioner testified on cross-examination that he could not recall the specific box he lifted on March 29, 2012, that started his pain. He did recall that the pain started in the morning that day. He further testified that he did not go to the emergency room or an urgent care facility on March 29, 2012.

Petitioner returned to light-duty work on August 4, 2012. He had received temporary total disability benefits from April 7, 2012 through August 3, 2012. Petitioner followed up with Dr. Mataragas on August 7, 2012. He continued to complain of pain and discomfort across the back and down the right side of his leg over the anterior thigh and also along the lateral aspect. He reported increased pain after returning to seated work. Dr. Mataragas diagnosed L4-L5 right-sided foraminal disc herniation with radicular complaints and failed conservative care, as well as trochanteric bursitis. Dr. Mataragas agreed with Dr. Phillips' recommendation for a CT myelogram. This was obtained on August 10, 2012.

After reviewing the CT myelogram, Dr. Phillips issued an addendum report on August 31, 2012. (R.E. 2) Review of the radiologist's report indicated L2-L3 diffuse disc bulge without significant stenosis. L3-L4 there was noted to be a right paracentral disc bulge causing some right foraminal narrowing. At L4-L5 there was facet hypertrophy with a diffuse disc bulge resulting in some mild right foraminal narrowing. Given these findings, Dr. Phillips did feel that Petitioner had underlying degenerative arthritis with a possible superimposed disc protrusion at L3-L4. While the CT myelogram was not clearly diagnostic for an acute herniation, Dr. Phillips opined that based on the information Petitioner provided to him, he did develop the anterior thigh pain while at work and therefore, Dr. Phillips believed, his current symptoms were causally related to his work events. (R.E. 2)

Dr. Phillips answered a series of questions numbered 1 through 7. (R.E. 2) Although the questions posed to Dr. Phillips were not provided to the Arbitrator, Petitioner did not object to the admission of R.E. 2. Presumably in response to a question regarding Mr. Howard's diagnosis, Dr. Phillips stated that the current diagnosis is upper lumbar radiculopathy related to underlying degenerative changes with symptoms that apparently flared up with every day work.

In response to question 2, Dr. Phillips wrote: "I believe based on the CT myelogram Mr. Howard does have underlying lumbar degenerative pathology." In response to question number 4, Dr. Phillips indicated that appropriate treatment might include a course of physical therapy for 4 to 6 weeks. If Petitioner did not respond to this conservative treatment, Dr. Phillips opined, a decompression procedure to address the radicular complaints would be a reasonable treatment option. He did not believe there was any indication for a fusion procedure. In response to questions number 5, Dr. Phillips opined that based on the myelogram results and Petitioner's description of events, Petitioner's symptoms were related to the date of injury. Dr. Phillips did not believe Petitioner was able to perform regular duty at this time, and recommended a 30-pound lifting restriction with no repetitive bending and twisting. (R.E. 2)

Petitioner returned to Dr. Mataragas on October 2, 2012. (P.E. 6) Dr. Mataragas recommended lumbar epidural steroid injections and an off-work status. However, the employer did not accept Petitioner's off-work slip. He continued to work at that time. He followed up with Rolling Ridge Pain Specialty on October 10, 2012. A lumbar epidural steroid injection at L4-5 was conducted. Petitioner returned to Dr. Mataragas on October 18, 2012 with no relief following this injection. Dr. Mataragas recommended posterior lumbar interbody fusion at L3-L4.

Petitioner presented for a second Section 12 examination by Dr. Frank Phillips on November 27, 2012. (R.E. 3) Petitioner described his symptoms as much more severe since returning to work. He described severe right anterior thigh pain and also pain on the left. Dr. Phillips noted that in addition, Petitioner has severe back pain, which had not been a complaint when he saw him after the injury. Upon examination, Dr. Phillips found Petitioner to be extremely pain focused. He exhibited an antalgic gait and had difficulty heel or toe walking. He

demonstrated marked superficial tenderness to palpation of his lumbar spine. Dr. Phillips noted that Petitioner re-presented with what seemed to be some radicular complaints but now more and more back pain, which was different from his prior presentation. Dr. Phillips was concerned that Petitioner's subjective complaints outweighed any objective findings. Dr. Phillips re-reviewed the August 10, 2012 CT myelogram, which he interpreted as showing mild spondylitic changes at L4-5 with diffuse disc bulging with similar changes noted at L3-4. Dr. Phillips noted that there did not appear to be much, if any, central stenosis. Dr. Phillips did not believe that a fusion procedure was appropriate. He opined that based entirely on Petitioner's subjective complaints and the subtle disc bulge on the MRI, Petitioner would potentially be a candidate for a decompressive procedure. Dr. Phillips further opined that given his evaluation on November 27, 2012, he was less than enthusiastic that the decompression procedure would provide him with complete or substantial relief. Dr. Phillips indicated that he believed Petitioner's symptoms developed while he was at work. However, given the fact that there was no specific traumatic event, he did not believe that Petitioner sustained an acute structural injury related to a work event that caused his pain. (R.E. 3)

Once again, questions were posed to Dr. Phillips. However, the Arbitrator does not have the benefit of seeing the specific questions answered by Dr. Phillips in his November 27, 2012 report. In answer to question 1, Dr. Phillips opined that due to Petitioner's now fairly diffuse complaints, he was not certain as to the likelihood of the surgery relieving Petitioner's pain. Yet, he found that a decompressive procedure would be reasonable. In response to question 2, Dr. Phillips did not see any evidence of weakness or atrophy in Petitioner's leg and felt that such complaints were primarily subjective. In partial response to question 8, Dr. Phillips opined that the use of a cane is based entirely on his subjective complaints of relief with use of the cane. In

partial response to question 10, Dr. Phillips wrote Petitioner has underlying mild disc bulging that apparently became symptomatic while at work. Dr. Phillips did not believe that this relates directly to any specific injury suffered at work, but rather is reflective of symptoms that occurred while he was at work doing his day-to-day activities. (R.E. 3)

Petitioner testified that he sought a third opinion from Dr. Steven Mather of M & M Orthopaedics. Petitioner saw Dr. Mather on December 14, 2012. (P.E. 7) Petitioner chose to seek this opinion since Dr. Mataragas and Dr. Phillips were recommending different surgical procedures. Petitioner filled out an intake form in which he drew a pain diagram and indicated that the March 29, 2012 back injury occurred when he was lifting boxes. Dr. Mather's note indicates that Petitioner injured himself in March of 2012 while lifting boxes working in a shipping department and that Petitioner had no symptoms in his back prior to this injury. Dr. Mather agreed with Dr. Phillips that a fusion procedure was not necessary at this point. Dr. Mather recommended bilateral microdiscectomy on the right L3-L4 and on the left L4-L5. Dr. Mather did not think that Mr. Howard should be working, given his overall condition, and indicated that foraminal disc herniations are especially painful in the vast majority of cases. (P.E. 7)

After considering Dr. Mather's recommendation to remain off work, Petitioner stopped working as of December 19, 2012. Dr. Mather performed the right L3-L4 and left L4-L5 extraforaminal microdiscectomy on Petitioner on January 30, 2013 at Advocate Good Samaritan Hospital. Post-operatively, Petitioner participated in physical therapy and followed-up with Dr. Mather's Physician's Assistant on numerous occasions. (P.E. 7)

On March 18, 2013, Petitioner was authorized to return to work with no lifting over 50 pounds. He was then authorized to return to work regular duty as of March 25, 2013, and he did in fact do so. (P.E. 7)

On April 19, 2013, Petitioner testified, he sustained a back injury. On that day, as Petitioner lifted a 25-pound box from the bottom of a cart, he developed low back pain and right lower extremity pain. He notified his supervisor, Jim Zimmerman, on the same date.

On April 25, 2013, Larry Masters completed a Supervisor's Report of Accident. He wrote that on April 19, 2013, Petitioner experienced back pain and leg pain after picking up a 20-pound master carton from the wire cart, lower shelf. Both Larry Masters and Petitioner signed this report. (P.E. 2)

On April 25, 2013, Debbie Boor completed OSHA'S Form 301 and an Illinois Form 45 in which she indicated that on April 19, 2013, Petitioner experienced back pain radiating down part of the right leg when picking up a master carton of A5 shim.

Dr. Mather's records indicate that prior to April 19, 2013, Petitioner's right leg pain was intermittent following the surgical procedure. (P.E.7)

The physical therapy records indicate that Mr. Howard was not experiencing any radiation of pain or radiculopathy down to his lower extremities following the microdiscectomy procedure.

On April 29, 2013, Petitioner presented to Dr. Mather with acute right lower back pain. He then participated in physical therapy. Such records indicate that Petitioner was experiencing radicular symptoms from the lumbar spine to the right hip. The therapy records also indicate that Petitioner was ambulating with an antalgic gait with decreased movement of his right lower extremity secondary to the pain within his right hip and low back. Petitioner was hesitant to put

weight through his right lower extremity due to the soreness. Petitioner was able to decrease his right low back pain with physical therapy, but continued to report pain into the posterior lateral aspect of his right hip. He reported that stairs are the hardest thing for him to do and he was stiff after sitting for prolonged periods. He reported some stiffness in the center of his back.

On May 2, 2013, Physical Therapist Lance Hammons wrote that Petitioner reported a date of injury of April 14, 2013. Such injury occurred when Petitioner was reaching down to lift an approximately 24 pound box off the bottom of a pull cart and had immediate pain within his right side. (P.E.7)

On May 24, 2013, Dr. Mather authorized Petitioner's return to work as of May 28, 2013. Petitioner did, in fact, return to work without restrictions on May 28, 2013. (P.E.7)

Respondent agreed that Petitioner was entitled to temporary total disability benefits from April 20, 2013 through May 27, 2013, a period of 5-3/7 weeks. The parties stipulated that Petitioner has received benefits for this period or will receive them in a timely manner. However, Respondent was unable to provide a figure for the credit they are seeking for this particular TTD period. (A.E. 2)

For case # 12 WC 29209, the parties did agree on a figure for the TTD credit that Respondent seeks ($9,551.79). (A.E. 1)

Petitioner testified that, currently, he continues to experience pain in his low back, buttocks and into his right leg. He finds it very difficult to walk up and down stairs. He further testified that he also has trouble with extended walking and rising from the floor. If he sits too long, his back stiffens up. His pain averages 6 out of 10. Lifting bothers him but he still does it because his job requires it. He does not have any symptoms down his left leg.

Petitioner further testified that since his low back surgery, he has not finished nine holes of golf due to his back pain. Petitioner testified that such surgery helped for a while. However, following the injury of April 19, 2013, his symptoms returned.

Conclusions of Law:

In support of his decision with regard to issue (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator makes the following findings of fact and conclusions of law:

An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of the employment, unexpectedly and without affirmative act or design of the employee. Mathiessen & Hageler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N.E. 249 (1918)

The Arbitrator finds that Mr. Howard has met his burden of proof that on the morning of March 29, 2012, while lifting boxes, he sustained an accident that arose out of and in the course of his employment with Respondent.

It is true that Petitioner did not recall the specific box he lifted on the morning of March 29, 2012 that brought about his back pain. However, Petitioner's testimony that he is the lead person in the shipping department, that his job requires him to pack and lift products that weigh from 1 to 150 pounds and that he was, in fact, lifting and packing such boxes on the morning of March 29, 2012, stands unrebutted. Moreover, the entry in Larry Masters' April 13, 3012 report that Petitioner "[c]ame to work Friday and worked until 11:45 am and went home" also stands unrebutted.

Petitioner did not report this injury to his supervisor until Monday, April 2, 2012.

Petitioner began to develop right leg/right hip pain and saw his primary care physician on April 2, 2012.

The Arbitrator finds Petitioner to be credible. Petitioner gave a consistent history of injury to his medical providers.

The Arbitrator finds that on the morning of March 29, 2012, Petitioner was packing and lifting boxes that weighed from 1 to 150 pounds. In doing so, he assumed a risk greater than that to which a member of the general public would be exposed.

It is not as though Petitioner was seated at a desk at work, turned in his chair, heard a snap in his back and experienced pain, as was the case in Board of Trustees v. Indus. Comm'n, 44 Ill. 2d 207, 254 N.E.2d 522 (1969).

The Arbitrator finds that this case is not consistent with the positional risk doctrine.

Merely because Petitioner could not identify the specific box that brought about the pain does not preclude a finding of accident.

Section 19(e) of the Act states, in pertinent part, the following:

"Decisions rendered by the Commission and dissents, if any, shall be published together by the Commission. The conclusions of law set out in such decisions shall be regarded as precedents by arbitrators for the purpose of achieving a more uniform administration of this Act."

In Godin v. Kloss Distributing, Inc., 11 IWCC 0197, the Commission found that a "keg driver", who lifted approximately 80 barrels a day (each weighing ~ 170-175 pounds), sustained an accident. Claimant did not identify the specific barrel he lifted when he experienced a burning sensation and tightness in his back. However, the evidence did support his claim that

such symptoms occurred while he was lifting heavy barrels in the "odd-ball" cooler at the end of the workday.

Therefore, the Arbitrator finds that Petitioner sustained an accident while lifting boxes that weighed between 1 and 150 pounds on the morning of March 29, 2012, and that such accident arose out of his and in the course of his employment by Respondent.

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator makes the following findings of fact and conclusions of law:

Respondent offered into evidence the Section 12 reports of Dr. Phillips, which are dated July 5, 2012, August 31, 2012, and November 27, 2012.

In his July 5, 2012 report, although he noted that Petitioner denied a specific traumatic event, Dr. Phillips opined that it did appear that his symptoms began while he was at work. At that time, Dr. Phillips wanted to wait to review the CT myelogram before rendering final opinions on causation and pathology.

In his August 31, 2012 report, which he authored after reviewing the CT myelogram, Dr. found that the CT myelogram indicated underlying degenerative arthritis with a possible superimposed disc protrusion at L3-4 but was not clearly diagnostic for an acute herniation. However, Dr. Phillips continued, based on the information Petitioner provided him, Robert Howard did develop anterior thigh pain while at work and therefore he believed that his current symptoms are causally related to his work events. (R.E. 2)

Given Dr. Phillips' opinions in these first two reports, as well as the multiple consistent histories that he gave to his treaters, the Arbitrator finds that Petitioner's current condition of ill-

being of his lumbar spine is causally related to his lifting of boxes on the morning of March 29, 2012.

The Arbitrator places less weight on Dr. Phillips' causation opinion in his third report of November 27, 2012. Upon evaluating Petitioner on November 27, 2012, Dr. Phillips suddenly found Petitioner to have subjective complaints and to be "pain focused."

On November 27, 2012, Dr. Phillips opined that Petitioner did not sustain any acute structural injury at work on March 29, 2012 that was responsible for his state of ill-being. However, this finding is inconsistent with his report of August 31, 2012 wherein he opined that Petitioner sustained a possible superimposed disc protrusion at L3-4, and that his symptoms were related to the work events of March 29, 2012. Dr. Phillips reiterated that Petitioner's symptoms occurred while he was at work performing his day-to-day work activities.

The Arbitrator finds that Petitioner's lifting activities on the morning of March 29, 2012 resulted in an injury to his lumbar spine. Petitioner developed this low back and anterior thigh pain while at work performing work duties. Dr. Phillips agreed that Petitioner required a discectomy procedure to treat the superimposed disc protrusion at L3-4 and that is what Dr. Mather subsequently performed on January 30, 2013.

Proof of an employee's good health prior to the time of injury and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. Westinghouse Electric Company v. Indus. Comm'n, 64 Ill. 2d 244, 356 N.E.2d 28 (1976).

The Arbitrator finds that Petitioner's current condition of ill-being as it relates to his lower back is causally related to his subsequent accident of April 19, 2013. Such accident is undisputed. Prior to this second accident, the microdiscectomy procedure was successful in

initially eliminating, and then reducing, the onset of Petitioner's right lower extremity radiculopathy. However, the Arbitrator finds that after the accident on April 19, 2013, Petitioner's lumbar/radicular condition worsened.

In support of his decision with regard to issue (F) "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 makes the following findings of fact and conclusions of law:

The Arbitrator finds Petitioner's treatment as a result of both injuries to be reasonable, necessary and related.

Respondent paid Petitioner's medical bills for all of his treatment at DuPage Medical Group and M & M Orthopaedics through December 12, 2012. (P.E. 9, P.E. 10) Petitioner's treatment from his pre-operative care on January 25, 2013 and his post-operative care through March 22, 2013 went through his Blue Cross/Blue Shield health insurance. After his second injury on April 19, 2013, Respondent paid his medical bills again. Blue Cross/Blue Shield of Illinois issued a Statement of Benefits Provided in the amount of $42,019.70. (P.E. 8, A.E. 1) Respondent is entitled to receive an 8(j) credit in this amount.

For services provided by Advocate Health and Hospital Corporation from January 25 through January 31, 2013, the disputed charges total $37,271.00. Respondent receives a credit for the Blue Cross/ Blue Shield payments in the amount of $37,133.41. Petitioner does not claim any remaining balance on this bill after Blue Cross/Blue Shield paid.

For services at M&M Orthopaedics, Ltd., the charges for service dates not paid by Respondent total $20,424.00. Respondent receives a credit for the Blue Cross/Blue Shield

payments in the amount of $3,629.49. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act. (P.E. 10)

For the services of Midwest Diagnostic Pathology, S.C., the charges for disputed services are $242.00. Respondent receives a credit for the Blue Cross/Blue Shield payments in the amount of $29.20. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

For the services of Radiologists of DuPage, S.C., the charges for disputed services are $152.00. Respondent receives a credit for the BlueCross BlueShield payments in the amount of $34.40. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

For the services of Anesthesiologists, Ltd., the charges for disputed services are $3630.00. Respondent receives a credit for the Blue Cross/ Blue Shield payments in the amount of $991.20. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

For the services of Inpatient Consultants of Illinois the charges for disputed services are $371.00. Respondent receives a credit for the Blue Cross/ Blue Shield payments in the amount of $202.00. As such, Respondent shall pay Petitioner $19.88 the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

In summary, as a result of both accidental injuries, the Arbitrator finds Respondent liable for disputed charges of $61,952.41, and orders them to pay such charges pursuant to Section 8(a) and subject to Section 8.2 of the Act. Respondent shall receive a credit of $42,019.70 pursuant to Section 8(j) of the Act.

In support of his decision with regard to issue (K) "What temporary benefits are in dispute? [TTD] ", the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner did not work as a result of his injury from April 7, 2012 through August 3, 2012, a period of 17 weeks, for which Respondent paid $9,551.79 in temporary total disability benefits.

Petitioner then returned to light-duty work on August 4, 2012. At the urging of Dr. Mather, Petitioner went back off of work on December 19, 2012. Dr. Mather explained that disc protrusions such as Petitioner's are especially painful in the vast majority of cases.

The Arbitrator is not persuaded by Dr. Phillips' opinion that Petitioner could continue to work in a light-duty capacity as Petitioner's subjective complaints were progressing, as recognized by Dr. Phillips himself. Further, both Dr. Phillips and Dr. Mather opined that Petitioner was a surgical candidate for a decompressive procedure that was ultimately performed on January 30, 2013.

Petitioner remained off work following this procedure through March 24, 2013. Since Dr. Phillips found, in his August 31, 2012 report, that Petitioner sustained a possible disc protrusion and that it was reasonable to consider a decompression surgery, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of December 19, 2012 through March 24, 2013, a period of 13-5/7 weeks. So, for the two lost-time periods related to the first accident, the Arbitrator finds that Petitioner is entitled to a total of 30-5/7 weeks of temporary total disability benefits.

Respondent agreed that Petitioner was entitled to temporary total disability benefits from April 20, 2013 through May 27, 2013, a period of 5-3/7 weeks. The parties stipulated that Petitioner has received benefits for this period or will receive them in a timely manner.

However, Respondent was unable to provide a figure for the credit they are seeking for this particular TTD period. (A.E. 2)

Respondent is entitled to a credit for all TTD benefits that they have previously paid Petitioner.

In support of his decision with regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator makes the following findings of fact and conclusions of law:

Pursuant to Section 8.1b of the Illinois Workers' Compensation Act, 820 ILCS 305/1 et seq. (hereafter the "Act"), 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 professional appropriate measurements of impairment that include, but are not limited to: loss of range of motion, loss of strength, measure atrophy of tissue mass consistent with the injury; and any other measurement 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.

With regard to 8.1(b)(i), the Arbitrator notes that neither party offered an AMA impairment report into evidence. Therefore, the Arbitrator gives no weight to this factor.

With regard to 8.1(b)(ii), the Arbitrator finds that prior to the first injury, Petitioner was employed as a lead person in the shipping department. He was required to pack and lift products that a tool room or a maintenance crew member would use. Such products weighed from 1 to 150 pounds, although most items did not exceed 70 pounds. After the two injuries, Petitioner returned to his full-duty job. The Arbitrator gives greater weight to this factor.

With regard to 8.1(b)(iii), the Arbitrator notes that the Petitioner's date of birth is May 15, 1953. So, Petitioner was 58 and 59 on the two dates of accident. As Petitioner is a somewhat older worker, and has a shorter work life than a younger worker, the Arbitrator puts less weight on this factor.

With regard to 8.1(b)(iv), the Arbitrator notes that no evidence was introduced to indicate that Petitioner's future earning capacity was affected by these two accidental injuries. Therefore, the Arbitrator gives no weight to this factor.

With regard to 8.1(b)(v), the Arbitrator notes that on January 30, 2013, Dr. Mather performed a right L3-4 and left L4-5 extraforaminal microdiscectomy surgery on Petitioner. The Arbitrator notes that May 24, 2013 was the last day Petitioner treated with Dr. Mather before he returned to work. In his progress notes, under the CHIEF COMPLAINT section, Dr. Mather wrote: "Robert returns today. He is approximately 4 months status post microdiscectomy.

[D]oing quite well. No complaints. Finished physical therapy. Wishes to return to work Tuesday." Under the PHYSICAL EXAMINATION section, Dr. Mather wrote: "On exam he has full range of motion of the lumbar spine. No tenderness. He can heel-and-toe walk without difficulty. No sciatic symptoms. Gait is normal." The Arbitrator gives greater weight to this factor.

Petitioner was involved in two workplace accidents, that both involved his lumbar spine,

Where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, it is proper for the Commission to consider all of the evidence presented to determine the nature and extent of his permanent disability as of the date of the hearing. Baumgardner v. Ill. Workers' Comp. Comm'n, 409 Ill. App. 3d 274, 947 N.E.2d 856 (1st Dist. 2011). Thus, the Arbitrator renders one PPD award in this case, which contemplates the sum of any injuries caused by both the 2012 and 2013 accidents.

After carefully considering the five factors, as required by Section 8.1b of the Act, the Arbitrator finds that as a result of the accidental injuries of March 29, 2012 and April 19, 2013, Petitioner has sustained a loss of use, man as a whole, of 15% thereof, pursuant to Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOWARD, ROBERT
Employee/Petitioner

Case# **13WC023529**

12WC029209

PRECISION BRAND PRODUCTS INC
Employer/Respondent

16IWCC0826

On 1/5/2015, 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 0.13% 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:

0412 RIDGE & DOWNES
AMYLEE HAGAN SIMONVICH
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY
LINDA ARUN ROBERT
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

16IWCC0826

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

Robert Howard
Employee/Petitioner

v.

Precision Brand Products, Inc
Employer/Respondent

Case # 13WC 023529

Consolidated cases: 12 WC 029209

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Wheaton**, on **June 5, 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 ___

16IWCC0826

FINDINGS

On **April 19, 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 **$43,825.60**; the average weekly wage was **$842.80**.

On the date of accident, Petitioner was **59** years of age, *married* with **0** children under 18.

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

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

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $561.87/week for 5-3/7 weeks, commencing April 20, 2013 through May 27, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit for temporary total disability benefits that have been paid.

Permanent Partial Disability: Person as a whole

The Arbitrator renders one PPD award for the sum of the injuries caused by the accidents claimed in 12WC 29209 and 13WC 23529. Respondent shall pay Petitioner permanent partial disability benefits of $505.68/week for 75 weeks, because the injuries sustained caused the 15% 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.

Signature of Arbitrator

December 29, 2014
Date

JAN 5 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ADDENDUM

Robert Howard

16IWCC0826

v. Case # 12 WC 29209 & 13 WC 23529

Precision Brand Products, Inc.

Statement of Facts:

Robert Howard ("Petitioner") works for Precision Brand Products, Inc. ("Respondent") as a lead person in the shipping department. He is required to pack products that a tool room or a maintenance crew member would use. Such products weigh from 1 to 150 pounds, although most items do not exceed 70 pounds. While lifting boxes on the morning of Thursday, March 29, 2012, Petitioner testified, he developed an ache in his low back that became worse by the end of the day. Petitioner testified that he could not recall the specific box he lifted on the morning of March 29, 2012 that brought about the back pain. Petitioner further testified that on Friday morning, his back pain was even worse, and by Monday morning, April 2, 2012, his back pain and leg pain were so bad that he could hardly walk.

Prior to March 29, 2012, Petitioner had not previously experienced such low back or right leg pain.

On Monday, April 2, 2012, Petitioner reported his low back pain to his supervisor, Larry Masters.

Petitioner testified that he did not report the injury until April 2, 2012 because he wanted to see if his condition got better.

On April 2, 2012, Petitioner presented to his primary care physician, Dr. Edward Michl, at DuPage Medical Group. (P.E. 3) Petitioner complained of right hip and leg pain. Dr. Michl's note indicated "no back pain." Nevertheless, Dr. Michl ordered x-rays of both the right hip and the lumbar spine, as well as CT scans of the right hip and lumbar spine. While Dr. Michl's note also stated "no obvious injury," he also indicated "occurred at work on Thurs." Dr. Michl's physical exam revealed a positive straight leg raise at 30 degrees on the right and decreased range of motion of the back. The clinical indication on the lumbar spine x-ray report was "pain along the right side going down right leg." Dr. Michl authorized Petitioner to remain off work for three days and prescribed Norco and Naprosyn. (P.E. 3)

The following day, a CT scan of the lumbar spine revealed multi-level degenerative changes within the lumbar spine, particularly at L3-L4 and L4-L5. The findings were most significant at L3-L4 where there is a prominent right-sided foraminal/extra foraminal disc protrusion that appears to be compressing the traversing right L3 nerve root. Clinical correlation was recommended to evaluate for right-sided L3 radiculopathy. According to the radiologist, these findings may account for the patient's right-sided symptoms. Mild disc bulge and minimal central canal stenosis was noted at L4-L5. After reviewing these images, Dr. Michl recommended that Petitioner follow up with Ortho Spine and Pain Clinic.

On April 5, 2012, Dr. Stephen R. Arndt of the DuPage Medical Group evaluated Petitioner. (P.E. 4) Dr. Arndt noted the "Reason for Visit" was "Hip Pain" and added: "right hip pain radiating down the leg since 3/29/12; not sure of injury; xrays on file; ref to Dr. Michl." In the History of Present Illness section, Dr. Arndt wrote, in pertinent part, the following:

"Robert Howard comes to see me today for his right thigh. He has evidence of degenerative changes in his thigh on CT and x-ray as well as some mild hip arthritis. He said he is having pain that radiates really from his right lower back and kind of down in the L3 distribution on the leg. It does not quite reach his knee."

Dr. Arndt wrote that Petitioner "is hobbling around certainly because of this." The pain was a 6 out of 10 to 8 out of 10 in intensity. Dr. Arndt felt that he should continue his appointment with the spine center, as he would be a possible candidate for injections. He also wrote that if Petitioner's hip gets worse or travels into his groin, he is to return to the clinic as that may be hip arthritis. (P.E. 4)

On April 12, 2012, Dr. John Gashkoff of the Rolling Ridge Pain Specialty, DuPage Medical Group, evaluated Petitioner. (P.E. 5) Dr. Gashkoff wrote that Petitioner has new onset low back pain radiating to the right upper leg. The lumbar CT showed HNP L3-L4 impinging right L3 nerve root. He also has lumbar foraminal stenosis at the L4-L5 level. Dr. Gashkoff noted Petitioner has been unable to work secondary to his pain since April 2, 2012. He works in a warehouse, which involves constant lifting. Dr. Gashkoff recommended Petitioner remain off work until his next visit in two weeks. In the interim, he is to undergo right L3 and L4 epidural steroid injections. (P.E. 5)

Also on April 12, 2012, Christine M. Daniels, N.P., wrote, in pertinent part, the following:

"Patient presents with right hip pain that radiates through the right anterior thigh/right hamstring to the knee. Patient states he has had these sx for approx. 2 weeks, and he thought it was arthritis but he went to see Dr. Michl and he was given medications (2 meds) that did not last very long and he was sent for CT and then sent here for eval." (P.E. 5)

On April 13, 2012, Larry Masters completed the Supervisor's Report of Accident. (P.E. 1) The date of injury is listed as March 29, 2012 and occurred in the "a.m." in "shipping." The detailed description provided that Petitioner was "working on packing order (linear tool) and lower back started to hurt, thought it was arthritis related and kept working. Came to work Friday and worked until 11:45 am and went home. Returned to work Monday in pain and scheduled primary care doctor's appointment. X-rays Monday, 4/2 and CT 4/3/12." The "cause" was listed as "unsafe loading, placing, mixing" and "explanation" stated "unsure but lifting boxes to pallets suspected." Petitioner and Mr. Masters both signed this form. (P.E. 1)

Also on April 13, 2012, Debbie Boor, Executive Secretary/HR for Respondent completed OSHA's Form 301 Injury and Illness Incident Report. This form indicates that Petitioner was lifting boxes on March 29, 2012 and injured his "back and right leg – two bulging discs." Further, Ms. Boor also completed an Illinois Form 45 Employer's First Report of Injury or Illness form with the same information. (P.E. 1)

After undergoing right L3 and L4 transforaminal epidural steroid injections on April 12 and May 1, 2012, Petitioner did not report significant relief when he followed up at the Pain Center on May 22, 2012. (P.E. 5) Dr. Paul Manganelli recommended holding off on the third injection and seeking a surgical evaluation. Dr. Manganelli also authorized Petitioner to remain off work at that time. (P.E. 5)

On May 29, 2012, Dr. Nicholas Mataragas of the Spine Center, DuPage Medial Group, evaluated Petitioner. (P.E. 6) Physician's Assistant Adam Molsen and Dr. Mataragas wrote of possible surgical intervention to address the L3-L4 right-sided foraminal disc herniation. Yet, Petitioner had an abdominal aortic aneurysm that needed to be repaired first. This was an

incidental comorbidity found during the course of Petitioner's imaging studies after the accident. Petitioner underwent a procedure to repair this on May 30, 2012.

On July 5, 2012, Petitioner underwent a Section 12 examination by Dr. Frank Phillips. (R.E. 1) During such examination, Petitioner provided a history of developing groin and anterior thigh pain on March 29, 2012 while at work. The pain became progressively worse over the next few days and persisted since that time. Petitioner denied a specific traumatic event, although he described the pain as "beginning while at work." Petitioner denied back pain in the past. Dr. Phillips felt that Petitioner presented with lumbar radiculopathy in an upper lumbar distribution. Given this presentation, Dr. Phillips felt it did appear that his symptoms began while he was at work. Dr. Phillips felt that Petitioner had underlying stenosis with possible superimposed herniated disc. He recommended a CT myelogram to make a more precise diagnosis as to the source of his lumbar radiculopathy. Dr. Phillips also felt that the CT myelogram would discern whether he, in fact, just had underlying degenerative stenosis or had any type of superimposed acute herniated disc. Dr. Phillips also wrote: "Final opinions regarding causation as well as pathology would be based on the CT myelogram." In any event, Dr. Phillips felt that Petitioner had become a surgical candidate, but only for a decompression procedure. He found Petitioner's symptoms to be acute radiculopathy, but felt that there is absolutely no indication for a fusion surgery. (P. E. 1)

Petitioner testified on cross-examination that he could not recall the specific box he lifted on March 29, 2012, that started his pain. He did recall that the pain started in the morning that day. He further testified that he did not go to the emergency room or an urgent care facility on March 29, 2012.

Petitioner returned to light-duty work on August 4, 2012. He had received temporary total disability benefits from April 7, 2012 through August 3, 2012. Petitioner followed up with Dr. Mataragas on August 7, 2012. He continued to complain of pain and discomfort across the back and down the right side of his leg over the anterior thigh and also along the lateral aspect. He reported increased pain after returning to seated work. Dr. Mataragas diagnosed L4-L5 right-sided foraminal disc herniation with radicular complaints and failed conservative care, as well as trochanteric bursitis. Dr. Mataragas agreed with Dr. Phillips' recommendation for a CT myelogram. This was obtained on August 10, 2012.

After reviewing the CT myelogram, Dr. Phillips issued an addendum report on August 31, 2012. (R.E. 2) Review of the radiologist's report indicated L2-L3 diffuse disc bulge without significant stenosis. L3-L4 there was noted to be a right paracentral disc bulge causing some right foraminal narrowing. At L4-L5 there was facet hypertrophy with a diffuse disc bulge resulting in some mild right foraminal narrowing. Given these findings, Dr. Phillips did feel that Petitioner had underlying degenerative arthritis with a possible superimposed disc protrusion at L3-L4. While the CT myelogram was not clearly diagnostic for an acute herniation, Dr. Phillips opined that based on the information Petitioner provided to him, he did develop the anterior thigh pain while at work and therefore, Dr. Phillips believed, his current symptoms were causally related to his work events. (R.E. 2)

Dr. Phillips answered a series of questions numbered 1 through 7. (R.E. 2) Although the questions posed to Dr. Phillips were not provided to the Arbitrator, Petitioner did not object to the admission of R.E. 2. Presumably in response to a question regarding Mr. Howard's diagnosis, Dr. Phillips stated that the current diagnosis is upper lumbar radiculopathy related to underlying degenerative changes with symptoms that apparently flared up with every day work.

In response to question 2, Dr. Phillips wrote: "I believe based on the CT myelogram Mr. Howard does have underlying lumbar degenerative pathology." In response to question number 4, Dr. Phillips indicated that appropriate treatment might include a course of physical therapy for 4 to 6 weeks. If Petitioner did not respond to this conservative treatment, Dr. Phillips opined, a decompression procedure to address the radicular complaints would be a reasonable treatment option. He did not believe there was any indication for a fusion procedure. In response to questions number 5, Dr. Phillips opined that based on the myelogram results and Petitioner's description of events, Petitioner's symptoms were related to the date of injury. Dr. Phillips did not believe Petitioner was able to perform regular duty at this time, and recommended a 30-pound lifting restriction with no repetitive bending and twisting. (R.E. 2)

Petitioner returned to Dr. Mataragas on October 2, 2012. (P.E. 6) Dr. Mataragas recommended lumbar epidural steroid injections and an off-work status. However, the employer did not accept Petitioner's off-work slip. He continued to work at that time. He followed up with Rolling Ridge Pain Specialty on October 10, 2012. A lumbar epidural steroid injection at L4-5 was conducted. Petitioner returned to Dr. Mataragas on October 18, 2012 with no relief following this injection. Dr. Mataragas recommended posterior lumbar interbody fusion at L3-L4.

Petitioner presented for a second Section 12 examination by Dr. Frank Phillips on November 27, 2012. (R.E. 3) Petitioner described his symptoms as much more severe since returning to work. He described severe right anterior thigh pain and also pain on the left. Dr. Phillips noted that in addition, Petitioner has severe back pain, which had not been a complaint when he saw him after the injury. Upon examination, Dr. Phillips found Petitioner to be extremely pain focused. He exhibited an antalgic gait and had difficulty heel or toe walking. He

demonstrated marked superficial tenderness to palpation of his lumbar spine. Dr. Phillips noted that Petitioner re-presented with what seemed to be some radicular complaints but now more and more back pain, which was different from his prior presentation. Dr. Phillips was concerned that Petitioner's subjective complaints outweighed any objective findings. Dr. Phillips re-reviewed the August 10, 2012 CT myelogram, which he interpreted as showing mild spondylitic changes at L4-5 with diffuse disc bulging with similar changes noted at L3-4. Dr. Phillips noted that there did not appear to be much, if any, central stenosis. Dr. Phillips did not believe that a fusion procedure was appropriate. He opined that based entirely on Petitioner's subjective complaints and the subtle disc bulge on the MRI, Petitioner would potentially be a candidate for a decompressive procedure. Dr. Phillips further opined that given his evaluation on November 27, 2012, he was less than enthusiastic that the decompression procedure would provide him with complete or substantial relief. Dr. Phillips indicated that he believed Petitioner's symptoms developed while he was at work. However, given the fact that there was no specific traumatic event, he did not believe that Petitioner sustained an acute structural injury related to a work event that caused his pain. (R.E. 3)

Once again, questions were posed to Dr. Phillips. However, the Arbitrator does not have the benefit of seeing the specific questions answered by Dr. Phillips in his November 27, 2012 report. In answer to question 1, Dr. Phillips opined that due to Petitioner's now fairly diffuse complaints, he was not certain as to the likelihood of the surgery relieving Petitioner's pain. Yet, he found that a decompressive procedure would be reasonable. In response to question 2, Dr. Phillips did not see any evidence of weakness or atrophy in Petitioner's leg and felt that such complaints were primarily subjective. In partial response to question 8, Dr. Phillips opined that the use of a cane is based entirely on his subjective complaints of relief with use of the cane. In

partial response to question 10, Dr. Phillips wrote Petitioner has underlying mild disc bulging that apparently became symptomatic while at work. Dr. Phillips did not believe that this relates directly to any specific injury suffered at work, but rather is reflective of symptoms that occurred while he was at work doing his day-to-day activities. (R.E. 3)

Petitioner testified that he sought a third opinion from Dr. Steven Mather of M & M Orthopaedics. Petitioner saw Dr. Mather on December 14, 2012. (P.E. 7) Petitioner chose to seek this opinion since Dr. Mataragas and Dr. Phillips were recommending different surgical procedures. Petitioner filled out an intake form in which he drew a pain diagram and indicated that the March 29, 2012 back injury occurred when he was lifting boxes. Dr. Mather's note indicates that Petitioner injured himself in March of 2012 while lifting boxes working in a shipping department and that Petitioner had no symptoms in his back prior to this injury. Dr. Mather agreed with Dr. Phillips that a fusion procedure was not necessary at this point. Dr. Mather recommended bilateral microdiscectomy on the right L3-L4 and on the left L4-L5. Dr. Mather did not think that Mr. Howard should be working, given his overall condition, and indicated that foraminal disc herniations are especially painful in the vast majority of cases. (P.E. 7)

After considering Dr. Mather's recommendation to remain off work, Petitioner stopped working as of December 19, 2012. Dr. Mather performed the right L3-L4 and left L4-L5 extraforaminal microdiscectomy on Petitioner on January 30, 2013 at Advocate Good Samaritan Hospital. Post-operatively, Petitioner participated in physical therapy and followed-up with Dr. Mather's Physician's Assistant on numerous occasions. (P.E. 7)

On March 18, 2013, Petitioner was authorized to return to work with no lifting over 50 pounds. He was then authorized to return to work regular duty as of March 25, 2013, and he did in fact do so. (P.E. 7)

On April 19, 2013, Petitioner testified, he sustained a back injury. On that day, as Petitioner lifted a 25-pound box from the bottom of a cart, he developed low back pain and right lower extremity pain. He notified his supervisor, Jim Zimmerman, on the same date.

On April 25, 2013, Larry Masters completed a Supervisor's Report of Accident. He wrote that on April 19, 2013, Petitioner experienced back pain and leg pain after picking up a 20-pound master carton from the wire cart, lower shelf. Both Larry Masters and Petitioner signed this report. (P.E. 2)

On April 25, 2013, Debbie Boor completed OSHA'S Form 301 and an Illinois Form 45 in which she indicated that on April 19, 2013, Petitioner experienced back pain radiating down part of the right leg when picking up a master carton of A5 shim.

Dr. Mather's records indicate that prior to April 19, 2013, Petitioner's right leg pain was intermittent following the surgical procedure. (P.E.7)

The physical therapy records indicate that Mr. Howard was not experiencing any radiation of pain or radiculopathy down to his lower extremities following the microdiscectomy procedure.

On April 29, 2013, Petitioner presented to Dr. Mather with acute right lower back pain. He then participated in physical therapy. Such records indicate that Petitioner was experiencing radicular symptoms from the lumbar spine to the right hip. The therapy records also indicate that Petitioner was ambulating with an antalgic gait with decreased movement of his right lower extremity secondary to the pain within his right hip and low back. Petitioner was hesitant to put

weight through his right lower extremity due to the soreness. Petitioner was able to decrease his right low back pain with physical therapy, but continued to report pain into the posterior lateral aspect of his right hip. He reported that stairs are the hardest thing for him to do and he was stiff after sitting for prolonged periods. He reported some stiffness in the center of his back.

On May 2, 2013, Physical Therapist Lance Hammons wrote that Petitioner reported a date of injury of April 14, 2013. Such injury occurred when Petitioner was reaching down to lift an approximately 24 pound box off the bottom of a pull cart and had immediate pain within his right side. (P.E.7)

On May 24, 2013, Dr. Mather authorized Petitioner's return to work as of May 28, 2013. Petitioner did, in fact, return to work without restrictions on May 28, 2013. (P.E.7)

Respondent agreed that Petitioner was entitled to temporary total disability benefits from April 20, 2013 through May 27, 2013, a period of 5-3/7 weeks. The parties stipulated that Petitioner has received benefits for this period or will receive them in a timely manner. However, Respondent was unable to provide a figure for the credit they are seeking for this particular TTD period. (A.E. 2)

For case # 12 WC 29209, the parties did agree on a figure for the TTD credit that Respondent seeks ($9,551.79). (A.E. 1)

Petitioner testified that, currently, he continues to experience pain in his low back, buttocks and into his right leg. He finds it very difficult to walk up and down stairs. He further testified that he also has trouble with extended walking and rising from the floor. If he sits too long, his back stiffens up. His pain averages 6 out of 10. Lifting bothers him but he still does it because his job requires it. He does not have any symptoms down his left leg.

Petitioner further testified that since his low back surgery, he has not finished nine holes of golf due to his back pain. Petitioner testified that such surgery helped for a while. However, following the injury of April 19, 2013, his symptoms returned.

Conclusions of Law:

In support of his decision with regard to issue (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator makes the following findings of fact and conclusions of law:

An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of the employment, unexpectedly and without affirmative act or design of the employee. Mathiessen & Hageler Zinc Co. v. Industrial Board, 284 Ill. 378, 120 N.E. 249 (1918)

The Arbitrator finds that Mr. Howard has met his burden of proof that on the morning of March 29, 2012, while lifting boxes, he sustained an accident that arose out of and in the course of his employment with Respondent.

It is true that Petitioner did not recall the specific box he lifted on the morning of March 29, 2012 that brought about his back pain. However, Petitioner's testimony that he is the lead person in the shipping department, that his job requires him to pack and lift products that weigh from 1 to 150 pounds and that he was, in fact, lifting and packing such boxes on the morning of March 29, 2012, stands unrebutted. Moreover, the entry in Larry Masters' April 13, 3012 report that Petitioner "[c]ame to work Friday and worked until 11:45 am and went home" also stands unrebutted.

Petitioner did not report this injury to his supervisor until Monday, April 2, 2012.

Petitioner began to develop right leg/right hip pain and saw his primary care physician on April 2, 2012.

The Arbitrator finds Petitioner to be credible. Petitioner gave a consistent history of injury to his medical providers.

The Arbitrator finds that on the morning of March 29, 2012, Petitioner was packing and lifting boxes that weighed from 1 to 150 pounds. In doing so, he assumed a risk greater than that to which a member of the general public would be exposed.

It is not as though Petitioner was seated at a desk at work, turned in his chair, heard a snap in his back and experienced pain, as was the case in Board of Trustees v. Indus. Comm'n, 44 Ill. 2d 207, 254 N.E.2d 522 (1969).

The Arbitrator finds that this case is not consistent with the positional risk doctrine.

Merely because Petitioner could not identify the specific box that brought about the pain does not preclude a finding of accident.

Section 19(e) of the Act states, in pertinent part, the following:

"Decisions rendered by the Commission and dissents, if any, shall be published together by the Commission. The conclusions of law set out in such decisions shall be regarded as precedents by arbitrators for the purpose of achieving a more uniform administration of this Act."

In Godin v. Kloss Distributing, Inc., 11 IWCC 0197, the Commission found that a "keg driver", who lifted approximately 80 barrels a day (each weighing ~ 170-175 pounds), sustained an accident. Claimant did not identify the specific barrel he lifted when he experienced a burning sensation and tightness in his back. However, the evidence did support his claim that

such symptoms occurred while he was lifting heavy barrels in the "odd-ball" cooler at the end of the workday.

Therefore, the Arbitrator finds that Petitioner sustained an accident while lifting boxes that weighed between 1 and 150 pounds on the morning of March 29, 2012, and that such accident arose out of his and in the course of his employment by Respondent.

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator makes the following findings of fact and conclusions of law:

Respondent offered into evidence the Section 12 reports of Dr. Phillips, which are dated July 5, 2012, August 31, 2012, and November 27, 2012.

In his July 5, 2012 report, although he noted that Petitioner denied a specific traumatic event, Dr. Phillips opined that it did appear that his symptoms began while he was at work. At that time, Dr. Phillips wanted to wait to review the CT myelogram before rendering final opinions on causation and pathology.

In his August 31, 2012 report, which he authored after reviewing the CT myelogram, Dr. found that the CT myelogram indicated underlying degenerative arthritis with a possible superimposed disc protrusion at L3-4 but was not clearly diagnostic for an acute herniation. However, Dr. Phillips continued, based on the information Petitioner provided him, Robert Howard did develop anterior thigh pain while at work and therefore he believed that his current symptoms are causally related to his work events. (R.E. 2)

Given Dr. Phillips' opinions in these first two reports, as well as the multiple consistent histories that he gave to his treaters, the Arbitrator finds that Petitioner's current condition of ill-

being of his lumbar spine is causally related to his lifting of boxes on the morning of March 29, 2012.

The Arbitrator places less weight on Dr. Phillips' causation opinion in his third report of November 27, 2012. Upon evaluating Petitioner on November 27, 2012, Dr. Phillips suddenly found Petitioner to have subjective complaints and to be "pain focused."

On November 27, 2012, Dr. Phillips opined that Petitioner did not sustain any acute structural injury at work on March 29, 2012 that was responsible for his state of ill-being. However, this finding is inconsistent with his report of August 31, 2012 wherein he opined that Petitioner sustained a possible superimposed disc protrusion at L3-4, and that his symptoms were related to the work events of March 29, 2012. Dr. Phillips reiterated that Petitioner's symptoms occurred while he was at work performing his day-to-day work activities.

The Arbitrator finds that Petitioner's lifting activities on the morning of March 29, 2012 resulted in an injury to his lumbar spine. Petitioner developed this low back and anterior thigh pain while at work performing work duties. Dr. Phillips agreed that Petitioner required a discectomy procedure to treat the superimposed disc protrusion at L3-4 and that is what Dr. Mather subsequently performed on January 30, 2013.

Proof of an employee's good health prior to the time of injury and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. Westinghouse Electric Company v. Indus. Comm'n, 64 Ill. 2d 244, 356 N.E.2d 28 (1976).

The Arbitrator finds that Petitioner's current condition of ill-being as it relates to his lower back is causally related to his subsequent accident of April 19, 2013. Such accident is undisputed. Prior to this second accident, the microdiscectomy procedure was successful in

initially eliminating, and then reducing, the onset of Petitioner's right lower extremity radiculopathy. However, the Arbitrator finds that after the accident on April 19, 2013, Petitioner's lumbar/radicular condition worsened.

In support of his decision with regard to issue (F) "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 makes the following findings of fact and conclusions of law:

The Arbitrator finds Petitioner's treatment as a result of both injuries to be reasonable, necessary and related.

Respondent paid Petitioner's medical bills for all of his treatment at DuPage Medical Group and M & M Orthopaedics through December 12, 2012. (P.E. 9, P.E. 10) Petitioner's treatment from his pre-operative care on January 25, 2013 and his post-operative care through March 22, 2013 went through his Blue Cross/Blue Shield health insurance. After his second injury on April 19, 2013, Respondent paid his medical bills again. Blue Cross/Blue Shield of Illinois issued a Statement of Benefits Provided in the amount of $42,019.70. (P.E. 8, A.E. 1) Respondent is entitled to receive an 8(j) credit in this amount.

For services provided by Advocate Health and Hospital Corporation from January 25 through January 31, 2013, the disputed charges total $37,271.00. Respondent receives a credit for the Blue Cross/ Blue Shield payments in the amount of $37,133.41. Petitioner does not claim any remaining balance on this bill after Blue Cross/Blue Shield paid.

For services at M&M Orthopaedics, Ltd., the charges for service dates not paid by Respondent total $20,424.00. Respondent receives a credit for the Blue Cross/Blue Shield

payments in the amount of $3,629.49. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act. (P.E. 10)

For the services of Midwest Diagnostic Pathology, S.C., the charges for disputed services are $242.00. Respondent receives a credit for the Blue Cross/Blue Shield payments in the amount of $29.20. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

For the services of Radiologists of DuPage, S.C., the charges for disputed services are $152.00. Respondent receives a credit for the BlueCross BlueShield payments in the amount of $34.40. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

For the services of Anesthesiologists, Ltd., the charges for disputed services are $3630.00. Respondent receives a credit for the Blue Cross/ Blue Shield payments in the amount of $991.20. As such, Respondent shall pay Petitioner the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

For the services of Inpatient Consultants of Illinois the charges for disputed services are $371.00. Respondent receives a credit for the Blue Cross/ Blue Shield payments in the amount of $202.00. As such, Respondent shall pay Petitioner $19.88 the remaining balance, pursuant to Section 8(a) and subject to Section 8.2 of the Act.

In summary, as a result of both accidental injuries, the Arbitrator finds Respondent liable for disputed charges of $61,952.41, and orders them to pay such charges pursuant to Section 8(a) and subject to Section 8.2 of the Act. Respondent shall receive a credit of $42,019.70 pursuant to Section 8(j) of the Act.

In support of his decision with regard to issue (K) "What temporary benefits are in dispute? [TTD] ", the Arbitrator makes the following findings of fact and conclusions of law:

Petitioner did not work as a result of his injury from April 7, 2012 through August 3, 2012, a period of 17 weeks, for which Respondent paid $9,551.79 in temporary total disability benefits.

Petitioner then returned to light-duty work on August 4, 2012. At the urging of Dr. Mather, Petitioner went back off of work on December 19, 2012. Dr. Mather explained that disc protrusions such as Petitioner's are especially painful in the vast majority of cases.

The Arbitrator is not persuaded by Dr. Phillips' opinion that Petitioner could continue to work in a light-duty capacity as Petitioner's subjective complaints were progressing, as recognized by Dr. Phillips himself. Further, both Dr. Phillips and Dr. Mather opined that Petitioner was a surgical candidate for a decompressive procedure that was ultimately performed on January 30, 2013.

Petitioner remained off work following this procedure through March 24, 2013. Since Dr. Phillips found, in his August 31, 2012 report, that Petitioner sustained a possible disc protrusion and that it was reasonable to consider a decompression surgery, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the period of December 19, 2012 through March 24, 2013, a period of 13-5/7 weeks. So, for the two lost-time periods related to the first accident, the Arbitrator finds that Petitioner is entitled to a total of 30-5/7 weeks of temporary total disability benefits.

Respondent agreed that Petitioner was entitled to temporary total disability benefits from April 20, 2013 through May 27, 2013, a period of 5-3/7 weeks. The parties stipulated that Petitioner has received benefits for this period or will receive them in a timely manner.

However, Respondent was unable to provide a figure for the credit they are seeking for this particular TTD period. (A.E. 2)

Respondent is entitled to a credit for all TTD benefits that they have previously paid Petitioner.

In support of his decision with regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator makes the following findings of fact and conclusions of law:

Pursuant to Section 8.1b of the Illinois Workers' Compensation Act, 820 ILCS 305/1 et seq. (hereafter the "Act"), 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 professional appropriate measurements of impairment that include, but are not limited to: loss of range of motion, loss of strength, measure atrophy of tissue mass consistent with the injury; and any other measurement 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.

With regard to 8.1(b)(i), the Arbitrator notes that neither party offered an AMA impairment report into evidence. Therefore, the Arbitrator gives no weight to this factor.

With regard to 8.1(b)(ii), the Arbitrator finds that prior to the first injury, Petitioner was employed as a lead person in the shipping department. He was required to pack and lift products that a tool room or a maintenance crew member would use. Such products weighed from 1 to 150 pounds, although most items did not exceed 70 pounds. After the two injuries, Petitioner returned to his full-duty job. The Arbitrator gives greater weight to this factor.

With regard to 8.1(b)(iii), the Arbitrator notes that the Petitioner's date of birth is May 15, 1953. So, Petitioner was 58 and 59 on the two dates of accident. As Petitioner is a somewhat older worker, and has a shorter work life than a younger worker, the Arbitrator puts less weight on this factor.

With regard to 8.1(b)(iv), the Arbitrator notes that no evidence was introduced to indicate that Petitioner's future earning capacity was affected by these two accidental injuries. Therefore, the Arbitrator gives no weight to this factor.

With regard to 8.1(b)(v), the Arbitrator notes that on January 30, 2013, Dr. Mather performed a right L3-4 and left L4-5 extraforaminal microdiscectomy surgery on Petitioner. The Arbitrator notes that May 24, 2013 was the last day Petitioner treated with Dr. Mather before he returned to work. In his progress notes, under the CHIEF COMPLAINT section, Dr. Mather wrote: "Robert returns today. He is approximately 4 months status post microdiscectomy.

[D]oing quite well. No complaints. Finished physical therapy. Wishes to return to work Tuesday." Under the PHYSICAL EXAMINATION section, Dr. Mather wrote: "On exam he has full range of motion of the lumbar spine. No tenderness. He can heel-and-toe walk without difficulty. No sciatic symptoms. Gait is normal." The Arbitrator gives greater weight to this factor.

Petitioner was involved in two workplace accidents, that both involved his lumbar spine,

Where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, it is proper for the Commission to consider all of the evidence presented to determine the nature and extent of his permanent disability as of the date of the hearing. Baumgardner v. Ill. Workers' Comp. Comm'n, 409 Ill. App. 3d 274, 947 N.E.2d 856 (1st Dist. 2011). Thus, the Arbitrator renders one PPD award in this case, which contemplates the sum of any injuries caused by both the 2012 and 2013 accidents.

After carefully considering the five factors, as required by Section 8.1b of the Act, the Arbitrator finds that as a result of the accidental injuries of March 29, 2012 and April 19, 2013, Petitioner has sustained a loss of use, man as a whole, of 15% thereof, pursuant to Section 8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RODNEY REDWEIK,

Petitioner,

vs.

NO: 12 WC 30795

ABBOTT LABORATORIES,

16IWCC0790

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, temporary total disability (TTD), and permanent partial disability (PPD), and being advised of the facts and applicable law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all of the testimony, exhibits, pleadings and arguments submitted by the parties.

Redweik sustained injury to his left foot, left leg, right foot, right leg, ribs, and right clavicle as a result of his June 21, 2011 work-related accident. Because Redweik sustained specific loss to multiple body parts as identified in Section 8(e) of the Act, the Commission modifies the Decision of the Arbitrator and finds that Petitioner is entitled to PPD pursuant to Section 8(e) and 8(d)(2) of the Act. Accordingly, the Commission finds that Redweik is entitled to 50% percent loss of use of the left foot, 30% loss of use of the left leg, 30% loss of use of the right foot, 30% loss of use of the right leg, and 7.5% loss of use of the man-as-a-whole. All else is affirmed and adopted.

16IWCC0790

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 11, 2016, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 300.10 weeks, provided in §8(e) and 8(d)(2) of the Act, for the reason that the injuries sustained caused the 7.5% loss of use of the man-as-a-whole pursuant to Section 8(d)(2), and 50% loss of use of the left foot, 30% loss of use of the left leg, 30% loss of use of the right foot, and 30% loss of use of the right leg pursuant to Section 8(e).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical services incurred by Petitioner that remain unpaid as reflected in Petitioner's Exhibit from Regional Medical Center of San Jose for $318,388.00, Loyola University Medical Center for $217,609.20 including bills for all physicians, Gottlieb Memorial Hospital for $112,276.09, and Athletix for $3,262.50 and pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for all amounts paid pursuant to §8(j) of the Act; 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 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: DEC 8 – 2016

Michael J. Brennan

MJB/tdm
O: 11-1-16
052

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REDWEIK, RODNEY
Employee/Petitioner

Case# **12WC030795**

ABBOTT LABORATORIES
Employer/Respondent

16IWCC0790

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:

1658 SAUNDERS CONDON & KENNY
JAMES J KENNEY
111 W WASHINGTON ST SUITE 1001
CHICAGO, IL 60602,

0560 WEIDNER & McAULIFFE LTD
MARK D WILKENING
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

☐ 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

Rodney Reweik
Employee/Petitioner

v.

Abbott Laboratories
Employer/Respondent

Case # 12 WC 37095

Consolidated cases: N/A

16IWCC0790

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 June 21, 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 as explained *infra*.

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 $92,385.78; the average weekly wage was $1,776.65.

On the date of accident, Petitioner was 44 years of age, *married* with 2 dependent children.

Petitioner *has* received all reasonable and necessary medical services as explained *infra*.

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

Respondent shall be given a credit of $N/A for TTD[1], $N/A for TPD, $ N/A for maintenance, and $ N/A for other benefits, for a total credit of $ N/A. *See* AX2.

Respondent is entitled to a credit $89,194.94 and for any such further credit as agreed by the parties, under Section 8(j) of the Act as explained *infra*. *See* AX1[2] & Hearing Transcript.

ORDER

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established that he sustained a compensable accident at work on June 21, 2011 as well as a causal connection between his current condition of ill-being and his accident at work.

Medical Benefits

Respondent shall pay the reasonable and necessary medical services incurred by Petitioner that remain unpaid as reflected in Petitioner's Exhibits from Regional Medical Center of San Jose (6-21/2-2011) for $318,388.00, Loyola University Medical Center (7-21-2011 to 2012) for $217,609.20 including bills for all physicians, Gottlieb Memorial Hospital (5-3-11 to 5-8-11) for $112,276.09 and Athletix (3-11-11) for $3,262.50 pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall receive a credit as agreed by the parties, 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. *See* AX1 & Hearing Transcript

[1] As stipulated by the parties, Petitioner does not claim entitlement to temporary total disability benefits from June 22, 2011 to December 19, 2011 during which period of time he received his full salary under his short term disability benefit plan. *See* AX1.

[2] As stipulated by the parties, "[t]he parties agree that in the event that petitioner's injuries are deemed work related by the Arbitrator, and that the treatment is determined to be reasonable, & necessary & causally related to the accident that Respondent shall hold petitioner harmless, as per the Illinois Fee Schedule from any claim for reimbursement." *See* AX1. The parties also stipulated that if Petitioner met his burden of proof and an ultimate decision awarded the medical bills claimed by Petitioner, those would be paid pursuant to Sections 8(a) and 8.2 of the Act, and Respondent would be entitled to a full credit pursuant to Section 8(j) for any group carrier insurance payments made. *See* Hearing Transcript at 5-8. The parties also noted that some of Petitioner's medical bills were paid through Petitioner's wife's insurance carrier and some were paid through an auto liability policy claim. *Id.*

Permanent Partial Disability: Person as a Whole

Respondent shall pay Petitioner 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.

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 30, 2015
Date

JAN 11 2016

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Rodney Reweik
Employee/Petitioner

v.

Abbott Laboratories
Employer/Respondent

Case # **12** WC **37095**

Consolidated cases: **N/A**

FINDINGS OF FACT

At this hearing the issues in dispute include accident, causal connection, Respondent's liability for certain unpaid medical bills, any credit due to Respondent under Section 8(j) of the Illinois Workers' Compensation Act ("Act") and the nature and extent of Petitioner's injury. Arbitrator's Exhibit[3] ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he currently works at Abbott Medical Optics in Mokena, Illinois and has been so employed since 1999. In June of 2011, Petitioner testified that he was a Regional Technical Support Engineer (RTSE). He is currently a Global Technical Support Engineer. Petitioner testified that his title is equivalent to a supervisory position, but he has no direct reports. Petitioner's manager is Ross Lagrand (Mr. Lagrand).

In his position, Petitioner answers phone calls and emails from customers and engineers providing assistance related their Lasik and aberrometer equipment. Petitioner works out of his home in Mokena, Illinois, but is required to travel approximately 30% of the time within the United States and Canada. He travels and is out of his home for the length of time necessary to repair the equipment. Sometimes Petitioner travels for training, special projects or to repair Excimer lasers and aberrometers, both of which are computer controlled.

Petitioner also testified that he is responsible for making his own travel arrangements. His travel expenses are reimbursed through an online software program called Concur. Unless the travel is local in Illinois, 90% of Petitioner's travel requires him to fly. He also testified that when he rents a car, he has discretion to rent whatever vehicle he needs to complete his work. Respondent's headquarters is located in Santa Ana, California and its manufacturing facility is located in Milpitas, California. Petitioner testified that he mostly travels to the manufacturing facility.

On cross examination, Petitioner testified that he has to be able to lift heavy equipment, which he still does and that from 2011-2015 his essential job duties have not changed. From the end of December of 2011 through August of 2012, Petitioner testified that he worked from home and did not travel. Mainly he worked on a computer and on the telephone. Petitioner testified that he resumed his complete duties and functions for Respondent since August of 2012. Petitioner also testified that he has received raises in his salary since that time.

[3] 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.

Travel from Illinois to California in June of 2011

Respondent stipulated that Petitioner was in California on June 21, 2011 pursuing business at Respondent's direction. Petitioner explained that he was working on an ongoing project that began six months prior related to Respondent's excimer laser. The project work was required by the FDA in the Design History File (DHF) Remediation Program, which was intended to show that Respondent's product did the work it was supposed to do.

Petitioner testified that he was working with 6-7 others including two other teammates with which he regularly worked. He flew from Illinois to San Francisco, California on June 19, 2011 and had to change planes in Chicago. Somewhere during his air travel his wallet containing all of his identification, credit cards, company credit card and cash was either lost or stolen. Petitioner landed at the San Francisco airport around 10:00/10:30 p.m. and went to the car rental company. He discovered that he was missing his wallet when he arrived at the car rental counter. Petitioner testified that when he discovered his wallet was missing he tried to get back to the terminal to get back to the plane, but he was told my personnel that the plane had departed. He reported the missing wallet to the airline and then started cancelling his credit cards. Petitioner was scheduled to stay at the Santa Ana Marriott hotel, which was pre-paid by his company card. Petitioner testified that his friend's parents picked him up and took him to the hotel.

On cross examination, Petitioner testified that he would sometimes fly into the San Jose, California airport when going to Respondent's facilities in California. He had flown into California approximately 50 times since beginning his work with Respondent in 1999. Petitioner also testified that he chose the car rentals by choosing the best rate.

On the morning of June 20, 2011, Petitioner spoke on the phone with his friend Dan Summers (Mr. Summers) who agreed to pick him up from the hotel and take him to work. Petitioner carpooled to work with Mr. Summers. On cross examination Petitioner also testified that he contacted his supervisor when reporting for work, but did not ask anyone for assistance with regard to his lost wallet. Petitioner testified that he had called his wife and she was in the process of sending his passport to him so that he could travel home.

Petitioner testified that he left work at approximately 5:00 p.m. with Mr. Summers and they went back to Mr. Summers' house. He explained that Mr. Summers loaned him money for food and offered him a motorcycle to use as transportation for the week. Petitioner testified that he took the motorcycle back to his hotel that evening and then used the motorcycle to get to work the following day. He described a specially designated area in which employees were to park motorcycles at the Milpitas, California manufacturing facility. Petitioner testified that he has a valid driver's license to drive a motorcycle, although he did not have it with him due to his lost wallet.

On cross examination, Petitioner testified that he had ridden a motorcycle with Mr. Summers once within the prior year and that the last time he owned a motorcycle was in the mid 1990's. However, he maintained his motorcycle driver's license and rode a motorcycle less than a handful of times each year. Petitioner testified that he had ridden the particular motorcycle on which he was injured before he was injured and that he demonstrated his ability to ride that particular bike at Mr. Summers's request.

Petitioner further acknowledged that prior to his accident he did not call his supervisor or anyone in a supervisory capacity for assistance with regard to his lost identification, cash or credit cards. He testified, however, that after reporting that he was unable to rent a car he was waiting for instructions on what to do.

June 21, 2011

On June 21, 2011, Petitioner testified that he worked until approximately 8:00 p.m. He explained that work was followed by a company dinner at a restaurant in Milpitas with fellow employees to discuss methods of how to test their equipment and how to come up with steps, tests or protocols to test the equipment. The dinner lasted approximately two hours and Petitioner left the restaurant at about 10:00 p.m. Petitioner testified that he carpooled with other coworkers to the restaurant from the manufacturing facility and then back after dinner to get into their own vehicles. Petitioner testified that his vehicle was the Harley Davidson motorcycle that was loaned to him by Mr. Summers for the week. The motorcycle was insured at the time of the accident.

Petitioner testified that he was on his way back to his hotel and he took Montegue Expressway, the most direct route to the hotel. Petitioner testified that he was driving in the right hand lane of the expressway spanning 8-10 lanes wide at the speed limit with light traffic. When he approached the intersection, a car turned left in front of him. Petitioner explained that he knew he could not stop without colliding with the car so he laid the bike down on the ground and ejected himself from the motorcycle.

Petitioner testified that he does not have much memory of the incident, but recalls rolling on the ground and that he did not hit the other vehicle although the motorcycle did. He was face down on the pavement and felt blood dripping off his face. Petitioner testified that his left leg was at a right angle. He felt extreme pain in his legs, ribs, and difficulty breathing.

Then a police officer came to the scene. Petitioner testified that he had a conversation with the police officer and recalls being asked if he had a driver's license. He did not have his license or proof of insurance with him at the time. The police officer completed a traffic collision report describing the circumstances of the accident in detail. PX1; *see also* PX11, RX1.

Medical Treatment

Petitioner testified that an ambulance came and he was transported to San Jose Regional Medical Center. The medical records reflect that Petitioner suffered significant physical injuries and several surgeries were performed. PX2. He was admitted with: a right clavicular fracture; a right fourth, fifth and seventh rib fractures; a left hip abrasion with laceration; a left lateral malleolar fracture status post open reduction internal fixation; a right tibial plateau fracture status post open reduction internal fixation; a left tibial plateau fracture with nonoperative management; and multiple abrasions. *Id.* Petitioner was examined by various physicians and underwent extensive x-ray and CT scans. *Id.*

Petitioner underwent surgery on June 24, 2011 to the right and left legs including an open reduction internal fixation of the right tibial plateau fracture along with a synthetic bone grafting and an open reduction internal fixation of the left ankle fractures. *Id.* Petitioner remained hospitalized for eleven days. *Id.* Following his hospitalization in California, Petitioner was taken by ambulance to the airport where he was flown home to Chicago. Petitioner testified that he had to travel in a first class seat as he was unable to bend his leg and the seating arrangement allowed him to lie down throughout the flight. Petitioner was unable to walk and confined to a wheelchair at the time. He testified that he was picked up from the airport in a medical van and then went to Loyola University Medical Center where he came under the care of Dr. Stover, an orthopedic surgeon.

Petitioner testified that, in all, he has undergone twelve surgical procedures through 2012. The medical records reflect extensive surgical intervention in both California and Chicago.

On July 20, 2011, Petitioner underwent extensive surgery to the left leg and knee. *Id.* Specifically, he underwent a left knee arthroscopically assisted ACL and LCL reconstruction with allografts, debridement chondroplasty of the patella and medial femoral condyle and loose body removal. *Id.* Post-operatively Petitioner was diagnosed with left ACL and LCL tears with a medial tibial plateau fracture with osteoarthritis and a traumatic chondral injury with intra-articular loose fragments. *Id.*

On July 26, 2011, Petitioner underwent further surgery for deep removal of the hardware from the left tibia, a revision open reduction internal fixation of the left tibia, distal intraarticular tibia and fibula and application of multiplanar external fixation for the fractures. *Id.* Post-operatively Petitioner was diagnosed with left distal intraarticular tibia and fibular fracture with syndesmotic injury and malreduction. *Id.* On July 29, 2011, Petitioner underwent an open reduction and internal fixation of the right tibial plateau fracture with removal of hardware and iliac crest bone graft and repair of right meniscus. *Id.* Post-operatively Petitioner was diagnosed with right tibial plateau malalignment. *Id.*

Petitioner underwent extensive post-operative care and physical therapy. *Id.* However, shortly after his last surgery in July his left ankle became infected. *Id.* On September 6, 2011, Petitioner underwent removal of hardware of the left tibia and fibula, with debridement of osteomyelitis and a left fibular osteotomy and ankle arthrodesis on the left side. *Id.* Post-operatively Petitioner was diagnosed with distal intra-articular tibia and fibular fractures. *Id.* On November 29, 2011, Petitioner underwent deep removal of the hardware on the right. *Id.* Post-operatively Petitioner was diagnosed with prominent hardware at the right tibial plateau. *Id.*

On February 20, 2012, Petitioner underwent a left ankle arthrotomy with deep removal of hardware, debridement of osteomyelitis at the distal tibia and fibula, a fibular osteotomy, ankle arthrodesis and application of a multiplanar external fixator. *Id.* Post-operatively Petitioner was diagnosed with a deep infection following the distal intraarticular tibial and fibular fractures. *Id.* On March 8, 2012, Petitioner underwent irrigation and debridement of the left ankle wounds with closure of the medial and lateral incisions. *Id.* Post-operatively Petitioner was diagnosed with a left ankle infection with post-op hematoma after left ankle fracture. *Id.* On May 14, 2012, Petitioner underwent removal of the most recent external multiplanar fixator to the left ankle. *Id.*

Petitioner described a long and arduous recovery process, which required him to be bedridden in a hospital bed in his home for six months. The recovery process also required assistance from family members to perform the most basis daily activities of life, including toileting and bathing. Petitioner testified that he felt helpless during this process and had to have someone lift his legs and turn him so he could turn himself onto the commode. It was an achievement when he was able to perform simple activities by himself.

Petitioner's treatment with Dr. Stover concluded in May of 2012, but he returned Dr. Stover a few months prior to November of 2015 and complained of a feeling of something floating in his right knee that inhibited his leg from bending or straightening. Petitioner acknowledged that no treatment was provided at that time and no future treatment has been scheduled.

Additional Information

Petitioner explained that he had to learn how to walk again and he had not walked for a year. After his ankle fusion, Petitioner testified that he had to learn a new way to walk. Petitioner testified that after his release by Dr. Stover, he continued to perform exercises learned in physical therapy at home. If he does not do the home exercises, Petitioner testified that his joints become painful.

Petitioner testified that walking without shoes is almost not an option for him because of his fused ankle. He has difficulty walking up or down stairs, which is his biggest challenge daily. In addition, he experiences difficulty performing activities such as carrying luggage down stairs. Petitioner also testified that he experiences back pain from this also, but he has not seen a doctor for it yet. He also has pain and stiffness in both knees, although he described the right knee to be considerably weaker than the left knee. Petitioner testified that he tries to exercise with them, but the more he exercises he feels he may further deteriorate his joints. With regard to his right shoulder, Petitioner testified that he has pain when he raises it. When he does not exercise it, the shoulder becomes stiff and painful. Petitioner also has scars on his forehead and left arm from road rash.

While off of work, Petitioner received full salary under the Employer-Sponsored Short Term Disability Plan. All of petitioner's medical bills were paid. The majority of these bills were paid through the employer-provided group health medical plan. A small portion of the bills were paid through Petitioner's spouse's insurance. There was also a payment made for medical bills under a personal automobile insurance claim.

Petitioner returned to work on December 20, 2011. Petitioner worked out of his home until August, 2012. Petitioner testified that he was unable to travel during the period of December, 2011 through August, 2012. Thereafter, Petitioner returned to his full duties for the respondent. He testified that he has been performing his full duties since August of 2012.

Daniel Summers

Mr. Summers testified that he currently works at Clerio Vision designing the next generation of ophthalmic refractive lasers. Mr. Summers testified that he is the System Architect and he designs hardware and some software for the alpha prototype that they hope to release for clinical trials in the near future. Previously, Mr. Summers worked for Abbott Medical Optics for 30 years. Mr. Summers testified that he knows Petitioner very well.

In June of 2011, Mr. Summers owned a 1998 Harley-Davidson FLSTC motorcycle. RX1. Mr. Summers testified that the size of the motorcycle was about 80 cubic inches; the biggest motorcycle that Harley Davidson makes. He had just had his motorcycle redone.

On or about June 20, 2011, Mr. Summers testified that he spoke with Petitioner at which time Petitioner informed him that he managed to lose his wallet on a plane. He understood that Petitioner was able to get a hotel room, but was unable to get to and from work under the circumstances. Mr. Summers testified that he picked Petitioner up from the hotel on Monday morning and took him into work, but since he had just had his motorcycle redone with new gaskets, etc., he told Petitioner that he could use it to get back and forth to work. Mr. Summers explained that the following Tuesday he had to drive his kids to daycare so either Petitioner could use the motorcycle and get to work on time or wait for him to get all of the kids and then go into work.

Mr. Summers testified that he saw Petitioner again on Tuesday and saw the motorcycle in the motorcycle parking area. He then learned of Petitioner's accident on Wednesday morning. Mr. Summers recalled that Petitioner left a message on his phone around 2:00 or 3:00 in the morning, which he retrieved after he woke up. Mr. Summers understood that Petitioner had basically been in a "T-bone" accident with a car and was very hurt receiving treatment at the trauma center of the hospital.

Mr. Summers testified that he had previously ridden motorcycles with Petitioner previously on several bike trips up to Santa Cruz, for example, lasting approximately four hours or so. Mr. Summers testified that he was not concerned about Petitioner's ability to ride the motorcycle. Ultimately, Mr. Summers was compensated for the loss of the motorcycle by the insurance company. It had been in perfect condition before Petitioner used it.

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 (C), whether Petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (LEXIS 2005). The parties' dispute in this case centers on whether Petitioner was a traveling employee injured in a compensable accident that arose out of and in the course of his employment with Respondent. In reliance on several cases[4] Respondent disputes that Petitioner's injury was sustained while he was engaged in a reasonable and foreseeable activity given his lack of identification, proof of insurance, limited operation of any motorcycle over the prior 20 years and use of a large Harley Davidson motorcycle despite relatively limited motorcycle riding experience. Petitioner contends that his accident while riding the motorcycle was reasonable and foreseeable, more akin to cases[5] involving claimants engaging in a recreational activities expected of employees during work-related travel or to the "street risk" doctrine where the employment causes the employee greater exposure to normal risks when compared to the general public.

A recent Supreme Court of Illinois case delineates the framework of compensability for an injury involving a traveling employee and is instructive, albeit factually distinguishable, in this case. *Venture-Newberg-Perini, Stone & Webster v. Ill. Workers' Comp. Comm'n*, 2013 IL 115728, 376 Ill. Dec. 823, 1 N.E.3d 535 (2013). Where an employee's duties require him to travel away from the employer's premises the courts generally regard him "differently from other employees when considering whether an injury arose out of and in the course of employment." *Venture-Newberg*, 2013 IL 115728, ¶16 (quoting *Wright v. Industrial Comm'n*, 62 Ill. 2d 65, 68 (1975); *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 199 (1985)). "The test for determining whether an injury to a traveling employee arose out of and in the course of his employment is the reasonableness of the conduct in which he was engaged and whether the conduct might normally be anticipated or foreseen by the employer." *Cox v. Ill. Workers' Comp. Comm'n*, 406 Ill. App. 3d 541, 545-46 (1st Dist. 2011) (citing *Howell Tractor & Equipment Co. v. Industrial Comm'n*, 78 Ill. 2d 567, 573-74 (1980)).

Petitioner was required to travel from his hotel to the Milpitas facility to perform the work he was assigned related to the FDA compliance project that began six months earlier. No specific testimony or evidence was submitted that Petitioner was required to report for work on time, or that he was required to work in the Milpitas

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[4] *Hoffman v. Industrial Comm.*, 109 Ill.2d 194, 199 (1985); *Howell Tractor and Equipment Co. v. Industrial Comm.*, 78 Ill.2d 567, 573-74 (1980); *Wright v. Industrial Comm.*, 62 Ill.2d 65, 71 (1975).

[5] *Insulated Panel Co v. Industrial Comm'n*, 318 Ill. App. 3d 100 (2nd Dist. 2001) (citing *Wright v. Industrial Comm.*, 62 Ill.2d 65, 71 (1975)); *Nee v. Ill. Workers' Comp. Comm'n*, 2015 IL App 132609WC, 390 Ill. Dec. 308 (1st Dist. 2015).

facility instead of remotely from his hotel room when they assigned him work that he could not do remotely from Illinois, but such inferences are reasonable. Respondent also stipulated that Petitioner was in California on June 21, 2011 pursuing business at Respondent's direction. Previously, Petitioner had been required by Respondent at this time and during approximately 50 prior trips over 12 years to travel from his home in Illinois to out-of-state locations, particularly in California where Respondent maintains its headquarters and a manufacturing facility. However, Petitioner's presence in California at Respondent's direction is not enough. An analysis is required of whether Petitioner's activity of driving a borrowed motorcycle during his work-related trip in California after losing his wallet was both reasonable and foreseeable. See *Venture-Newberg*, 2013 IL 115728, ¶16; *Cox*, 406 Ill. App. 3d at 545-46; *Wright*, 62 Ill. 2d at 68; *Hoffman*, 109 Ill. 2d at 199.

As to the particular trip in June of 2011, Petitioner testified that he traveled from his home in Illinois on two flights to reach the San Francisco airport. During this travel he lost his wallet with all of his identification, money and credit cards. During Petitioner's continuous employment with Respondent since 1999 and residence in Illinois, Petitioner had flown into the San Francisco or the San Diego airport approximately 50 times when required to perform work out-of-state. Petitioner had also used different car rental agencies and stayed at different hotels. All of these expenses were paid by Respondent. Respondent did not direct Petitioner on the precise method of travel to reach California or what method of transportation to use while located in California to perform his work. Petitioner testified that he was given discretion in his travel arrangements during his years of employment with Respondent and Respondent had always paid for the travel arrangements that he made through either reimbursement or use of a company credit card to make such arrangements, which was lost during this trip. Petitioner's testimony in this regard is uncontroverted.

In any event, whether Petitioner arrived at the Milpitas facility in a rental car, by carpooling with co-workers or on a motorcycle focuses too narrowly on the method of transportation without considering the reasonableness and foreseeability of the circumstances giving rise to Petitioner's accident as a whole. In line with over a decade of completely discretionary travel arrangements paid for by Respondent, it is reasonable and foreseeable that Petitioner—a long-term employee given complete discretion over twelve years to make regular out-of-state travel arrangements who was entrusted at the time of his accident with work to ensure FDA compliance of one of Respondent's products—would resolve the problem of getting to and from the assigned work facility in Milpitas by borrowing a vehicle from a co-worker in the area whether it was a motorcycle, car, van or scooter.

Based on the foregoing, the Arbitrator finds that Petitioner was a traveling employee that sustained a compensable accident on June 21, 2011 reasonably and foreseeably arising out of and in the course of his employment with Respondent.

In support of the Arbitrator's decision relating to Issue (F), whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

As explained in the accident analysis above, Petitioner sustained a compensable accident on June 21, 2011. The Arbitrator also finds that Petitioner's claimed current condition of ill-being is causally related to the June 21, 2011 accident at work. In so finding, the Arbitrator notes the consistency of Petitioner's testimony with the medical records submitted into evidence as well as the testimony of Mr. Summers. Petitioner underwent extensive medical treatment including a dozen surgeries to repair injuries his body as a whole and, in particular, his legs and ankles. This evidence is uncontroverted. Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the June 21, 2011 accident at work.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, and Issue (N) whether Respondent is entitled to any credit for payments made, the Arbitrator finds the following:

"Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)), a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of her employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury." *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n*, 409 Ill. App. 3d 463, 470 (4th Dist. 2011) (*citing University of Illinois v. Industrial Comm'n*, 232 Ill. App. 3d 154, 164 (1st Dist. 1992)).

As explained more fully above, the Arbitrator finds that Petitioner's condition of ill-being is causally related to his accident at work. The medical bills submitted into evidence are for reasonable and necessary medical treatment rendered to Petitioner to alleviate him of the effects of his injury on June 21, 2011. Accordingly, the Arbitrator finds that the medical bills incurred by Petitioner that remain unpaid (as reflected in Petitioner's exhibits from Regional Medical Center of San Jose (6-21/2-2011) for $318,388.00, Loyola University Medical Center (7-21-2011 to 2012) for $217,609.20 including bills for all physicians, Gottlieb Memorial Hospital (5-3-11 to 5-8-11) for $112,276.09 and Athletix (3-11-11) for $3,262.50) shall be paid by Respondent as provided in Sections 8(a) and 8.2 of the Act.

With regard to credit due to Respondent, the parties stipulated as follows: "[t]he parties agree that in the event that petitioner's injuries are deemed work related by the Arbitrator, and that the treatment is determined to be reasonable, & necessary & causally related to the accident that Respondent shall hold petitioner harmless, as per the Illinois Fee Schedule from any claim for reimbursement." *See* AX1. The parties also stipulated that if Petitioner met his burden of proof and an ultimate decision awarded the medical bills claimed by Petitioner, those would be paid pursuant to Sections 8(a) and 8.2 of the Act, and Respondent would be entitled to a full credit pursuant to Section 8(j) for any group carrier insurance payments made. *See* Hearing Transcript at 5-8. The parties also noted that some of Petitioner's medical bills were paid through Petitioner's wife's insurance carrier and some were paid through an auto liability policy claim. *Id.* Thus, Respondent shall be entitled to a full credit for any payments made by Petitioner's group insurance carrier pursuant to Section 8(j) of the Act as agreed and Respondent shall hold Petitioner harmless per the Illinois Fee Schedule from any claim for reimbursement.

In support of the Arbitrator's decision relating to Issue (L), the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Based on the record as a whole—which reflects that Petitioner sustained fractures to several ribs and the right clavicle requiring non-operative treatment, severe injuries to both knees and ankles requiring more than 10 surgeries most seriously resulting a fused left ankle and resulting in continued symptomatology about which Petitioner credibly testified affecting his activities of daily living although allowing a full duty return to work—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 60% loss of use of the man as a whole pursuant to Section 8(d)2 for his injuries.

STATE OF ILLINOIS)	☐ Affirm and adopt	☐ 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

DENNIS CHRANS,

Petitioner,

16IWCC0783

vs.

NO: 12 WC 31853

SPRINGFIELD PARK DISTRICT,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and notice given to all parties, the Commission, after considering the issues of causal connection and reasonableness and necessity of the 09/19/14 lumbar spine MRI and 09/17/14 EMG/NCV medical bills, PPD 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 modifies the Decision of the Arbitrator only to the extent of finding that the 09/19/14 lumbar spine MRI and 09/17/14 EMG/NCV were reasonable and necessary treatment for the injuries Petitioner sustained in the course and scope of his employment on 10/11/11.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $485.81 per week for a period of 55-3/7 weeks, commencing October 11, 2011 through June 1, 2012 and July 8, 2013 through December 8, 2013, 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 $437.23 per week for a period of 75.15 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 45% loss of use of the right foot.

16IWCC0783

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $437.23 per week for a period of 25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 5% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical bills as identified in Petitioner's Exhibit 19, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule, including the medical bills incurred in connection with the MRI and EMG/NCV studies performed on September 19 and September 17, 2014, respectively.

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: DEC 6 - 2016
KLW/bsd
O: 10/18/16
42

Kevin Lamborn

Thomas Tyrell

Michael Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0783

CHRANS, DENNIS
Employee/Petitioner

Case# **12WC031853**

SPRINGFIELD PARK DISTRICT
Employer/Respondent

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:

0333 SHAY & ASSOCIATES
TIMOTHY M SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

0332 LIVINGSTONE MUELLER ET AL
KENNETH S BIMA
620 E EDWARDS ST PO BOX 335
SPRINGFIELD, IL 62705

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

16IWCC0783

Dennis Chrans
Employee/Petitioner

v.

Springfield Park District
Employer/Respondent

Case # 12 WC 31853

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 August 28, 2015 and Springfield, on November 23, 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 October 11, 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 $39,675.48; the average weekly wage was $728.71.

On the date of accident, Petitioner was 46 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 $28,105.89 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $28,105.89.

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

ORDER

Respondent shall pay reasonable and necessary medical bills as identified in Petitioner's Exhibit 19, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule, with the exception of medical bills incurred in connection with the MRI and EMG/nerve conduction studies performed on September 19, and September 17, 2014, respectively.

Respondent shall pay Petitioner temporary total disability benefits of $485.81 per week for 55 3/7 weeks commencing October 11, 2011, through June 1, 2012, and July 8, 2013, through December 8, 2013, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $437.23 per week for 75.15 weeks because the injury sustained caused the 45% loss of use of the right foot, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $437.23 per week for 25 weeks because the injury sustained caused the five percent (5%) loss of use 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.

William R. Gallagher

William R. Gallagher, Arbitrator

January 18, 2016

Date

JAN 21 2016

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment for Respondent on October 11, 2011. According to the Application, Petitioner was struck by a vehicle and sustained injuries to the right leg and low back (Arbitrator's Exhibit 2). Respondent stipulated that Petitioner sustained a work-related accident; however, Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

There were also disputes in regard to the computation of the average weekly wage and Respondent's liability for medical expenses, specifically, medical expenses incurred with an EMG/nerve conduction studies and an MRI there were performed on September 17, and September 19, 2014, respectively. In regard to the average weekly wage, Petitioner alleged an average weekly wage of $762.99 and Respondent alleged an average weekly wage of $728.71. The basis of this dispute was whether Petitioner was required to work overtime. At trial, Petitioner and Respondent stipulated that if overtime was required, Petitioner's average weekly wage was $762.99, and, if overtime was not required, Petitioner's average weekly wage was $728.71 (Arbitrator's Exhibit 1).

Petitioner claimed that he was entitled to temporary total disability benefits for 55 3/7 weeks, commencing October 11, 2011, through June 1, 2012, and July 8, 2013, through December 8, 2013. Respondent stipulated that Petitioner was entitled to temporary total disability benefits for the aforestated periods of time. Because of the dispute in regard to the computation of the average weekly wage, there was a dispute as to the appropriate rate of temporary total disability benefits (Arbitrator's Exhibit 1).

Petitioner began working for Respondent in 2002, and, at the time the case was tried, he was a foreman. Petitioner's primary job duty consisted of maintaining the golf courses owned and run by Respondent. In regard to the accident of October 11, 2011, Petitioner testified that another employee was driving a utility vehicle used on the golf course, the vehicle backed up and drove over and up Petitioner's right leg and pinned him between it and a building. When the vehicle pulled away, Petitioner stated that he fell, landing on some pipe that was adjacent to the building.

After the accident, Petitioner was seen in the ER of Midwest Occupational Health Associates (MOHA) where he was seen by Dr. Gregory Clem. According to the history in the MOHA records, Petitioner sustained injuries when a portable small work truck accidentally backed up over his right leg. Petitioner estimated that this vehicle weighed 1,000 to 2,000 pounds. There was no history in that record of Petitioner having fallen on pipes or having sustained a back injury. Dr. Clem opined that Petitioner sustained a right leg contusion and recommended Petitioner go to the ER of Memorial Medical Center (Petitioner's Exhibit 4).

Petitioner was then seen in the ER of Memorial Medical Center. According to the Memorial Medical Center record of that date, Petitioner was "...run over in the back of RLE with a gator at work." At that time, Petitioner had complaints of severe right leg pain as well as back pain. The history did not contain a reference to Petitioner having fallen on any pipes. Multiple x-rays of the right leg and foot were taken and they were all negative for fractures. An x-ray of the translumbar spine was also taken which revealed a mild loss of height of the T12 and L1

vertebral bodies probably degenerative with compression fractures not excluded. Petitioner was discharged and instructed to seek treatment from his family physician (Petitioner's Exhibit 2).

Petitioner subsequently sought treatment from Dr. Jennifer Richards, his family physician. He was initially seen by Ann Self, a Nurse Practitioner in Dr. Richards' office, on October 14, 2011. According to the history in the record of that date, Petitioner was at work and he was trying to get the tailgate down on one of the utility vehicles when the driver's, of the vehicle, foot slipped off of the clutch. The vehicle then lunged backward and pinned the Petitioner between it and a wall. The back wheel of the vehicle pinned Petitioner's right lower leg. The record did not contain a history of Petitioner injuring his back when he fell on some pipe. NP Self noted that x-rays were taken which revealed possible compression fractures at T12 and L1. Petitioner advised NP Self that most of his pain was in the right leg and not the back. NP Self's assessment was limb pain and closed compression fractures of the L1 vertebral body (Petitioner's Exhibit 8).

At trial, Petitioner testified that, at his direction, his wife prepared an accident report on October 18, 2011, which Petitioner then signed. The report stated that Petitioner was putting the tailgate of the vehicle down when the vehicle moved backwards catching his right foot and pinning him against the maintenance building. There was no mention of Petitioner falling on a pipe; however, the report stated that Petitioner sustained injuries to the "Right foot & leg, Back." (Petitioner's Exhibit 1).

Petitioner was again seen by NP Self on October 28, 2011, and he continued to complain of both right foot and back pain. She referred Petitioner to an orthopedic surgeon, Dr. Rishi Sharma, for the right foot and ordered physical therapy for the back (Petitioner's Exhibit 8).

Petitioner received physical therapy at Memorial Medical Center from November 2, 2011, through May 14, 2012. In the record of November 2, 2011, Petitioner described the accident of October 11, 2011, which included his landing on a pipe (Petitioner's Exhibit 5).

On November 4, 2011, Petitioner was evaluated by Dr. Sharma. Dr. Sharma opined that Petitioner sustained a right ankle sprain with Achilles tendinopathy. He treated the condition conservatively but, because of Petitioner's continued complaints, he ordered an MRI of the right ankle. The MRI was performed on February 28, 2012, which revealed some ankle and subtalar joint fluid and a possible sprain or partial tear (Petitioner's Exhibits 3 and 9).

Following his review of the MRI, Dr. Sharma referred Petitioner to Dr. Benjamin Stevens, an orthopedic surgeon, for a second opinion. Petitioner was evaluated by Dr. Stevens on March 15, 2012. When seen by Dr. Stevens on that date, Petitioner complained of both the right ankle and low back pain. On examination, Dr. Stevens noted that there was swelling of the right foot/ankle and he recommended additional conservative treatment. In regard to Petitioner's back symptoms, Dr. Stevens referred Petitioner to Dr. William Payne, an orthopedic surgeon (Petitioner's Exhibit 10).

From November, 2011, through March, 2012, Petitioner continued to be seen by NP Self. It was on March 30, 2012, that Petitioner was seen by Dr. Richards who prescribed medications and noted that she was coordinating his care with the other treating physicians (Petitioner's Exhibit 8).

On March 22, 2012, Petitioner was seen by Jennifer Nichelson, a Nurse Practitioner in Dr. Payne's office. The record of that date noted the accident of October 11, 2011, which included Petitioner injuring his back when he fell on a pipe. She noted that Petitioner had compression fractures of T12 and L1 which were healing and right leg pain consistent with an S1 radicular pattern. She ordered an MRI of the lumbar spine (Petitioner's Exhibit 11).

The lumbar spine MRI was performed on April 10, 2012. The MRI revealed some disc bulges but no herniations. Petitioner was seen by Dr. Payne on April 26, 2012, and he reviewed the MRI. Because of Petitioner's leg complaints, Dr. Payne ordered EMG/nerve conduction studies which were performed on May 24, 2012, and were described as being normal. Dr. Payne subsequently saw Petitioner on May 31, 2012, and noted that the EMG/nerve conduction studies were negative. Petitioner's back symptoms had also improved and Dr. Payne stated that he would see Petitioner on an as-needed basis (Petitioner's Exhibit 6, 7 and 11).

On June 29, 2012, Petitioner was again seen by NP Self. At that time, she continued to keep Petitioner on restrictions and imposed a 10 pound lifting restriction, no repetitive bending/kneeling and getting breaks from walking and standing as needed (Petitioner's Exhibit 8).

Petitioner was seen by Dr. Stevens on February 4, 2013. At that time, Petitioner informed Dr. Stevens that he had been on light duty for several months and that his right ankle pain had not improved. Dr. Stevens ordered some stress x-rays which he opined revealed instability. He further opined that ankle surgery was an option but, had limited predictability. (Petitioner's Exhibit 10).

At the direction of Respondent, Petitioner was examined by Dr. John Krause, an orthopedic surgeon, on April 15, 2013. The purpose of this examination was to obtain an opinion as to whether the surgery suggested by Dr. Stevens was appropriate. Dr. Krause was deposed on January 9, 2015 (his medical report was not attached) and his deposition was received into evidence at trial. In regard to his examination of April 15, 2013, Dr. Krause testified that Petitioner had non-specific findings and symptom magnification and he did not observe any instability of the right ankle on examination. While he would not recommend surgery, he could not state that the surgical recommendation made by Dr. Stevens was unreasonable (Respondent's Exhibit 1; pp 9-11).

Dr. Stevens performed surgery on Petitioner's right foot/ankle on July 8, 2013. The surgical procedure consisted of a right gastrocnemius recession, right modified brostrom ligamentous reconstruction, right tibiotalar arthrotomy right accessory band of the anterior talofibular ligament excision at the ankle (Petitioner's Exhibit 13).

Following surgery, Petitioner continued to be treated by Dr. Stevens who authorized him to be off work and ordered physical therapy. When Dr. Stephen saw Petitioner on December 5, 2013, Petitioner's right ankle condition was improved. Dr. Stevens authorized Petitioner to return to work on light duty and then to full duty effective January 6, 2014 (Petitioner's Exhibit 10).

Petitioner was seen by Dr. Richards on December 17, 2013, and she modified his work restrictions from a 40 pound lifting restriction to a 10 pound lifting restriction. When Petitioner was subsequently seen by Dr. Richards on January 20, 2014, he advised that his right foot was swelling especially after a full day at work (Petitioner's Exhibit 8).

Dr. Stevens saw Petitioner on February 11, 2014, and Petitioner advised him that he had returned to work to full duty; however, he informed Dr. Stevens that it had been very painful for him and that he did not believe that he could perform full work duties. Dr. Stevens noted Petitioner's right foot was extremely tender when examined. He ordered Petitioner undergo a functional capacity evaluation (FCE) (Petitioner's Exhibit 10).

The FCE was performed on February 25, 2014. The examiner opined that Petitioner was capable of working between the light and medium physical demand levels. The examiner noted that Petitioner was tolerating a full day of work but alternating between sitting, standing and walking. The examiner opined Petitioner could lift from 10 inches with 26.5 pounds, 15 inches with 33.25 pounds, 20 inches with 34.5 pounds, overhead to 68 inches with 20 pounds, carry 50 feet with 20 pounds, and push/pull with 325 pounds or 36 pounds of force, all on an occasional basis. It was also recommended Petitioner use stairs with a railing, reaching overhead work and 1/2 kneeling on an occasional basis (Petitioner's Exhibit 15).

Petitioner was seen by Dr. Stevens on March 6, 2014. At that time, Dr. Stevens reviewed the FCE. He opined that Petitioner was at MMI and released him to return to work subject to the restrictions stated in the FCE (Petitioner's Exhibit 10).

On March 21, 2014, Petitioner was seen by Dr. Richards who also reviewed the FCE. Dr. Richards opined that Petitioner was at MMI and also imposed permanent work restrictions consistent with the FCE (Petitioner's Exhibit 8).

At the direction of Respondent, Petitioner was examined for the second time by Dr. Krause on July 28, 2014. Dr. Krause opined that Petitioner could return to work without restrictions. Further, based on the AMA Guides, Dr. Krause opined that Petitioner had an impairment of one percent (1%) whole person lower extremity impairment based upon the Sixth Edition of the AMA Guides. In his report, Dr. Krause then stated that this gave Petitioner a combined lower extremity impairment of two and a whole person impairment of one (Respondent's Exhibit 1; Deposition Exhibit 2).

At trial, Petitioner testified that Dr. Krause hurt him when he conducted the examination of his right ankle on July 28, 2014. Petitioner stated that Dr. Krause turned/twisted his ankle to where it was extremely painful. Petitioner's wife, Tracy Chrans, also testified when this case was tried and stated that she was present when Dr. Krause examined Petitioner on July 28, 2014, and she observed him twisting Petitioner's right ankle and Petitioner's reaction to same.

Petitioner was again seen by Dr. Richards on September 9, 2014, because of increased right foot symptoms. Dr. Richards' record of that date noted that Petitioner had been recently examined and that, the examining doctor forcibly manipulated Petitioner's right ankle and Petitioner stated that the right foot/ankle pain had been worse ever since then. Dr. Richards stated that she was going

to refer Petitioner back to Dr. Stevens and that she might consider ordering an EMG/nerve conduction study (Petitioner's Exhibit 8).

Dr. Richards referred Petitioner to Dr. Edward Trudeau who performed an EMG/nerve conduction study on September 17, 2014. The studies were positive for posterior tibial neuropathy at/distal to the right medial malleolus (tarsal tunnel syndrome) that was moderately severe and right sural neuropathy that was moderately severe (Petitioner's Exhibit 17).

Dr. Richards also ordered an MRI of Petitioner's right foot that was performed on September 19, 2014. The MRI revealed a chronic tear of some of the components of the lateral ligament complex and also the anterior distal tibiofibular ligament (Petitioner's Exhibit 16).

Petitioner was seen by Dr. Stevens on September 24, 2014, and he reviewed the MRI (his record did not indicate if he reviewed the EMG/nerve conduction studies). Dr. Stevens opined that the MRI findings were not of concern and that nothing had changed in Petitioner's overall condition. He stated that he would defer to the FCE for determination of Petitioner's limitations (Petitioner's Exhibit 10).

Dr. Richards subsequently prepared a letter dated December 30, 2014, in which she explained why she ordered the EMG/nerve conduction studies in September, 2014. The primary basis for her ordering the test was because of the "forcible manipulation" of Petitioner's ankle during the IME examination. She stated that it was within the scope of her practice to order such a study because Dr. Stevens would like to have this information prior to seeing a patient so that he could properly evaluate the patient (Petitioner's Exhibit 18).

Petitioner was seen by Dr. Richards for the last time on April 20, 2015. At that time, Dr. Richards opined that Petitioner was at MMI and specified the permanent restrictions as being no shoveling, no walking on wet, icy, muddy or slippery slopes; stairs if less than 10 per flight (occasionally only); needs to sit every 15 minutes of every two hours (not driving); stay on even ground; if below 32°, cannot be outside more than 15 minutes; if 33 to 39°, can be outside max of 45 minutes; and if 40° or over, then there were no restrictions (Petitioner's Exhibit 20).

At the direction of Respondent, Petitioner was examined again examined by Dr. Krause on June 22, 2015. In connection with his examination of Petitioner, Dr. Krause reviewed up-to-date medical records provided to him by Respondent. In his report, Dr. Krause opined that there was not a causal relationship between Petitioner's current symptoms which he related to the "abundant treatment" Petitioner had received despite minimal findings. He also opined Petitioner was at MMI, but disagreed with the restrictions stated in the FCE. He recommended Petitioner undergo another FCE at the Work Center for a more accurate assessment. He commented that: "Any restrictions the patient has are a consequence of his treatment and not a consequence of his injury." (Respondent's Exhibit 2; Deposition Exhibit 1).

Dr. Richards testified live when the first part of this case was tried on August 28, 2015. Dr. Richards' testimony was consistent with her medical records. In regard to the MRI and EMG/nerve conduction studies ordered by her in September, 2014, Dr. Richards stated that she ordered them so as not to delay Petitioner's care and treatment.

On cross-examination, Dr. Richards agreed that when Dr. Stevens saw Petitioner on September 24, 2014, that he opined that there were no changes and that Petitioner was still at MMI and could work within the restrictions stated in the FCE. Dr. Richards also agreed that Dr. Stevens reviewed the MRI, but not the EMG/nerve conduction studies.

Dr. Krause was deposed on January 9, 2015, in regard to his examinations of Petitioner of April 15, 2013, and July 28, 2014. Dr. Krause was again deposed on August 14, 2015, in regard to his examination of June 22, 2015. Dr. Krause's deposition testimony (both depositions) was received into evidence at trial.

In regard to his initial examination of April 15, 2013, Dr. Krause testified that while he would not perform surgery on Petitioner's right foot/ankle, he could not state that Dr. Stevens' surgical recommendation was unreasonable. When Dr. Krause saw Petitioner on July 28, 2014, he opined that all of the medical treatment Petitioner had received to date was reasonable and appropriate. Dr. Krause also testified that he performed an AMA impairment rating based upon the Sixth Edition of the AMA Guides and that based upon same, that Petitioner had a one percent (1%) whole person impairment (Respondent's Exhibit 1; pp 12-14).

Dr. Krause was cross-examined at length in regard to his AMA impairment rating. Dr. Krause stated that he had received formal training in performing AMA impairment ratings based on the Fourth Edition, but not on either the Fifth or Sixth Editions. Dr. Krause did not ask Petitioner how his pain complaints interfered with activities of daily living, he even though the Sixth Edition states that when an individual has "sensory deficits" that the evaluator should inquire as to how the deficit or pain interferes with performance of daily activities. Dr. Krause did not use a goniometer when measuring Petitioner's range of motion even though its use was recommended by the Sixth Edition. Dr. Krause did not perform a pin prick test to determine if Petitioner's complaints were consistent with the dermatomal pattern even though this test was recommended in the Sixth Edition (Respondent's Exhibit 1; pp 21-22, 26-31, 38-39).

When Dr. Krause was deposed on August 14, 2015, he testified that the treatment Petitioner had received was reasonable and necessary, with the exception of the MRI and EMG/nerve conduction studies performed in September, 2014. This was primarily because Petitioner already had multiple studies performed and Dr. Stevens opined that the nerve conduction studies did not add a whole lot to the case (as previously noted herein, Dr. Stevens actually reviewed the MRI and opined that it was of little or no significance). In regard to Petitioner's work restrictions, Dr. Krause testified that the only restrictions that Petitioner would have would be the ability to stand for 30 minutes when followed by sitting for 30 minutes (Respondent's Exhibit 2; pp 11-14).

At trial, Petitioner testified that he still had pain in the mid to lower portion of his back that goes into his legs. The symptoms are worsened by twisting or bending. Petitioner admitted to having a prior back problem in 2004 to 2006 that required some injections; however, he stated that he had fully recovered from those prior back issues and had no symptoms immediately prior to the accident of October 11, 2011.

Petitioner testified that he still has complaints of pain in his right foot/ankle and that he occasionally wears a brace on his ankle. He stated that his foot is numb virtually all of the time, that he has a burning sensation in his heel, and walking uphill or on uneven surfaces is extremely

difficult for him. Petitioner also testified that he attended a meeting at work in April, 2015, and reviewed a description of his various job duties with Respondent. This description was received into evidence at trial and Petitioner identified eight tasks which he could perform and 16 tasks which he could no longer perform because of his injuries (Petitioner's Exhibit 21). Based on this, it was determined that Petitioner could not perform cup changing, irrigation repair, planting/removing of trees or plants, tree trimming, weed eating, moving blocks, raking, bending and pushing of spreaders.

Dan Crumrein testified on behalf of the Respondent at trial. Crumrein is Petitioner's immediate supervisor and was present at the meeting in April, 2015, when Petitioner's job duties and restrictions were reviewed. He stated that he does observe Petitioner working approximately two hours every week and has not seen Petitioner experiencing any difficulty.

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 is causally related to the accident of October 11, 2011, with the exception of the compression fractures of T12 and L1.

In support of this conclusion the Arbitrator notes the following:

The fact that Petitioner sustained a serious injury to his right foot/ankle that required extensive medical treatment including surgery was not disputed.

There was no question that Petitioner had back symptoms that pre-existed the accident of October 11, 2011. Petitioner testified that his prior back symptoms had resolved prior to the accident and, following the accident, Petitioner was treated for low back pain. However, there was no medical evidence that clearly stated that the compression fractures of T12 and L1 were, in fact, related to the accident of October 11, 2011.

The Arbitrator noted that Respondent disputed whether Petitioner fell on some pipe that was on the ground at the time of the accident. However, resolution of that factual dispute is not critical to determine this issue.

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

The Arbitrator concludes that Petitioner's average weekly wage was $728.71.

In support of this conclusion the Arbitrator notes the following:

As noted herein, Petitioner and Respondent agreed that this dispute was based on whether or not Petitioner was required to work overtime. If it was found that Petitioner was required work overtime, the parties stipulated that the average weekly wage was $762.99 and, if Petitioner was not required to work overtime, that the average weekly wage was $728.71.

The only evidence tendered regarding the average weekly wage was Petitioner's wage statement. There was no testimony as to whether overtime was required or not.

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, with the exception of the MRI and EMG/nerve conduction studies performed on September 19, and September 17, 2014, respectively.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 19, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule, with the exception of the medical bills incurred in connection with the MRI and EMG/nerve conduction studies performed on September 19, and September 17, 2014, respectively.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator is not persuaded by Dr. Richards' opinion that the test were because of her belief that Dr. Stevens would want this information to properly evaluate and treat Petitioner. When Dr. Stevens saw Petitioner on September 24, 2014, he stated that the MRI findings were of no concern. It appears Dr. Stevens did not review the EMG/nerve conduction studies and may have been unaware that they were even performed.

The Arbitrator is uncertain as to why Dr. Richards' would have attempted to speculate as to what tests Dr. Stevens would want/need. It is more practical that Dr. Stevens, a treating physician, would choose to order tests himself.

The Arbitrator also notes the opinion of Dr. Krause that the studies were not necessary; however, this is not the primary reason for the Arbitrator's ruling.

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

Based upon the stipulations of the parties at trial, Petitioner is entitled to temporary total disability benefits of 55 3/7 weeks commencing October 11, 2011, through June 1, 2012, and July 8, 2013, through December 8, 2013.

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 45% loss of use of the right foot and five percent (5%) loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

In his medical report of July 28, 2014, Dr. Krause opined that Petitioner had an impairment rating of one percent (1%) whole person lower extremity impairment which he stated was a combined lower extremity rating of two and a whole person impairment of one. When he was deposed, Dr. Krause opined that Petitioner had a one percent (1%) whole person impairment.

The preceding makes it difficult for the Arbitrator to make a determination as to Dr. Krause's opinion as to an impairment rating.

On cross-examination, Dr. Krause admitted that he had not been trained in performing impairment ratings using the Sixth Edition of the AMA Guides. The Arbitrator acknowledges that there is not a requirement that a physician performing such impairment rating examinations be certified; however, on cross examination, Dr. Krause admitted that he did not follow several directives stated in the Sixth Edition of the AMA Guides when he performed his examination of Petitioner. Based on the preceding, the Arbitrator gives this factor no weight.

Petitioner worked as a foreman for Respondent and his primary responsibilities were maintaining golf courses owned and run by Respondent. While Petitioner has returned to work, there are a significant number of job duties ordinarily associated with Petitioner's position which he can no longer perform because of his injuries. The Arbitrator gives us factor significant weight.

Petitioner was 46 years of age at the time of the accident. Petitioner will have to live with the effects of the injuries he sustained for the remainder of his working and natural life. As previously noted, Petitioner is precluded from performing many of the job tasks generally associated with his job and he will have to deal with this until the time he retires. 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.

In regard to Petitioner's low back injury, Petitioner still has subjective complaints; however, the medical records indicated that he sustained a soft tissue low back strain/sprain. As aforestated, the Arbitrator found the vertebral fractures of T12 and L1 not to be related to the accident.

Petitioner sustained a serious right ankle injury which required extensive medical treatment including surgery. Based upon the FCE as well as the opinions of Dr. Stevens and Dr. Richards, Petitioner has significant work/activity restrictions because of the injury he sustained.

The Arbitrator is not persuaded by the opinion of Dr. Krause that Petitioner can work either with no restrictions or minimal restrictions. The Arbitrator gives this factor significant weight.

William R. Gallagher

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 Up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUCY PARKER, WIDOW OF
RICHARD PARKER, DECEASED,

Petitioner,

vs.

NO: 12 WC 37305
13 WC 11243

KNIGHT'S TRANSPORTATION,

Respondent,

16IWCC0800

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 expenses, and "evidentiary issues," 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 modifies the Order section to accurately reflect the law in effect at the time of Decedent's accident; namely, that benefits shall not exceed the greater of $500,000.00 or 25 years pursuant to Section 8(b)4.2 of the Act, and that the burial benefits have been increased to $8,000.00 under Section 7(f).

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay the sum of $485.80/week to the surviving spouse, Lucy Parker, on his or her own behalf and on behalf of the children: Rachel Parker, born June 7, 1991; Wyatt Parker, born February 5, 1993; commencing September 1, 2012, because the injury caused the employee's death, as provided in Section 7 of the Act. These payments shall continue as outlined below but shall not exceed the greater of $500,000.00 or 25 years pursuant to Section 8(b)4.2 of the Act.

If the surviving spouse dies before the maximum benefit level has been reached, and the

16IWCC0800

children herein named still survive, Respondent shall continue to pay benefits until the youngest child reaches 18 years of age; however, if such child is enrolled as a full-time student in an accredited educational institution, payments shall continue until the child reaches 25 years of age. If any child is physically or mentally incapacitated, payments shall continue for the duration of the incapacity. If no children named herein are alive upon the death of the surviving spouse, payments shall cease.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall make payments for not less than six years to any eligible child under 18 years of age.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $8,000.00 for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) 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 $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.

DEC 14 2016

DATED:

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

SE/
O: 11/16/16
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PARKER, LUCY WIDOW OF PARKER, RICHARD DECEASED
Employee/Petitioner

Case# **12WC037305**

13WC011243

KNIGHT'S TRANSPORTATION
Employer/Respondent

16IWCC0800

On 7/30/2015, 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 0.14% 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:

0347 MARSZALEK AND MARSZALEK
STEVEN A GLOBIS
221 N LASALLE ST SUITE 400
CHICAGO, IL 60601

2542 BRYCE DOWNEY & LENKOV
JUSTIN T NESTOR
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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
ARBITRATION DECISION
FATAL

LUCY PARKER, WIDOW OF RICHARD PARKER, Deceased
Employee/Petitioner
v.
KNIGHT'S TRANSPORTATION
Employer/Respondent

Case # **12** WC **37305**

Consolidated cases: **13 WC 11243**

16IWCC0800

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 **New Lenox**, on **7/9/15**. 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 Decedent's employment by Respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were Decedent's earnings?

H. ☐ What was Decedent's age at the time of the accident?

I. ☐ What was Decedent's marital status at the time of the accident?

J. ☐ Who was dependent on Decedent at the time of death?

K. ☐ Were the medical services that were provided to Decedent reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

L. ☐ What compensation for permanent disability, if any, is due?

M. ☐ Should penalties or fees be imposed upon Respondent?

N. ☐ Is Respondent due any credit?

O. ☐ Other _____

FINDINGS

On the date of accident, **9-1-12**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

Decedent's death *is* causally related to the accident.

In the year preceding the injury, Decedent earned **$32,369.53**; the average weekly wage was **$622.49**.

On the date of accident, Decedent was **54** years of age, *married* with **0** dependent children.

The Arbitrator finds that Decedent died on **9-1-12**, leaving **1** survivor(s), as provided in Section 7(a) of the Act.

ORDER

Fatal

Respondent shall pay death benefits, commencing **09-01-12**, of **$485.80**/week to the surviving spouse, ***Lucy Parker***, on his or her own behalf and on behalf of the children: ***Rachel Parker***, born ***06-07-1991***; ***Wyatt Parker***, born ***02-05-1993***, until ***$250,000 has been paid or 20 years,*** whichever is greater, have been paid, because the injury caused the employee's death, as provided in Section 7 of the Act.

If the surviving spouse dies before the maximum benefit level has been reached, and the children herein named still survive, Respondent shall continue to pay benefits until the youngest child reaches 18 years of age; however, if such child is enrolled as a full-time student in an accredited educational institution, payments shall continue until the child reaches 25 years of age. If any child is physically or mentally incapacitated, payments shall continue for the duration of the incapacity. If no children named herein are alive upon the death of the surviving spouse, payments shall cease.

If the surviving spouse remarries, and no children remain eligible, Respondent shall pay the surviving spouse a lump sum equal to two years of compensation benefits; all further rights of the surviving spouse shall be extinguished.

Respondent shall make payments for not less than six years to any eligible child under 18 years of age at the time of death.

Respondent shall pay ***$4,200*** for burial expenses to the surviving spouse or the person(s) incurring the burial expenses, as provided in Section 7(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) 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

7/29/15
Date

JUL 30 2015

16IWCC0800

STATEMENT OF FACTS

This is a claim for death benefits brought by Lucy Parker stemming from her deceased husband Richard Parker's alleged accident on September 1, 2012. There are two separate Applications for Adjustment of Claims that are duplicative filings and have been consolidated. There is no dispute regarding the facts of this case and the main issue is whether Richard Parker's death arose out of and in the course of his employment with the Respondent. .

The Petitioner, Lucy Parker, testified on her own behalf. She indicated that she married Richard Parker on April 19, 2001 in Reno, Nevada, and was still married to him and resided with him in Sparks, Nevada at the time of his death. Mr. Parker had two children by a previous marriage. Rachel Parker was born on June 7, 1991 and Wyatt Parker was born on February 5, 1993. Rachel Parker was a full time student at a local community college at the time of the arbitration hearing.

Mr. Parker began working at Knight Transportation in April of 2010. He was an over the road truck driver and driver trainer. He worked out of the Sparks, Nevada terminal. He would be away from home running trips three to six weeks long. He had a sleeper truck and would rest or sleep in the cab on his trips. Mrs. Parker typically spoke to him over his cell phone three times a day while he was away.

She last spoke to him on August 28, 2012. He complained of a headache. He stated he was on his way to drop a load in Ohio and then he was headed to Joliet, Illinois.

On September 1, 2012, she was informed that Mr. Parker was found dead in his truck in the Knight Transportation Terminal Yard in Joliet, Illinois. That day, Mrs. Parker received a phone call from Chuck Perry, the Human Resources Manager for Knight Transportation. He offered his condolences and also offered to make arrangements for Mr. Parker's remains. Mrs. Parker asked him "What happened?" Mr. Perry told her that the dispatcher received a call at 3:30 that, "I arrived and I do not feel good. I need to go to the hospital." She asked again, "What happened?" Mr. Perry stated, "He forgot about him."

On September 2, 2012, Mr. Parker spoke over the phone with Andrew Gomes, who was Mr. Parker's immediate supervisor at the Sparks, Nevada terminal. Mr. Gomes told her that the dispatcher in Joliet received a call from Mr. Parker who told him that he did not feel good.

Petitioner's Exhibit Number One and Respondent's Exhibit Number Five are movement display records showing the location of Mr. Parker's truck from August 10, 2012 through September 8, 2012. The display indicates that by 13:30:04 military time (1:30 p.m.) on August 29, 2012, Mr. Parker's truck was in Joliet, Illinois. There is no recorded movement after that time.

Petitioner's Exhibit Number Two is a description of the Respondent's terminal at 3301 Mound Road, Joliet, Illinois. The property includes a 24,800 square foot building on 13 acres with a secure yard for parking with access control for 28 tractor spaces, 117 trailer spaces and 134 car spaces. It is bordered by Interstate 80 on one side Mound Road on one side and mainly vacant property on the other two sides.

Petitioner's Exhibit Number Three is a Joliet Police Department incident report. It indicates that on September 1, 2012, Joliet Police were called to Knight Transportation at 3301 West Mound Road in Joliet for a male

16IWCC0800

subject found deceased in his cab in a parking lot. The officers indicate they were told that the last contact with Mr. Parker was on August 29, 2012 when he indicated he was not feeling well. There were no indications of foul play.

Petitioner's Exhibit Number Four and Respondent's Exhibit Number Four are copies of the Will County Coroner's Report authoned by Deputy Coroner, J. P. Rasmussen. It indicates that on September 1, 2012, the Coroner's office arrived at Knight Transportation at 3301 West Mound Road in Joliet. A deceased male subject was found in the cab of the truck on the floor between the two front seats. His face was partially in a blue five gallon garbage bucket. There were signs of post-mortem decomposition of the body. Both windows were open in the truck. The Deputy Coroner was told by representatives of Knight Transportation that Mr. Parker parked at the terminal lot on August 29, 2013 at 3:30 p.m. On September 1, 2012, Mr. Parker's truck was located by GPS and noted to be running. A worker from the Knight Transportation Division office walked out to the truck and found Mr. Parker deceased. Mr. Rasmussen spoke with Chuck Perry of Knight Transportation corporate headquarters who informed him that the truck was idling and that on August 29, 2012, Mr. Parker complained he did not feel well and he was going to the hospital. There were no indications that he actually went to any hospital. An autopsy was performed on September 3, 2012. The major organs including the heart were markedly decomposed. The coronary arteries could not be identified due to decomposition. The forensic pathologist, Valerie Arangelovich, M.D. found that he died of cardiac arrhythmia.

Petitioner's Exhibit Number Five and Respondent's Exhibit Number Five is the Death Certificate issued on October 10, 2012 by the Will County Medical Examiner's Office. It indicates Richard Avery Parker died on September 1, 2012. The listed cause of death is cardiac arrhythmia.

Mr. Kevin Lewis testified on behalf of Knight Transportation. He indicated that drivers have means of communication in their cabs including cell phones. The Knight Transportation property at 3301 West Mound Road in Joliet has a terminal with a lounge area for drivers and bays for refueling. The terminal yard is fenced in and the general public can only gain access to the terminal building, but must be cleared to enter the truck yard.

The respondent also offered the evidence deposition and April 30, 2014 report of Dr. Richard Carroll, who is Board Certified in Internal Medicine with a subspecialty in Cardiovascular Disease. He reviewed the autopsy report, death certificate, medical records from the Veteran's Administration, truck log information and application for adjustment of claim. He concluded that Mr. Parker died from a cardiac arrhythmia resulting in sudden cardiac death, most likely caused by an enlarged heart. The doctor testified that the fact that Mr. Parker was isolated and alone at the time he was stricken increased his risk of his arrhythmia becoming fatal. He indicated with a malignant arrhythmia the sooner they can be identified and intervention takes place is critical. (Respondent's Exhibit Number Six).

CONCLUSIONS OF LAW

1. With regard to the issue of whether the Richard Parker's death arose out of and in the course of his employment with Respondent, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this conclusion, the Arbitrator relies on the both the testimony and the evidence presented at trial. The evidence shows that Petitioner was a travelling employee, whose job as an over the road truck driver required him to leave Ohio on August 28, 2012 and travel to Respondent's terminal in Joliet, Illinois, where it appears he intended to spend the night in his sleeper cab. After establishing that a claimant is a traveling employee,

16IWCC0800

whether an injury to a traveling employee arises out of and in the course of his employment and is therefore compensable is to be determined by the reasonableness of the conduct in which the employee is engaged at the time of the injury. District 141 International Association of Machinists and Aerospace Workers vs. the Industrial Commission, 79 Ill 2d 544, 554 – 555, 404 N.E. 2d 787, 791 (1980). By all indications Mr. Parker's conduct was reasonable when he was stricken by the arrhythmia. He was permitted to stay and sleep in Respondent's terminal yard which was secured. The evidence further shows that Mr. Parker's death was due to a cardiac arrhythmia – which was caused by personal risk factors. However, a personal risk may be compensable where the conditions of the employment increase the risk of the injury. Illinois Institute of Technology Research Institute vs. the Industrial Commission, 314 Ill App 3d 149, 163; 731 N.E. 2nd 795 (2000). Here, Mr. Parker's risk of dying from an arrhythmia was increased by the employment circumstance of being alone and isolated in a truck cab in a 13 acre truck lot, over 1,800 miles from home. Had the arrhythmia occurred someplace else, where he would be in the company of others who could provide or seek medical attention, it could have enhanced his chance of surviving this condition and surviving the cardiac event. Being alone and isolated in a truck cab rather than being in the company of others makes his chances of surviving minimal to nonexistent. Mr. Parker's employment required him to travel far from home and frequently by himself. His employment increased his risk of death because by virtue of his employment he was alone in a truck cab when he was stricken where no one could observe that he was stricken and call for aid.

The Arbitrator further notes that the evidence indicated Mr. Parker contacted Respondent and informed their dispatcher that he was not feeling well and needed to go to the hospital. This call was made presumably just before his death, while he sat alone in his truck in Respondent's enclosed 13 acre lot. When trying to explain what happened after the dispatcher received Mr. Parker's call for help, Respondent's human resources director Chuck Perry explained that the dispatcher simply forgot about Mr. Parker. The Arbitrator finds that the Respondent's action - through its dispatcher - of ignoring or failing to respond to Mr. Parker's call, more than likely increased his risk of death.

Given these facts, the Arbitrator concludes that Mr. Parker's death arose out of and in the course of his employment with the Respondent.

2. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met her burden of proof. In support of this finding, the Arbitrator again relies on the testimony and the evidence presented at trial, particularly the testimony of Dr. Richard Carroll. Dr. Carroll testified that with a malignant arrhythmia even a few minutes can be critical in order to identify and intervene when a cardiac arrhythmia occurs. Here, Mr. Parker had no chance of survival since he was alone in his truck when he was stricken and there was no one to aid him. Furthermore, on August 29, 2012, Mr. Parker notified the dispatcher he was not feeling well and wanted to go to the hospital. The dispatcher took no steps to aid Mr. Parker or check on him. In fact, Mrs. Parker was told that the dispatcher forgot about him. This neglect more than likely increased Mr. Parker's risk of death from the cardiac arrhythmia. It is likely Mr. Parker did not seek further assistance on his own, because he had reasonable expectations that the dispatcher would contact medical aid . Consequently, the Arbitrator finds that a causal connection exists between Mr. Parker's death and his employment duties for the Respondent.

3. Based on the Arbitrator's findings above, the Petitioner is awarded death benefits as set forth in the Order section of this decision.

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

16IWCC0825

Oscar F DeLeon,
Petitioner,
vs.

NO: 13 WC 2365

Kinnard Realty & Management LLC and the Illinois State Treasurer, as Ex Officio Custodian of the Illinois 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 nature and extent ofPetitioner 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 March 15, 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.

DEC 21 2016

DATED:
KWL/vf
O-12/19/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0825

DeLEON, OSCAR F
Employee/Petitioner

Case# **13WC002365**

LILLIE KINNARD-CHANDLER C/O
Employer/Respondent

On 3/15/2016, 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 0.51% 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:

2811 CIARDELLI CUMMINGS & CAMPAGNA
MARC R CAMPAGNA
70 E LAKE ST SUITE 1000
CHICAGO, IL 60601

2337 INMAN & FITZGIBBONS LTD
TERRENCE DONOHUE
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

5462 ASSISTANT ATTORNEY GENERAL
MEGGIE TIMLIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

O. De Leon v. Kinnard, et al, 13 WC 02365

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 16IWCC0825

Oscar F. DeLeon
Employee/Petitioner
v.
Kinnard Realty & Management LLC and the Illinois State Treasurer, as Ex Officio Custodian of the Illinois Injured Workers' Benefit Fund
Employer/Respondent

Case # 13 WC 02365

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 **December 14, 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 **Insurance coverage- Was Respondent- Employer uninsured on the D/A and whether Petitioner is entitled to benefits from the IWBF under § 4(d) of the Act.**

FINDINGS

On **December 14, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employer-employee 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 Respondent.

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

In the year preceding the injury, Petitioner earned **$18,008.44**; the average weekly wage was **$450.21**.

On the date of accident, Petitioner was **33** years of age, ***married*** 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 **$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 of $154,042.59** or the fee schedule amount, whichever is less, to the following medical providers: City of Chicago EMS ($816.00), University of Chicago Medical Center ($125,128.59), University of Chicago Physicians Group ($21,108.00), and Dr. Robert Breitweiser, D.C. ($6,990.00), as provided in **Sections 8(a) and 8.2 of the Act.**

Respondent shall pay Petitioner permanent partial disability benefits of **$270.13/week** for **75.15 weeks**, because the injuries sustained caused the **45%** loss of the **right foot**, as provided in **Section 8(e) of the Act.**

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

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

March 16, 2016
Date

MAR 15 2016

INTRODUCTION

An Application for Adjustment of Claim was filed with Petitioner, Oscar F. DeLeon, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, Kinnard Realty and Management, LLC. This action sought further relief from the Illinois Injured Workers' Benefit Fund because Respondent-Employer allegedly did not maintain workers' compensation insurance. A hearing was held before Arbitrator Jeffrey Huebsch on December 14, 2015 in Chicago, Illinois. Respondent-Employer was represented by counsel and fully participated in the arbitration proceeding. The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio* custodian of the Injured Workers' Benefit Fund, and also participated in the arbitration proceeding.

Because the IWBF was a party, all issues were in dispute.

At trial, Petitioner amended the Application For Adjustment of Claim to dismiss named Respondent "Lillie Kinnard-Chandler, individually and as managing member of Kinard Realty & Management LLC" from the case. (PX 1) Petitioner testified via an interpreter.

FINDINGS OF FACT

Petitioner testified that he was married with two dependent children on the date of the accident. Medical records and the Application show Petitioner's date of birth to be December 15, 1978. (PX 1& 8). Petitioner testified that on December 14, 2012, he was employed as a maintenance worker at Kinnard Realty and

Management LLC. As such, Petitioner was responsible for performing maintenance tasks, such as clearing snow and fixing sinks, in nine buildings and six to seven homes. His position required the use of several tools, including lawnmowers, snow blowers and machines to unplug drains. Petitioner testified that these items were owned and provided by Kinnard Realty and Management LLC; however, he would also use some of his own small tools, such as screwdrivers, pliers and drills. He also used materials, such as drywall and nails, to perform repairs. Petitioner testified that all materials were purchased by Kinnard Realty and Management LLC.

Petitioner testified that at the time of the accident, he was paid hourly by Kinnard Realty and Management LLC at the rate of $11.36 per hour. He testified that he worked forty hours per week and received one week of vacation each year. Taxes were not withheld from Petitioner's pay and W-2s were not issued.

Petitioner testified that on December 14, 2012, Shelia Love, the secretary of Kinnard Realty and Management LLC, instructed him to remove a stove from an unoccupied apartment and transport it to the company's storage unit. With the help of a coworker, Petitioner attempted to carry the stove down an outside wooden staircase from the second floor apartment to his truck. Petitioner explained that he walked down the stairs backwards carrying the bottom of the stove while his coworker walked forward carrying the top of the stove. Petitioner testified that after a few steps, his coworker let go of the stove, causing it to fall on Petitioner's right ankle. As he fell from the force of the stove, Petitioner also hit his head on the stair's wooden spindles.

Petitioner was transported by ambulance to University of Chicago Medicine with complaints of severe right ankle and leg pain. (PX 7). X-rays revealed distal tibial and fibula fractures to the right ankle with no apparent dislocation. (PX 8). Petitioner began sedation monitoring and underwent a joint reduction procedure. CTs of the head and cervical spine were also obtained, revealing no acute intracranial abnormality and no evidence of cervical spine fracture or subluxation.

Petitioner was kept in the hospital and underwent right ankle surgery on December 15, 2012. The procedure involved the application of a right ankle spanning external fixator. Petitioner's postoperative diagnosis was a right ankle pilon fracture with distal tibia and fibular fractures extending intra-articularly. A

CT of the right lower extremity revealed the external fixation holding the distal tibial intra-articular comminuted fracture within gross alignment. (PX 8)

Petitioner testified that the then-owner of Kinnard Realty and Management LLC, Lillie Kinnard-Chandler, visited him at the hospital on or around the date of his surgery. Petitioner testified that he notified his employer of the accident immediately after it happened. The secretary for Kinnard Realty and Management LLC called Petitioner once or twice a week for approximately two months to check on Petitioner's recovery.

Petitioner remained in the hospital following his surgery until December 19, 2012. Prior to his discharge, Petitioner attended two inpatient occupational therapy sessions and one inpatient physical therapy session to aid in his functional re-training. At discharge, Petitioner was independent with ambulation with crutches. Petitioner was prescribed pain medication and instructed to remain non-weight-bearing on his right leg. The treating doctor informed Petitioner that he would require a second surgery for removal of the external fixator once his soft tissue swelling improved. (PX 8)

Petitioner returned to University of Chicago Medicine for a preoperative evaluation on December 27, 2012. Repeat X-rays showed the restoration of length of the ankle fracture in the external fixation device. *Id.* Surgery to undergo the removal of the hardware and also perform an open reduction and internal fixation of the right ankle pilon fracture was scheduled for the following day. Petitioner had developed a wound at the fracture site, so it was determined that fixation of the fibular fracture would not take place. The surgery performed on December 28, 2012 included: (1) open treatment of the pilon fracture of the tibia only; (2) removal of the external fixation device of the right leg under general anesthesia; and (3) irrigation and debridement of a full-thickness fracture blister on the right leg. The preoperative and postoperative diagnosis remained a right ankle pilon fracture. (PX 8)

After Petitioner's second surgery, he remained in the hospital until December 30, 2012. Prior to his discharge, Petitioner attended one inpatient occupational therapy session and two inpatient physical therapy sessions for retraining of activities of daily living. Upon discharge, Petitioner demonstrated improved

independence with crutches. Petitioner was given prescriptions for pain medication and told to remain non-weight-bearing on his right leg. (PX 8)

Petitioner had continued follow-up care at University of Chicago Medicine and received PT and OT at University of Chigago Hospital through March 6, 2013. Due to Petitioner's self-pay status, he was discharged with a home exercise program. (PX 8)

On March 8, 2013, Petitioner began seeing chiropractor Dr. Robert Breitweiser for his right ankle. Petitioner returned to Dr. Breitweiser for multiple sessions per week until May 9, 2013. Dr. Breitweiser noted that Petitioner continued to progress with decreased symptoms throughout his visits. At his March 25, 2013 visit, Dr. Breitweiser noted that Petitioner no longer required crutches to ambulate. At Petitioner's final visit on May 9, 2013, Dr. Breitweiser found Petitioner had reached maximum chiropractic improvement with improved flexion and extension. Petitioner was advised to continue his home exercise program to help improve ankle range of motion. According to Dr. Breitweiser's notes, Petitioner returned to work on May 8, 2013 after being taken off work from March 8, 2013 to May 7, 2013. (PX 10)

Final X-rays of Petitioner's right ankle were obtained on December 21, 2013, revealing orthopedic fixation of healing ankle fractures without evidence of complication. (Px 8). At the time of arbitration, Petitioner testified that he had not actively treated for his right ankle injury since his final chiropractic treatment on May 9, 2013.

Petitioner was paid full salary by Respondent during the time that he was off work.

At the time of arbitration, Petitioner testified that he returned to his regular maintenance position on May 8, 2013 and still works full time for Kinnard Realty and Management LLC. Petitioner testified that he experiences right ankle pain after standing for extended periods, going up stairs and using ladders. Petitioner further explained that his right foot and ankle swell if he stands or walks for extended periods. It is common for the swelling to occur after Petitioner works. Petitioner takes ibuprofen and aspirin for the pain and swelling. Petitioner testified that he is able to climb stairs or carry heavy objections when his job requires it; however, he

notes some difficulty with it. Petitioner further noted that he has not been able to go jogging or play soccer since his accident. Initial PT notes at U of C Hospital confirm that Petitioner was a jogger in the past.

Respondent-Employer presented the testimony of Gene Chandler. Mr. Chandler testified that he was married to Lillie Kinnard Chandler, the owner of Kinnard Realty and Management LLC, at the time of Petitioner's accident. Mr. Chandler testified that Mrs. Kinnard-Chandler passed away in May 2013 and he took over the management of Kinnard Realty and Management LLC after her death. Mr. Chandler testified that he had no involvement with the business prior to Mrs. Kinnard-Chandler's death; however, he recalled Mrs. Kinnard-Chandler telling him that she did not have workers' compensation insurance around the date of Petitioner's accident. Apparently, Mrs.Kinnard- Chandler had neglected to renew her WC insurance because she was distracted by her illness. Mr. Chandler testified that Petitioner was paid his full salary for all his missed work.

Mr. Chandler further testified that Mrs. Kinnard-Chandler was aware of Petitioner's accident as of December 14, 2012. He testified that he accompanied Mrs. Kinnard-Chandler when she visited Petitioner in the hospital within days of the accident.

Mr. Chandler stated that on December 14, 2012, Kinnard Realty and Management LLC employed one officer and six or seven maintenance workers. Mr. Chandler explained that the business is still operational today with four employees who perform janitorial work, snow removal and maintenance calls.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Petitioner's testimony is found to be credible.

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Disease Act?

Petitioner was employed as a maintenance worker at Kinnard Realty and Management LLC on the date of his accident. Petitioner testified that his position required him to perform various maintenance tasks, including clearing snow and fixing sinks. He was required to use several power tools, including lawnmowers, snow blowers, drills and machines to unplug drains. The Arbitrator finds such maintenance tasks sufficient for Kinnard Realty and Management LLC to be subject to the automatic coverage provision of Section 3 of the Act.

B. Was there an employee-employer relationship?

The existence of an employment relationship is a prerequisite for any award of benefits under the Act. There is no specific litmus test for determining whether an employer-employee relationship exists. Instead, there are multiple factors to consider when assessing the nature of the relationship between the parties. *Ware v. Indus. Comm'n.*, 318 Ill. App. 3d 1117, 1122 (1st Dist. 2000). Among these are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with materials and equipment; and (7) whether the employer's general business encompasses the person's work. *See Roberson v. Indus. Comm'n.*, 866 NE.2d 191, 200 (Ill. 2007). Other relevant factors include the label the parties place on their relationship, and whether the parties' relationship was "long, continuous, and exclusive." *Ware*, 318 Ill.App. at 1122, 1126. No single factor is determinative and such determination of the employer-employee relationship rests on the totality of the circumstances. *Roberson*, 866 NE.2d at 200.

In the present case, both Petitioner and Mr. Chandler testified that Petitioner was employed as a maintenance worker for Kinnard Realty and Management LLC on the date of his accident. Petitioner testified that his daily schedule was dictated by the secretary of Kinnard Realty and Management LLC. Petitioner further testified that if he refused to perform a task, he would likely be fired. Kinnard Realty and Management LLC also provided the majority of tools Petitioner used as well as purchased the material required for jobs.

After considering the totality of circumstances, the Arbitrator finds that an employer-employee relationship did exist between Petitioner and Respondent-Employer, Kinnard Realty & Management, LLC.

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

Petitioner testified that on December 14, 2012, he was instructed by the secretary of Kinnard Realty and Management LLC to remove a stove from a second floor apartment. Petitioner testified that, as he and his coworker carried the stove down the stairs, the coworker let go of his hold on the stove, causing it to fall on Petitioner's ankle. Petitioner was immediately transported by ambulance to University of Chicago Medicine and diagnosed with right tibial and fibula fractures.

Thus, the Arbitrator finds that Petitioner sustained an accident on December 14, 2012 that arose out of and in the course of his employment with Respondent Kinnard Realty and Management LLC.

D. What was the date of the accident?

Petitioner testified that the accident occurred on December 14, 2012. Petitioner's testimony is supported by medical records and there is no evidence to the contrary. Thus, the Arbitrator finds the accident occurred on December 14, 2012.

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

Both Petitioner and Mr. Chandler testified that Mrs. Kinnard-Chandler was immediately notified of the accident. Mrs. Kinnard-Chandler also visited Petitioner in the hospital on the day following the accident. Therefore, the Arbitrator finds that Petitioner provided timely notice of the accident.

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

Petitioner's current condition of ill being (status post right ankle pylon fracture, with surgical repair times 2, retained hardware and limitations and disability as set forth above) is causally related to the injury, based upon the unrebutted testimony of Petitioner and the medical records.

G. What were Petitioner's earnings?

Petitioner testified that he earned $11.36 per hour and worked forty hours a week for Kinnard Realty and Management LLC. The Arbitrator finds Petitioner's Average Weekly Wage to be $450.21.

H. What was Petitioner's age at the time of the accident?

The Arbitrator finds that Petitioner was 33 years old on the date of the accident.

I. What was Petitioner's marital status at the time of the accident?

Petitioner testified that he was married with two dependents on December 14, 2012. Thus, the Arbitrator finds Petitioner was married with two dependents on December 14, 2012.

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 that the medical services that were provided to Petitioner were reasonable and necessary to cure or relieve the effects of the injury and are causally related to the injury.

Petitioner submitted bills from City of Chicago EMS ($816.00); University of Chicago Medical Center ($125,128.59); University of Chicago Physician's Group ($21,108.00) and Dr. Robert Bretweiser, DC ($6,990.00). The same are awarded, pursuant to §§8(a) and 8.2 of the Act.

It is noted that Petitioner claimed that the bills from University of Chicago Medical Center were $125,678.59. The award is for $125,128.59 because there appears to be a duplicate bill in the amount of $550.00 (DOS: 2/5/2013, Steven Jackson, PT).

K. What temporary benefits are in dispute?

No temporary benefits are in dispute, as Petitioner was paid his full salary by Respondent for all his lost time.

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

For accidents occurring after September 1, 2011, Section 8.1(b) of the Act provides that permanent partial disability shall be established using five enumerated criteria, with no single factor being the sole determinant of disability. Per 820 ILCS 305/8.1b(b), the criteria to be considered includes: (i) the reported level of impairment pursuant to (a), a disability impairment report by a physician complying with the current AMA "Guides to Evaluation of Permanent Impairment"; (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.

Regarding criterion (i), no AMA Impairment Rating was rendered. Therefore, this factor is given no weight in determining PPD.

Regarding criterion (ii), Petitioner is a maintenance worker who was able to return to his regular duties and position after his accident. At the time of arbitration, Petitioner still works for Kinnard Realty and Management LLC full time as a maintenance worker. He does have some difficulties standing and climbing ladders, which would be expected, given the significant injury to his right ankle. This factor is given some weight in determining PPD.

Regarding criterion (iii), Petitioner was 33 years old at the time of the accident and still has several more years in the workforce. He will live with the effects of the injury for a long time and it will limit his activities. Because of the nature of a pylon fracture and the retained hardware, the likelihood of future surgery is high. This factor is given much weight in determining PPD.

Regarding criterion (iv), Petitioner was able to return to his regular work at the same pay rate. Thus, Petitioner did not show a negative effect on Petitioner's current earning capacity. Because of the likelihood of future surgery, there may be a negative effect on Petitioner's future earning capacity. This factor is given some weight in determining PPD.

Regarding criterion (v), Petitioner continues to experience some right ankle pain and swelling, especially after standing or walking for extended periods. Petitioner is still able to fulfill his maintenance job duties, including climbing stairs and lifting heavy objections. However, he often experiences right ankle swelling after work. He takes only over-the-counter pain medication for pain and swelling and has not treated for his right ankle since May of 2013.

Based on consideration of all factors, the Arbitrator finds Petitioner sustained the 45% loss of use of his right foot pursuant to Section 8(e) of the Act.

O. Other: Insurance coverage-was Respondent-Employer uninsured on the D/A and whether Petitioner is entitled to benefits under §4(d) of the Act.

Petitioner provided certification from the National Council on Compensation Insurance showing that Kinnard Realty and Management LLC did not have workers' compensation insurance on December 14, 2012. (PX 3&4). Gene Chandler also testified that Kinnard Realty and Management LLC did not maintain an active workers' compensation insurance policy on December 14, 2012. Therefore, the Arbitrator finds that Respondent-Employer, Kinnard Realty and Management LLC did not have workers' compensation insurance on the date of Petitioner's accident.

To the extent that Kinnard Realty and Management LLC fails to pay the award herein, liability should attach to the IWBF, in accordance with §4(d) of 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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify (AWW/benefit rates)	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Donaldson,

Petitioner,

vs.

NO: 13 WC 03584

Central Grocers, Inc. d/b/a Centralia Foods,

16IWCC0780

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 average weekly wage/benefit rates (legal error), temporary total disability (rate), permanent partial 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 FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 41 year old employee of Respondent, who described his job as a delivery driver. Petitioner drives a truck for a living. He had been with Respondent for about 21 years in the same position. Petitioner's job was delivering cargo product from the warehouse to retail support stores in the Midwest (Illinois, Indiana, and some Ohio, Iowa, and Wisconsin). The terminal is located in Joliet, Illinois. Petitioner started his day there with a fully loaded tractor-trailer, and depending on assignment, he made his deliveries on the days. Petitioner testified that he was responsible for the load, to secure, deliver, count pieces, and make sure he delivered what needed to be delivered at which stores. He might have had a couple stores stops on each trailer and he had to be sure he was getting the correct products to the correct stores. He indicated there are different options at the receiving stores for delivery. He testified that some stores had dock plates and he had to

back up, flip the plate and unload the semi using a manual or electric jack. Some locations had forklifts (electric or gas). He indicated some places had an electric plate outside that rose to meet the truck bed. He would have to pull out the pallets, bring them down, and roll them into the back doors. Petitioner testified that other stores you could just pull up and there was the door and he could put product on the conveyors, rollers, one piece at a time from the truck to the facility, touching every piece that came off of the truck. Petitioner testified that most of the time the trailer was loaded with product on pallets that are stacked and shrink-wrapped, so the load does not shift. He indicated some loads, created blocks that were tougher to unload as they like melted/compressed together with traveling. Petitioner was not involved with the loading of the truck for his deliveries. Petitioner testified that prior to the day of his injury he had been working full unrestricted duty prior and prior to the accident he had no difficulties with his right arm nor had he been under any prior medical treatment regarding his right arm. Petitioner is right hand dominant. On the day of accident he had been on the afternoon shift; he did not recall if it started then at 11:00am or 1:00pm. Petitioner testified in 2010-2011 the hours varied but most of the time he always worked over ten hours per day, almost mandatory. Petitioner stated that he never saw early days. Petitioner stated he was paid by the hour and they wanted to get the loads there as quickly as possible so the customer was not complaining to the warehouse, so he was kind of rushing. Petitioner testified that he usually ran two loads per day with two to three stops for each truckload, to the individual stores. He again noted most days/shifts were a minimum of ten hours, so it was overtime, which was mandatory. Petitioner testified that he regularly worked overtime for Respondent. Petitioner had previously viewed the wage statement (at time of prior hearing) and he agreed the wage statement showed quite a bit of overtime for the year preceding the accident. Petitioner did not recall exactly, but he believed his hourly wage at that time was $24.78 (stipulated to hourly). Petitioner stated they do get a raise every year and they negotiated a new contract every five years, so he did not recall the exact rate. Petitioner viewed RX 1, wage statement, and agreed it reflected his earning for the year prior to the accident. Petitioner typically would report to the terminal at the beginning and end of his shift. Petitioner testified in the year before his accident he had missed five or more days from work. If a week indicated he worked 8 hours for a particular week he probably had worked a day. Petitioner testified, per the statement indicating he worked 24 hours, that that might have been over two days. Petitioner indicated the statement accurately reflected the hours and earnings and overtime for the prior year.

- On the date of accident, January 30, 2011 (he believed it was a Sunday), Petitioner testified he had started that morning at the terminal. He believed it was his second load of the day at Tony's Finer Foods (North Riverside) when he was unloading that he was injured. It was his last load on that truck. Petitioner testified that he was pulling off pallets at that store. Petitioner testified he backed up the semi and brought pallets to the back of the truck with the manual pallet jacks they had there. The workers there would come with the forklift and the forklift would drop the load to ground level and go to the ramp and bring the product into the store. As it was the second stop, the load was in the nose/front of the trailer and he had to pull the freight from the front to the back of the trailer so the forklift could pick it up and off the trailer. Petitioner was using a regular manual pallet jack (hydraulic to raise pallet 1-2 inches.) to get the pallets apart; it was not

an electric hand-jack. He had to manually pull the pallets to the tailgate of the trailer. Petitioner noted the load for that store was pin-wheeled, sideways, one straight and one sideways to make a block (like chimney blocked together). Petitioner testified that configuration made it very difficult to get apart as the load settles and gets fatter and with the shrink-wrap, it heats up. He indicated the wrap is supposed to hold the pallet load together, but it also rubs against the other pallets and almost creates like a suction between them. Petitioner stated you are pulling a pallet from the wall and the other pallet and he had to shimmy it back and forth, almost like banging it against the pallet to make it skinnier so you can pull it out of the hole. Petitioner testified the product is like fused with the plastic wrap. He testified you have to turn it 90 degrees and pull the pallet and then push the pallet to make it skinnier and going back and forth and that was when he felt like a tear in his right shoulder. His hands were out in front as he moved the pallet back and forth. He indicated the handle of the jack was like a T-bar with hand guards and then the pole down to the jack with the lever to steer and pull/push with the upright. He indicated it is supposed to be more ergonomic and better fit than pulling straight out. Petitioner testified when he did it then he felt like a burning in his shoulder and he knew something was not right. Petitioner testified then he actually had a few of the guys there come up on the truck and help him as there was no way he was getting it off. He noted there were two guys on the ground to make sure the pallets did not fall over as they were going up the ramp. He had the guys help with the last three pallets. Petitioner testified he had one guy manually handling it and Petitioner was pushing the pallet, as they were really heavy. Petitioner testified they were able to unload the remaining pallets at Tony's and after Petitioner did that he returned to the terminal in Joliet and reported the accident to his supervisor, Mile Belmont. Petitioner testified Mike advised Petitioner to go to the St. Joseph emergency room, as it was a Sunday. Petitioner drove himself there. At the ER Petitioner had complained about his right shoulder and he was examined and x-rayed and given a sling and pain medication and light duty restrictions. Petitioner testified that Respondent does not have light duty work and they were not able to accommodate the restrictions. Petitioner was not admitted to the hospital from the ER. Petitioner had a follow up at Respondent's clinic (Physicians Immediate Care-January 31, 2011) the next day as that was protocol when someone at Respondent is injured; they were not open on Sunday. The doctor at Physicians Care continued the light restrictions, continued medications and they administered prednisone and scheduled a follow up. Petitioner returned there on February 4, 2011 and the restrictions were continued and they recommended an MRI of the shoulder. Petitioner returned to the clinic February 15, 2011, after the MRI, and they went over the results. The doctor there recommended Petitioner see a specialist and referred Petitioner to Dr. Komanduri. Petitioner testified to first seeing Dr. Komanduri on February 25, 2011. Dr. Komanduri recommended surgery. Petitioner did not return to Respondent's clinic at that point as he was seeing the specialist. Petitioner had the surgery with Dr. Komanduri March 18, 2011 as an outpatient and he recalled waking in a lot of pain; that he could not explain how bad it was. Petitioner stated the pain was real bad and he could not lie down or sit and could hardly breathe. Petitioner stated that he could not get comfortable due to the pain.

- Petitioner testified that he was in excruciating pain on the ride from Naperville to Roselle

after the surgery. He was given pain medication to take no matter what and he stated he could not take it fast enough to keep up with the pain. The surgery was on Friday and he had a follow up on Monday and he just sat counting the hours to see the doctor, he was in so much pain, could not lie down, could not get comfortable. Petitioner stated that he had the first follow up three days after surgery. Petitioner testified that he was still experiencing pain in his shoulder and the doctor increased the Norco and Percocet and continued Petitioner off work. Over the next couple days the pain was a little better. Petitioner stated that he called the doctor after about three days, to tell him that he was still in extreme pain and he saw the doctor again March 24, 2011. It was noted that Petitioner or his wife called the doctor about the pain and they were instructed to go to the emergency room (ER). Petitioner stated that he went to Alexian Brothers March 24 and they did further work up and testing. Petitioner stated the pain then was so bad his arm was hot, inflamed and red, and he knew something was not right; that was why he called Dr. Komanduri. Petitioner testified the work up at Alexian Brothers found Petitioner had developed an infection. As he was under the care of Dr. Komanduri, in Bolingbrook, the doctors at Alexian would not look at Petitioner so they transferred Petitioner to Adventist Bolingbrook Hospital the same day he was at the ER. Petitioner was hospitalized for five days at Adventist Bolingbrook Hospital. Petitioner was seen by an infectious disease doctor and had follow up with her for months after. Petitioner stated that he was administered IV antibiotics while in the hospital and was discharged March 28, 2011. Petitioner received IV antibiotics at home until about April 25, 2011. Petitioner indicated during the IV home care he had a port and every 8 hours Michelle (wife) had to take a vial of antibiotics and clean the port and push in the medication slowly. Petitioner stated that his wife had to administer the drugs three times per day for about 6 weeks. Petitioner testified a nurse came on a regular basis, once every 5 days to clean the port and check everything and make sure that nothing was getting infected. Petitioner indicated the end of March everything broke loose as he had a leakage, eruption in his shoulder. Petitioner stated he was finally able to lay back and get comfortable after he got the stitches out and he was able to take a shower as long as he was guarded and had it covered. Petitioner stated after the shower he laid down and was watching TV and he looked down and his hand was covered in blood, the bed was full of blood, draining from his shoulder. Petitioner stated his wife thought he had stuck himself with a knife as the sheets were covered in blood and pus oozing out of his shoulder. Petitioner stated he got up and went to the bathroom as it was running like a faucet down his arm, and he just hung over the toilet and let it drain. Petitioner stated his wife was freaking out and called Dr. Komanduri. Dr. Komanduri said to meet at the ER of Adventist Bolingbrook Hospital; he did not recall if his wife of her mother drove. Petitioner was admitted that day and the doctor did another surgery for irrigation and debridement; he believed he was in the hospital for about 4 days or so; records only indicated a day (it has been about 5 years since). He was released March 30. After that surgery and release he was prescribed therapy, which he received at ATI from April 4 through June 16, 2011, 30 sessions. Petitioner continued follow-ups with the doctor during the therapy. Petitioner stated that he also followed up with the infectious disease doctor and he continued getting IV antibiotics. Petitioner testified that it was not good with the therapy; it was just stretching and range of motion. He continued with the doctor regarding the infection. Petitioner stated that he had to cover the site while he showered, it was draining and he had another

blow out again in his shoulder. During April, May, and June, Dr. Komanduri focused on the healing of the wound. Petitioner stated after the stitches were removed there was still a little hole left and the doctor said it would close. Petitioner stated that he went home and it started leaking again really bad and the doctor had Petitioner come to the office. Petitioner stated the doctor used gauze and rubbed the wound and it opened up to 3 inches wide and the doctor packed the wound. Petitioner indicated the wound was open in the shoulder from April to June 2011. At the end of June the doctor recommended work conditioning at ATI and he had that June 20 through August 21, 2011, 34 sessions. Petitioner indicated that he had good days and bad days during the treatment. At the end of work conditioning the doctor recommended a functional capacity evaluation that was done at ATI on August 17, 2011. Petitioner agreed the FCE indicated he had performed at medium level. Petitioner returned to the doctor August 19 and they discussed return to work. Petitioner stated he just wanted to return to work as he was not making money sitting at home. Petitioner stated he was only receiving so much on WC and he was missing out on the OT, and it was getting to the busy season and he did not want to depend on the small TTD check.

- Petitioner testified that Respondent could not accommodate medium level work and that was why he asked the doctor in August about a release. Petitioner indicated (per the records) that the doctor released him to work on a trial basis to see what he was able to do, and Petitioner talked to Tom Pierro (safety) at Respondent about returning to work. Petitioner testified that Tom helped Petitioner transition back to work August 2011 with Dr. Komanduri's release. Petitioner indicated the goal was to just get driving with lighter loads and get the shoulder back again. Petitioner stated they were manual transmission trucks that they shifted many times through the day. Petitioner agreed he was off work January 31 through August 23, 2011 and he had received TTD benefits during that time.

- Petitioner testified when he returned to work August 2011 he was as good as possible for what happened and he tried to put out of his mind how bad it felt. Petitioner stated that everyone who works at Respondent works with pain there is always something aching or sore, so you just try to get through it. He indicated his work level was probably at medium demand. He stated they were supposed to be able to lift 50 pounds. In August and September Petitioner stated his shoulder was popping and clicking and when he went palm down he felt snapping sensation. Petitioner stated he was driving mainly and not unloading as much at the stores, but there was some unloading involved. Petitioner testified (per the records) that in September, a couple weeks after he returned to work, he returned to see Dr. Komanduri, and complained of pain Petitioner stated that Dr. Komanduri gave him an injection to the shoulder. Petitioner indicated the injection gave him 1-2 days of relief, but it was not a cure-all. Petitioner again saw the doctor October 5, 2011 and he received another injection and the doctor recommended another MRI to see what was going on in the shoulder. Petitioner had the MRI later that month and returned to the doctor October 24, 2011. Petitioner testified that the doctor said that the labrum needed to be repaired, it was leaking; the doctor recommended arthroscopic surgery and it was done November 22, 2011 at St. Joseph Hospital. The doctor restricted Petitioner's activities after that surgery. Petitioner stated that upon follow-up the doctor continued him off work and continued pain medication and recommended therapy to start in

December, again at ATI. Petitioner had 52 sessions of therapy for the shoulder between December 12, 2011 and April 27, 2012, and he had ongoing follow-ups with the doctor during that time. Petitioner testified he continued with the ongoing soreness and instability in the shoulder. Petitioner was transitioned to work conditioning, work readiness at ATI, which he had April 30 through May 13, 2012. Petitioner saw the doctor at the completion of that and Petitioner stated then he was having issues with raising his arm over his head and pulling down and lifting up and there was still clicking and popping. Petitioner stated the pain was worse when he would work it and sore any other time. With the conditioning he stated it was like he never rested until the weekend. He would feel better by Monday. He stated there would be days he told them he could not work the shoulder and needed 1-2 days off. Petitioner indicated after the conditioning Dr. Komanduri recommended an arthrogram of the shoulder, which was done June 2012 at St. Joseph and he saw the doctor for follow-up after. Petitioner indicated at that time Dr. Komanduri indicated he was done, like everything that could be fixed was done, but Petitioner stated Dr. Komanduri indicated that he thought it needed a reattachment of the muscle. Dr. Komanduri recommended a 2nd opinion with a doctor at Gottlieb or Rush so Petitioner picked a doctor from Rush and he saw Dr. Romeo July 17, 2012. Petitioner brought the arthrogram results. Petitioner testified Dr. Romeo said Petitioner needed surgery and Petitioner had another right shoulder surgery October 4, 2012 by Dr. Romeo, at Rush. Petitioner testified Dr. Romeo restricted him from work after surgery and kept him off work and started therapy towards the end of October at Athletico; October 17, 2012 through April 15, 2013, about 67 sessions. Petitioner testified all through that therapy they were pushing it to get back to work. Petitioner had ongoing follow-ups with Dr. Romeo in November and December 2012 and January through April 2013. Petitioner indicated after that surgery the doctor just wanted to see everything was all right. Petitioner believed the doctor did a decompression of the shoulder blade and reattachment of the muscle and the doctor wanted to be sure the muscle did not rip again. After the extended therapy the doctor recommended work conditioning in April 2013 that was done at Athletico, April 19, 2013 through June 3, 2013; about 7 weeks. Petitioner testified after that an FCE was not done. Petitioner saw Dr. Romeo June 5, 2013 and the doctor released Petitioner to return to work. Petitioner noted Respondent does not have light duty. He indicated even if he asked for medium duty, like they tried to help him before, Petitioner stated he knew that would not happen as they were probably sick of Petitioner being off so long already. It was indicated that Petitioner was required to be released to full duty to return to work as Petitioner understood. Petitioner testified that his motivation asking Dr. Romeo for a full release in June 2013 was to get back to work. Petitioner indicated he was glad to be payed TTD, but it was not the money he was making working. Petitioner agreed he was off the second period of time from November 22, 2012 through June 8, 2013 and he had received TTD benefits during that time.

- Petitioner did return to work at Respondent June 9, 2013. Prior to his January 30, 2011 accident he had never injured his shoulder and had never received any treatment for his right shoulder. Petitioner testified when he had returned to work it was tough as the doctor told him it would be; it was not going to get any better. Petitioner indicated the doctor was happy how it had turned out, but that was how it would be and to just get back to work. Petitioner testified when he returned to work there was a lot of adapting and

different ways of doing things and a lot of babying and protecting his shoulder. He knew there were things he was no longer able to do. Petitioner stated that he was not able to pull the pallets like he used to and he was not able to do overhead work with his right hand. He noted even trying to pull a door closed or pushing pallets, he could not push with stiff arms; he pushed with his elbows bent and against his chest. Petitioner believed when he returned he requested a later shift as those had easier loads; more drop and switches instead of live unloads. He indicated if it was a dock lift or drop and switch there would be an empty trailer so he would drop a full trailer and take back an empty trailer. He indicated that involved less lifting; by that time Respondent bought electric lift equipment. Petitioner testified that it was difficult getting in and out of the truck and climbing was different. Petitioner indicated he was not able to activate/pull the friction pins (to release the back wheels on the slider that is spring loaded, used to shorten the trailer for weight purposes) when he returned to work so he usually had someone help. He usually does not go through that route anymore, as he knows better; he was not going to pull, he tries to find someone to help slide the wheels. Petitioner testified that prior to the accident he was able to pull that friction pin with one hand. Other problems he has is mainly climbing in and out of the trailer if at ground level as the handles on the semi's are on the right side; the stair is usually on the right side and the grab rail on the trailer is on the right side; there was not much left hand world in the semi industry. He testified grabbing trailer doors to close them was difficult and he usually tries to find someone to close his trailer for him. He indicated he is guarded and he looks ahead of what needs to be done. With pushing he tries not to use that shoulder as much as he does not want to jeopardize it and get hurt again. He uses his left hand more now; Petitioner stated that he is right handed.

- Petitioner indicated that his injury has affected home activities. He has gained a lot of weight from being off work for that long. He stated he used to be healthy and used to ride bikes with his kids and played a lot of baseball with them. He indicated it was hard to show his younger son to throw lefty when Petitioner is a righty. Petitioner indicated he had probably gained 100+ pounds being off with the injury. He stated he became diabetic and since with the infectious disease doctor he is now on high blood pressure medication and he cannot sleep right; he indicated trying to get comfortable with the shoulder was difficult. He now takes diabetic medication. He had not been diabetic prior to the accident and he had never seen doctors before the accident and with the infectious disease doctor he realized he better see a doctor. He used to play football with his son and bike and swim. He indicated he cannot bear down on the pedals to ride. There is an in-ground pool at his in-laws next door and he used to swim before in the summer but he cannot as he has an ugly scar and just stroking is a problem. The Arbitrator viewed the scarring on Petitioner's shoulder; she noted from the top a pretty deep scar angling down about 4 inches long and deep at the top and jagged at the top, and some abrasion or reddening of the adjacent skin and scar as well. The locations of the infection that was opened and the portals from the arthroscopy and reattachment of the bicep were noted. Petitioner indicated the portals feel like electricity running through it with touch, like a nerve ending there in the back.

- Petitioner indicated he used to play sports with his boys, now 10 and 19; including baseball and wrestling. His kids used to try to wrestle and roughhouse before, not much anymore. Petitioner indicated he stopped coaching baseball as he could not throw and he did not want to embarrass his son. He no longer plays sports or roughhouses with his boys. His older son is now in college, he could not even move the son away to college as he could not lift anything. Petitioner indicated he could not teach his son to drive when he turned 16 as Petitioner was then still in a shoulder harness and had a pillow. He indicated his mother in-law taught his son to drive. He stated he is a truck driver and told his son things to look out for, but that was not like showing him. Petitioner testified at home he does not lift much, he may pull 20 pounds, not like he used to. He indicated more than 20 pounds he feels a strain and if he does too much he would be in pain for probably a day or two. He still gets pain in the shoulder with various things, like just putting on his shirt. He indicated lying with his hand behind his head causes pain. He sleeps face down with arm at his side so he does not move the arm. Petitioner indicated he has different levels of pain; regardless he feels pain in his right shoulder daily. Petitioner's arm goes numb in certain positions. It could go numb 2-3 times per day, 15 times per week. He indicated he tried to learn not to do those things that cause it. There are days he has no numbness, maybe a day or two. Petitioner takes Ultracet for pain; as a truck driver it cannot be a narcotic or anything heavy. He takes Aleve. He takes both daily. As to pain levels, when real bad it is 5/10 and when real good 2/10. He feels like his shoulder is hanging and sometimes dragging. Petitioner testified he has lost strength in his right arm. He does try strengthening exercises and stretches every morning for 10-15 minutes. He indicated there is a point raising his arm he will experience pain; about 2/3's+ up per record; using his left hand to brace it, he can get further up. Petitioner testified he learned how to do more lefty. Petitioner played drums in a garage band, but he had to sell them as he could not play drums anymore. He indicated playing drums was a release from driving and he cannot do that now. They used to play almost daily. He did not have the stamina to keep playing the drums. Before the accident he could go for a couple hours playing. He did not believe he tried to play drums after the first surgery as he was in too much pain. He tried a practice pad that is less strenuous.

- Petitioner testified that he can no longer paint or change a light bulb other than left handed. He indicated even personal hygiene was difficult. He indicated his right arm ROM was not there. His shoulder does make noises. He now has to brush his teeth with his left hand. He indicated the majority of activities he now uses his left hand. Petitioner had not been able to see Dr. Romeo since his release. His medications are prescribed by his family doctor now. He had not seen the infectious disease doctor in the prior year.

- Respondent presented RX 1, Petitioner's wage statement.

The Commission finds Petitioner's testimony is unrebutted and the Arbitrator found Petitioner highly credible. Respondent's presented wage statement is somewhat unclear, as it indicates hours paid, but does not indicate what was paid as vacation hours versus work hours. The wage statement noted 1,878.1 total hours over 42.5255 weeks, which apparently did include vacation hours paid. Given the available evidence, the Commission finds an average weekly wage

(AWW) of $1,131.96, given the indicated hourly wage rate (also considering Respondent's indicated rate near the Commission calculation), resulting in a temporary total disability (TTD) rate of $754.63 and permanent partial disability (PPD) rate of $679.18. The Commission finds the decision of the Arbitrator as not totally contrary to the weight of the evidence, but slightly inaccurate. The Commission, herein, modifies the Arbitrator's finding of AWW, TTD, PPD rates and amount of underpayment of TTD respectively to $1,131.96 (AWW), $754.63 (TTD), $679.18 (PPD) and $10,287.06. ((110 weeks TTD awarded at $754.63=$83,009.30; Respondent paid $72,722.24 which equals an underpayment of TTD due to Petitioner of $10,287.06 based on the modified AWW/TTD rate))

The Commission finds that Petitioner did not have a normal surgery and recovery. Petitioner had complications that included a sepsis infection and ultimately Petitioner had three surgeries on his shoulder and also the surgery because of the infection. Petitioner was released to full duty, but that was at his urging for financial reasons. The award of 37.5% loss MAW equates to a loss of approximately 87.2% of the arm. The Commission finds, given the number of surgeries, the complications resulting therefrom and Petitioner's continuing problems, that the Arbitrator's award is supported by the evidence and testimony, and consistent with prior Commission decisions of like nature and sequela. The Commission therefore, finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability (37.5% loss person as a whole).

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $10,287.06 that being the calculated underpayment of temporary total disability under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $679.18 per week for a period of 187.5 weeks ($127,346.25 total PPD), as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of 37.5% of Petitioner's 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

16IWCC0780

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.

DEC 5 - 2016

DATED:
o-10/20/16
DLG/jsf
045

David Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DONALDSON, DANIEL
Employee/Petitioner

Case# **13WC003584**

CENTRAL GROCERS INC D/B/A CENTRELLA FOODS; SENTRY INSURANCE
Employer/Respondent

16IWCC0780

On 3/29/2016, 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:

1876 PAUL W GRAUER & ASSOC
EDWARD ADAM CZAPLA
1300 WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

3998 ROSARIO CIBELLA LTD
MARK P MATRANGA
116 W CHICAGO ST SUITE 600
JOLIET, IL 60432

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

DANIEL DONALDSON
Employee/Petitioner

v.

CENTRAL GROCERS, INC., d/b/a CENTRELLA FOODS; SENTRY INSURANCE.
Employer/Respondent

Case # 13 WC 3584

16IWCC0780

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 March 11, 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: Prospective Medical Treatment?

FINDINGS

On 1/30/11, 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 $ 53,995.65 the average weekly wage was $ 1,163.70.

On the date of accident, Petitioner was 41 years of age, *married* with 2 dependent children.

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

Respondent shall be given a credit of $ 72,722.24 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE ATTACHED.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $775.80/week for 29 2/7 weeks, commencing January 31, 2011 through August 23, 2011 and for 80 5/7 weeks, commencing November 22, 2011 through June 8, 2013, as provided in Section 8(b) of the Act.

Respondent is ordered to pay Petitioner permanent partial disability benefits, of $669.64/week for 187.5 weeks because the injuries sustained caused the 37.5% 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.

Molly C Mason

Signature of Arbitrator

MAR 29 2016

3/29/16

Date

Daniel Donaldson v. Central Grocers
13 WC 3584

Procedural History

The parties tried this case to completion before former Arbitrator Steffen on September 4, 2015. Arbitrator Steffen became a Circuit Court judge not long thereafter. The Chairman subsequently reassigned the case to Arbitrator Mason. The parties opted to re-try the case. They offered the transcript from the original hearing as a joint exhibit at the hearing held on March 11, 2016.

Summary of Disputed Issues

The parties agree that Petitioner, a longtime delivery driver, injured his right shoulder while using a manual jack to pull loaded pallets inside his truck on January 30, 2011. Petitioner underwent several surgeries and extensive care for post-operative infections following the injury. He was ultimately released to full duty but testified he asked to be released for economic reasons.

The disputed issues include causation, average weekly wage calculation, temporary total disability rate calculation and nature and extent. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he lives with his wife and sons, who were 10 and 19 years old as of the hearing.

Petitioner testified he has worked for Respondent for almost 21 years. He drives a truck and delivers products to various stores in the Midwest. He starts and ends each workday at Respondent's terminal in Joliet. Other employees load the truck in advance. He secures the load and checks it for accuracy before heading out on his route. The products are loaded on shrink-wrapped pallets that are 3 x 4 feet in size. The method of loading varies. Sometimes the pallets are stacked in a pinwheel fashion. This can make unloading more difficult because the shrink wrap creates suction as it heats up and the product settles due to compression.

Petitioner testified his unloading methods vary, depending on the store. Some stores have metal dock plates. Others have electric plates or conveyors. At some locations, the unloading is done piece by piece. This is referred to as "fingerprinting."

Petitioner testified his schedule varied during the year before the accident but he always worked at least 10 hours a day. His overtime was regular and mandatory. He was paid by the hour and made his deliveries as quickly as he could. He was usually able to deliver two truckloads per workday.

Petitioner identified RX 1 as a statement showing his earnings during the year before the accident. The parties agree his hourly rate was $24.78 as of the accident. He received a raise each year. As of the accident, he worked either five or six days per week. RX 1 reflects he worked "a lot of overtime." During the year before the accident, he missed more than five days of work.

Petitioner testified he is right-handed. He denied having any right arm problems before his January 30, 2011 accident. He was not subject to any restrictions before the accident.

Petitioner testified his accident occurred during his last stop of the day. He was in the "nose" of the trailer, close to the cab, and was "pulling" pallets, using a manual pallet jack. The pallets were loaded in a "pinwheel" fashion and it was very difficult to pull them apart. The shrink wrap had heated up, causing the product to fuse. He had to bang the product to "make it skinnier." As he was pulling a pallet back, with both hands positioned on the T-shaped handle of the pallet jack, he felt tearing and burning in his right shoulder. He could not continue the unloading process. He had to prevail upon the store employees to come up into the truck to help him. He returned to Joliet and reported the accident to his supervisor, who told him to go to the hospital.

Petitioner testified he drove himself to the closest Emergency Room, which was at Provena St. Joseph in Joliet. The Emergency Room records set forth a history of Petitioner injuring his right shoulder four hours earlier while unloading pallets at work. The examining provider noted pain with abduction and external rotation and moderate tenderness. Right shoulder X-rays demonstrated no acute process. Petitioner was given an ice pack, a sling and Norco. He was taken off work and directed to see an orthopedic surgeon. PX 1.

Petitioner testified he went to the company clinic, Physicians Immediate Care, the following day, January 31, 2011, per Respondent protocol. He saw Dr. Gregus at that facility. The doctor recorded a history of the accident and noted a complaint of constant right shoulder pain, rated 7/10. On examination, he noted pain with range of motion in all directions. He diagnosed a right rotator cuff strain. He directed Petitioner to continue the Norco, start a 9-day course of Prednisone and return in a few days. He imposed restrictions of no lifting more than 10 pounds and no overhead lifting. PX 2.

Petitioner returned to Physicians Immediate Care on February 4, 2011 and reported little improvement. Dr. Gregus noted evidence of impingement on examination. He prescribed a right shoulder MRI, prescribed Tramadol and continued the previous restrictions. PX 2.

On February 11, 2011, Dr. Gregus again prescribed an MRI and started Petitioner on Methocarbamol and Hydrocodone. He continued the previous restrictions. PX 2.

The MRI, performed without contrast on February 15, 2011, showed a cyst consistent with a labral tear and a small partial-thickness tear of the distal anterior supraspinatus tendon. PX 2.

On February 21, 2011, Dr. Hirsch of Physicians Immediate Care reviewed the MRI and referred Petitioner to Dr. Komanduri, an orthopedic surgeon, "per company protocol." Dr. Hirsch continued the previous restrictions. PX 2.

Petitioner first saw Dr. Komanduri on February 25, 2011. The doctor recorded a history of the accident. On right shoulder examination, he noted positive impingement signs, positive O'Brien's maneuver, abduction to only 80 degrees and substantial anterior subluxation on load and shift. After reviewing the MRI, he diagnosed a capsular injury with a labral tear and a full-thickness rotator cuff tear. He recommended an arthroscopy, subacromial decompression, mini open rotator cuff repair, SLAP repair and possible capsulorrhaphy. PX 3.

On February 28, 2011, Dr. Hirsch of Physicians Immediate Care noted Dr. Komanduri's surgical recommendation and imposed new restrictions of lifting no more than 10 pounds floor to waist and no lifting whatsoever waist to shoulder or overhead. PX 2.

On March 18, 2011, Dr. Komanduri operated on Petitioner's right shoulder at The Center for Surgery. PX 4. In his operative report, he indicated he required an assistant due to Petitioner's large size and the need for "extensive manipulation of the arm." He performed a biceps tenotomy and open biceps tenodesis in addition to the other projected procedures due to an "unstable biceps anchor." He documented a "significant area of Grade IV osteoarthritis roughly 4 mm wide x 1.5 cm in length over the anterior third of the glenoid." PX 3.

Petitioner testified he was in excruciating pain after the surgery. He drew some heat from his wife after he described his pain as "worse than childbirth." He was completely unable to get comfortable. He sat on the edge of his bed, watching the hands of the clock move as he waited for his first post-operative visit with Dr. Komanduri. On Monday, March 21, 2011, Dr. Komanduri issued a "work comp report" indicating that Petitioner was "having a lot of trouble with pain management" and that he had prescribed Percocet 10 mg. He described Petitioner's wounds as "clean and dry." He noted "no sign of cellulitis or deep infection." He prescribed physical therapy and allowed Petitioner to delay this until the end of the week so that he could get some better pain relief. PX 3.

Petitioner testified he continued to experience extreme pain despite the new medication. His right arm was hot and red. His wife called Dr. Komanduri's office on March 24, 2011 and a nurse directed them to go to Alexian Brothers, the nearest hospital. PX 3. At Alexian Brothers, physicians ordered lab studies and blood cultures.

A note in Dr. Komanduri's chart reflects that Dr. Barrick called the doctor from Alexian Brothers' Emergency Room and described Petitioner as having a fever, an elevated pulse rate and a red and swollen incision. Dr. Komanduri arranged for Petitioner to be transferred to Adventist Bolingbrook Hospital.

On March 25, 2011, Dr. Owaisi, an infectious disease specialist, saw Petitioner in the hospital at Dr. Komanduri's request. Dr. Owaisi noted a history of the post-surgical events and indicated that the blood cultures taken at Alexian Brothers "were now growing gram-positive cocci in clusters." He also noted that Petitioner had been started on intravenous antibiotics the previous night and that he was showing some improvement but still had 2+ edema and red streaking over the right shoulder and arm. Dr. Owaisi diagnosed cellulitis involving the right upper arm and chest wall. He added some antibiotics to cover possible pathogens.

On March 28, 2011, while still hospitalized, Petitioner saw Dr. Hong, a pain management specialist. The doctor noted that Petitioner was reporting high levels of pain despite intravenous Dilaudid, a Fentanyl patch and OxyIR. The doctor recommended that the IV medication be discontinued, due to Petitioner's history of sleep apnea.

Petitioner was discharged from the hospital on March 28, 2011. The discharge summary reflects diagnoses of right shoulder cellulitis and staph septicemia. It also reflects that Petitioner had improved on intravenous Ancef and Zyvox and that he had had a PICC line placed. It further reflects that Petitioner had "newly diagnosed diabetes type 2" and had been started on Metformin.

Petitioner testified that, shortly after being discharged from the hospital, he was lying in bed when he realized that blood and pus were erupting from his shoulder wound. He called Dr. Komanduri and was sent back to Adventist Bolingbrook, where he was readmitted. On March 30, 2011, Dr. Komanduri performed another surgery consisting of an irrigation and debridement of the glenohumeral joint. He obtained deep cultures. He described the rotator cuff and labral repairs as intact. PX 3.

On April 5, 2011, Petitioner underwent an initial evaluation at ATI Physical Therapy. PX 3.

On April 6, 2011, Dr. Komanduri removed some sutures and noted "no evidence of recurrence of infection." He recommended that Petitioner continue therapy. PX 3.

On April 7, 2011, Petitioner experienced another episode of drainage from his surgical wound. He saw Dr. Komanduri the same day. The doctor described the wound as partially open. He opened the wound somewhat further and packed it with gauze. Petitioner also saw Dr. Owaisi, with the doctor noting serous drainage but no cellulitis. PX 3.

On April 19, 2011, Dr. Komanduri's assistant re-packed the wound and prescribed Hydrocodone, noting that Petitioner wanted to wean himself off Oxycontin. PX 3.

On April 24, 2011, Dr. Komanduri noted that Petitioner's wound was closing nicely and that there were no signs of infection. He recommended that Petitioner continue therapy. PX 3.

On June 10, 2011, Dr. Komanduri described Petitioner's wound as "solidly healed." He also noted a "good overhead range of motion." He recommended work conditioning to build strength, noting that Petitioner would have to start "very light" but attend on a daily basis with the hope of eventually resuming his medium heavy job. PX 3.

Petitioner began attending work conditioning at ATI thereafter. In a progress note dated July 25, 2011, Petitioner's therapist noted that Petitioner was experiencing popping in his shoulder with overhead activities and that he was exhibiting some shoulder instability. PX 3.

Petitioner underwent a functional capacity evaluation at ATI on August 17, 2011. The evaluator rated the evaluation as valid. He found that Petitioner demonstrated the capability of performing at a medium physical demand level, with occasional lifting of 57 pounds and frequent lifting of 21 pounds. He indicated that Petitioner wanted to return to work but was uncertain as to how his shoulder was going to respond to pushing and pulling pallets. The evaluator opined that Petitioner could attempt to resume his job, which he rated as medium. PX 3, 10.

Petitioner testified he pushed himself to achieve goals during the functional capacity evaluation because he wanted to return to work. He missed his job and his overtime earnings. He also knew it was Respondent's busy season.

On August 19, 2011, Dr. Komanduri noted mild impingement along with tenderness and clicking at the acromioclavicular joint. He attributed these symptoms to "repetitive stress to the shoulder" during work conditioning. He released Petitioner to full duty but recommended that Petitioner "work back into his occupation carefully" to avoid injury. He indicated he had talked with Tom Pierro of Respondent to arrange for Petitioner to have lighter loads. He prescribed a strong anti-inflammatory and a non-narcotic pain medication, with the idea that Petitioner would wean off these medications during the following month. PX 3.

Petitioner further testified that Respondent would not accommodate a medium duty restriction. Because he wanted to resume working, to earn more money, he asked Dr. Komanduri to release him to full duty on a trial basis. He resumed working on August 24, 2011. He spoke with Tom Pierro, Respondent's safety manager, when he returned to work. At the outset, Respondent helped him transition by assigning him lighter loads.

Petitioner testified he "tried to put out of [his] mind how bad [his] shoulder felt" when he resumed working. The work was "probably medium" because he had to be able to lift 50 pounds. His shoulder continued to pop and click. He primarily drove but also performed some unloading.

Petitioner returned to Dr. Komanduri on September 14, 2011. The doctor noted Petitioner was experiencing "a lot of pain with overhead elevation" and was having difficulty tolerating "12-hour days, along with vibration associated with the heavy equipment he uses."

The doctor injected the acromioclavicular joint and subacromial space. He recommended that Petitioner ice his shoulder, take anti-inflammatories and return in one month. PX 3.

Petitioner testified that the injection helped only for a day or two.

Petitioner saw Dr. Komanduri again on October 5, 2011. He reported "no relief" secondary to the injection. On re-examination, the doctor noted "some new onset of rotator cuff impingement" and "some anterior joint line tenderness." He administered a subacromial steroid injection but commented as follows: "I do not like the way his pain appears to be labral in nature. I suspect a possible recurrent tear of the labrum." He ordered an MR arthrogram. PX 3.

The MR arthrogram, performed on October 18, 2011, showed a "recurrent labral tear, primarily involving the anterior labrum with a focal area of posterior-superior labral tear as well." The interpreting radiologist described the biceps tendon as intact at the site of the tenodesis. He also noted fraying and partial-thickness tears of the supraspinatus and subscapularis tendons. PX 3.

On October 24, 2011, Dr. Komanduri reviewed the MR arthrogram results and recommended a revision labral repair. He indicated that the need for this repair was partially related to Petitioner's size and the overall weight of his arm. PX 3.

Dr. Komanduri operated on Petitioner's right shoulder at Provena St. Joseph Medical Center on November 22, 2011. He performed a diagnostic arthroscopy, removal of suture foreign bodies, a revision labral repair from 12 o'clock to 5 o'clock and an arthroscopic suture capsulorrhaphy. In his operative report, he noted that a number of sutures had ruptured in the peri-operative period and that "the prior capsule repair was also damaged." PX 3.

At the first post-operative visit, on November 25, 2011, Dr. Komanduri described Petitioner as doing well. He noted that Petitioner believed the re-tear might have occurred while he was performing heavy lifting during a particular work conditioning session. The doctor recommended that Petitioner hold off on beginning therapy for another two weeks. PX 3.

On December 9, 2011, Dr. Komanduri noted that Petitioner was doing well and experiencing minimal pain. He recommended that Petitioner start therapy. PX 3.

On January 6, 2012, Dr. Komanduri noted an improved range of motion but indicated that Petitioner's "strength is still poor." He recommended that Petitioner continue therapy. PX 3.

Petitioner continued attending therapy thereafter, with some absences secondary to illness. In April, he began a course of work conditioning. In a progress note dated May 8, 2012, the therapist indicating Petitioner was reporting increased pain and clicking when completing strengthening exercises. On May 9, 2012, Dr. Komanduri noted that Petitioner was "reporting a

new pain primarily in the posterior aspect of his shoulder" which he attributed to work conditioning. Dr. Komanduri indicated this was "the second time this has happened." He expressed frustration and offered Petitioner the chance to seek out another opinion. He placed work conditioning on hold and ordered an MR arthrogram. PX 3, 10.

The MR arthrogram, performed on June 1, 2012, showed moderate arthrosis of the glenohumeral joint with degenerative chondrosis, marginal osteophytes and post-surgical changes. The radiologist did not see a definite paralabral cyst but could not exclude a recurrent labral tear. PX 3.

On June 1, 2012, Dr. Komanduri reviewed the MR arthrogram results and recommended that Petitioner see Dr. Marra at Loyola or Dr. Romeo at Rush.

Petitioner testified that Dr. Komanduri suggested he see either a physician who he described as a friend or another physician at Rush. Given everything that had happened thus far, he opted to see the doctor at Rush.

Petitioner first saw Dr. Romeo on July 17, 2012. The doctor's lengthy note of that date sets forth a history of the work accident and subsequent care. The doctor noted that Petitioner reported having attempted to return to work in August 2011 but never being able to fully perform his job. He also noted that Petitioner had been off work since November 2011 and, in June 2012, had been discharged to a home exercise program.

Dr. Romeo noted that Petitioner complained of constant pain and heaviness in his right arm as well as numbness when lying on the arm.

Dr. Romeo described Petitioner as 6 feet, 1 inch tall and weighing 390 pounds. He noted a "visible deformity over [the] mini open incision with slight indentation of the deltoid." He indicated Petitioner had 150 degrees of active forward elevation, 60 degrees of external rotation and internal rotation to the hip.

Dr. Romeo noted acute tenderness to palpation over the anterior biceps groove, exquisite pain to palpation of the AC joint and pain to palpation of the suprascapular nerve in the groove. He noted 5/5 strength with Jobe testing and positive Speed's, O'Brien's and active compression testing.

After examining Petitioner, viewing the MRIs and obtaining new shoulder X-rays, Dr. Romeo gave Petitioner two options: 1) live with his current condition and undergo another functional capacity evaluation; or 2) undergo a revision surgery, specifically a "right shoulder arthroscopy with an evaluation and debridement of the rotator cuff and labrum, distal clavicle resection, suprascapular nerve decompression and revision biceps tenodesis." Dr. Romeo indicated that only the second option would offer Petitioner any chance of improvement. He described Petitioner's ability to resume his former job postoperatively as "unpredictable at this time." PX 11.

Dr. Romeo operated on Petitioner's right shoulder on October 4, 2012. PX 11, 12.

At the first post-operative visit, on October 12, 2012, Dr. Romeo removed the sutures and recommended that Petitioner wear a sling for a total of four weeks and start physical therapy the following Monday. He prescribed Ultram and directed Petitioner to remain off work. PX 11.

At the next visit, on November 7, 2012, Dr. Romeo noted that Petitioner was still taking quite a bit of pain medication due to therapy-related discomfort. He also noted that Petitioner had been taking narcotic pain medication for over a year. On examination, the doctor noted about 120 degrees of active forward flexion and 85 degrees of abduction. He prescribed Naproxen and recommended that Petitioner taper his Norco and Tramadol. He directed Petitioner to stay off work and continue therapy. PX 11.

On January 30, 2013, Dr. Romeo noted that Petitioner's rotator cuff was "weak throughout." He renewed the Naproxen and directed Petitioner to stay off work and continue therapy. PX 11.

On March 13, 2013, Dr. Romeo noted a new symptom of tingling extending down the right arm into the hand. He also noted that Petitioner was still attending therapy but had been working only with 3-pound dumbbells. Dr. Romeo prescribed EMG/NCV testing to evaluate Petitioner for cervical radiculopathy. He renewed the Naproxen and directed Petitioner to continue therapy and stay off work. PX 11.

Dr. Heller conducted EMG/NCV testing of both upper extremities on March 28, 2013. She noted a four-week history of numbness and tingling in the right hand. She noted no acute findings consistent with a right cervical radiculopathy. PX 11.

On April 17, 2013, Dr. Romeo noted that Petitioner had undergone the recommended testing and that the EMG showed no significant findings. He also noted that Petitioner "is interested in returning to work." He prescribed six weeks of work conditioning, to be performed multiple times per week. PX 11.

Petitioner testified he attended 67 physical therapy sessions following the surgery by Dr. Romeo. He was "in pain the whole time."

Petitioner began attending work conditioning at Athletico on April 19, 2013. During the initial evaluation, the therapist noted Petitioner was not able to perform at a heavy demand level across all assessments. In a progress note dated June 3, 2013, the therapist noted that Petitioner had made significant improvements in work conditioning but was still experiencing "pain with everyday activities" and popping and clicking in the shoulder. The therapist described Petitioner as "highly motivated to return to work." PX 11.

On June 5, 2013, Dr. Romeo re-examined Petitioner, noting 170 degrees of active forward elevation, 50 degrees of external rotation and 5/5 rotator cuff strength throughout. He released Petitioner to full duty on a trial basis and directed Petitioner to return in six weeks. PX 11.

Petitioner testified that Respondent cannot accommodate medium duty. Respondent's counsel stipulated that Respondent required a full duty release in order for Petitioner to be allowed to resume working. Petitioner testified he asked Dr. Romeo to release him to full duty due to economic concerns. He was not earning what he needed to. He returned to work on June 9, 2013. It was "tough" to resume working. Dr. Romeo had likened his surgery to "taking ten pounds of crap and putting it into a five-pound bag." Petitioner testified he had to "baby" his right arm and figure out new ways of performing his tasks. He could not perform overhead work. It was difficult for him to try to rely on his left hand and arm because "the semi industry is not designed for lefties."

Petitioner last saw Dr. Romeo on July 17, 2013. On that date, the doctor noted 175 degrees of active forward elevation, 50 degrees of external rotation and 5/5 rotator cuff strength throughout. He found Petitioner to be at maximum medical improvement and capable of full duty. PX 11.

Petitioner testified he no longer pushes pallets the way he did before the accident. He requested a later shift because that shift usually involves easier deliveries that do not require active unloading. Some of the deliveries are "drop and swing," meaning he leaves a full trailer behind and transports an empty trailer back to the warehouse.

Petitioner testified he is no longer able to adhere to the "three points of contact" tenet when he pulls himself up into his cab. He finds it difficult to use the grab bar outside of the cab because it is usually on the right. Before the accident, he could easily slide the four spring-loaded "friction pins" which allow him to shorten the trailer and adjust the weight of the load. He now has to get help with this. He also has to get help closing the trailer door. He favors his left arm and "hide[s] what [he] cannot do."

Petitioner testified he gained over 100 pounds after the accident, due to inactivity. He used to cycle with them but it is now difficult for him to bear down on the pedals. He used to play catch with them but avoids this because it's "hard to throw lefty" and he does not want to embarrass them. His mother-in-law lives next door and has an in-ground pool. Before the accident, one of his greatest pleasures was swimming with his son in the morning, before work. He no longer swims very often because he finds it difficult and he is embarrassed about the ugly scar he has on his shoulder. [The Arbitrator conducted a viewing. Petitioner's most obvious scar is jagged, deep at the top and about 4 inches long.] When he drove his older son to college, he felt sad because he could not help unload his son's belongings. When his son was learning to drive, he was laid up post-surgery and could not teach him. This was very frustrating for him, since he drives professionally. It was not until 2016 that he was able to help his son learn how to merge onto a highway. He tries to avoid lifting over 20 pounds. It can be

painful for him to put on a shirt or lie down with his arm underneath his head. Sometimes he wakes up with his arm pinned underneath him, as if he were unconsciously protecting the arm. His pain varies in intensity but he experiences it daily. When he puts his arm in certain positions, the arm "goes numb right away." This can happen three or four times a day. On a "good" day, his pain might be 2/10. On a bad day, it can be 5/10. He takes Ultracet each morning and Aleve at night. His arm fatigues easily. He feels as if his arm lacks muscles and is simply hanging by his side. Each morning, he spends 10 or 15 minutes doing stretches that he learned in therapy. If he uses a wall as a support, he can raise his arm up almost fully. [When he demonstrated this at the hearing, he used his left hand to support the right arm.]

Petitioner testified he and his sons had a kind of "garage band" before the accident. He acted as the drummer. He could drum for a couple of hours at a time. The drumming was a real release. After the accident, he got depressed when he looked at his drum set. He tried a modified form of drumming, using a pad, but eventually sold the set because he had no stamina. In an attempt at "gallows" humor, he stated he no longer needs the set because he can make noise with his shoulder.

Petitioner testified that, before the accident, he performed routine tasks such as painting, changing light bulbs and changing the oil in his car. He now avoids these activities.

Petitioner testified his injury has also affected self-care activities. He now holds his toothbrush with his left hand. It is difficult for him to put his right hand far enough behind his back to wipe himself after going to the bathroom.

Under cross-examination, Petitioner acknowledged he has not returned to Dr. Romeo or Dr. Komanduri. He sustained another work accident in 2015 but did not gain more weight thereafter. Respondent offers drivers many different shifts. At the prior hearing, he testified that the 6 am shift was too early. An earlier shift can be easier in some ways but the second load of that shift can involve "throwing" product. Employees bid for shifts and Respondent assigns them, based on seniority. At the present time, Respondent employees 80 drivers. He is #10 on the roster, in terms of seniority. There is no guarantee that any particular shift will be easy. If a dispatcher dislikes an employee, he will assign that employee bad loads. None of the shifts is easy. He bid for the shift that was best for him. The later he arrives at work, the fewer "throws" he has to make. Respondent's customers vary in size. Some stores are "ma and pa" operations with only three aisles but others are large, with thirty aisles. At one point after the accident, he offered to buy his own electric jack. The following year, Respondent purchased electric jacks and lifts. Respondent's trucks are now all automatic. No shifting is required.

Petitioner acknowledged that RX 1 shows zero hours in some weeks. RX 1 also shows he worked 134 hours in week 18. He would agree he never worked this many hours in one week. The weeks that reflect a lot of hours are probably weeks in which he also received vacation pay. It is also possible he did not work at all those weeks and only received vacation pay.

Petitioner testified his right arm was immobilized a lot of the time after the accident. Before he resumed working the first time, in August 2011, his wife drove him to appointments. It was easier for him to get into his wife's car than his own because he drives an SUV. He did not drive when his arm was in a sling. When he resumed working on August 24, 2011, he drove his car to work.

Petitioner testified he chose to see Dr. Romeo.

Petitioner testified he was off work from November 22, 2011 to October 24, 2012.

On redirect, Petitioner clarified that Respondent did not purchase an electric jack for each driver. Respondent employs 80 drivers but has only 30 electric jacks. The early shift drivers take the jacks. By the time he arrives for his 1 PM shift, no jacks are available.

No witnesses testified on behalf of Respondent.

Arbitrator's Credibility Assessment

Petitioner was a very appealing witness. It would be impossible to overstate his believability. He was rueful at times, recalling the activities he used to enjoy before his accident, but never self-pitying.

The Arbitrator finds credible Petitioner's testimony that he asked Dr. Romeo to release him to full duty for economic reasons. The doctor clearly inherited a "salvage" situation. At the initial visit, he was noncommittal as to whether Petitioner would ever be able to resume full duty. That he deferred to Petitioner's subjective reporting in assessing readiness to work is apparent.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between his undisputed accident of January 30, 2011 and his current right shoulder condition of ill-being?

The Arbitrator finds in Petitioner's favor on the issue of causation. In so finding, the Arbitrator relies in part on Petitioner's credible denial of any pre-accident right shoulder problems. The voluminous records in evidence mention prior left wrist and back surgeries but no right shoulder treatment. The Arbitrator also relies on Petitioner's credible description of the mechanism of injury, as well as the treatment records. It appears that Petitioner had some post-accident flare-ups but those flare-ups were consistently linked to treatment, such as work conditioning. It also appears that Petitioner had some sub-optimal surgical results during the time he treated with Dr. Komanduri, a physician to whom he was referred by Respondent's selected clinic.

What is Petitioner's average weekly wage?

The parties agree that Petitioner earned $24.78 per hour as of the accident. They also agree he earned $53,995.65 ($47,419.63 in regular earnings and $6,576.02 in includable overtime earnings, calculated at the straight time rate) during the year preceding the accident. They disagree as to how to go about calculating his average weekly wage although, ultimately, their respective calculations were not far apart.

The only wage-related document in evidence is RX 1, a breakdown of Petitioner's hours and earnings for the year preceding the accident. RX 1 reflects that Petitioner worked approximately 44 to 49 hours per week in 24 weeks. RX 1 also reflects that Petitioner logged 0 hours in each of four weeks and an improbably high number of hours (134.12, 90.33 and 84.50) in three other weeks.

At the hearing held on March 11, 2016, Petitioner testified he generally worked five or six days per week. He acknowledged missing more than five days of work during the year preceding the accident. Petitioner also testified that the 8.10 hours he worked during the week-long pay period ending April 24, 2010 (week #12) represented one day of work and that the 23.25 and 24.87 hours he worked during the periods ending December 4, 2010 (week #44) and January 15, 2011 (week #50), respectively, probably represented two days of work in each of those weeks. Under cross-examination, Petitioner testified that the weeks reflecting improbably high hours were weeks during which he might not have worked but received vacation pay.

The Arbitrator uses the second method of wage calculation set forth in Section 10 of the Act, based on RX 1 and Petitioner's testimony that he lost five or more days of work during the year preceding the accident.

In order to arrive at a divisor, the Arbitrator first eliminates the four 0-hour weeks and the three other weeks in which Petitioner received vacation pay and likely did not work. This leaves 45 weeks (52 – 7 = 45). The Arbitrator then combines the hours worked in five other partial weeks (i.e., weeks 6 (28.05 hours), 12 (8.10 hours), 25 (27.27 hours), 44 (23.25 hours) and 50 (24.87 hours) so as to arrive at roughly three weeks. The Arbitrator then divides the agreed earnings of $53,995.65 by 43 weeks to arrive at $1,255.71. Because this figure exceeds the $1,163.70 wage Petitioner claimed at the hearing (Arb Exh 1), the Arbitrator defaults to $1,163.70. Petitioner is bound by his stipulation under Walker v. Industrial Commission, 345 Ill.App.3d 1084, 1088 (4th Dist. 2004).

What temporary total disability benefits are owed to Petitioner?

The parties agree that Petitioner was temporarily totally disabled during two intervals totaling 110 weeks and that Respondent paid $72,722.24 in temporary total disability benefits. Arb Exh 1.

The Arbitrator has found Petitioner's average weekly wage to be $1,163.70. This gives rise to a temporary total disability rate of $775.80. The total owed to Petitioner is $85,338.00 (110 weeks x $775.80/week). There is thus an underpayment of $12,615.76.

What is the nature and extent of the injury?

This is a pre-amendatory case, since Petitioner's accident occurred prior to September 1, 2011. In assessing permanency, the Arbitrator notes the multiple surgeries, the post-operative infections that impeded recovery, the work conditioning records and Dr. Romeo's final examination findings. The Arbitrator also notes the circumstances under which Petitioner returned to full duty in 2013. Petitioner did not undergo a functional capacity evaluation prior to this return and credibly testified he asked to be released to full duty for economic reasons. Petitioner also credibly testified about the difficulties he encountered after resuming his job and the manner in which he has altered his approach to certain tasks. The Arbitrator also notes Petitioner's compelling testimony about the recreational activities he has given up due to his ongoing symptoms.

The Arbitrator finds that Petitioner established permanency equivalent to 37.5% loss of use of the person, equivalent to 187.5 weeks of benefits, under Section 8(d)2.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Paul Lemin,
Petitioner,

vs. NO: 13 WC 5725

Al-Amin Brothers Transportation,
Respondent.

ORDER

Motion to Dismiss Petitioner's Petition for Review having been filed by Respondent herein, and due notice given, this matter came on for hearing before the Illinois Workers' Compensation Commission on September 28, 2016 in Chicago, Illinois.

Upon consideration of said Motion and the Commission's independent review of the record and file, the Commission is of the belief that Respondent's Motion to Dismiss Petitioner's Petition for Review should be denied.

The facts are as follows:

Prior to the commencement of the Arbitration hearing for the above captioned claim the parties' attorneys completed a Request for Hearing form in which, among other things, they listed their e-mail addresses as RBoguszlaw @ Yahoo.com and dsarther @ wolfl.

On May 3, 2016 and May 26, 2016, the claim proceeded to Arbitration before Arbitrator Williams. On June 16, 2016, Arbitrator Williams filed his decision with the Commission. On June 20, 2016, a member of the Commission e-mailed Arbitrator Williams' June 16, 2016 Arbitration decision to Mgubalu2003 @ yahoo.com with a carbon copy to Dan Sarther.

At the September 28, 2016 Review Hearing, Attorney Bogusz contended that the June 20, 2016 e-mail from the Commission with the attached the June 16, 2016 Arbitration decision from Arbitrator Williams was sent to an assistant in the law firm representing Petitioner and not to his e-mail address that was listed on the Request for Hearing form. Mr. Bogusz also represented that

he received a notice of the decision in the mail on June 21, 2016. His Petition for Review is filed stamped July 21, 2016.

Mr. Bogusz contends his filing of the Petition for Review was timely and in compliance with the Illinois Workers' Compensation Act. Mr. Sarther contends that the decision for the above caption claim was emailed to Petitioner's firm on June 20, 2016 and Petitioner's filing of the Petition for Review on July 21, 2016 is not in compliance with the 30 day requierement for filing a review as set forth in the Illinois Workers' Compensation Act. Furthermore, Mr. Bogusz's firm used the Mgubalu2003 @ yahoo.com e-mail address to send a copy of his proposed decision for this claim to the Arbitrator.

The Commission finds that because the Illinois Workers' Compensation staff member did not e-mail the June 16, 2016 Arbitration decision to the e-mail address set forth by Attorney Bogusz on the Request for Hearing form and Mr. Bogusz timely filed the Petition for Review within the 30 days of his receipt of the June 16, 2016 Arbitration decision via mail, Respondent's Motion to Dismiss Petitioner's Petition for Review is hereby denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Motion to Dismiss Petitioner's Petition for Review is hereby 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: DEC 23 2016

MB/jm

R: 9/28/16

Mario Basurto

David L. Gore

Stephen Mathis

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

Gabriela Valdes,
Petitioner,

vs.
Posen Robbins Elementary SD #143.5,
Respondent,

NO: 13 WC 08243

16IWCC0788

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 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 6, 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: DEC 7 – 2016

MB/mam
o:11/17/16
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VALDES, GABRIELA
Employee/Petitioner

Case# **13WC008243**

16IWCC0788

POSEN-ROBBINS ELEMENTARY SD #143.5
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:

3019 BRIAN T MORROW, LAW OFFICE
63 W JEFFERSON ST
SUITE 201
JOLIET, IL 60432

0863 ANCEL GLINK
ERIN M BAKER
140 S DEARBORN ST 6TH FL
CHICAGO, IL 60603

16IWCC0788

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

GABRIELA VALDES
Employee/Petitioner

v.

POSEN ROBBINS ELEMENTARY SD #143.5
Employer/Respondent

Case # **13** WC **8243**

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 **Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, 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 _____

16IWCC0788

FINDINGS

On **02/19/2013**, 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 $**46,023.15**; the average weekly wage was $**1,278.42**.

On the date of accident, Petitioner was **42** years of age, ***married*** 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 $**0.00** 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 $**60,837.80** under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence that an accident occurred which arose out of and in the course of her employment by Respondent therefore, no benefits are awarded, pursuant to the Act.

The Respondent is shall receive a credit of $60,837.80, pursuant to Section 8(j) 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.

16IWCC0788

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical bills; 4) temporary total disability benefits; and 5) the nature and extent of Petitioner's injury. *See,* AX1.

Gabriela Valdes (hereinafter referred to as "Petitioner") testified that she is currently employed for the Plainfield School District. However, on February 19, 2013, Petitioner was employed for the Posen-Robbins Elementary School District (hereinafter referred to as "Respondent") as a first grade teacher and had been so employed for eight (8) years. While employed by the Respondent, Petitioner worked at the Gordon School.

Petitioner's testimony

Petitioner stated that on February 19, 2013, at approximately 7:30 a.m., while attempting to enter the school building, she slipped and fell on snow, on the sidewalk leading to the main entrance of the school; injuring her right knee. Petitioner stated that after she fell, she reached for the nearby flagpole and used it to help herself up. Petitioner stated that she did not notice any ice in the area, just snow.

After she fell, she limped into the school with her right knee in pain. She tried to put weight on the knee but it was too painful. Petitioner's husband subsequently picked her up from Gordon School and took her to the emergency room at Provena St. Joseph's Hospital.

Petitioner began treating with Dr. Komanduri and underwent surgery for ligament reconstruction and treatment of a fracture. The operative report mentions that "patient had chronic pain and discomfort associated with patellar dislocation with failed prior reconstruction." Petitioner also later underwent physical therapy and manipulation to help her bend the knee. Petitioner remained under Dr. Komanduri's care until July 29, 2013. Petitioner stated that after the accident on February 19, 2013, she was unable to work until released by Dr. Komanduri on July 29, 2013. PX2.

Petitioner stated that she had previously injured her right knee several years prior to this accident. She had a meniscus tear, which required surgery. Petitioner claims that she did not have any issues with her right knee following the prior surgery. Petitioner mentioned one knee surgery at trial, but medical records from Provena on March 13, 2013; and February 27, 2013 records from MK Orthopedics mention a history of three prior knee surgeries. Petitioner also cited a history of two prior surgeries and repeated knee dislocations, on her history form for MK Orthopedics. In the operative report, Dr. Komanduri also repeatedly mentions a failed prior reconstruction. PXs 1 & 2.

Petitioner stated that prior to the accident, she was able to work out with a trainer, but now she swims as she is unable to flex her right knee like she used to. Petitioner testified that she can no longer squat. Petitioner also stated that since the accident, she experiences swelling in her right knee after standing for longer than twenty-five (25) minutes.

The school parking lot and the sidewalk are part of Respondent's property and as such, are maintained by the Respondent. The parking lot and sidewalk are also open to the public and any visitors to the school may park in the lot and enter through the main entrance.

Petitioner reviewed Respondent's Exhibit 5 and stated that it was an accurate depiction of the main entrance and sidewalk at Gordon School. The parties agreed that Respondent's Exhibits 3 through 5, show photos of the sidewalk and main entrance of the school, where the accident occurred. However, the parties specified that the photos were not taken on the date of accident. After a review of Respondent's Exhibit 5, Petitioner marked a red "x" in the spot where she fell, indicating that she fell in the flagpole area, closer to the school then the parking lot; and not on the main sidewalk. Petitioner stated at trial that the custodians at Gordon School do not salt the area behind the flagpole; but that they salt a pathway between the parking lot and the flagpole.

Petitioner testified that she spoke with the insurance adjuster on the case, Irene Majewski; and provided a recorded statement which she stated was true and accurate to the best of her recollection. In her recorded statement, Petitioner stated that she believes she fell on some snow, and did not see any ice. Petitioner stated that she fell while walking into the main entrance, which is for everybody, not just teachers. Petitioner stated that she tried to use the pole to get up after she fell. Petitioner stated that she saw Mr. Cole after the accident and that he helped her put an ice pack on her right knee. RX1.

Petitioner also stated that following the accident, she completed a report of injury. Petitioner reviewed the report, marked Respondent's Exhibit 2, at trial, and indicated that she completed the report in her own handwriting. She stated that the statements included in the report of injury were true and accurate. In her report of injury Petitioner stated that her accident occurred outside the front entrance of the school by the light pole. RX2.

Petitioner called Ms. Tarra Batts who testified that she is employed as the business manager for the Respondent. She has worked in this position for five (5) years. Ms. Batts reviewed Respondent's Exhibit 5, and stated that she recognized the photograph as the front entrance to Gordon School. Ms. Batts testified that the Respondent owns the building pictured in Respondent's Exhibit 5, and that the Respondent also owns the sidewalk, parking lot, and flagpole area depicted in the photo. Ms. Batts stated that the parking lot and sidewalk, leading to the main entrance, are open to the public and that any visitors to the school can park there.

Ms. Batts stated that as business manager, her job duties include overseeing the custodial staff and maintenance of the parking lot and school grounds. Ms. Batts testified that on February 19, 2013, the respondent's maintenance crew would have removed the snow and applied salt to the parking lot and sidewalks of Gordon School.

The respondent then called Mr. Joe Cole as a witness, who testified that he works for the respondent as a custodian at Gordon School. Mr. Cole has worked for the respondent for the past twenty (20) years and has worked at Gordon School for the past nine (9) years.

Mr. Cole stated that as a custodian, his job duties include maintaining the building, sidewalks, and main entrance. Mr. Cole stated that he is also in charge of clearing the parking lot and sidewalks on snowy and icy days. On such days, he goes about clearing the parking lot and sidewalks by using a snow blower. He then puts down salt and makes sure that any excess ice is removed from the sidewalks, by chipping it with an ice pick.

Mr. Cole stated that on February 19, 2013, he was working at Gordon School as a custodian. He was aware that Petitioner had an accident on that date, as he saw her only a few minutes after the accident. Mr. Coles testified that when he saw the Petitioner a few minutes after the accident, she told him that she slipped and fell on ice, while cutting through the flagpole area.

Mr. Cole testified that at 5:30 a.m., on February 19, 2013, he began clearing the parking lot and sidewalk to the main entrance at Gordon School; and that the area was cleared by 7 a.m. Although the sidewalk was clear, Mr. Cole stated that there still was ice and snow near the flagpole, as he does not clear that area. Although Petitioner stated that Mr. Cole was ordered to salt around the flagpole area after she fell, Mr. Cole denied that and reiterated that the sidewalk path was cleared and he never clears the area between the flagpole and the building.

Mr. Cole reviewed Respondent's Exhibit 5 and stated that on a snowy and icy day, he would clear the area between the parking lot and the crack in front of the flagpole. He stated that he does not clear or salt the area between the flagpole and the school. Although Petitioner stated that everyone cuts through the flagpole area to enter the school, Mr. Cole stated that in the nine (9) years he has worked at Gordon School, he has never observed anyone cut through the flagpole area. Mr. Cole also stated that the area around the flagpole is a little steeper than the sidewalks.

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CONCLUSIONS OF LAW

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

In order for an injury to be deemed compensable, Petitioner must establish it arose out of and in the course of the employment. "An injury 'arises out of' employment when it originates from some risk related to the employment, thereby establishing a causal connection between the injury and the occupation." *Wise v Industrial Commission,* 54 Ill.2d 138, 142 (1973); *Material Service Corp. v. Industrial Commission,* 53 Ill.2d 429, 292 N.E.2d 367; *Thurber v. Industrial Commission,* 49 Ill.2d 561, 276 N.E2d 316. "A compensable injury occurs 'in the course of' employment when it is sustained while claimant is at work or while he performs reasonable activities in conjunction with his employment." *Wise v Industrial Commission,* 54 Ill.2d 138, 142 (1973); *Hydro-Line Manufacturing Co. v. Industrial Commission,* 15 Ill.2d 156, 154 N.E.2d 234; *Associated Vendors, Inc. v. Industrial Commission,* 45 Ill.2d 203, 258 N.E.2d 354 (1974).

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission,* 47 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 is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission,* 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

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 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).

The Arbitrator finds that the subject accident did not arise out of or in the course of her employment for the respondent and that the respondent is not liable for Petitioner's present condition of ill-being.

Petitioner's condition is not compensable based on the Illinois Appellate Court's holding in *Dodson v. Industrial Commission*, 308 Ill. App. 3d 572, 720 N.E.2d 275 (1999). In Dodson, the claimant left the employer provided sidewalk and walked across a grassy slope which was the most direct route to her car. *Id.* at 574. The Appellate Court held that Commission was correct in finding that the grass the claimant walked upon after leaving the employer provided sidewalk was a hazard to which the claimant would have been equally exposed to apart from her employment and Petitioner's choice of an alternate route in which she walked across the grass because it was the most direct route to her car was a personal voluntary act outside of the scope of her employment. *Id.* at 576-7. It further held that a claimant's injury doesn't arise when the claimant voluntarily exposes him/herself to an unnecessary personal danger solely for his/her own convenience and not the interest of the employer. *Id.* at 577.

Additionally, the Court rejected the claimant's argument that because other employees often walked across the same grassy slope to reach the employee parking lot and because the employer was aware of this practice and never attempted to stop it, the employer acquiesced and this non-action converted a personal risk to an employment risk. *Id.* The Appellate Court noted that the holding in *Dodson* was not to imply that an injury does not arise out of the employment simply because it was sustained while the employee was taking an alternative path. *Id.* However, "where the employee ventures from a safe sidewalk provided by the employer and instead proceeds to walk down a grassy slope covered with water an ice..." it was not be compensable as it constitutes an "unnecessary personal risk." *Id.*

Here, Petitioner similarly chose an alternative route when she chose to cut through the flag pole area, rather than walking along the cleared sidewalk. In doing so, Petitioner voluntarily exposed herself to an unnecessary personal risk solely for her own convenience, as did the claimant in *Dodson*.

Petitioner admitted that she cut through the flagpole area and did not use the sidewalk path, which Mr. Cole testified he had cleaned and salted. Also, similar to *Dodson*, Petitioner testified that other employees often cut across the flagpole area, although Mr. Cole stated that he has never seen anyone cut through the flag pole area in his nine (9) years at Gordon School. The Arbitrator similarly rejects this argument, based on the Illinois Appellate Court's holding in *Dodson*, and finds that Petitioner was exposed to no greater risk than that of anyone who cuts through a snowy, uncleared area. Petitioner voluntarily exposed herself to an unnecessary personal risk by exposing herself to the danger of falling, when she cut through the flagpole area.

Both Mr. Cole and Ms. Batts testified that a path along the sidewalk was cleared by the time Petitioner arrived at school. Petitioner testified that there was a small amount of snow on the ground, and the witnesses admitted that the area of the flagpole is not cleared following a snowfall. Rather, Mr. Cole cleared a path between the parking lot and the main entrance, which Petitioner should have used.

Further, the Arbitrator notes that the sidewalk area was located in the parking lot, leading to the main entrance, both of which are open to the public. This further indicates that Petitioner did not sustain any greater risk than the general public, even though she had to be "buzzed in" by custodial personnel.

The Arbitrator also notes that Petitioner had an extensive, prior history of knee problems and that she mentioned one prior knee surgery at trial and testified that she had not any issues with her knee. The records indicate that she has a history of three prior knee surgeries. In his operative report, Dr. Komanduri repeatedly mentions a failed prior reconstruction, indicating that Petitioner's issues may be related to her prior issues. PXs 1 & 2.

Based on relevant case law, Petitioner's prior history of knee issues, the testimonies of Petitioner and Mr. Cole, the Arbitrator finds that Petitioner failed to prove, by a preponderance of the evidence, that she sustained an accident that arose out of and in the course of her employment by Respondent. As the petitioner has failed to prove a compensable accident, all other disputed matters are moot and will not be addressed.

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ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
13WC8243
SIGNATURE PAGE

Signature of Arbitrator

January 6, 2016
Date of Decision

JAN 6 - 2016

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☒ 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

Kris Gould,

Petitioner,

vs. NO: 13WC 9690

16IWCC0797

Fed Ex Freight,

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 causation, temporary total disability, incurred and prospective medical 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 September 29, 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.

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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 $5,500.00. 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: DEC 14 2016

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CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

GOULD, KRIS
Employee/Petitioner

Case# **13WC009690**

FEDERAL EXPRESS
Employer/Respondent

16IWCC0797

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:

0400 DAVID W OLIVERO
1615 4TH ST
PERU, IL 61354

1401 SCOPELITIS GARVIN LIGHT
GREGORY E AHERN
30 W MONROE ST SUITE 600
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

☐ 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)

KRIS GOULD
Employee/Petitioner

v.

FED EX FREIGHT
Employer/Respondent

Case # 13 WC 009690

Consolidated cases: _____

16IWCC0797

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 **Ottawa**, on **08/27/15**. 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 16IWCC0797

On the date of accident, **07/20/12**, 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 **$71,709.30**; the average weekly wage was **$1379.02**.

On the date of accident, Petitioner was **49** 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 **$10,289.79** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$10,289.79**.

Respondent is entitled to a credit of **$105,323.45 less income tax** under Section 8(j) of the Act.

ORDER

Respondent shall pay petitioner temporary total disability benefits of $919.34 /week for 114-2/7 weeks, commencing 11/20/12 through 08/27/15, as provided in Section 8(b) of the Act. Respondent shall receive credit for any amount of benefits it has paid thus far, whether in the form of TTD, TTD advances or disability benefits.

Respondent shall authorize, pay and provide medical treatment as described by Dr. Komanduri, including all medical charges and period of temporary total disability relating to same.

Respondent shall pay reasonable and necessary medical services of $5,496.20, as provided in Section 8(a) of the Act pursuant to the medical fee schedule. Respondent to receive credit for all sums previously paid hereunder.

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

9/25/15
Date

SEP 29 2015

16IWCC0797

FINDINGS OF FACT

This case involves a Petitioner claiming injuries from a undisputed work accident on November 20, 2012. In dispute are the following issues: 1) causation, 2) medical expenses, 3) TTD, and 4) penalties and attorney fees. The focus of the dispute is on Petitioner's right shoulder condition. A hearing was held pursuant to Section 19(b) of the Act to address the issues in dispute.

TESTIMONY

Petitioner testified that he started working for employer, Fed Ex Freight, in May 2010 as an over-the-road truck driver. He further testified that on November 20, 2012, his general state of health was fine and that he never had any previous injury to his right shoulder. On November 20, 2012, Petitioner drove his semi-tractor trailer onto a ramp, when it turned over onto the passenger side. When the truck flipped over, he fell out of his seat and ended up in the passenger side of his cab.

Petitioner immediately experienced pain over his body and he noticed that he was bleeding. He called for assistance and was taken by ambulance to the emergency room at the University of Iowa Hospital where he complained of pain to his neck, shoulder, back and legs. A physician ordered numerous diagnostic tests to check for fractures and then sutured the laceration in his right groin area. He was then discharged and instructed to follow-up with his family physician for further treatment.

On November 21, 2012, Petitioner sought treatment at St. Margaret's Hospital emergency room where he complained that with any movement, his muscles are sore and that he had stiffness in his neck, upper back and lower legs.

The workers' compensation insurance company adjuster called Petitioner shortly after the accident to find out about his injuries. Petitioner testified that he told the adjuster that he was having pain in both of his shoulders and had difficulty raising his arms above his shoulders.

On November 27, 2012, Dr. Arnold Faber examined Petitioner who complained of pain in his shoulders and had difficulty lifting his arms up. Dr. Faber referred him to the physical therapy department at Perry Memorial Hospital. On November 30, 2012, when Petitioner presented to Perry Memorial Hospital, he completed a patient questionnaire and he indicated that he was having shoulder pain. He also completed a pain diagram on the form and marked that he was experiencing pain in his right shoulder. Petitioner testified that he did complain to his therapists that he had right shoulder pain.

Petitioner testified that following physical therapy, Dr. Faber referred him to Dr. Lisa Snyder, a pain management specialist, who ordered additional physical therapy along with a right shoulder MRI. Once Dr. Snyder received the results of the right shoulder MRI, which showed a rotator cuff tear, she referred him to Dr. Michael Shin, orthopedic surgeon, for treatment of his right shoulder condition. Petitioner testified that he saw Dr. Shin, but could not be treated by him due to insurance issues.

Petitioner was also evaluated by his choice of physicians, Dr. Robert Eilers and Dr. Komanduri. He testified that he was evaluated by his employer's physicians, Dr. Delheimer and Dr. Cole. Petitioner testified that he did not agree with Dr. Cole's opinion that his right shoulder condition was not related to

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his work accident.

Petitioner testified that due to his current physical condition, he cannot not safely perform the duties of an over-the-road truck driver. He also testified that he was never provided with any type of restricted work by Respondent.

On cross-examination, Petitioner was asked by Respondent's attorney, why he complained of left shoulder pain, but not right shoulder pain, at the University of Iowa emergency room. Petitioner responded that the other parts of his body hurt worse and that was why he didn't notice the right shoulder pain at that time.

MEDICAL EVIDENCE

University of Iowa Hospital - Records (PX. 1)

Immediately following his work accident, Petitioner was taken to the University of Iowa Hospital emergency room where he complained of pain in his low back, neck, left shoulder, right lower extremity and laceration to his lower extremity. The emergency room physician ordered a CT scan of his neck and low back, along with x-rays of the thoracic spine, lumbar spine, right tibia / fibula, pelvis, chest and left shoulder. The CT scans and x-rays were interpreted as being unremarkable for pathology. Petitioner also had his laceration sutured by the physician. He was discharged on hydrocodone for the pain and instructed to follow-up with his primary care physician.

St. Margaret's Hospital - Emergency Room - Records (PX. 2)

On November 21, 2012, Petitioner was seen in the emergency room for muscle soreness over his body and stiffness in his neck, upper back, lower back and legs. He was diagnosed with a cervical, thoracic, lumbar strain and left shoulder strain and was prescribed Vicodin for the pain.

Dr. Arnold Faber/Princeton Family Physicians - Records (PX. 3)

On November 27, 2012, Petitioner saw Dr. Arnold Faber, his primary care physician and complained of neck, shoulder and back pain. According to Dr. Faber's examination records, Petitioner's right shoulder strength was weaker than his left shoulder. Dr. Faber prescribed a course of physical therapy at Perry Memorial Hospital.

Perry Memorial Hospital - Records (PX. 4)

On November 30, 2012, Petitioner started his physical therapy at Perry Memorial Hospital at which time and he filled out a patient questionnaire form documenting shoulder pain and on a pain diagram he marked that he had right shoulder pain. On January 7, 2013, the therapist's progress note states that Petitioner complained of pain in the right shoulder and rated his pain being 6 out of 10. On January 9, 2013, the PT Outpatient Recertification form, which was completed by the therapist, noted that Petitioner reports pain in his right shoulder.

Perry Memorial Hospital records contain a physician order from Dr. Faber on January 11, 2013, for x-rays of right shoulder of Petitioner. The diagnosis was "trauma/pain." It was also written "11/20/12 work comp." On January 18, 2013, the therapist's progress notes indicated that Petitioner complained of right neck and shoulder pain.

Dr. Arnold Faber/Princeton Family Physicians - Records (PX.3)

On January 11, 2013, Dr. Faber examined Petitioner who made complaints of right shoulder pain with inability to lift his arm above shoulder height. On examination, Dr. Faber found that Petitioner's right shoulder was painful in and around the shoulder capsule and that he had increased pain when attempting to elevate his arm. Dr. Faber ordered x-rays of the right shoulder.

Dr. Lisa Snyder / I.P.M.R. - Records (PX. 5)

On March 26, 2013, Petitioner was referred to Dr. Lisa Snyder for further treatment of his right shoulder strain, cervical and lumbar strain. Dr. Snyder ordered a right shoulder MRI, which revealed a full thickness tear of the rotator cuff. Dr. Snyder then referred him to Dr. Shin, an orthopedic surgeon at St. Margaret's Hospital.

Dr. Michael Shin - Records (PX. 6)

On July 23, 2013, Petitioner saw Dr. Michael Shin and gave him a history of having been injured in a roll-over accident. He indicated to Dr. Shin that he had multiple body pains which distracted from the pain he had in his right shoulder. Dr. Shin diagnosed a right rotator cuff tear and right labral tear. Due to insurance issues, Dr. Shin could not perform a physical examination, but did recommend further physical therapy.

Dr. Robert Eilers' Report (PX. 7)

On June 27, 2013, Dr. Robert Eilers examined Petitioner and reviewed his medical records. When Dr. Eilers reviewed the records of Dr. Faber for November 27, 2012, he noted that Petitioner had right shoulder weakness. Dr. Eilers also reviewed the physical therapy records of November 30, 2012, which showed Petitioner had right shoulder pain. Dr. Eilers examined Petitioner and diagnosed a right supraspinatus near complete tear in the rotator cuff which needed immediate attention to prevent a complete treat and loss of further function. Dr. Eilers opined that Petitioner injured his right shoulder at work on November 20, 2012, when he was released from his seatbelt and fell to the right side of the cab. Dr. Eilers believed that Petitioner could return to light, sedentary job such as dispatch, but would have difficulty doing repetitive lifting with the shoulder.

Dr. Mukund Komanduri's Report (PX. 8)

On October 28, 2013, Dr. Mukund Komanduri, an orthopedic surgeon, performed a physical examination on Petitioner in addition to reviewing his medical records. Dr. Komanduri found that there was a clear causal connection between the roll-over accident where Petitioner suffered a traumatic blow to the right shoulder and the right shoulder rotator cuff tear. The mechanism of injury was definitely consistent with

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a shoulder injury because the over the shoulder seatbelt allowed the humeral head to translate anterior causing the injury. Dr. Komanduri recommended a right shoulder arthroscopy, reconstruction of the labrum and capsule with biceps tenodesis, rotator cuff debridement versus repair, a subacromial decompression and possible acromioclavicular joint resection.

Dr. Komanduri believed that current work restrictions should be one-handed duty, 25 pound weight limit, and no overhead work. These restrictions are permanent if the right shoulder is not treated.

CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is supported by both the Petitioner's testimony and the medical evidence. The main focus of this dispute is on the Petitioner's right shoulder condition. Respondent disputes that the Petitioner's right shoulder condition is related to the undisputed accident on November 20, 2012 because there is no mention of the Petitioner's complaints of right shoulder pain in the initial medical records from the University of Iowa Hospital. Respondent further relies on the IME report of Dr. Cole, who also does not believe there is any causal relationship between the Petitioner's right shoulder and the November 20, 2012 accident because he noted that there was no report of right shoulder injury nor any treatment for the right shoulder until 8 weeks post accident. However, Petitioner credibly testified that upon his initial visit to the University of Iowa hospital, he complained of pain in other parts of his body that hurt worse. Furthermore, upon closer inspection of the medical records, the Arbitrator notes that the records from Dr.Faber and Princeton Family Physicians corroborate the Petitioner's testimony that he told Dr. Faber about his right shoulder pain as early as November 27, 2012. Petitioner's other treating physicians all provide a causation opinion regarding his right shoulder. Based on these facts, the Arbitrator finds that the Petitioner's right shoulder condition is causally related to his undisputed work accident from November 20, 2012.

2. With regard to the issue of medical expenses and prospective medical care, the Arbitrator finds that the Petitioner has met his burden of proof and awards the medical expenses (indicated below) and the medical care recommended by Dr. Komanduri, including surgery to the right arm. The Arbitrator adopts his previous findings from the issue of causation and incorporates those findings herein. Petitioner submitted into evidence, various medical expenses and reimbursement claims. The Arbitrator, after carefully considering the testimony of the Petitioner as well as the medical records, finds the following medical expenses reasonable and necessary:

$ 818.00 St. Margaret's Hospital
$ 193.87 Dr. Faber
$1,312.00 Dr. Lisa Snyder
$2,113.00 Perry Memorial Hospital
$ 150.00 Dr. Michael Shin (paid out of pocket by Petitioner)
$ 450.00 EMPI
$ 446.00 Central Illinois Radiology
$ 48.33 Prescriptions paid by either Petitioner or BCBS

$5,496.20 TOTAL MEDICAL OUTSTANDING/REIMBURSEMENT

16IWCC0797

The Arbitrator orders Respondent to pay $5,496.20 in accordance with Section 8(a) of the Act, subject to Section 8.2 Medical Fee Schedule. Respondent shall receive a credit for any benefits it has already paid and shall hold Petitioner harmless for any of the above expenses paid through group insurance.

3. Regarding the issue of TTD, the Arbitrator finds that the Petitioner has met his burden of proof. This finding is based in part on the Arbitrator's findings with regard to the issue of causation and is further supported by both the testimony and medical evidence. The medical records of Petitioner's primary care physician, Dr. Faber, indicate that Petitioner was restricted from all work at all times while under his care. On February 6, 2013, employer, Respondent's IME, Dr. Steven Delheimer, released employee Petitioner to full duty. Respondent discontinued paying TTD benefits as of Dr. Delheimer's examination. However, Petitioner continued to seek medical treatment for his right shoulder condition from Dr. Lisa Snyder and Dr. Michael Shin and was not released to return to work. On June 27, 2013, Petitioner was evaluated by his choice of physician, Dr. Robert Eilers, who indicated that he could return to light, sedentary work such as a dispatcher. Respondent never offered him such a position. On October 28, 2013, Petitioner was evaluated by his choice of physician, Dr. Mukund Komanduri, who indicated that he could return to one-handed work with a twenty five pound restriction and no overhead lifting. This restriction was permanent unless the right shoulder was repaired. Respondent never offered him such a position. On May 19, 2014, Petitioner was evaluated by Respondent's IME, Dr. Brian Cole, who restricted him to a desk job only. Respondent never offered him such a position. On February 9, 2015, Dr. Brian Cole re-evaluated Petitioner and placed a fifteen pound weight restriction with no over the shoulder work. Respondent never offered him such a position.

Petitioner testified that due to his current physical condition, he could not safely perform the duties of an over-the-road truck driver. He also testified that he was never provided with any type of restricted work by Respondent.

Based on the above, the Arbitrator Petitioner TTD benefits of $919.34 a week for 114-2/7 weeks, that being the period from November 20, 2012 to August 27, 2015, as provided in Section 8(b) of the Act. Respondent is entitled to a credit for its TTD payments of $10,289.79. Respondent shall also receive a credit for any long term and short term disability it has paid to the Petitioner in lieu of TTD. Respondent has paid Petitioner before taxes, a total of $105,323.45 in short term and long term disability benefits. Respondent should receive credit for the net short term and long term benefits paid, that being the gross amount less state and federal taxes.

4. With regard to the issue of Penalties and Attorneys Fees, the Arbitrator finds that penalties and attorneys fees are not warranted in this case. This finding is supported by the evidence and the issues in dispute. Respondent's denial of benefits in this case was reasonably based on the disputed medical evidence. Therefore the denial of benefits was not vexatious or unreasonable. As such, the Petition for Penalties and Attorneys fees is denied.

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

Procopio Rosillo,
Petitioner,
vs.

City of Chicago,
Respondent.

16IWCC0784
NO: 13 WC 10759

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 of Petitioner 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 May 25, 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: DEC 6 - 2016
KWL/vf
11/29/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0784

ROSILLO, PROCOPIO
Employee/Petitioner

Case# 13WC010759

CITY OF CHICAGO
Employer/Respondent

On 5/25/2016, 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 0.48% 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:

0226 GOLDSTEIN BENDER & ROMANOFF
JUNIRA A CASTILLO
1 N LASALLE ST SUITE 2600
CHICAGO, IL 60602

0010 CITY OF CHICAGO LAW DEPT
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
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
NATURE AND EXTENT ONLY

16IWCC0784

Procopio Rosillo
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 13 WC 10759

Consolidated cases: n/E

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 **Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **4/7/16**. By stipulation, the parties agree:

On the date of accident, **5/29/12**, 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 **$66,752.31**, and the average weekly wage was **$1,283.70**.

At the time of injury, Petitioner was **66** 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 **$5,135.04** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,135.04**.

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 for a further period of 7.6 weeks, as provided in Section 8 of the Act, because the injuries sustained caused **a loss of 20% of the left middle finger.**

Respondent shall pay Petitioner compensation that has accrued from through , and shall pay the remainder of the award, if any, in weekly payments.

The petitioner fractured the distal phalanx of his middle finger with a nail plate avulsion injury that occurred in the course and scope of his employment with respondent. He testified that the top third of the finger is now numb. He returned to work, full duty, after the injury as a laborer.

Neither party entered an impairment rating into evidence. (i) This does not preclude an award for permanent partial disability. (ii) The petitioner returned to his usual and customary position. The Arbitrator places great weight to this factor. (iii) The petitioner was 66 years old on the date of injury The Arbitrator places some weight on this. (iv) The petitioner had no loss of earnings. The Arbitrator gives weight to this factor. (v) The evidence of disability is corroborated by the treating medical records. The Arbitrator gives greatest weight to this factor.

The respondent will pay an outstanding bill to Midland Orthopedics, directly to the provider, an outstanding bill of $1,726.32 pursuant to the fee schedule.

As a result of the injuries sustained the petitioner is to have and to receive 7.6 weeks at a weekly rate of $695.78 from the respondent because he sustained a loss of 20% of the left middle finger.

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

5-25-16
Date

MAY 25 2016

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

Donna Reynolds,
Petitioner,
vs.
Penn National Gaming,
Respondent,

NO: 13WC 24191

16IWCC0834

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,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 4, 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: DEC 2 3 2016
MJB/bm
o-12/19/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

REYNOLDS, DONNA
Employee/Petitioner

Case# **13WC024191**

PENN NATIONAL GAMING
Employer/Respondent

16IWCC0834

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:

1001 SCHREMPF KELLY & NAPP LTD
ALLAN L NAPP
307 HENRY ST SUITE 415
ALTON, IL 62002

4301 HEPLER BROOM LLC
DAVID G KOWERT
211 N BROADWAY SUITE 2700
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)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Donna Reynolds
Employee/Petitioner

v.

Penn National Gaming
Employer/Respondent

Case # 13 WC 24191

Consolidated cases: _____

16IWCC0831

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**. 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 16IWCC0834

On **April 29, 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 **$27,662.40**; the average weekly wage was **$531.20**.

On the date of accident, Petitioner was **52** 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 $ under Section 8(j) of the Act.

After reviewing all of the evidence presented, the Arbitrator makes findings regarding causation and whether Petitioner sustained an accident that arose out of and in the course of her employment, and attaches the findings to this document.

ORDER

Because the evidence demonstrated that the Petitioner's job duties were not a cause or an aggravation of her carpal tunnel syndrome, 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.

Edward Lee
Signature of Arbitrator

12/2/15
Date

DEC 4 - 2015

Donna Reynolds v. Penn National Gaming
13 WC 24191

16IWCC0834

Findings of Fact and Conclusions

This matter was brought to hearing on September 29, 2015 in Collinsville, Illinois. Both parties were represented by counsel.

Ms. Donna Reynolds, Petitioner herein, testified that she worked as a cage cashier for Penn National Gaming, a casino in Alton, Illinois. This was a full-time position, and she worked 8 hours per day and 40 hours per week. Medical records indicate that the petitioner worked in this position for the casino for approximately 17 years. (Respondent's Exhibit 2, Page 1). She testified that as of the date of the hearing she no longer worked for Respondent as her employment had been terminated.

Petitioner explained that her job duties required her to wait on customers at the casino for most of the work day. She explained that, upon arriving at the cashier station, she would count the money available in the top drawer of her station, and then make certain that all of her drawers together contained a total of $50,000.00. She explained this counting process took approximately 1 hour and was performed by hand. She described the remainder of her time as requiring her wait on customers, exchanging checks and tickets for cash. On cross-examination, the petitioner described performing this activity by holding stacks of cash in her left hand and thumbing out individual bills on the counter between her and the customer. The bills were grouped into separate stacks for each denomination, something that was required for observation by security cameras. She also described occasional computer entries for certain transactions and certain customers.

The petitioner also described her job as requiring her to dump coins from slot machines into a coin-counting machine, then tie up bags of coins weighing between 20 and 25 pounds apiece and throw those bags into piles. However, she admitted on cross-examination that the casino transitioned away from the use of coins in 2004, and therefore she had not performed those activities since that time.

The petitioner stated that, in the few months leading up to April 2013, she developed numbness and discomfort in both of her hands. On cross-examination, she admitted that the problems developed in both hands contemporaneously and with equal severity.

The petitioner sought treatment with Dr. Hoelscher with Alton Internal Medicine. (Petitioner's Exhibit 4). The petitioner underwent nerve conduction studies on April 23, 2013, and those studies revealed evidence consistent with bilateral median nerve entrapment.

On May 9, 2013, the petitioner was evaluated by Dr. David German, as a Section 12 examination on behalf of the respondent. (Respondent's Exhibit 2). In his report, Dr. German set forth a detailed description of job duties as related to him by the petitioner, and set forth her history and clinical examination results. Dr. German advised that the petitioner likely suffered from bilateral carpal tunnel syndrome, but he did not feel her job duties would have been an aggravating or contributing factor in

the development of her symptoms due to the lack of repetitive flexion and extension, force, and pressure. He felt that other risk factors likely played a role in the development of her symptoms, and he cited such things as her age, gender, and body mass index. On cross-examination, the petitioner advised that she stood 5 foot 6 inches tall and weighed 200 pounds. She also described being post-menopausal.

The petitioner went for treatment with Dr. Michael Beatty of Edwardsville, Illinois, who first evaluated her on June 17, 2013. (Petitioner's Exhibit 5). Dr. Beatty felt the petitioner suffered from bilateral carpal tunnel syndrome and was a candidate for surgery. Splints were prescribed.

On August 14, 2013 Dr. Beatty recommended surgery. A right carpal tunnel release was performed at Saint Anthony's Health Center in Alton, Illinois on September 18, 2013, and the left-sided release was performed at the same facility on October 9, 2013. (Petitioner's Exhibit 6).

The petitioner testified that she did well following surgery, and that aside from some loss of strength in her hands she was doing well. She denied any residual complaints of numbness, tingling, or discomfort.

Dr. Beatty testified by deposition on June 18, 2015. (Petitioner's Exhibit 8). He testified that he felt the work activity reported by the petitioner "would be consistent with the causation or cause for worsening of preexisting cause [sic] of carpal tunnel syndrome bilaterally." Dr. Beatty testified that he took detailed information from the petitioner as to her job description, and that in the information provided by the petitioner there were activities that he believed would cause or contribute to carpal tunnel syndrome. However, Dr. Beatty did not identify what activities those might be, nor how such activities could have contributed to cause the condition. (Petitioner's Exhibit 8, Pages 13-14).

Dr. Beatty also testified that he disagreed with the opinion tendered by Dr. David German in the matter. (Petitioner's Exhibit 8, Page 15-17). Dr. Beatty testified that a basis for this disagreement was Dr. German's statement that the petitioner's job did not require force or pressure when there was no indication that testing had been performed along these lines. However, on cross-examination, Dr. Beatty admitted that he did not perform such testing, either. (Petitioner's Exhibit 8, Page 19).

On cross-examination, Dr. Beatty admitted that the petitioner had potential for non-occupational risk factors for the development of carpal tunnel syndrome. (Petitioner' Exhibit 8, Page 20). He agreed that there was medical literature indicating that the female gender represented such a risk factor, although he indicated that he disagreed with those conclusions. (Petitioner's Exhibit 8, Pages 20-21). He also agreed that the petitioner's age of 52 was a documented, non-occupational risk factor in the medical literature, but he once again argued with the conclusion. (Petitioner's Exhibit 8, Pages 22-23). He agreed that obesity was also considered a non-occupational risk factor for the condition, and admitted that the claimant was overweight or obese. (Petitioner's Exhibit 8, Page 23). Dr. Beatty agreed that certain anatomic abnormalities in an individual could place them at higher risk for the development of carpal tunnel syndrome. (Petitioner's Exhibit 8, Page 24). He agreed that medical literature stated that

carpal tunnel syndrome could develop without any known cause, but he once again disagreed with the conclusions held in that peer-reviewed journal article. (Petitioner's Exhibit 8, Page 25-26). He cited no medical literature supporting his positions on these issues.

Dr. German testified by deposition on March 11, 2015. (Respondent's Exhibit 1). Dr. German explained that he took a detailed description of the petitioner's job duties, which consisted primarily of interacting with players at the casino exchanging tickets, money, and counting money. (Respondent Exhibit 1, Page 7). He explained that the petitioner physically demonstrated the mechanics involved in those job activities, and testified that he took some of the bills from his wallet and she demonstrated to him how the money was transferred toward the customer. (Respondent's Exhibit 1, Page 8).

Dr. German testified that, on the basis of the history taken, the clinical evaluation, the job activities, and records he reviewed he did not think that her job was contributing to her diagnosis of carpal tunnel syndrome. (Respondent's Exhibit 1, Pages 9-10). He testified that carpal tunnel syndrome could occur for a variety of reasons, but the petitioner did not seem to have any occupational reasons to suspect would cause or contribute to the disease. He testified that although the petitioner had some repetition in her hands, she had no force, no pressure, and no reason to contribute to an increase in pressure in her carpal tunnel to account for her symptoms. (Respondent's Exhibit 1, Page 10). He explained that the mechanism of counting demonstrated to him by the petitioner did not require repetitive flexion or extension of her hands, and that moving money did not cause increased pressure or force. He stated that the petitioner had several non-occupational risk factors for the development of carpal tunnel syndrome including her female gender, her age, body mass index, and possible hypothyroidism. (Respondent's Exhibit 1, Pages 11-12). He further explained there were no studies he could find that showed an increased risk of carpal tunnel syndrome in people using keyboards or exerting more pressure than one would with holding a bill. (Respondent's Exhibit 1, Page 35).

Conclusions

Based upon the foregoing, the Arbitrator finds there is an insufficient basis upon which to conclude that Petitioner's condition of ill-being was causally related to her employment. Rather, the evidence demonstrates the petitioner's employment was neither a cause nor an aggravation of her condition, and, therefore, all benefits are denied.

The Arbitrator does not find the testimony of Dr. Beatty on the issue of causation to be persuasive, in that Dr. Beatty failed to explain what particular job activities could have contributed to cause carpal tunnel syndrome, or how such activities would cause the condition to develop. It is also puzzling that Dr. Beatty voiced disagreement with all medical literature concluding that gender and age were risk factors for carpal tunnel syndrome, as well as peer-reviewed literature concluding that carpal tunnel syndrome can occur idiopathically.

The Petitioner's testimony that her symptoms developed in both hands contemporaneously and with equal severity lends credence to Dr. German's opinion that the condition developed due to non-occupational factors.

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Carlos Deprow,
Petitioner,

vs.

No. 13 WC 26149
No: 13 WC 26181

U.S. Steel,
Respondent.

16IWCC0791

DECISION AND OPINION ON REMAND FROM THE CIRCUIT COURT

This matter returns to the Commission pursuant to the February 23, 2016 Order of the Circuit Court of Madison County (Judge John B. Barberis, Jr.) under its case number 15-MR-24. That Order affirmed in part and reversed in part the September 1, 2015 decision of the Commission, which decision modified the Arbitrator's decision of May 22, 2014.

A summary of the factual background is in order: On August 12, 2013, Petitioner, a steel mill worker, filed two Applications for Adjustment of Claim. These Applications alleged separate accidents, one resulting in repetitive trauma and the other in acute injury. For case no. 13 WC 26149, he alleged that he sustained "repetitive trauma associated with working with hand tools, large pipe wrenches, and other tools associated with his duties as a pipefitter," affecting "both elbows and hands." The date of accident or manifestation was identified as July 9, 2013. For case no. 13 WC 26181, he alleged that, on July 26, 2013, he sustained an acute injury when, "while working with a large bearing block and holding chains from an overhead crane, the crane operator tried to lift the bearing block and the chains violently jerked both Petitioner's arms forward." The body parts affected by the second accident were "both elbows and right shoulder." The two cases were consolidated and hearing under §19(b) was held before the Arbitrator on March 25, 2014.

At hearing, Petitioner testified regarding the undisputed accident of July 26, 2013. In particular, he testified regarding the pain in the right shoulder that he experienced following the accident; the right rotator cuff repair performed by Dr. Richard Lehman on February 5, 2004; his ongoing recovery, which, as of the date of hearing, involved wearing a sling around the right arm and twice-weekly physical therapy; and the fact that Dr. Lehman had placed him off work since the day of the surgery and had not yet released him to return to work in any capacity. The Arbitrator, in pertinent part, found that Petitioner "sustained accidental injuries to both elbows and his right shoulder on July 26, 2013," and was entitled to temporary total disability benefits as well as penalties and fees.

16IWCC0791

On review of the Arbitrator's decision, the Commission found that Petitioner had proven temporary total incapacity and thus was entitled to temporary total disability benefits (up through the date of hearing of March 25, 2014),[1] but that penalties and attorney's fees were unwarranted; the Arbitrator's award of penalties and fees was thus vacated. The Commission further added that, "as to Petitioner's claim of repetitive injury to his elbows that was alleged to have occurred on July 9, 2013," it found no compensability **[noting, *inter alia,* the lack of testimony from Petitioner during the hearing regarding his elbows.]**

Petitioner sought review in the Circuit Court. The Circuit Court's Order stated that, while it was upholding the Commission's decision as to temporary total disability benefits and penalties and fees, the Commission's decision "as it related to causal connection of the elbows is reversed and remanded." Respondent's motion for leave to file interlocutory appeal was denied by the Appellate Court for the Fifth District.

In accordance with the Circuit Court's Order, the Commission reverses its affirmative statement regarding non-compensability of elbow injury, including any injury as may have occurred on July 9, 2013, as having been prematurely made. The Commission vacates its earlier finding regarding Petitioner's claim of July 9, 2013, and remands this matter to the Arbitrator for further proceedings.

IT IS THEREFORE ORDERED BY THE COMMISSION that the case in its entirety is remanded to the Arbitrator for disposition consistent with this Order.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,600.00. 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: DEC 8 - 2016

Joshua D. Luskin

Charles J. DeVriendt

jdl/ac
68

Ruth W. White

[1] The Arbitrator had also ordered Respondent to "pay continuing temporary compensation benefits from March 26, 2014 until the Petitioner is allowed to return to light duty by orders of his treating physician." The Commission vacated this award of "continuing" benefits, as an award of potentially disputed future temporary total disability benefits is appropriately the subject of a future §19(b) hearing.

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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rolan Johnson,

Petitioner,

vs. NO: 13 WC 30653

16IWCC0786

UPS,

Respondent.

DECISION AND OPINION ON REVIEW

This case comes before the Commission on Petitioner's Petition for Review requesting reinstatement of the case following the Dismissal for Want of Prosecution by Arbitrator Williams on September 24, 2014 and denial of Motion to Reinstate on May 20, 2015. The Commission, having considered the entire record, grants Petitioner's Petition to Reinstate and remands the matter to the Arbitrator, for the reasons set forth below.

1) Petitioner filed an Application for Adjustment of Claim on 9/18/13.
2) Arbitrator Williams subsequently issued an Order dismissing Petitioner's claim for want of prosecution on 9/24/14.
3) Petitioner filed a motion to reinstate on 4/15/15.
4) Arbitrator Williams denied Petitioner's motion to reinstate on 5/20/15.
5) Petitioner filed a Petition for Review on 6/24/15.

The Commission notes that at the time of the Arbitrator's dismissal for want of prosecution on 9/24/14 the case was not above the red-line, given that it was not more than three-years. In addition, no record was made at that time and no reason was given for the dismissal other than the standard language contained in the DWP order form. Likewise, no record was made at the time of the Arbitrator's denial of Petitioner's motion to reinstate on 4/15/15 and no reason was given for the denial beyond checking the appropriate space on the Notice of Motion and Order form.

16IWCC0786

Based on the above, and in light of the lack of adequate explanation as to the basis for the dismissal, the Commission grants Petitioner's Petition to Reinstate and remands the matter to the Arbitrator for further proceedings.

The Commission also notes that Petitioner, at oral argument, withdrew the document attached to his brief entitled "Contemporaneous Recordation of Proceedings." Accordingly, Respondent's objection to same is moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Reinstatement is hereby granted, and the matter is remanded to an Arbitrator for further proceedings.

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: DEC 7 - 2016
o: 10/25/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

REBECA RODRIGUEZ,

Petitioner,

16IWCC0806

vs.

NO: 13 WC 31692
14 WC 3516
16 WC 4645

STAFFING NETWORK, LLC,

Respondent.

DECISION AND OPINION UNDER SECTION 19(b-1)

Arbitrator Robert Williams, on August 2, 2016, was presiding over the arbitration hearing pursuant to Petitioner's Section 19(b-1) claim. During the course of the hearing, Petitioner informed Arbitrator Williams that she had recently filed a complaint with the Commission. He immediately indicated that he would recuse himself and file the appropriate documents with the Commission to accomplish this. Additionally, he orally declared a mistrial of the arbitration hearing. Arbitrator Williams then, also on August 2, 2016, issued a written Order dismissing Petitioner's Petition under Section 19(b-1) and put into writing that he declared a mistrial "due to a complaint [being] filed with the Commission against the Arbitrator." A timely Petition for Review of Arbitrator Williams' Order was filed by Respondent. The Commission, accordingly, reviewed the Arbitrator Williams' Order.

The Commission, upon reviewing the transcript of the arbitration hearing and reviewing Arbitrator Williams' Order, finds no basis or justification to dismiss Petitioner's Petition under Section 19(b-1). Arbitrator Williams failed to allege any procedural impropriety that would have justified the petition's dismissal. As such, the Commission finds the dismal of Petitioner's petition to have been unjustified and inappropriate.

16IWCC0806

The Commission also cannot condone Arbitrator Williams' declaration of a mistrial. Neither the Act nor the Rules Governing Practice before the Illinois Workers' Commission appears to sanction this course of action.

Arbitrator Williams, once he recused himself from the proceedings, should have taken no further action except to notify the Commission of his recusal so that the Commission could reassign the case to another arbitrator as is called for under Rule 9090.30(e) in the Rules Governing Practice before the Illinois Workers' Commission. The Commission will therefore take the action not taken by Arbitrator Williams and remand the matter to an arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Arbitrator Williams' Order dismissal of Petitioner's 19(b-1) petition is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's 19(b-1) petition be remanded and assigned to a new arbitrator for further proceedings.

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: DEC 15 2016
KWL/mav
O:11/1/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jay Helton,

Petitioner,

vs.

NO: 13 WC 35935

16IWCC0810

Vienna Grade School,

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 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 June 13, 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.

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: DEC 16 2016

MB/mam
o:12/8/16
43

Mario Basurto

David L. Gore

Stephen Mathis

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

HELTON, JAY
Employee/Petitioner

Case# **13WC035935**

16IWCC0810

VIENNA GRADE SCHOOL
Employer/Respondent

On 6/13/2016, 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 0.43% 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:

4377 MICHAEL MILES
ATTORNEY AT LAW
PO BOX 907
CARBONDALE, IL 62903

1139 NOBEL & ASSOCIATES
MICHAEL MAHAY
387 SHUMAN BLVD SUITE 210E
NAPERVILLE, IL 60563

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- [ ] 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)

Jay Helton
Employee/Petitioner

v.

Vienna Grade School
Employer/Respondent

Case # **13** WC **35935**

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 **Mount Vernon**, on **12/3/2015**. 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. [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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0810

FINDINGS

On the date of accident, **07/02/2012**, 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 **$27,040**; the average weekly wage was **$520**.

On the date of accident, Petitioner was **54** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$3561.66** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$3561.66**.

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 $346.67/week for 104 5/7 weeks, commencing 7/3/12 through 9/6/12 (9 3/7 weeks), and 2/5/14 through 12/3/15 (95 2/7 weeks), as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $3,561.60 for temporary total disability benefits that have been paid.

Respondent shall authorize and pay for prospective medical services as recommended by Dr. Davies and/or Dr. Colle, as provided in Sections 8(a) and 8.2 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.

Michael K. Nowak, Arbitrator

6/4/16
Date

ICArbDec19(b)

JUN 13 2016

FINDINGS OF FACT

The Petitioner testified that on July 2, 2012, he was working in his usual capacity as a custodian for the Respondent, Vienna Grade School. On that day, the Petitioner was operating a mechanical floor stripper which malfunctioned, stopped suddenly and caused him to be thrown to the floor. He testified that he had an immediate onset of lower back pain. He was sent home to rest, but the following day was much worse and he could not get out of bed without the help of a cane. (Px 9, Page 137).

According to the medical records the Petitioner first sought medical treatment on July 6, 2012 at Rural Health, Inc. - Vienna Medical Clinic. The Petitioner described experiencing lower back pain since the accident as constant sharp pain with an intensity of 11/10. He reported that he could not get up if he lay down. (Px 1, page 3) He further reported a prior surgery to the lower back 34 years ago. At the 07/06/12 visit he reported that the prior surgery consisted of trimming a disc bulge at L2-3. However, after consultation with his treating physicians subsequent to his initial office visit, he recalled that the surgery was performed at the L5-S1 intervertebral space, which he confirmed in his testimony at trial. Dr. Qi Liu, M.D., his treating primary care physician recommended a CT Scan of the lumbar spine without contrast, prescribed medications and ordered him off work for one week.

At his July 9, 2012, visit to Rural Health, the Petitioner attended a follow up appointment to discuss the results of the CT Scan. He reported that his pain was better but not gone. He reported that he still needed a cane to get up and down from a sitting position. The assessment included back pain, "not really classical sciatica at this point." (Px 1 page 3) The plan included a neurosurgical evaluation.

On July 30, 2012, the Petitioner attended a neurosurgical evaluation with Dr. Theodore Davies, MD at Paducah Neurosurgical Center. After taking a history, reviewing the CT Scan and conducting a neurological evaluation, Dr. Davies reported that the findings of the diagnostic film indicate a small central disc displacement at L3-4, not clearly compressing on the cord or impinging on a nerve root. He also noted disc degeneration at L5-S1 as well as scarring from the surgery in 1979. He further stated, "At this point, there are no clear surgical lesions seen." (Px 4, page 27) Dr. Davies prescribed physical therapy and medication management.

On August 16, 2012, the Petitioner followed up with Dr. Davies. The Petitioner reported primarily back pain with symptoms into the right leg all the way to the foot. Improvement with physical therapy was noted. However, pain returned as he increased his activities. Dr. Davies noted that the Petitioner "is extremely eager to return to work." However, Dr. Davies further noted he would not be ready and ordered an additional three to four weeks of physical therapy.

On September 6, 2012, the Petitioner returned to Dr. Davies. He reported that his level of pain was markedly improved. He had been active in physical therapy and working on exercises. Electrical stimulation did not help and he was avoiding medications due to side effects. Sitting for periods of time aggravated his back. Dr. Davies allowed him to resume work activities, but wanted physical therapy to continue twice a week for the next month.

On November 15, 2012, the Petitioner appeared for an office visit with Dr. Paul Juergens to schedule a series of three epidural steroid injections in the lumbar region. (Px 6, page 73). During his initial visit with Dr.

Juergens, the Petitioner reported that his pain level is at worst a nine out of ten, at least a five out of ten, but averages around a five.

On November 26, 2012, Dr. Juergens performed a left transforaminal epidural injection and right transforaminal epidural steroid injection at the L3-4 level. (Px 6, page 76). At the December 12, 2012, post-injection follow up, the Petitioner reported to Dr. Juergens that the pain on the left side had improved but continued to have pain on the right side in addition to shooting pains down the right leg. He stated that riding in the car for an hour or more increased burning in both legs. (Id.)

On December 17, 2012, the Petitioner returned to Dr. Davies. In his report, Dr. Davies stated, "At his last visit, we had initiated Neurontin, and he also had a small supply of Percocet. He was taking three Neurontin a day and states he really could not tell any difference. When he ran out of it, he did not choose to have it refilled. He has been referred to Dr. Juergens. He has gotten his first injection." (Px 4, page 32). Dr. Davies further reported that the Petitioner did experience "good relief" from the first injection. Petitioner did not request any further medication. Dr. Davies noted that medication management may need to be readdressed after the series of epidural injections were completed.

On January 7, 2013, Dr. Juergens performed a right transforaminal epidural steroid injection at S1. According to the post-op note on January 21, 2013, the Petitioner reported significant improvement following the procedure. He reported better relief as compared to his first injection and described his pain level is a 1 at its worst.

On February 25, 2013, the Petitioner again reported significant improvement following his second injection. He had no pain and continued to work full duty. Dr. Davies released the Petitioner to return as needed. (Px 4, page 34)

On May 8, 2013, the Petitioner returned to Dr. Juergens requesting the third injection. According to the office note, the Petitioner stated he received a great deal of relief from the last procedure but the pain returned over the last two weeks. Initially, Dr. Juergens scheduled a repeat injection at the right S1 level. (Px 6, page 83-86) However, according to the operative report dated 6/17/2013, the procedure was performed at the L4-5 level. (Id. page 92) According to the follow-up note dated July 1, 2013, the Petitioner reported no improvement from the third injection.

On August 5, 2013, the Petitioner returned to Dr. Davies. He reported low back pain and bilateral leg pain, worse on the right going down to his foot over the dorsum. He reported that the first two injections worked, the third one did not. He reported no new injury. The Petitioner reported that his pain level was steadily between 2 and 3, increasing to 5 with certain activities, including sitting or driving. Dr. Davies ordered an MRI with and without contrast. (Px. 6, page 35)

On September 10, 2013, the Petitioner returned to Dr. Davies following the MRI. Dr. Davies noted "He has had increasing pain in his low back and legs, particularly the right leg if he is on his feet for any period or sitting, in particular, increases the radicular pain. He no longer works at the school district, but has now been doing remodeling of homes, which is somewhat more physical and harder work." Dr. Davies indicated that the Petitioner may have slight listhesis at L5-S1 and ordered flexion and extension x-rays. Dr. Davies further

indicated that if surgery was necessary, a fusion would be likely. He ordered additional physical therapy and scheduled a consultation with Dr. Gruber.

The Petitioner testified that shortly after the September 10, 2012, visit he discussed his condition and treatment with the claims representative for the Respondent. He further testified that all workers' compensation benefits, including medical benefits ceased.

A second application for adjustment of claim was filed by Petitioner on November 5, 2012. (Jay Helton v. Dean Corbit Construction 13 WC 35934) That application stated that the Petitioner slipped and fell while spinning a suspended wall on September 16, 2013. The part of the body that was affected was the low back. The nature of the injury was "To be Shown." The Petitioner dismissed the claim against Dean Corbit Construction prior to the hearing in this cause. The Petitioner testified that he believed he did not suffer any lasting injury from the September 16, 2013, incident. He testified that he filed the application after his conversation with the claims representative for the Respondent and consultation with his prior attorney. The medical records entered into evidence do not mention any specific incident occurring on or around September 16, 2013.

On February 4, 2014, the Petitioner returned to Dr. Davies with continued low back and significant right leg pain with activity or sitting and some pain in the left leg. The Petitioner provided a history that he tried another type of job and it was too heavy. Straight leg raising was done reasonably well, but he had limited forward flexion and straightening of his back. Dr. Davies stated that "he may remain off work" but noted issues with access to medical care and worker's compensation coverage. Dr. Davies recommendations included an EMG and nerve conduction study to assess radiculopathy as well new diagnostic studies. (Px 4, page 38)

On January 6, 2015, the Petitioner attended a neurological evaluation conducted by Dr. Kyle Colle, D.O, at the Regional Brain & Spine Center in Cape Girardeau. The evaluation was scheduled by his attorney. According to Dr. Colle's report, the Petitioner provided a history to Dr. Colle that was consistent with the treating medical records and his testimony. In addition to conducting a neurological examination and reviewing the diagnostic films, Dr. Colle also reviewed the available medical records. Dr. Colle noted that the Petitioner returned to Dr. Juergens on May 8, 2013, requesting the third epidural injection. Dr. Juergens scheduled the Petitioner for a repeat injection into the right S1 nerve root. However, the procedure was changed on June 17, 2013 to an injection at the L4-5 level, from which the Petitioner reported that he did not get any measurable relief. Dr. Colle diagnosed degenerative disc disease, disc herniation, radiculopathy and numbness. Dr. Colle further noted it "is within a reasonable degree of medical certainty that the work related injury is the prevailing factor for the patient's current complaints." (Px 9, page 142) Dr. Colle recommended a treatment plan similar to Dr. Davies, but also recommended medial branch blocks around the L5-S1 facets as well as a lumbar corset.

On May 19, 2015 Petitioner was examined by Dr. Russell C. Cantrell pursuant to Section 12 of the Act. According to Dr. Cantrell's report, the Petitioner provided a history of accident and complaints consistent with prior records and his testimony at the hearing. Dr. Cantrell's review of the available medical records was similar to the review conducted by Dr. Colle. However, at page 5 of Dr. Cantrell's report, it does not mention that on June 17, 2013, Dr. Juergens injected the epidural steroid into the L4-5 level instead of the L5-S1 level as originally scheduled. Also, in contrast to Dr. Colle's opinion as to causal connection, Dr. Cantrell stated, it was his opinion that there was not a causal relationship between the work injury of July 2, 2012, and his current complaints.

16IWCC0810

At trial, the Petitioner testified that he still had significant pain in the lower back and right leg. He still had s trouble sitting and sleeping. He testified that he could not function competently at a job site due to his lower back and radicular symptoms. He further testified that he although he had a lumbar surgery in 1979, he had not experienced significant back pain or sought medical treatment for lower back pain until after the July 2, 2012, accident. He admitted that he could not accurately remember whether the 1979 surgery was performed at the L5-S1 level or the L3-4 level until the surgical scarring at the L5-S1 level was identified by Dr. Davies. He testified that he would like to follow the treatment plan outlined by his treating physicians, as well the recommendations made by Dr. Colle.

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

The Arbitrator found the Petitioner to be a credible witness. The Petitioner's medical treatment through February 25, 2013, illustrated a reasonable medical plan designed to bring an injured worker to maximum medical improvement with the least amount of medical treatment possible. The Petitioner initially attempted to rest at home for a few days before he sought medical treatment. In consultation with his physician he was allowed to return to work about two months after the accident, even though he was still undergoing treatment. In November 2012, lumbar injections were commenced because the Petitioner was still experiencing significant symptoms. The first injection, which was into the L3-4 level, helped a little. The second injection into the right S1 level helped a lot and the Petitioner experienced almost complete relief for nearly five months. The third injection into the L4-5 level did not provide any relief.

Other than the temporary relief the Petitioner experienced from January to May, 2013, the pattern of Petitioner's symptoms remained consistent. Although there was a history that the Petitioner had micro-disc surgery and/or a laminectomy in 1979, the record is devoid of any medical treatment relating to any lower back condition until after the July 2, 2012, injury.

It is not lost on the Arbitrator that Petitioner filed an Application for Adjustment of Claim for a work incident occurring on September 16, 2013, involving a different employer, which was dismissed prior to the hearing in this cause. However, Petitioner described the incident at the hearing and testified that it did not cause any additional symptoms to his ongoing condition. There are no medical records indicating that the Petitioner suffered a specific injury on or about September 16, 2013. Most significantly, on September 10, 2013, six days before that incident, the Petitioner had returned to Dr. Davies, reporting that his symptoms were still present and increasing. At that time, Dr. Davies ordered additional diagnostic testing and discussed the possibility of surgery. Accordingly, the Arbitrator concludes that incident occurring on September 16, 2013, did not contribute to the Petitioner's current condition of ill-being.

The Arbitrator finds the opinions of Dr. Colle and Dr. Davies more persuasive than those of Dr. Cantrell. The Arbitrator specifically finds that Dr. Colle's forensic analysis in determining that the injection therapy at the different lumbar levels helped determine that the primary pain generator was at the L5-S1 level, and to a lesser extent, the L3-4 level persuasive.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that his current condition of ill-being is related to the July 2, 2012, work accident.

Issue (K): Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that the medical treatment plan suggested by Dr. Colle is reasonable and necessary and causally related to the July 2, 2012, work accident. Dr. Colle's plan is similar to the recommendations of Dr. Davies, but includes medial branch blocks at the L5-S1 level. As evidenced by the successful epidural injection into the S1 in January 2013, it is reasonable to project that these procedures will likely provide significant albeit temporary relief the Petitioner needs.

Respondent shall authorize and pay for prospective medical services as recommended by Dr. Davies and/or Dr. Colle, as provided in Sections 8(a) and 8.2 of the Act.

Issue (L): What temporary benefits are in dispute?

The Petitioner was initially off work from July 3, 2012 to September 6, 2012, (9 3/7 weeks) The Respondent paid TTD during this time period. The Petitioner was released to full duty work until his February 4, 2014, office visit with Dr. Davies. During that visit, the Petitioner discussed his inability to continue working due to his ongoing symptoms in the lower back and legs. Dr. Davies noted that the Petitioner "may remain off work." Dr. Davies further noted that the Petitioner was having difficulty finding access to medical care. As of the time of hearing, the treatment plan prescribed by Dr. Davies had not been implemented. The Petitioner testified that he was currently unable to work due to his lower back symptoms. The preponderance of evidence supports the Petitioner's claim that he has been unable to return to work February 4, 2014 through the date of hearing, December 3, 2015 (95 2/7 weeks).

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Respondent shall pay Petitioner temporary total disability benefits of $346.67/week for 104 5/7 weeks, commencing 7/3/12 through 9/6/12 (9 3/7 weeks), and 2/5/14 through 12/3/15 (95 2/7 weeks), as provided in Section 8(b) of the Act. Respondent shall be given a credit of $3,561.60 for temporary total disability benefits that have been paid.

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

KAREN MCLAUGHLIN,

Petitioner,

vs. NO: 13 WC 37617

AIG,

Respondent,

ORDER

This matter comes before the Commission on Petitioner's "Motion to Dismiss Respondent's Petitioner for Review on Arbitration Decision", relating to the Arbitrator's decision granting Petitioner's Motion to Reinstate on May 9, 2016. The Transcript of Proceedings on Arbitration from May 9, 2016 regarding the reinstatement was submitted by the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) On April 15, 2015, this matter was dismissed pursuant to a "Motion to Dismiss" filed and noticed for hearing by Respondent.

2) In February, 2016, Petitioner filed a Petition to Reinstate.

3) On May 9, 2016, a hearing on the Petition to Reinstate was held before Arbitrator Simpson and a record was made.

4) Arbitrator Simpson reinstated Petitioner's case.

5) On May 11, 2016, Respondent filed a Petition for Review on the grounds the matter was not properly reinstated.

6) On July 18, 2016, Petitioner filed a Motion to Dismiss Review on the grounds that an order of reinstatement is interlocutory and not appealable.

The decision to grant or deny reinstatement is a matter which rests within the sound discretion of the Commission. Banks v. Industrial Comm'n, 345 Ill.App.3d 1138, 1140 (2004); *See also*, Conley v. Industrial Commission, 229 Ill.App.3d 925, 930 (1992). The reinstatement, although not

timely filed, was appropriately granted as this matter was below the red line, no rulings on the merits had issued, and it was appropriately within the discretion of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Motion to Dismiss Review 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: DEC 7 - 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

CJD/dmm
O: 11/21/16
49

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ 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

Jamey Garrett,
Petitioner,

vs.

Lawrence Correctional Center,
Respondent.

16IWCC0824

NO: 13 WC 42351

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, 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 3, 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: DEC 21 2016
KWL/vf
O-12/19/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0824

GARRETT, JAMEY
Employee/Petitioner

Case# **13WC042351**

LAWRENCE CORRECTIONAL CENTER
Employer/Respondent

On 2/3/2016, 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:

0969 THOMAS C RICH PC
MICHELLE M RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

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

4948 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

1350 CENTRAL MANAGEMENT SYSTEMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

FEB 3 - 2016

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

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

16IWCC0824

Jamey Garrett
Employee/Petitioner

v.

Lawrence Correctional Center
Employer/Respondent

Case # **13** WC **42351**

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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **January 6, 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 **October 9, 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.

In the year preceding the injury, Petitioner earned **$65,476.84**; the average weekly wage was **$1,259.17**.

On the date of accident, Petitioner was **41** years of age, *married* with 3 dependent children.

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

Respondent agreed at the time of arbitration that it was liable for unpaid medical bills as contained in Petitioner's Exhibit 1.

Respondent shall be given a credit of **$37,297.36** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$37,297.36**.

Respondent is entitled to a credit for **all amounts paid under group health plan** under Section 8(j) of the Act.

ORDER

Respondent shall pay any unpaid medical bills as contained in Petitioner's Exhibit 1 according to the Illinois fee schedule or PPO agreement, whichever is less, directly to the providers listed therein, as agreed to by the parties at the time of arbitration.

Respondent shall pay Petitioner the sum of **$721.66**/week for a further period of **63.25** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **12.65% loss of the person-as-a-whole.**

Respondent shall be given a credit for **all amounts paid under group health plan** under Section 8(j) 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

2/1/16
Date

FEB 3 - 2016

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0824

Jamey Garrett
Employee/Petitioner

Case # **13** WC **42351**

v.

Consolidated cases: **N/A**

State of Illinois/Lawrence Correctional Center
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that that he has been employed by Respondent as a correctional officer for 12½ years. He sustained injuries on October 9, 2013. He testified that at 3:30 a.m., he was going upstairs to the closet where they kept the dietary carts. When Petitioner went to pull the carts out, the steel door wedged the carts in between the door and the frame. He felt pain in his right shoulder immediately. He continued with his feed duties, and then around 4:15 a.m. he notified his immediate supervisor, Lieutenant Timothy McAllister.

Petitioner testified that that he filled out the Employee's Notice of Injury, which was included in Respondent's Exhibit 2. He went to the facility's health care and then when he got home he tried to make an appointment to see Dr. Mitchell (his primary care physician), but ended up seeing Dr. Thompson. He ultimately came under care of Dr. Mall. He was given an injection when he saw Dr. Mall initially and was pleased with the results, but it eventually wore off. He then returned to Dr. Mall, who recommended surgery. After the surgery, he progressed through therapy but was still having pain in the original area which he noted to the therapist. It felt like it was better, but there was still nagging pain. He was released to return to work full duty at one point and did return, but he continued to have symptoms and ultimately returned to Dr. Mall.

Petitioner testified that Dr. Mall ordered an MRI and recommended additional surgery, which he underwent. He was better after the surgery, did not notice the pain in therapy and seemed to be getting stronger while in therapy. He had a prior accident in 2012 when he was carrying milk crates up stairs, the crates turned and flexed his shoulder and he felt a little bit of pain. It happened in the summer of 2012. He sought medical treatment after it happened, and saw his primary care physician who recommended rest and ice, medications and an MRI. He did not have any further treatment and returned to work full duty shortly after the accident occurred. He denied have any other injuries or accidents to his right shoulder before October 9, 2013.

Petitioner testified that he did not tell Dr. Mall about his prior accident as he forgot, that his pain was a 0 and he forgot about the MRI from 2012. He recalled making a call to his assistant, Nathan, and explaining that he forgot to write it down on the form, but he suggested it was a non-issue and not to worry about it.

Petitioner testified that he attended two IMEs with Dr. Farley, and that he brought an MRI disk from the hospital where he had the 2012 MRI performed. He saw Dr. Farley in both April of 2014 and October of 2015, and he believed that he brought the MRI disk at the time of the first visit. Between the injury in 2012 and the October 9, 2013 injury, his right shoulder was fine and he had no issues.

Petitioner testified that he still has residual symptoms in his right shoulder. Soreness comes and goes, it is intermittent, and he notices it mainly after excessive use like chopping wood, hammering or throwing a baseball. He does not have pain consistently, it is sporadic and once every couple of weeks he has a sharp pain for a few seconds. He has diminished range of motion in his right shoulder, and he notices it mainly with tasks above his head and he has difficulty reaching behind his back and putting his belt on. He does not have the same strength in his right shoulder, and he notices that it fatigues quicker. When he plays catch with his son, he notices the fatigue and the strength not being there as it was prior to the injury. When he is at work, he opens doors and uses keys and feels a little bit of pain or tightness in his shoulder with excessive use. He has 11½ years with the Department of Corrections before he can retire.

When asked if he had any hobbies that had been affected, Petitioner testified that he coaches baseball and basketball, and he has changed the way he approaches coaching. How he goes about passing and layup drills has changed. He does his own auto maintenance, and when he is laying on the floor and reaching back above his head he has to think about being in the right position to do that.

Petitioner testified that he was paid temporary total disability benefits while he was off work or placed under restrictions, but he did not know if all of his medical bills had been paid.

On cross-examination, Petitioner testified that he had a prior injury to his right shoulder in the summer of 2012 that occurred while he was at work. He agreed that he filled out incident reports at work and treated with his primary care physician, but also testified that he recalled going to an orthopedic surgeon in Mount Vernon who said that he did not see anything on the MRI that was structurally wrong. He agreed that he saw Dr. Ahn at Orthopedic Center of Southern Illinois. He disputed that Dr. Ahn's medical records indicated that his diagnosis was that of a rotator cuff partial tear. He testified that he would dispute his medical records if they reflected that he underwent an injection to his shoulder on August 27, 2012. He testified that he did not tell Dr. Mall about his prior injury because he forgot to tell him. He testified that his attorney advised him to get second opinion and that his attorney recommended Dr. Mall to him. He testified that the disk that he brought with him to Dr. Farley had the 2012 MRI on it and he did not know if it had the 2013 MRI, but that he had them done at same place.

On cross-examination, Petitioner agreed that he was still able to coach and that he was still able to perform his auto maintenance. He agreed that he was back to work full duty with no restrictions. He agreed that he is not currently seeing a doctor for his shoulder, that he is not taking any over-the-counter or prescription medications for his shoulder and that he is not undergoing any physical therapy. He agreed that he was not required to wear any kind of brace or protective device for his shoulder, and that he was able to perform his job duties satisfactorily. He agreed that Dr. Mall told him at his last visit that he should return if he had any further issues, and that he has not returned to see him since.

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The Medical Records List was entered into evidence at the time of arbitration as Petitioner's Exhibit 2.

The medical records of Horizon Healthcare were entered into evidence at the time of arbitration as Petitioner's Exhibit 3. Petitioner presented on October 11, 2013 complaining of right shoulder pain and he indicated that his symptoms were moderate. He reported an onset of October 9, 2013 while at work, when he was moving carts out of a storage closet and the door had an auto closer. Petitioner stated

that he was moving carts in a left to right motion across the body, at which time he felt pain in the right front shoulder area. It was noted that Petitioner had an MRI of the right shoulder in the past. The assessment was noted to be disorders of the bursae and tendons in the shoulder region, and he was scheduled to undergo physical therapy. (PX3).

The records of Fairfield Memorial Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner underwent an Outpatient Initial Evaluation on October 17, 2013. Petitioner had a work-related injury approximately 10 days ago when he was pulling on a cart and had an immediate onset of right shoulder pain, particularly in the anterior aspect. Petitioner reported a prior history of a similar problem with his right shoulder a year or two ago, at which time he had an MRI. Petitioner had increased symptoms with activity and use of the right upper extremity, particularly with trying to reach behind his back or with prolonged overhead motions. Petitioner was seen for treatment for the timeframe of October 17, 2013 through November 15, 2013 and he met his goals. (PX4).

The records reflect that Petitioner underwent an MRI of the right shoulder on November 30, 2013. The Impression of the interpreting radiologist was that of (1) focal full-thickness tear of the supraspinatus tendon with surrounding large partial-thickness tear; (2) mild tendinopathy of the infraspinatus and subscapularis tendons; (3) marked osteoarthritis at the glenohumeral joint with loose body in the joint and moderate joint effusion. It was noted that comparison was made with the prior exam from August 20, 2012. (PX4).

Also included within the Fairfield Memorial Hospital records was a Physical Therapy Department Initial Evaluation performed on January 8, 2014. Petitioner had been seen for a brief course of physical therapy back in the fall, and he had eventually been referred to Dr. Mall in St. Louis. Petitioner had been administered a steroid injection and had been referred for a course of physical therapy. Petitioner had noticed some significant improvement since the injection, but he still had persistent pain with certain movements, particularly with overhead activities. Petitioner had been off work for some time but was scheduled to return back to work that night on modified duty. (PX4).

The medical records of Wabash General Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. Petitioner underwent x-rays of the right shoulder on December 9, 2013. The Impression of the interpreting radiologist was that of (1) mild glenohumeral and acromioclavicular arthrosis; (2) examination otherwise unremarkable. (PX5).

The records reflect that Petitioner was also seen by Dr. Justin Miller on that date for right shoulder pain. Petitioner was injured on October 9, 2013 when he was pulling on a cart when it hit a door jam and he continued to pull. Petitioner stated that his injury had gotten worse, that he had tried 15 sessions of physical therapy which he said made it worse, and that anything behind his back or elbow above chest made it worse. A diagnostic shoulder arthroscopy with possible rotator cuff repair was discussed. (RX5).

The medical records of Dr. Mall were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Petitioner was seen on December 23, 2013 with a chief complaint of right shoulder pain. Petitioner had been pulling some carts out of storage, the cart got caught on the door, and he continued pulling causing a traction type of injury to the right shoulder. Petitioner had difficulty with overhead movements as well as with pain sideways, and all of his pain was anterior in nature. Petitioner denied any prior shoulder problems or pain in the past. Dr. Mall's assessment was that of (1) right shoulder superior labral tear; (2) right shoulder high grade partial thickness rotator cuff tear; (3) right shoulder AC joint arthrosis. His recommendation was to perform a cortisone injection into the shoulder for both diagnostic and therapeutic purposes, and he thought this would be beneficial for Petitioner and to allow him to do/be more productive in physical therapy. Dr. Mall indicated that clearly Petitioner had no

prior right shoulder problems before this injury, and that since that time Petitioner had developed right shoulder pain. Dr. Mall opined that he believed that the pathology on the MRI was consistent with his work injury given the fact that this was a pulling type of injury or a traction type injury in which he was pulling and the cart got stuck causing a traction-type force to the shoulder, which would cause a superior labral tear. Dr. Mall suggested that he disagreed with the radiologist's report in that Petitioner's symptoms associated with his injury were consistent with a superior labral tear as was his mechanism of injury, and that his MRI appeared to have a superior labral tear. He further indicated that Petitioner's rotator cuff tear would be assessed surgically should it be necessary, but he did not see a full thickness rotator cuff tear present on the MRI. He also indicated that if Petitioner did have a high-grade partial thickness rotator cuff tear that was more than 50% of the rotator cuff insertion and he did not get better with physical therapy and anti-inflammatory medications, then this may need to be repaired as well. A Work Status Report dated December 23, 2013 was issued, allowing Petitioner to return to work on December 24, 2013 with restrictions of avoiding constant repetitive use of the right upper extremity, primarily one-handed work with injured hand assisting on light tasks, no reaching overhead/overhead work, no push/pull greater than 15 pounds, no inmate contact, no lifting greater than 10 pounds overhead/above chest and no lifting greater than 15 pounds from floor/waist/chest to waist/chest. (PX6).

The records reflect that Petitioner was seen on January 27, 2014, at which time it was noted that Petitioner had a cortisone injection and was doing extraordinarily well at that point. Petitioner had done a great job with his physical therapy and stated that his right shoulder really was not bothering him at all anymore. The Assessment was that of (1) Right shoulder SLAP tear; (2) right shoulder partial thickness rotator cuff tear; (3) AC joint arthrosis. Conservative treatment was recommended, and Petitioner was released to full duty for the next four weeks after which he was to be reassessed. It was noted that if Petitioner's pain returned, they would consider another injection versus surgical intervention. A Work Status Report was issued dated January 27, 2014, allowing Petitioner to return to work full duty effective January 28, 2014. (PX6).

The records reflect that Petitioner was next seen on March 10, 2014, at which time it was noted that Petitioner's pain had returned over the last few weeks. Petitioner's pain was anterior in nature, and it felt similar to him as it did previously. The Assessment was that of (1) Right shoulder SLAP tear; (2) right shoulder partial thickness rotator cuff tear; (3) AC joint arthrosis. Dr. Mall did not think additional injections and physical therapy were likely going to give him permanent relief of his symptoms, so surgery was discussed which was noted to entail a right shoulder arthroscopy, possible rotator cuff repair if more than 50% of the rotator cuff tendon was torn and a biceps tenodesis. A Work Status Report was issued on that date, allowing Petitioner to return to work full duty effective March 11, 2014. (PX6).

Included within Dr. Malls's records was an Operative Report dated May 15, 2014 pertaining to surgery performed on that date, which included (1) Arthroscopic rotator cuff repair of the supraspinatus and part of the infraspinatus; (2) intraarticular debridement of the anterior synovium, superior labrum, anterior labrum, posterior labrum and glenoid cartilage; (3) loose body removal of the intraarticular space; (4) debridement of the subscapularis tendon and coracoplasty; (5) subacromial decompression and acromioplasty; (6) open biceps tenodesis; (7) AC joint resection, open. The post-operative diagnoses were noted as (1) right shoulder superior labral tear, type II; (2) high grade partial thickness rotator cuff tear, 75% of the tendon; (3) intraarticular loose body; (4) anterior labral tearing, posterior labral tearing, and glenoid cartilage injury; (5) subacromial bursitis and acromial spur and AC joint arthrosis. (PX6).

The records reflect that Petitioner was seen on May 27, 2014 for post-operative follow up. Petitioner's incisions were well healed, and he had intact sensation and motor function in the median, ulnar, radial and axillary nerve distributions bilaterally. Dr. Mall recommended initiating physical therapy per protocol for the small to medium rotator cuff tear protocol. Petitioner was next seen on June 24, 2014, at which time it was noted that Petitioner was doing well with minimal complaints. Anti-inflammatory medications were started and it was suggested that he push his physical therapy range of

motion. Petitioner was next seen on July 28, 2014, at which time it was noted that he was doing well and had minimal complaints other than some soreness with reaching out away from his body and overhead. Dr. Mall recommended continued physical therapy, and it was noted that he hoped that in four weeks Petitioner would be close to a full duty release. (PX6).

The records reflect that Petitioner was seen on August 29, 2014, at which time it was noted that Petitioner was doing well and was able to throw a ball a little bit. Petitioner denied any popping or cracking, but he did have some anterior shoulder pain. Petitioner was significantly better than he was before he came in, and Dr. Mall thought the anterior shoulder pain would continue to improve. Petitioner had excellent rotator cuff strength and excellent examination in terms of his range of motion and negative AC joint and negative O'Brien's testing. Dr. Mall thought Petitioner was getting closer to being able to return to work in a full-duty capacity. (PX6).

The records reflect that Petitioner was seen on September 29, 2014, at which time it was noted that Petitioner was doing well with minimal complaints. Petitioner was noted to have good, full range of motion of his bilateral shoulders and that his bilateral shoulders were symmetric in terms of range of motion and strength in the rotator cuff. Dr. Mall thought Petitioner would benefit from two weeks of work conditioning, after which it was expected that Petitioner would be able to return to work full duty. Petitioner was seen on October 27, 2014, at which time it was noted that Petitioner was doing well and felt like he was ready to go back to work. A full-duty release was recommended, and Petitioner was deemed to have attained maximum medical improvement. (PX6).

The records reflect that Petitioner returned on January 12, 2015, at which time it was noted that Petitioner had minimal complaints other than some continued right anterior shoulder pain which had not completely gone away since before the surgery. It was noted to wax and wane somewhat, and that it flared up with some increase in activity. Petitioner had some residual rotator cuff tendonitis, and he was recommended to get back into his home exercise program and anti-inflammatory medications. An MRI was also recommended. Petitioner was seen on January 20, 2015, at which time it was noted that Petitioner had been having some right shoulder pain that persisted. An MRI arthrogram had been obtained, which revealed a small defect at the musculotendinous junction of the supraspinatus which was in the area medial to the previous repair. It was suggested that this could be related to a stitch that was placed in the area and had not healed. The Assessment was noted to be right shoulder rotator cuff tear at the musculotendinous junction, for which another four weeks of conservative care with rotator cuff strengthening at home was recommended. Petitioner was to continue his normal work to see how he did. A potential revision surgery was discussed. (PX6).

Included within the medical records was that of an MRI arthrogram performed on January 21, 2015, at MRI Partners in Chesterfield, MO. The impression of the interpreting radiologist was that of (1) Status-post rotator cuff surgery with post-surgical changes, there is a focal full thickness tear in the mid portion of the supraspinatus myotendionous junction as well as in the anterior aspect of the distal tendon insertion, no tendon retraction; (2) no discrete labral tear; (3) non-visualization of the long heads biceps tendon in the bicipital groove likely related to prior tenodesis. (PX6).

Included within Dr. Malls's records was an Operative Report dated February 26, 2015 pertaining to surgery performed on that date, which included (1) Arthroscopic rotator cuff repair, revision; (2) arthroscopic removal of foreign tissue, suture; (3) revision subacromial decompression; (4) arthroscopic debridement of the humeral head; (5) arthroscopic lysis of adhesions within the subacromial space. The post-operative diagnoses were that of (1) Right shoulder rotator cuff repair with incomplete healing; (2) humeral head cartilage flap; (3) acromial spur; (4) scar tissue around the rotator cuff. (PX6).

The records reflect that Petitioner was seen on March 9, 2015, at which time Petitioner stated that he was less painful this time than he was the last time. Petitioner's incisions were healing well, and he

had intact, well-perfused bilateral upper extremities. Additional physical therapy was recommended. Petitioner was next seen on April 6, 2015, at which time it was noted that Petitioner was doing well and had minimal complaints, and that therapy was going well for him. Continued physical therapy was recommended. Petitioner was next seen on May 5, 2015, at which time it was noted that Petitioner was doing well with minimal complaints, and that he had been doing well with physical therapy with no substantial issues. Petitioner was again recommended to continue physical therapy. (PX6).

The records reflect that Petitioner was seen on June 12, 2015, at which time it was noted that Petitioner had some soreness recently but had been progressing with physical therapy. Additional physical therapy was recommended, and it was noted that Petitioner could return to work in a full duty capacity. Petitioner was also seen on July 21, 2015, at which time it was noted that Petitioner was doing well, had minimal complaints and was able to do some mild lifting without any pain whatsoever. Petitioner was released on a fully duty basis and deemed to have attained maximum medical improvement. (PX6).

The Operative Reports dated May 15, 2014 and February 26, 2015 from Timberlake Surgery Center was entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The interpretive report for the MRI arthrogram performed on January 20, 2015 was entered into evidence at the time of arbitration as Petitioner's Exhibit 8.

The transcript of the evidence deposition of Dr. Nathan Mall was entered into evidence at the time of arbitration as Petitioner's Exhibit 9. Dr. Mall testified that he is an orthopedic surgeon and is board-certified in orthopedics as well as independent medical examinations, and that he did a fellowship in sports medicine and shoulder surgery. He testified that he sees approximately 100 patients per week, and that 50-60% of those cases involved shoulder injuries. He testified that he performs an average of 1-4 independent medical evaluations per week. He testified that he had opportunity to review medical records from Petitioner's primary care physician which were prior to the date of injury, and he believed they pertained to a prior shoulder strain. He also had opportunity to review the MRI from 2012 that was referenced in Dr. Farley's report. (PX9).

Dr. Mall testified that he first saw Petitioner on December 23, 2013, at which time Petitioner reported that he was pulling some carts out of storage when the carts got caught on a door, and he continued to pull which caused a traction type of injury to his right shoulder. He testified that the physical examination performed on that date revealed some findings including, among others, pain over the biceps tendon on the right side and mild pain over the AC joint. He reviewed the MRI from November of 2013, which he read as showing a superior labral tear, fluid around the biceps tendon and a partial-thickness rotator cuff tear of the very front part of the supraspinatus. The significance of the fluid around the biceps tendon suggested that the biceps was inflamed, and the presence of fluid in the joint itself indicated a recent injury. His diagnosis was that of a right shoulder superior labral tear, a high-grade partial-thickness rotator cuff tear and some AC joint arthritis or arthrosis. He opined that the pulling or traction type of injury that Petitioner described to him was a known cause of rotator cuff and superior labral injuries, and therefore felt that Petitioner's symptoms were likely the cause of his underlying pathology but at least aggravated the condition. He recommended a cortisone injection into the shoulder joint and physical therapy to try to strengthen his rotator cuff muscles, and issued work restrictions at that time. He testified that initially Petitioner did very well following the injection and did his physical therapy, and that his rotator cuff strength was excellent following his rehabilitation. Dr. Mall testified that Petitioner was referred to him by Dr. Thompson. (PX9).

Dr. Mall testified that Petitioner returned about six weeks later, indicating that his pain was returning and had been increasing over the last couple of weeks. He testified that when Petitioner returned on March 10th, he said it felt very similar to what it did when he first came in. He testified that this was pretty typical, and that the hope was that strengthening the rotator cuff and keeping it strong

would prevent any pain from the superior labral injury from coming back. He testified that based on the high-grade partial thickness tear, he was a little concerned that Petitioner would continue to be symptomatic given his injury. He testified that he recommended surgery when Petitioner returned in March of 2014. (PX9).

Dr. Mall testified that the first surgery was performed on May 15, 2014, after which Petitioner was keep off work. Petitioner did quite well after the procedure and was hitting all of his physical therapy milestones. Once Petitioner completed his therapy, Dr. Mall was concerned because he was still having a little bit of pain. He testified that he allowed Petitioner to return to work on October 27, 2014 because he had been doing well, but then he returned in January 2015 with some continued anterior shoulder pain. He testified that he ordered another MRI to assess for rotator cuff healing. He testified that he found a small defect in the musculotendinous junction, which was a little bit further medial than the repair was previously. He testified that he thought it was probably where a stitch was placed and there was probably some tearing from the stitch itself between the muscle and the tendon. He testified that it was a fairly small defect and that if Petitioner's pain improved and he was able to return back to work and perform his activities of daily living without much pain then he could be left alone, but if it became and continued to be fairly symptomatic for him or worsened with time then it probably needed to be fixed. (PX9).

Dr. Mall testified that when Petitioner returned in April, he started having some worsening symptoms so a rotator cuff revision surgery was recommended. He testified that a second surgical procedure was performed on February 26, 2015, at which time he found that there was incomplete healing of the rotator cuff and some scar tissue around the rotator cuff repair that had previously been done so he had to remove some of the suture material and re-repair the rotator cuff. Dr. Mall testified that Petitioner did very well after the second procedure, and that in July of 2015 Petitioner was doing excellent and was able to return back to work with no complications and was released at maximum medical improvement. He testified that he has not seen Petitioner since that time. (PX9).

Dr. Mall testified that he obtained the MRI report from 2012 as it was helpful to review the reports and films, and that the benefit of having a pre-injury MRI was to look at any differences between the two. He testified that he wanted to make sure that he saw the 2012 MRI and then either agree or disagree with Dr. Farley's reports as it related to the MRIs and offer an appropriate causation opinion. He testified that from his review of the MRI reports, Petitioner did sustain an injury in 2012 to the right shoulder which appeared to be a shoulder strain of some sort. He testified that from looking at the records that he saw, Petitioner probably did not require the MRI ordered by his primary care physician, as it was something that would have been treated with an injection and some physical therapy. From his review of the medical records and reports Petitioner was released to work full duty shortly after that injury, and he was working full duty at the time at which he suffered the injury at issue. (PX9).

Dr. Mall testified that he had opportunity to compare the 2012 and 2013 MRI films, and he also reviewed Dr. Farley's report as it related to the MRIs as well. Dr. Mall testified that the 2012 MRI showed a tear that was at most six millimeters in size, but on the 2013 MRI the tear appeared to have doubled in size. He testified that there was a loose body seen in the joint that was not there in the 2012 images. He testified that the 2013 MRI showed a clear superior labral tear, and it also showed a clear rotator cuff injury and a large joint effusion as well as fluid around the biceps tendons and that there was no doubt that some injury had happened. He testified that the 2012 injury was something from which Petitioner was able to recover very quickly from with just some conservative care which would be consistent with some rotator cuff tendonitis, whereas the partial tearing in the 2013 MRI was substantial enough to make him require surgery. (PX9).

Dr. Mall testified that his causation opinion had not changed. He testified that Petitioner had a significant traction type of injury, which was consistent with his findings on the MRI and at the time of surgery, and that clearly there was a change in his condition following the new accident. (PX9). He

testified that his services were rendered as a result of the care and treatment that Petitioner required due to the October 9, 2013 injury, and that they were reasonable and customary charges for the same or similar services in the medical community and in his geozip area. He confirmed that he recommended some time off work and light duty for Petitioner throughout his care and treatment, and that the recommendations were made as a result of the October 9, 2013 injury. He also testified that the need for the second surgery was causally related to the October 9, 2013 injury as well, as the rotator cuff did not heal appropriately. (PX9).

On cross-examination, Dr. Mall admitted that at the time that he began treating Petitioner in December of 2013 he was not yet board-certified. He testified that the first time that he could become board-certified was in July of 2014, and that he became board-certified in independent medical examinations in April of 2015. Dr. Mall agreed that at the time of the initial visit, he gave a causation opinion indicating that he believed that his shoulder condition was related to the alleged October 9, 2013 injury, and that it was based on the examination and history taken from Petitioner. He agreed that Petitioner told him at that point that he had no prior history of injury to his right shoulder or problems with it. (PX9).

On cross-examination, Dr. Mall agreed that the last time that he saw Petitioner on July 21, 2015 he released him at maximum medical improvement and told Petitioner to follow-up if needed if there were any additional problems. He agreed that Petitioner has not done so. He testified that he recently reviewed the MRI from 2012, within the month or two prior to the deposition. He testified that he requested the films from the facility where they were performed. (PX9).

On cross-examination when asked if it was possible that the changes seen between the 2012 and 2013 MRIs could have occurred over time from wear and tear, Dr. Mall testified that Petitioner had a little bit of arthritis in his shoulder joint which was actually somewhat protective for the rotator cuff and that it was unlikely that his rotator cuff tearing was a natural progression of what was happening in his shoulder. He further testified that the fact that there was a significant joint effusion also indicated that there was some sort of additional trauma that occurred or a new injury beyond just a progression of some underlying pathology. (PX9).

The Intake Form completed by Petitioner at the time of his initial examination was attached to the deposition transcript as Respondent's Exhibit 1. The second page of the form referenced that Petitioner heard about Dr. Mall's office from his attorney. (PX9).

The Illinois Form 45 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Form 45 was completed on October 18, 2013, and identified the date and time of accident as October 9, 2013 at 3:30 a.m., and that Petitioner stated that he was pulling carts out of a storage closet for inmate use. (RX1).

The Workers' Compensation Employee's Notice of Injury was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The document referenced a date and time of injury of October 9, 2013 at 3:25 a.m., and indicated that Petitioner was removing stacked carts from the storage office, that the carts got wedged between the doorframe and the door, and that he pulled on the carts with his right arm to dislodge them. (RX2).

The Supervisor's Report of Injury or Illness was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The document indicated that the date and time of accident was that of October 9, 2013 at 3:20 a.m. It was noted that Petitioner was pulling food carts out of the upper office when the door shut on the stacked food carts, and that he pulled on both carts hurting his right shoulder. (RX3).

The medical records of Dr. Steven Mitchell were entered into evidence at the time of arbitration as Respondent's Exhibit 4. The records reflect that Petitioner was seen on July 16, 2012, at which time he was seen for a re-check of right shoulder pain which was noted to be a work-related injury. Petitioner stated that he had had pain since his injury on July 2nd. An x-ray was taken which was normal, and it was noted that Petitioner had been taking Ibuprofen. Petitioner stated that it was helping a little but he was still feeling pain, stiffness and he was somewhat weak in the shoulder. On examination there did appear to be some edema in the anterior aspect and Petitioner was tender to palpation, and it was noted that stressing the bicep tendon did elicit some pain as well. Petitioner appeared to have full range of motion of the shoulder but with abduction to 90 degrees he had pain and across his body he experienced pain. The assessment was that of a right shoulder strain, and Petitioner was ordered to undergo an MRI and physical therapy. (RX4).

The records reflect that Petitioner was seen on July 12, 2012, at which time Petitioner presented with right shoulder pain. Petitioner stated that on July 2, 2012 he was carrying two milk crates in his right hand, he twisted his wrist down and abducted his shoulder to move the crates. He stated that he felt a kind of pop in the shoulder and since then had pain intermittently. He stated that there was no pain at rest. It was noted that it was a work-related injury. Petitioner stated that since then, he almost felt a slight weakness in the shoulder and when he raised his shoulder a little above 90 degrees he had some pain and that reaching above the head he experienced some pain as well. He denied any numbness or tingling in the extremities. On examination, there appeared to be a minimal edema in the anterior aspect of the shoulder, and it was noted that he was tender to palpation in the anterior aspect and the biceps groove. Stress of the biceps tendon elicited some pain, but he appeared to have full range of motion of the shoulder, equal strength of the upper extremities and equal grip strength. The assessment was that of right shoulder strain, possible tendonitis. Rest was recommended, along with no overhead reaching. Petitioner was to use ice as needed, and to take anti-inflammatories as instructed. An x-ray was ordered. (RX4).

Included within the medical records was an interpretive report for an MRI of the right shoulder performed on August 18, 2012 at Fairfield Memorial Hospital. The report reflects that the impression of the interpreting radiologist was consistent with tears of the transverse ligament in the anterior portion of the humerus together with tears of the inferior glenohumeral ligament and the inferior glenoid labrum with focal areas of subchondral cystic degeneration in the greater tuberosity of the humerus and in the glenoid fossa; also incidentally noted was that of degenerative arthritis in the acromioclavicular joint. X-rays of the right shoulder performed on July 12, 2012 were interpreted as follows: (1) Normal right shoulder showing no evidence for any calcific tendonitis; (2) no evidence for any post-traumatic changes; (3) no evidence for any shoulder impingement. (RX4).

Included within the medical records was a note from Dr. Ahn dated August 27, 2012, which indicated that Petitioner presented with a complaint of significant right shoulder pain mostly on the anterior aspect and the lateral aspect of the shoulder. Petitioner was carrying a 30-pound milk crate up the stairs, the crate hit the side rail, the whole weight was torqued around and the shoulder was externally rotated while carrying it up the stairs. Petitioner had instant sharp pain on the anterior aspect of the shoulder, and it was noted to have occurred on July 2, 2012. Dr. Ahn's review of the MRI suggested that the official report was reading as anterior glenohumeral ligament injury with labral injury, but he did not see any obvious avulsion of the ligamentous structures or labral structures from the shoulder. He noted that the one abnormality he saw was a partial tear of the supraspinatus tendon and tendon inflammation in the shoulder. The impression was that of right shoulder strain/rotator cuff partial tear. It was noted that Dr. Ahn could not say that the partial tear seen on the shoulder was from the torqueing injury, but that mostly the tendinopathy and inflammation that was seen was probably related to the injury. Physical therapy and a cortisone injection were recommended, and an injection of cortisone into the right shoulder subacromial space was performed. (RX4).

The IME Report of Dr. Timothy Farley dated April 14, 2014 was entered into evidence at the time of arbitration as Respondent's Exhibit 5. The IME Report of Dr. Farley dated October 21, 2015 was entered into evidence at the time of arbitration as Respondent's Exhibit 6.

The transcript of the evidence deposition of Dr. Farley was entered into evidence at the time of arbitration as Respondent's Exhibit 7. Dr. Farley testified that he is an orthopedic surgeon board-certified in orthopedic surgery, and his practice is predominantly a sports medicine surgeon focusing on knee, shoulder and elbow-related conditions. He testified that approximately 95% of his practice is devoted to treating patients, with the remaining amount attributed to performing independent medical examinations. (RX7).

Dr. Farley testified that the first IME was performed on April 14, 2014. He testified that he reviewed medical records from Dr. Thompson of Horizon Health Care, Dr. Mall (including operative reports), an MRI from November 30, 2013 and the report for an MRI performed at Fairfield Memorial Hospital in August of 2012. He testified that Petitioner gave a history of injuring his right shoulder on October 9, 2013 when he was pulling a lunch cart from left to right through a doorframe and the cart got stuck in the frame. Petitioner had to somewhat jerk at the cart and felt pain within his right shoulder. He testified that Petitioner's prior MRI suggested that he had prior right shoulder injury or pain, but when he specifically asked Petitioner whether or not he had ever seen a doctor, chiropractor, therapist or any other person in the allied medical health field or whether he ever had x-rays, therapy, surgery or any other treatment, Petitioner stated that he did not. He testified that when he asked Petitioner about this, Petitioner stated that he had had some problems before while carrying milk and juice crates in the summer of 2012. Petitioner estimated those weights around 50 pounds, and described an event where he was walking up stairs with the crates being held onto by his right hand and his arm extended. Petitioner indicated that they caught on the stairs, and he twisted his shoulder. Petitioner stated that he took Mobic, went through physical therapy and was able to return to work one month later without restriction. (RX7).

Dr. Farley testified that the findings of the physical examination included tenderness over the biceps tendon of his right shoulder, normal strength in all planes, positive Neer, Hawkins and O'Brien's maneuvers, and that Petitioner was neurovascularly intact within his upper extremity, indicating no nerve- or vascular-related injury. Dr. Farley testified that his diagnoses were that of a superior labrum tear, possible paralabral cyst, high grade partial thickness tear of the anterior supraspinatus with possible full thickness component, a large intraarticular loose body, degenerative arthrosis within the glenohumeral joint and AC joint arthrosis. When asked if he believed any further treatment was necessary at that time, Dr. Farley testified that he thought that it was based on the overall level of comfort within Petitioner's shoulder in that he could either decline treatment and be released to maximum medical improvement without restrictions or he could reasonably elect to undergo surgery as he felt that the intraarticular loose body was a reasonable thing to have removed from his shoulder. (RX7).

Dr. Farley testified that that he felt as though it was likely that Petitioner's rotator cuff and superior labral injury were related to the October 9, 2013 injury, but he did not believe that the other injuries had a relationship to the October 9, 2013 injury. He agreed that he indicated that his opinions could change if additional medical information was brought to his attention. (RX7).

Dr. Farley testified that he was asked to perform a second IME of Petitioner on October 21, 2015, and that he was provided with additional medical records to review as part of his examination. He agreed that he had opportunity to review the actual films from the August 2012 MRI, and that he was able to perform another physical examination of Petitioner which revealed that Petitioner's range of motion was good, his strength was good and he was not significantly tender around his shoulder. He testified that Petitioner's neurologic and vascular exams were intact, and that he had fairly benign examination findings. He testified that he also had opportunity to review the operative report from the procedure performed on May 15, 2014. (RX7).

Dr. Farley testified that his review of the additional medical records, including the images from Petitioner's 2012 MRI, changed his opinions from his 2014 IME. He testified that he found that the major difference between the first and second MRI was essentially that of an osteochondral defect that was unstable but in place in 2012 and then unstable and displaced in 2013 after the injury. He testified that the findings of the SLAP tear, the rotator cuff tearing and the AC joint arthritis were present in both. He further testified that his opinion was that much of the pathology that was present in Dr. Mall's subsequent treatment was actually present prior to the injury, and that the only thing that he could say was that the loose body removal was likely related to the injury even though it was present prior to the injury. (RX7).

Dr. Farley testified that the SLAP tear that was present on both the 2012 and 2013 MRIs involved the labrum, and that there no major changes of the labrum tear in the imaging studies between 2012 and 2013 beyond what he would consider time-related changes. He testified that once the labrum tears it stays torn, and then over time it will just naturally become worse with time. He testified that the progression that was made between the 2012 and 2013 images was not significant, as he was not sure that he appreciated it having progressed at all significantly. (RX7).

When asked if he agreed with Dr. Mall's testimony that the 2012 MRI showed that the rotator cuff tear was .6 centimeters and the 2013 MRI showed the rotator cuff was 1.2 centimeters, Dr. Farley testified that the ability to differentiate between .6 and 1.2 on an MRI was very difficult, and that partial thickness tearing was notoriously difficult to comment on the length and the width of the MRI. He testified that he did not think what he would call intraobserver reliability – which was the ability to look at a test and comment on a difference – would be very high at all in trying to differentiate between a .6 centimeter difference in tears. He also testified that an MRI was not a continuous image from back to back so it all came down to where the slices were taken, and that he would have a hard time thinking that it was at all a valid comment to be able to differentiate between those two numbers. (RX7).

When asked if he agreed with Dr. Mall's testimony that there was more fluid in the 2013 MRI than there was in the 2012 MRI, Dr. Farley testified that if you had a loose body floating around in the shoulder that was not previously loose, there was going to be swelling, irritation and inflammation in the joint. Dr. Farley testified that he believed that the removal of the intraarticular loose body was probably exacerbated by the injury, as his subsequent MRI showed that it was floating around in the pouch in the bottom of his shoulder and had moved from one spot to another. (RX7).

Dr. Farley testified that as part of his practice he provides AMA ratings based on the Sixth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*, and that he believed that Petitioner suffered a 6% permanent partial disability at the level of his right shoulder with regards to his rotator cuff repair, that the superior labrum injury represented 3% permanent partial disability to the labrum, that the biceps procedure performed represented a 3% permanent partial disability of the biceps, that he suffered an 8% permanent partial disability with regard to the acromioclavicular condition, and with regards to the intraarticular loose body he suffered 6% which, per his calculations, totaled 26%. He testified that he felt only that the 6% of the loose body was related to the October 9, 2013 injury, and that the 20% would be related to pre-existing conditions. (RX7).

On cross-examination, Dr. Farley testified that he estimated that he performed 1-2 IMEs weekly, and that on average he did one deposition per month. He testified that x-rays were performed at both IMEs. He testified that he saw approximately 90 patients on average per week and he performed in the range of 8-15 surgeries per week, approximately 40% of which were related to the shoulder. (RX7).

On cross-examination, Dr. Farley admitted that he was familiar with Dr. Mall but had never watched him operate nor had he watched him talk to a patient. He agreed that in his October 2015 IME report, he indicated that he thought Petitioner's surgeries were technically well done. He agreed that at

the time of the April 2014 IME he did not have the actual images of the MRI that had been performed, and that he could not recall if Petitioner brought the report or if it was provided through some other mechanism. He agreed that he did question Petitioner about the 2012 injury to the right shoulder, for which Petitioner had conservative treatment and was back to work full duty within a month. He agreed that in the April 2014 IME report he talked about the fact that he believed that the rotator cuff tear and superior labral injury were related to the October 9th injury at that point in time, and that the basis for the opinion was a combination of the mechanism of injury as well as his understanding of MRI changes pre- and post-injury. He agreed that it was possible that the mechanism of injury that Petitioner reported could have caused the symptoms and pathology that Petitioner had, but stated that it was unlikely in a 43-year-old to tear the rotator cuff pulling a cart even if it got stuck and you had to jerk. He agreed that it was hypothetically possible that it could increase the size of a tear that was already present and make it more symptomatic, but he did not think it should be a persistent worsening of symptoms. (RX7).

On cross-examination, Dr. Farley testified that the osteochondral defect that got dislodged could have accounted for some of Petitioner's symptoms. He testified that he was not aware of any medical records indicating that, prior to the injury of October 9, 2013 injury, surgery was ever recommended or discussed. He agreed that it was his understanding that Petitioner was working full duty at the time that the injury occurred in 2013. He agreed that he was not aware of Petitioner having any treatment other than the anti-inflammatories or physical therapy, but indicated that he did not know whether Petitioner ever saw an orthopedic surgeon. (RX7).

On cross-examination, Dr. Farley testified that he did not specifically recall a notable difference in the amount of joint effusion on the 2013 MRI as compared to the 2012 MRI. He agreed that joint effusion can be indicative of an acute trauma. He testified that he did not have any disagreement with any of the medical treatment that was performed in this case by Dr. Mall, and he agreed that everything he did was reasonable and appropriate for Petitioner. He agreed that, other than the 2012 and 2013 injuries, he was not aware of any other incidents or traumas as reported to him by Petitioner. He testified that he did not comment on whether there were any signs that Petitioner was exaggerating his symptoms or malingering, but he did not see anything of that nature. He agreed that if he felt someone was malingering or if he felt that someone had non-organic pain, he would comment on it. (RX7).

On cross-examination, Dr. Farley agreed that he based a treatment recommendation for his patients on not only what he saw on an MRI but also considered his patient's symptoms, and that the MRI helped guide what you thought you need to do. He agreed that someone can have pathology seen on an MRI but could be asymptomatic. When asked if it seemed to be the case with Petitioner that prior to the injury on October 9th that he had some pathology but it was not bothering him to the point where he did not seek medical care and treatment for it, Dr. Farley responded that Petitioner had medical care a year prior to that and that the MRI clearly showed that he had problems within his shoulder. Dr. Farley admitted that he did not know when the last time Petitioner received treatment prior to the 2013 injury. (RX7).

On cross-examination, Dr. Farley agreed that he performed an AMA impairment rating at the time of the October 2015 examination. He testified that the training to perform AMA impairment ratings was part of the training for board certification for orthopedic surgery. He agreed that he could take additional courses but he had not done so. He admitted that he did not know how much training there had been on the AMA ratings in the board certification process. He agreed that the AMA Guides can consider pain in giving an AMA rating, but when asked if he took it into consideration in this case, Dr. Farley responded that Petitioner said he was doing all right. He testified that Petitioner said he was doing fine, that he did not want anything more done, and that Petitioner's physical exam was pretty good so it was hard not to utilize the diagnosis-based guide. (RX7).

On cross-examination, Dr. Farley agreed that pain can be disabling. He agreed that impairment was a different concept than disability, and he admitted that he did not know what other factors in Illinois workers' compensation cases judges were supposed to consider other than AMA impairment ratings. He agreed that there was usually a cap on what a specific body part injury was rated at, which he stated was totally reasonable. (RX7).

On cross-examination, Dr. Farley testified that he did not talk to Petitioner about what he liked to do and how that had been affected by the injury, and he indicated that he did not ask Petitioner if he had any trouble performing his job. He agreed that the AMA Guides do not take into account any sort of future problems that someone may have, including whether their injury may worsen or deteriorate, and that it was taken at one fixed point in time. (RX7).

CONCLUSIONS OF LAW

The parties stipulated at the time of hearing that on October 9, 2013, Petitioner sustained an accident that arose out of and in the course of his employment with Respondent.

With respect to disputed issue (F) pertaining to causal connection, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally connected to the accident of October 9, 2013. The Arbitrator finds that the medical records submitted into evidence suggest that Petitioner did indeed have pre-existing issues in the right shoulder, but there was an approximate 13-month gap in treatment for the right shoulder between the time of his release by Dr. Ahn at Orthopedic Center of Southern Illinois and the commencement of treatment after the accident of October 9, 2013 at issue. Furthermore, the Arbitrator notes that Petitioner testified at the time of arbitration that he underwent a conservative course of treatment for the July 2012 accident, after which he was released to full duty and was pain-free until the time of the October 9, 2013 accident. Additionally, the Arbitrator notes that even Dr. Farley testified that the loose body removal was likely related to the injury even though it was present prior to the injury. As a result thereof, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally connected to the accident of October 9, 2013.

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injury, 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. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that an AMA rating was offered by Respondent in this matter. Specifically, Dr. Farley provided an AMA rating of 26% of the upper extremity. No AMA impairment rating was offered by Petitioner. As a result thereof, the Arbitrator gives some weight to this factor.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner continues to be employed as a correctional officer for Respondent. Petitioner testified he is capable of performing the duties associated with his position, but testified that when he was at work, he opened doors and used keys and felt a little bit of pain or tightness in his shoulder with excessive use. In light thereof, the Arbitrator finds that the nature and demands of Petitioner's position will somewhat affect his permanent partial disability and, as such, the Arbitrator places some weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 41 years of age at the time of the incident at issue. Petitioner testified that he has 11½ years with the Department of Corrections before he can retire. The Arbitrator finds that the Petitioner has a moderate length of expected work life remaining during which he would be anticipated to experience the disability associated with this accident. As such, the Arbitrator places some weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that, following his work injury, Petitioner returned to his pre-accident employment with Respondent and, as such, there was no evidence proffered at arbitration to demonstrate that his work accident has impaired or otherwise affected his future earnings capacity. The Arbitrator places no weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that at his final office visit with Dr. Mall on July 21, 2015, it was noted that Petitioner was doing well, had minimal complaints and was able to do some mild lifting without any pain whatsoever. Petitioner was released on a full duty basis and was deemed to have attained maximum medical improvement. The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely his continued complaints and limitations, were not fully corroborated by his treating records at the conclusion of his treatment with Dr. Mall. The Arbitrator accordingly places great weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of 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 concludes that Petitioner sustained permanent partial disability to the extent of 12.65% loss of use of the person-as-a-whole as provided in Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IWCC, Insurance Compliance Division,
Petitioner,

vs.

NO: 14 INC 306
16 IWCC 731

Byung Kim, individually and
Owner of 680 Cleaners,
Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

This matter comes before the Commission on its own motion to correct a clerical error in the Decision and Opinion on Review of the Commission filed November 10, 2016 *sua sponte.* After reviewing the Decision on Review, the Commission recalls the Decision for the purposes of correcting the clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Order dated November 10, 2016, is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

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

DATED: DEC 2 - 2016
RWW/rm

Ruth W. White
Ruth W. White

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

IWCC, INSURANCE COMPLIANCE DIVISION,

Petitioner,

vs.

NO. 14 INC 306
16 IWCC 731

BYUNG KIM, individually and Owner of 680 CLEANERS,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

This matter comes before the Commission on the Petitioner's action for penalties for willful failure to comply with the requirement to maintain workers' compensation insurance pursuant to Section 4(d) of the Workers' Compensation Act. Petitioner, the Illinois Workers' Compensation Commission Insurance Compliance Division, represented by the Office of the Attorney General, brought its motion before Commissioner Ruth White in Chicago on June 21, 2016. Respondent, Byung Kim, appeared *pro se* and a record was taken.

Findings of Fact and Conclusions of Law

1. Petitioner called Respondent, Byung Kim, as an adverse witness. The Commission notes that Respondent is not a native English speaker and testified without the benefit of an interpreter.

2. Mr. Kim testified he is 75 years old and operates a dry cleaning business with locations at 680 North Lake Shore Drive and 600 North Lake Shore Drive in Chicago. The location at 600 is only available for residents of the building. The location at 680 is open for

business to the general public. Mr. Kim believed he had the 680 location for about 13 years and the 600 location for about two and a half years.

3. The business accepts clothes for dry cleaning from customers and sends them out to a plant to be dry cleaned. Mr. Kim acknowledged he had an employee at both locations. He also acknowledged that his wife performs clothing alterations using scissors, an electric sewing machine and a steam iron which items are used on the premises. There is also an electrically operated device to revolve racks of dry cleaned clothing to retrieve orders. Mr. Kim denied that any chemicals are used on the premises.

4. After his testimony, Commissioner White allowed Respondent to make statements. He stated that he was unaware that he was required to carry workers' compensation insurance until about three years previously when a woman came onto his premises and advised him that he should purchase insurance within 10 days or he would have "trouble or citation or something like that." Mr. Kim stated that he purchased the insurance within three or four days of that conversation.

5. Petitioner called Frank Capuzi to testify. He is Chief of Investigators of the Insurance Compliance Division of the Workers' Compensation Commission. He investigated Respondents' alleged non-compliance. Mr. Capuzi testified he received documentation from the Illinois Department of Revenue and the Illinois Department of Employment Security. Those documents confirmed that Respondent's business declared having employees to both State agencies, every year since at least 2009.

6. Mr. Capuzi also testified that pursuant to his investigation he consulted the official records of the National Commission of Compensation Insurers ("NCCI"). That entity tracks workers' compensation insurance policies issued throughout the country. He believed insurers have to report any change in such insurance policies to that Commission within 24 to 48 hours.

7. Mr. Capuzi identified the official records from NCCI which showed that Respondent had workers' compensation insurance from July 11, 2004 to July 11, 2011. Respondent then did not have workers' compensation insurance from July 12, 2011 to August 24, 2014.

8. Mr. Capuzi noted that when Respondent obtained the new insurance policy in 2011, it used a different Federal Employer's Identification Number ("FEIN") in the application. Mr. Capuzi explained that in his experience employers use that tactic to avoid paying back premiums.

9. On cross examination by Mr. Kim, Mr. Capuzi testified that he did not have the information at hand on which company had issued the previous workers' compensation insurance policies.

10. Mr. Capuzi also acknowledged that the Insurance Compliance Division has the discretion to issue citations for violations of the insurance requirement ranging between $500 and

$2,500, *in lieu* of the Attorney General filing a formal charge before the Commission. Mr. Capuzi also explained that "if the company did not have workers' compensation [insurance] in the past, it is more likely they would receive a" citation.

11. However, Mr. Capuzi did not believe Respondent would qualify for the lesser penalty of a citation because he had workers' compensation insurance but declined to pay premiums beginning in 2010. He also noted that Mr. Kim denied to investigators that he ever had workers' compensation insurance in the past.

12. After testimony, Respondent presented an exhibit titled "Insurance History" purportedly from State Farm Insurance. It indicated a business policy was in effect from August 31, 2005 to August 25, 2015, and workers' compensation insurance policy in effect between August 25, 2014 and August 25, 2015. Premiums for renewal were both due on August 25, 2015.

Petitioner argues that the record is clear that Respondents willfully violated the requirements of the Act to maintain workers' compensation insurance. It cites the previous insurance and the use of different FEIN to obtain the insurance after it had been terminated. Petitioner seeks penalties of $100,000.00. Respondent, Mr. Kim, claims that he did not remember having previous workers' compensation insurance and he only learned about the requirement when specifically informed of such by the woman after which he purchased it. Mr. Kim argues that at the most he should be subject only to a fine pursuant to citation.

The Commission does not find Mr. Kim's claim of ignorance credible. He has operated a business in Illinois for 13 years and clearly had workers' compensation insurance for most of that time. His decision to cancel/non-renew that insurance appears conscious. In addition, the fact that he reapplied for new insurance with a different FEIN number suggests his knowledge of the process and his attempt to avoid the consequences of previous non-compliance. Finally, Respondent's exhibit is not persuasive. It was unauthenticated and in any event only identified some policies that had been in effect and did not prove that no previous workers' compensation policies had been in effect.

Nevertheless, the Commission finds Petitioner's request for an imposition of a fine of $100,000.00 to be excessive. The Commission is cognizant of the public policy goal of encouraging compliance with the insurance requirement and that high fines could result in higher incentive for such compliance. In addition, fines collected for non-compliance are the only source of money for the Injured Workers' Benefit Fund, which pays benefits to injured workers of non-insured employers. However, in the opinion of the Commission imposing a $100,000 fine probably would result in nothing except the likely discontinuation of Respondent's business; a result which would be of benefit to nobody.

The Commission does not have the authority to convert the instant non-compliance action into a citation action. The power to issue a citation rests solely with an investigator with the compliance division and not a Commissioner. Once a non-compliance action has been instituted and the Commission finds the violation of the insurance requirement was willful, the

Commission can levy a fine of up to $500 per day the employer is in noncompliance. However, the Act provides that "the minimum penalty under this Section shall be the sum of $10,000." Therefore, the Commission does not have the discretion to impose a fine of less than $10,000.00.

The Commission finds the minimum fine of $10,000.00 to be appropriate in this matter. The Commission notes that Respondent's business is small with total payroll ranging between about $3,000 to less than $26,500 per year. Petitioner always had a very limited number of employees and the work activities of employees were not of a particularly dangerous nature. Therefore, the risk of a serious injury, especially a catastrophic injury, was relatively small. The lack of danger associated with Respondent's business operation is supported by the fact that there is no evidence of any workers' compensation claim or any injury associated with Respondents.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents, Byung Kim and 680 Cleaners pay to the Illinois Workers' Compensation Commission the sum of $10,000.00 pursuant to Section 4(d) of the Act.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $10,000.00. 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: DEC 2 - 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
R-6/21/16
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

Kelly Purlee,
Petitioner,

vs.

NO: 14 WC 02373

State of Illinois - State Retirement Systems,
Respondent,

16IWCC0844

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, prospective 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 April 26, 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.

There is no bond required for State cases.

DATED: DEC 27 2016
O120816
DLG/mw
045

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PURLEE, KELLY
Employee/Petitioner

Case# **14WC002373**

ST OF IL-STATE RETIRMENT SYSTEMS
Employer/Respondent

16IWCC0844

On 4/26/2016, 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 0.40% 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 BRANDOW
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PEORIA, IL 61603

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4993 ASSISTANT ATTORNEY GENERAL
AMY S OXLEY
500 S SECOND ST
SPRINGFIELD, IL 62706

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

APR 26 2016

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

16IWCC0844

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

Kelly Purlee
Employee/Petitioner

v.

State of Illinois – State Retirement Systems
Employer/Respondent

Case # **14** WC **002373**

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 **Springfield**, on **March 24, 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 **November 25, 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 **$53,408**; the average weekly wage was **$1027.08**.

On the date of accident, Petitioner was **43** 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 $ **N/A** for TTD, $**N/A** for TPD, $ **N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**N/A**.

Respondent is entitled to a credit for medical paid under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury to her left knee on November 25, 2013 that arose out of and in the course of her employment by Respondent. Petitioner's claim for compensation and 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.

Edward Lee
Signature of Arbitrator

4/18/16
Date

APR 26 2016

Findings of Fact

Petitioner Kelly Purlee filed an Application for Adjustment of Claim against the Respondent State of Illinois State Retirement Systems (SRS) on January 27, 2014. The Application alleges that Petitioner was injured on November 25, 2013 when she "fell on [a] defective sidewalk going into building." Petitioner alleged she suffered permanent injuries to her left leg, left hand, left arm, head, and whole person. (Arb. Ex. 2).

Petitioner testified that she started working for SRS in December 2000. (TX p. 7). On November, 25, 2013, Petitioner was returning from lunch to the SRS building at 2101 South Veterans Parkway in Springfield when she tripped and fell at the employee entrance at the back of the building. Only employees are allowed to use the back door. Petitioner testified that she thought she tripped over mulch that had come out of the landscaping area next to the door. She also testified that she thought she got her shoe stuck in the crevice of the sidewalk after she tripped on the mulch. (TX pp. 8-9). Petitioner testified she tripped as she was walking towards the badge access door system in order to gain access inside the building. She was holding her purse and a Styrofoam cup. (TX pp. 10, 24). After Petitioner tripped, she testified that she landed on her wrist, elbow and knee and then fell forward and slammed her head into the building.

Petitioner identified Petitioner's Exhibits 7(a) and 7(b) as photographs of the entrance area where she fell. (TX p. 9). She did not know how far away from the side of the sidewalk she was when she fell. (TX p. 10). Petitioner indicated on Petitioner's Exhibit 7 where she fell, by placing an X where one concrete slab connected to another concrete slab of the sidewalk. Petitioner did not know how deep the crevice between the two slabs was. (TX p. 11-12). Respondent's Exhibit 5 also contains pictures of the entrance area. The photographs depict a sidewalk approaching a sliding glass door stating "Employees Only. Visitors Use Front Entrance. Deliveries Ring Bell." Mulch and landscaping are on both sides of the sidewalk. A trash can is located in the mulch on the right side of the door. (RX 5).

After Petitioner fell, she was found by Mary McKibben who instructed Petitioner to stay put. McKibben assisted Petitioner into the building. Several others also assisted Petitioner. (TX p. 13).

Once Petitioner was inside the building, she contacted her father to come and take her to Express Care, where x-rays of Petitioner's wrist, elbow, and knee were taken (TX pp. 14-15). Petitioner was diagnosed with a contusion and given a wrap and crutches for her knee. (PX 2).

Petitioner testified that she completed Respondent's Exhibit Number 4, Employee's Notice of Injury, on December 2, 2013, a few days after the accident. On the form, Petitioner provided a description of the accident which indicates that she "fell walking into the building." The description does not mention the presence of mulch or any defect with the sidewalk. (TX pp. 26-27).

Petitioner returned to Express Care on December 5, 2013, as she continued to have pain in her left knee. It was recommended that Petitioner follow up with her primary care physician for a referral to an orthopedist or MRI. (PX 2). An MRI was performed on Petitioner's left knee on December 26, 2013, which indicated that Petitioner had a soft tissue contusion and edema, a possible hematoma, osteoarthritis, and lateral meniscal tears. (PX 3).

Petitioner underwent physical therapy for her left knee from February 13, 2014 through February 27, 2014. She saw Dr. Hillard-Sembell on March 3, 2014, who diagnosed Petitioner with a meniscus tear and a history of patellar pain. Dr. Hillard-Sembell recommended arthroscopic surgery, which was performed on April 3, 2014. No meniscal tears were found during the arthroscopic surgery, but a chondral injury, medial femoral condyle articular cartilage flap, and degenerative changes to the meniscus were noted. On April 14, 2014, Dr. Hillard-Sembell indicated during the post-op office visit that she was unable to tell whether all of the findings of the

surgery were related to Petitioner's work place injury, as they were similar to changes that could be seen with the degenerative process. (PX 4).

Petitioner resumed physical therapy for her left knee on April 29, 2014. On May 29, 2014, Dr. Hillard-Sembell indicated that Petitioner had improved, but still had grinding in both of her knees. Dr. Hillard-Sembell instructed Petitioner to discontinue physical therapy and instructed her to return to her office on an as needed basis. (PX 4).

Petitioner attended an independent medical examination performed by Dr. Michael Milne on September 22, 2014. (RX 1). After taking a history, examining the Petitioner, and reviewing Petitioner's medical records, Dr. Milne diagnosed Petitioner with a left knee contusion as a result of the fall. Dr. Milne did not believe that Petitioner sustained any structural change to her knee as a result of the work injury, but may have increased her symptoms. Dr. Milne opined that Petitioner's left knee arthroscopy on April 3, 2014 was unnecessary for the work related injury, but did not criticize Dr. Sembell-Hillard for proceeding with the procedure as she was expecting to find a meniscus tear. Dr. Milne determined that Petitioner was at maximum medical improvement and gave her an impairment rating of 0% for her work related injury and 2% for the non-work related chondromalacia and patellafemoral medial compartment arthrosis.

Petitioner does exercises at home for her left knee. (TX p. 18). She testified she still has fluid on her knee. (TX p. 21). She testified that she cannot kneel for very long due to pain and experiences a throbbing sensation with changes in weather. (TX p. 22). Petitioner testified that she also has pain in her right knee. (TX p. 28).

Petitioner testified that she did not have any treatment for her left elbow or wrist other than the x-rays she received. (TX p. 19). Petitioner has not had any problems with her elbow or wrist since the accident. (TX p. 20).

Petitioner testified that her primary care physician diagnosed her with a concussion two days after the fall. (TX p. 19). She also had a black eye. Petitioner testified that she had a small increase in the severity of her headaches since the accident, but she did have headaches before the accident. (TX p. 20).

Witness Mary McKibben testified at the arbitration. Ms. McKibben indicated that she was sitting in her vehicle in the parking lot when Petitioner fell. She noticed that Petitioner was on the ground and got out of her car to come to Petitioner's aid. (TX p. 31-32). Petitioner testified that the only items on the ground in the area where Petitioner fell were Petitioner's drink, glasses, and purse. Ms. McKibben did not remember if there were any pieces of mulch on the ground. (TX p. 33).

The deposition of Dr. Sembell-Hillard was taken on June 10, 2015. Dr. Sembell-Hillard is board certified in orthopedic surgery and orthopedic sports medicine. (PX 5, p. 4). She testified that she treated Petitioner following the November 25, 2013 injury, as indicated in the records produced in Petitioner's Exhibit 4. Dr. Sembell-Hillard testified that the chondral injury and medial femoral condyle articular cartilage flap injury were caused or aggravated by the November 25, 2013 fall. (PX 5, pp. 12-14). Dr. Sembell-Hillard also testified that degenerative changes of the patellofemoral joint, softening of the lateral joint line, and softening of the tibial plateau were not caused by the workplace accident. (PX 5, p. 19). Dr. Sembell-Hillard confirmed that Petitioner's complaint of bilateral grinding kneecaps during her last visit was indicative of a degenerative condition in both of her knees. *Id.*

The deposition of Dr. Milne was taken on September 22, 2014. Dr. Milne is board certified in orthopedic surgery and is fellowship-trained in knee and shoulder surgery and sports medicine. (RX 2, p. 6). Dr. Milne's testimony was consistent with his independent medical examination report. Dr. Milne testified that Petitioner

experienced a left knee contusion as a result of the workplace accident and recommended conservative treatment of activity modification, icing, and oral anti-inflammatory medications. (RX 2, p. 14). Dr. Milne opined that the conditions of Ms. Purlee's knee that were discovered during the knee surgery were not caused by the workplace injury and instead were the result of the normal wear and tear of daily life. (RX 2, p. 15). Dr. Milne confirmed his earlier impairment rating of 0% for the work-related knee contusion and 2% for her chondromalacia and patellofemoral medial compartment arthrosis, which were not work-related. (RX 2, pp. 16-17).

Conclusion of Law

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

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." 820 ILCS 305/2. A claimant bears the burden of proving by a preponderance of the evidence that her injury arose out of and in the course of employment. 820 ILCS 305/2.

In order for an injury caused by a fall to arise out of employment, petitioner must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with her employment. Examples of such a risk include tripping on a defect at the employer's premises, falling on uneven ground, or performing a work-related task that contributes to the risk of falling. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102, 106 (1st Dist. 2006).

Petitioner testified to two separate reasons for explaining her fall. First, she "thought" she tripped over a piece of mulch on the sidewalk. Then she "thought" that her shoe got stuck in the crevice between concrete slabs of the sidewalk. Neither of these reasons for her fall were documented on the Employee's First Notice of Injury completed by Petitioner on December 2, 2015, just a few days after the incident or in any of Petitioner's medical records. At trial, Petitioner was unable to clearly convey how much mulch was present on the sidewalk or where exactly the mulch was located on the sidewalk. Witness Mary McKibben, who found Petitioner on the ground immediately after the fall, testified that Petitioner's glasses, drink, and purse were on the ground, but could not recall if any mulch was present. In regards to the crevice between the two slabs of concrete, Petitioner testified that she did not know how deep the crevice was and provided no evidence indicating that the crevice was abnormal or defective in any way, as similar crevices are present in all sidewalks made from concrete slabs.

The evidence does not support a reasonable inference that Petitioner's fall stemmed from a defect at her employer's premises. As such, Petitioner failed to prove that her injury arouse out of and in the course of employment with Respondent. Petitioner's claim for benefits is denied.

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?

As Petitioner failed to prove by a preponderance of the evidence that her injury arose out of and in the course of her employment with Respondent, the above 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

Doris Brown,
Petitioner,
vs.

16IWCC0832

NO: 14WC 4884

Nestle USA, 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 issues of accident, notice, temporary total disability, causation, 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 November 4, 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: DEC 23 2016
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CJD/jrc
049

Charles J. DeVriendt

Joshua D. Luskin

Ruth W. White

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

16IWCC0832

BROWN, DORIS
Employee/Petitioner

Case# **14WC004884**

NESTLE USA INC
Employer/Respondent

On 11/4/2015, 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 0.28% 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:

1480 MARC J SHUMAN & ASSOCIATES LTD
DONOVAN S FECHNER
105 W ADAMS ST 28TH FL
CHICAGO, IL 60603

2461 NYHAN BAMBRICK KINZIE & LOWRY
JASON H PAYNE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
19(b)

16IWCC0832

DORIS BROWN,
Employee/Petitioner

Case # **14 WC 04884**

v.

NESTLE USA, INC.,
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 **DAVID KANE**, Arbitrator of the Commission, in the city of **CHICAGO**, on February 26, 2015, August 27, 2015 and October 21, 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 16IWCC0832

On the alleged date of accident, January 16, 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 ***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 **$45,760.00**; the average weekly wage was **$880.00**.

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 as all benefits denied.

Respondent is entitled to a credit of **$19,370.61** under Section 8(j) of the Act.

ORDER

Denial of benefitsf
No benefits are awarded. The Petitioner failed to prove that she sustained an accident on January 16, 2014.

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
Signature of Arbitrator

November 4, 2015
Date

ICArbDec19(b)

NOV 4 - 2015

BEFORE THE ILLINOIS INDUSTRIAL COMMISSION

DORIS BROWN,	)	
	)	16IWCC0832
Petitioner,	)	
	)	
v.	)	Case No. 2014 WC 04884
	)	
NESTLE USA, INC.,	)	
	)	
Respondent.	)	

FINDINGS OF FACTS AND CONCLUSION OF LAW TO MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF EVIDENCE

The Petitioner testified she was presently employed by the Respondent, Nestle USA, Inc., as a Baby Ruth mass mixer and was so as of January 16, 2014. (T. 10). The job duties of a Baby Ruth mass mixer required making fudge and caramel for Baby Ruth candy bars. *Id.* The Petitioner testified that on January 16, 2014 she worked a 12 hour shift beginning at 4:00 a.m. with the alleged accident occurring around 1:00 in the afternoon. (T. 11-12). The Petitioner testified that on January 16, 2014 she was notified by her supervisor that the milk truck had arrived, therefore, she met the truck downstairs in order to help facilitate pumping the milk. (T. 17). To facilitate pumping the milk, the Petitioner is required to push a hose outside the building in order to make a connection with the milk truck. (T. 18). The Petitioner testified to facilitate the hose connection she was required to go outside the building where she noticed bad weather including ice piles. (T. 19). The Petitioner testified that the milk pumping process took approximately 45 minutes to two hours. (T. 21). Following completion of the process, the Petitioner testified that she again went downstairs and

outside to disconnect the hose from the milk truck and bring the hose back indoors. (T. 22). The Petitioner testified that she advised the driver of the delivery truck that the milk was done pumping, at which time the driver removed the hose for the Petitioner. (T. 23). Upon removal of the hose, the Petitioner testified she grabbed the same, and then while attempting to push the hose through the opening; she slipped falling onto her right side. (T. 24-25). The Petitioner testified that the driver witnessed the fall and attempted to provide assistance. (T. 25). The Petitioner testified that after striking her right side on the ice she stood back up and witnessed the driver completing his necessary tasks to leave the facility. (T. 26). The Petitioner testified that she noticed that she was wet and cold but continued to complete her work task of hooking the hose to the indoor pump and cleaning the same. (T. 27-28). The Petitioner testified upon completion of her job duties, she notified her supervisor of the incident as well as consulting with the nurse. (T. 28-29). The Petitioner testified she completed her shift and had no difficulties doing the same. (T. 29). The Petitioner testified she began experiencing pain later that evening and upon her return to work the next day she consulted with the nurse who directed her to Elmhurst Medical. (T. 30).

The Petitioner testified that she subsequently sought treatment with occupational health on January 17, 2014. The medical records memorialize the Petitioner presented to Elmhurst Memorial Occupational Health Services on January 17, 2014 complaining of pain to her right elbow and lower back. (PX2). The Petitioner provided a history of sustaining injury while attempting to attach a hose with a co-worker and falling onto her right side. (PX2, p. 13). The Petitioner was diagnosed with contusions to the right elbow and knee as well as a thoracolumbar strain. (PX2, p. 25). The Petitioner was reevaluated at Elmhurst Memorial Occupational Health Center on January 24, 2014 with a continuation of her diagnosis and a recommendation for physical therapy. (PX2, p. 30).

The Petitioner testified she subsequently sought treatment with Dr. Vargas and Dr. Bouvin. (T. 34). The Petitioner testified that Dr. Vargas referred the Petitioner to Dr. Markarian, who subsequently referred the Petitioner to Dr. Sclamberg, who performed surgery to her right shoulder on September 5, 2014. (T. 34). The Petitioner testified she continued under active medical treatment with Dr. Sclamberg with ongoing physical therapy. (T. 34-35). The Petitioner further testified she has remained off work without interruption since April 3, 2014. (T. 35).

On cross-examination, the Petitioner testified that she had received payment for her lost time through short and long term disability benefits provided by the Respondent. (T. 36). The Petitioner testified that she was unaware as to whether or not the group medical health plan had paid her medical bills as she had not submitted the same to the group medical plan. (T. 36). The Petitioner testified that Dr. Vargas referred the Petitioner to Dr. Markarian who refused to undertake performance of the recommended surgery unless payment assurances were provided. As such, Dr. Markarian referred the Petitioner to Dr. Sclamberg. (T. 38).

The Petitioner testified that on January 24, 2014 she participated in a telephone conversation with Ms. Shirley McGill. (T. 40). The Petitioner testified that she answered Ms. McGill's questions truthfully. (T. 41). The Petitioner testified that she recalled advising Ms. McGill that it was her job to verify the hose was pushed back into the building following the pumping of the milk. (T. 42). The Petitioner testified that she could not recall telling Ms. McGill that the truck driver helped her in pushing the hose into the building. *Id.* The Petitioner agreed that she advised Ms. McGill that the driver was immediately present when she fell and that she believed that the driver witnessed the fall. (T. 42-43). The Petitioner testified that she could not recall telling Ms. McGill that the driver helped her after she fell to the ground. (T. 43). The Petitioner testified that she could not recall

whether or not she advised Ms. McGill as to whether the driver helped her up, but further testified that she was able to right herself without help of the driver. (T. 44).

The Petitioner testified that upon seeking treatment from Elmhurst Memorial Occupational Center that she was truthful regarding the history provided. (T. 44). When questioned regarding the history memorialized in the records of Elmhurst Memorial Occupational Health Center, the Petitioner testified such history was inaccurate. (T. 44-45).

Ms. Shirley McGill was called by the Respondent to testify. Ms. McGill testified that she was employed as a claims examiner for Sedgwick and had been so since 1997. (T. 47). Ms. McGill testified that as part of her job duties she adjusted workers' compensation claims which included contacting the injured employee, performing investigation, assessing compensability of an injury as well as paying benefits for the same. (T. 47). Ms. McGill testified as of January 23, 2014 she was advised of a claim concerning the Petitioner and followed her normal protocol of making contact with the employer, the Petitioner as well as medical information and witness contacts. (T. 48). In that regard, Ms. McGill contacted the Petitioner on January 24, 2014 via telephone. (T. 48). During this conversation, Ms. McGill obtained a recorded statement in order to verify the details of the claim. (*Id.*). Ms. McGill testified that during the telephone conversation she transcribed the information obtained while taking the recorded statement from the Petitioner and subsequently entered the information into her claim notes. (T. 51). Ms. McGill testified the Petitioner recounted that while she was outside performing her job duties; she slipped and fell on ice. (T. 53). The Petitioner further recounted the truck driver who was present witnessed the accident as well as assisted the Petitioner once she fell. (T. 53). Thereafter, Ms. McGill identified Respondent's Exhibit 1, those being the claim notes which represented the telephone conversation which transpired

between the Petitioner and Ms. McGill on January 24, 2014. (T. 54). Ms. McGill testified she was unable to locate the actual recorded statement, and her claim notes accurately reflected what transpired during the telephone conversation. As such, the claim notes were admitted as Respondent's Exhibit No. 1.

Also called to testify by the Respondent was Mr. Chris Haywood. Mr. Haywood testified he was currently employed by Lowell C. Hagen Trucking located in Whitewater, Wisconsin. (T. 60). Mr. Haywood testified that his testimony was not voluntary but compelled via subpoena. (60). Mr. Haywood testified that as an employee of Lowell Hagen Trucking, he drove a semi tanker truck. (T. 61). Mr. Haywood testified that he recalled making a delivery at Nestle in Franklin Park on January 16, 2014 but that at written statement would help his memory. (T. 63). Mr. Haywood was subsequently presented with Respondent's Exhibit No. 2, for identification, that being a written statement previously prepared on January 28, 2014. (T. 64). Mr. Haywood testified that the statement was prepared by a separate individual who typed the statement upon Mr. Haywood's recounting of the incident described therein. (T. 65). Mr. Haywood testified that he arrived at the Respondent at approximately 10:44 a.m., and after the proper testing of the milk, he unloaded the truck in a different area. (T. 66). Mr. Haywood testified that he recalled interacting with an employee of Respondent as it is her job to connect the hose to his truck for the unloading of the milk. (T. 67). Mr. Haywood denied ever having to rearrange his truck due to it being improperly situated. (T. 67). Mr. Haywood also denied witnessing anyone fall nor seeing anyone on the ground. (T. 67).

Mr. Haywood further stated he did not help anyone up from the ground nor was he advised by anyone that she had fallen to the ground. (67). Mr. Haywood further denied helping the

Respondent's employee with the hose hookup and explained that as a policy the employees of the Respondent are not allowed access to the truck nor its parts, and Mr. Haywood does not access the equipment of the Respondent. (T. 68). Mr. Haywood testified that he opens the lid of the truck after which time the employees of the Respondent proceed with all other actions to hook up the hose to the truck while Mr. Haywood sits in the interior of his truck. (T. 70). Mr. Haywood testified definitively that he does not help with the hose and does not touch the hose in any manner. (T. 71). Mr. Haywood testified that Lowell C. Hagen Trucking no longer has a contract with the Respondent. (T. 72).

On cross-examination, Mr. Haywood testified that he did not recall seeing any ice in the area where the hose was connected/disconnected. (T. 73). Mr. Haywood testified that upon disconnection of the hose, he prepares his truck for departure by closing the lid of the truck as well as the doors in the back. (T. 74). Mr. Haywood testified that the hose connection is on the back of the truck therefore when he is preparing for his departure the employee of the Respondent would already have left given the disconnection of the hose. (T. 75).

The medical records evidence consistent with the Petitioner's testimony that following her initial treatment at Elmhurst Memorial Occupational Health Center, she sought treatment from Dr. Charles Bodem of Rehab Dynamix, Ltd. on February 12, 2014. (PX8). The Petitioner also testified that she was evaluated by a Dr. Vargas at this facility, but there are no medical records documenting such care. Dr. Bodem referred the Petitioner for an orthopedic consult on March 5, 2014. (PX8). The medical records evidence the Petitioner was subsequently evaluated by Dr. Gregory Markarian of Orthopedic Associates of Naperville on March 19, 2014. (PX5). The Petitioner treated with Dr. Markarian through June 19, 2004 with a diagnosis of torn rotator cuff. Dr. Markarian initially

provided the Petitioner with a steroid injection and then subsequently recommended surgery. (PX 5). In the interim, the Petitioner underwent an MRI on February 22, 2014 which revealed no obvious tear of the glenoid labrum. (PX4). Thereafter, the Petitioner underwent an MRI arthrogram with contrast on June 17, 2014 which evidenced a tear of the anterior aspect of the supraspinatus tendon. (PX6).

At Dr. Markarian's referral, the Petitioner was evaluated by Dr. Steven Sclamberg who subsequently performed arthroscopic surgery with a rotator cuff repair, subacromial decompression, synovectomy and debridement on September 5, 2014. (PX3). As of the date of hearing, the Petitioner was still undergoing physical therapy according to her testimony.

The Petitioner offered into evidence numerous bills regarding her treatment, specifically as follows: 1) Elmhurst Occupational Health Center; 2) Rehab Dynamix, Ltd.; 3) Imaging Centers of America; 4) Dr. Gregory Markarian; 5) Archer Open MRI; 6) Grey Medical, Inc.; 7) RX Billing; 8) Accredited Ambulatory Care; 9) Chicago Pain and Orthopedic Institute; 10) Metro Milwaukee Anesthesia. (PX9). It is noted there are no corresponding medical records relative to the treatment of Chicago Pain and Orthopedic Institute (Dr. Vargas) and Metro Milwaukee Anesthesia.

ISSUE C: DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY THE RESPONDENT?

The Arbitrator makes the following findings of fact and conclusions of law:

- The Petitioner failed to prove that she sustained an accident on January 16, 2014.
- The Petitioner is not credible.
- All benefits are denied.

In support of these findings, the arbitrator notes the Petitioner testified at trial while attempting to disconnect the hose, she fell on ice landing on her right side. The Petitioner testified emphatically that the delivery truck driver witnessed the fall and further offered assistance. The Petitioner again recounted this same manner of injury to Ms. McGill during the recorded statement obtained on January 24, 2014. The claim notes of Ms. McGill memorialize the Petitioner's story of falling on ice, and such fall being witnessed by the delivery truck driver who offered assistance. (RX1).

In complete contradiction to the Petitioner's version of events, Mr. Chris Haywood, the delivery truck driver denied any such event occurred. Mr. Haywood, who has no connection with the Respondent, testified via subpoena by compulsion that no such fall occurred. Mr. Haywood testified he did not witness an employee of the Respondent fall nor did he ever offer any such assistance for this alleged fall. The arbitrator finds Mr. Haywood's testimony to be credible, and the Petitioner's testimony not. No incentive exists for Mr. Haywood to provide such testimony, and it is noted that Mr. Haywood was reluctant to testify and received no financial benefit for his testimony. Additionally, as of the date of trial, Mr. Haywood's employer had relinquished its contract with the Respondent for milk deliveries.

Not only did Mr. Haywood's testimony contradict the Petitioner's testimony as to the occurrence of the fall, but in other significant areas. The Petitioner testified that upon the truck's arrival, the Petitioner required Mr. Haywood to reposition his truck. The Petitioner further testified that Mr. Haywood assisted her in removing the hose, and it was at that moment the fall occurred due to icy conditions. The Petitioner again recounted this same timeline of events to Ms. McGill during

the telephone conversation of January 24, 2014. It should be noted that the Petitioner specifically indicated during the telephone conversation, she was unaware of the driver's name.

Again in contradiction to the Petitioner's testimony, Mr. Haywood testified he was not required to reposition his truck to complete the delivery. Further, Mr. Haywood testified he in no manner assisted the Petitioner in removing the hose. Mr. Haywood testified as to the general policy, he does not utilize the equipment of the Respondent, and the Respondent's employees do not utilize the trucking equipment. Mr. Haywood testified he did not recall the area being icy.

As the court noted in *Elliott v. The Industrial Commission of Illinois*, 303 Ill. App. 3d 185, 188, 707 N.E.2d 228 (1999), "[e]ven before there can be consideration of whether an accidental injury arose out of employment, claimant must prove there was an accidental injury." The Petitioner is not credible. The Petitioner failed to prove that an accident occurred. As such, all benefits are denied.

ISSUE F: IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?

The Arbitrator makes the following findings of fact and conclusions of law:

- The Petitioner failed to prove that she sustained an accident on January 16, 2014.
- The Petitioner is not credible.
- As no accident occurred on January 16, 2014, it follows that the Petitioner failed to prove that her current condition of ill-being is causally connected.

ISSUE J: WERE THE MEDICAL SERVICES THAT WERE PROVIDED PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL EXPENSES?

The Arbitrator makes the following findings of fact and conclusions of law:

- The Petitioner failed to prove that she sustained an accident on January 16, 2014.
- The Petitioner is not credible.
- As no accident occurred on January 16, 2014, all medical benefits are denied.

ISSUE K: WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

The Arbitrator makes the following findings of fact and conclusions of law:

- The Petitioner failed to prove that she sustained an accident on January 16, 2014.
- The Petitioner is not credible.
- As no accident occurred on January 16, 2014, all temporary total disability benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Other (explain) 7030.20 noncompliance	☐ Second Injury Fund (§8(e)18)
☐ Modify	☐ PTD/Fatal denied
	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EMILY McTAGGART,

Petitioner,

16IWCC0813

vs.

NO: 14 WC 06206

TRI-COUNTY SPECIAL EDUCATION,

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 the ex parte hearing, accident, benefit rates, jurisdiction, medical expenses, notice, statute of limitations, penalties and compliance with the Rules Governing Practice before the Illinois Workers' Compensation Commission, and being advised of the facts and law, vacates the Decision of the Arbitrator, which is attached hereto and made a part hereof, and remands the case to the Arbitrator for a new trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On February 14, 2014 Petitioner filed a worker's compensation claim alleging accidental injuries arising out of and in the course of her employment with Respondent on April 24, 2013. Notice of filing was mailed to Respondent at its address at 1725 Shomaker Drive, Murphysboro, IL.

2. The case appeared quarterly on the status call thereafter and was scheduled to appear on the Herrin status call docket on November 9, 2015.

16IWCC0813

3. Arbitrator Lee presided over the October 6, 2015 status call in Mt. Vernon, IL and was also scheduled to preside over the November 9, 2015 status call in Herrin, IL.

   Section 7030.20 (a) of the Rules states: "A written request for a date certain for trial may be made at the monthly status call on which the case appears. A request for a trial date in a case which does not appear on the monthly status call may only be made in accordance with Section 7020.60(b)(2)(B)."

   Section 7020.60(b)(2)(B) states in pertinent part: "... A request for a trial date may be made in a case which does not appear on the monthly status call if:

   i) a Petition under Section 19(b) of the Act has been filed in accordance with Section 7020.80(a);
   ii) death benefits under Section 7 of the Act or permanent total disability benefits under Section 8 of the Act are claimed; or
   iii) special circumstances exist which in the opinion of the Arbitrator would warrant advancing the case for trial. The moving party must set forth in his motion the basis of the claimed special circumstance.

4. Petitioner's first attorney (now deceased) presented a notice of motion and request for hearing for trial date certain at the October 6, 2015 Mt. Vernon status call. The two boxes checked on the Notice were "Request for Hearing" and "Other." The explanation for "Other" was "Date certain trial setting-November 12, 2015 – Herrin."

5. The attached Motion for Date Certain Trial Setting presented on October 6, 2015 stated, *inter alia*, 1) that the cause is on the docket for November, 9, 2015; 2) that the Petitioner made repeated demands upon the Respondent's insurance company to settle the case without success-and that the insurance company failed and refused to respond to Petitioner's communications; and 3) included a prayer for trial date certain on 11/12/15.

6. The record is devoid of evidence corroborating Petitioner's attorney's repeated demands upon the insurance company to settle the case without success e.g. no record of the identity of the claims representative to whom he spoke, the date and time they spoke or when he left a message, and no corroborating evidence of written communications either via email or United States Postal system.

7. The Proof of Service on the Notice is dated September 22, 2015, and the service list consisted solely of Respondent's name at the Murphysboro, IL address and did not list service upon the Arbitrator pursuant to the mandates of Section 7020.70(a) of the Rules Governing Practice before the Illinois Workers' Compensation Commission. (Px1)

8. Section 7020.70(a) of the Rules Governing Practice before the Illinois Workers' Compensation Commission mandates "All motions, except motions made during an Arbitration or Review hearing, motions for a continuance of cases in the regular review call, and petitions filed under Section 19(h) and/or Section 8(a), must be

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accompanied by an Industrial Commission form entitled Notice of Motion and Order and **must be served on the Arbitrator** or Commission and all other parties in accordance with subsection (b). (emphasis added)

9. The notice of Petitioner's intent to present the Request for Hearing and motion to set the case for trial date certain on October 6, 2015 at the Mt. Vernon status call was also noncompliant with the mandates of Section 7020.70(b)(1)(B) of the Rules Governing Practice before the Illinois Workers' Compensation Commission for service of the motion for trial 15 days preceding the status call set forth in the notice. 15 days excludes the day of the event that triggers the period, counting every day, including Saturdays, Sundays and legal holidays and includes the last day of the period, unless the last day is a Saturday, Sunday or legal holiday, then the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

10. The record is devoid of evidence that Respondent ever received the Notice of motion and request for hearing to be presented on October 6, 2015.

11. The motion presented by Petitioner's attorney in Mt. Vernon on October 6, 2015 also did not conform to the exceptions to 7020.60(b)(2)(B) as required by 7030.20 of the Rules Governing Practice before the Illinois Workers' Compensation Commission either. There was no 19(b) filed and the substantive motion did not pertain to death or permanent and total benefits pursuant to Sections 7020.60(b)(2)(B)(i) and (ii) or the "special circumstances" exception as enunciated in Section 7020.60(b)(2)(B)(iii).

12. At the October 6, 2015 status call in Mt. Vernon, Arbitrator Lee assigned a trial date certain of November 12, 2015 in Herrin as requested by Petitioner's attorney.

13. Petitioner's attorney sent notice via certified mail to Respondent of the Order assigning a trial date certain on November 12, 2015 at its Murphysboro, IL address.

14. Respondent received Notice of the trial date certain on or about October 16, 2015 as evidenced by receipt of the signed United States Postal Service certified mail green card. (Px1)

15. No further communication between the parties was evidenced before or after the November 9, 2015 status call date.

16. On November 12, 2015, Arbitrator Lee presided over an *ex parte* hearing with only Petitioner and Petitioner's attorney present.

17. At the start of the trial on November 12, 2015, Petitioner's attorney admitted that he had unilaterally stopped communications with the insurance carrier. Counsel stated: "they have an insurance company, the Sander (sic) Group. In July and August of this year, I have had several conversations with the Sander (sic) Group and told them to obtain defense counsel as I was no longer going to communicate with them about the case. We filed a Motion for Date Certain trial setting, and we filed a Proof of Service

16IWCC0813

with the actual Respondent. They did not appear and you entered an Order setting this case for trial today. When you set that case for trial, we sent them by certified mail a copy of your Order and Notice to appear, that this case was set for today, November 12. And since that day, I've not had any response from the Respondent themselves or any attorney on behalf of the Respondent." (T, pp. 7,8)

18. The Petitioner testified she saw a physical therapist, a chiropractor and a message therapist and returned to work the first day of school in August of 2013; she did not know if any medical bills remained outstanding. (T, pp. 19, 15) She was placed at MMI in August 2013. (Px9) The Petitioner also testified she received a check for underpayment of temporary total disability benefits during the previous summer. (T, pp. 19-20)

19. The Petitioner testified that she never had back and shoulder complaints or treatment or any kind of incidents or injuries relating to her back or shoulders prior to this incident. (T, p. 19) The medical records of her treating physician, Dr. Wood confirm a history of shoulder problems in 2009 diagnosed as MDI or multidirectional instability.

20. The Rehab Physical Services history documents her reports of a nerve injury in the past involving her shoulder and that she had a lot of loose joints. (Px11)

21. The subject matter of the ex parte arbitration hearing is incongruous with the type of special circumstances that are contemplated in 7020.60(b)(2)(B)(i), (ii) and (iii). There was no evidence of special or exigent circumstance to justify setting the case without Respondent representation.

22. Absent special circumstances, the Rules Governing Practice before the Illinois Workers' Compensation Commission mandate that Petitioner's attorney would be required to send a notice to Respondent of his intent to present a request for hearing at the regularly scheduled status call on November 9, 2015 in Herrin unless the case was on file 3 or more years pursuant to 7020.60(b)(C)(i).

23. As required by 7020.70(b)(1)(B) of the Rules Governing Practice before the Illinois Workers' Compensation Commission, Petitioner's attorney failed to conform to the strictures of 7030.20(a) of the Rules Governing Practice before the Illinois Workers' Compensation Commission because he did not serve a motion for trial 15 days preceding the October 6, 2015 status call in Mt. Vernon, the case does not fall into the exceptions in Section 7020.60(b)(2)(B) and he failed to send Notice or present a Motion and Request for Hearing at the November 9, 2015 status call when the case appeared on the docket for quarterly status.

24. On October 5, 2015, the Commission posted Notice on the IWCC website that the commission was suspending the mailings of Arbitrator and Commission decisions. The Commission website specified that at the arbitration level, the parties "email the

16IWCC0813

Arbitrator to whom your case is assigned, waiver of service by mail and acceptance of email service."

25. Petitioner's attorney received the Arbitration Decision on or about January 22, 2016. There is no evidence that Respondent or Respondent's attorney received a copy of the Arbitrator's Decision until May 9, 2016. Respondent's attorney filed a timely Petition for Review on May 16, 2016, on the same day he filed his appearance.

Accordingly, the Commission finds that Respondent's Petition for review was timely filed. The Commission also finds that Arbitrator Lee erred in proceeding with the *ex parte* hearing on November 12, 2015. The Commission hereby vacates the Arbitrator's Decision, and remands the case for a new hearing on Arbitration.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's Motion to Dismiss Respondent's Petition for Review is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator entered on January 22, 2016 is vacated and the matter remanded back to the Arbitrator for further proceedings consistent with this Decision.

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: DEC 16 2016
KLW/bsd
O: 10/18/16
42

Kevin Lamborn

Thomas Tyrrell

Michael Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0813

McTAGGART, EMILY
Employee/Petitioner

Case# **14WC006206**

TRI-COUNTY SPECIAL EDUCATION
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:

0752 ALLEMAN LAW FIRM PC
JOHN D ALLEMAN
310 E MAIN ST
CARBONDALE, IL 62901

0000 TRI-COUNTY SPECIAL EDUCATION
1725 SHOMAKER DRIVE
MURPHYSBORO, IL 62966

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

16IWCC0813

Emily McTaggart
Employee/Petitioner

Case # 14 WC 06206

v.

Tri-County Special Education
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 **Herrin**, on **November 12, 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 OF FACT:

On September 22, 2015, the Petitioner filed a Notice of Motion / Order and Motion for Date Certain Trial Setting seeking a November 12, 2015 date certain trial setting. The Respondent failed to appear, and this cause proceeded to trial on November 12, 2015.

The Petitioner testified that in conformity with the Request for Hearing form filed with the Commission:

On April 24, 2013, the Petitioner was employed by the Respondent as a teacher's aide, and was working within the course and scope of her employment, supervising a student on a treadmill, when the student grabbed her around the neck, and both fell to the ground injuring the Petitioner. Petitioner notified her employer orally, and in writing of the incident / injury. Petitioner was 24 years old at the time of the injury; single, with no children.

The Petitioner had concurrent employment, and earned $ 525.00 per week through both jobs. The Respondent knew about the second employment, as that job was as a school bus driver that transported the students / children of the Respondent's education program; and said position was coordinated with Petitioner's employer.

The Petitioner received medical treatment from Rehab Unlimited, Cape Radiology, Work Care, Dr. Whitacre, Dr. John Wood, Orthopedic Institute of Southern Illinois; and Dr. Newell. There remains unpaid bills to Dr. Whitacre in the amount of $ 1,987.09; and Dr. Newell $ 632.00- both of which are reasonable and customary, and related to the April 24, 2014 work related injury.

The Petitioner was temporarily totally disabled from both employers from April 24, 2013 to July 18, 2013, a period of 12 weeks at the TTD rate of $ 350.00 = $ 4,200.00. The Respondent initially paid $ 874.14 in TTD benefits. On August 4, 2015 the Petitioner filed a Petition for Penalties seeking past due TTD benefits. Thereafter on August 5, 2015 the Respondent paid an additional $ 1,854.29 in TTD benefits, leaving $ 1,471.57 in past due TTD benefits owed at the time of trial.

The Petitioner filed a Petition for Penalties and Attorney Fees on August 4, 2015. There is no dispute that past due TTD benefits in the amount of $ 3,325.86 were due and owing when the Petition for Penalties / Attorney Fees was filed. There has been no evidence or testimony presented to justify the delay and non-payment of benefits.

Pursuant to Section 19(l), the Respondent is ordered to pay $ 30.00 per day, from July 18, 2013 to August 5, 2015, a period of 747 days, ($ 22,410.00)

Pursuant to Section 19(k), the Respondent is ordered to pay $ 735.78; which is 50% of the amount of past due TTD benefits payable at the time of trial.

In regards to permanency, the Petitioner sustained a thoracic and cervical strain / sprain injury. Petitioner testified that she continues to have limited range of motion, pain, and achiness. When at MMI she was referred for trigger point injections by Dr. John Wood; through a physiatrist, or pain management. She has lifting restrictions ; and has been recommended to **not** restrain upset students, (which is an essential job function as Petitioner is employed as a teacher's aide at Tri County Special Education which deals with behaviorally and mentally challenged students).

CONCLUSIONS OF LAW:

On **April 24, 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 **$ 27,300**; the average weekly wage was **$525.00**.

On the date of accident, Petitioner was **24** 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 $ 2,728.43 for TTD payments previously made.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $ 350.00 /week for 12 weeks ($ 4,200.00), commencing April 24, 2013 through July 19, 2013, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $ 2,728.43 for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $ 1,987.09 to Dr. Whittacre; and $ 632.00 to Dr. Newell as provided in Sections 8(a) and 8.2 of the Act.

Penalties

Respondent shall pay to Petitioner penalties of **$ 22,410.00** as provided in Section 19(k) of the Act; and **$735.78**, as provided in Section 19(l) of the Act.

Permanent Partial Disability with 8.1b language

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. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no opinion comporting with the specific requirements of §8.1b(a) was submitted into evidence. However, the Arbitrator has considered the doctor's comments as a factor in the evaluation of Petitioner's permanent partial disability as required by §8.1b(b)(i). The doctor noted pain, restrictions, lifting restrictions, and the need for trigger point injections. Because of these ongoing problems, and limitations, the Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a teacher's aide at the time of the accident and that she *is* able to return to work in her prior capacity as a result of said injury. The Arbitrator therefore gives *no* 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 the accident. Because of the young age, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes the Petitioner returned to pre-injury employment. 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 that the Petitioner tried physical therapy, anti-inflammatories and was recommended for trigger point injections. Because of these continuing problems, the Arbitrator therefore gives *greater* weight to this factor.

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 **6 %** loss of use of the man as a whole pursuant to § 8 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.

Edward Lee, Arbitrator

1/15/16
Date

JAN 22 2016

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

Mark Carriaga,

Petitioner,

vs.

NO. 14 WC 07356

16IWCC0793

Kurtz Ambulance Service,

Respondent.

DECISION AND OPINION ON REVIEW

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, notice, causal connection, medical expenses, prospective medical care and temporary disability, and being advised of the facts and law, affirms with changes the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's finding that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent. The finding of no accident renders the remaining issues moot. The Commission does not adopt and strikes the findings regarding causal connection, medical expenses, prospective medical care, temporary disability and credit.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 26, 2016, is hereby affirmed with changes.

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: DEC 13 2016
o-11/17/2016
SM/sk
44

Stephen Mathis

Maria Basurto

David L. Gore

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

CARRIAGA. MARK
Employee/Petitioner

Case# **14WC007356**

16IWCC0793

KURTZ AMBULANCE SERVICE
Employer/Respondent

On 4/26/2016, 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 0.40% 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
JILL WAGNER
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

1120 BRADY CONNOLLY & MASUDA PC
IVAN NIEVES
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

16IWCC0793

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
19(b)

MARK CARRIAGA
Employee/Petitioner

v.

KURTZ AMBULANCE SERVICE
Employer/Respondent

Case # **14** WC **7356**

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 **June 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. ☒ Is Petitioner entitled to any prospective medical care?

FINDINGS

On the date of accident, **January 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 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 **$18,720.00**; the average weekly wage was **$360.00**.

On the date of accident, Petitioner was **25** 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 **$2,242.66** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$2,242.66**.

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

ORDER

The Arbitrator does not award medical benefits or TTD/TPD benefits, finding that Petitioner failed to prove that he was injured in an accident that arose out of and in the course of his employment by Respondent and that his current condition of ill-being is causally related to the accident.

The Arbitrator makes no findings on the remaining disputed issues.

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

April 1, 2016
Date

ICArbDec19(b)

APR 26 2016

16IWCC0793

INTRODUCTION

This matter proceeded to hearing on June 22, 2015 before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***E:*** Was timely notice of the accident given to Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to 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/TPD*; ***N:*** Is Respondent due any credit?; ***O:*** Is Petitioner entitled to prospective medical care and services?

Petitioner, Julie Reichhardt, and Leslie Au testified at trial. Evidence depositions of Drs. Martin Herman and Andrew Zelby were admitted in evidence along with various documents.

FINDINGS OF FACT

Petitioner worked for Respondent as a medical driver. In that capacity Petitioner transported non-emergent patients to and from their medical appointments at Weiss Memorial Hospital. Petitioner testified that his work vehicle was a Ford E-150 with the high top for the space for clients and a medical lift on the side. The van was equipped with side-facing benches in the back where the patients would sit.

On January 27, 2014 Petitioner was working with a co-worker Leslie Au. They were transporting a longstanding client from Weiss Memorial Hospital back to his home. Mr. Au was driving. The client preferred to ride in the front passenger seat. The lift ramp was not used to assist the client into the van. Petitioner then loaded the client's walker into the back of the van.

Petitioner then got into the back of the van and was closing the back doors. As he was reaching to close the left door Mr. Au hit the gas, causing him to grab something in the inside of the van and arch his back, almost falling out of the van. He yelled out to Mr. Au, who immediately stopped the van. Petitioner testified that Mr. Au said he thought Petitioner was already in the van.

Petitioner testified that he called his supervisor Jim Billquist later that day and reported the accident and that he was taking a personal day the next day due to his low back pain. Mr. Billquist did not direct to get medical care. Petitioner continued to work the day of the accident. He further testified that he worked for a week before seeing a doctor. He did not know he could go to a doctor for his injury.

Petitioner testified that he first went to the emergency room of St. Joseph's Hospital (PX #5) in Chicago. He explained everything to the doctor and then received a shot. He then testified that he went to St. Joseph's on February 13, 2014, after he went to Ingalls Memorial Hospital. Petitioner testified that he went to the emergency room at Ingalls Memorial Hospital (PX #4) on February 11, 2014. He testified that he did not know he could get medical treatment and the Respondent never directed him to get treatment sooner. He was given an injection and diagnosed with a lumbar strain and lumbar radiculopathy.

Two days later Petitioner went to St. Joseph's with continued complaints of back pain which radiating into his left gluteus and hip. He was given another injection and put on light duty restrictions of no heavy lifting, bending, or squatting for 1-2 weeks. Petitioner testified that he gave his light duty restrictions to Casey Hermes, the supervisor who took over Jim Billquist's position. Mr. Hermes told him that there was no light duty available.

Petitioner continued to follow up at Ingalls Occupational Health (PX #4) on February 17, 2014 where he saw Dr. Muhammad Choudry. Dr. Choudry diagnosed lumbar strain and radiculopathy, prescribed medication, ordered physical therapy, and continued with light duty restrictions.

Petitioner testified that he went to see Dr. Michael Foreman at Beverly Park Medical Center (PX #2) on February 19, 2014. Dr. Foreman diagnosed lumbar strain and lumbar radiculopathy, recommended an MRI of the lumbar spine and took him off work. Petitioner testified that he completed physical therapy from February 26 through March 7, 2014 and underwent the lumbar spine MRI on March 3, 2014. Dr. Foreman referred Petitioner to Dr. Martin Herman at the Center for Brain and Spine Surgery (PX #3).

Petitioner was examined by Dr. Herman on March 27, 2014. Dr. Herman recommended an L5-S1 microdiscectomy. Petitioner followed up with Dr. Herman on June 24, 2014 who again recommended surgery and restricted him off work. Petitioner saw Dr. Herman again on July 9, 2014 where he again diagnosed S-1 radiculopathy and herniated disc, again recommended surgery, and at this point, prescribed light duty restrictions of walking or standing only occasionally, occasionally lifting, 10 pounds maximum, and/or carrying articles like small tools. Petitioner testified that he provided Dr. Herman's work restrictions to HR ("Julie") but he was told there was no light duty work.

Petitioner was examined by Dr. Andrew Zelby at Neurological Surgery and Spine Center on April 21, 2014 at the request of the insurance company.

Petitioner testified that he only received one off work check from Respondent and did not receive any other sort of income. He sought other employment within his restrictions elsewhere. He began work at CDT Pace as a driver on August 18, 2014. Petitioner testified that his job duties as a driver for CDT Pace included "picking up ambulatory people, dropping them off, hospitals, work, wherever they need to basically

go, some grocery stores...and dropping them off and picking them up." He is still working for CDT Pace, 40 hours a week, earning $13.70 an hour (RX # 7). Petitioner testified that he was not required to lift more than 20 pounds; carry any objects; walk or standing more than occasionally.

Petitioner testified that he had never hurt his back before January 27, 2014. He admitted that he played non-competitive tag football in high school 5 years earlier, but never sustained any sort of injury. He further testified that if the Arbitrator would award the recommended surgery, he would get the treatment immediately.

On cross examination Petitioner was questioned about the February 17, 2014 record of Ingalls Occupational Health indicating "chief complaint: patient states while at work two weeks ago, he was getting out of a van and his partner hit the gas, causing patient to fly forward and caused pain to the lower back". Petitioner testified that was inaccurate, making clear that he was inside the van and not getting out of the van at the time of his accident.

On further cross examination Petitioner acknowledged that despite his pain he went to St. Joseph's Hospital even though Ingalls Hospital and Metro South Hospital were much closer to his home. Petitioner offered no explanation for his choice of travelling so far while experiencing severe pain.

Petitioner also disputed he medical records of St. Joseph Hospital where it was noted that he reported that the accident involved the open side doors of the van. Petitioner testified that he was never on the side of the van.

On cross examination Petitioner was questioned about the different accident description attributed to him in the Beverly Park Medical Center records. He acknowledged that this history contradicted his earlier testimony. He could not explain why Dr. Foreman had a different accident description.

On cross examination Petitioner reviewed Form 45, Employer's First Report of Injury, (RX #2) and testified that he signed off as to the accuracy of the report with his signature. He acknowledged that the accident description was different than the initial medical records at Ingalls Hospital.

Petitioner admitted that he continued to work his regular schedule after January 27, 2014 incident until February 12, 2014.

Julie Reichhardt testified she has been employed with Kurtz Ambulance Services for 16 years as QA Manager. Her job duties involved Workers' Compensation claims. Ms. Reichhardt testified as to the preparation of the Illinois Form 45 reports on February 19, 2014 (RX #2 & RX #3). She was unaware of the January 27 incident until Petitioner went to St. Joseph's Hospital. She did not know that Petitioner had gone to Ingalls Hospital before February 19. She testified that the employee fills out part of the Form 45 and then signs. In this case Petitioner signed RX #2. RX #3 is computer generated for insurance claims processing.

Ms. Reichhardt testified that according to timesheets (RX #4 & RX #5) Petitioner worked 9 hours on February 3, 9.5 hours on February 4, 9.5 hours on February 5, 9.75

hours on February 6, 12.25 hours on February 7, 15.25 hours on February 10, 10.5 hours on February 11, and 12 hours on February 12.

Ms. Reichhardt testified that she never received any forms or phone calls from Petitioner's supervisor, Mr. Billquist, regarding a January 27, 2014 work accident involving Petitioner.

She further testified that the normal procedure when an employee has an injury is that an employee would go to the manager of the division, report the injury, and medical treatment is offered at that time, including making transportation arrangements available, but if the injured employee chooses not to seek treatment on the date of injury, the employer documents it with the Form 45 and an in-house investigation report, which are then placed in the personnel file. She testified that an employee is never denied the opportunity to seek medical treatment.

Ms. Reichhardt testified that Petitioner did not inform her of any work restrictions. She testified to a telephone conversation with Petitioner's mother. Petitioner's mother said petitioner was put on light duty restrictions. Ms. Reichhardt offered light duty but Petitioner's mother said he was in too much pain to work. Ms. Reichhardt testified that from February 13 through August 10, 2014, light duty work was available during that time period for the petitioner.

Leslie Au testified at hearing on behalf of Respondent. Mr. Au is employed by Respondent as a Medi-Car driver. He started working in December 2013. Mr. Au testified that the job duties of a Medi-Car driver involved pick up and transport patients to and from their medical appointments. Prior to working for Kurtz, he was a truck driver, 18-wheel semis, over the road, and that he maintained he commercial driver's license.

Mr. Au testified that he heard Petitioner's testimony. He testified that as of January 27, 2014, Petitioner would no longer have been training him. Mr. Au testified that normally, Medi-Car drivers work alone, however, a van was not yet ready for him that day so he worked with the petitioner, splitting the duties of driving and taking care of the patients.

Mr. Au testified that he heard Petitioner's testimony regarding a January 27, 2014 work accident. He testified that there was no work accident. Mr. Au testified:

> "What he told me about the accident happened was not related to work incident, he told me it was a personal injury related back, you know, when he was in school, he injured himself in sports, I believe it was football when he told me that, but he never mentioned anything to me that it was work-related, no, so I have no knowledge of that."

Mr. Au confirmed that on the day of the incident he and Petitioner had placed the patient in the front passenger seat. Mr. Au also testified that he did not remember taking off with a door open as described by Petitioner.

Mr. Au identified Respondent's Exhibits 1-A, 1-B, and 1-C, photographs of the van he and Petitioner operated on January 27, 2014. He identified the side door as the access to the lift mechanism. He further testified that an interlock does not allow the van to move when the lift mechanism is in use and the door open.

Respondent's counsel played a video recording of the operation of the lift mechanism of Respondent's van (RX #6). The video demonstrated the interlock mechanism which prevents the van from moving when the lift mechanism is engaged.

Mr. Au continued to work with Petitioner from January 27 through February 12, 2014. During that time Petitioner did not mention a work injury.

Dr. Martin Herman Evidence Deposition (PX #7)

Dr. Herman is a board certified neurosurgeon. He testified on December 11, 2014. Dr. Herman testified by refreshing his recollection from his clinical chart for Petitioner.

Dr. Herman reviewed Petitioner's clinical visits, reciting his findings and opinions from his chart notes. Dr. Herman opined that Petitioner sustained a herniated disc at L5-S1 as a result of the medicar incident Petitioner described in his history. He believed that the force of the accident described by Petitioner was sufficient to cause a herniated disc. Dr. Herman based his causation opinion on the fact that Petitioner told him he had not had back problems or a back injury before the January 27, 2014 accident at work. In explaining his opinion, he testified:

> "He had no pain prior to the work injury. His pain onset was with the work injury, and he had pain subsequent to the work injury. So chronologically the problem is consistent with the injury at work. And so objectively there's an injury that is identified, and so the combination of the temporal onset along with the symptoms which arose and continued and were identified diagnostically to be the disk herniation is what leads me to believe that his disk herniation was caused by the work-related injury...

Dr. Herman reiterated his opinion that Petitioner needed a lumbar micro-discectomy. He testified that:

> "most people in general terms get better in the first three months if they're going to get better. He's already had conservative treatment to the extent that he's had physical therapy for a month, and I think at this stage anything other than a micro lumbar discectomy is really not going to be of much help to him."

The Dr. Herman repeated that he had kept Petitioner off work due to his injury up to July 2014 when Petitioner requested a release to return to work. But for Petitioner's request to return to work Dr. Herman would have kept him off work.

On cross-examination Dr. Herman testified that his causation opinion is based on the accuracy of the history given by Petitioner. He would not change his opinions even knowing that Petitioner continued to work 9+ hour days from February 3 through February 11, 2014. Dr. Herman discounted Petitioner's obesity as a possible cause of his disc herniation.

On further cross-examination Dr. Herman acknowledged that the only other medical record of Petitioner was the March 3 MRI. Dr. Herman had also read Dr. Zelby's §12 exam report. He disagreed with Dr. Zelby's opinion that hyperextension could not cause a L5-S1 disc herniation, noting that Petitioner did not give that history to him. He acknowledged that he could not say that with 100% confidence. Dr. Herman would release Petitioner to drive an ambulance if that were considered to be sedentary work.

He reiterated his causation opinion based on a temporal relationship between the event and the onset of symptoms.

Dr. Andrew Zelby Evidence Deposition (RX #10)

Dr. Zelby testified at evidence deposition on January 15, 2015. He is a board certified neurosurgeon. He examined Petitioner pursuant to §12 of the Act on April 21, 2014. Dr. Zelby generated a written report to Respondent on April 21, 2014, which was marked as Respondent's Exhibit #2 of the deposition and admitted in evidence without objection.

At the examination Petitioner gave a history that he had an injury at work on January 27, 2014. He said that he loaded a patient into the back of a Medi-Car and leaned out from the inside of the van to close the doors. The driver then stepped on the gas. Petitioner grabbed the closed door with his right hand and a strap on the inside of the car with his left hand as he went backwards, so he wouldn't fall out. Petitioner arched his back as the Medi-Car started moving. He did not feel anything in that time, and continued working. He began to notice a little low back pain about 4 hours later. Petitioner reported that the back pain got worse and began to radiate down his left leg. Petitioner reported that his lawyer sent him to a doctor who started physical therapy, which helped. At the time of the exam Petitioner reported continuing back and leg pain once or twice a week. Dr. Zelby testified that he accurately recorded the facts of the accident as Petitioner described the facts.

On examination Petitioner's range of lumbar motion was limited in flexion but was otherwise normal. Petitioner had back pain on a left straight leg raise. Other than tenderness on palpation the exam of the lumbar spine was normal. Petitioner's BMI was 42.83 which would be considered morbidly obese Dr. Zelby testified that:

> "morbid obesity places a biomechanical force on the spine constantly in a manner that the spine was not designed to withstand, and the only way to decrease that force is through weight loss it would be as if you were

> carrying an extra 100 pound backpack everywhere you went, and that loads the spine anytime you are not lying down, it loads it when you are sitting, it loads it when you are standing...and the place it loads it the most is the bottom of the spine."

Dr. Zelby did not review Dr. Herman's records. He reviewed the March 3, 2014 lumbar spine MRI and noted the predominant finding was a paracentral left disc extrusion with inferior migration of disc material at L5-S1, on the left. Dr. Zelby testified that based upon his examination of Petitioner, his review of medical treatment records and diagnostic studies that the findings on the MRI would not be causally related to the work accident as Petitioner had described it to him:

> "Well, what I said was, as he described it, which is an extension-he arched his back-he was facing backwards. The ambulance takes off. His body carries him forward. He arches his back as he is holding on. That's not the biomechanical force vector that would cause a herniated disc. A herniated disc comes from an axial load, which is downward force, and a flexion vector, a flexion moment. So the way he described it would not be a mechanism of injury that would be expected to result in a herniated disc." Dr. Zelby testified that "someone who is morbidly obese, his risk of a herniated disc from almost anything would be greater, but not extension of the spine."

Dr. Zelby testified that any medical treatment or work restrictions would not be related to the accident as Petitioner described it to him.

Dr. Zelby testified that "as he described his injury, biomechanically, that would make no sense to cause a herniated disc...and someone who is more than 100 pounds overweight, that could certainly be a source."

Ingalls Occupational Health (PX # 4)

Petitioner presented for emergency care on February 11, 2014. Petitioner reported a back injury at work 2 weeks before. He reported that while getting into a van his partner hit the gas and that he flew forward. He complained of 7/10 mid lower back pain which radiated to the right knee. Another note documented low back pain radiating down the left leg. It was also noted there that Pettioner reported that he stretched his back as he was getting into a van when the van started going. A third entry noted no radiation of pain. X-rays demonstrated L5-S1 degenerative changes.

No weakness or paresthesias of the extremities were noted on exam. The neurological exam was negative.

Petitioner returned on February 17, 2014, when he saw Dr. Muhammad Choudry. Dr. Choudry noted Petitioner's report that he was getting into a van when his partner hit the gas, causing him the fly forward. Petitioner complained that his back pain radiated

down the back of his left leg to the foot. He also had on and off tingling and numbness in the left leg.

On exam Petitioner reported his inability to forward flex his lumbar spine and squat due to pain. Straight leg was positive at 60° on the left. Dr. Choudry diagnosed lumbar strain and lumbar radiculopathy. He prescribed Medrol Dosepak.

St. Joseph Hospital (PX #5)

Petitioner presented for emergency care on February 13, 2014. He complained of low back pain radiating into the left butt and hip. He reported an accident at work on January 27 when he was at the side of a van with the doors open. He stated that as he was closing the doors his partner started to drive forward. He reported that as he held onto the door his back was hyperextended. The physical exam demonstrated reduced range of lumbar motion and tenderness on palpation. Straight leg raise caused pain in the low back. No x-rays were taken. He was given an injection of Toradol. Petitioner was discharged with a diagnosis low back pain and groin strain, which prescriptions for Norco and Flexeril.

Beverly Park Medical Center/Dr. Michael Foreman (PX #2)

Petitioner saw Ashley Daliege on February 19, 2014 complaining of 10/10 back pain. Petitioner gave a history of being on duty January 27, 2014, sitting in the passenger seat and trying to pull the passenger door closed. He reported that the driver hit the gas as he pulled the door closed and he was violently jerked. Petitioner reported that he was referred by his employer to Ingalls Hospital on February 11. He followed up at Ingalls on February 17, when he was given Medrol Dosepak and Norco. Petitioner also reported his consultation at St. Joseph's Hospital on February 13 for additional care.

Petitioner sought care due to persistence of his symptoms, despite taking the prescribed medication. Petitioner stated that his work as a medicar driver required loading and offloading of patients and prolonged periods of sitting. He was unable to work because of his symptoms.

Petitioner denied any history of other trauma or injury. The general physical exam was unremarkable. The orthopedic exam revealed positive Bechterew's and Kemp's and left leg pain on straight leg raise. The lumbar spine was tender and range of motion was limited by pain except for extension. Strength was normal. Reflexes were equal bilaterally. Dr. Foreman diagnosed lumbar sprain and lumbar radiculopathy. He ordered Petitioner off work, continued medication, and considered physical therapy.

On February 24, 2014 Petitioner was essentially the same. Dr. Foreman ordered an MRI and physical therapy. Petitioner saw Ms. Daliege again on February 26, complaining of 8/10 pain. Dr. Foreman's course of treatment was continued. Petitioner

also saw John Carlson, Jared Thomure, Dale Hooton, and Tonika Belt throughout his course at Beverly Park Medical Center. There are no notes of what the professional qualifications of Daliege, Carlson, Thomure, Hooton, and Belt may be.

Dr. Foreman's last note is dated April 14, 2014. Dr. Herman's recommendation of surgery was discussed. Petitioner expressed a desire to have the surgery in order to resume a normal pain free lifestyle. Dr. Foreman noted that Petitioner had plateaued with therapy. Dr. Foreman adjusted Petitioner's medication. He still kept Petitioner off work but discharged Petitioner from his care to the spine specialist.

Archer Open MRI (PX #6)

A lumbar MRI was performed on referral for Dr. Foreman on March 3, 2014. The imaging demonstrated an 8 mm left paracentral disc herniation at L5-S1, displacing the left S1 nerve root.

Center for Brain and Spine Surgery/Dr. Martin Herman (PX #3)

Petitioner consulted Dr. Herman on March 27, 2014 on referral by Dr. Foreman. Petitioner gave a history trying to close the door of a medicar on January 27 when the driver started driving. Petitioner almost flew out of the car and had immediate back pain. The next day the pain was going into his left leg down to the foot. Petitioner recited his course of care at Ingalls Hospital, St. Joseph's Hospital, and with Dr. Foreman without relief.

Dr. Herman noted the March 3 MRI which showed a large 8 mm L5-S1 herniation with nerve compression. Dr. Herman had Petitioner complete a medical/surgical history which was not incorporated in PX #3.

On examination Dr. Herman noted Petitioner's right-sided antalgic gait. Petitioner was able to toe-heel walk normally. Lower extremity muscle tone was normal. Seated straight leg raise reproduced left leg pain. Lumbar range of motion was slightly reduced. Reflexes were normal except an absent Achilles on the left. Dr. Herman diagnosed left S1 radiculopathy due to an L5-S1 herniation from a work injury on January 27, 2014 and recommended micro discectomy.

Dr. Herman did note Petitioner's morbid obesity. He also noted that Petitioner was able to perform activities of daily living.

Petitioner returned to Dr. Herman on June 24, 2014. Surgery was discussed again. Petitioner expressed his desire to proceed with surgery. The clinical notes of the June 24 examination are virtually word-for-word of the notes from the March 27 examination.

Petitioner saw Dr. Herman a third time on July 9, 2014. Petitioner's continued to complain of left leg pain which Dr. Herman associated with a work related L5-S1 disc herniation. Petitioner expressed frustration that his Workers' Compensation claim was

not progressing. Dr. Herman released Petitioner to sedentary work at petitioner's request due to financial hardship. Again, the clinical notes of the July 9 examination are virtually word-for-word of the notes from the March 27 and June 24 examinations.

CORRECTED CONCLUSIONS OF LAW

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

After reviewing and weighing all the evidence, the Arbitrator finds that the petitioner failed to prove that he sustained an accidental injury that arose out of and in the course of his employment by Respondent.

The principal basis for the Arbitrator's finding is the determination that petitioner was not a credible witness. The Arbitrator takes note of the varying accounts of the claimed incident Petitioner gave over time and to different people. In fact it was recorded that he reported that he was injured while using the front passenger door and then was injured while using the side lift-gate door. He readily admitted at trial that he gave different accounts of his injury to different healthcare providers at different times. He clearly was not a reliable historian.

In addition, Petitioner testified that he was never offered light duty work, work within his restrictions. Respondent's witness Julie Reichhardt, Manager of QA for Respondent, testified credibly that an offer of light duty was made to Petitioner through his mother.

Respondent's witness Leslie Au also offered testimony that contradicted Petitioner's testimony. While Mr. Au was not as compelling a witness as Ms. Reichhardt's his testimony was cumulative in establishing petitioner's poor credibility.

E: Was timely notice of the accident given to Respondent?

This issue was not seriously disputed. Respondent admitted its Exhibits #2 and #3, Illinois Form 45: Employer's First Report of Accident. The Form 45 is dated February 19, 2014. Petitioner was referred to Ingalls by Respondent on that same day. Respondent paid the Ingalls bill for Petitioner's medical services, PX #1. Accordingly, the Arbitrator finds that Petitioner complied with §6(c) of the Act in giving timely notice of the claimed accident.

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

The Arbitrator finds that Petitioner failed to prove that his current condition of ill-being is causally related to the accident. The Arbitrator found the opinion of Dr. Andrew Zelby that the accident did not cause Petitioner's L5-S1 disc herniation more persuasive than the causation opinion of Dr. Martin Herman. The evidence

demonstrated that Dr. Zelby had a broader and more comprehensive view of Petitioner's condition than did Dr. Herman. It is apparent that Dr. Zelby obtained a more complete history of the underlying event than did Dr. Herman. Dr. Zelby reviewed more of Petitioner's medical records than did Dr. Herman. DR. Herman discounted Petitioner's obesity and that fact that he continued to work for more than a week after the accident. The Arbitrator finds Dr. Herman's dismissal of these factors detracting from his opinions. Dr. Zelby offered a logical and persuasive opinion that the hyperextension mechanism described by Petitioner was incapable of creating the mechanical load necessary to cause an L5-S1 disc herniation. Therefore, the Arbitrator adopts Dr. Zelby's causal connection opinion in finding that Petitioner's present condition of ill-being was not causally-related to any work injury of January 27, 2014.

In addition, Dr. Herman's incomplete history of Petitioner's accident and his cut-and-paste approach to maintaining clinical charts detract from the persuasiveness of his opinions. A review of Petitioner's other records would have demonstrated to Dr. Herman that Petitioner was not an accurate historian. Further, Dr. Herman's opinion is based on Petitioner's report that he had no back problems before the accident. A fact contradicted by Mr. Au. In addition Mr. Au testified that Petitioner never complained of an injury after the accident.

Dr. Herman's causation opinion is based on his belief that Petitioner accurately described the events of January 27, 2014 and that he accurately described his symptoms. After a careful review of the evidence the Arbitrator did not find Petitioner to be credible. Throughout his medical care following the accident and during his §12 exam Petitioner described differing versions of his accident. He readily admitted so on cross examination. Furthermore, Petitioner denied having any prior back problems while Leslie Au testified that Petitioner admitted to him having such a history.

The Arbitrator notes that he found Mr. Au's account of the accident not credible. Mr. Au may well have been motivated to divert attention from his own negligent operation of the van at the time of the accident. However, the Arbitrator finds no comparable motive for Mr. Au to misrepresent Petitioner's admission of prior back problems.

The Arbitrator is also persuaded that Petitioner's credibility is questionable when considering that he continued to work for the remainder of the day of the accident and for another 2 weeks. Such is not the behavior of someone sustaining a work-related injury of the nature diagnosed in Petitioner.

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?

In light of the Arbitrator's findings that Petitioner failed to prove that he was injured in an accident that arose out of and in the course of his employment by

Respondent and his failure to prove that his condition of ill-being is causally related to the accident, this issue is moot.

K: What temporary benefits are in dispute? *TTD/TPD*

In light of the Arbitrator's findings that Petitioner failed to prove that he was injured in an accident that arose out of and in the course of his employment by Respondent and his failure to prove that his condition of ill-being is causally related to the accident, this issue is moot.

N: Is Respondent due any credit

In light of the Arbitrator's findings that Petitioner failed to prove that he was injured in an accident that arose out of and in the course of his employment by Respondent and his failure to prove that his condition of ill-being is causally related to the accident, this issue is moot.

O: Is Petitioner entitled to prospective medical care and services?

In light of the Arbitrator's findings that Petitioner failed to prove that he was injured in an accident that arose out of and in the course of his employment by Respondent and his failure to prove that his condition of ill-being is causally related to the accident, this issue is moot.

Steven J. Fruth, Arbitrator

April 1, 2016
Date

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

Joseph Losoya,

Petitioner,

16IWCC0847

vs.

NO: 14 WC 8602

National Freight,

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 benefit rates, medical expenses, 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 March 22, 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.

16IWCC0847

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: DEC 27 2016
o12/14/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

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

16IWCC0847

LOSOYA, JOSEPH
Employee/Petitioner

Case# **14WC008602**

NATIONAL FREIGHT
Employer/Respondent

On 3/22/2016, 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 0.44% 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:

2208 CAPRON & AVGERINOS PC
MICHAEL A ROM
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CHICAGO, IL 60603

0481 MACIOROWSKI SACKMAN & ULRICH
ROBERT E MACIOROWSKI
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16IWCC0847

16IWCC0847

0STATE 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)

Joseph Losoya
Employee/Petitioner

v.

National Freight
Employer/Respondent

Case # **14 WC 08602**

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 February 17, 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 and average weekly wages?

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 _____

16IWCC0847

FINDINGS

On the date of accident, August 26, 2013, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did 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 $20,608.40; the average weekly wage was $386.37.

On the date of accident, Petitioner was 47 years of age, married with no dependent children.

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

Respondent shall be given a credit of $7,218.40 for TTD, $-0- for TPD, $ -0- for maintenance, and $-0- for other benefits, for a total credit of $7,218.40.

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 his current condition of ill-being is causally connected to the work accident of August 26, 2013, therefore benefits will be awarded through August 18, 2014, the date of receipt of the independent medical evaluation.

Respondent shall pay Petitioner temporary total disability benefits from February 17, 2014 through August 18, 2014 at the rate of $257.58 for a period of 28 weeks, as provided in Section 8(b) of the Act.

Petitioner has not proven, by a preponderance of the evidence, that he is entitled to prospective medical care therefore it is not awarded, pursuant to Section 8(a) of the Act.

Respondent shall be given a credit of $7,218.40 for temporary total disability paid to Petitioner.

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.

The disputed issues in this matter are: 1) causal connection; 2) earnings; 3) average weekly wage; 4) temporary total disability; and entitlement to prospective medical care. *See,* AX1.

Findings of Fact

Petitioner's testimony

Mr. Joseph Losoya, (the "petitioner") testified that prior to August 26, 2013, he had never injured his back at work or been treated for back pain. He is employed by National Freight International, (the "Respondent") as a picker and described his work duties as going throughout the warehouse, putting various pieces of merchandise on a pallet. He testified that he performed this work with a stand-up "walkie", which dragged the pallet. As he picked throughout the warehouse he would put items onto the pallet, until he finished the pick. He was hired to do that job on October 11, 2012 and that he initially earned $10.50 an hour, which increased to $11.00 an hour; and his normal work week was forty (40) hours.

On August 26, 2013, he put on his voice headset to start picking, as the machine would tell him where to go and what to pick. At the first pick location, he had to venture underneath shelving to retrieve merchandise and as he did so, he lifted one box. The weight of the box pushed him backwards and he tripped over a pallet, landing onto more pallets.

At the time of the occurrence, he landed on the small of his back and tailbone, noted a sharp pain in his lower back and he could not get up. He testified that he eventually removed himself from the floor with the aid of his supervisor, who transported him to Physicians Immediate Care.

The petitioner stopped working in February of 2014, when the Respondent's plant relocated and at this point, he began receiving workers' compensation benefits until he was seen by Dr. Soriano. Temporary total disability benefits ("TTD") payment history was introduced into evidence at the time of trial and shows that the petitioner was paid from February 17, 2014 through August 18, 2014.

The petitioner testified that he understood his restrictions to be no lifting more than 20 to 25 pounds and that he found a job on August 13, 2015, as a janitor for Standard Supermarket in Naperville, Illinois. He is currently earning $11.00 an hour, working a 40-hour week. He testified that he last received medication in March of 2015 and at the current time, he feels like he has something in the small of his back that compresses and stretches and is painful. He takes breaks as needed. Prior to his employment as a picker, the petitioner drove a truck, however, he has subsequently lost his license.

On cross-examination, the petitioner admitted that there was a gap in treatment between July 19, 2014 and March 19, 2015. He stated that Dr. Soriano gave him a full-duty release in July of

2014. He testified that after temporary total disability benefits ceased, he received unemployment compensation until he found work at the supermarket.

Petitioner's treatment

The medical records from Physicians Immediate Care were admitted into evidence as Petitioner's exhibit 1. The initial diagnosis was low back pain and sciatica. The petitioner was prescribed medication and provided with work restrictions of not lifting anything that exceeded 25 pounds and to sit and walk as needed. The petitioner testified that he did return to work under those restrictions. On September 2, 2013, the petitioner underwent an MRI of his lumbar spine.

The petitioner testified that Dr. Leazzo, from Physicians Immediate Care, referred him to Dr. Narayan Tata. The petitioner initially saw Dr. Tata on August 31, 2013; who performed a series of three lumbar epidural steroid injections. In addition, Petitioner was sent for a course of physical therapy at ATI Physical Therapy from December 20, 2013 to March 28, 2014.

The records of Dr. Tata and ATI were submitted into evidence as Petitioner's exhibits 2 and 4. The petitioner testified that he was allowed to work in a restricted capacity until February of 2014 and that he received no relief from the physical therapy or from the steroid injections.

In April of 2014, Dr. Tata referred him to Dr. Anis Mekhail for an evaluation and this doctor recommended a discogram. Petitioner testified that during this period of time, he continued to treat with Dr. Tata.

On July 24, 2014, the petitioner was seen by Dr. Marc Soriano, at the request of Respondent. That report was submitted into evidence along with the deposition of Dr. Soriano taken on October 15, 2015. Dr. Soriano, after taking a history, reviewing the treatment records and diagnostic studies, performed a detailed physical examination and opined that the petitioner's condition of ill-being was limited to a soft tissue injury; and that there were no findings to indicate that his pre-existing, degenerative condition was aggravated by the injury. He found that the petitioner was at maximum medical improvement ("MMI") and needed no additional care, treatment or work restrictions. He pointed out that the petitioner had positive Waddell signs and that a discography was neither reasonable nor appropriate.

Deposition of Dr. Narayan S. Tata dated, August 14, 2015

The petitioner testified that he last saw Dr. Tata on March 9, 2015. Dr. Tata's records were introduced into evidence as well as his deposition transcript. Dr. Tata testified to his qualifications in pain management and to the care and treatment provided to Mr. Losoya. The petitioner was referred to him by his primary care physician, Dr. Anthony Leazzo. The Arbitrator notes that Dr. Tata's records do not contain any off-work slips. Dr. Tata testified

that the MRI of August 31, 2013, showed a right paracentral disc bulge that he called an annular tear at L5-S1. He testified that the annular tears could be degenerative in nature. He testified to the injections which gave the petitioner short term relief.

Upon his examination of the petitioner, Dr. Tata found "pain to palpation along the lower lumbar spine. "His straight leg raise was positive with pain radiating down the left lower extremity going along the anterolateral thigh". Involving the annular tears at L4-L5 and L5-S1, Dr. Tata stated "these findings could be degenerative in nature, but given the temporal relationship of his pain complaints and the work-related injury, that I felt that there was—his injury did cause his low back pain." For the first time, Dr. Tata commented on Petitioner's ability of work, indicating that Petitioner would be capable of light, sedentary work if he were given the opportunity to change positions. Dr. Tata stated that Petitioner's lifting restrictions should be ten to fifteen pounds. PX5.

On cross-examination, Dr. Tata stated that he was unsure if he actually viewed the MRI itself or just the report however, he thought that he had reviewed the actual MRI. He testified that the spondylosis and the disc desiccation shown on the MRI were degenerative that that he could not determine whether the annular tears were degenerative or traumatic in nature. He further testified that he could not tell what caused the tears or when they specifically occurred. He admitted that the tears could have predated the injury in question.

As to Dr. Mekhail's recommendation that the petitioner have a discogram, Dr. Tata stated that he concurred with the recommendation because "that is the logical next step." The doctor testified that he did not perform Waddell testing because he did not think it was important, in that he did not feel that the petitioner's pain was out of proportion, that pain being 6-7 over 10.

He testified that the petitioner's complaints could be consistent with a lumbar strain and that a functional capacity evaluation ("FCE"), which was not performed, was the best way to ascertain Petitioner's ability to function. He testified that whether the petitioner could return to gainful employment would depend upon him returning to work to see how he responds and that a discography was a controversial test because it is subjective and that there was no way to determine whether the petitioner's complaints of pain were real.

Conclusions of Law

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

A 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 Commission,* 79 Ill. 2d. 249, 253, 403 N.E.2d

16IWCC0847

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 Commission*, 397 Ill. App. 3d 665, 674 (2009).

For an employee's workplace injury 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 Commission*, 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 Commission*, 44 Ill. 2d 207 at 214, 254 N.E.2d 522 (1969).

On August 26, 2013, the petitioner did sustain accidental injuries arising out of and in the course of his employment. The petitioner was initially treated at Physicians Immediate Care for a soft tissue injury and subsequently received physical therapy at ATI Physical Therapy and pain management from Dr. Tata.

The records from Dr. Tata revealed little, if any, relief from the injections provided. The records also reveal that the petitioner's treatment was based upon subjective complaints, with Dr. Tata admitting that there were no objective findings.

Dr. Soriano took a detailed history, reviewed the medical records in question and performed a detailed physical examination. Dr. Soriano found positive Waddell signs which indicated that the petitioner was attempting to exaggerate his condition. Dr. Soriano did find that the petitioner had evidence of pre-existing degenerative changes but that the petitioner had recovered from his soft tissue injury and was at MMI.

The Arbitrator finds that there was a causal connection between the care and treatment rendered by Physicians Immediate Care, ATI and Dr. Tata, until the examination with Dr. Soriano July 24, 2014. The Arbitrator finds on July 24, 2014, the petitioner reached MMI and had returned to his pre-injury state.

G. What were Petitioner's earnings?

Respondent offered into evidence an exhibit that established the petitioner's average weekly wage to be $386.37. There was no objection to that exhibit going into evidence. The petitioner, on direct examination, testified that he initially earned $10.50 an hour, then $11.00 an hour for a 40-hour work week. There was no documentation offered to support same or any testimony by the petitioner that he consistently worked a 40-hour work week. The burden is on the petitioner to establish each and every element of his case and the Arbitrator finds that the petitioner failed to provide sufficient evidence to establish an average weekly wage of $440.00 and adopts the average weekly wage from

the respondent of $386.37, noting for the record that the petitioner, for a period of 28 weeks, received TTD at $257.58, consistent with an average weekly wage of $386.37, without any objection on the part of the petitioner as to the accuracy of same.

K. Is Petitioner entitled to any prospective medical care?

The Arbitrator notes that the dispute as to additional care and treatment is limited to the need for a discogram. Dr. Tata, the petitioner's treating physician, admitted that it was a controversial test and is subjective in nature. Dr. Tata wanted to perform the test because of the petitioner's complaints of pain.

The Respondent, in denying the petitioner's request for a discogram, relied on the detailed examination and report from Dr. Marc Soriano and his testimony. In his deposition, Dr. Soriano clearly explains why the discogram was not indicated; given Petitioner's normal exam and the positive Waddell signs. The petitioner has not proven, by a preponderance of the evidence, that he is entitled to prospective medical care. The Arbitrator, in denying the petitioner's request for a discogram, finds Dr. Soriano to be more persuasive, also, noting Dr. Tata's admission that there was no way to determine whether the petitioner's complaints of pain were real.

L. What temporary benefits are in dispute?

The petitioner was accommodated in his work up until the plant relocated, February 16, 2014. Thereafter, the petitioner received temporary total disability benefits from February 7, 2014 through August 18, 2014, until Respondent received Dr. Soriano's findings the petitioner capable of returning to work in a full duty capacity.

In reviewing the records of Dr. Tata, there was nothing to support that the petitioner should have been off work. The opinion that the petitioner currently needs restrictions was solicited by the petitioner's attorney and at the time of Dr. Tata's deposition. The Arbitrator would note that Dr. Tata, testified that an FCE was the best way to determine the petitioner's capabilities and that the only way to determine whether or not the petitioner could return to work in a full duty capacity, was for him to try to do so.

In support of the Respondent's position to terminate temporary total disability benefits, they relied on the opinion of a neurosurgeon, Dr. Marc Soriano. Dr. Soriano, contrary to Dr. Tata, reviewed all of the treating records including the MRI, in giving his opinion.

The Arbitrator, in denying the petitioner's claim for additional temporary total disability benefits from August 18, 2014 through August 13, 2015, relies on the qualified opinion of Dr. Soriano. The Arbitrator would also note that during the period when the petitioner was last paid TTD, he was receiving unemployment compensation which means that he represented that he was ready and able to return to gainful employment. The Arbitrator, therefore, denies the petitioner's claim for additional temporary total disability benefits beyond August 18, 2014.

16IWCC0847

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
14WC08602
SIGNATURE PAGE

Signature of Arbitrator

March 21, 2016
Date of Decision

MAR 22 2016

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Margo Kopp,

Petitioner,

vs.

NO: 14 WC 14664

Presence St. Joseph Hospital,

16IWCC0785

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 causation, medical expenses and temporary total disability, and being advised of the facts and law, affirms the Decision of the Arbitrator with changes as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the decision of the Arbitrator at p.2 of the form decision to show that Petitioner is entitled to temporary total disability from 6/19/14 through 3/9/15, for a period of 37-5/7 weeks (not 37-4/7 weeks). This period was correctly noted as 37-5/7 weeks at p.8 of the "Addendum to the Decision of the Arbitrator."

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 11/17/15, with corrections, 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.

16IWCC0785

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 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: DEC 7 - 2016
o: 10/25/16
TJT/pmo
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

KOPP, MARGO
Employee/Petitioner

Case# **14WC014664**

PRESENCE ST JOSEPH HOSPITAL
Employer/Respondent

16IWCC0785

On 11/17/2015, 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 0.33% 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:

1559 LEAHY, JAMES P
1275 DAVIS RD
ELGIN, IL 60123

2965 KEEFE CAMPBELL BIERY & ASSOC
SEAN BROGAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

16IWCC0785

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
19(b)

MARGO KOPP
Employee/Petitioner

v.

PRESENCE ST. JOSEPH HOSPITAL
Employer/Respondent

Case # **14** WC **14664**

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 **Arbitrator Jessica Hegarty**, Arbitrator of the Commission, in the city of **Elgin**, on **07/14/2015**. 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. [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 [x] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **11/08/13**, 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 **$64,293.32**; the average weekly wage was **$1,236.41**.

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 **$24,116.48 (non-occupational disability benefits)** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of **$24,116.48**.

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

ORDER

1. Respondent shall pay Petitioner temporary total disability benefits of $824.28/week for 37 4/7ths weeks, commencing 06/19/14 through 03/09/15, as provided in Section 8(b) of the Act.

2. Respondent shall pay Petitioner maintenance benefits of $824.28/week for 18 & 1/7ths weeks commencing 03/10/15 through 07/14/15, as provided in Section 8(a) of the Act.

3. Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, as follows:

-	Presence St. Joseph Hospital	$ 1,202.00
-	Suburban Orthopaedics	$32,081.80
-	Essential Testing LLC	$ 566.37
-	Elgin Internal Medicine	$ 337.00
-	Ashton Surgical Center	$31,564.48
	Oak Brook Anesthesiologists, Ltd.	$ 1,987.45
	Advocate Sherman Hospital	$28,586.70
	-Enhanced Medical Imaging	$ 2,320.00
-	Prescription Partners	$ 1,790.98
-	Metro Health Solutions	$ 2,988.79

as provided in Sections 8(a) and 8.2 of the Act.

4. Respondent shall be given a credit for any and all reasonable and related medical benefits paid through group insurance per parties stipulation and Respondent shall hold the Petitioner harmless from any claims through group insurance of the services for which Respondent is receiving this credit, as provided in Section 8(j) 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.

Jason A. Mozenter

11/3/15

ICArbDec19(b)

NOV 17 2015

16IWCC0785

BEFORE THE WORKERS' COMPENSATION COMMISSION
IN THE STATE OF ILLINOIS

MARGO KOPP, Petitioner,	)	
vs.	)	**No. 14 WC 14664** *Kane County*
PRESENCE ST. JOSEPH HOSPITAL, Respondent.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

On July 14, 2015, this matter proceeded to hearing pursuant to Section 19(b) of the Illinois Workers' Compensation Act (the "Act") before Arbitrator Jessica A. Hegarty in Elgin, Illinois.

The disputed issues with respect to 14 WC 14664 are:

- Causal Connection;
- Medical Bills;
- TTD;
- Maintenance.

FINDINGS OF FACT

Margo Kopp ("Petitioner") began working as a registered nurse on the oncology and renal floor of Presence St. Joseph Hospital ("Respondent") in 2005. (T. 8-9.).

Petitioner's work duties include taking vital signs, assisting with patient bed mobility, transferring patients from the bed to a standing position, transferring patients to the commode, lifting and carrying equipment, pushing medication carts, and pushing a 50 pound "crash cart". (PX#3, FCE).

Petitioner testified she was speaking with a coworker in the medication room on November 8, 2013 when the back of her non-dominant left arm was struck by a door that was being opened by another nurse. (T. 14.) She testified she felt immediate pain from the top of her left shoulder extending down to her left elbow. (T. 15.)

Petitioner testified her left shoulder was symptomatic before the November 8, 2013 incident. (T. 38.) Petitioner started having problems with her left shoulder in July, 2012 and had been under the care of Dr. Richard Baley and the nurses at his practice since that time..(T. 32.). Petitioner participated in physical therapy two to three times per week for four to six weeks in 2012 by order of Dr. Baley and she missed a couple of months of work in 2013 due to her left shoulder condition. (T. 33, 37.) She was referred to Dr. Ankur Chhadia in 2013. (T. 36.) She testified she returned to her full duties in

July 2013, but was still having problems with her left shoulder and left arm, including pain and difficulty with movement. (T. 12, 38.)

Pre-Accident Medical Treatment

On July 20, 2012, Petitioner presented to Nurse Anne Maynard of Elgin Internal Medical Associates. She complained of left shoulder and upper arm pain lasting one week. She noted the pain was predominantly on the top of her shoulder but it radiated down to the biceps. On exam, she had full range of motion of the left shoulder and arm. She was diagnosed with left shoulder and right wrist pain. She was prescribed Diclofenac, and the nurse recommended physical therapy, no heavy lifting at work, and an MRI of the left shoulder if her symptoms persisted. (PX #4.)

On August 23, 2012, Petitioner followed up with Nurse Maynard complaining of intermittent left shoulder pain radiating to the biceps/triceps area as well as pain in her upper back, posterior neck, and right wrist. She stated her pain was worse with external and internal rotation of the shoulder.

On March 8, 2013, Petitioner presented to Dr. Baley who noted Petitioner had been diagnosed with rotator cuff syndrome. He further noted physical therapy had provided some improvement. Dr. Baley diagnosed left shoulder joint pain. Antivert was prescribed, and the doctor recommended an MRI of the left shoulder from an orthopedist. (Id.).

On April 17, 2013, Petitioner presented to Dr. Ankur Chhadia at Suburban Orthopaedics with complaints of left shoulder pain that "comes and goes". She stated her symptoms started in July 2012, and were not related to an accident or injury. Petitioner was diagnosed with left shoulder bursitis/tendonitis with a possible rotator cuff tear. Dr. Chhadia recommended an MRI of the left shoulder, over-the-counter anti-inflammatories, cryotherapy, and physical therapy. (PX #3.)

On April 18, 2013, an MRI of the left shoulder was completed at Enhanced Medical Imaging. Petitioner presented with chronic shoulder pain and assessed moderate degenerative arthritic changes in the acromioclavicular joint along with a type III acromion giving rise to moderate impingement with moderate tendinopathy involving the supraspinatus and infraspinatus tendons. The radiologist noted a partial substance tear involving the distal supraspinatus tendon, which extended to the outer surface. There were no signs of a complete full-thickness rotator cuff tear or a labral injury. (Id.)

On April 22, 2013, Petitioner returned to Dr. Chhadia who noted the MRI showed a partial-thickness rotator cuff tear. A Triamcinolone injection was administered into the the left shoulder, and Petitioner's work restrictions were changed to no lifting more than 20 pounds for two weeks. (Id.).

On May 8, 2013, Petitioner followed up with Dr. Chhadia reporting that the corticosteroid injection did not help. Petitioner denied numbness and tingling. She further reported her pain started on the lateral side of the left shoulder and went down to the left biceps. X-rays of the cervical spine revealed advanced degenerative disc disease. Petitioner was additionally diagnosed with cervical degenerative disc disease, disc bulge, and radicular pain. The doctor recommended an MRI of the cervical spine and upper extremity EMG and re-instituted Petitioner's off-work restrictions for two weeks. (Id.),

On May 15, 2013, Petitioner began physical therapy at Sherman Health. (PX #6.)

On May 30, 2013, Dr. Chhadia restricted Petitioner from working until June 18, 2013. (Id.).

On July 19, 2013, Petitioner returned to Dr. Chhadia. She stated she continued to experience left shoulder pain, but she could bare it and wanted to return to work. Petitioner reported that anti-inflammatory medication was helping with her pain. Her physical examination and diagnoses were the same as previous visits. The doctor issued a full-duty release effective July 23, 2013. (Id.).

Post-Accident Medical Treatment

On November 8, 2013, Petitioner presented to Dr. Maria Vlahos at Presence Saint Joseph Hospital Occupational Health Services complaining of left shoulder and arm pain. Petitioner reported another employee pushed open a heavy door that struck the posterolateral aspect of her left shoulder and upper arm. She had immediate pain in her shoulder radiating down into her left upper arm and elbow. She denied numbness or tingling. Her medical history included a partial rotator cuff tear in her left shoulder in April 2013, C4-6 disc compression, C3-4 disc bulge, and pinched ulnar nerves in the bilateral elbows.

On exam, complaints of tenderness to palpation over the anterior glenohumeral joint area as well as the scapular spine and over the supraspinatus muscle, were noted. There was mild swelling and slight bruising along the posterior aspect of the upper arm along the triceps. X-rays showed mild degeneration of the acromioclavicular joint, x-rays of the left humerus were normal. Petitioner was diagnosed with acute contusion to the left shoulder and left upper arm. Dr. Vlahos advised Petitioner to continue taking Voltaren for pain. She was given work restrictions of no lifting, pushing, or pulling over five pounds with her left arm and no work above shoulder level with her left arm. (PX #2).

On November 14, 2013, Petitioner returned to Dr. Vlahos. She reported difficulty abducting her arm out to shoulder level, and she was having pain across the top of the shoulder and the supraspinatus muscle. Dr. Vlahos advised Petitioner to follow up with her orthopedic surgeon and continue Voltaren. Her work restrictions were continued, and she was discharged from occupational health. (Id.).

On November 18, 2013, Petitioner returned to Dr. Chhadia who diagnosed her with a left shoulder contusion. Physical therapy and medications were prescribed, and Petitioner was placed on light-duty work restrictions. (PX #3.)

On January 27, 2014, Petitioner returned to Dr. Chhadia. She stated physical therapy was helping. Petitioner reported she has pain on the top of her left shoulder and the pain sometimes goes down the left shoulder. She reported that after physical therapy she has some tingling on the left hand. Dr. Chhadia opined there was a possibility the rotator cuff tear was worsening. An MRI was ordered, and her work restrictions were continued. (Id.)

On February 7, 2014, an MRI of the left shoulder was completed at Enhanced Medical Imaging and compared to the April 18, 2013 study. The radiologist noted "a very small insertional tear is suggested which conceivably be full-thickness but just a few mm in size." The radiologist further noted the focus of that fluid signal was not definitively identified on the previous exam. There were also findings of mild tendinosis of the supraspinatus and the musculotendinous junction. (Id.)

On February 12, 2014, Petitioner returned to Dr. Chhadia. The doctor noted the February 2014 MRI showed a very small complete tear of the supraspinatus tendon. He opined there was progression of the rotator cuff tear since the new injury at work based on Petitioner's history, exams, and MRI. Dr. Chhadia recommended left shoulder arthroscopic rotator cuff repair, subacromial decompression, and either a biceps tenotomy or tenodesis. Her work restrictions were continued. (Id.).

On March 31, 2014, Petitioner presented to Dr. Lawrence Lieber of M&M Orthopaedics for an independent medical examination ("IME"). Dr. Lieber's exam and subsequent findings are discussed below.

On April 9, 2014, Petitioner returned to Dr. Chhadia. The doctor reviewed the IME report and indicated he strongly disagreed with its findings. Dr. Chhadia opined there was worsening of the rotator cuff tear both clinically and on the MRI since the work injury. Surgery was recommended again. (PX #3.)

On June 19, 2014, Dr. Chhadia performed surgery on Petitioner consisting of left shoulder arthroscopic rotator cuff repair, subacromial decompression, and biceps tenotomy. (PX.#1 pg. 21). Dr. Chhadia took Petitioner off work after the surgery and prescribed post-surgical physical therapy to begin on June 27, 2014.

On August 20, 2014, Petitioner returned to Dr. Chhadia. She reported persistent pain throughout the anterior shoulder and deltoid with some intermittent numbness and tremors in the phalanges. Her work restrictions were continued. (Id.)

On September 2, 2014, Dr. Lieber authored an addendum to his IME report. Dr. Lieber's addendum is discussed below.

Petitioner followed-up with Dr. Chhadia on September 24, October 22 and November 19, 2014. Her off duty work restrictions were continued. (PX #3.)

On December 17, 2014, Petitioner returned to Dr. Chhadia reporting that she continues to have difficulty engaging in activities of daily life. She also reported intermittent bouts of numbness and tingling in her left upper extremity, but that these episodes are rare. The doctor modified her work restrictions consisting of no lifting with the left arm over one pound. (Id.).

On January 14, 2015, Petitioner returned to Dr. Chhadia. She stated physical therapy had given her 85-90% improvement with range of motion, but she needed to work on strengthening as she was not fully able to carry 50 pounds. The doctor ordered an MRI of the shoulder to assess residual pain and weakness, and he noted he would plan for full duty/MMI in four to eight weeks. Her light-duty work restrictions were continued. (Id.).

On January 19, 2015, an MRI of the left shoulder was completed at Enhanced Medical Imaging. The rotator cuff appeared intact with no evidence of re-tearing. (Id.).

On January 30, 2015, Petitioner followed up with Dr. Chhadia. She complained of minimal discomfort in her left shoulder. The doctor noted Petitioner's MRI showed no rotator cuff tear. Her work restrictions were continued. (Id.).

On March 3, 2015, Petitioner underwent a Functional Capacity Evaluation ("FCE") at Suburban Physical Therapy. The therapist opined Petitioner demonstrated the ability to perform within the light physical demand level and that the results of the evaluation were valid based on Petitioner's consistency of effort. (Id.).

On March 9, 2015, Petitioner followed up with Dr. Chhadia. She complained of intermittent sharp pains through the anterior left shoulder into the deltoid as well as occasional numbness through the forearm. The FCE results were discussed, and Dr. Chhadia opined permanent light-duty restrictions were appropriate. The doctor further opined Petitioner had reached MMI. (Id.).

Dr. Lieber IME

On March 31, 2014, Petitioner presented to Dr. Lawrence Lieber of M&M Orthopaedics for an independent medical examination (IME). She reported her left shoulder was struck by a door on November 8, 2013. She also stated she fell in April 2013, injured her left shoulder, and her left shoulder was still bothering her on November 8, 2013. She complained of left shoulder pain and difficulty with overhead activity as well as stiffness, weakness, and numbness in the left shoulder and arm. On exam, she had positive impingement signs. There was no swelling or popping. Dr. Lieber reviewed the actual February 2014, MRI study and noted it showed rotator cuff tendinopathy, fluid collection, acromioclavicular joint arthritis, and the absence of a frank tear. Dr. Lieber

noted there was no evidence of a significant change in pathology compared to the April 2013 MRI. The doctor assessed rotator cuff tendinitis, acromioclavicular joint arthritis, and a contusion of the left shoulder. He opined Petitioner's findings were related to pre-existing degenerative abnormalities within the left shoulder area that were present on the April 2013, MRI. He further opined there was no evidence that the November 8, 2013 event caused any abnormalities within the left shoulder rotator cuff and that she did not require surgery. Lastly, the doctor opined Petitioner had reached maximum medical improvement (MMI) and could return to full employment without restrictions. (RX #1.)

On September 2, 2014, Dr. Lieber authored an addendum to his IME report. Following a review of the left shoulder MRI studies from April 18, 2013 and February 2, 2014, the doctor opined there was no significant interval change in rotator cuff pathology or abnormalities within the shoulder. The doctor disagreed with Dr. Chhadia's opinion that the February 2014 MRI confirmed evidence of a very small complete rotator cuff tear. Dr. Lieber opined there was no definitive complete rotator cuff tear and there was no evidence of any acute abnormality within the left shoulder area that could be related to the November 2013 event. (RX #2.)

Dr. Chhadia Testimony

Dr. Chhadia testified via deposition on September 30, 2014. (PX #1.) The doctor testified Petitioner's left shoulder symptoms began as early as July 2012 and were not linked to a traumatic event. (Id. at 27.) He also testified Petitioner's left shoulder complaints were likely chronic by the time he first examined her in April 2013.(Id. at 31). The doctor confirmed Petitioner was still complaining of left shoulder pain when he released her to full-duty work on July 19, 2013. (Id. at 37-38). The doctor also testified he did not discharge Petitioner from his care on July 19, 2013, nor did he find she had reached MMI. (Id. At 39-40). According to his testimony, the February 7, 2014 MRI of Petitioner's left shoulder showed a full-thickness tear of the supraspinatus whereas the April 18, 2013 MRI of the left shoulder showed a partial-thickness tear. (Id. at 19). The doctor testified that he was able to view the tear as he performed the arthroscopic repair which he described as a tear of the supraspinatus tendon, a full thickness crescent-shaped tear with minimal retraction in the mid-section approximately 2 to 3 centimeters in width, which would be a moderate, approaching a large-sized tear (Id. At 21-22). He testified that the arthroscopic findings show the tear to be slightly larger than the second MRI findings would have suggested. (Id.).

The doctor opined the November 8, 2013 work accident contributed to and caused a full-thickness rotator cuff tear which required surgery. (Id. at 24).

Post-MMI

Though her employment was terminated in January 2015, Petitioner testified she called Respondent on March 14, 2015 after Dr. Chhadia imposed permanent restrictions to

inquire whether her restrictions could be accommodated. (T. 20-21, 44). She further testified she started speaking with vocational counselors from Unum, the administrator of Respondent's employee benefits program, about reapplying for a position with Respondent. (T. 25-27, 40). She testified she worked with Unum to update her resume and thereafter began visiting prospective employer's websites as well as indeed.com to search for employment opportunities. (T. 28-29). She testified she and the Unum representatives identified several categories of jobs for which was qualified, such as a nurse case manager, triage nurse, and case manager. (T. 41). She testified she did not begin applying for jobs until July 2015. (T. 43). She also testified she interviewed with MedCorp for a triage quality nurse position and was waiting to hear back, and she had an upcoming interview with Bickford, an assisted living memory care center in St. Charles, Illinois. (T. 29-30). She testified both jobs are within Dr. Chhadia's restrictions. (T. 30). The parties stipulated that Petitioner was paid $24,116.48 in short- and long-term disability benefits through Respondent's group plan.

CONCLUSIONS OF LAW

Casual Connection

The Arbitrator finds, after a careful review of the evidence contained in the record, that Petitioner has established that her current condition of ill-being is causally related to the November 8, 2013, work accident.

Petitioner's prior, non-work-related left shoulder condition was managed with physical therapy, pain medications, and time off from work in 2012 and 2013.

Petitioner's April 18, 2013, pre-work injury MRI showed a partial substance tear involving the distal supraspinatus tendon, which extended to the outer surface. There were no signs of a complete full-thickness rotator cuff tear or a labral injury. (PX #3).

The Arbitrator adopts the opinions of Petitioner's treating surgeon, Dr. Chhadia who testified that the November 08, 2013 work injury contributed to and caused the full thickness rotator cuff tear in Petitioner's left shoulder. (PX#1, pg. 24). The doctor explained that although Petitioner did have a prior shoulder condition, it had "fairly resolved with non-operative treatment". Petitioner had gone back to work for approximately four (4) months and was not treating with him for any persisting symptoms until she sustained the work injury. (Id. at p. 24-25). The doctor testified the post-accident MRI findings, and arthroscopic findings, showed a full thickness, crescent-shaped tear of supraspinatus tendon with minimal retraction in the mid-section approximately 2 to 3 centimeters in width, which the doctor indicated was a moderate, approaching a large-sized tear. (PX. #1,. 21-22). The doctor noted that the arthroscopic photo that he took during the surgery clearly shows a full thickness tear (Id.).

Although Dr. Chhadia had discussed rotator cuff surgery with Mr. Kopp as a "potential future option" since he first began treating her in May of 2013, he testified it was his opinion that Petitioner would not have required surgery if the November 08, 2013 injury had not occurred (PX#1, pg. 29). Regarding the biceps portion of the surgery, it was his opinion that the biceps condition was re-aggravated by the injury becoming symptomatic to the point it was reasonable to address it at the time of surgery. He clarified that he felt that she was not asymptomatic prior to the work accident but mildly symptomatic.

The Arbitrator notes the March 3, 2015, FCE, which concluded that Petitioner could perform within the light physical demand level. Dr. Chhadia released Petitioner from his care with permanent light-duty restrictions .

With respect to Dr. Lieber's IME and subsequent Addendum, the Arbitrator finds his conclusion that there is no evidence of "abnormalities" within the left shoulder rotator cuff from the work accident is contradicted by the post accident MRI, Dr. Chaddia's arthroscopic findings as well as Petitioner's course of treatment.

Based on the credible evidence contained in the record, the Arbitrator finds that Petitioner has sustained her burden of proof with respect to causal connection.

TTD

Petitioner claims entitlement to TTD benefits from June 19, 2014, the date of her surgery, through March 9, 2015, when she was released by her treating surgeon with permanent restrictions, a total of 37 5/7 weeks. The Arbitrator finds that the treating medical records reflect that she was disabled for this period of time. Accordingly, the Arbitrator awards Petitioner TTD benefits for the disputed period of time.

Maintenance

The Petitioner testified that she contacted her prior employer, Presence St. Joseph Hospital, on March 14, 2015, regarding employment within her restrictions. There was testimony as to her being referred between various departments and various persons at Presence St. Joseph Hospital (T. 21-27) and Unum Insurance Company provided a vocational counselor to aid her in seeking employment within her restrictions (T 26). Unum is the insurance carrier providing short term and long term disability benefits and is paid for through Presence St. Joseph Hospital.(T 40, T 44) The Petitioner testified that after she determined that Presence St. Joseph Hospital would not hire her, she was instructed by her vocational counselor, Rebecca Towne, not to submit an application through the web sites that she had located but to send a resume which the vocational counselor reviewed and subsequently advised Petitioner that the document needed to be brought up to date (T 28-29).

Petitioner's Exhibit #7 contains communications between the Petitioner and the vocational counselor and supports the Petitioner's testimony.

16IWCC0785

The Arbitrator finds that Petitioner made reasonable efforts and followed the vocational plan. (PX. #7). By following the vocational plan, and the counselor's advice regarding her resume, at the time of hearing, Petitioner had two (2) interviews scheduled . (T 29-30).

The Arbitrator finds that Petitioner has sustained her burden with respect to her entitlement to maintenance benefits. Accordingly, Petitioner is awarded those benefits from March 10, 2015, though July 14, 2015.

Medical

The Petitioner's condition has been found to be causally related to her injury of November 8, 2013. Based on the credible evidence contained in the record, the Arbitrator finds the treatment of Petitioner's work related injury was reasonable and necessary and the Respondent is found liable for payment, pursuant to the fee schedule of the billing listed in Petitioner's Exhibit #8.

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

YOLANDA AREVALO,

Petitioner,

16IWCC0775

vs.

NO: 14 WC 17239

ADDUS HEALTH CARE, INC.,

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 notice, temporary total disability, penalties and fees, and medical expenses both current and prospective 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).

Findings of Fact and Conclusions of Law

1. Petitioner testified, through an interpreter, that in 2014 she was employed by Respondent as a "homemaker." She took care of a quadriplegic and worked six hours a day for three days a week. He was 5'2" and she thought he weighed about 170 lbs. She had to give him a sponge bath, change his clothing, and move him from the bed using sheets. His sister would assist Petitioner in putting "like a rubber under him, and there's a devise, and you hook it up to that, and his sister would help" her put him in an electric wheelchair.

2. On May 12, 2014, "he was like moved from the bed, way below the bed." He asked if she "could walk to the area where his head [was] resting." She grabbed the sheet and pulled. She felt something happen on the right side of the spine. She yelled and the patient's sister asked what was wrong. Petitioner sat down for a while but the pain remained. The patient's sister gave her two Tylenol. Petitioner was still in pain but accompanied the patient when he was picked up for a doctor appointment.

3. After they returned, she "couldn't take it anymore." She called 911 and told them she had a lot of pain in her right shoulder and back. They brought her out from the car and took her to hospital by ambulance. The day after the accident she and the patient's sister called her supervisor, Vanesa.

4. Petitioner also testified she did not have any pain in her bladder or kidneys at the time, she did not indicate that she had such pain at the emergency department, and they did not examine her bladder of kidneys. Petitioner followed up at Erie Family, where her principle care physician practices. When asked whether the doctor determined "there was no problems with kidney stones," Petitioner answered "no, no;" she did "not at that moment" go "elsewhere for her bladder or kidney stones" and she was sent for therapy.

5. Petitioner had an MRI which she testified showed a 2-3 mm disc bulge at L5-S1 indenting the thecal sac. She was also seen by Dr. Silver who diagnosed impingement in her right shoulder. He administered an injection and prescribed physical therapy, which she had for about eight months. Dr. Silver has recommended arthroscopic shoulder surgery. She also went to Dr. Sharma, who administered three injections. The third injection was in February of 2015, which provided relief until about a month ago. The pain returned but "it's not an intense pain." Dr. Sharma recommended she see a specialist for her lumbar spine. Respondent has not authorized such an appointment.

6. Petitioner also testified she had a previous injury to her low back in April of 2010. For that injury she had physical therapy and injections. She reinjured her low back in a motor vehicle accident in December of 2011. She had physical therapy for that injury, but she did not remember whether she had any injections at that time. After she completed treating for the 2011 reinjury, she was released to full duty with no restrictions. She had no treatment for her back from the time she was released from treatment from the 2011 injury to the time of the instant injury in May 2014.

7. In March or 2015, Respondent directed her to a Section 12 examination for her shoulder with Dr. Verma. She has not seen a copy of Dr. Verma's report. Petitioner also sent for a Section 12 examination for her lumbar spine with Dr. Goldberg. She has not received his report either.

8. Petitioner also testified that currently she has problems with all household chores. If she is standing she wants to sit; when she is sitting she wants to stand. She's "sleeping already" at 6:00 p.m. She has difficulty grooming and dressing herself because of her shoulder. For her pain she has a cream she rubs on. She also takes over-the-counter medication. "Of course" she wants additional treatment for both her back and shoulder.

9. Esperanza Vega was called by Petitioner and testified through an interpreter that she knew Petitioner from when she began taking care of her brother. Petitioner worked around six hours a day three days a week. Petitioner could bathe him, and they both "would change him." They "would lift him from the bed and move him into his chair." The witness would feed her brother while Petitioner cleaned his room. When asked whether she ever complained about pain in her back or shoulder, Ms. Vega answered "no, she never complained."

10. On May 12, 2014, she was in the kitchen and Petitioner was changing her brother's position. His position had to be changed every half hour to hour. She heard that Petitioner "was complaining." Petitioner stated she pulled him the wrong way and had a lot of pain in her shoulder and back. Petitioner never returned to work for her brother after that date.

11. The matter was continued to a later date. On reconvening, Respondent waived cross examination of Ms. Vega. Petitioner was then recalled for cross examination. She agreed that she did not immediately seek medical treatment after the accident. She continued her work by accompanying the patient to his doctor appointment. She agreed that at least a couple of hours passed between the time of the accident and the time she sought medical treatment. She agreed that she had prior treatment for her back and had an MRI. She went to an emergency department prior to her instant accident. Petitioner denied she had a bladder infection or kidney issues for which she sought treatment, except when she "was young."

12. On redirect examination, Petitioner testified she did not immediately seek medical attention because she had nobody who could accompany the patient to his appointment.

13. The voluminous medical record appears incomplete and is in disarray. However, it shows that Petitioner treated extensively for her lower back prior to the instant accident. She reported a work accident on April 19, 2010 after lifting a heavy patient. She went to an emergency department after that accident.

14. On April 26, 2010, Petitioner presented to her principle care physician for follow up after an emergency department visit for abdominal pain and low back pain which developed a few hours after she caught a patient from falling; "it was not a case of diverticulitis." Her low back pain had not subsided and she had leg numbness.

15. On May 6, 2010, Petitioner returned for low back pain and left-leg radiculopathy. An MRI taken May 4th showed a synovial cyst at L5-S1 causing compression of the right S1 nerve root. Dr. Castillo ordered a test for "nerve-root compression from the traumatically-induced synovial cyst."

16. Petitioner continued to treat with physical therapy for her low back pain. On June 21, 2010, she reported to her principle care physician that her low back pain increased with physical therapy. A repeat MRI showed an annular tear and "mildly sized" disc bulge and height loss at L5-S1.

17. On June 28, 2010, Petitioner presented to Dr. Bermudez, D.C. for low back pain. Petitioner reported the accident on April 19, 2010, when she tried to keep a patient from falling and developed low back pain. The pain was currently 9/10 and radiated into the right leg; the radiating pain was 8/10. Dr. Bermudez took Petitioner off work, provided a lumbosacral support, and noted she would return after an EMG.

18. On September 9, 2010, Petitioner presented to Dr. Harsoor on referral from Dr. Bermudez for evaluation of management of low back pain. She reported that on April 19, 2010 she was taking a "heavy-old patient" to an appointment and Petitioner grabbed her as she was slipping getting out of a car. She had an immediate onset of low back pain and had been symptomatic for four months, but had moderate relief from an ESI. Dr. Harsoor diagnosed right lumbar radiculopathy and prescribed physical therapy and Vicodin.

19. Petitioner continued to treat with Dr. Bermudez and Dr. Harsoor. On November 12, 2010, a lumbar MRI taken for back pain showed mild degenerative disc disease L3-S1, most prominently at L5-S1 with a central disc bulge and mild lateral stenosis at that level. At two more visits in 2010, Dr. Harsoor noted no change in symptoms.

20. On January 18, 2011, Petitioner presented to Dr. Salehi with a chief complaint of low back pain with right leg numbness. She complained of constant 8/10 pain and failed physical therapy and ESIs. She stated that "the pain is so bad some times she 'does not want to live' and" tried to "overdose on the pain medication twice but called her PCP when she felt this way." She was supposed to take anti-depressant medications but denied taking them. Dr. Salehi did "not appreciate the previously noted tarlov cyst." He also noted that the pathology on the MRI was mild and did not warrant surgery.

21. On May 17, 2011, Petitioner returned to Dr. Harsoor reporting that on February 22nd she was pushed into a wall by a supervisor injuring her left arm and worsening her low back pain. She had injections, medications, physical therapy, and chiropractic treatment. An MRI showed degenerative disc disease, facet arthritis, and disc protrusion at L5-S1. Dr. Harsoor kept Petitioner on light duty and encouraged her to continue physical therapy.

22. On July, 12, 2011, Petitioner reported 6/10 pain. Dr. Harsoor reiterated the cause of Petitioner's condition was her work accident on April 19, 2010. She provided a back brace and encouraged Petitioner to continue her medication as needed to alleviate pain.

23. On November 8, 2011, Petitioner had a functional capacity evaluation which was considered valid. She demonstrated the ability to work at a sedentary physical demand level. Her job title of homemaker was classified as a light physical demand level. However, Petitioner indicated she had to assist with supporting elderly patients which would place the job more at the medium to heavy physical demand level. Petitioner had had about a year of physical therapy and the therapist recommended consultation with her doctor to assess all options.

24. A lumbar MRI taken on January 17, 2012, showed mild disc desiccation and mild facet arthritis, particularly at L5-S1 where there was also a small annular fissure formation and mild disc protrusion. There was no significant spinal or foraminal stenosis.

25. Petitioner apparently had four lumbar injection through April 23, 2012. She also treated with Dr. Bermudez on seven separate occasions between April 3, 2012 and May 29, 2012. At each of those visits she exhibited full range-of-motion but complained of pain at the end of flexion/extension. Dr. Bermudez continued to provide therapy.

26. On July 5, 2012, Petitioner presented to Dr. Barnabas for physical therapy for diagnosed lumbar sprain, neuritis/radiculitis, lumbago, and muscle spasm. She already had multiple lumbar injections and was in physical therapy. She still had 6/10 pain and had exhausted conservative treatment. The next step was probable referral to a neurosurgeon.

27. Petitioner continued to treat with Dr. Barnabas, Dr. Bermudez, and Dr. Salehi for low back pain throughout 2012. On November 18, 2012, Petitioner returned to Dr. Salehi reporting that since her last visit she had an motor vehicle accident which increased her low back pain significantly; it was now at 7/10. She denied pain down the legs but felt the right leg might give out. He again noted that the findings on the MRI were not significant and she was not a surgical candidate.

28. On November 14, 2012, Petitioner presented to Dr. Mercurio on referral by Dr. Salehi for non-surgical management of her back pain. Dr. Mercurio diagnosed groin pain, for which she recommended continued daily swimming, back pain with radiculopathy, for which Dr. Mercurio would obtain EMG results, essentially benign hypertension, for which she prescribed Losartan Potassium Tabs, and greater trochanteric bursitis, which, if persistent, might be treated with an injection.

29. On January 16, 2013, Dr. Barnabas indicated Petitioner was still in pain because of the motor vehicle accident. He noted she was sent to a psychiatrist in the neurosurgeon's

office and that she saw Dr. Giannoulias who wanted her see another spine surgeon for a second opinion for radicular pain and disc bulge. We don't have records of such visits.

30. An MRI report dated January 17, 2013 was compared to an MRI apparently taken one year earlier. Dr. Kuritza noted that "compared to the previous study, there is again at the L5-S1 level, a 3-4 mm subligamentous posterior disc herniation indenting the thecal sac without significant spinal stenosis, nor significant neuroforaminal narrowing."

31. On January 18, 2013, Petitioner presented to Dr. Malek on referral from Dr. Barnabas. Petitioner reported an injury from an motor vehicle on accident on December 9, 2011 and a history of a work-related injury on April 19, 2010. Dr. Malek recommended various injections, medications, and took Petitioner off work. Dr. Malek indicated that if that treatment did not resolve the condition he would consider a discography to determine if the annular tear at L5-S1 was symptomatic.

32. On May 12, 2014, Petitioner presented to an emergency department after developing lower back pain after trying to lift a paraplegic patient. She also complained of abdominal pain for a day that radiated "from the right flank down to the PLQ." The pain started "a day after she was helping to carry and move people at work." She denied any known injury. She had nausea but no vomiting and had no history of kidney stones. "She was diagnosed with a UTI by her doctor a couple of days ago." History was limited due to a language barrier. An abdominal CT was taken for pain and suspected renal stone and showed diverticulosis of the sigmoid colon and a three mm calcification in the bladder, but no renal stones. X-rays for chest pain showed no active disease but mild degenerative changes in the dorsal spine. She was taken off work for three days and was to follow up with her principle care physician in two days for reevaluation.

33. On May 16, 2014, Petitioner presented to Dr. Barnabas for initial physical therapy evaluation after she experienced sharp back and shoulder pain after pulling a sheet trying to adjust a quadriplegic patient on May 12th. As noted, Petitioner had treated with him extensively in 2012 and 2013 for lower back pain. He indicated her pain has worsened since the accident. The diagnoses were no full-thickness rotator cuff tear, inflammation of rotator cuff tendon and impingement, lumbago, lumbar sprain/disc displacement without myelopathy, and neuritis/radiculitis. Dr. Barnabas ordered MRIs, prescribed medications, and provided a back brace.

34. MRIs were taken on May 18, 2014. The lumbar MRI showed a 2-3 mm posterior disc bulge/protrusion indenting the thecal sac without significant spinal stenosis and mild bilateral neuroforaminal narrowing. The shoulder MRI showed rotator cuff tendonitis/bursitis with an intact rotator cuff, and AC inferior hypertrophic 3-4 mm spurring indenting the supraspinatus tendon and narrowing the subacromial space and probable impingement.

35. On May 23, 2014, Petitioner presented to Dr. Silver for evaluation of her right shoulder. She reported her accident on May 12th in which she was trying to lift a quadriplegic patient and felt a tearing pain in her right shoulder. She had persistent pain and limited range-of-motion since. The MRI showed signs of impingement and rotator cuff inflammation. Dr. Silver attributed Petitioner's impingement to her work accident. He administered an injection, recommended physical therapy and antiinflammatories, and took off work until reevaluation in five weeks. By August 1, 2014, Dr. Silver recommended arthroscopic surgery for Petitioner's shoulder.

36. Petitioner continued to treat with Dr. Barnabas from May 20, 2014 through August 19, 2014. There were eight separate treatment notes.

37. On June 17, 2014, Petitioner presented to Dr. Sharma on referral from Dr. Barnabas for 8/10 low back pain with lumbar radiculopathy. She reported the "current episode of pain" began on May 12, 2014 when she was trying to move a paralyzed patient at work and felt a sharp pain in her back. She had two weeks of physical therapy and her symptoms progressively worsened. A little more than a month later, Dr. Sharma administered a right L5-S1 transforaminal epidural steroid injection.

38. Petitioner continued to treat with Dr. Sharma. He continued to refer her for physical therapy. He also ordered an MRI which he noted on February 6, 2015 showed "AC joint hypertrophy with SS fraying; no labral tear." Dr. Sharma administered an injection in the shoulder.

39. Petitioner apparently treated at New Life Medical with physical therapy/chiropractic treatment from May 29, 2014 through April 30, 2015. The records are extremely unclear, but it appears that she had about 88 separate visits in that period. The prognosis remained "guarded" and on the last recorded visit, Petitioner reported no appreciable change in her shoulder or back conditions.

40. Petitioner continued to treat with Dr. Sharma on several occasions. On May 1, 2015, Petitioner reported her back was worse since her last visit and was now 6/10. Her shoulder pain was 1/10. Dr. Sharma noted that Petitioner did not want to entertain possible back surgery so she was at maximum medical improvement for her back. However, she returned on June 19, 2015 with 6/10 low back pain. Dr. Sharma indicated he would refer Petitioner for a neurosurgical evaluation.

41. On March 2, 2015, Petitioner presented to Dr. Goldberg for a Section 12 examination of her lumbar spine at the request of Respondent. Dr. Goldberg noted he previously saw her in April of 2010, at which time he thought she had a synovial cyst at L5-S1 which was subsequently "resorbed." Dr. Goldberg also noted she had an motor vehicle accident on December 8, 2011 and a flare up of low back pain. She had ESIs, medial branch blocks, and "radiofrequencies" on four occasions in 2012.

42. Dr. Goldberg also noted that Petitioner was evaluated by Dr. Salehi on November 8, 2012 and by Dr. Malek on January 25, 2013. Both doctors opined that she was not a surgical candidate. She returned to work full duty in September of 2013.

43. Petitioner related to Dr. Goldberg the May 12, 2014 accident, in which she tried to move a paralyzed patient with a sheet. Thereafter, she developed right-sided low back pain. Petitioner also injured her right shoulder in that accident, but Dr. Goldberg was not going to address the shoulder condition.

44. Petitioner had good improvement after an ESI from Dr. Sharma. She also had some physical therapy. Nevertheless, she still had low back pain aggravated by bending, twisting, and lifting. Dr. Goldberg then summarized her back treatment to date.

45. On examination, Petitioner's chief complaint was her shoulder. Straight leg raises were negative and sensation was intact L3-S1. Dr. Goldberg noted that the lumbar MRI showed "nothing degenerative." There was a minimal bulge, but he believed that was normal for a 72 year old woman. He diagnosed lumbar strain with some radiculitis, which he attributed to her work accident. He recommended formal physical therapy for two weeks after which he anticipated maximum medical improvement. She could return to work with a 30-lb limit.

46. On March 23, 2015, Petitioner presented to Dr. Verma for a Section 12 examination of her right shoulder at the request of Respondent. "A qualified Spanish-English medical interpreter" was present throughout. She reported feeling acute pain when trying to move a patient with a draw sheet. The pain was in the peri-axial neck region extending into the shoulder and down to her hand. Physical therapy has been recommended for the neck and surgery has been recommended for the shoulder.

47. Dr. Verma then summarized Petitioner's treatment to date, including treatment for her back. He noted Petitioner had diffuse pain with palpitation over the peritrapezial muscles, peri-axial neck muscles, and the shoulder "without anatomic localization." Strength was difficult to evaluate because of pain complaints, but was graded at 4-/5. Petitioner reported some sensory numbness particularly in certain fingers. A 2014 MRI showed trace fluids in the subacromial space, but everything else appeared normal, while 2015 MRI was normal with no fluid identified. A cervical MRI showed multilevel cervical spondylosis with posterior disc bulging.

48. Dr. Verma diagnosed neck, shoulder, and arm pain with arm numbness. He opined that her condition was related to her accident because the mechanism of injury was consistent with the subsequent onset of symptoms. The most recent MRI was normal except for age-related degeneration.

49. Dr. Verma believed the treatment Petitioner received to date for her shoulder had been reasonable. However, he also recommended further evaluation of Petitioner's cervical condition before any further treatment of her shoulder, because he did not believe her current problems emanated from the shoulder. Therefore, Petitioner was not at maximum medical improvement, pending further cervical evaluation. She could work light duty with minimum lifting.

50. The record also includes some correspondences between the lawyers for the parties. On July 29, 2014, Respondent's lawyer informed Petitioner's lawyer that they had not received medical records verifying the claim and compensability was under investigation. On August 12, 2014, Respondent's lawyer informed Petitioner's lawyer that no benefits had been authorized and they had not received any documentation or medical records verifying the claim. Respondent's lawyer noted that the emergency department records indicated she was suffering from kidney stones and the bills were submitted to Medicare. On September 9, 2014, Respondent's lawyer informed Petitioner's lawyer that she received off-work notes but no records supporting her claim and that Respondent continued to dispute liability.

In finding Petitioner proved proper notice, the Arbitrator noted that her testimony about informing her supervisor was corroborated by the emergency department records, Respondent must have known about the accident because Petitioner never returned to her assigned work, and that Petitioner filed her Application for Adjustment of Claim only about a week after the accident. In addition, he noted that Respondent acknowledged it knew of the accident some time before July 29, 2014, when its lawyer informed Petitioner's lawyer that it received no corroborating documentation and was investigating the claim. Respondent argues that Petitioner did not prove notice because she did not present any documentary evidence that notice was provided and that even though the Application for Adjustment of Claim was admitted into evidence there was no Proof of Service included. In addition, it notes that initially medical bills were not submitted to Respondent's Workers' Compensation carrier.

The Commission affirms the Decision of the Arbitrator finding that Petitioner provided proper notice. The Arbitrator's reasoning is persuasive and Respondent's argument is not. It is noteworthy that Respondent argues that Petitioner did not provide evidence of Proof of Service, but it does not assert that it did not actually receive service. In addition, the Arbitrator is clearly correct that Respondent had knowledge of the accident prior to July 29, 2014, because of the letter it sent to Petitioner's lawyer on that date acknowledging the alleged accident and its investigation thereof. In addition, Respondent did not present any evidence rebutting Petitioner's testimony that she informed her supervisor, Vanesa, the next day. Presumably, Respondent had access to Vanesa. Therefore, it could have called her to testify if it wanted to try to rebut Petitioner's testimony. It did not.

The Arbitrator found that Petitioner proved causation of both her lumbar condition and shoulder conditions. In so finding, the Arbitrator noted that there is no indication that Petitioner had any previous treatment of her right shoulder, the emergency department records support the shoulder/low back complaints were contemporaneous with the alleged accident, and the Respondent's Section 12 medical examiners, Dr. Goldberg and Dr. Verma, opined that the accident caused the conditions of ill-being of both her lumbar spine and her shoulder and or cervical spine, respectively. After finding causation, the Arbitrator awarded all medical expenses incurred to date as well as prospective treatment recommended by Dr. Neckrysh (presumably for the back) and Dr. Silver (for the shoulder). Initially, the Commission notes that it did not notice any records from Dr. Neckrysh in the file before us. However, there was an indication in his last treatment note that Dr. Sharma intended to refer Petitioner to a neurosurgeon for evaluation.

Respondent argues the Arbitrator erred in finding Petitioner proved causation. It stresses the history of Petitioner's extensive lumbar complaints, for which she initially sought treatment several years prior to the instant accident as well as extensive lumbar treatment throughout the period prior to the instant accident. In addition, Respondent notes that she did not "immediately" seek treatment after the accident and Petitioner first complained about her shoulder "almost a week after the accident."

Regarding the shoulder condition, the Arbitrator is correct that there is no indication in the record that she had any previous problems with, or treatment for, her shoulder prior to the accident. In addition, as noted by the Arbitrator, Respondent's Section 12 medical examiner for the shoulder, Dr. Verma, opined that her condition of ill-being of her shoulder and/or her cervical spine was causally related to her accident. Therefore, the Commission affirms the Decision of the Arbitrator that Petitioner's ongoing shoulder/cervical condition was caused by the May 12, 2014 accident.

On the other hand, it is clear that Petitioner had a serious and long-standing lumbar condition for which she received extensive treatment prior to the instant accident. Nevertheless, the Arbitrator is correct that Respondent's Section 12 medical examiner for the lumbar spine, Dr. Goldberg, accepted that the accident caused the diagnosed "lumbar strain with some radiculitis." The Commission notes that Dr. Goldberg specifically was aware of her previous lumbar treatment and he opined that her condition was caused by the accident notwithstanding the previous condition and treatment.

Regarding medical expenses, Dr. Verma was skeptical that Petitioner's current symptoms in her upper extremity were emanating from her shoulder. However, he also opined that Petitioner was not at maximum medical improvement from her work accident. He recommended additional cervical evaluation prior to the continuation of any additional treatment of her shoulder. The Commission is persuaded by Dr. Verma's opinion. Therefore, the Commission orders Respondent to authorize cervical evaluation recommended by Dr. Verma, after which the treatment plan for her shoulder/cervical spine will be reassessed.

Regarding medical expenses relating to Petitioner's lumbar condition, even though the Commission finds that Petitioner's accident caused an exacerbation of her lumbar condition and aggravation of her symptoms, that conclusion does not necessarily mean that the Commission finds that the totality of Petitioner's entire ongoing lumbar condition is now caused by the instant accident and that her subsequent treatment is related entirely to that accident. Initially, the Commission notes that the MRI results of Petitioner's lumbar spine after the accident showed no appreciable difference in pathology from MRIs taken prior to the accident. In addition, the Commission finds persuasive the opinion of Dr. Goldberg regarding the extent of the aggravation of Petitioner's lumbar condition. He opined that the accident had exacerbated her condition with lumbar strain with radiculitis which required treatment. However, he also opined that after an additional two weeks of physical therapy, she would be at maximum medical improvement from her work-related injury and she would return to her pre-accident condition thereafter.

Therefore, the Commission finds that Respondent is not liable for any treatment rendered to Petitioner for her lumbar condition incurred after March 16, 2015, two weeks after Dr. Goldberg's Section 12 medical report. Respondent is also not liable for any prospective treatment incurred for treatment of Petitioner's lumbar spine. Regarding prospective treatment, the Commission notes that no surgeon has ever recommended surgery for Petitioner's lumbar condition and her extensive conservative treatment appears to have been of limited value at best.

The Arbitrator awarded temporary total disability benefits from the date of accident to the date of arbitration. As noted above the Commission concludes that Petitioner was at maximum medical improvement for her lumbar condition as of March 16, 2015, two weeks after Dr. Goldberg's Section 12 medical report. Therefore, Petitioner was not entitled to temporary total disability benefits after that date based on the condition of her lumbar spine condition. However, the Commission also found that Petitioner has an ongoing shoulder/cervical condition causally related to her work accident. Dr. Verma opined that Petitioner was not at maximum medical improvement from her shoulder/cervical condition. Therefore, the Commission concludes that Petitioner is entitled to temporary total disability benefits from the date of the accident to the date of arbitration because of that ongoing condition. Accordingly, the Commission affirms the Arbitrator's award of temporary total disability benefits.

The Arbitrator awarded penalties and fees because he concluded Respondent did not present a good-faith defense to liability. He considered its repeated requests for records was basically a sham because it had the emergency department records and clearly it had all the records by January 15, 2015, when it contracted with Dr. Goldberg for the Section 12 medical examination. Most noteworthy to the Arbitrator was Respondent's failure to provide Petitioner with Dr. Goldberg's and Dr. Verma's reports, in which they both accepted causal connection to conditions of ill-being. He considered that failure to be willfully hiding information from Petitioner.

The Commission agrees with the Arbitrator that Respondent's overall defense is lacking. Its argument about notice seems a bit disingenuous and its complete refusal of any liability despite the opinions of its Section 12 medical examiners as well as its withholding of their reports is unfortunate and disconcerting.

However, the Commission finds a distinction between the imposition of penalties for unpaid medical expenses and the imposition of penalties for unpaid temporary total disability benefits. The Commission finds that because of the opinion of Dr. Goldberg about the extent of Petitioner's lumbar condition and the need for ongoing treatment, as well as Dr. Verma's disagreement with the treating physician regarding the source of Petitioner's shoulder/neck complaints, there was a legitimate dispute about medical expenses. However, at the same time, Dr. Verma opined that Petitioner was not at maximum medical improvement from her shoulder/cervical condition and there was no evidence that Petitioner was able to return to her job as a caregiver of disabled patients. Therefore, the Commission finds that Respondent's denial of temporary total disability benefits was unreasonable.

The Arbitrator awarded Petitioner pursuant to "Section 19(l) for late payments on medical benefits and TTD which have gone unpaid for 69 weeks 3 days, or a total of 486 days, at the maximum of $10,000.00." As noted above, the Commission deems penalties for delay in payment of medical expenses inappropriate because there existed a legitimate dispute about Petitioner's medical condition and appropriate treatment. However, Respondent's unreasonable refusal to pay temporary total disability benefits for 486 days makes the imposition of the maximum fine of $10,000.00 appropriate. Therefore, the Commission affirms that award.

Based on the reasons stated above, the Commission vacates the award of penalties in the amount of 50% of medical expenses imposed by the Arbitrator pursuant to Section 19(k), affirms the award for penalties in the amount of $8,782.71 imposed by the Arbitrator for the denial of temporary total disability benefits pursuant to Section 19(k), affirms the award of penalties in the amount of $10,000.00 imposed by the Arbitrator for the denial of temporary total disability benefits pursuant to Section 19(l), and modifies the award of attorney fees imposed by the Arbitrator pursuant to Section 16, to comport with the Commission's findings regarding penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $253.00 per week for a period of 69&3/7 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 for all medical expenses incurred to date for the treatment for the condition of ill-being of Petitioner's right shoulder under §8(a) of the Act, subject to the applicable medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for all medical incurred through March 16, 2015 for the treatment of the condition of ill-being of Petitioner's lumbar spine under §8(a) of the Act, subject to the applicable medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for further evaluation of Petitioner's cervical spine, as recommended by Dr. Verma.

IT IS FURTHER ORDERED BY THE COMMISSION that the imposition penalties of 50% of the unpaid medical expenses imposed pursuant to Section 19(k) of the Act, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay penalties in the amount of $8,782.71 for the refusal to pay temporary total disability benefits pursuant to Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay penalties of $10,000.00 for failure to pay temporary total disability benefits pursuant to Section 19(l) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay attorney fees in the amount of $1,756.54 pursuant to Section 16 of the Act, representing 20% of the penalties imposed pursuant to Section 19(k) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay attorney fees in the amount of 20% of medical expenses allowable pursuant to the applicable medical fee schedule pursuant to Section 16 of the Act.

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: DEC 2 - 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-10/26/16
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0775

AREVALO, YOLANDA
Employee/Petitioner

Case# **14WC017239**

ADDUS HEALTH CARE
Employer/Respondent

On 12/16/2015, 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 0.58% 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:

2221 VRDOLYAK LAW GROUP LLC
MEGAN A WAGNER
741 N DEARBORN ST 3RD FL
CHICAGO, IL 60610

0766 HENNESSY & ROACH PC
ERICA LEVIN
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

16IWCC0775

16IWCC0775

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

Yolanda Arevalo
Employee/Petitioner

v.

Addus Health Care
Employer/Respondent

Case # 14 WC 17239

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, IL**, on **July 14, 2015 and September 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. ☒ 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 **prospective medical care**

FINDINGS

On **5/12/2014**, 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 **$7,389.33 for 29 weeks of work**; the average weekly wage was **$284.21**.

On the date of accident, Petitioner was **71** years of age, ***married*** with **0** dependent children.

Petitioner ***has not*** 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 Petitioner temporary total disability benefits of $253.00/week for 69 and 3/7th weeks, commencing 5/12/2014 through 9/10/2015 as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $63,567.61 to Petitioner for unpaid medical bills as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize treatment and payment for such treatment as recommended by Dr. Neckrysh and Dr. Silver until such time as Petitioner's condition of ill being is rendered at maximum medical improvement.

Respondent shall pay to Petitioner penalties of $3,513.08 for attorney fees, as provided in Section 16 of the Act; $8,782.71 as a 50% penalty on unapaid temporary total disability, as provided in Section 19(k) of the Act; and $10,000.00, as provided in Section 19(l) of the Act.

Respondent shall also pay attorney fees of 20% of the allowable payments under the fee schedule for medical services rendered.

Respondent shall pay Section 19(k) penalties of 50% on the amount of medical services rendered, after accounting for fee schedule reductions.

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
KURT CARLSON

12-16-15
Date

DEC 16 2015

16IWCC0775

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Yolanda Arevalo,

vs.

14 WC 17239

Addus Health Care,

ARBITRATOR'S DECISION

STATEMENT OF FACTS

Background Testimony:

Ms. Yolanda Arevalo ("Petitioner") testified via translator from Spanish to English that she was employed by Addus Health on May 12, 2014, as a "homemaker." T. 8. Petitioner testified she took care of a patient who couldn't move from the neck down. She testified that she would arrive in the morning and give him medication, heat water and wash his body, and change his clothing. She testified she had to move him from the bed about every half an hour. T. 8. She testified the patient was about 5'2" tall and 170 lbs. T. 8-9. She worked with him six hours per day and three days per week. T. 9. Petitioner testified she would move the patient's sheet so he could turn around and his sister, Mrs. Esperanza, would help [her] put him into an electric wheel chair and bring him into the kitchen. T. 9.

Petitioner Testimony on Accident:

Petitioner testified that on May 12, 2014 she attempted to move the patient and she "grabbed the sheet" and "bent over [to] pull him" and she yelled "oh, my God, and [she] felt that something happened to the right side of [her] spine." T. 10. She testified the patient's sister was in the kitchen and she came over and asked her what happened and [she] told her, "I don't know, something happened to me" and the patient's sister told her to sit down and she was still in pain so the patient's sister gave her two Tylenols. T. 10. Petitioner testified she took them and the pain did not go away but the [patient] had an appointment at Northwestern and the car arrived and they took him out and [she] rode along with him and on [her] way there her pain was so intense. T. 10-11. She testified that after she returned from the doctor and when she "couldn't take it anymore" and they were arriving to the house she called 911. T. 11.

Petitioner testified that when she called 911 she told them she had a lot of pain in her shoulder and the lower middle area of her back. T. 11. She testified that she remained in the car and the ambulance workers brought her out of the car and into the ambulance and gave her a ride to the hospital. T. 11. Petitioner testified that during this encounter she was not feeling pain in her bladder or kidneys. T. 11.

Ambulance Record:

The City of Chicago Fire Department record dated 5/12/2014 indicates that they responded to a call from Yolanda Arevalo a 71-yr-old Hispanic female weighing 140 lbs. Incident type indicates "back pain." PX 10 at2. Pelvis exam was noted to show "coccyx: pain" and the impression was "back pain." *Id.* at 3. The record further states: "Pt. c/o back pain. Pain started when she lifted a pt from a wheel chair. Pt unable to give further description." *Id.* at 4. Notes further state Petitioner was found sitting in back seat of "medicar" c/o lower back pain after lifting the disabled child out of his wheel chair. "Pt statcd her pain progressively got worse this afternoon. She felt something 'crack' earlier when lifting. Notes further state "rt sided back pain with radiation into rt groin; pt slight numbness to rt leg. pt. w/ pain w/ any movement." *Id.* at 3.

The City of Chicago Fire Department record makes no mention of any bladder or kidney problems occurring or pain in such areas on 5/12/2014.

Medical Records and Petitioner's Medical Treatment Testimony:

Petitioner testified when she arrived to the hospital, Our Lady of Resurrection, and told the hospital workers she had pain in her back and right shoulder. T. 12. She testified that the person she spoke to did not speak Spanish. T. 12. She testified that she told them she was trying to lift a heavy patient and it caused pain in her low back, right arm, and right leg. T. 13. She testified she never complained of pain in her bladder or kidney. She could not recall if her bladder or kidneys were examined but she remembered that the hospital "took X-rays of [her] back." T. 13.

Our Lady of Resurrection medical records dated 5-12-2014 state: "pt ambulatory from express care, developed lower back pain after trying to lift a patient who is paraplegic. Pt works as his homemaker. No numbness of lower extremities but pain is 8/10 ++ nausea without vomiting." PX1 at 20. Respondent's records indicate a subpoena for Our Lady of Resurrection medical records was mailed out January 12, 2015 and the custodian of records documents that all records were sent on February 5, 2015, with the exception of the 4/22/2011 inpatient chart. RX1 at 3. The front of the subpoena indicates that the records sent to Respondent included dates of 5-12-14 ER, 12-9-13 OV, 8-25-14 ER, 12-9-14 IPD, with a seemingly later addition of 4-22-11 IPD. RX1.

Records additionally state: "patient presents with: back pain: low back pain and right arm and leg numbness after 'lifting a heavy patient.' No relief with Tylenol," and "Abdominal Pain." The note states, "HPI comments: 71 yo F with h/o DM presenting c/o right sided flank and abdominal pain x 1 day. She describes a sharp pain that radiates from her right flank down to her RLQ. The pain is constant and not made better or worse by movement. She has not tried taking anything for the pain at home. She endorses nasua no vomiting. No fever. She denies any known injury though. No prior episodes. She denies

numbness or tingling or weakenss of her LE and is able to ambulate without assistance. No h/o kidney stones. She was diagnosed with a UTI by her PCP a couple of days ago and started on bactrim. The history is provided by the patient. The history is limited by a language barrier. A language interpreter was used." PX 1 at 24. Past medical history of hyperlipidemia, hypertension, diabetes mellitus, and diverticulis were noted, with past surgical history of partial bowel resection. *Id.*

Physical examination noted positive for nausea and abdominal pain with tenderness in the suprapubic area, negative for vomiting and diarrhea." PX 1 at 25. No examination of the low back or shoulder are noted. Urine labs were taken found to be abnormal and a CT of the abdomen and pelvis were taken. Impression was diverticulosis of the sigmoid colon, no renal stones or tumors, 3mm calcification in posterior wall of bladder. PX1 at 26.

Diagnoses or management options state: "71 yo F with back and abdominal pain she relates to heavy lifting at work. Patient with some tenderness to lower back but suprapubic pain as well. Describes sharp pain radiating from right flank to right suprapubic bone region more c/w kidney stone vs pyelonephritis. CT scan with 3 mm stone in bladder pain likely from passed kidney stone. IVF, toradol and noco x1 given with resolution of abdominal pain. Persistent right lower back pain. 2.5 mg diazepam given with resolution of symptoms. PX1 at 27.

Petitioner was placed off work by Our Lady of Resurrection for 3 days and advised to see her PCP. PX1 at 89.

On May14, 2014, Petitioner presented to Erie Humboldt Park Health Center and reported "a recent injury moving a patient when working in her home health position. She pulled a muscle in her low back and also feels numbness in her R leg. Pain is constant 9/10, relieved somewhat with ibuprofen and hot towels. RX3 at 241. Petitioner was diagnosed with lumbar pain, given Flexeril for acute muscle contraction, and advised to return in one week to assess for improvement and rule out disc herniation. RX3 at 242.

On May 16, 2014, Petitioner presented to Dr. Ravi Barnabas at Herron Medical Center indicating that on 5-12-14 she tried to pull an elderly paralyzed patient from the bed by pulling his sheet and felt sharp pain in her low back and right shoulder. PX2 at 9. Petitioner indicated her back was worse with walking, sitting, standing, coughing, sneezing and she had pain into both legs. Petitioner indicated the right shoulder had worsened since the date of accident and she had right shoulder pain with sleeping, lifting hands over head, and trying to grasp anything. Nothing made the pain better. PX2 at 9; RX4 at 9. Records indicate Respondent requested Herron medical records on August 25, 2014 and received them on September 12, 2014. RX4.

Dr. Barnabas' notes indicated Petitioner was employed by "Addis Health Care [sic]" as a care giver, had been working there for 9 months, and that Petitioner reported her injury to her supervisor Vanessa Rodriguez on May 13, 2014. PX2 at 9.

Dr. Barnabas' examination revealed tenderness with palpation in the paraspinal muscles, forward flexion 30 degrees, extension 15 degrees, lateral bending right 20 degrees, left lateral bending 15 degrees. PX2 at 9. Straight leg testing was positive at 20 degrees on the right with pain in the back and leg and 35 degrees on the left. Heel-to-toe was painful. Left shoulder inspection was normal; however, palpation of the right shoulder revealed tenderness in the supraspinatus and infraspinatus, ROM in the shoulder in all planes was painful, Jobe's, Neer's, speed O'Brien's, and Hawkins tests were all positive. *Id.* Dr. Barnabas diagnosed Petitioner with full thickness rotator cuff tear, inflammation of rotator cuff tendon, rotator cuff impingement, lumbago, sprain of lumbar, displacement of lumbar intervertebral disc without myelopahty, and thoracic or lumbosacral neuritis or radiculitis. *Id.*

Dr. Barnabas placed Petitioner off work, prescribed pain medication, a back brace, performed compression therapy, and referred Petitioner to have an MRI of the back and right shoulder. PX2 at 9.

On May 19, 2014, Petitioner presented to lakeshore open MRI for lumbar and right shoulder MRIs. The radiologist's impression of the lumbar spine was L5-S1 2-3 mm posterior disk bulge indenting the thecal sac, while the rest of the lumbar spine was noted to be unremarkable. PX4.

Further, the radiologist's impression of the right shoulder was rotator cuff tendonitis and/or bursitis involving the distal supraspinatus tendon, AC inferior hypertrophic spurring indenting the supraspinatus tendon and narrowing the subacromial space, likely with impingement. PX4.

On May 23, 2014, Petitioner presented to Dr. Ronald Silver, by referral from Dr. Barnabas and indicated she tried to lift a quadriplegic patient and felt tearing and pain in her right shoulder. PX5 at 16. She noted the right shoulder was normal without previous symptoms or treatment before the work accident on May 12, 2014. PX5 at 16. Since that time she complained of persistent pain and limited range of motion in her right shoulder. Dr. Silver notes, prior to the accident, she was working full time without any restriction. On exam she had tenderness over the rotator cuff insertion anterolaterally, 1+ soft tissue swelling, pain at 90 degree forward flexion, 60 degree of lateral abduction with internal rotation to the back pocket. She had positive impingement, Hawkins, and drop arm tests. He noted her MRI demonstrated signs of rotator cuff impingement with inflammation of the rotator cuff. His impression was that the rotator cuff impingement was due to the work injury. PX5 at 16.

Dr. Silver gave Petitioner a subacromial cortisone injection with 40 mg of Kenalog and 4 cc of Lidocaine. PX5 at 16. He recommended physical therapy and medications including Meloxicam for swelling and inflammation, Protonix for gastrointestinal protection as Petitioner had sensitivity to other nonsteroidal anti-inflammatory medication, Hydrocodone for pain, Ultram for lower levels of discomfort, and Terocin cream and patches to provide topical analgesia--pain relief to minimize use of narcotics. Dr. Silver noted she was temporarily disabled pending re-evaluation in five weeks. PX5 at 16-17.

On May 28, 2014, Petitioner presented to Herron Medical center and underwent an EMG with Lake

County Neuromonitoring which indicated "significant evidence of the S1 Left 0.9/Right 1.0 dermatomal conduction delay, while no delays were noted in the other mixed posterior tibial nerve responses. PX8.

On May 29, 2014, Petitioner began regular physical therapy at M&R Rudra New Life medical. PX3.

On June 17, 2014, Petitioner presented to Dr. Samir Sharma, on referral from Dr. Barnabas. Records indicate lower back pain rated 8/10 was located primarily in the upper, mid, and lower lumbar spine with radiation to the right buttock, right posterior thigh, and lateral thigh right, right calf, and right foot. PX6 at 31. Petitioner gave a history via translator and characterized the pain as constant, moderate in intensity, and numb, tingling, aching. Petitioner noted the current episode of pain started 5/12/14 when she was trying to help move a paralyzed person at work and felt a sharp pain in her back. Her associated symptoms were stiffness that occurred after prolonged sitting and standing, radicular right leg pain and numbness in the right thigh, right lower leg, and right foot. Dr. Sharma reviewed the lumbar MRI and noted neural foraminal narrowing of the L5-S1 levels, stating "the MRI indicated b/l narrowing at L5-S1 due to disc bulging" and indicated multi-level degenerative disc disease. PX6 at 31. Petitioner indicated conservative therapy including modification of activities, oral medications (NSAIDS) for 4 weeks, physical therapy/chiropractic therapy for 3 weeks, with temporary relief. Further, the notes indicate decreased functionality and QOL, pain lasting 1 month, pain that was incapacitating, and noting difficulty with ADLs. Examination was positive for paresthesia (right lower extremity) and acute back pain. Musculoskeletal exam notes stated "decreased ROM with back flexion, extension, and lateral flexion; pain with back flexion, extension, and lateral flexion. Crepitus, Tenderness, Effusion: tenderness ntoed in the lumbar paraspinals." PX6 at 32. Petitioner was diagnosed with lower back pain and lumbar radiculopathy and prescribed a transforaminal epidural injection of the right L5-S1 spinal levels. PX6 at 32.

Dr. Sharma's notes indicate Petitioner's history appeared to be reliable. PX6 at 31.

On June 27, 2014, Petitioner returned to Dr. Silver indicting that the shoulder pain was gone for 1 week but had come back and worsened. Petitioner's examination indicated 80 degree forward flexion 50 degrees of lateral abduction with internal rotation not making the back pocket with positive impingement, Hawkins, and drop arm tests. PX5 at 14. Dr. Silver indicated Petitioner would need arthroscopic surgery of her right shoulder due to her work injury of May 12, 2014. He again noted her MRI showed rotator cuff impingement with inflammation of the rotator cuff. He prescribed medication and noted Petitioner was "temporarily disabled." PX5 at 14-15.

On June 30, 2014, Petitioner returned to Erie Humboldt Park Health Center and records indicate she was seen for exacerbation of chronic LBP and noted she aggravated her right shoulder while lifting one of her patients in her role as a home patient assistant. She was considering getting a right shoulder surgery for an apparent rotator cuff tear, but was noted to be very wary of getting the recommended back surgery. RX3 at 245. Records note Petitioner agreed to get rotator cuff surgery soon, and that her back pain and lumbar

radiculopathy had deteriorated. RX3 at 245.

On July 22, 2014, Petitioner presented to Lakeshore Surgery Center and underwent Right L5-S1 transforaminal epidural steroid injection for low back pain and right lumbar radiculopathy. PX9 at 12.

On August 1, 2014, Petitioner returned to Dr. Silver indicating her injection helped for a number of days but that her shoulder pain had returned and was quite severe. PX5 at 12. Dr. Silver noted that all conservative care, including physical therapy, anti-inflammatories, and steroid injection, had been exhausted. Dr. Silver noted she had developed significant soft tissue inflammation and he was prescribing anti-inflammatory Ketorolac DMSO gel as a matter of medical necessity. Additionally, he prescribed Meloxicam, Protonix, Hydrocodone, Ultram, and Terocin cream and patches. He noted she remained temporarily disabled.

On September 24, 2014, Petitioner returned to Dr. Silver and he noted her ROM was 80 degrees of forward flexion and 70 degrees of lateral abduction with positive impingement and Hawkins tests. His diagnoses and recommendation for arthroscopic right shoulder surgery remained the same. He again noted she was temporarily disabled.

On October 21, 2014, Petitioner returned to Dr. Sharma indicating that her condition had improved following the lumbar injection but had since worsened with activities. Petitioner's pain radiated to the right buttock and was described as intermittent, moderate, aching, dull, and throbbing. Symptoms included stiffness after prolonged sitting and standing and radicular right leg pain. She indicated pain worsened with back flexion. PX6 at 33-34.

On December 17, 2014, Petitioner returned to Dr. Sharma with complaints of lumbar radiculopathy and shoulder pain. Petitioner noted that her pain that was previously treated had gradually returned. She stated t hat 3-4 weeks prior she was hospitalized with acute bronchitis for 3-4 days and felt increased low back pain while being in the hospital bed. Overall, she noted significant improvement and requested continued physical therapy sessions at New Life Medical. Dr. Sharma noted she was still not working. PX6 at 35.

With regard to her shoulder pain, she noted it radiated to the arm and upper back and described it as moderate in severity, intermittent, throbbing, aching, stabbing, and tearing with related symptoms of shoulder stiffness, crepitus, locking of her shoulder in a fixed position, and numbness over the upper arm forearm, and hand. Discomfort was increased by external rotation, internal rotation, adduction, and abduction. Petitioner denied a prior shoulder injury or prior shoulder surgery, and noted she had surgery pending with an orthopedic surgeon. Petitioner felt her right shoulder pain was debilitating. PX6 at 35. Dr. Sharma's right shoulder examination indicated pain elicited at the sternoclavicular joint, over the lateral clavical, at the acromioclavicular joint, over the coracoids process, over the anterior acromion, over the rotator cuff, over the subacromial and subdeltoid bursa, over the medial border and lateral border of the

scapula, and laterally and decreased ROM. Dr. Sharma noted positive Yergason test, positive Speeds test, positive drop arm test, positive apprehension test, and negative scapular winging test. Dr. Sharma referred her to physical therapy and administered a glenohumeral shoulder joint injection. PX6 at 36.

Petitioner continued physical therapy at M&M Rudra New Life Medical. PX3.

On January 30, 2015, Petitioner returned to Dr. Sharma with continued lower back pain and lumbar radiculopathy and shoulder pain. PX6 at 38. Dr. Sharma noted Petitioner's shoulder pain symptoms improved 100% immediately following the glenohumeral joint injection but that the pain starte to return back to baseline a few days after. Dr. Sharma noted this was documented for a minimum of 5-6 hours, consistent with duration of Marcaine anesthetic used. Dr. Sharma notes Petitioner was attempting to increase activity after injection but pain returned and increased. Petitioner planned to follow up with her PCP to be referred to Northwestern for ortho evaluation of her shoulder as WC insurance was not covering her current treatment. Dr. Sharma recommended Petitioner undergo a shoulder MRI. PX6 at 38.

On February 6, 2015, Petitioner returned to Dr. Sharma indicating her shoulder and back pain were worse since her last visit. Petitioner indicated physical therapy for 6 months had failed to remedy her condition. Dr. Sharma states that MRI findings included AC joint hypertrophy with SS tendon fraying, no labral tear. He states that MRI findings of the cervical spine showed evidence of disc protrusion/HNP at the Right C5-C6 levels, neural foraminal narrowing of the right C5-C6 vertebral levels. PX6 at 41.

Dr. Sharma's physical exam of the right shoulder indicated a positive Yergason test, positive Speed's test, positive drop arm test, positive apprehension test, negative scapular winging test. Cervical exam testing indicated positive distraction test with pain reduction in posterior neck, positive compression test, with pain elicited in posterior neck, negative valsalva test, and negative Spurling's Test bilaterally. PX6 at 42.

Dr. Sharma diagnosed Petitioner with lower back pain, lumbar radiculopathy, shoulder pain, and neck pain. He recommended Petitioner undergo one additional shoulder/AC joint injection and if it rendered no benefit she should proceed with an orthopedic evaluation at Northwestern for possibility of right C5-C6 disc HNP contributing to her right shoulder pain. PX6 at 43. Dr. Sharma discharged Petitioner from physical therapy and recommended some isometric and isotonic exercises.

On February 24, 2015, Petitioner presented to Lakeshore Surgery Center and underwent right shoulder glenohumeral joint injection with Dr. Sharma. PX9.

Following the shoulder injection, Petitioner returned to Dr. Sharma on March 20, 2015 and indicated her shoulder pain improved and rated it 2/10, or 80% reduction of pain with increased function. Petitioner noted decreased arm pain/numbness and increased ROM in the right shoulder. Dr. Sharma found negative Yergason test, negative Speed's test, negative drop arm test, and positive apprehension test. Additionally, she indicated that her lower back pain was the same since last visit and rated it 5/10. PX6 at 44. Dr. Sharma recommended isometric and isotonic exercises and aqua therapy. *Id.* at 45.

On April 13, 2015, Petitioner followed up with her primary care physician, Dr. Frank Castillo, with a chief complaint of persistent lower back pain that radiates to her right leg in relation to work accident in the prior year. PX11 at24. Notes indicate Petitioner stated she was "getting stone-walled by the company doctors" for her persisting back pain and "wonder[ed] if there [was] anything [Dr. Castillo] could do." *Id.* Dr. Castillo recommended present management, current medications, and therapeutic measures. *Id.* at 26.

On May 1, 2015, Petitioner returned to Dr. Sharma with low back pain rated 6/10 and she noted her lower lumbar pain was radiating to her right calf and characterized it as constant, moderate, sever, cramping, and pulling. She stated her back pain that was treated on 7/14 had returned over the last 1-2 months and that she was treating it with a topical patch prescribed by Dr. Silver. Additionally, she noted her shoulder pain continued but rated it at 1/10. PX6 at 46. With regard to low back, examination indicated positive straight leg raise test, and negative bilateral Fabere test. Dr Sharma noted options of repeat TFESI versus conservative management and that Petitioner was requesting topical pain patch and was directed to Dr. Silver for further medications as Dr. Sharma found her to be at MMI for the low back due to her statement that she did not want to entertain further interventional or surgical options for the low back. Dr. Sharma advised Petitioner to return on p.r.n. basis.PX6 at 47.

On June 19, 2015, Petitioner returned to Dr. Sharma with continued neck pain, low back pain, lumbar radiculopathy, and shoulder pain. Petitioner noted her lumbar pain was 6/10 and radiated to her right calf. PX6 at 49. Dr. Sharma's examination indicated positive straight leg raise test, and negative bilateral Fabere test. Dr. Sharma referred her to see Dr. Neckrysh at UIC for a low back surgical evaluation. PX6 at 50. Medical records indicate that Dr. Sharma was never compensated for any treatment provided to Petitioner. PX6 at 4-8.

On August 3, 2015, Petitioner returned to Dr. Castillo with complaints of worsening pain in her right shoulder and low back. PX11 at 19. Petitioner indicated she obtained some relief from past injections. Dr. Castillo's examination indicated decreased ROM of the back and decreased ROM of the right shoulder with inability to abduct past 30 degrees. Dr. Castillo recommended she follow her current management with medications and therapeutic measures.

Independent Medical Examinations:

Petitioner testified that she underwent two Independent Medical Examinations but that Respondent refuse to furnish her with reports following either examination. T. 26-27.

On January 19, 2015 an Independent Medical Examination letter from Respondent's attorney, Erica Levin, was sent to Dr. Edward J Goldberg. The letter outlined Petitioner's accident history medical treatment in detail. The letter noted Petitioner had "been receiving treatment for the low back since at least 2011." That she had presented to Dr. Harsoor for a series of lumbar injections with moderate relief. The letter states Petitioner had suffered injuries "to her left arm and low back on February 22nd", she was unable

to perform light duty work, and Dr. Harsoor diagnosed her with radiculopathy of the lumbar spine. The letter goes on to detail treatment from a January 16, 2012 motor vehicle accident during which she reported working light duty following an FCE. The letter documents that Dr. Salehi recommended no neurosurgical intervention. However, a January 2012 MRI was noted to indicate mild disc dessication at L5-S1 with moderate facet arthritis and a small annular fissure with mild central disc protrusion. The letter notes Petitioner returned to Dr. Malek January 25, 2013 and obtained a lumbar injection. The letter documents no treatment to the right shoulder. The letter documents no treatment on the low back from January 25, 2013 until her May 12, 2014 work accident.

The letter then goes on to state "Ms. Arevalo was seen in the emergency room at Our Lady of Resurrection Medical Center. She was authorized off work for three days based upon what appears to be a diagnosis of kidney stone." The letter then states Petitioner was given physical therapy from Erie Family Health Center based upon "acute chronic low back pain following muscle strain." The letter then documents treatment for the lumbar spine and "left shoulder" at Herron Medical Center. It further outlines treatment with Dr. Samir Sharma, alleging he released Petitioner to full duty work August 25, 2014 but that she returned to Dr. Sharma on December 17, 2014 reporting that she had increased low back pain following a hospital stay for bronchitis. Following this summary from Respondent's attorney were numerous questions for Dr. Goldberg. PX14 at 39-44

On February 19, 2015, a letter from Dr. Goldberg was drafted to Respondent charging them $7,500.00 for "excessive records." PX14 at 22.

On March 2, 2015, Petitioner presented for an independent medical evaluation with Dr. Goldberg. PX14 at 16. The following day, March 3, 2015 a summary of the examination was drafted for David Larson of Hennesy & Roach, and CC'd to the insurance adjuster, Heather Dunn "(Emdat Autopfax)" at Ghallagher Bassett. PX14 at 18.

Dr. Goldberg asserted he had previously examined Petitioner for a work-related accident on April 19, 2010 and that she had a synovial cyst on the right at L5-S1, which subsequently resorbed. PX14 at 16. He notes records show she had a "flare-up" of low back pain following an MVA. He notes Dr. Salehi did not recommend surgery and Petitioner returned to full duty work September 2013. Dr. Goldberg summarizes medical records he reviewed from Dr. Barnabas, Dr. Sharma, and Dr. Silver, in which he notes the Petitioner has off work notes valid through September 2014.

Dr. Goldberg's physical exam indicates her chief complaint at that visit was right shoulder pain—which he indicated he would not address. Dr. Goldberg's report outlined the following:

1. diagnosed Petitioner with lumbar strain with some radiculitis;

2. he states her current condition of ill being was due to the accident of May 12, 2014, as she had returned to work full duty in September 2013, his review of the MRI was a minimal bulge (nothing degenerative), no herniation or stenosis;

3. he stated that all treatment has been appropriate;

4. recommended 2 weeks of formal physical therapy focusing on core strengthening, followed by return to work full duty without restrictions of the lumbar spine and he did not recommend injections or surgery;

5. recommended 30-pound lifting restriction regarding lumbar spine; and

6. anticipated MMI of the lumbar spine and full duty work after 2 more weeks of therapy.

On March 11, 2015, Respondent's attorney drafted an Independent Medical Examination request letter to Dr. Nikhil Verma with an identical summary of treatment and requested him to examine Petitioner's shoulder complaints. PX14 at35-38.

On March 23, 2015, Petitioner presented to Dr. Verma for the independent medical examination. Petitioner indicated she injured her self on May 12, 2014 when trying to move a patient. PX14 at 8-11. She described her pain as per-axial neck region extending into the shouder and down her hand into the arm. Petitioner denied any prior trauma or treatment for the shoulder. She indicated a shoulder cortisone injection provided no benefit and that a neck injection provided significant improvement. Dr. Verma notes that he reviewed records extending from 2012 which indicated complaints of pain in the low back. Dr. Verma points out that he did not see any pre-existing complaints of shoulder or neck pain in her medical records dating back to 2012. He noted Petitioner had an FCE returning her to sedentary work. He notes the treatment records indicate "some distal tendinitis or bursitis" but showed rotator cuff intact with possible hypertrophic changes. He indicated Dr. Silver did not examine Petitioner's neck, but had positive impingement signs. He notes that later medical records state Petitioner had rotator cuff impingement on an MRI scan. PX14 at 8-11.

Dr. Verma's physical examination indicates diffuse pain with palpation over the peritrapezial muscles, peri-axial neck muscles, anterior, posterior, and lateral aspect of the shoulder and cervical ROM reproducing symptoms. PX14 at 8-11. Dr. Verma reviewed an MRI of the right shoulder from January 30, 2015 and he indicated no fluid in the subacromial space, normal rotator cuff, and mild hypertrophic changes of the AC joint. MRI of the cervical spine reviewed indicated multilevel cervical spondylosis with posterior disc bulging. PX14 at 8-11.

Based upon his review of the medical records and his physical examination, Dr. Verma asserted the following:

1. diagnosis was axial neck pain, right shoulder pain, and right upper extremity pain and numbness and tingling;

2. Petitioner's current condition of ill-being is causally related to the work accident based upon the consistent mechanism of injury and subsequent onset of symptoms;

3. MRI findings indicate trace fluid in the right shoulder on the 2014 MRI with mild age-related degenerative changes in the AC joint on the 2015 MRI;

4. He asserts the treatment appears to be reasonable and necessary, and goes on to state that relief with the cervical injection performed by Dr. Sharma would indicate a cervical etiology for her pain;

5. Recommends further cervical evaluation and further treatment of the cervical spine, or resolution of the cervical condition before proceeding with any shoulder intervention;

6. He indicated work capacity would be light duty with minimal lifting with the right upper extremity and sedentary work only; and

7. He stated Petitioner had not reached MMI at this time, pending further evaluation including cervical eval or IME.

Records indicate this IME report was sent to David Larson of Hennessy & Roach and CC'd to Heather Dunn at Gallagher Bassett. PX14 at 8-11.

Notice Testimony:

Petitioner testified that the patient's sister, Esperanza, spoke to "Vanessa" her supervisor when the work accident occurred and that Petitioner contacted Vanessa the following day. T. at 29-30. Additionally, Petitioner filed her application for adjustment of claim on May 20, 2014, only six days after the occurrence. PX #12

Current Condition of Ill-Being Testimony:

At Arbitration on July 14, 2015, Petitioner testified that the third shoulder injection administered by Dr. Sharma relieved the pain in her right shoulder but that over the course of the previous month the pain had started coming again. T. 19 Petitioner explained that she doesn't have enough strength for example to put the dishes up [with the right shoulder], and she "drop[s] them." T. 20. She stated that she has no problems putting dishes up with the *left* shoulder. She testified she did not have these issues with her right shoulder prior to the May 12, 2014 injury. T. 20.

Petitioner testified that since her work accident her daily activities have been impacted as follows: "Before, [she] used to go walking a lot. [She] would go on vacation. Now if [she is] standing [she] wants to

sit down, if [she is] sitting down [she] wants to stand up." T. 28 She testified that she has difficulty with household chores and that she can't sweep her house, and she is not the same person as before. T. 28. She testified she has difficulty doing laundry and making the beds. She testified she has pain when she puts her arm through the sleeve of a "blouse." T. 28-29.

Petitioner testified she manages her pain with cream, Ibuprofen or Tylenol. She testified that she would like to have more medical treatment to try and get back to her pre-injury status. T. 29.

Esperanza Vega Witness Testimony:

Esperanza Vega testified that she was the sister of the patient Petitioner was caring for on 5-12-14. T. 31. Ms. Vega testified petitioner worked 6 hours a day for 3 days per week. T. 32. Ms. Vega testified Petitioner's duties included bathing the patient, changing him, lifting him from bed onto chair, taking him to kitchen, feeding him, and cleaning his room. T. 32. She further testified Petitioner never complained of pain in her low back or right shoulder while working with the patient. She testified she never saw Petitioner taking any pain medication. T. 33. Ms. Vega testified she was in the kitchen and heard Petitioner "complaining" so she "went over to the room and that's when [Petitioner] told her that she pulled him in the wrong way and then she had lots of pain in her shoulder and this back part of her waist." T. 34. Ms. Vega testified she told Petitioner to sit down for a while and see if the pain will go away. She testified her brother had an appointment with the doctor and she told Petitioner to take some Tylenol and she went with him to his appointment. She testified she was not home when Petitioner returned. T. 34.

Prior Medical History Testimony:

Petitioner testified she had a prior injury to her low back in April of 2010 and that she had therapy, injections and cortisone injections. T. 23.

She further testified she had a motor vehicle accident in December 2011. T. 23-24. She testified she injured her lower back and had therapy but could not recall if she had injections. She testified she was released without restrictions after the 2011 accident. T. 24.

Petitioner testified she was working for about a year or a few months for Respondent before her injury in May of 2014. T. 25. She testified that after she finished treatment for the car accident and before her injury of May 2014 she "was better" and had no medical treatment. T. 25-26.

Cross Examination:

Petitioner testified she was moving the patient on the bed when her accident occurred. T. 7. She testified she did not go immediately to seek treatment and went to a medical appointment with the patient. T. 7-8. Petitioner testified that she had sought prior treatment for her lumbar spine and that she had undergone prior MRI studies. T. 9. Petitioner testified she had one motor vehicle accident before May 12, 2014. Petitioner testified she had no problems with her bladder or abdomen that she had sought medical treatment for. Petitioner was asked if she had a bladder infection or kidney issues and she responded, "Yes, when I

was young." T. 11.

Redirect Examination:

Petitioner testified she did not immediately go to seek medical treatment when she hurt her back because Mr. Vega had an appointment and no one could accompany but [herself]. T. 14.

Respondent's Correspondence:

Respondent's sent correspondence dated from July 24, 2014 to September 9, 2014 to Petitioner's counsel asserting that Respondent "had not received any records to support a claim that Petitioner suffered a work accident which arose out of and in the course of her employment on May 12, 2014, as alleged. As such, Respondent continues to dispute liability for any TTD benefits, medical bills, or medical treatment in connection with the petitioner's alleged injuries." Specifically, on August 12, 2014 Respondent's counsel states that the records from Resurrection Medical Center indicate Petitioner was "diagnosed with kidney stones." Requests are made to Petitioner's counsel to provide any medical records that would support Petitioner's claim. RX10.

An email from Petitioner's counsel dated March 6, 2015 asserts that the medical records from the Emergency Room "do state that she had immediate back pain when trying to lift a heavy patient." RX10.

An additional letter dated April 21, 2015 again asserts Respondent had not received any medical records reflecting Petitioner's current course of treatment or any treatment recommendations. RX10.

Petition for Medical Benefits and Attorney's Fees under 8(a), 19(b), 19(k), 19(l) and 16

Petitioner's petition for medical benefits and penalties was file stamped June 3, 2015 and asserts that injuries arose out of and in the course of her employment. Petitioner asserts that she came under the care of Advanced Rehab Specialists, Lakeside Surgery Center, Erie Humboldt Park Heath Care Center, Our Lady of Resurrection, Western Touhy Anesthesia, New Life Medical Center, Herron Medical Center, Spine Consultants, Dr. Michael Malek, Lakeshore Surgery Center, and Pain & Spine Institute. In light of Respondent's failure to pay any benefits Petitioner requested Respondent to authorize and pay for necessary medical treatment, pay TTD benefits, penalties, and late fees under Sections 8(a), 19(b), 19(k), 19(l) and 16. PX13.

CONCLUSIONS OF LAW

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

To obtain compensation under the Workers' Compensation Act (820 ILCS 305/2), a claimant must show by a preponderance of the evidence that he or she has suffered a disabling injury arising out of and in the course of his or her employment. *Vogel v. Industrial Commission* (2nd Dist. 2005), 354 Ill.App.3d 780, 821 N.E.2d 807.

In light of the arbitration testimony and evidence taken on July 14, 2015, the parties agreed to stipulate that an accident did occur out of and in the course of Petitioner's employment on May 12, 2014. Arb.X 1.

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

As Section 6(c) of the Act states, "Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. . . . Notice of the accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing."

Petitioner testified credibly that both she and Ms. Vega advised the supervisor, Vanessa Rodriguez, that Petitioner had a work injury on May 12, 2014. Similarly, Petitioner's medical records at Herron Medical on indicate she gave notice to Vanessa Rodriguez. Moreover, Petitioner's application for adjustment of claim was filed on May 20, 2014 and listed her employer as Addus Health Care, Inc. at 9259 S. Western Avenue, Chicago Illinois, 60643.

Petitioner and Ms. Vega both testified that she worked three days per week and the records make clear that Petitioner did not return to work following the May 12, 2014 accident. As such, it is clear that Respondent would have been informed as to the situation when Petitioner failed to return to work her three days the week after the May 12, 2014 accident.

Additionally, shortly following the filing of the application for adjustment of claim Hennessy and Roach had been assigned as attorneys on the case as evidenced by RX10 which contains correspondence from Respondent's counsel to Petitioner's counsel dated July 24, 2014, a mere two months following the May 2014 accident.

In light of the credible testimony and the records, the Arbitrator finds Petitioner gave timely notice to her employer of her May 12, 2014 work accident.

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

After hearing the testimony of Petitioner and reviewing the exhibits submitted, the Arbitrator hereby finds that the Petitioner's present condition of ill-being with regard to her low back, cervical spine, and right shoulder is causally related to the injuries sustained on May 12, 2014.

Petitioner testified and medical records corroborate that before the initial accident on May 12, 2014, she never previously treated or injured her right shoulder. She additionally testified, and medical records corroborate, that she worked as a home health care worker for several months without any treatment to her low back or cervical spine. Petitioner acknowledges that she had a prior low back injury in 2010, and an aggravation in 2011. However, records and testimony indicate she had been without any treatment for an extended period of time and had not made any complaints of pain while working with the patient. Ms. Vega testified that Petitioner made no complaints of pain during her time working with Mr. Vega. Notably, the independent medical examiners hired by Respondent both agreed that based upon the timeline of medical treatment prior to the May 12, 2014 accident that her current condition of ill-being of the low back, right shoulder, and neck *are* causally connected to the May 12, 2014 work accident.

Further, the emergency records from Petitioner's very first date of treatment, on May 12, 2014, at Resurrection explicitly state the following: "patient presents with: back pain: low back pain and right *arm* and leg numbness after 'lifting a heavy patient.' No relief with Tylenol." (PX1 at 24.) Any mentions of kidney problems Petitioner may or may not have had do not negate the causation that is made clear in the record which states that Petitioner had low back pain and right arm and leg numbness after lifting a heavy patient. Respondent's reliance on these kidney examinations are completely unreasonable. It is noteworthy that neither independent doctor was confused by these medical record mentions of Petitioner's kidneys in the E.R. records.

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

After reviewing the testimony and reviewing the Petitioner's exhibits, the Arbitrator hereby finds that the Respondent did not provide reasonable and necessary medical services to Petitioner. The Arbitrator finds that the services that were rendered to Petitioner by Petitioner's choice of physicians were reasonable and necessary. The Arbitrator notes that Respondent did not offer any evidence to contest the reasonableness or necessity of the treatment rendered by Petitioner's choice of doctors.

The Arbitrator therefore finds that Respondent must pay the outstanding bills from Our lady of Resurrection, Herron Medical Center, New Life medical, Lakeshore Open MRI, Orthopedic Specialists, Pain & Spine Institute, Advanced Rehab Specialists, Lake Co. Neuromonitoring, Lakeshore Surgery & Western Touhey Anesthesia, City of Chicago Ambulance, and Erie Humboldt Park Health Center subject to the limitations as provided by Section 8.2 of the Act. Respondent shall hold Petitioner harmless for any payments made by Medicare or Medicaid as related to Petitioner's work injury of 5-12-2014.

K. Is Petitioner entitled to any prospective medical care?

Petitioner testified at the hearing that she wanted to have the recommended treatments in order to get back to her pre-injury status. She testified she cannot sit or stand for long periods of time and that her

right shoulder causes her pain and inability to perform certain basic household chores and difficulty dressing herself. Medical records indicate that Dr. Silver has recommended arthroscopic surgery for the right shoulder, and that Dr. Sharma has referred Petitioner to Dr. Neckrysh for an orthopedic evaluation of her back pain and radiculopathy. Additionally, Dr. Verma, the Independent Examiner, has recommended Petitioner seek an orthopedic evaluation of her cervical spine.

The medical records of Dr. Sharma, Dr. Silver, Dr. Castillo, and Dr. Verma make clear that Petitioner is not at maximum medical improvement in terms of functionality and/or palliative pain management. As such it is reasonable for Petitioner to pursue further medical treatment until such time as she is rendered MMI for the shoulder, neck, and back by her medical providers.

The Arbitrator orders Respondent to approve and pay for further evaluation of Petitioner's lumbar condition, for further evaluation of Petitioner's cervical condition, and for further evaluation of Petitioner's right shoulder condition until such time as all such conditions are rendered to be at maximum medical improvement.

L. Is Petitioner entitled to temporary total disability?

Records indicate that Petitioner was continuously placed off work by her medical providers. Likewise, both independent examiners placed Petitioner's physical abilities below the required level to perform her usual and customary employment. Records indicate Petitioner received no TTD from Respondent since the date of injury, May 12, 2014.

Based upon the foregoing findings, The Arbitrator finds that Respondent must pay Petitioner for TTD from 5/12/2014-9/10/2015, or 69 and 3/7 th weeks, at a minimum TTD rate of $253.00, or $17,565.43.

M. Are penalties appropriate?

Penalties may be awarded pursuant to §19(*l*) if the employer or insurance carrier fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." 820 ILCS 305/19(*l*). This section states the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits *** have been so withheld or refused, not to exceed $10,000. Generally, penalties will not be imposed if the employer has relied on a qualified medical opinion and a dispute exists as to how alleged disability is related to the employment. The standard is dependent on whether the employer's conduct in relying on the medical opinion is reasonable under the circumstances. *Consolidated Freightways, Inc. v. Industrial Commission*, 136 Ill.App.3d 630, 483 N.E.2d 652, 91 Ill.Dec. 306 (3d Dist. 1985). "The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if ***a reasonable person*** in the employer's position would have believed that the delay was justified." *Id.*

The standard for awarding penalties under section 19(k) and attorney fees under section 16 of the

Act is higher than the standard under section 19(l). Sections 19(k) and 16 require more that an unreasonable delay in payment. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514-15 (1998). These sections of the Act are "intended to address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose." *Id.* at 515.

Respondent has not set forth a good-faith argument as to why it believed that Petitioner's right shoulder, neck, and low back injuries were not compensable under the Act. Respondent's argument is that the emergency room records included an examination of Petitioner's kidneys and that Petitioner did not complain of pain in the shoulder. The records make clear that Petitioner indicated she hurt her right arm, shoulder, and back during her visit to the emergency room on May 12, 2014. Similarly, her treatment thereafter clearly documented a May 12, 2014 injury to Petitioner's right shoulder and back with clear references that it was the result of lifting a patient at work. Respondent cannot point to Petitioner's prior work injury and prior car accident as justification for refusal to pay, as aggravations of existing medical conditions are clearly compensable under the Workers' Compensation Act. Moreover, Petitioner's right shoulder and neck conditions were not preexisting conditions.

Respondent's letters claim they had no medical records to corroborate a work accident occurred. However, the correspondence makes clear they had the Emergency Room records. Notably, Respondent's attorney drafted a letter to Dr. Goldberg in January of 2015 outlining the full medical treatment of Petitioner's right shoulder, low back, and neck with all of her medical providers at that time (Dr. Silver, Dr. Sharma, Dr. Castillo) as well as her history of t reatment which was clearly devoid of any right shoulder treatment and which indicated a gap of at least 8 months during which Petitioner had no treatment to her back. Despite being able to review these records and draft a long summary for Dr. Goldberg, Respondent continued to assert to Petitioner in its April 2015 correspondence that it had no medical records to rely upon to justify paying any benefits.

Even more alarming is Respondent's refusal to furnish the IME reports from Dr. Goldberg and Dr. Verma to Petitioner where both reports assert causal connection for Petitioner's injuries. Dr. Goldberg and Dr. Verma made their opinions in full understanding of Petitioner's prior work injury and prior car accident from 2010 and 2011.

Respondent willingly hid information from Petitioner which made it clear that this claim was compensable and failed to pay benefits which are clearly due and owing to Petitioner.

Respondent's refusal to pay temporary total disability as well as medical benefits in this case was unreasonable and vexatious, and as a result, penalties are appropriate. The Arbitrator therefore imposes penalties under Section 19(l) for late payments on medical benefits and TTD which have gone unpaid for 69 weeks and 3 days, or a total of 486 days, at the maximum of $10,000.00.

Additionally, the arbitrator finds that in light of Respondents refusal to pay even one single dollar in

benefits, despite the causal connections made clear by every single medical provider involved in this case, Respondent shall pay Section 19(k) penalties in the amount of $8,782.71, which constitutes 50% of the unpaid temporary total disability. Furthermore, the Arbitrator orders Respondent to pay attorneys' fees in the amount of $3,513.08, which constitutes 20% of the TTD award.

Additionally, Respondent shall also pay attorney fees of 20% of the allowable payments for medical services rendered. Further, Respondent shall pay Section 19(k) penalties of 50% on the amount of medical services rendered, after accounting for fee schedule reductions.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☒ 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

Chazz Reedy,
Petitioner,
vs.

16IWCC0803

NO: 14 WC 21589

Gunite,
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 statute of limitation, permanent partial disability, disfigurement 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 March 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $3,400.00. 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: DEC 15 2016
KWL/vf
O-12/13/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0803

REEDY, CHAZZ
Employee/Petitioner

Case# **14WC021589**

14WC021590

GUNITE
Employer/Respondent

On 3/17/2016, 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 0.51% 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:

2489 BLACK AND JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0507 RUSIN & MACIOROWSKI LTD
RANDALL STARCK
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

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

16IWCC0803

Chazz Reedy
Employee/Petitioner

v.

Gunite
Employer/Respondent

Case # **14 WC 21589**

Consolidated cases: **14 WC 21590**

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 **Gregory Dollison,** Arbitrator of the Commission, in the city of **Rockford, Illinois,** on **February 19, 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 **Statute of Limitations**

FINDINGS

On the date of accident, **November 3, 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 these accidents ***was*** given to Respondent.

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

In the year preceding the injury, Petitioner's average weekly wage was **$1,079.11**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **0** dependent children. .

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

ORDER

Respondent shall pay Petitioner the sum of **$647.47**/week for a period of **5** weeks, as provided in Section **8(c)** of the Act, because the injuries sustained caused disfigurement to the right hand.

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

3/14/16
Date

ICArbDec

MAR 17 2016

STATEMENT OF FACTS:

Petitioner testified that he began working for Respondent around 2003 as an Iron Pourer. Petitioner provided that on November 3, 2011, while in the course of his employment, he was emptying iron. While doing so, a piece of iron flew into the glove he was wearing on his right hand. An Incident Report was completed on November 3rd wherein Petitioner indicated, "I was emptying out my ladle in a pig tray and iton came out of the pig tray and went inside my glove and landed on my hand." (PX 7) Petitioner testified that he sought treatment at MedCor, Respondent's medical facility. MedCor records indicate that on November 3, 2011, Petitioner sought care for a burn to his right hand while "pigging out." Petitioner described a small hole in his glove between his and first finger. He assumed that metal came through that hole. A picture of the injury was taken, his wound was cleaned and bandaged, and he was returned to work. (PX 6)

Petitioner demonstrated the area on his right hand in which the iron had burned him. The Arbitrator viewed Petitioner's right hand. On the top of the right hand, near the base of the right thumb, there was a small, faint scar measuring approximately ½ inch wide. There is a small gap, and then another, more pronounced scar measuring approximately 1½ inches by ¾ inch.

The MedCor records contain a document titled "Settlement Request," dated September 26, 2012. This indicated that Petitioner was requesting a settlement of his November 3, 2011 injury. (PX 7) Petitioner testified that offers were made to settle his scar claim by Respondent's attorney. Finding the offer insufficient, Petitioner sought counsel. The MedCor records contain a letter to Petitioner dated November 20, 2013 that indicated that he was scheduled for a burn review with Attorney Stark on December 13, 2013. (PX 7) Also included in MedCor records is a February 25, 2014 letter from Respondent's Sr. Claims Adjuster, T.J. Scruggs, making a settlement offer of $2,000 from the insurance company. Petitioner declined said offer. (PX 7)

Initially, an Application for Adjustment of Claim was filed on June 25, 2014. (PX 1) The initial application noted a date of accident of January 2, 2011 o.a. for body part "BUE." Petitioner testified that he was not sure of the specific date of accident when he sought counsel. As such, he provided an approximate date that was used on the initial application. After securing the subpoenaed MedCor records, in the later half of 2015, Petitioner authorized the filing of an Amended Application for Adjustment of Claim with the corrected accident date of November 3, 2011. On September 10, 2015, the application was amended to reflect the date of accident of November 3, 2011 and the body part was amended to "RUE." (PX 4)

With respect to (O.) Other: Statute of Limitations, the Arbitrator finds as follows:

Respondent argues that Petitioner's claim is barred by the statute of limitations. Respondent argues that the 3 year filing period for filing an Application for Adjustment of Claim was not met with Petitioner's initially filed Application on June 25, 2014. The initial Application for Adjustment of Claim alleged a date of accident on January 2, 2011. The alleged affected body part was bilateral upper extremity, "BUE." An amended Application for Adjustment of Claim was filed September 10, 2015 amending date of accident to November 3, 2011 and the body part affected, right upper extremity, "RUE", as opposed to bilateral upper extremity, "BUE."

In workers' compensation cases, statutes of limitations are designed to assure fairness to employers by protecting against claims that are too old to be successfully investigated and defended. Goodson v. Industrial Comm'n, 190 Ill. App. 3d 16 (1989). "[P]leadings and the proceedings in workers' compensation cases are

informal and are designed to expedite and to achieve a right result. Thus, the Commission must decide a case on the evidence presented and on the merits of the case before it and must not be restricted to the information provided on a form." Caterpillar Tractor Co. v. Industrial Com. 215 Ill. App. 3d 229, 239 (Ill. App. Ct. 4th Dist. 1991).

The Commission has repeatedly found that the application for adjustment of claim is to be liberally amended to conform to the proofs contained in the record and that the date of accident can be changed to conform to the evidence. "In pleadings under a compensation act, calling things by wrong names, or bringing a petition under a wrong title, or making other harmless mistakes as to details such as dates, are immaterial if the intention of the pleading is clear." McLean Trucking Co. v. Industrial Comm'n, 96 Ill. 2d 213, 218-219 (Ill. 1983).

The Commission has held that an Amendment to an original Application for Adjustment of Claim relates back to the original filing so long as the Amendment refers to the same accident and not to a wholly different accident. The Commission has held that an Amendment to an original Application to Adjustment of Claim is not barred if filed beyond the three year time period as the Amendment relates back to the original filing date. Hulbert v. Helfrich Painting Co., 2015 Ill. Wrk. Comp. LEXIS 293.

In this case, Petitioner's original application was filed on June 25, 2014. The Amended Application, filed on September 10, 2015 with the corrected accident date, relates back to the original filing. As such, the claim was filed with the statute of limitations. The statute of limitations is designed to assure that the employer is protected against claims that are too old to be successfully investigated and defended. Here, there is every indication that Respondent was specifically aware that the 14 WC 21589 filing was in relation to Petitioner's November 3, 2011 scar. The records from MedCor contain accident reports, a settlement request from Petitioner, a scar viewing set up by Respondent, and a settlement offer made by Respondent's insurance carrier. Further, after counsel was obtained by Petitioner, the parties discussed settlement of Petitioner's scar claim. Respondent was clearly able to successfully investigate and defend the November 3, 2011 injury. The intention of Petitioner to resolve his November 3, 2011 scar to his right hand was made clear at the time of the original filing. This is not a situation in which Petitioner amended the Application for Adjustment of Claim to reflect a wholly different accident. Instead, Petitioner's Application was Amended when he received documentation from Respondent of the correct accident date. The application was amended to reflect the specific date of accident for which the parties had been negotiating settlement for over a year.

As such, Petitioner's claim is not barred by the statute of limitations as the Amended Application relates back to the original filing, which was well within three years of November 3, 2011.

With respect to (F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of November 3, 2011. Petitioner testified that on November 3, 2011, he sustained a burn injury to his right hand when iron splashed onto his hand and passed through a hole in his glove. There was no evidence or testimony of any other injury sustained by Petitioner to his right hand. The burn demonstrated at hearing is consistent with Petitioner's testimony and with the medical records from MedCor that described his burn injury. As such, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his November 3, 2011 injury.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator observed the scarring on Petitioner's right hand/wrist. The Arbitrator observed scarring measuring approximately 1½ inch by ¾ inch and a smaller faint scar approximately ½ inch in diameter. The Arbitrator finds that Petitioner has suffered 5 weeks of disfigurement as a result of the November 3, 2011 work injury. As such, Petitioner is awarded $647.47 per week for a period of 5 weeks, as provided in Section 8(c) of the Act, because the injuries sustained caused disfigurement to the right hand

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

☒ 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

Chazz Reedy,
Petitioner,
vs.

16IWCC0804

NO: 14 WC 21590

Gunite,
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 statute of limitation, permanent partial disability, disfigurement 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 March 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,300.00. 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: DEC 15 2016
KWL/vf
O-12/13/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0804

REEDY, CHAZZ
Employee/Petitioner

Case# **14WC021590**

14WC021589

GUNITE
Employer/Respondent

On 3/17/2016, 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 0.51% 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:

2489 BLACK AND JONES
JASON ESMOND
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

0507 RUSIN & MACIORWSKI LTD
RANDALL STARCK
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606-3833

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 16IWCC0804

Chazz Reedy
Employee/Petitioner

v.

Gunite
Employer/Respondent

Case # **14 WC 21590**

Consolidated cases: **14 WC 21589**

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 **Gregory Dollison,** Arbitrator of the Commission, in the city of **Rockford, Illinois,** on **February 19, 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 **Statute of Limitations**

FINDINGS

On the date of accident, **May 9, 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 these accidents *was* given to Respondent.

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

In the year preceding the injury, Petitioner's average weekly wage was **$1,079.11**.

On the date of accident, Petitioner was **28** years of age, ***single*** with **0** dependent children. .

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

ORDER

Respondent shall pay Petitioner the sum of **$647.47**/week for a period of **8** weeks, as provided in Section **8(c)** of the Act, because the injuries sustained caused disfigurement to the left forearm.

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

3/14/16
Date

ICArbDec

MAR 17 2016

STATEMENT OF FACTS:

Petitioner testified that he began working for Respondent around 2003 as an Iron Pourer. Petitioner provided that on May 9, 2012, while in the course of his employment, he was pouring iron. While doing so, iron splahed onto his left arm and burned through his work shirt. Petitioner testified that he sought treatment at MedCor, Respondent's medical facility. MedCor records indicate that on May 9, 2012, Petitioner sustained a 2nd degree burn to his left forearm. The record indicated that he had thrown a "hub in the ladle and iron splashed out and went down his sleeve." It was noted that he had a burn about 1.5 inches in length and about .25 inches in width. The burn was described as being on the thumb side of his arm and parallel to the ground when his arm was at his side. Petitioner was given an antibiotic cream and instructed to cover the burn. (PX 6) Petitioner returned to work. An Incident Report was completed on May 10, 2012 wherein Petitioner indicated, "threw hub in ladle and iron splashed out and went down sleeve." (PX 7)

Petitioner demonstrated the area on his left forearm in which the iron had burned him. The Arbitrator viewed Petitioner's left forearm. Between the elbow and wrist, Petitioner has a dark, prominent scar measuring approximately 2½ inches by 3/8 inch.

The MedCor records contain a letter to Petitioner dated November 20, 2013 that indicated that he was scheduled for a burn review with Attorney Stark on December 13, 2013. (PX 7) Also included in MedCor records is a February 25, 2014 letter from Respondent's Sr. Claims Adjuster, T.J. Scruggs, making a settlement offer of $2,000 from the insurance company. Petitioner declined said offer. (PX 7)

Initially, an Application for Adjustment of Claim was filed on June 25, 2014. (PX 2) The initial application noted a date of accident of January 2, 2012 o.a. for body part "BUE." Petitioner testified that he was not sure of the specific date of accident when he sought counsel. As such, he provided an approximate date that was used on the initial application. After securing the subpoenaed MedCor records, in the later half of 2015, Petitioner authorized the filing of an Amended Application for Adjustment of Claim with the corrected accident date of May 9, 2012. (PX 5) On September 10, 2015, his application was amended to reflect the date of accident of May 9, 2012 and the body part was amended to "LUE."

With respect to (O.) Other: Statute of Limitations, the Arbitrator finds as follows:

Respondent argues that Petitioner's claim is barred by the statute of limitations. Respondent argues that the 3 year filing period for filing an Application for Adjustment of Claim was not met with Petitioner's initially filed Application on June 25, 2014. The initial Application for Adjustment of Claim alleged a date of accident on January 2, 2012. The alleged affected body part was bilateral upper extremity, "BUE." An amended Application for Adjustment of Claim was filed September 10, 2015 amending date of accident to May 9, 2012 and the body part affected, left upper extremity, "LUE", as opposed to bilateral upper extremity, "BUE."

In workers' compensation cases, statutes of limitations are designed to assure fairness to employers by protecting against claims that are too old to be successfully investigated and defended. Goodson v. Industrial Comm'n, 190 Ill. App. 3d 16 (1989). "[P]leadings and the proceedings in workers' compensation cases are informal and are designed to expedite and to achieve a right result. Thus, the Commission must decide a case on the evidence presented and on the merits of the case before it and must not be restricted to the information provided on a form." Caterpillar Tractor Co. v. Industrial Com. 215 Ill. App. 3d 229, 239 (Ill. App. Ct. 4th Dist. 1991).

The Commission has repeatedly found that the application for adjustment of claim is to be liberally amended to conform to the proofs contained in the record and that the date of accident can be changed to conform to the evidence. "In pleadings under a compensation act, calling things by wrong names, or bringing a petition under a wrong title, or making other harmless mistakes as to details such as dates, are immaterial if the intention of the pleading is clear." McLean Trucking Co. v. Industrial Comm'n, 96 Ill. 2d 213, 218-219 (Ill. 1983).

The Commission has held that an Amendment to an original Application for Adjustment of Claim relates back to the original filing so long as the Amendment refers to the same accident and not to a wholly different accident. The Commission has held that an Amendment to an original Application to Adjustment of Claim is not barred if filed beyond the three year time period as the Amendment relates back to the original filing date. Hulbert v. Helfrich Painting Co., 2015 Ill. Wrk. Comp. LEXIS 293.

In this case, Petitioner's original application was filed on June 25, 2014. The Amended Application, filed on September 10, 2015 with the corrected accident date, relates back to the original filing. As such, the claim was filed with the statute of limitations. The statute of limitations is designed to assure that the employer is protected against claims that are too old to be successfully investigated and defended. Here, there is every indication that Respondent was specifically aware that the 14 WC 21590 filing was in relation to Petitioner's May 9, 2012 scar. The records from MedCor contain accident reports, a scar viewing set up by Respondent, and a settlement offer made by Respondent's insurance carrier. Further, after counsel was obtained by Petitioner, the parties discussed settlement of Petitioner's scar claim. Respondent was clearly able to successfully investigate and defend the May 9, 2012 injury. The intention of Petitioner to resolve his May 9, 2012 scar to his left forearm was made clear at the time of the original filing. This is not a situation in which Petitioner amended the Application for Adjustment of Claim to reflect a wholly different accident. Instead, Petitioner's Application was Amended when he received documentation from Respondent of the correct accident date. The application was amended to reflect the specific date of accident for which the parties had been negotiating settlement for over a year.

As such, Petitioner's claim is not barred by the statute of limitations as the Amended Application relates back to the original filing, which was well within three years of May 9, 2012.

With respect to (F.) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injury of May 9, 2012. Petitioner testified that on May 9, 2012, he sustained a burn injury to his left forearm when iron splashed onto his arm and burned through his work shirt. There was no evidence or testimony of any other injury sustained by Petitioner to his left forearm. The burn demonstrated at hearing is consistent with Petitioner's testimony and with the medical records from MedCor that described his burn injury. As such, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his May, 9, 2012 injury.

With respect to (L.) What is the nature and extent of the injury, the Arbitrator finds as follows:

The Arbitrator observed the scarring on Petitioner's left forearm. The Arbitrator observed scarring measuring approximately 2½ inches by 3/8 inch. The Arbitrator finds that Petitioner has suffered 8 weeks of disfigurement as a result of the May 9, 2012 work injury. As such, Petitioner is awarded $647.47 per week for a period of 8 weeks, as provided in Section 8(c) of the Act, because the injuries sustained caused disfigurement to the left forearm.

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

Sandra Maxwell,
Petitioner,

vs.

NO: 14 WC 23581

16IWCC0811

David Fernitz, DDS LTD.,
Respondent.

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Black finding Petitioner sustained an accidental injury arising out of and in the course of her employment on December 11, 2013. As a result, Petitioner was temporarily totally disabled from January 4, 2012 through May 4, 2014 for 15-5/7 weeks under Section 8(b) of the Illinois Workers' Compensation Act, is entitled to $45,969.97 in medical expenses and $3,821.29 in out-of-pocket expenses under Section 8(a) of the Act and is permanently partially disabled to the extent of 15% man as a whole under Section 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 December 11, 2013, whether timely notice was given to Respondent, whether a causal relationship exists between the alleged December 11, 2013 work accident and Petitioner's present condition of ill-being, and if so, the nature and extent of Petitioner's permanent disability. The Commission, after reviewing the entire record, reverses the Arbitrator's findings and holds Petitioner failed to prove she sustained an accidental injury arising out of and in the course of her employment on December 11, 2013. Petitioner further failed to prove a causal relationship exists between the alleged December 11, 2013 work accident and Petitioner's present condition of ill-being and failed to timely notify Respondent of the alleged December 11, 2013 work accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner initially filed an Application for Adjustment of Claim in which she noted that her date of accident was May 10, 2013. On November 25, 2015, approximately three weeks prior to the December 16, 2015 Arbitration hearing, Petitioner filed an amended Application for Adjustment of Claim in which she claimed a December 11, 2013 date of accident.

2. Petitioner, a 56 year old dental hygienist, testified she is currently employed by Respondent and has been employed there for 20 years. As a dental hygienist, her job duties include setting up the room, bringing patients in, taking x-rays, cleaning teeth and notifying her boss when she is done so that he can check the patients. As of 2013, she had held this position for 18 years. On average, she saw between 6-8 patients on weekdays and 5 patients on Saturday. She worked 4 week days and Saturdays. She agreed that during the weekday she worked 8 hours with a one hour lunch. She would clean the teeth by removing tartar and plaque from the teeth, check for decay and polish and shine the teeth. The process of cleaning teeth would take between 40-60 minutes. She agreed that all 60 minutes of the hour were not devoted to cleaning teeth. There were two hours a day that she was not cleaning teeth.

3. Petitioner testified that there are a total of 5 stations. They are all set up the same way. The patient's chair is adjustable and it reclines through the use of a foot pedal. She was also seated in a chair which was adjustable and is on wheels. While cleaning teeth, the patient is laying down at a height a little above her knees. She is turned toward them. The patient's body and mouth are just slightly higher than her knees which she estimated to be approximately six inches above her knees. She can make adjustments during the course of the cleaning and sometimes she raises the chair up or down. Her hands and arms are usually up and out and are slightly forward and extended so she can manipulate the instruments and clean all four corners of the patient's mouth. She is ambidextrous. She holds the mirror with her left hand and the instruments with her right hand. Starting in 2011, they had new headphones the patients listen to while in the chair. These prevented the patients from turning their head as far toward her and she might need. This caused her to have to lean forward and extend her arms more completely in order to perform the cleaning on a lot of the patients. She agrees that she was taught to use her fingers and anchors when working on patients and cleaning their teeth. She rested her finger or part of her hand on one of their other teeth or their chin.

4. Dr. Fernitz testified that Petitioner works as a dental hygienist in his office and has done so for the past 20 years. He is familiar with her job duties and he identified Respondent's RX4 as a document that lists Petitioner's job duties. He agreed that there are hour appointments set for adults and testified that there are half hour appointments set for

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children. The two dental hygienists work on both adults and children. He testified that cleaning can take anywhere from 30-50 minutes. Petitioner has been trained on the ultrasonic scaler, which cleans teeth using water. The dental hygienist and the patient make the determination if it is going to be used. Dr. Fernitz testified that dental hygienists do not have to work with their hands extended at shoulder length. When cleaning teeth their hands are below the shoulder. He agreed that if the patient's head is 6" above the seated technicians' knees and that is the angle at which they typically clean teeth. He agrees that Petitioner's arms could have been at least at a 30 degree angle away from her body.

5. In the spring of 2013, she noticed that as she began to scrape the teeth that her right shoulder began to bother her. It began to ache, was very tender and slightly painful. The aching sensation was at the top and rear of her right shoulder. During lunch, she would have to take an Advil or Aleve for the pain. She sought treatment with Chiropractor Donoghue who she had been seeing since 2003 for other conditions. She saw him for her shoulder from May 22, 2013 through the fall of 2013. The chiropractor manipulated her right scapula blade which had a tendency to tip forward. It did not offer relief.

6. The May 22, 2013 medical records show that Petitioner saw Chiropractor Donoghue that day. He noted that Petitioner's chief complaint was moderate to severe, constant shoulder pain, stiffness and weakness affecting her right shoulder. She reported that the shoulder discomfort radiated into her upper right cervical area. Chiropractor Donoghue noted that Petitioner is a dental hygienist who works on patients throughout the day. She reports her right shoulder got worse on or about May of 2010. Chiropractor Donoghue treated her and returned her to work with some restrictions.

7. On July 10, 2013 and July 17, 2013, Petitioner followed up with Chiropractor Donoghue and he noted that Petitioner has seen another doctor who gave her an orthopedic diagnosis of a right shoulder rotator cuff tear. On September 11, 2013, Petitioner again followed up with Chiropractor Donoghue and he noted that Petitioner's job is causing her right shoulder to be worse.

8. Petitioner testified that on October 16, 2013 she saw Dr. Palutsis at the Illinois Bone & Joint Institute. Prior to that, she attended a seminar Dr. Palutsis was giving on rotator cuff tears and injuries. Up until October 16, 2013, she continued to perform her job duties. During this time she noticed that her arm was weaker when she had to take the lead shield off the hook and place it on the patients. If she had to reach overhead to get something out of a cabinet, she had to use her left hand or had to get a stool. She only had to raise her arm to shoulder height before she started feeling some pain. At the time Dr. Palutsis took the x-rays, they discussed her work and the pain she was feeling. He prescribed a cortisone shot which worked for three weeks. The nurse's notes from October 16, 2013 show that Petitioner gave a history of experiencing right shoulder pain for about 9 months. Petitioner reported that the pain has been getting worse for last two

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months. She denied having any injury. It was noted that Petitioner works as a dental hygienist and her suspicion is that all the repetitive arm motion at her shoulder level is causing her to have pain. Dr. Palutsis opined that Petitioner is suffering from subacromial bursitis and from probably rotator cuff tendinitis. He ordered and injection and noted that it this did not improve her condition he would order an MRI.

9. On November 13, 2013, Petitioner follow up with Chiropractor Donoghue who noted that Petitioner reported her rotator cuff is getting worse and is causing more weakness in the shoulder girdle and that the orthopedic doctor has suggested that it be repaired.

10. On December 7, 2013, Petitioner underwent a right shoulder MRI. The radiologist indicated that the MRI showed at least a high grade partial tear of the anterior fibers of the insertion of the supraspinatus tendon. When this is combined with a moderate fluid within the subacromial bursa, an occult full-thickness tear is suspected. There is also an additional area of more proximal 50% articular surface tearing. There is medial subluxation of the biceps into interstitial tearing of the subscapularis tendon with likely at least moderate tendinosis and possibly partial tearing at the biceps tendon. This is moderate underlying subscapularis tendinosis, which is likely a SLAP tear.

11. On December, 11, 2013, Dr. Palutsis remarked that the MRI showed clear evidence for a near complete rupture of the supraspinatus tendon. There was also subluxation of the biceps tendon into the subscapularis with partial tearing of the subscapularis. Based on the MRI, he recommend arthroscopic surgery.

12. On December 17, 2013, Petitioner completed a report on injury in which she indicated the date of injury was around May 10, 2013.

13. On January 14, 2014, Petitioner underwent surgery. The post-operative diagnosis was a partial supraspinatus tendon tear, a subscapularis tendon tear and a biceps tendon tear of the right shoulder along with subacromial impingement. The surgery consisted of an arthroscopic biceps tenotomy, debridement of subscapularis partial tear and repair of supraspinatus tendon of the right shoulder along with an arthroscopic subacromial decompression.

14. On April 16, 2014, Petitioner followed up with Dr. Palutsis who noted that Petitioner is three months post-surgery. She should continue physical therapy and recheck in one month. She is ready to start back to work as a dental hygienist on May 5th.

15. Petitioner testified she was off of work from January 14, 2014 through May 6, 2014. She came back to work and worked afternoons only for the first week to ten days. After that, she returned to full duty work performing her regular job duties.

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16. On June 2, 2014, Dr. Palutsis authored a "To Whom It May Concern" letter. In the letter, he noted that Petitioner has been under his care since October 13th with right shoulder pain. She has worked as a dental hygienist for quite a long period of time and has noticed in the months or so prior to coming to see me she was experiencing an increasing pain in her shoulder with repetitive activity that she has been doing at work. She reported that she held her arm in the abducted and rotated position. As a result of these repetitive motion activities, it is his belief that the repetitive nature of her work with her arm in an abducted and rotated position with a type 2 acromion would predispose her to a tear of the rotator cuff.

17. Petitioner denied receiving any diagnosis for her right shoulder condition prior to December 11, 2013 and she said she did not have any knowledge of what condition her shoulder was in. She gave notice to Dr. Fernitz, D.D.S., after December 11, 2013. The Form 45 report of accident was completed on December 17, 2013, which was shortly after she gave verbal notice to Dr. Fernitz. She agrees it has a date of accident of May 10, 2013. She also agreed that she told her employer that the accident happened around May 10, 2013, which was the time when she first began having pain. She agreed that she received medical treatment for her right shoulder in May of 2013. However, her primary adjustments with Chiropractor Donoghue were for her neck. She does not recall that on May 22, 2013 Chiropractor Donoghue released her with restrictions. She never gave any restrictions to Dr. Fernitz. She disagrees with Chiropractor Donoghue's notation dated July 10, 2013 and July 17, 2013 which state that she had seen an orthopedic doctor who diagnosed a rotator cuff tear of the right shoulder. She further denies seeing an orthopedic doctor in July. She agrees on September 11, 2013 she told Chiropractor Donoghue that she had right shoulder pain and weakness and that her job caused it to be worse. She also agrees that she attended a seminar on rotator cuff tears before she saw Dr. Palutsis. She attended the seminar because she and Dr. Donoghue discussed where the rotator cuff was located and with that kind of pain she decided there might be something wrong with her rotator cuff.

18. Petitioner was asked whether sometime around October 9, 2013 she thought that there might be a connection between a possible rotator cuff injury and her employment and she answered that she did not know that she felt that there was direct relationship between those two subjects. She testified that she just felt that the pain she was having might very well be related to her rotator cuff. She agreed that they had just established through questions that she did have a conversation with Dr. Donoghue in which she said she noticed this pain when she was working on patients. She further agreed that the nexus in her mind was established before the October 9, 2013 seminar. She testified that the only orthopedic doctor she ever saw for her right shoulder was Dr. Palutsis. She testified that on December 11, 2013 Dr. Palutsis had not directly given her any causation opinion between her right shoulder condition and her employment. She did agree that she amended her Application for Adjustment of Claim to reflect a manifestation date of December 11, 2013. Petitioner denied that any doctor, chiropractor or orthopedic surgeon

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told her before December 11, 2013 what the diagnoses was for her shoulder. She testified that December 11th was the first time she found out she had a torn rotator cuff. Petitioner said her symptoms arose around May 10, 2013 and that is why she initially placed that date on the forms.

19. Dr. Fernitz testified that on December 13, 2013, Petitioner told him she had a tear in her right rotator cuff and that on January 7, 2014 she was scheduled for surgery. She said she was told her condition is related to the repetitive motion from her job and she was going to fill out a Workers' Compensation claim. He testified that Petitioner never provided him with any restrictions from any doctors between May 10, 2013 and December 13, 2013.

20. On May 29, 2014, a physical therapy discharge report was completed. In the report it was noted that the Petitioner stated she felt like she had improved about 70-75% since starting physical therapy. At that time, she reported that she continues to have increased tightness in her upper neck and trapeztus area after a full work week. She felt like she made good gains in range of motion and posture since starting therapy. She continues to do her exercises at home independently and will follow up with her massage therapist for maintenance on a weekly basis. Currently, she has no difficulty moving her neck 96-100% of normal. She has no problem with sleeping. She experiences mild problems with desk work after more than a 60 minute duration. She reports her pain is 2-3 out of 10 on a 10 point scale with long days at work and 0 out of 10 at rest. Her range of motion with left rotation is 70 degrees and 75 degrees with right rotation. Side bending is 32 degrees to the left and 30 degrees to the right. She has mild impairment upon 45-55 degrees of flexion and 55-65 degrees of extension. She is mildly symptomatic on the upper limb tension test. She has normal strength, segmental mobility with mild segmental mobility deficit. She is able to type on a computer at work for 10-15 minutes without pain. When she does have pain she rates it as a 8 out of 10 and when she is sleeping she rates it as 9 out of 10. She rates the pain as being 10 out of 10 when she is driving and looking out her blind spot.

21. Petitioner testified that currently she tends to protect her right arm and shoulder. They are still tender and very tired at the end of the day. She now prohibits the use of headphones for her adult patients. She protects the amount of forward motion and height she performs. She is not able to hold out a gallon of milk or a pot of water because they are too heavy. When she grabs things she brings her elbow into her side now. If she fully extends her arm, she had very little strength. She performs her home exercises once a week.

22. Dr. Palutsis was deposed on October 30, 2015. He would estimate that 50% of his surgical practice is devoted to shoulder disorders and the other 50% is devoted to knee surgery.

Petitioner reported she is a dental hygienist. In her job she was working with her arm extended at shoulder level. She reported pain related to her job activities. He does not know what precipitated the June 2, 2014 letter. He has a vague recollection that Petitioner had been talking to him about the causation of her shoulder pain and that it was related to her work activities. Whether this was from her or her attorney, he does not know. On cross examination, he agreed that none of his office visit notes addressed the issue of causation prior to the June 2, 2014 "To Whom It May Concern" letter. Petitioner thought that this was a Workers' Compensation injury and we discussed it. He told her that unfortunately this type of claim is not blatantly accepted as a Workers' Compensation claim unless there was an injury. He told Petitioner that rotator cuff tears are not accepted as a standard Workers Compensation issue due to repetitive activity. He told her that it was contributory but it is not accepted by the Workers Compensation people as a cause for rotator cuff pathology. He thought she was trying to get the letter in an effort to bolster her case that it was a Workers' Compensation injury.

Dr. Palutsis stated that given the lack of other causes, his belief is that it was the repetitive nature of her work that caused her rotator cuff tear. He did not visit her work site. He did not have a job description. He did not know if the dental chair for the patient retracted to the ground. He did not know if her job required her to perform other duties during the day. He did not know how many patients she cleans teeth for in a day. He did not review medical records from other doctors prior to authorizing the June 2, 2014 report. Having had his teeth cleaned over the years, he has a general knowledge of her job duties. Petitioner did not go into details with him as to how many times she extended or how many minutes a day that she extended. Petitioner described working with her arms up, abducted from her body in front of her and stated that is where she keeps her arms through most of the day. It was noted for the record that the doctor has his arms extended outward and at shoulder length. He opined that the nature of working at shoulder level means the rotator cuff was under tension the whole time. The objective of the rotator cuff is to help lift our arms up and hold them in position we want them to be in. So every time there is constant stress on the shoulder the tissues can fail. Barring any other reason for them to fail, that is likely to be the cause. Her bills were submitted through group insurance.He last saw her on May 14, 2014. She was doing well at that point and he expected her to fully recover.

23. Dr. Troy, a board certified sports medicine and orthopedic surgeon, was deposed on November 17, 2015. He would estimate that shoulder problems constitute 25-30% of his practice. He evaluated Petitioner on March 6, 2014. At that time, Petitioner had reported she had been a dental hygienist for 16 years. Her job consisted of cleaning teeth, performing and developing x-rays and entering information into a computer. He opined that Petitioner had some variety in her job tasks.

Petitioner reported her shoulder condition developed in the early part of May without any direct cause. He identified a Bigliani type II acromion as a moderate curving

of the acromion which puts a moderate amount of pressure on the rotator cuff. He opined that both Petitioner's age and her type II acromion were significant factors in causing rotator cuff tears.

From his personal experience with dental hygienists over the years, they work looking down at the patient with their cervical spine flexed. He did not appreciate a significant amount of shoulder motion or repetitive hand work. He testified that when dental hygienists clean teeth their arms are below their shoulder level. He agreed that the stress on the rotator cuff is markedly increased when performing repetitive functions at or above shoulder level. He noted that Petitioner's post-operative diagnosis was a supraspinatus tendon tear, partial subscapularis tendon tear, biceps tendon tear and sub-acromial impingement. He opined that these findings appear to be age appropriate. He found Petitioner's shoulder condition was lacking in causality as it relates to her work activities. He based his opinion on the lack of any type of direct trauma and the lack of any significant recording of pain to the shoulder that was given to him outside of the May 2013 report. He further found that Petitioner was not doing any type of repetitive over the shoulder activity. He held that her findings were overall consistent with her age and her type II acromion. On cross examination, he agreed that in order to sustain a rotator cuff injury, it is not required that a patient actually describe a history of a sudden, traumatic injury to the joint.

The Commission finds there is a very good analysis of what is appropriate in terms of identifying the correct manifestation date in a repetitive trauma claim found within the Durand v. Industrial Commission, 224 Ill. 2d. 53 (2014). The Commission notes that the Courts have set forth a bright line standard that a manifestation date is the date that a reasonable person would have been put on notice that his or her condition was work related and medically disabling. The Courts have further noted that the facts must be closely examined to ensure a fair result for both the faithful employee and the employer's Workers' Compensation carrier. Just as the Court rejects the date of discovery it also rejects the last day of work. There must be "fairness" and "flexibility" in weighing the many factors that can determine the manifestation date. The Courts have typically set the manifestation date on either the date the employee requires medical treatment or the date that the employee can no longer work due to their physical disability. Yet, they have also found that a formal diagnosis from a medical profession is not required. Rather, the standard is when it is plainly apparent to a reasonable person. In order to analyze the facts, the governing body needs to look at the employee's medical treatment, the severity of the injury and how the injury affects the employee's performance. In doing so, the Courts held that the fact finders will have made an objective determination of when a reasonable person would plainly recognize the injury. Id.

Taking the above into consideration, the Commission notes the following facts in this case are relevant.

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Petitioner indicates that in the spring of 2013 her right shoulder was bothering her and was aching. She treated the same with over the counter Advil and Aleve. The Commission finds that at this point that Petitioner has a very vague understanding of her condition and was using a fairly benign method of treating her condition. There is no indication yet that she has connected her condition to her work.

On May 22, 2013, Petitioner saw Chiropractor Donoghue and expressed constant pain, stiffness, weakness in her right shoulder. She reports she was working on patients when it got worse on or about May 10, 2013. Chiropractor Donoghue performed chiropractic treatment and released her with restrictions. Petitioner never brought the restrictions to her employer. Based on these facts it appears that Petitioner has a clearer understanding of her condition and she was receiving more treatment for her condition. She is also beginning to relate her condition to her work duties but it has not yet reached the level where she is unable to perform her job. Petitioner's originally Application for Adjustment of Claim contained a May 10, 2013 date of accident.

The July 10, 2013 chiropractor note indicates Petitioner had seen an orthopedic doctor who diagnosed her with a rotator cuff tear. Petitioner denies seeing an orthopedic doctor. No records from an orthopedic doctor are placed into evidence for this time period and neither party deposed the chiropractor to receive further clarification on this issue. Depending on who is believed, this is the first time that Petitioner's diagnosis is identified. At this time, Petitioner is still able to work and Petitioner is receiving the same level of care at this time.

On September 11, 2013, Chiropractor Donoghue notes Petitioner is complaining of right shoulder pain and weakness and Petitioner indicates her job is causes the shoulder pain to be worse. The Commission notes even though the severity of her condition seems to be increasing, her medical treatment is still the same and she is still able to perform her job duties.

Petitioner testified that on October 9, 2013 she attended a seminar in which Dr. Palutsis talked about rotator cuff tears. Petitioner indicates she is beginning to think about what is wrong and she and the chiropractor are discussing this. With the exception of the unknown orthopedic doctor diagnosis a rotator cuff tear, Petitioner does not yet have a formal medical diagnosis. The Commission finds that the nexus is definitely stronger at this time in that at this juncture Petitioner appears to more likely able to understand her condition and its relationship to work.

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On October 16, 2013, Petitioner sees Dr. Palutsis at which time she identifies her profession and states she has her "suspicion" that the repetitive motion from her job is causing her condition. Here the Commission finds the issue is whether Petitioner's "suspicion" is strong enough to link Petitioner's job duties to her condition of ill-being.

On December 7, 2013, Petitioner undergoes a right shoulder MRI where a tear is clearly identified. Petitioner is given a formal diagnosis five days later on December 11, 2013 and surgery is recommended. The alleged December 11, 2013 manifestation date is contained in Petitioner's amended Application for Adjustment of Claim. Here, the Commission finds there is absolutely no doubt that Petitioner has a doctor who diagnosed her condition and related the same to her work. The Commission notes that the Courts have held that a formal diagnosis from a medical profession is not required. Rather, the standard is when it is plainly apparent to a reasonable person.

Having looked at the facts in this case and having applied the same to the standard set forth by the Court, the Commission finds that on or around October 2013 there is a definite nexus between Petitioner's job duties and her condition of ill-being. At that time, Petitioner discussed the fact that she noticed that her right arm was weaker. She was feeling more pain and she had to alter how she reached overhead to get items from cabinets. As such there is evidence that Pet.'s condition was affecting her work performance.

Most importantly the following exchange also took place during Petitioner's cross-examination:

> Question: Sometime around October 9, 2013 in your mind you thought there might be a connection between a possible rotator cuff injury and your employment?
>
> Answer: I do not know that I felt it was directly related between those two. I just felt that the pain I was having might very well be related to my rotator cuff.
>
> Question: But we have just established through questions that you did have a conversation with Dr. Donoghue saying that you noticed this pain when you were working on patients?
>
> Answer: Yes.

Question: So that nexus in your mind was established before the October 9, 2013 seminar?

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Answer: Yes.

Given the above, the Commission finds that on or around October 9, 2013 an objective determination can be made that a reasonable person would plainly recognize the injury and its relationship to work. As such, the Commission finds that the evidence demonstrates that the proper manifestation date is October 9, 2013 rather than the alleged December 11, 2013 manifestation date.

Section 6(c) of the Illinois Workers' Compensation Act requires that notice "shall" be given within 45 days of the date of accident. Petitioner testified that she gave oral notice on December 13, 2013. In this instance and using an October 9, 2013 manifestation date the end of the 45 day notice period would be on or around November 22, 2013. As such the Commission finds that Petitioner failed to prove timely notice to the Respondent. The Commission notes that the Petitioner amended her Application for Adjustment of Claim on November 25, 2015, which is two years later and on the eve of the arbitration hearing. While Petitioner is allowed to amend his or her Application for Adjustment of Claim, the amendment was filed after the evidence depositions of Drs. Palutsis and Troy had been taken on October 30, 2014 and November 17, 2015 respectively. Thus, even if the Commission were to have found defective or inaccurate notice was given, said notice taking place after the depositions resulted in an undue prejudice of Respondent who did not have the ability to put forth a defense against the most current alleged December 11, 2013 manifestation date. As such, the Commission finds Petitioner failed to timely provide notice of the alleged accident to Respondent pursuant to Section 6(c) of the Act and even if the Commission were to find timely notice had been given the timing of the amended Application of Adjustment of claim unduly prejudice Respondent.

Lastly, the Commission finds that Dr. Palutsis' expert opinions were generic at best, were provided only being requested by Petitioner and/or her attorney, were provided with some hesitancy and were provided without a clear foundational understanding of Petitioner's overall job.

More specifically, the Commission notes that Dr. Palutsis testified he did not visit Petitioner's work site; he did not have Petitioner's job description; he did not know if the patients' dental chair retracted to the ground; he did not know if Petitioner's job required her to perform other duties during the day; he did not know how many teeth cleanings Petitioner performed; he had not looked at any other doctors' reports prior to issuing his own report and he noted that Petitioner did not go into any details as to how many time she extended her arm and how many minutes a day that she did so. All of these answers lead to the fact that Dr.

Palutsis did not have a clear foundational understanding of Petitioner's overall job. Instead, of having a specific understanding of what Petitioner did for a living, the doctor relied on his everyday knowledge of what he knew his dental hygienist did while he/she cleaned his teeth. During direct examination, Dr. Palutsis indicated twice that Petitioner was working at shoulder level. It is not until later on during his deposition that he indicates that anyone lifting his/her arms between 30 and 120 degrees is sufficiently engaging his/her rotator cuff. He further indicates that he did not provide a causation opinion until Petitioner and/or her attorney asked for one. He did indicate to the Petitioner that as a general rule of thumb that the Workers' Compensation community does not accept this type of injury from repetitive traumas and at best he is basis his opinion on a "but for" understanding that unless some other type of trauma can be given he believed her condition was related to work. Overall, the Commission finds that the doctor's opinion is weak and does not rise to the level of medical certainty needed to support causation. As such, the Commission places very little weight on his opinion.

Upon reviewing Dr. Troy's causation opinion, the Commission finds that there are some valid points that clearly substantiate his causation opinion.

As with other documentation, Petitioner initially provided a history of a May manifestation date without any direct cause. He noted that there is some variety in Petitioner's job duties and they are not limited strictly to cleaning teeth. He further observed that dental hygienists worked with their arms below their shoulder level, which is contrary to the normal over the shoulder activity that one sees with this type of condition. Furthermore, Petitioner's age and her type of tear lend itself to being more idiopathic in nature. Given all of the above, the Commission places more weight on Dr. Troy's causation opinion than on Dr. Palutsis' causation opinion.

IT IS THEREFORE OREDERED BY THE COMMISSION that since Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment on December 11, 2013, her claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that since Petitioner failed to prove a causal relationship between the alleged December 11, 2013 accident and Petitioner's condition of ill-being, her claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that since Petitioner failed to provide timely notice under Section 6 (c) of the Act, Petitioner's claim for compensation is hereby denied.

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The party commending 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: DEC 16 2016

Mario Basurto

Stephen Mathis

David L. Gore

MB/jm

O: 10/27/16

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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

Arthur Gwayne Williams,
Petitioner,
vs.

NO: 14WC 26561

Southern Illinois University Carbondale,
Respondent,

16IWCC0778

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 issue(s) 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December, 15, 2015, 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.

DATED: DEC 2 - 2016
MJB/bm
o-11/29/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

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

WILLIAMS, ARTHUR GWAYNE
Employee/Petitioner

Case# **14WC026561**

SOUTHERN ILLINOIS UNIVERSITY-CARBONDALE
Employer/Respondent

16IWCC0778

On 12/15/2015, 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 0.58% 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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TIM DENNY
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ANNA, IL 62906

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CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
301 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

DEC 15 2015

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

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)

Arthur Gwayne Williams
Employee/Petitioner

v.

Southern Illinois University-Carbondale
Employer/Respondent

Case # **14** WC **26561**

Consolidated cases: **N/A**

16IWCC0778

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, IL**, 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, **July 29, 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 **$12,543.70**; the average weekly wage was **$1,140.34**.

On the date of accident, Petitioner was **25** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of **$18,335.07** 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 Petitioner temporary total disability benefits of $760.22/week for 44 weeks, commencing 7/30/14 through 11/11/14 (15 1/7 weeks), 1/13/15 through 2/21/15 (5 6/7 weeks), 4/3/15 through 4/26/15 (3 4/7 weeks), and from 7/6/15 through 11/17/15 (19 3/7 weeks), as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 7/29/14 through 11/17/15, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $18,335.07 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of $27,230.60, as set forth in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a 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 Section 8(j) of the Act.
Respondent shall authorize and pay for prospective medical treatment, including the surgery recommended by Dr. Gornet, to the providers pursuant to §§ 8(a) and 8.2 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.

Michael K. Nowak, Arbitrator

12/7/15
Date

ICArbDec19(b)

DEC 15 2015

FINDINGS OF FACT

Petitioner injured his lumbar and thoracic spine in an undisputed accident on 7/29/14. Petitioner is a union iron worker who works out of Union Local 782 in Paducah Kentucky. His work as an iron worker consists of structural steel, reinforcing welds, and performing other construction as a laborer. Prior to the date of accident Petitioner had worked for respondent off and on for approximately three years. Every six months they rotate workers in and out. On 7/29/14 Petitioner and a co-worker were reinforcing a roof. In doing so they were attempting to weld a piece of angle iron which was 120 inches long, 4 inches wide, by 6 inches toe down and 3/8 of an inch thick. It was estimated to weigh approximately 150 pounds. They were working over head with the angle iron wedged in place using a block of wood. The block of wood came loose and Petitioner caught the steel over his head to keep it from coming down on top of him. He experienced an immediate onset of pain. The accident was witnessed by his co-worker Scott Rheaume and was reported to his supervisor.

On the day of the accident Petitioner began treating at the Rea Clinic. He was taken off work and referred to Dr. Gornet on 8/1/14. Petitioner was examined by Dr. Gornet on 9/5/14. Dr. Gornet noted that the x-rays showed old fractures at L2 and L4 and a loss of disc height at L5-S1. Dr. Gornet recommended six weeks of physical therapy's with MRI of the thoracic and lumbar spine. Dr. Gornet noted that Petitioners current symptoms were causally related to the described work injury. The Petitioner was placed on a 20 pound lifting restriction. Petitioner's unrefuted testimony indicated that there is no light duty for iron workers.

On 10/1/14, Petitioner presented to NovaCare Rehabilitation for physical therapy. Petitioner did not complete any additional physical therapy at this time. Although Petitioner remained temporarily and totally disabled, TTD benefits were terminated on 11/11/14 due to failure to cooperate with medical treatment. On 1/13/15 Petitioner returned to NovaCare Rehabilitation for physical therapy. TTD benefits were reinstated on that date.

On 1/22/15 Petitioner underwent MRIs of his thoracic and lumbar spine. The thoracic MRI was read as normal. The lumbar study showed L5-S1 broad-based disc herniation approaching the right and left traversing S1 nerve roots and mild recess stenosis and mild broad-based disc protrusion without significant spinal canal compromise or foraminal encroachment at L3-4 and L4-5.

Also on 1/22/15 Petitioner returned to Dr. Gornet. Dr. Gornet reviewed Petitioner's MRIs and noted he believed Petitioner had a central disc herniation/annular tear at L5-S1. Dr. Gornet indicated Petitioner's thoracic MRI did not reveal any significant posterior disc herniation, but there may be an indication of an acute disc herniation at T10-11. Dr. Gornet recommended conservative care. Dr. Gornet prescribed physical therapy and exercise with conditioning three times a week for six weeks and referred Petitioner to Dr. Boutwell for injections at T10-11 and L5-S1. (PX4). Petitioner was to continue the light duty restrictions previously given. (PX4).

On 1/28/15 Petitioner underwent an epidural steroid injection at T10-11 by Dr. Boutwell. On 2/9/15 Petitioner underwent an epidural steroid injection at L5-S1 by Dr. Boutwell. (PX4).

Between 1/27/15 and 2/25/15, Petitioner attended physical therapy at NovaCare Rehabilitation for a total of seven appointments and cancelled/no-showed for five appointments. Petitioner was discharged from physical therapy at NovaCare Rehabilitation for non-compliance on February 26, 2015. Benefits were again terminated

on 2/21/15 for failure to attend therapy. Petitioner testified that during this period his grandfather had passed away and he was required to go out of state to help his grandmother tend to her affairs

On 4/3/15 Petitioner followed up with Dr. Gornet. Petitioner indicated that the thoracic injection helped his mid back pain, but that he was still experiencing lower back pain. Dr. Gornet noted he wanted to exhaust all possibilities "and even give him a trial of return to work full duty with no restrictions" before considering additional testing or surgery. (PX4, p. 16) Dr. Gornet told Petitioner to increase his weight lifting at the gym and returned him to work full duty with no restrictions as of 4/27/15. Dr. Gornet cautioned that Petitioner was not at MMI and still may require surgery to adequately treat his problem. Petitioner was to return in two months.

Petitioner returned to work as instructed and contacted Dr. Gornet on multiple occasions in early May complaining of increased symptoms with work.

On 5/19/15 Petitioner underwent a §12 examination with Dr. David Robson. Dr. Robson assessed Petitioner with a thoracic and lumbar strain, chronic compression fractures at L2 and L4, and pre-existing diffuse disc bulging at L5-S1. Dr. Robson opined that Petitioner's thoracic and lumbar strains were related to the 7/29/14 work injury. However, Petitioner's continued complaints were not related to the work injury, but rather to his underlying disc bulge at L5-S1 and compression fractures at L2 and L4. Dr. Robson opined Petitioner was at MMI with regard to the 7/29/14 work injury, no additional medical treatment was needed, and Petitioner could return to work full duty.

On 7/6/15, Petitioner returned to Dr. Gornet. Petitioner indicated since his return to work, he had several jobs, including one which required him to load, carry, and restrain rebar. Petitioner indicated that the repetitive bending and lifting made him miserable. (PX4). Dr. Gornet noted he did not believe Petitioner had a new injury. Dr. Gornet recommended a discogram at L4-5 and L5-S1. Dr. Gornet also recommended an anterior L5-S1 fusion.

On 8/18/15, Petitioner underwent a discogram at L4-5 and L5-S1 which revealed a non-provocative disc at L4-5 and a provocative disc at L5-S1 with annular tear.

On 9/10/15, Dr. Robson authored an addendum to his report in which he opined that should Petitioner undergo surgery at L5-S1, the surgery would be due to his long standing problems of his lumbar spine and not related to his 7/29/1414 work injury.

At Arbitration Petitioner testified regarding a motorcycle accident in which he suffered the fractured vertebrae after hitting a deer. The Arbitrator notes that this history was provided to Petitioner's medical providers as well as Dr. Robson. The Arbitrator also notes that during his testimony Petitioner became confused and misstated the year of his motorcycle accident as 2008. The record is clear however that Petitioner was involved in only one motorcycle accident and on cross examination he indicated that the correct year was 2011. Petitioner testified that from the time his treatment for the motorcycle accident concluded he had no further problems with his low back until the accident of 7/29/14. The Arbitrator found Petitioner's testimony in this regard forthright and credible. It is clear that following treatment for the earlier Petitioner was able to and did, in fact return to the heavy manual labor of an iron worker. Respondent called Jenny Batson to testify at Arbitration. Ms. Batson is employed at SIU/Carbondale as the Workers' Compensation and Disability Coordinator. She testified that Petitioner worked under extra help contracts at SIU in 2011, 2012, and 2013. She

verified that there was no indication in her records that Petitioner was unable to perform his job as an iron worker from a physical standpoint prior to this accident.

On the day of hearing Petitioner was still symptomatic. He was still suffering with tingling in his feet and sharp pain in his lower back. Petitioner wishes to proceed with surgery.

Dr. Gornet testified by deposition in this matter. It was his opinion that the Petitioner's current condition and the need for surgery are casually connected to the work related injury. With regard to Petitioner's pre-existing condition, Dr. Gornet indicated that prior to the 7/29/14 work injury Petitioner was working full duty as an iron worker and had been for many years after his recovery from his spinal fractures. He noted that Petitioner's previous state of well-being in his spine was one of good health, full function, and labor. It was Dr. Gornet's opinion that although Petitioner had a pre-existing condition of some disc degeneration, at the time of the accident, when he had this applied mechanical load he injured the disc in his mid-back and the disc in his low back tearing it, making it more painful, and causing his requirement for treatment.

Dr. David Robson also testified by deposition in this matter. Dr. Robson diagnosed Petitioner with a thoracic and lumbar strain as a result of the accident. Dr. Robson agreed that the MRI from 1/22/15 showed an annular tear. Dr. Robson agreed that the proposed surgery is a reasonable treatment. However, Dr. Robson believes that the need for the surgery is attributable to the chronic problems that occurred in the motorcycle accident. Dr. Robson indicated that he would have placed Petitioner at MMI at the time he saw with respect to the injuries sustained in the work accident. Dr. Robson admitted that none of the records he reviewed showed Petitioner still had pain from the 2011 accident in the weeks or months prior to the July 2014 work accident. Although Dr. Robson did not initially understand the logic behind the thoracic injection he conceded that if it was inflamed or exacerbated the injection may have been appropriate thing to do and he cannot argue with the logic.

CONCLUSIONS OF LAW

Respondent does not dispute the Petitioner suffered an accident that occurred in the course and scope of his employment on 7/29/14. The essence of the dispute in this case is whether the Petitioner had reached a point of maximum medical improvement from the work accident as of 4/26/15, or whether his condition of ill being continues to be related to the work accident.

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

It is undisputed that Petitioner was working full unrestricted duty as a union iron worker on the date of accident. Petitioner credibly testified that he had been working full duty as an iron worker for approximately three years prior to this accident. There is no evidence in the record to refute Petitioner's testimony in this regard. Respondent's witness confirmed that Petitioner had worked for Respondent during parts of 2011, 2012, and 2013. She also testified that at no time was Petitioner unable to perform full duty work as an iron worker. Both Dr. Gornet and Dr. Robson agree that the Petitioner has an annular tear at the L4-5 level and that surgical intervention is reasonable and necessary. Dr. Gornet indicated that the need for the surgery is causally related to the work injury. Dr. Robson believes the condition is related to the prior 2011 motorcycle accident and not the current work injury. The Arbitrator finds the testimony and opinions of Dr. Gornet more persuasive.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met his burden of establishing that Petitioner's current condition of ill being is causally related to the 7/29/14 work accident.

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?

Petitioner submitted medical bills totaling $27,230.60. (PX6) Dr. Robson essentially agreed with the medical treatment that had been rendered to the Petitioner up until the time of his evaluation and did not dispute the reasonableness and necessity of any of the treatment performed by Dr. Gornet. Both Dr. Gornet and Dr. Robson agreed that anterior lumbar interbody fusion at L5-S1 is reasonable and necessary for Petitioner. Dr. Robson's sole contention was that the condition necessitating the surgery is not casually related to the work accident. Based upon the foregoing and the record taken as a whole, and having found Petitioner's current condition is related to the accident of 7/29/14, the Arbitrator finds that both the medical treatment up to the date of hearing and the prospective treatment recommended by Dr. Gornet are reasonable and necessary.

Respondent shall pay reasonable and necessary medical services of $27,230.60, as set forth in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a 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 Section 8(j) of the Act.

Further, Respondent shall authorize and pay for the treatment recommended by Dr. Gornet pursuant to Sections 8(a) and 8.2 of the Act.

Issue (L): What temporary benefits are in dispute?

The Petitioner was temporarily and totally disabled from 7/30/14 through 4/26/15 when he was released to return to work for a trial period by Dr. Gornet. The Petitioner has again been temporarily and totally disabled from 7/16/15, when Dr. Gornet again took Petitioner off of work, through the date of hearing.

Respondent paid TTD from 7/30/14 through 11/11/14 at which point benefits were terminated due to Petitioners failure to attend physical therapy. Respondent resumed temporary total disability payments from 1/13/15 through 2/21/15 at which time benefits were again terminated due to Petitioners failure to attend physical therapy. On 4/3/15 Petitioner returned to Dr. Gornet who rescinded his recommendation for physical therapy and began transitioning Petitioner toward a trial return to work. Although Petitioner remained temporarily and totally disabled during this entire period, he is not entitled to benefits for the periods he did not comply with the medical treatment, specifically attend physical therapy, ordered by his own physician.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner is entitled to temporary total disability benefits of $760.22 per week from 7/30/14 through 11/11/14 (15 1/7 weeks), 1/13/15 through 2/21/15 (5 6/7 weeks), 4/3/15 through 4/26/15 (3 4/7 weeks), and from 7/6/15 through 11/17/15 (19 3/7 weeks) for a total of 44 weeks. Respondent shall be given a credit of $18,335.07 for benefits previously paid.

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

JAVIER MORENO,

Petitioner,

16IWCC0830

vs.

NO: 14 WC 32681

NOT JUST GRASS, 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, medical expenses, prospective medical, and penalties, 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

Petitioner worked as a general laborer for Respondent for approximately one month before September 5, 2014. (T, pp. 18, 77) The company provides services including mowing, different types of construction on hard job(s), and landscaping. (T, p. 18) The Petitioner was sometimes required to lift heavy material including rocks, stones, machines, and trees. (T, p. 19)

Petitioner was seen on August 30, 2014 at 3:59 a.m. at Provena Mercy Medical Center for emergency treatment after he was assaulted at a bar. He arrived at the bar at 10:00 or 11:00 p.m. (T, p. 97) At Provena, he reported that he was struck with a bottle behind his right ear. He had a three centimeter laceration to his left inner cheek, swelling to the left side of his face and pain to his face and mouth with scattered abrasions to his right elbow. Petitioner's blood alcohol level was measured as .21. He was treated and discharged at 9:18 a.m. (Px25) Petitioner testified that there were "two guys and a girl" together at the bar when one of the men

16IWCC0830

approached him to buy drugs. When he refused, the "other guy" hit him in the head with a beer bottle and stole his necklace. They kicked him in the head while he was on the ground. (T, pp. 100-101) He was scheduled off-work following this incident for the week-end, then scheduled off-work for the Labor Day holiday on Monday, September 1, 2014. He requested time off-work for two days thereafter, through September 3, 2014. He returned to work on Thursday, September 4, 2014. (T, pp. 105-108) When he returned to work on Thursday, he was mowing lawns. On Friday, September 5, 2014 Petitioner was using the weed whacker, the blower and a small machine mowing the back of the house. (T, pp. 108-110)

On September 5, 2014, Petitioner was working with Emanuel and Lupe. (T, pp. 24, 25) Petitioner's two co-workers left to cut grass at other houses and Petitioner finished his part. He then went to the trailer where they had all the tools and he was getting machines ready by filling them up with gas. There was a gas can that was six liters, about thirty pounds heavy. (T, p. 25) Petitioner bent over, reached with his right hand and when his body got tense, he heard his back pop. (T, p. 25) Petitioner testified "when I grabbed the can, and I was ready to lift them up but when I bent over like down is when I hear the pop in my back." (T, p. 28)

Petitioner's assertion that the gas can was six liters is incongruous with his assertion that the gas can was thirty pounds heavy. Regardless, the weight of the can is not relevant because the Petitioner repeatedly testified that the pop in his back occurred when he "bent over."

Petitioner's testimony is consistent with the history he provided to Dr. Matthew Ross at the Section 12 evaluation which took place at Respondent's request. Dr. Ross noted that "There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can." (Rx3, p.3)

The act of bending over or bending forward is a movement consistent with normal daily activity and by itself is not an activity associated with a risk of employment.

The Appellate Court has categorized the risks to which an employee may be exposed as: "(1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics." *Metropolitan*, 407 Ill.App. 3d at 1014, 944 N.E.2d at 804. As indicated by the relevant case authority, employment-related risks are compensable while personal risks typically are not. Further, "[i]njuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Id.* "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." quoting Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 797 N.E. 2d 665 (2003). See Noonan v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152300WC.

In Noonan, Petitioner alleged he hurt his right wrist when he leaned over in a rolling chair and fell while trying to retrieve a pen off the floor. He ultimately sought and received medical treatment, including surgery, for an injury to his right wrist. Petitioner's attorney relied

upon four cases to argue that Petitioner's injury was a result of an employment-related risk, each factually distinguished by the Court. Among the cases were Young v. Il Workers' Compensation Comm'n, 13 N.E.3d 1252, 383 Ill.Dec. 131 (4th Dist. 2014) and Autumn Accolade v. Illinois Workers' Comm'n, 990 N.E.2d 901 (2013), 2013 IL App (3d) 120588WC. In Young, the Petitioner reached into a box at work and aggravated his degenerative shoulder. In Autumn Accolade, the Petitioner reached for the soap dish while assisting a showering patient and aggravated her degenerative cervical condition.

The Court in Noonan held that the claimant's action of bending over or reaching while seated in his work chair, without more, was insufficient to establish a work related cause to his accidental injury. The risk of injury at issue was simply not one "distinctly associated" with claimant's employment. Noonan v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152300WC.

In a specially concurring opinion in Noonan, Presiding Justice Holdridge emphasized "a claimant may not obtain benefits for injuries caused by activities of everyday living (such as bending, reaching, or stooping), even if he was ordered or instructed to perform those activities as part of his job duties, unless the claimant's job required him to perform those activities more frequently than members of a the general public or in a manner that increased the risk." quoting from Adcock v. Illinois Workers' Compensation Comm'n, 2015 IL App (2d) 130884WC. "In other words, such injuries should be analyzed under neutral risk principles. Although both Young and Autumn Accolade involved injuries stemming from the performance of everyday activities, neither case applied a neutral risk analysis. Accordingly, I am now of the opinion that Young and Autumn Accolade were wrongly decided, and I would decline to follow them." See Adcock, 2015 IL App (2d) 130884WC. Noonan v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152300WC, ¶ 41.

The Commission finds that the Arbitrator properly applied the neutral risk analysis and found the evidence to establish accident deficient under either the qualitative or quantitative analysis. The Commission finds no reason to otherwise disturb the findings and Conclusions of the Arbitrator's Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 22, 2016 is hereby modified for the reasons stated herein, and otherwise 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.

16IWCC0830

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: DEC 22 2016
KLW/bsd
O: 11/01/16
42

Kevin Lamborn

Michael Brennan

Thomas J. Tyrrell

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

16IWCC0830

MORENO, JAVIER
Employee/Petitioner

Case# **14WC032681**

15WC010078

NOT JUST GRASS INC
Employer/Respondent

On 2/22/2016, 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 0.41% 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:

1922 STEVEN B SALK & ASSOC LTD
DAMIAN R FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

0445 RODDY LAW LTD
JOHN MAGIERA
303 W MADISON ST SUITE 1900
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ 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)

16IWCC0830

Javier Moreno
Employee/Petitioner

Case # 14 WC 32681

v.

Consolidated cases: 15 WC 10078

Not Just Grass, Inc.
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 **Brian Cronin**, Arbitrator of the Commission, in the cities of **Wheaton and Geneva**, on **6/29/15 and 7/10/15**. 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, **9/5/14**, 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.

In the year preceding the injury, Petitioner earned **$31,200.00**; the average weekly wage was **$600.00**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **3** dependent children.

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.

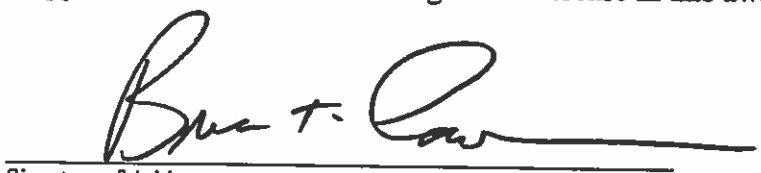
ORDER

As Petitioner failed to prove the issue of accident, the Arbitrator hereby denies benefits. All other issues are rendered moot.

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

February 22, 2016
Date

ICArbDec19(b)

FEB 2 2 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

Javier Moreno

16IWCC0830

v.

Case # 14 WC 32681
Consolidated with 15 WC 10078

Not Just Grass, Inc.

FINDINGS OF FACT:

On August 25, 2014, Petitioner worked as a general laborer for Respondent, which is a landscaping company. Petitioner testified on cross-examination that he began working for Respondent early that same month. Petitioner testified that when he started working for Respondent, he was not having any problems with his body and that he was "completely fine to work." Petitioner acknowledged that he had a prior right shoulder injury.

Petitioner's job duties for Respondent included lifting rocks, stones, heavy machines and trees, as well as mowing lawns and trimming trees. His work hours were from 7:00 a.m. to 5:30 p.m. Sometimes he worked until 6:00 p.m.

Petitioner testified that on the morning of August 25, 2014, he and his supervisor, Zak, lifted and moved 5 flagstones from one pallet to another pallet and that each flagstone weighed approximately 150 pounds. After Zak left the scene, Petitioner testified, he started feeling "a low pain in [his] back like real light in [his] lower back."

Petitioner did not seek medical care for any lower back complaints at that time. Petitioner testified that he did not think it was an emergency and did not think he needed to see a doctor. Petitioner testified that he thought the pain would go away.

Petitioner testified that on September 5, 2014, he first reported this accident

Petitioner worked the remainder of the day on August 25, 2014, and subsequently worked on August 26, 27, 28 and 29, 2014. During that time, Petitioner made no complaints of back pain to Zak or any co-workers.

Early Saturday morning on August 30, 2014, Petitioner was involved in a physical altercation/assault in a bar in Aurora, Illinois. Petitioner testified that he

was hit in the head with a glass beer bottle, knocked out for a brief period of time, and kicked in the head by unknown assailants. Petitioner was robbed of a gold chain and pendant at that time.

Immediately following the physical altercation/assault, Petitioner walked home. His wife called the police, and then Petitioner and the police officer completed a report.

Respondent introduced into evidence the records of the Aurora Police Department relative to that incident, which was reported at 3:10 a.m. and took place at the "North End Tap." (Rx.2) The police officer characterized the type of injury sustained as "minor" and consisting of "abrasions/scratches" to Petitioner's head and right forearm. (Rx.2)

Petitioner was taken by ambulance to the Emergency Room at Presence Mercy Medical Center. Petitioner presented to the ER at 3:59 a.m. The following letters were written above the signature line on the "Consent to and Conditions for Treatment" form: "*PT ETOH.*" Petitioner's blood alcohol level was found to be at .21. (Px. 25)

Leilani LaBianco, M.D., examined Petitioner and performed a review of systems. Although Petitioner complained of head pain and right arm abrasions, he did not voice any complaints of lumbar pain, hip pain, leg pain or groin/testicle pain. The medical records further indicate that Petitioner had not experienced a loss of consciousness. (Px. 25)

The long weekend of August 30 - September 1, 2014 was Labor Day Weekend and Petitioner was not scheduled to work on these days. After informing "Greg" of the altercation, Petitioner took off 2 workdays (September 2nd and 3rd) and did not return to work for Respondent until the morning of September 4, 2014. Petitioner denied that he performed lighter-duty work on September 4th, and stated that he mowed lawns and used the weed whacker and blower that day.

Petitioner testified that on September 5, 2014, he worked for Respondent. While he was standing on the ground, Petitioner bent over, grabbed a 30-pound, 6-liter gas can with his right hand but "never lift[ed] the can" when he felt his back "pop." Petitioner testified that he did not feel pain immediately when he bent over. He testified that after he grabbed the can and was ready to lift it up, his body got tight and he heard a pop in his back. He experienced pain in his low back, could not move and was stuck in that position for approximately 15 minutes.

Petitioner testified that on September 5, 2014, he gave notice to "Greg" at the company of his August 25, 2014 and September 5, 2014 accidents. Petitioner further testified that when he saw Greg, "Zak and the other workers" were around them, and he told Greg that two weeks earlier on August 25th when he and Zak were

lifting stones he felt light pain in his back and also told Greg what had happened that morning when he bent over to try to lift the gas can.

Petitioner's Counsel called Gregory Voirin, owner of Respondent, as an adverse witness. Mr. Voirin testified that Petitioner began working for him in either late July or early August 2014 as a laborer/landscaper. Mr. Voirin acknowledged that Petitioner worked for him on August 25, 2014, but that Petitioner did not advise him of an August 25, 2014 work accident. Mr. Voirin acknowledged that Petitioner did advise him on September 5, 2014 of an accident that took place on September 5, 2014 (the subject of the Decision for case #14 WC 32681), but did not advise him of an accident that took place on August 25, 2014.

Mr. Voirin testified that if one of his employees moves the gas can from the trailer to the ground, he would have to pick it up to get gas to put in the trimmer or whatever equipment he was using.

Mr. Voirin testified that in the earlier part of the day on September 5, 2014, Zak called him and told him that Petitioner had an incident and hurt his back. Mr. Voirin testified that in that conversation with Zak, an August 25th incident never came up. Mr. Voirin testified that later that same day, at approximately 5:30 p.m., Petitioner personally reported the September 5th incident to him. Zak, Lupe and Emmanuel were in the vicinity at the time - "maybe within earshot" - but it was Petitioner who was telling him the story.

Mr. Voirin further testified that it was not until the actual trial date of June 29, 2015, when he spoke with Respondent's Counsel, that he first became aware of Petitioner's allegations with respect to an alleged accident of August 25, 2014.

Petitioner testified that prior to September 5th, he never felt pain going down his back and into his left testicle.

During his September 5, 2014 conversation with Mr. Voirin, Petitioner testified, he requested that Voirin help him and maybe take him to the hospital. Mr. Voirin paid Petitioner, said nothing, took his truck and left the premises. One-half hour later, Zak phoned Petitioner and told him that Greg did not want him to show up for work the next day.

On Monday, September 8, 2014, Petitioner and Greg Voirin had a text message conversation. Petitioner told Mr. Voirin that he feels terrible, even with the medication, and that he is going to see the doctor that and will text Voirin to let him know what he or she said. Mr. Voirin told Petitioner that he needed for him to get better and to be completely healed before he would allow Petitioner to return to work. Mr. Voirin also stated that he was not going to pay Petitioner until he is healthy and back working. Later that day, Mr. Voirin texted the following: "Javier. If you start the claim I can't have you work because you may get more hurt." (Px.23)

Petitioner sought treatment that day at Rush-Copley Medical Center for left-sided back pain that radiated to the left groin. Petitioner told the medical staff there that his symptoms started 2 days ago when he was trying to pick up a gas can. He was initially diagnosed with an acute lumbar strain and instructed to remain off work the rest of the day. (Px.1)

On September 23, 2014, Petitioner presented to Samir Sharma, M.D., who is a board-certified anesthesiologist associated Illinois Orthopedic Network. (Px.2) The HISTORY/INDICATIONS section of Dr. Sharma's INITIAL CONSULTATION NOTE includes the following:

"This is a 32-year-old gentleman who sustained a work-related injury on 09/05/2014 while he was employed as a landscaper. He was doing a job including repetitive bending, twisting, moving locks (sic) that were over 100 pounds in weight, when he felt a slight strain which was aggravated when the patient was bending to lift a gas can to fill a lawnmower. The patient states at that time he bent forward and felt a strain in his left low back and aggravated it as he was going to a standing position. The patient states that happened around 10:30 a.m. on 09/05/2014, and it was reported to his supervisor at approximately 11:30 a.m. . . . " (Px.2)

In the CHIEF COMPLAINT section of the handwritten 9/23/14 HISTORY FORM, the medical professional wrote: "Pt works in landscaping. Pt bent over to pick up gas can. Pt states he couldn't get upright no more. Pt had a sudden sharp pain in low back. Pt states a week before accident Pt lifted a heavy rock but didn't think nothing of it + cont. working." (Px.2)

Dr. Sharma prescribed medication and physical therapy, and took Petitioner off work at that time. Later, he administered 2 injections to Petitioner's low back. (Px.2) Petitioner participated in a physical therapy program at Nuestra Clinica de Aurora. (Px.3) Petitioner then began treating with orthopedic surgeon Geoffrey R. Dixon, M.D., who has recommended surgery. (Px.2)

Petitioner underwent his first session of physical therapy at Nuestra Clinica de Aurora on September 24, 2014. (Px. 3) Dr. Sharma reviewed the MRI on October 21, 2014 and noted a left lateral L4-5 disk herniation contributing to moderate lateral recess and foraminal stenosis. (Px.2) Post-MRI, Dr. Sharma ordered 4 more weeks of physical therapy and advised Petitioner he could return to work with restrictions. As of December 2, 2014 Dr. Sharma opined that Petitioner symptoms were secondary to the work-related injury on September 5, 2014. (Px.2)

On January 29, 2015, at the request of Respondent and pursuant to Section 12 of the Act, Petitioner presented to neurosurgeon Matthew J. Ross, M.D., for an examination. (Rx.3) After taking a history, conducting a physical examination, viewing a CD containing an MRI of Petitioner's lumbar spine and reviewing the

treatment records that were forwarded to him, Dr. Ross offered his IMPRESSION, which includes the following:

"Mr. Moreno has low back and left sciatic pain following his work incident on September 5, 2014. By history, Mr. Moreno started becoming symptomatic a week or 2 earlier with lifting heavy rocks at work. There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can. Although Mr. Moreno did not have an accident or over stress (sic) injury of his back on the date of major pain flare-up, his history of low level back pain following lifting rocks suggests that his injury actually occurred earlier. The L4-5 disk may have been initially injured lifting the rocks. The bending forward to lift the gas can may literally have been the straw that broke the camel's back. It is not uncommon to see disk herniation in evolution begin as back pain, and then erupt as sciatic pain following a trivial event. As a result, I am of the opinion that there is a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment."

After reviewing the Presence Mercy Hospital records of August 30, 2014, Dr. Ross wrote, in pertinent part, the following: "The ER physician specifically did not notice any evidence of trauma to the neck or back." (Rx.3)

Petitioner testified that when he presented to Dr. Ross for an examination, he gave Dr. Ross the same story he gave at trial about the way the accidents happened. Petitioner was sure of that.

On September 26, 2014, Petitioner filed an Application for Adjustment of Claim in which he alleged that on September 5, 2014, he sustained a serious/permanent injury to his man as a whole at work. The case was assigned case # 14 WC 32681. (Px.16)

On April 1, 2015, Petitioner filed an Application for Adjustment of Claim in which he alleged that on August 25, 2014, he sustained a back injury as a result of heavy lifting at work. The case was assigned case # 15 WC 10078. (Px.17)

The Commission file indicates that on May 20, 2015, Petitioner filed a Petition for an Immediate Hearing Under Section 19(b) of the Act against Respondent for case numbers 14 WC 32681 and 15 WC 10078 and set it on Arbitrator Cronin's June 18, 2015 status call in Wheaton. The Arbitrator notes that in his 19(b) Petition for case number 15 WC 10078, Petitioner claims that on August 25, 2014, as a result of heavy lifting while working for Respondent, he sustained a disc herniation at L4-5, nerve root compression and disc protrusion at L5-S1. At the June 18, 2015 status call, the parties agreed on a trial date of June 29, 2015.

Aside from his attempts to return to work for Respondent, Petitioner acknowledged on cross-examination that he never sought work with another employer.

CONCLUSIONS OF LAW:

In support of his decision with regard to issue (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator concludes as follows:

Petitioner testified that on September 5, 2014, he worked for Respondent. While he was standing on the ground, Petitioner bent over, grabbed a 30-pound, 6-liter gas can with his right hand but "never lift[ed] the can" when he felt his back "pop." Petitioner testified that he did not feel pain immediately when he bent over. He testified that after he grabbed the can and was ready to lift it up, his body got tight and he heard a pop in his back. He experienced pain in his low back, could not move and was stuck in that position for approximately 15 minutes.

As of December 2, 2014, treating physician Samir Sharma, M.D., opined that Petitioner symptoms were secondary to the work-related injury on September 5, 2014.

On January 29, 2015, after taking a history, conducting a physical examination, viewing a CD containing an MRI of Petitioner's lumbar spine and reviewing the treatment records that were forwarded to him, Matthew J. Ross, M.D., Respondent's Section 12 physician, offered his IMPRESSION, which includes the following: "There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can."

Petitioner testified on cross-examination that when he presented to Dr. Ross for his evaluation, he gave Dr. Ross the same story he gave at trial about the way the accidents happened. Petitioner was sure of that.

The Arbitrator finds the history Petitioner gave to Dr. Ross and Petitioner's testimony on cross-examination relative to that history to be most persuasive.

Therefore, the question becomes: In this case, to which category of risk does the acting of bending over or bending forward belong?

There are three categories of risk an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. Employment risks include the obvious kinds of industrial injuries and occupational

diseases and are universally compensated. Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee and injuries caused by personal enemies and are generally noncompensable. Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing and hurricanes. Compensation for neutral risks depends upon whether claimant was exposed to a risk of injury to an extent greater than that to which the general public is exposed. Illinois Institute of Technology Research Institute v. Indus. Comm'n, 731 N.E.2d 795, 247 Ill. Dec. 22 (1st Dist. 2000)

Petitioner argues that at the time of the occurrence, he was engaged in an activity he might reasonably be expected to perform incident to his assigned duties.

On direct examination, Petitioner's Counsel asked Greg Voirin the following question:

Q: I'll re-ask the question. As part of his work duties, it's reasonable to expect that one of your employees would bend over to pick up a gas can, correct?

A: If the employees put the gas can in the trailer on the ground, then they would have to pick it up to get gas to put in the trimmer or whatever equipment they're using. (Tr. 125)

In support of his position that the act of bending over or bending forward and then grabbing the gas can is a compensable accident, he cites the holding by the Appellate Court in Don Young v. Illinois Workers' Compensation Commission, 13 N.E.3d 1252, 383 Ill. Dec. 131 (4th Dist. 2014).

In Don Young, claimant was a parts inspector who was required to reach into a box that was about 36" deep and 16" by 16." The box was too narrow to fit both of his arms or shoulders into. Each part, a spring clip, weighed between 12 and 20 pounds. Claimant testified that on February 19, 2010, he was in the process of checking some parts, had removed approximately 8 such parts from the box, and was reaching for the last spring clip in the bottom of the box and as he was doing so, he felt a snap or pop in his shoulder and then a little bit of a burn. Respondent argued that the mere act of reaching down for an item did not increase claimant's risk of injury beyond what he would experience as a normal activity of daily living. However, the Court found that the evidence established that the risk to which claimant was exposed was necessary to the performance of his job duties. His action of reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment.

In the case at bar, Petitioner simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denied making any effort to actually lift the gasoline can. Petitioner may have grabbed the can with his right hand, but made no attempt to lift it. Petitioner was standing on the ground when he

bent over. There is no evidence that he was in an awkward position, in a tight space or on uneven ground when he bent over.

In Interlake, Inc. v. Indus. Comm'n, 515 N.E.2d 202, 113 Ill. Dec. 393 (1st Dist. 1987), claimant initially injured his back while working for respondent on April 19, 1982. He treated conservatively and was restricted to light-duty work for 2-3 weeks. However, claimant testified, his back pain persisted. On July 27, 1982, while working for respondent, claimant's foreman directed claimant to get a screwdriver. Claimant testified that his tool pouch was lying on the floor and that when he reached down to get a screwdriver from it, his back "snapped." Interlake contended that the act of bending over is a personal, routine activity and that the court should not consider claimant's prior work-related accident. However, the court concluded that the incident on July 27, 1982, cannot be considered in isolation. Since claimant's initial accident on April 19, 1982, appears to be a compensable, work-related injury, "the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause." 1 A. Larson, Workmen's Compensation sec. 13.11(a), at 3 - - 354 (1985).

The majority of the Interlake court found the accident to be compensable since claimant was exposed to a risk distinctly associated with the employment.

The Interlake court noted that the decisions in Greater Peoria and Board of Trustees are distinguishable in that in each of these cases the Supreme Court determined that the claimant's employment bore no relationship to the injury for which compensation was sought. Please see Greater Peoria Mass Transit District v. Indus. Comm'n, 81 Ill. 2d 38, 405 N.E.2d 796 (1980) and Board of Trustees of the University of Illinois v. Indus. Comm'n, 44 Ill. 2d 207, 254 N.E.2d 522 (1969)

The Arbitrator notes that each of the claimants in Greater Peoria and Board of Trustees possessed a personal infirmity. The Supreme Court found that bending over to pick up a bus transfer (Greater Peoria) and turning in a chair (Board of Trustees) were not risks peculiar to employment.

As to the first category of risk, the Arbitrator finds, in the case at bar, that the act of bending over or bending forward is a movement consistent with normal daily activity.

As to the second category of risk, the Arbitrator found, in consolidated case # 15 WC 10078, that Petitioner failed to prove an August 25, 2014 accidental injury to his low back and failed to prove timely notice. The Arbitrator therefore denied compensability. The Arbitrator notes that Petitioner has no past history of back pain or of radiating pain from the low back to the hip, thigh or groin/testicle.

Therefore, the Arbitrator finds that the risk of injury caused by simply bending over or bending forward is neither a risk distinctly associated with the

employment nor a risk personal to the employee. Consequently, the risk of injury here must be a neutral risk.

Whether an injury caused by a neutral risk arises out of employment is dependent upon whether claimant was exposed to a risk to a greater degree than the general public. Brady v. Louis Ruffolo & Sons Construction Co., 143 Ill. 2d 542, 161 Ill. Dec. 275, 578 N.E.2d 921 (1991)

In assessing neutral risk, one must perform both a qualitative and a quantitative analysis.

Qualitatively, there is no evidence as to type of bend that Petitioner performed on the morning of September 5, 2014. That is, there is no evidence as to whether or not he twisted his body when he bent over/bent forward, and there is no evidence as to the degrees of trunk flexion that he performed. Was it a slight, forward bend at the waist or a deep, touch-your-toes type of bend? Was the 6-liter gas can tall and narrow or short and wide?

Quantitatively, there is no evidence, specifically, as to the number of times Petitioner bent over or bent forward during the course of a typical workday for Respondent. Petitioner's job duties for Respondent included mowing lawns, trimming trees, lifting rocks, stones, heavy machines and trees, as well as using the weed whacker and operating the bobcat to "download" the flagstones from the truck.

The Arbitrator finds that Petitioner failed to prove that in bending over or bending forward, he was exposed to a risk to a greater degree than the general public. The Arbitrator finds that this act is a routine activity of daily living and therefore finds that on September 5, 2014, Petitioner did not sustain an accident that arose out of his employment. Petitioner certainly was in the course of his employment when he injured his back when bending over.

In support of his decision with regard to issues (O) "Illinois Injury Lawyers' Motion for Fees and Costs," the Arbitrator concludes as follows:

Petitioner's prior attorney, Andrew A. Edelman, presented his Motion for costs and fees (Edelman Exhibit F). Such Motion does not list the costs he is seeking to be reimbursed, the hours he expended on the file or the hourly rate. Mr. Edelman also offered, and the undersigned arbitrator admitted into evidence, Edelman Exhibits A, B, C, D and E.

Petitioner's attorney of record, Damian R. Flores of Steven B. Salk & Associates, offered, and the undersigned arbitrator admitted into evidence, the following exhibits: Salk A, B and C.

The undersigned arbitrator has denied compensation based on Petitioner's failure to prove accident. All other issues are rendered moot.

Brian T Cronin

Brian Cronin
Arbitrator

2-22-2016

Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☐ 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

Charles Bisch,
Petitioner,

vs.

NO: 14 WC 33505
14 WC 33515

Ashley Furniture,
Respondent.

16IWCC0839

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 causation and prospective medical 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

While the Arbitrator correctly assigned the proper weight regarding causation and prospective medical to the evidence, the Commission finds the need to further expound on the basis for said decision. As such, the Commission will provide an additional basis for its holding below. The Commission has reviewed the credibility of the doctors who have weighed in on this case and the foundation upon which they built their opinions prior to properly assessing the weight to be assigned to each doctor. The Commission finds as follows:

In reviewing Dr. Kube's testimony, the first thing that is readily apparent is the fact that Petitioner was examined by and received his treatment not primarily from Dr. Kube but from Physician Assistant (PA-C) Morrow who works in Dr. Kube's office. As such, Dr. Kube's observations of Petitioner appear to be once removed from an immediate face to face encounter with the Petitioner. Thus, Petitioner's attorney's claim on review that Dr. Kube should be given

16IWCC0839

more weight than the other doctors in that he saw Petitioner on multiple occasions rings untrue. Furthermore, while PA-C Morrow performed a physical examination of Petitioner, it appears that said exam was not a complete work up of Petitioner's back but was rather limited in nature in that it only focused on Petitioner's sacroiliac joint. In all, Petitioner received two sacroiliac joint injections which provided temporary relief for an hour or less with the second injection providing less relief than the first. After the second injection, PA-C Morrow indicated that he would like to have Petitioner set up to see Dr. Kube and he would like to get additional imaging/CT scans. Yet, neither of these events appear to have taken place. When Dr. Kube speaks of Petitioner's condition he states it "kinda of plays" more toward an S1 joint problem. Later on, he states it is "more likely" the SI joint. Based on these statements it appears that Dr. Kube's opinion that this is a SI joint condition is stated with less than a degree of medical certainty. This belief is further supported by Dr. Rink's, the doctor Petitioner went to for a second opinion, belief that Petitioner's response to the sacroiliac joint injections is "not the typical response". Lastly, the Commission notes that Dr. Kube has represented himself as a sacroiliac expert and he indicated that he is anxious to publish the data obtained from Petitioner. Without reading too much into this, the Commission finds that it does appear that Dr. Kube has more than a passing interest in making Petitioner's situation into a case study. Given all of the above, the Commission finds that it appears that the basis for Dr. Kube's opinion that Petitioner is a surgical fusion candidate due to his sacroiliac condition is not established to a degree of medical certainty.

In terms of Dr. Van Fleet's testimony, the primary thing that struck the Commission about Dr. Van Fleet's deposition testimony is that while he may have only seen Petitioner on one occasion, it appears he performed a more comprehensive examination of Petitioner's low back than did PA-C Morrow. Having done so, Dr. Van Fleet found that while there was pain in the general area, the pain was not in the SI joint area per se. Additionally, he found other possible sources for the pain in the form of degenerative disc disease and radiculopathy. He further indicated that he, along with Dr. Rink, felt that there should be an additional work up and/or alternative treatment that needed to be pursued. Lastly, he addressed the fact that the sacroiliac diagnosis is rare in nature and the proposed surgery is most often not undertaken due to it poor results. In the end, Dr. Van Fleet's opinion weighs against the need for the proposed surgery.

The next doctor who weighed in on the issue of whether Petitioner's is in need of additional medical care is Dr. Rink who Petitioner sought out for a second opinion. Of note, is the fact that Dr. Rink found Petitioner's outcome from the two sacroiliac injections to be "somewhat unusual" and "not the typical response" one would expect from this type of injection. Like Dr. VanFleet, Dr. Rink found some tenderness over the sacroiliac joint region, which was less than one inch from the other structures in the back. In general, given the non-typical response from the Petitioner after the sacroiliac injections, Dr. Rink was not advocating "rushing" into a fusion surgery and he felt the need to perform additional work up through both speaking with the physical therapist and performing nerve blocks. As such, Dr. Rink's current opinion also weighs against the need for the proposed surgery.

The last doctor to weigh in is Dr. Steiehl. The Commission finds that given the fact that his opinion was expressed early in the process after the first injection but prior to his obtaining

the results from the second injections, his opinion has limited value. It also has limited value in the fact that he found Petitioner had reached maximum medical improvement when the remainder of the evidence shows that this is clearly not the case. The one take away that can be gleaned from his reports is that it allowed for yet another comprehensive physical examination. Overall, the Commission finds that Dr. Steiehl's reports have limited value in determining whether or not Petitioner is a surgical candidate.

Having reviewed all of the doctors' records and/or testimony, the Commission agrees with the Arbitrator that Petitioner has failed at this time to prove that he is a candidate for a fusion of the sacroiliac joint. Having found this, the Commission further notes that both Drs. Rink and Van Fleet and even PA-C Morrow have found that there is an additional workup that needs to be had, that Petitioner has not reached maximum medical improvement and it is premature to indicate what the appropriate prospective treatment is at this junction.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 24, 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: DEC 23 2016

MB/jm

O: 11/3/16

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Mario Basurto

David L. Gore

Stephen Mathis

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

BISCH, CHARLES
Employee/Petitioner

Case# 14WC033505

14WC033515

ASHLEY FURNITURE
Employer/Respondent

16IWCC0839

On 5/24/2016, 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 0.48% 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
SEAN D OSWALD
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2871 LAW OFFICE OF STEPHEN G PILAND
MARY FLANAGAN-DEAN
1010 MARKET SUITE 1510
ST LOUIS, MO 63101

16IWCC0839

STATE OF ILLINOIS)
)SS.
COUNTY OF MC LEAN)

- ☐ 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)

Charles Bisch
Employee/Petitioner

Case # 14 WC 33505

v.

Consolidated cases: 14 WC 33515

Ashley Furniture
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 William R. Gallagher, Arbitrator of the Commission, in the city of Bloomington , on March 31, 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 ____

FINDINGS

On the date of accident, July 12, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $859.72.

On the date of accident, Petitioner was 26 years of age, single with 0 dependent child(ren).

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

Based upon the Arbitrator's Conclusions of Law attached hereto. Petitioner's petition for prospective medical treatment 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)

May 14, 2016
Date

MAY 24 2016

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment for Respondent. In case number 14 WC 33505, the Application alleged that Petitioner sustained a work-related accident on July 12, 2014, when he injured his low back while moving furniture (Petitioner's Exhibit 1). In case number 14 WC 33515, the Application alleged that Petitioner sustained a work-related accident on September 8, 2014, when he injured his low back while moving a mattress (Petitioner's Exhibit 2).

The two cases were consolidated and tried in a 19(b) proceeding in which Petitioner sought an order for prospective medical treatment, specifically, an SI joint fusion surgical procedure. Respondent stipulated that Petitioner sustained work-related accidents on both of the date alleged in the Applications and agreed that all temporary total disability benefits and medical bills incurred to date had been, or would be paid. However, Respondent disputed liability for the prospective medical treatment being sought by Petitioner on the basis of causal relationship and whether the surgical procedure being sought was medically reasonable and necessary (Arbitrator's Exhibits 1 and 2).

Petitioner worked for Respondent as a Sales Associate. At trial, he testified that he injured his low back on both occasions while moving furniture.

Petitioner initially sought medical treatment after the first accident on July 13, 2014, at OSF Occupational Healthcare where he was apparently diagnosed with a lumbar strain/sprain. The bill for this treatment was tendered into evidence, but the medical records were not (Petitioner's Exhibit 15).

At the direction of Respondent, Petitioner was examined by Dr. James Stiehl, an orthopedic surgeon, on October 31, 2014. In connection with his examination of Petitioner, Dr. Stiehl reviewed medical records provided to him regarding the treatment Petitioner had received from July through September, 2014. These records were not tendered into evidence at trial; however, according to Dr. Stiehl's review of same, Petitioner was seen for low back pain, prescribed some medications and a 20 pound lifting restriction was imposed. Dr. Stiehl opined that Petitioner had sustained a low back strain, that the 20 pound lifting restriction was appropriate and that Petitioner should undergo a course of physical therapy (Respondent's Exhibit 2).

Petitioner was subsequently treated by Dr. Richard Kube, an orthopedic surgeon, who saw Petitioner for the first time on November 11, 2014. Dr. Kube continued to impose the work restrictions and ordered an MRI scan. The MRI was performed on January 21, 2015, and it revealed mild left/central disc bulges at L4-L5 and L5-S1 (Petitioner's Exhibits 8 and 9).

Dr. Kube saw Petitioner on February 3, 2015, and reviewed the MRI scan. He noted the MRI findings at L4-L5 and L5-S1; however, he opined that there was not any contact with the nerves because the Petitioner did not have any symptoms going down his legs. On examination, Dr. Kube noted tenderness in the left sacroiliac joint. He recommended Petitioner have an injection at that level (Petitioner's Exhibit 8).

Petitioner had two sacroiliac joint injections performed on March 16, and April 20, 2015 (Petitioner's Exhibits 12 and 13). Following the injections, Petitioner had some relief of his symptoms, but for only 30 to 45 minutes. Afterward, Petitioner had pain going down his buttocks into his left thigh (Petitioner's Exhibit 8).

Respondent had Petitioner examined for the second time by Dr. Stiehl on May 8, 2015. Again, Dr. Stiehl reviewed medical records provided to him by Respondent. In regard to the SI injection (Dr. Stiehl only had a record regarding the first) that had recently been performed, Dr. Stiehl noted that it made Petitioner's symptoms worse afterward and that it was not diagnostic. Dr. Stiehl opined that no further treatment was indicated, Petitioner was at MMI, had a 50 pound lifting restriction that was probably permanent, and that Petitioner had an AMA impairment rating of two percent (2%) of the whole person (Respondent's Exhibit 3). When Dr. Kube saw Petitioner on May 21, and June 2, 2015, he noted that Petitioner had SI pain on the left side going down the leg (Petitioner's Exhibit 8). It was at that time that Dr. Kube made a recommendation that Petitioner have an SI surgical fusion performed.

Petitioner sought a medical opinion regarding Dr. Kube's surgical recommendation from Dr. Christopher Rink, an occupational medicine specialist, on August 7, 2015. Dr. Rink observed that a 45 minute relief of his symptoms after an SI injection was not definitive enough to warrant performing a fusion. He suggested that Petitioner seek more conservative treatment options (Respondent's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Timothy VanFleet, an orthopedic surgeon, on September 25, 2015. In connection with his examination of Petitioner, Dr. VanFleet reviewed medical records provided to him by Respondent. Dr. VanFleet opined that Petitioner had lumbar radiculopathy which he related to Petitioner's work-related accident of July, 2014. He opined that the surgical procedure recommended by Dr. Kube was not medically reasonable and necessary; however, he also opined that Petitioner was not at MMI and that a series of epidural steroid injections might be appropriate. He further stated that Petitioner had a 25 pound lifting restriction with no repetitive lifting or bending (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Kube was deposed on November 2, 2015, and his deposition testimony was received into evidence at trial. Dr. Kube testified that the predominant area of Petitioner's symptoms was the left SI joint. He stated that the diagnostic injections that he ordered ruled out radiculopathy and that a minimally invasive SI joint fusion surgical procedure was appropriate. Further, Dr. Kube testified that the condition was aggravated by Petitioner's work injury (Petitioner's Exhibit 14; pp 26-29).

Dr. VanFleet was deposed on March 2, 2016, and his deposition testimony was received into evidence at trial. Dr. VanFleet's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. VanFleet testified that Petitioner had lumbar radiculopathy and that the treatment recommended by Dr. Kube was medically unnecessary and unreasonable. He based this opinion on his belief that Petitioner had sustained a lumbar spine injury with L5 nerve root impingement not SI joint dysfunction. Dr. VanFleet also testified that SI joint dysfunction is a very rare condition and that fusion at that level was unnecessary and

unreasonable. He also noted that Petitioner being a smoker would have a negative effect on the healing of any fusion procedure. He agreed with Dr. Rink's recommendation that Petitioner undergo some epidural steroid injections. He also opined that Petitioner had permanent restrictions of no lifting in excess of 25 pounds and no repetitive bending or lifting (Respondent's Exhibit 1; pp 9-13).

At trial, Petitioner stated that the injections provided him with some temporary relief and that he wanted to proceed with the fusion surgical procedure as recommended by Dr. Kube. Petitioner no longer works for Respondent and plans to accept a job selling legalized marijuana in Seattle, Washington, after he concludes his medical treatment in this case.

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 the left sacroiliac joint is not related to the accident of July 12, 2014.

In support of this conclusion the Arbitrator notes the following:

It was undisputed that Petitioner sustained a work-related injury on July 12, 2014, that caused Petitioner to sustain an injury to his low back.

The MRI scan of November 11, 2014, clearly indicated disc pathology on the left side at L4-L5 and L5-S1.

Dr. Kube opined that Petitioner's symptoms were because of left sacroiliac joint dysfunction. This opinion was based, to a large extent, on the fact that Petitioner experienced some temporary relief when he received injections in the left SI joint.

Dr. Stiehl, one of Respondent's Section 12 examiners, opined that an SI injection was not diagnostic and, further, Petitioner's symptoms had actually worsened afterward.

Dr. Rink, a physician selected by Petitioner for a second opinion, clearly stated that Petitioner experiencing 45 minutes of relief of his symptoms was not definitive enough to warrant performing a fusion.

Dr. VanFleet, another of Respondent's Section 12 examiners, opined that Petitioner's symptoms were because of lumbar radiculopathy and not SI joint dysfunction.

The Arbitrator finds the opinions of Dr. Stiehl, Dr. Rink and Dr. VanFleet to be more persuasive than the opinion of Dr. Kube.

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

The Arbitrator concludes that Petitioner is not entitled to the prospective medical treatment he is seeking, an SI joint fusion.

In support of this conclusion the Arbitrator notes the following:

As was stated in disputed issue (F), Petitioner's current condition of ill-being in regard to the left SI joint is not causally related to the accident of July 12, 2014.

Further, the Arbitrator notes that both Dr. Rink and Dr. VanFleet opined that Petitioner was not at MMI and that further treatment, specifically, epidural steroid injections might be appropriate. However, this was not the prospective medical treatment being sought by Petitioner in this proceeding.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☐ 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

Charles Bisch,
Petitioner,

vs.

NO: 14 WC 33515
14 WC 33505

Ashley Furniture,
Respondent.

16IWCC0838

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 causation and prospective medical 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

While the Arbitrator correctly assigned the proper weight regarding causation and prospective medical to the evidence, the Commission finds the need to further expound on the basis for said decision. As such, the Commission will provide an additional basis for its holding below. The Commission has reviewed the credibility of the doctors who have weighed in on this case and the foundation upon which they built their opinions prior to properly assessing the weight to be assigned to each doctor. The Commission finds as follows:

In reviewing Dr. Kube's testimony, the first thing that is readily apparent is the fact that Petitioner was examined by and received his treatment not primarily from Dr. Kube but from Physician Assistant (PA-C) Morrow who works in Dr. Kube's office. As such, Dr. Kube's observations of Petitioner appear to be once removed from an immediate face to face encounter with the Petitioner. Thus, Petitioner's attorney's claim on review that Dr. Kube should be given

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more weight than the other doctors in that he saw Petitioner on multiple occasions rings untrue. Furthermore, while PA-C Morrow performed a physical examination of Petitioner, it appears that said exam was not a complete work up of Petitioner's back but was rather limited in nature in that it only focused on Petitioner's sacroiliac joint. In all, Petitioner received two sacroiliac joint injections which provided temporary relief for an hour or less with the second injection providing less relief than the first. After the second injection, PA-C Morrow indicated that he would like to have Petitioner set up to see Dr. Kube and he would like to get additional imaging/CT scans. Yet, neither of these events appear to have taken place. When Dr. Kube speaks of Petitioner's condition he states it "kinda of plays" more toward an S1 joint problem. Later on, he states it is "more likely" the SI joint. Based on these statements it appears that Dr. Kube's opinion that this is a SI joint condition is stated with less than a degree of medical certainty. This belief is further supported by Dr. Rink's, the doctor Petitioner went to for a second opinion, belief that Petitioner's response to the sacroiliac joint injections is "not the typical response". Lastly, the Commission notes that Dr. Kube has represented himself as a sacroiliac expert and he indicated that he is anxious to publish the data obtained from Petitioner. Without reading too much into this, the Commission finds that it does appear that Dr. Kube has more than a passing interest in making Petitioner's situation into a case study. Given all of the above, the Commission finds that it appears that the basis for Dr. Kube's opinion that Petitioner is a surgical fusion candidate due to his sacroiliac condition is not established to a degree of medical certainty.

In terms of Dr. Van Fleet's testimony, the primary thing that struck the Commission about Dr. Van Fleet's deposition testimony is that while he may have only seen Petitioner on one occasion, it appears he performed a more comprehensive examination of Petitioner's low back than did PA-C Morrow. Having done so, Dr. Van Fleet found that while there was pain in the general area, the pain was not in the SI joint area per se. Additionally, he found other possible sources for the pain in the form of degenerative disc disease and radiculopathy. He further indicated that he, along with Dr. Rink, felt that there should be an additional work up and/or alternative treatment that needed to be pursued. Lastly, he addressed the fact that the sacroiliac diagnosis is rare in nature and the proposed surgery is most often not undertaken due to it poor results. In the end, Dr. Van Fleet's opinion weighs against the need for the proposed surgery.

The next doctor who weighed in on the issue of whether Petitioner's is in need of additional medical care is Dr. Rink who Petitioner sought out for a second opinion. Of note, is the fact that Dr. Rink found Petitioner's outcome from the two sacroiliac injections to be "somewhat unusual" and "not the typical response" one would expect from this type of injection. Like Dr. VanFleet, Dr. Rink found some tenderness over the sacroiliac joint region, which was less than one inch from the other structures in the back. In general, given the non-typical response from the Petitioner after the sacroiliac injections, Dr. Rink was not advocating "rushing" into a fusion surgery and he felt the need to perform additional work up through both speaking with the physical therapist and performing nerve blocks. As such, Dr. Rink's current opinion also weighs against the need for the proposed surgery.

The last doctor to weigh in is Dr. Steiehl. The Commission finds that given the fact that his opinion was expressed early in the process after the first injection but prior to his obtaining

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the results from the second injections, his opinion has limited value. It also has limited value in the fact that he found Petitioner had reached maximum medical improvement when the remainder of the evidence shows that this is clearly not the case. The one take away that can be gleaned from his reports is that it allowed for yet another comprehensive physical examination. Overall, the Commission finds that Dr. Steiehl's reports have limited value in determining whether or not Petitioner is a surgical candidate.

Having reviewed all of the doctors' records and/or testimony, the Commission agrees with the Arbitrator that Petitioner has failed at this time to prove that he is a candidate for a fusion of the sacroiliac joint. Having found this, the Commission further notes that both Drs. Rink and Van Fleet and even PA-C Morrow have found that there is an additional workup that needs to be had, that Petitioner has not reached maximum medical improvement and it is premature to indicate what the appropriate prospective treatment is at this junction.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 24, 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: DEC 23 2016

MB/jm

O: 11/3/16

43

Mario Basurto

David L. Gore

Stephen Mathis

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

BISCH, CHARLES
Employee/Petitioner

Case# **14WC033515**

14WC033505

16IWCC0838

ASHLEY FURNITURE
Employer/Respondent

On 5/24/2016, 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 0.48% 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
SEAN D OSWALD
3100 N KNOXVILLE AVE
PEORIA, IL 61603

2871 LAW OFFICE OF STEPHEN G PILAND
MARY FLANAGAN-DEAN
1010 MARKET SUITE 1510
ST LOUIS, MO 63101

16IWCC0838

STATE OF ILLINOIS)
)SS.
COUNTY OF MC LEAN)

- ☐ 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)

Charles Bisch
Employee/Petitioner

Case # 14 WC 33515

v.

Consolidated cases: 14 WC 33505

Ashley Furniture
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 William R. Gallagher, Arbitrator of the Commission, in the city of Bloomington , on March 31, 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 _____

16IWCC0838

FINDINGS

On the date of accident, September 8, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $859.72.

On the date of accident, Petitioner was 26 years of age, single with 0 dependent child(ren).

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

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's petition for prospective medical treatment 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)

May 14, 2016
Date

MAY 24 2016

Findings of Fact

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Petitioner was subsequently treated by Dr. Richard Kube, an orthopedic surgeon, who saw Petitioner for the first time on November 11, 2014. Dr. Kube continued to impose the work restrictions and ordered an MRI scan. The MRI was performed on January 21, 2015, and it revealed mild left/central disc bulges at L4-L5 and L5-S1 (Petitioner's Exhibits 8 and 9).

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Petitioner had two sacroiliac joint injections performed on March 16, and April 20, 2015 (Petitioner's Exhibits 12 and 13). Following the injections, Petitioner had some relief of his symptoms, but for only 30 to 45 minutes. Afterward, Petitioner had pain going down his buttocks into his left thigh (Petitioner's Exhibit 8).

Respondent had Petitioner examined for the second time by Dr. Stiehl on May 8, 2015. Again, Dr. Stiehl reviewed medical records provided to him by Respondent. In regard to the SI injection (Dr. Stiehl only had a record regarding the first) that had recently been performed, Dr. Stiehl noted that it made Petitioner's symptoms worse afterward and that it was not diagnostic. Dr. Stiehl opined that no further treatment was indicated, Petitioner was at MMI, had a 50 pound lifting restriction that was probably permanent, and that Petitioner had an AMA impairment rating of two percent (2%) of the whole person (Respondent's Exhibit 3). When Dr. Kube saw Petitioner on May 21, and June 2, 2015, he noted that Petitioner had SI pain on the left side going down the leg (Petitioner's Exhibit 8). It was at that time that Dr. Kube made a recommendation that Petitioner have an SI surgical fusion performed.

Petitioner sought a medical opinion regarding Dr. Kube's surgical recommendation from Dr. Christopher Rink, an occupational medicine specialist, on August 7, 2015. Dr. Rink observed that a 45 minute relief of his symptoms after an SI injection was not definitive enough to warrant performing a fusion. He suggested that Petitioner seek more conservative treatment options (Respondent's Exhibit 4).

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Dr. Kube was deposed on November 2, 2015, and his deposition testimony was received into evidence at trial. Dr. Kube testified that the predominant area of Petitioner's symptoms was the left SI joint. He stated that the diagnostic injections that he ordered ruled out radiculopathy and that a minimally invasive SI joint fusion surgical procedure was appropriate. Further, Dr. Kube testified that the condition was aggravated by Petitioner's work injury (Petitioner's Exhibit 14; pp 26-29).

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The Arbitrator concludes that Petitioner is not entitled to the prospective medical treatment he is seeking, an SI joint fusion.

In support of this conclusion the Arbitrator notes the following:

As was stated in disputed issue (F), Petitioner's current condition of ill-being in regard to the left SI joint is not causally related to the accident of September 8, 2014.

Further, the Arbitrator notes that both Dr. Rink and Dr. VanFleet opined that Petitioner was not at MMI and that further treatment, specifically, epidural steroid injections might be appropriate. However, this was not the prospective medical treatment being sought by Petitioner in this proceeding.

William R. Gallagher, Arbitrator

unreasonable. He also noted that Petitioner being a smoker would have a negative effect on the healing of any fusion procedure. He agreed with Dr. Rink's recommendation that Petitioner undergo some epidural steroid injections. He also opined that Petitioner had permanent restrictions of no lifting in excess of 25 pounds and no repetitive bending or lifting (Respondent's Exhibit 1; pp 9-13).

At trial, Petitioner stated that the injections provided him with some temporary relief and that he wanted to proceed with the fusion surgical procedure as recommended by Dr. Kube. Petitioner no longer works for Respondent and plans to accept a job selling legalized marijuana in Seattle, Washington, after he concludes his medical treatment in this case.

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 the left sacroiliac joint is not related to the accident of September 8, 2014.

In support of this conclusion the Arbitrator notes the following:

It was undisputed that Petitioner sustained a work-related injury on September 8, 2014, that caused Petitioner to sustain an injury to his low back.

The MRI scan of November 11, 2014, clearly indicated disc pathology on the left side at L4-L5 and L5-S1.

Dr. Kube opined that Petitioner's symptoms were because of left sacroiliac joint dysfunction. This opinion was based, to a large extent, on the fact that Petitioner experienced some temporary relief when he received injections in the left SI joint.

Dr. Stiehl, one of Respondent's Section 12 examiners, opined that an SI injection was not diagnostic and, further, Petitioner's symptoms had actually worsened afterward.

Dr. Rink, a physician selected by Petitioner for a second opinion, clearly stated that Petitioner experiencing 45 minutes of relief of his symptoms was not definitive enough to warrant performing a fusion.

Dr. VanFleet, another of Respondent's Section 12 examiners, opined that Petitioner's symptoms were because of lumbar radiculopathy and not SI joint dysfunction.

The Arbitrator finds the opinions of Dr. Stiehl, Dr. Rink and Dr. VanFleet to be more persuasive than the opinion of Dr. Kube.

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

STATE OF ILLINOIS)
)
)
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)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Haugh,
Petitioner,

vs. NO: 14 WC 38196

Marquette Bank,
Respondent.

16IWCC0840

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 issues including accident, causal connection, temporary total disability, calculation of rates, and medical expenses, and being advised of the facts and law, hereby reverses the October 2, 2015 decision of Arbitrator Hegarty as described below. The Arbitrator's decision is attached hereto and made a part hereof.

The Arbitrator found that Petitioner proved that his accidental injuries arose out of and in the course of employment with Respondent. She awarded temporary total disability benefits and medical expenses (she declined to assess penalties and fees). The Commission, after reviewing the entire record, disagrees with the Arbitrator's finding of compensable accident. In particular, the Commission finds that Petitioner failed to prove that his injuries – incurred in a fall while ascending stairs – "arose out of" his employment. Accordingly, the Commission reverses the Arbitrator's decision and vacates all awards of benefits.[1] In addition, the Commission corrects the error as to yearly earnings, average weekly wage and benefit rate in the decision.

[1] Although Respondent invoked causal connection as a purportedly separate issue on review, its review brief does not argue that Petitioner's ill-being in any respect was not caused by the fall, but only that his injuries were not caused by a *work-related* fall. In other words, Respondent conflates the issue of causal connection with whether the

16IWCC0840

BACKGROUND

A. Petitioner's Accidental Fall While Ascending Stairs

Petitioner, John Haugh, 68 years old, testified that he was employed as a security guard by Respondent. On the morning of October 31, 2014, he stumbled and fell while climbing a staircase between the basement and ground floor of his workplace, a Marquette Bank branch in Chicago. He was carrying a cup of coffee in one hand and napkins and Styrofoam plates in the other. He was bringing the napkins and plates from the employee breakroom in the basement up to the ground floor as a courtesy to his co-workers, for their use in connection with "Doughnut Friday." Respondent provided doughnuts to its employees on Friday mornings at this branch; the doughnuts were located on the first floor behind the tellers' lane. The coffee was for Petitioner's own consumption. (Tr. 40-41, 63).[2]

At the top of the stairs, Petitioner stumbled and fell forward onto the landing. He landed "on [his] left knee and [his] right side open to the floor," while "[his] arm went back." (Tr. 42-43). As to what caused him to fall, Petitioner testified, "I really don't know. I got to the top of the stairs, and I went down."[3] (Tr. 42). That afternoon, he presented to Little Company of Mary Hospital Immediate Care for his pain. Its medical records reflect that Petitioner was "walking up stairs and tripped." (PX 6). On November 3, 2014, Petitioner sought care at Parkview Orthopedic, reporting that he "tripped while coming up the stairs." (PX 8). Eventually, Petitioner was found to have suffered a fractured kneecap and right shoulder contusion and strain. On December 11, 2014, Petitioner underwent knee surgery (open reduction internal fixation of the patella fracture). (PX 8). At the time of hearing, Petitioner was undergoing physical therapy for both knee and shoulder. He had been placed off work since the day after the fall and had not been returned to work by his doctors. (Tr. 47-48).

Regarding his job activities as a security guard, Petitioner testified that his morning routine included opening the bank, de-activating the alarm, inspecting the premises prior to the

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accident "arose out of and in the course of employment." It articulates its causal connection argument in the following manner:

> "Based on the evidence presented at trial, Petitioner did not sustain an injury arising out of and in the course of his employment. Petitioner failed to prove that he sustained a work-related accident. The Arbitrator erred in finding that Petitioner's present condition of ill-being is causally related to the accident."

(Respondent's Statement of Exceptions and Brief at page 9). Insofar as the Commission has decided that Petitioner has not satisfied the "arising out of" prong of his case, the causation issue as articulated by Respondent is decided as well.

[2] Citations to the transcript pages of the hearing, Petitioner's exhibits and Respondent's exhibits are styled "Tr. --," "PX --," and "RX --," respectively.

[3] Although Petitioner's Application for Adjustment of Claim alleged that he "slipped on wet floor," and his Petition for Immediate §19(b) Hearing alleged that he "slipped on wet stairs and fell," his testimony made it clear that no wet or other slippery substance figured in his fall. See footnote 4 of this Decision and Opinion.

bank being open for business, and allowing other staff through the door prior to the bank being open for business. He carried a weapon while on the job. (Tr. 37). He testified that he made 8 to 12 trips up and down the stairs per day. He worked 12 hours per day, 4 days per week. (Tr. 48). He traversed the stairs during his regular security rounds and also when accompanying meter readers and other tradesmen to the basement so they could do their jobs. (Tr. 37, 62). He also went downstairs to make coffee in the breakroom in the morning and to use the employee restroom located there. (Tr. 37-38). He is not required to make coffee or partake in Doughnut Fridays. (Tr. 71).

B. Testimony of Respondent's On-Site Employees Regarding Condition of Stairs

As mentioned above, medical records reflect that Petitioner related to medical providers that he "tripped" while ascending the stairs. At hearing, he could attest to no structural defect, deficiency or other irregularity in the stairs. He reiterated that he just did not know what caused him to stumble and fall: "I don't know exactly what happened. All I know is my feet went out from under me."[4] (Tr. 58-59).

At hearing, Respondent presented three witnesses, employees at the branch. None saw the actual fall. These three -- Ebony Boyd, Cynthia Martinez, and Elvira Hernandez (two tellers and a supervisor) – heard Petitioner's fall and came to his immediate assistance. The witnesses testified that Petitioner did not indicate what caused him to fall. All three attested that they traversed those stairs themselves that day and had noticed no irregularity, in particular no defect or substance on which Petitioner might have slipped, on the stairs or on the landing. (Tr. 81-82, 86, 90-91, 93-94). Ms. Boyd even testified that she traversed those stairs ten minutes prior to the accident, and did not notice any substance on the stairs or the landing area. (Tr. 83).

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[4] At hearing, Petitioner testified that, after he got back to his feet, he went to a closet to retrieve a mop to clean up the coffee he had spilled. He stated, "I went back to the area where I fell… and I had wiped up the floor behind the vault door, which was open, and the floor area, and I noticed that it was wet by the stairs, not coffee, but wet like water." (Tr. 43). He added, "What I saw was on the landing area. It was right at the top of the stairs." (Tr. 73). This substance "appeared to be water." (Tr. 53). Although his Application indicated that he "slipped on wet floor," at no point did Petitioner testify that he slipped, or must have slipped, on this substance. Instead, Petitioner repeatedly testified that he just did not know what caused him to fall – even after having discovered the alleged non-coffee substance. Ultimately, the video evidence showed that Petitioner stumbled on the stairs, before he got to the landing, and then fell forward onto the landing. (See "Video Evidence" section in the body of this Decision and Order.)

Petitioner's testimony is rather remarkable for the fact that, for all the effort spent on establishing the presence of this substance, he would not expressly assert that this substance was or must have been the cause of his fall -- notwithstanding that the ostensible (and only) purpose of testifying about the substance would be to allege such causation. Notably, during Petitioner's counsel's questioning of Respondent's claims investigator Patrick Carrigan – who testified before Petitioner did – Petitioner's counsel appeared to be positing the scenario of Petitioner slipping on coffee that had been spilled on the stairs by someone else. (Petitioner's counsel asked, "Mr. Carrigan, if, in fact, the evidence will show that that coffee pot was in the basement of the building, wouldn't it be possible for people coming up the stairs to have spilled coffee on the day in question?") (Tr. 32). However, Petitioner went on to testify that the liquid substance he discovered was "by the stairs" and "on the landing," and last but not least, it was "not coffee."

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C. Video Evidence

Security video footage of the incident was admitted at hearing, upon the parties' stipulation. (RX 4). The video showed that Petitioner began falling before he reached the landing (that is, he did not slip while on the landing). His right foot appeared to get caught somewhere beneath the lip of the riser of the step preceding the landing; his foot does not clear the top of that step. He falls forward and lands on the right side of his body on the floor of the landing. He testified that he reached for the handrail and missed it. (Tr. 42). However, the video does not depict him reaching for the handrail. As he falls and hits the ground, coffee is splattered and the napkins and plates are scattered about. He rolls on his back. The video ends shortly after two women arrive.

DISCUSSION

The Commission finds that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment with Respondent. In so doing, the Commission reverses the decision of the Arbitrator, who cited "repeated use of the stairs" in support of her favorable decision for Petitioner. The Arbitrator wrote:

> "Based on the credible evidence contained in the record, the Arbitrator finds that Petitioner has established that his repeated use of the stairs, both for his personal comfort and for job related duties, exposed him to a quantitatively increased risk of fall than the general public. Accordingly, Petitioner has established that he sustained an accident that arose out of and in the course of his employment for Respondent."

(Addendum to Arbitrator's decision at page 4). No further analysis was provided.[5]

To prove entitlement to compensation under the Illinois Workers' Compensation Act, a claimant must satisfy the familiar requirements that his injury "arose out of" and occurred "in the course of" his employment. Sisbro, Inc. v. Industrial Commission, 207 Ill. 2d 193, 203-04 (2009). In the case at hand, there is no dispute that Petitioner's injuries were sustained "in the course of" his employment. The issue presented is whether the injuries also "arose out of" that employment.

The "arising out of" component is primarily concerned with causal connection between the employment and the accidental injury. The mere fact that an incident occurred on the premises of the employer is not sufficient to fulfill the "arising out of" requirement. Builders Square v. Industrial Commission,339 Ill. App. 3d 1006, 1010-11, 791 N.E.2d 1308, 274 Ill. Dec. 897 (2003). To determine whether a claimant's injury arose out of his employment, the type of risk to which he was exposed first must be identified. Risks to employees fall into three

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[5] Although the Arbitrator had summarized the testimony of Petitioner and other witnesses regarding the presence (or lack thereof) of the non-coffee liquid substance, whether this substance played a role in Petitioner's accident was not considered at all in her determination that Petitioner's accident was compensable.

categories: (1) risks that are distinctly associated with one's employment; (2) risks that are personal to the employee (such as "idiopathic" falls due to a bad knee); and (3) neutral risks, which have neither an employment nor a personal characteristic. Illinois Institute of Technology Research Institute v. Industrial Commission. 314 Ill. App. 3d 149, 162-63, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000).

Falling during traversal of stairs is a neutral risk. Illinois Consolidated Telephone Co. v. Industrial Commission, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 247 Ill. Dec. 333 (2000) (Rakowski, J., specially concurring) ("In the context of falls, neutral risks include falls on level ground or while traversing stairs"); *see also* First Cash Financial Services v. Industrial Commission, 367 Ill. App. 3d 102, 853 N.E.2d 799, 304 Ill. Dec. 722 (2006). Injuries resulting from a neutral risk generally are deemed not to have arisen out of employment and thus are not compensable under the Act. Illinois Consolidated Telephone Co., 314 Ill. App. 3d at 353.

Petitioner's injury stemmed from a neutral risk. His foot failed to clear the riser of a step during an ascent of an ordinary set of stairs, and he fell and hurt himself. While the accident is unfortunate, his injuries are not covered under the Act, the purpose of which is to protect employees from risks and hazards that are peculiar to the nature of the work they are employed to do. *See* Illinois Bell Telephone Co. v. Industrial Commission, 131 Ill. 2d 478, 483 (1989). By itself, the act of walking up or down a staircase does not expose one to a risk different – or more critically speaking, greater -- than that faced by one outside work, separate from one's employment. There is no evidence that falling on stairs while carrying coffee and napkins is a peculiar hazard of the work of a bank security guard. Additionally, there was no evidence here that a defect or debris (including any liquid or slippery substance) on the employer's premises interfered with Petitioner's ability to make it up the stairs. Petitioner testified that he just did not know what caused him to stumble. To put it colloquially, Petitioner simply tripped over his own feet. This is not the kind of accident that is compensable under the Act.

In her decision in favor of Petitioner, the Arbitrator invoked an exception to the rule of non-compensability for injuries resulting from a neutral risk. This exception exists "where the requirements of the employment create a risk to which the general public is not exposed." Illinois Consolidated Telephone Co., 314 Ill. App. at 353. "The increased risk may be qualitative, such as the dangerous nature of the stairs... or quantitative, such as where the employee is exposed to a common risk more frequently than the general public." Id. As already noted, there was no evidence that the stairs at the Marquette Bank branch was dangerous in nature. The increased risk found to exist by the Arbitrator was quantitative.

In the Arbitrator's words, Petitioner's "repeated use of the stairs, both for his personal comfort and for job related duties, exposed him to a quantitatively increased risk of fall than the general public." While the Arbitrator did not cite to any caselaw, this language tracks that used in Village of Villa Park v. Workers' Compensation Commission, 2013 IL App (2d) 130038WC, 378 Ill. Dec. 320, 3 N.E.3d 885. In that case, the claimant, a police officer, fell and injured himself when his knee, which was still weak from a prior injury, gave out while he was descending the stairwell. The claimant testified that in a typical day he would traverse the stairs a number of times to get equipment required for his duties and for "personal comfort" errands (getting lunch and the like). This evidence of being "continually forced to use the stairway," coupled with evidence that his superiors were aware that he was still suffering the effects of an

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injured knee, was found adequate to support the inference that his employment placed him in a position of sufficiently increased risk of falling. Village of Villa Park, 2013 IL App (2d) 130038WC at *P21. It should be noted that this claimant was exposed to two types of risk: personal and neutral.

In the case at hand, Petitioner suffered a fall on an ordinary staircase, of no defect or unusual character, while performing an ordinary activity, of no distinct association with the nature of a security guard's work. Inasmuch as the Arbitrator apparently inferred that Petitioner's alleged frequency of stairway use at his workplace -- 8 to 12 trips over the course of a 12-hour day, including his security rounds and breaks -- is sufficient, by itself, to make his fall compensable, such inference is not reasonable. The Commission finds that Petitioner's frequency of stairway use did not constitute a risk increase of such magnitude as to make this incident a work-related accident compensable under the Act.

Lastly, the Commission notes that it would be hard-pressed to find a compensable accident in these circumstances without adopting the positional risk doctrine, a doctrine rejected by the Supreme Court in Brady v. Louis Ruffolo & Sons Construction Co., 143 Ill. 2d 542 (1991). While it has been observed that there exist post-Brady cases in the lower courts where the claimants' recovery could only be justified as a matter of causation theory by an acceptance of the positional risk doctrine, the fact remains that the Supreme Court has rejected this doctrine and its "but for" approach, whereby a claimant may recover by showing merely that the injury would not have been incurred but for the fact that the claimant was engaged in some employment-related activity when the accident happened *See* Brady, 143 Ill. 2d 542; Campbell "66" Express, Inc. v. Industrial Commission, 83 Ill. 2d 353 (1980); Decatur-Macon County Fair Association v. Industrial Commission, 69 Ill. 2d 262 (1977).

While possibly academic given its finding as to accident, the Commission corrects an error regarding the yearly earnings, average weekly wage, and temporary total disability rate (erroneous amounts appear on page 3 of the decision and page 6 of the addendum to decision). The erroneous amounts should be corrected to reflect the correct stipulated figures of $33,186.92 (earnings), $638.21 (AWW) and $425.47 (TTD rate).

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed October 2, 2015, is hereby reversed as discussed above. Benefits denied.

IT IS FURTHER ORDERED that the Arbitrator's calculations of yearly earnings, AWW, and TTD rate are corrected as discussed 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: DEC 23 2016

Joshua D. Luskin

o-10/26/16
jdl/ac
68

Ruth W. White

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DISSENT

I must respectfully dissent from the majority's decision that the Petitioner failed to prove that his current condition of ill-being was not causally connected or caused by an alleged accident on October 31, 2014. I would instead affirm the findings of Arbitrator Hegarty and find that the Petitioner did prove he sustained injuries to his kneecap and right shoulder as a result of his work activities at that time.

The Petitioner has been working security at this bank branch for nearly 19 years. Petitioner made coffee every morning in the downstairs breakroom for himself and his co-workers. On the date of the accident, Respondent sponsored "Donut Friday". The donuts were located on the first floor behind the teller area. Petitioner was bringing plates and napkins, as well as a cup of coffee for himself, up the stairs to partake in this employer-sponsored event. Petitioner was injured when he fell while walking up the stairs from the basement with both of his hands full. Petitioner testified that the general public did not have access to the stairwell in which Petitioner fell, and that only employees with key pad access were permitted in this area of the bank. He would make 8-12 trips per day up and down the stairs. The employee bathrooms and the employee breakroom were located in the basement.

The evidence of record supports the Arbitrator's finding that the claimant was forced to use the stairway both for his personal comfort and to complete his work related activities. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." Sisbro, Inc. v. Industrial Comm'n, 207 Ill.2d 193, 204. Falling while traversing stairs is a neutral risk, and the injuries resulting therefrom generally do not arise out of employment. Illinois Consolidated Telephone Co. v. Industrial Comm'n, 314 Ill.App.3d 347, 353. As with personal risks, however, an exception to non-compensability under the Act exists where the requirements of the claimant's employment create a risk to which the general public is not exposed. Id. "The increased risk may be qualitative or quantitative, such as where the claimant is exposed to a common risk more frequently than the general public." Id. The facts of this case support the finding that the claimant's fall and resulting injury arose both out of and in the course of his employment with the Respondent.

I concur with the majority as to the corrected stipulated figures of $33,186.92 (earnings), $638.21 (AWW), and $425.47 (TTD rate).

Charles J. DeVriendt

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

HAUGH, JOHN
Employee/Petitioner

Case# **14WC038196**

MARQUETTE BANK
Employer/Respondent

16IWCC0840

On 10/2/2015, 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 0.10% 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:

2559 BOWMAN & CORDAY LTD
JOHN T BOWMAN
134 N LASALLE ST SUITE 1440
CHICAGO, IL 60602

0532 HOLECEK & ASSOCIATES
BARNALI ROY-MOHANTY
161 N CLARK ST SUITE 800
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)

JOHN HAUGH
Employee/Petitioner

v.

MARQUETTE BANK
Employer/Respondent

Case # 14 WC 38196

Consolidated cases: _____

16IWCC0840

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **March 15, 2015 and July 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. ☒ 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, **October 31, 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 **$34,710.00**; the average weekly wage was **$667.50**.

On the date of accident, Petitioner was **68** years of age, ***married*** with **no** 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 $43,352.65, as provided in Section 8(a) and 8.2 of the Act.**
- **Respondent shall pay Petitioner temporary total disability benefits of $445.00/week for 17-6/7 weeks, commencing November 1, 2014 through March 5, 2015, as provided in Section 8(b) of the Act.**
- **The Arbitrator declined to award penalties and/or fees against the Respondent.**

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 Jessica Hegarty

9/28/15
Date

ICArbDec19(b)

OCT 2 - 2015

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN HAUGH, Petitioner,	)	
v.	)	**No. 14 WC 38196**
MARQUETTE NATIONAL BANK, Respondent.	)	**16IWCC0840**

ADDENDUM TO THE DECISION OF THE ARBITRATOR

An Application for Adjustment of Claim was filed in this matter. The case was heard by Jessica Hegarty, Arbitrator of the Commission, in the city of Chicago and Elgin, on March 15, 2015 and July 9, 2015, respectively. After hearing the proofs and reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues below.

FINDINGS OF FACT

Testimony of Petitioner

Petitioner was 68-years-old at the time of his alleged accident and had been employed as an armed security guard for Respondent for approximately 19 years at the time of the hearing. (T. 36) Prior to his employment with Respondent, Petitioner worked for the Chicago Police Department for 31 years. (Id.)

Petitioner testified that he worked a 12 hour shift for Respondent, 4 days a week beginning at 6:30 am. (Id. 50) Generally, upon his arrival at work, Petitioner turned the lights on, de-activated the alarms, inspected the bank and went downstairs to the basement to make coffee. (Id. 37, 50) Several times a month, Petitioner would escort electricians, plumbers or meter readers to the basement area of the bank to perform various services and repairs prior to the 8 am opening of the bank. (Id. 37, 50) Petitioner worked a Petitioner testified the basement area of the bank also houses the employee bathrooms and the employee break room. (Id. 37)

Petitioner testified that October 31, 2014, was "Donut Friday" where the bank provided the employees complimentary donuts. (Id. 40) At 9:30 am, donuts were delivered to the area behind the "teller lane" on the bank's first floor. (Id.) At around 9:50 am, Petitioner grabbed some paper towels, Styrofoam plates and a cup of coffee from the basement and began walking up the stairs towards the donut area. (T. 40, 50) As he got to the top of the stairs, he "reached for the handrail...and missed it...falling forward." (Id. 42) Petitioner landed on his left knee and his right side" while his right arm "went back". (Id. 42, 43)

Petitioner testified that he "really did not know" what caused his fall. (Id. 63).

No one witnessed the fall but three bank tellers came to assist him immediately after. (Id. 43)

Petitioner eventually got on his feet and retrieved a mop from the water closet and began to mop up the area where he fell. (Id. he was mopping up he "noticed that it was wet by the stairs, not coffee, but wet like water." (Id.)

Petitioner testified that the stairwell where he fell is located in the northeast side of the basement of the bank coming up from the basement to the vault area. The area is not open to the general public and is only accessible to bank employees with a pass key. (Id. 39)

In the normal course of a workday at the bank, Petitioner made between 8 and 12 trips up and down the stairs. (Id. 48)

On cross-exam, Petitioner testified he is not required to transport napkins, plates and coffee to others. (Id. 63). He testified that his job duties do not include making coffee and that he does so as a courtesy. (T. 71). Doughnut Friday is a voluntary activity and employees are not required to partake in this activity. (Id.)

Petitioner testified that he noticed liquid behind the vault door and by the stairs. (Id. 43). Petitioner identified these areas to be on the landing of the stairwell and not on the actual stairs. (See PX. 1a, Photograph of Stairwell and Landing; T. 66, 72-73). He confirmed that he did not report noticing any type of liquid on the stairwell to his doctors or employer. (Id. 59, 62).

Testimony of Ebony Boyd

Ms. Boyd is employed as a Teller for Respondent and worked in the same location as Petitioner on October 31, 2014. Ms. Boyd did not witness the alleged accident. She heard Petitioner fall and came to his assistance. (Id. 81). Petitioner did not inform her how he fell or what caused his fall. Ms. Boyd testified that she frequently goes up and down the stairwell in question and did so on October 31, 2014. (Id. 82). She testified that 10 minutes prior to Petitioner's accident, she went down and back up the stairwell and did not notice any type of liquid on the stairwell itself or the landing area. (Id. 82-83).

Testimony of Elvira Hernandez

Ms. Hernandez is employed as a Supervisor for Respondent and worked in the same location as Petitioner on October 31, 2014. Ms. Hernandez did not witness the alleged accident; however, came to his assistance. (Id. 85). She testified that Petitioner did not indicate what caused him to fall nor did Petitioner report that he slipped on anything. (Id. 86). She did not see any defects to the stairwell or landing area at that time. (Id. 87). She testified that she frequently goes up and down the stairwell in question and did

so on October 31, 2014. (Id. 90-91). She testified that she did not notice any type of liquid on the stairwell. (Id. 91).

Testimony of Cynthia Martinez

Ms. Martinez is employed as a Teller for Respondent and worked in the same location as Petitioner on October 31, 2014. Ms. Martinez did not witness the alleged accident; however, came to his assistance. (Id. 93). She testified that Petitioner did not indicate what caused him to fall nor did Petitioner report that he slipped on liquid. (Id. 94). She did not see any defects or liquid on the stairwell at that time. (Id.) She testified that she frequently goes up and down the stairwell in question and did so on October 31, 2014. She testified that she did not notice any type of liquid on the stairwell. (Id.)

Testimony of Georgeanne Kruger

Ms. Kruger is the Assistant Vice President of Facilities for Respondent. She oversees the maintenance staff, messenger staff and the physical maintenance of the buildings. (Id. 75). On October 31, 2014, Petitioner spoke to Ms. Kruger and reported that he "tripped going up the stairs." (Id. 77). Ms. Krueger testified that Petitioner did not mention what, if anything caused his fall. Specifically, Petitioner did not mention any type of liquid on the ground. (Id.)

Testimony of Patrick Carrigan

Mr. Carrigan is employed as a Claims Professional with Travelers Insurance, who covers the Respondent for workers' compensation coverage. Mr. Carrigan was assigned this case for investigation. As part of his investigation, he obtained the medical records, reviewed the job description, interviewed the Petitioner (while unrepresented by counsel), spoke to the co-workers, and spoke to Petitioner's supervisor.

Relative to his discussion with Petitioner, Mr. Carrigan testified that on November 4, 2014, he contacted Petitioner via telephone to discuss the allege accident. Petitioner conveyed that he "was walking up from the basement...got to the top of the stairs...(didn't) know what happened but (he) fell." (Id. 25). Petitioner further stated that "he didn't know of any liquid by the ground, and there were no defects with the stairs." (Id. 26; See also RX. 1). He testified that Petitioner was coherent during the telephone call. (T. 28). Furthermore, he found Petitioner to be truthful in describing the incident. (Id.)

After his investigation, he determined that Petitioner's accident did not arise out of and in the course of his employment. (Id. 11). Mr. Carrigan's basis for denial was based on Petitioner's representation that there were no defects or liquid on the stairs that caused him to fall. (Id. 27).

On November 10, 2014, Mr. Carrigan contacted Petitioner via telephone and advised him of the denial. (Id. 29). A written denial was subsequently mailed to Petitioner. (PX. 1, Denial Letter).

VIDEO FOOTAGE of the ACCIDENT

The parties stipulated to the video footage of the incident. (See RX. 4, Video Footage). The Arbitrator viewed the footage which depicts an aerial view of the top of a stairwell. Petitioner can be seen climbing stairs and falling forward at the top of the stairwell. Petitioner's feet are still on the stairs at the top of the stairwell when he falls forward. Petitioner then drops several items, including a dark colored liquid and several white objects on the landing of the stairwell as he is falling forward. Petitioner's body lands on the stairwell and he rolls over onto his back.

MEDICAL EVIDENCE

On October 31, 2014, Petitioner sought immediate treatment at Little Company of Mary Hospital. (PX 6) X-rays of his left leg revealed severe osteoarthritis and an acute fracture of the patellar. (Id.) X-rays of the shoulder revealed no abnormalities. (Id.) X-ray of the rib revealed an oblique fracture of the right fifth rib, either sub acute or chronic in nature. (Id.)

On November 3, 2014, Petitioner treated at Parkview Orthopedic, reporting that he "tripped while coming up the stairs." (PX 8) He was diagnosed with a displaced left patellar fracture, right shoulder contusion and strain, and pre-existing degenerative joint disease of the left knee. He was recommended to undergo ORIF of the left knee, which was performed on December 14, 2014. (Id.)

At the time of the hearing, Petitioner testified he was participating in ongoing physical therapy for his knee and shoulder.

CONCLUSIONS OF LAW

Accident

In this case, testimony from Mr. Patrick Carrigan and Mr. Haugh establish that the general public had no access to the area that Mr. Haugh fell. Only employees with key pad access could be in that part of the bank. Mr. Haugh testified that his job required him to make 8 to 12 trips per day up and down the stairs. He made coffee every morning in the downstairs break room, the employee restrooms were located in the basement, and Mr. Haugh would have to accompany meter readers and other tradesmen up and down the stairs so they could perform their jobs in the bank. Mr. Haugh also testified that he made trips up and down the stairs as part of his security rounds.

Based on the credible evidence contained in the record, the Arbitrator finds that Petitioner has established that his repeated use of the stairs, both for his personal comfort and for job related duties, exposed him to a quantitatively increased risk of fall than the general public. Accordingly, Petitioner has established that he sustained an accident that arose out of and in the course of his employment for Respondent.

Causal Connection

Petitioner testified that after his fall on October 31, 2014, he landed on his left knee and his right side while his right arm "went back". (42, 43) Records from Little Company of Mary Hospital note that Petitioner presented for treatment later that day. X-rays of Petitioner's left leg revealed severe osteoarthritis and an acute fracture of the patellar while X-rays of his rib revealed an oblique fracture of the right fifth rib, either sub acute or chronic in nature. (PX 6)

On November 3, 2014, Dr. Kevin Luke of Parkview Orthopedic diagnosed Petitioner with a displaced left patellar fracture, right shoulder contusion and strain, and pre-existing degenerative joint disease of the left knee. (PX 8) The doctor recommended conservative treatment with respect to Petitioner's shoulder. (Id.) Dr. Luke recommended knee surgery in the form open reduction internal fixation of the left comminuted patella fracture with tension band construct, which he performed at Advocate Christ Hospital on December 11, 2014. (Id.)

On December 17, 2014, Petitioner left knee was placed into a cylinder cast by Dr. Luke.

On January 7, 2015, Dr. Luke discontinued the case and placed Petitioner's knee into an immobilizer.

On January 20, 2015, Dr. Luke recommended Petitioner participate in physical therapy for his left knee.

At the time of the hearing, Petitioner was undergoing physical therapy for his knee and shoulder.

Based on the foregoing, the Arbitrator finds that Petitioner's present condition of ill-being is causally connected to the work accident he sustained on October 31, 2014.

Unpaid Medical Bills

Petitioner received treatment for injuries to his left knee, right shoulder and ribs that were necessitated by his fall on October 31, 2014. Specifically, Petitioner alleges the following unpaid bills (PX 2, 3, 4, 5, 12):

Little Company of Mary Medical Center	$ 1,381.00
Advocate Medical Center	$ 18,765.00
PMI Diagnostic MRI	$ 2,468.00
Parkview Orthopedics	$20,738.65

The Arbitrator reviewed the aforementioned bills and the corresponding treatment records and finds the medical treatment contained therein is causally connected to the work injuries he sustained on October 31, 2014. Based on the evidence contained in the

record, the Arbitrator finds the disputed bills to be reasonable and necessary. Therefore, Respondent shall pay to Petitioner the aforementioned medical expenses incurred in connection with the treatment rendered to Petitioner and pursuant to Section 8(a)and 8.2 of the Act.

Prospective Medical Care

The Arbitrator finds that Petitioner is entitled to prospective medical care regarding treatment to his left leg and right shoulder as recommended by his treating physicians.

TTD

At the time of the hearing, Petitioner was undergoing physical therapy for his knee and shoulder.

Based on the evidence contained in the record, the Arbitrator finds that Petitioner did not work and was unable to work from November 1, 2014 through that date of his testimony at the hearing on March 5, 2015, a period of 17-6/7 weeks. Accordingly, the Arbitrator awards Petitioner Respondent shall pay Petitioner temporary total disability benefits of $445.00/week for 17-6/7 weeks, commencing November 1, 2014 through March 5, 2015, as provided in Section 8(b) of the Act.

Penalties/Fees

Mr. Carrigan, the claims adjuster for Respondent's carrier, testified that pursuant to his investigation, he determined that Petitioner's accident did not arise out of and in the course of his employment. (T. 11). Mr. Carrigan's basis for denial was based on Petitioner's representation that there were no defects or liquid on the stairs that caused him to fall. (T. 27). On November 10, 2014, Mr. Carrigan contacted Petitioner via telephone and advised him of the denial. (T. 29). A written denial was subsequently mailed to Petitioner. (PX. 1, Denial Letter). The Arbitrator declines to award penalties or fees in this matter, finding that Respondent's refusal to provide benefits to the Petitioner was not unreasonable or vexatious.

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

Joseph Serpico,
Petitioner,
vs.
Veteran's Park District,
Respondent,

NO: 14WC 39326

16IWCC0823

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, accident, temporay 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 January 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $45.000.00. 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: DEC 20 2016
MJB/bm
o-12/13/16
052

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SERPICO, JOSEPH
Employee/Petitioner

Case# **14WC039326**

VETERANS PARK DISTRICT
Employer/Respondent

16IWCC0823

On 1/4/2016, 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 0.55% 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:

1759 MARTAY & MARTAY
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0507 RUSIN & MACIOROWSKI LTD
KISA P STHANKIYA
10 S RIVERSIDE PLZ SUITE 1530
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

JOSEPH SERPICO,
Employee/Petitioner

Case # **14 WC 39326**

v.

Consolidated cases: _____

VETERAN'S PARK DISTRICT
Employer/Respondent

16IWCC0823

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maria Bocanegra,** Arbitrator of the Commission, in the city of **Chicago, Illinois,** on **November 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? **(No PPD requested by Petitioner)**
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Credit for Prior WC Claims**

FINDINGS

16IWCC0823

On **November 6, 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 **$31,141.24**; the average weekly wage was **$598.87**.

On the date of accident, Petitioner was **67** 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 **$2,623.66** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$2,636.66 (Respondent paid TTD from November 7, 2014 through December 22, 2014)**. Respondent is entitled to a credit under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$399.25/week** for **16** weeks, commencing **11/17/14** through **2/25/15**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$2,623.66** for temporary total disability benefits that have been paid. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **11/17/14** through **2/25/15**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay directly to Petitioner the reasonable and necessary medical services of **$88,734.20** provided for the right knee as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a 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. Ax1, Rx3.

No permanency is awarded based on Petitioner's prior right leg awards and Respondent's credit for same.

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

1-4-2016
Date

JAN 4 - 2016

Joseph Serpico ("Petitioner") testified that he currently resides in Melrose Park, Illinois. Prior to 11/6/14, he testified he had other injuries to the right leg, including:

1967	First right knee surgery high school
11/06/81	82 WC 8852 where he received 55% loss of use of the right leg. On cross he stated this was an injury to the hip after falling down some stairs. Ax1, Rx5.
12/14/00	01 WC 3055 where he received 45% loss of use of the right leg after slipping and falling on ice. Ax1, Rx6.
09/16/06	06 WC 48653 where he received 20% loss of use of the right leg after falling on asphalt. Ax1, Rx7.

For the last injury in 2006, Petitioner could not recall whether it was surgical. He last received treatment for that in 2006. During that time, he was working for Arlington Heights Ford as a used car manager and secondary finance manger. He worked there until 2012 or 2013. He testified he was treatment and pain free before coming to work for Veteran's Park District ("Respondent").

Petitioner testified he was hired by Respondent to work at their health and racquet ball club. Job duties were to pass out lockers and make sure facilities were not being abused. He worked full time and during this period of time and he was not under any medical care for the right knee. He stated that during a usual shift, from 1-4pm he manned the front desk and from 4-9pm he manages.

He described the club as having 2 floors and that when you walk in the front door where members come to register, there is an office directly behind that and a smaller area with 4 to 5 work out machines. The lower level is accessed via 14 or 15 stairs and there are racquetball/handball courts, an aerobics room and a weight room. He testified there is a wash room on the top floor and additional wash rooms downstairs in both the women's and men's locker rooms. He testified the wash room on the first (main) floor is the furthest West in relation to his office desk, which was on the East end.

Petitioner described the original flooring were the machines were as carpeted, which was surrounded by ceramic tile. Petitioner testified that in 2014, the carpeting was replaced with a poured floor. The ceramic flooring surrounding the newly poured flooring remained. He testified the new floor was not poured correctly, resulting in a ¾ inch difference in height where the poured floor met the ceramic floor. In an attempt to correct the uneven floor, a plastic capping was put between where the trim of the poured floor met the trim of the ceramic floor.

Petitioner testified that when working, he usually walked around this area between 10 at 35 times per day depending on work. He testified that the club is open to members of community who want to come in and sign up for membership.

Petitioner testified that on 11/6/14, he was scheduled to work for Respondent from 1pm until 9pm. He testified that on that night, around 8pm he was walking to the bathroom and his right foot hit the gap/ledge between the poured floor and ceramic floor. He said he went forward, tried to catch his balance and when he got his legs planted, he heard a pop in the right knee and his right knee went. He said he stayed there the last 45 minutes. When he fell, he said he was not looking down, was not carrying anything, was not running. Petitioner was shown and identified Px5 as accurately depicting the condition and the location of where he fell. He testified that at the time of the incident, he walked over the plastic strip between the poured flooring and the

ceramic tile. On cross, he stated there was no cracked floor and no debris. He testified that in his opinion, the defect in the floor was Respondent deciding to lay the floor the way they did. On cross, he stated he never actually fell and his knee did not strike the floor.

Petitioner stated he then reported his injury. Petitioner was shown and identified Px1 as the injury report he completed the same night. Petitioner wrote that he was "going to bathroom caught my foot on molding lost my balance came down on knee felt it pop." Under the remarks he wrote "hardly can put any weight on leg if not better tomorrow I am going to go to the emergency room at hospital."

After his shift, Petitioner went home that night and woke up between 4 and 5am and drove to Gottlieb emergency room with his wife. Px6. There, chief complaint noted was tripping over cement lip on new flooring at work and injured right knee heard popping with slight swelling to knee rating pain 9 out of 10. A nurse also noted that Petitioner said he tripped while at work and that his knee twisted. Swelling was noted. Under history of present illness it was noted that Petitioner was at work the day before and tripped on uneven flooring and twisted his right knee. Petitioner related he felt a popping sensation with his knee internally rotated. Petitioner said he did not fall. Petitioner related he was able to bear limited weight on the leg due to pain. Petitioner noted chronic knee problems bilaterally due to previously having been a football player. On cross exam, Petitioner stated he did not recall telling the emergency room that he had chronic knee pain due to football. Past medical history was positive for left knee total knee replacement, right hip replacement and multiple right knee arthroscopies. Exam of the right knee was tender to palpation mainly medially along with mild knee swelling. No pain and no laxity was noted with both anterior and posterior drawer testing. There was no laxity with medial or lateral stress testing but there was pain medially with medial stress testing. McMurray's test was positive medially. Radiographs were negative for fracture or dislocation but severe osteoarthritic degenerative changes with small loose body in the medial compartment were noted. Clinical impression was right knee injury likely internal derangement. Assessment was suspect for medial meniscal or MCL injury. Petitioner was excused from work November 7 through November 12. Petitioner was prescribed ibuprofen for mild pain in Norco/Hydrocodone for moderate pain. He was referred to orthopedic surgery for further management and placed in a knee immobilizer and crutches.

On 11/12/14, Petitioner presented to Dr. Lopez of Midwest Sports Medicine. Px3. There, Petitioner completed hand written intake forms indicating that on 11/6/14 he hurt his right knee after an injury or accident. Petitioner marked that he thought it was work related. The Petitioner wrote that while walking to the bathroom he hit the lip of the floor and twisted his knee and it popped. Petitioner wrote that he is been to Gottlieb Memorial Hospital for prior treatment. Petitioner disclosed that he had prior injuries of a similar nature. He described the current problem as constant, sharp, aching, throbbing and stabbing. He described weakness and sleep disturbance. Symptoms were worse with activity, crutches, climbing stairs and walking. Petitioner reported difficulties with activities of driving, kneeling and squatting, putting on shoes and socks, sitting and walking.

Dr. Lopez wrote under history of present illness the Petitioner had an onset of symptoms sudden and related to an injury occurring on 11/6/14. The doctor wrote much of the same description, symptoms, difficulties and medications as Petitioner disclosed on his intake form. Exam of the right knee showed varus deformity, moderate synovitis. Palpation showed tenderness along the medial aspect of the proximal tibia and adjoining joint line. There was mild patellar crepitus. Flexion past 90° caused significant pain but the knee was stable in full extension. The doctor noted 5 mm of pseudo-laxity when applying a varus stress test in 20° of flexion. Anterior and posterior drawer were negative. The doctor noted that x-rays of the knee showed advanced right knee osteoarthritis. Impression was right knee advanced osteoarthritis. Based on a failure of conservative care, the doctor recommended a right Visionaire total knee replacement. The right knee was injected. Ice and elevation were recommended. An MRI of the right knee was ordered. On 11/17/14, MRI of the right knee showed joint effusion and chronic degenerative joint disease especially involving the lateral

compartment with chronic tear of the lateral meniscus. New x-rays of the right lower extremity in relevant part showed degenerative joint disease in the right knee joint with joint space narrowing and osteophyte formation. In December 2014, Petitioner underwent preoperative workup and clearance at both Loyola Medicine and Alexian Brothers.

On 12/22/14, Petitioner presented to Alexian Brothers Medical Center with a chief complaint of right knee and end stage osteoarthritis. On 12/23/14, Petitioner underwent and Dr. Lopez performed a right knee totally replacement. Of relevance, findings included end-stage osteoarthritis of the right knee.

On 1/14/15, Petitioner followed up with Dr. Lopez. Additional related discomfort associated with range of motion exercises in therapy. The doctor recommended physical and occupational therapy for the next 6 to 8 weeks. Petitioner was removed from work until further evaluation for at least one month. That same month, Dr. Lopez ordered a wheeled walker for Petitioner. Petitioner testified that on 3/1/15, he was released by Dr. Lopez to the same job. Petitioner identified unpaid bills from Alexian Brothers and Dr. Lopez that he would like Respondent to pay for. Px2, 3. Petitioner testified that he was paid temporary total disability (TTD) by Respondent in the amount of $2,622.66 and that he was not paid any additional compensation from 12/23/14 through 2/28/15. Ax1.

Respondent introduced Petitioner's prior medical records. Rx8-11. Relevant prior medical history records show that in April 1986, an x-ray of the right leg showed degenerative changes involving the lateral aspect of the right knee joint. In July 2001, Petitioner underwent a right knee arthroscopic and lateral meniscal debridement for a post operative diagnosis of right knee pain with osteoarthritis. In December 2004, Petitioner underwent a right knee arthroscopy and debridement of medial meniscal tear. In October 2006, Petitioner presented to Dr. Lopez for a diagnosis of right knee osteoarthritis with possible meniscus tear. At that time, Dr. Lopez noted that Petitioner had a long orthopedic problem including prior hip revision surgery in the replacement on the left side. Physical exam showed antalgic gait, varus deformity of the knee and stable knee in full extension. Anterior and posterior drawer testing were negative, bilateral bounding dorsalis pedis pulses and mild synovitis and swelling were noted. Dr. Lopez's impression was that it may be related to degenerative meniscus tear. An MRI was ordered. He wrote back to Dr. Scheck indicating that Petitioner may have a meniscus tear that is causing some of his discomfort and pain. A 2006 MRI of the right knee showed generalized tricompartmental osteoarthritis especially of the lateral compartment. Also identified was a tear of the undersurface of the posterior horn of the medial meniscus, a slightly irregular ACL indicating a possible partial thickness tear, joint effusion with loose intra-articular bodies and a small Baker's cyst in the popliteal fossa. In November 2006, Petitioner followed up with Dr. Scheck. At that time he was admitted for an elective right knee arthroscopy secondary to knee pain and probable foreign body. Assessment was foreign body and posterior cruciate ligament tear of the right knee. On 11/20/06, Petitioner underwent a partial medial meniscus and partial lateral meniscectomy, microfracture medial femoral condyle and micro fracture lateral femoral condyle. Post operative diagnosis was right medial and lateral meniscus tears, osteochondritis and osteoarthritis of the lateral femoral condyle, osteochondritis of the medial femoral condyle and anterior compartment loose body.

In December 2006, Petitioner returned to Dr. Lopez having recently undergone right knee surgery. At that time the diagnosis was right knee medial and lateral meniscal tears, osteoarthritis, ACL deficiency and status post ACL reconstruction. At that time it was anticipated that Petitioner would reach maximum medical improvement three months from the date of surgery. In May 2007, Petitioner returned to Dr. Lopez for pain and discomfort in his knee. Petitioner was noted to have recurrent grinding and pain. The right knee was injected. X-rays at that time revealed advanced osteoarthritis. Dr. Lopez noted the Petitioner continue to be plagued by recurrent pain from inflammatory arthritis. The doctor anticipated it would change before the golf season. In June 2007, Midwest Orthopedics at Rush noted Petitioner was scheduled to have a right total knee replacement.

On cross, Petitioner stated he did not recall seeing Dr. Lopez or complaining of his right knee in 2007. On cross, Petitioner was shown Rx9 for a date of service 5/10/07 but Petitioner did not recall the specific date. Petitioner testified he cancelled right knee replacement surgery because his knee no longer hurt. On re-direct, he testified that from 2007 until the incident at work with Respondent, he did not have any new injury to the right and was not under any medical care for the right knee. He worked full time full duty for various employers including respondent from 2007-2014. He said he was able to use the bathroom as needed at work for Respondent.

On cross, Petitioner recalled that in 1969 he played football one year. He had his first right knee operation in high school around 1967. Petitioner testified that he did not recall discussing a right knee total knee replacement with Dr. Lopez in 1997. Petitioner recalled Dr. Sheinkop as the doctor who performed his hip replacement and treated him for the left and right knees. Petitioner recalled discussing a total knee replacement with Dr. Sheinkop in 2005 and 2007.

In April 2015, Petitioner presented for a section 12 examination at Respondent's request with Dr. Daniel Troy. According to the report, Petitioner related that in November 2014 there was a workout area that had a new floor poured and that Petitioner reported that when the new floor was poured it was pouring down leaving a threshold with a secondary floor off to the side. Petitioner related that he was walking across that area and caught his foot at that threshold and suffered a fall directly on the right knee and he heard a pop come from his right knee. On cross, Petitioner testified that he did not tell Dr. Troy that he fell directly on his knee and that that would be in accurate. Under the assessment portion, Dr. Troy wrote that Petitioner was having minimal to no symptoms to the right knee and then subsequently suffered a fall with a direct blow to the right knee. The doctor's diagnosis was status post right total knee arthroplasty doing very well.

Dr. Troy was asked to determine whether in his opinion Petitioners right knee condition and subsequent total replacement was related to his "minor slip" of November 2014 or whether it was related to his pre-existing condition. Respondent wrote Dr. Troy that it believed Petitioner suffered an "exacerbation of his pre-existing condition that resulted in any sprain at most." Dr. Troy responded that Petitioner was minimally symptomatic prior to the right knee injury and that the need for total knee replacement is secondary to the claimant's radiographic findings as well as that at the time the claimant was symptomatic. Dr. Troy opined that Petitioner and Dr. Lopez did not give additional enough time to see if he could be returned back to his pre-injury level by way of injections, hyaluronic acid replacement therapy and bracing, among various options. Dr. Troy stated that secondary to the fact that Petitioner did not enough time for the need for the totally replacement was purely and simply based on the fact that Petitioner had end-stage, long-term, pre-existing, arthritic changes, as well as secondary to his symptoms at that time. Therefore the need for the total knee replacement was secondary to his pre-existing condition and not from the Worker's Compensation injury. Dr. Troy believed that all treatment to date, irrespective of causality, was reasonable necessary. The doctor believed that Petitioner was at maximum medical improvement and that he was capable of working in a full duty capacity.

On 7/30/15, Dr. Troy issued a letter directed to Respondent's counsel. At that time, Dr. Troy noted that he had an opportunity to review the MRI films and reports from October 2006 and November 2014. He noted that the 2006 report demonstrated generalized tricompartmental osteoarthritic changes greater in the lateral and medial tibiofemoral compartment. It also showed changes present in the medial as well as lateral aspects. The MRI of 2014 in his opinion again demonstrated advancement of the arthritic changes to the knee and describes a chronic tear of the lateral meniscus. The doctor concluded that both MRIs were consistent with advancing degenerative changes in the tricompartmental are of the knee. The new MRI of 2014 in his opinion did not show any new findings on MRI in regards to dramatically induced changes. The doctor noted that Petitioner was contemplating undergoing a right total knee replacement as far back as 2007. The doctor concluded that the comparison of the two MRIs only supported his conclusion that Petitioner's need to progress to a total knee

replacement in such a short period of time following his work accident as secondary to the long-standing, pre-existing, degenerative process of the knee and not to any injury.

On cross, Petitioner admitted he plays golf. Before his recent right knee injury, he played 106 rounds of golf. He said he took 3 Advil before every round of golf for his whole body including the knee.

Petitioner testified he continues to work at Respondent today, at the same pay and without restrictions. He currently has no active medical care for right knee. He has no new injuries at home or at work for the right knee. He last saw Dr. Lopez in March 2015. Today, he notices the right leg is swollen and it is still stiff.

The parties submitted various outstanding bills and payments made in connection with the claim. Px2, 10, Rx3, Ax1.

CONCLUSIONS OF LAW

The Arbitrator's Credibility Assessment

Petitioner was the only individual to testify at trial. That testimony was unrebutted and uncontroverted. The Arbitrator finds Petitioner's testimony to be credible in his recollection of events and dates of treatment and finds the testimony to be forthright and candid in disclosing his prior medical history and prior workers' compensation awards

ISSUE (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2008). The Arbitrator has carefully considered Petitioner's testimony and all evidence submitted at trial and concludes that Petitioner has proven by a preponderance of the evidence that he sustained an accident on 11/6/14 arising out of and in the course of his employment with Respondent.

a. Arising out of

An injury *arises out of* one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury. *Parro v. Indus. Comm'n,* 167 Ill. 2d 385,393, 657 N.E. 2d 882 (1995). An injury sustained by an employee arises out of his employment if the employee at the time of the occurrence was performing acts he was instructed to perform by his employer, acts which he has a common law or statutory duty to perform while performing those duties for his employer or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Howell Tractor & Equip. Co. v. Indus. Comm'n*, 78 Ill. 2d 567, 573, 403 N.E.2d 215 (1980) (emphasis added). A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.

There are three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Ill. Workers' Comp. Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523 (1st Dist. 2007). Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site or performing some work related task which contributes to the risk of falling. *First Cash Fin. Svcs. v. Indus. Comm'n*, 367 Ill. App. 3d 102, 106, 853 N.E.2d 799 (2006).

In this case, Petitioner was injured when he tripped over the cap or lip separating the ceramic and poured flooring. He testified without contradiction that the carpeted flooring inside the health club was replaced with a poured flooring, resulting in what he described as a defective and uneven surface between where the ceramic flooring met the newly poured floor. Petitioner also explained that Respondent later attempted to correct the uneven flooring by putting a cap or lip. When Petitioner was injured on 11/6/14, he testified his right foot caught the cap or lip and when his legs planted he felt a pop in his right knee. Based on these facts, the Arbitrator concludes that Petitioner's accident arose out of his employment as an employment related risk as the floor was defective and uneven resulting in a cap or molding being installed on which Petitioner's right foot was caught resulting in injury.

Respondent asserts that the particular risk to which Petitioner was exposed was neutral in nature as it is a risk is neither distinctly associated with his employment nor is it personal to him. Even under this analysis, the Arbitrator still concludes Petitioner's injuries arise out of his employment.

Injuries resulting from a neutral risk do not arise out of the employment and are not compensable unless the employee was exposed to the risk to a greater degree than the general public. The increased risk may be either *qualitative*, that is when some aspect of the employment contributes to the risk or *quantitative*, such as when the employee is exposed to a common risk more frequently than the general public. Here, Petitioner testified that the location of the bathroom in question that day is located on the opposite end of where his work desk is located. He testified he walked this area between 10 to 35 times per day. Petitioner testified the health club is open to members of the community *if* they want to purchase a membership. Respondent presented no evidence that Petitioner was not allowed to use this particular bathroom or that he was otherwise prohibited from using the route he usually took to get to the bathroom. Petitioner's testimony only established that the club was open to the public who wanted to purchase a membership. This fact does not, by itself, establish that the public actually had open and unfettered access to the club, the bathroom or to the area in which Petitioner testified he traversed 10 to 35 times per day and the area in which he was injured. Simply because the public could come in does not establish that they did come in. Even assuming the general public was exposed to the same risk, Petitioner's credible and unrebutted testimony was that he traversed this area between 10 and 35 times per day. Thus, from a quantitative analysis, Petitioner was exposed to this neutral risk to a greater degree than the general public.

b. In the course of

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. *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill.2d 52, 57, 541 N.E.2d 665 (1989); *Scheffler Greenhouses, Inc., v. Indus. Comm'n*, 66 Ill.2d 361, 365, 362 N.E.2d 325 (1977). Here, there is no doubt Petitioner's injuries were sustained in the course of his employment. Petitioner's unrebutted testimony was that on 11/6/14 he was working and while walking to use the bathroom located on the top floor, he tripped over the cap or lip separating the ceramic tile floor and the poured floor.

Petitioner was not on any break and was in an otherwise authorized area when walking to get to the bathroom, which he testified he was able to use. This evidence establishes Petitioner was engaged in an act of personal comfort, which the Arbitrator finds to be an act authorized and incidental to his employment and to the performance of his duties. Additionally, based on the description of the number of bathrooms and location of the bathrooms, Petitioner's use of the bathroom was reasonable and foreseeable. There was no rebutting evidence that Petitioner's use of the bathroom was not a sanctioned activity. *Lindley v, Fournie-Belleville Concrete Contracting*, 7 IWCC 262; 2007 Ill. Wrk. Comp. LEXIS 254 (Mar. 7, 2007).

Under cross examination, Respondent attempted to elicit testimony from Petitioner that would tend to suggest Petitioner was not paying attention when the incident occurred. There was also testimony regarding whether the flooring was defective or had debris at the time of the fall. When an employer has placed or permitted an employee to be placed in a position where it might reasonably be expected the employee would encounter and undertake a hazard, recovery may lie. Here, Petitioner testified the flooring was uneven and Respondent attempted to correct it by laying down a cap or lip between where the ceramic and poured floorings met. He further testified he traversed this area and used the area to access the bathroom, which was located on the opposite end of the top floor. Thus, Petitioner was in an area he was allowed and expected to be.

Based on the foregoing, the Arbitrator concludes Petitioner's accident was in the course of his employment.

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

For compensability of a claimed injury, where a pre-existing condition exists, recovery will depend on the employee's ability to show that a work-related injury aggravated or accelerated the pre-existing condition such that the employee's current condition of ill-being is said to have been causally connected to the work-related injury and not simply the natural sequela process of the pre-existing condition. *Sisbro Inc. v. Indus. Comm'n,* 207 Ill. 2d 193, 797 N. E. 2d 665 (2003). Additionally, an injury need only be *a* cause of an employee's condition of ill-being, not the sole or primary causative factor. The existence of health problems of an employee prior to work related injury neither deprives the employee of a right to benefits nor relieves the employee of the burden of proving a causal connection between the employment and the subsequent health problems. *Nunn v. Indus. Comm'n*, 510 N.E.2d 502 (4th Dist. 1987). Thus, recovery may be had where an occurrence at work aggravates a preexisting condition.

Having considered Petitioner's testimony and all available medical evidence and opinions, the Arbitrator concludes Petitioner's right knee condition is causally related to his 11/6/14 work accident. Medical evidence clearly established a long history of prior right knee problems and surgeries. Rx8-11. Petitioner candidly disclosed this not only at trial but to various medical providers, including Gottlieb emergency room.

On cross, Petitioner did not specifically recall certain dates of service discussing total knee replacement surgery but did not attempt to hide the fact that such a surgery was in fact discussed in his prior medical treatment before the accident. Petitioner testified he never underwent the surgery because his pain and symptoms subsided. The Arbitrator finds this testimony credible and corroborated by the fact that between 2007 and Petitioner's work accident on 11/6/14, Petitioner had no medical treatment to the right knee. Petitioner also testified that during this same time period, he was treatment and medication free for the right knee. Petitioner testified he was able to perform his work for Respondent without limitation leading up to the accident. Following the accident, Petitioner testified he heard a pop in the right knee for which he eventually underwent a right total knee replacement with Dr. Lopez. Medical records show that after the work accident, Petitioner was noted to have swelling and described his symptoms as constant, sharp, aching, throbbing and stabbing. He had difficulty driving, kneeling, squatting, putting on shoes and socks and with sitting and walking. Petitioner was given crutches and a knee immobilizer immediately after the fall. The Arbitrator finds these symptoms were the result of Petitioner's work accident resulting in injury to the knee. This conclusion is supported by Dr. Lopez's 11/12/14 opinion that Petitioner had an onset of symptoms sudden and related to an injury occurring on 11/6/14.

When Petitioner was evaluated by Dr. Troy, Respondent's exam doctor, he concluded "*the need for total knee replacement is secondary to his pre-existing condition and not from the workers' compensation injury.*" While this conclusion is partially correct, it omits the fact that Petitioner's right knee was symptom free for his pre-existing condition for 7 years prior to the work accident and only became symptomatic as a result of the

accident. The Arbitrator finds that Petitioner's pre-existing right knee condition was rendered symptomatic as result of his work accident, which resulted necessitated a right total knee replacement. In Dr. Troy's addendum report, he concluded that the 2006 and 2014 MRIs of Petitioner's right knees were essentially the same and that therefore the need for the total knee replacement was secondary to long standing, pre-existing degenerative changes of the right knee. However, for similar reasons noted above, the Arbitrator is not persuaded by this analysis as it ignores Petitioner's lack of symptoms or treatment from 2007 to 2014. Therefore, in light of the foregoing, the Arbitrator concludes Petitioner's right knee condition is causally related to his 11/6/14 work accident.

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?***

Having found in favor of Petitioner on the issues of accident and causal connection, the Arbitrator finds Petitioner's medical services for the right knee have been reasonable and necessary. Petitioner introduced the following unpaid medical bills: Alexian Brothers Medical Center $62,175.00; Midwest Sports $26,435.50 and CMS $123.70.

Respondent shall pay directly to Petitioner the reasonable and necessary medical services of **$88,734.20** provided for the right knee as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a 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. Ax1, Rx3.

ISSUE (K) ***What temporary benefits are in dispute?***

The testimony of Petitioner and the medical records support a finding of temporary total disability benefits as requested by Petitioner. Petitioner was disabled from employment from 11/7/14 through 2/28/15 or 16 weeks. Respondent shall pay Petitioner temporary total disability benefits of **$399.25/week** for **16** weeks, commencing **11/17/14** through **2/25/15**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$2,623.66** for temporary total disability benefits that have been paid. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **11/17/14** through **2/25/15**, and shall pay the remainder of the award, if any, in weekly payments.

ISSUE (L) ***What is the nature and extent of the injury? (No PPD requested by Petitioner)***
ISSUE (O) ***Credit for prior WC Claims***

Petitioner testified he received prior awards for injury to the right leg. Ax1, Rx5-7. Given that Petitioner has received 120% loss of use of the right leg in those prior awards, Petitioner would be entitled to receive no additional permanency as to the right leg. Petitioner stipulated to this on the record. Accordingly, no permanency is awarded based on Petitioner's prior right leg awards and Respondent's credit for same.

Signature of Arbitrator

1-4-2016
Date

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 Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARSHALL "STEVEN" KNEFELKAMP,

Petitioner,

16IWCC0846

vs.

NO: 14 WC 40164

STATE OF ILLINOIS – DEPARTMENT OF TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review 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, nature and extent of Petitioner's disability, and medical expenses both current and prospective, 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 testified he has been a highway maintainer for Respondent for 12 years. Since 2007 his job activities included fixing signs/posts, removing large debris, trimming trees, and removing snow.

2. On March 4, 2014, while attempting to climb up to the passenger side of the state truck, his "left foot got lodged between the top step of the truck and the truck body itself due to ice and snow that had been impacted on the top of that step." He slipped and fell backwards; his "left foot remained lodged between the step and the truck causing it to pull and be strained unbelievably." His foot dislodged and his head slammed into the fuel pump island resulting in a concussion. He also felt immediate excruciating pain in his knee, ankle and foot with immediate bruising.

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3. Petitioner testified he had pain in his left knee previously, but sustained no prior injuries to, or had any surgery on, that knee. He agreed that the medical records indicated he had an MRI of his left knee a few years previously, but he could not remember the reason. He remembered he had some soreness in his knee which he wanted checked out. He believed at that time Dr. Baumer found some arthritis in the knee, but he did not lose any time at work from that condition.

4. Petitioner received workers' compensation benefits after the accident until September 14, at which time it was terminated after a Section 12 examination with Dr. Milne. He read Dr. Milne's report and there were a few inaccuracies. "The biggest thing is that Dr. Milne did not want to agree that this fall had in fact been a major problem with [his] knee and kept making referrals to preexisting problems such as the arthritis."

5. Petitioner began treating with Dr. Morton who performed surgery on June 4, 2014. Currently, Petitioner cannot stand for any extended periods because of his knee. He has difficulty climbing stairs and getting out of his "own vehicle." He has to stay away from lifting, can't climb a ladder, and can't bend over. His wife now performs the yard work he used to do. He can no longer ride a motorcycle because he can't depend on leaning on his leg and "playing with the grandkids it's a very big chore now."

6. Petitioner was released to work with restrictions in May 2015. Since then he has been working at the headquarters, "feeding paperwork into a scanner which in turn is feeding a machine to try to get their files all on computer." Prior to his employment with Respondent Petitioner was a police officer for Belleville for over 31 years. Prior to that he was in the Army and spent a year in Vietnam. He did not suffer any injuries to his left knee during those previous employments.

7. Petitioner had a second examination with Dr. Milne and reviewed Dr. Milne's second report. Petitioner again disagreed with Dr. Milne that the accident had no major effect on his knee and "it was due to the preexisting arthritis and some bone to bone wear." Prior to the accident, Petitioner had no problem performing his job because of his left knee, had no restrictions because of his left knee, nor took any medication because of his left knee. His right knee is fine. He is still under Dr. Morton's care. Dr. Morton wishes to perform additional surgery only if Petitioner chooses that.

8. On cross examination, Petitioner testified he went to see Dr. Baumer sometime in 2005 and he received some shots. He did not remember Dr. Baumer recommending a knee replacement, but he may have noted that as a future option. He agreed that Dr. Morton had indicated that a total knee replacement "would probably be the next option." It was currently an option as it was in the mid-2000s. Petitioner again testified that he did not remember that he previously missed work for treatment of his left knee, but he may have taken some sick time. Petitioner did have occasional pain in his left knee which would flare up prior to the accident.

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9. The medical records reveal that on October 21, 2005, Petitioner presented to Dr. Horner for a problem with his left knee began spontaneously in June 2005. The right knee was asymptomatic. The left-knee pain was persistent in the medial joint line. Dr. Horner ordered an MRI to rule out meniscal tear.

10. On October 28, 2005, Petitioner returned and noted his symptoms persisted. Dr. Horner noted the MRI showed a tear in the posterior horn of the medial meniscus. He recommended arthroscopic debridement. Petitioner wanted to proceed but could not at that time due to his work situation.

11. Petitioner returned to Dr. Horner on May 3, 2006 but elected to leave his knee alone because a lot of his pain went away. However, Dr. Horner noted that new x-rays showed a remarkable change with markedly more narrowing of the medial joint line. Dr. Horner thought it showed Petitioner was developing osteoarthritis in the medial compartment joint. Dr. Horner feared a meniscectomy might dramatically worsen that disease. Petitioner agreed to conservative treatment and he administered an injection and provided him a sole wedge. He released Petitioner from treatment prn.

12. Petitioner returned two months later with a spontaneous onset of right-knee pain similar to that he experienced in the left knee. He had no residual left-knee pain. X-rays were consistent with mild arthritis. Dr. Horner injected the right knee. Dr. Horner again injected the knees bilaterally on four more occasions, the last being October 30, 2007.

13. On June 16, 2009, Petitioner presented to Dr. Baumer with a six-month history of knee soreness, mostly in the left knee. He reported a twisting episode at work. It really did not bother him much, got better, but was now more troublesome. X-rays showed bone-on-bone changes in the left knee and significant narrowing in the right. Dr. Baumer noted that even though Petitioner might have a degenerative meniscal tear, he did not believe arthroscopy would be beneficial because of the significance of the arthritis. He discussed with Petitioner the importance of weight loss, to alleviate symptoms, protect the knees, and to improve the outcome of any possible prospective surgery. Dr. Baumer administered an injection in the left knee.

14. Dr. Baumer injected Petitioner's left knee on October 20, 2009. Almost 10 months later, Petitioner presented for follow up for his left knee. He also complained of bilateral wrist pain. Dr. Baumer noted that x-rays showed Petitioner had significant arthritis in the wrists. Petitioner reported attempts at weight loss had been unsuccessful thus far. Dr. Baumer stressed the importance of losing weight. They discussed intermittent injections. They also discussed the contemplation of knee replacement sometime in the future, but it was not reasonable at that time due to Petitioner's age, body habitus, and activity level. He released Petitioner from treatment prn.

15. On October 9, 2012, Petitioner presented to Dr. Du for bilateral knee pain on referral from Dr. Malcharek, Petitioner's primary care provider. Dr. Du diagnosed bilateral knee osteoarthritis secondary to morbid obesity. He would set up injections.

16. Dr. Dru administered steroid injections for severe bilateral joint pain on three occasions, the last being November 11, 2012. By November 27, 2012, Petitioner reported his knee pain was gone. Dr. Du released him from treatment prn.

17. On March 4, 2014 (the date of the instant accident), Petitioner presented to the emergency department of Belleville Memorial Hospital for leg pain. Petitioner reported the accident and complained of left ankle/knee and neck pain. He denied loss of consciousness but saw "stars" and currently felt lightheaded. Mild edema with no deformity was noted in the knee and ankle. X-rays of the ankle and knee and CTs of the head and neck were deemed to be normal. The x-ray report of the knee indicated moderate medial and mild patellofemoral compartment osteoarthritis. Concussion with no loss of consciousness, post-concussion syndrome, cervical strain and ankle/knee sprain were diagnosed, and Petitioner was taken off work for five days.

18. On March 25, 2014, Petitioner presented to Dr. Morton for left knee/ankle pain. He reported the accident on roughly March 4, 2014. His ankle mostly cleared up and the current problem was mostly his knee. Petitioner treated with a TENS unit with some benefit. He had previous issues with the left knee and had injections. Petitioner realized he had a preexisting osteoarthritic condition but it was markedly worse after the accident. Dr. Morton diagnosed osteoarthritis with recent trauma and ordered an MRI.

19. The MRI showed severe chondromalacia of the medical femoral condyle with grade 4 chondromalacia and grade 3-4 chondromalacia in the medial tibial plateau, diffuse maceration of the medial meniscus, MCL bursitis, a likely tear in the horn lateral meniscus, "2 mm focus of near full-thickness chondromalacia of the more medial aspect of lateral femoral condyle," and small effusion and Baker's cyst.

20. After reviewing the MRI, Dr. Morton diagnosed "medical and lateral meniscal tears with osteoarthritis about the left knee." They discussed various treatment option including conservative treatment and "eventual total knee arthroplasty." Petitioner was "really not looking toward a total knee replacement at this time. He wants to know how he would be able to get rid of the meniscus tears." Petitioner wanted to proceed with surgery after which he would receive conservative treatment for the osteoarthritis.

21. On June 4, 2014, Dr. Morton performed "diagnostic and operative arthroscopy of the left knee, partial medial and partial lateral meniscectomies, and chondroplasty of all 3 compartments" for medical and lateral meniscal tears and left knee osteoarthritis.

22. Petitioner reported some improvement postop. However, he did not want to proceed with cortisone injection or Synvisc treatment at that time. He was offered physical therapy but wanted to proceed with a home exercise program. By July 15, 2014, Dr. Morton noted that Petitioner had end-stage arthritis with some good days and bad days. He was not improving as much as he would like. "He realizes that the meniscal tear did probably from Workman's Comp; however, the arthritis was not caused by the accident but certainly could have been aggravated by his fall." Dr. Morton indicated that Petitioner had sufficient arthritis to proceed with replacement, and Petitioner wanted to proceed.

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23. On September 26, 2014, Dr. Morton released Petitioner to work light duty with a 20-lb lifting/pushing limit and various other restrictions. There does not appear to be any accompanying treatment note in the record.

24. On January 9, 2015, Petitioner returned to Dr. Morton for follow up for arthritis of the left knee. "He had initially fallen or slipped off his truck with no previous pain." He had improved to the point that he did not want surgery, but still had difficulty getting into and out of the trucks; he wanted to continue conservative treatment. Dr. Morton administered a cortisone injection and took Petitioner off work three months until reevaluation. Dr. Morton continued to treat Petitioner with injections on three more occasions, the last being August 11, 2015.

25. Dr. Morton testified by deposition on April 9, 2015. He is a board-certified orthopedic surgeon. He sees somewhere between 75 and 90 patients and performs six to seven surgeries per week. Less than 5% of his patients have workers' compensation claims.

26. Petitioner had seen his partner, Dr. Baumer, previously from July 16, 2009 through August 10, 2010. Dr. Morton first saw Petitioner on March 25, 2015. Petitioner reported his accident. He did not relate his arthritis, and Dr. Morton did not ask because he had the records from Dr. Baumer indicating he had some arthritis. After his examination and review of x-rays, Dr. Morton diagnosed osteoarthritis with recent trauma.

27. Dr. Morton and Petitioner went through all the possible conservative treatments for osteoarthritis including weight loss, physical therapy, injections, medication, and then eventual knee replacement. However, with the new history of trauma he could not rule out fracture and because of his worsened arthritis after the accident, Dr. Morton ordered an MRI. He opined that the accident aggravated Petitioner's preexisting arthritis because of his report of increased pain.

28. Dr. Morton did not have a pre-accident MRI, but he assumed the meniscal tears could have been caused by the accident and the tears could have caused the increased pain. The meniscal tears could have made the arthritis "more symptomatic." It was hard to say why Petitioner experienced the increase in pain, but Petitioner did report a markedly increase of symptoms after the injury.

29. Dr. Morton went over with Petitioner treatment options for the separate diagnoses. He recommended conservative treatment for the arthritis. Regarding the meniscal tears he could do nothing or remove the tears arthroscopically. However, "at his age, you wouldn't necessarily fix them, but just get rid of them." Petitioner decided to proceed with the arthroscopy.

30. Dr. Morton noted that he released Petitioner to light duty on September 26, 2014. He believed Petitioner tried to return to work with restrictions. But by January 9, 2015 he "just couldn't get back to full capacity" and then considered knee replacement. He did not believe Petitioner could return to work at full duty.

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31. Petitioner has the requisite condition to justify a knee replacement, but it was up to him when he wanted to proceed based on his symptomology. Petitioner did not want to proceed when he last saw him on April 7, 2015.

32. Dr. Morton believed the injury "aggravated the knee" and he did not believe he ever indicated Petitioner returned to his pre-injury status. When asked whether it accelerated the need for knee replacement, Dr. Morton answered, "currently, he doesn't want a total knee replacement, so hopefully it was more of an aggravation over a year's time frame, but apparently it settled down with the knee arthroscopy and conservative treatment." He thought Petitioner was at maximum medical improvement for the meniscal tears. He will need continued treatment for osteoarthritis until he eventually has a replacement. Then when asked whether his treatment to date and his recommended prospective treatment including replacement were causally related to the accident he answered, "yes."

33. On cross examination, Dr. Morton testified he was aware that there were x-rays of Petitioner's left knee prior to the accident but he was not aware of an MRI. He did not look at the previous x-rays, but he read the reports. He agreed that "from an x-ray standpoint, Petitioner could have gone on to have a total knee back in 2009." He had not seen records of Dr. Malcharek, or Dr. Du. He knew that Dr. Baumer administered injections but was not aware that Dr. Du administered injections. Dr. Morton agreed that Petitioner's grade 4 chondromalacia predated the accident. He did not know the extent the chondromalacia was aggravated by the accident. On January 9, 2015, when Petitioner rejected replacement and proceeded with conservative treatment, he was getting the same treatment as he had in 2012. However he was not at pre-injury status because he had not returned to his previous function.

34. Dr. Morton agreed that Petitioner had not had formal physical therapy or a Functional Capability Evaluation. A home exercise program is not the same as physical therapy. Petitioner's condition was not currently exacerbated by work activities and he was able to tolerate his current level of pain with conservative management. Proceeding with knee replacement was up to Petitioner. Dr. Morton was trying to get him preapproved for viscosupplements.

35. Dr. Milne testified by deposition on August 7, 2015. He is board certified in orthopedic surgery with fellowships in sports medicine and knee/shoulder surgery. He examined Petitioner twice. Initially, he was only provided records since the emergency department visit on March 4, 2014. Prior to the second examination he was provided records dating back to 2005. He noted Petitioner was 5'8" and 307 lbs. Dr. Milne then summarized treatment that he had records of for the first examination. He then testified about the additional records he received prior to the second examination.

36. Dr. Milne also testified that at the time of his first examination he opined that Petitioner's condition was related to his accident because there were no medical records of any previous condition and based on Petitioner's history to him.

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37. However, after Dr. Milne reviewed the additional records prior to the second examination he believed that Petitioner's meniscal tear predated the accident, which was "well documented." He noted that the initial MRI report described the tear as macerated, "which implies a longstanding change."

38. Dr. Milne testified he initially believed the accident aggravated Petitioner's condition. However, at that time he could not tell whether the aggravation was temporary or permanent. He noted that Petitioner had surgery within three months of the accident, which provided no relief and resulted in reversion to the plan of total knee replacement. However, upon the second examination he opined that Petitioner suffered only a temporary aggravation of his symptoms, because he did not suffer any structural changes. The arthroscopy was of no benefit to him and he remained a knee replacement candidate as he was prior to the arthroscopy. In fact he was a candidate for knee replacement dating as far back as at least 2012. Petitioner's current condition was the natural progression of his degenerative joint disease.

39. On cross examination, Dr. Milne testified he does not perform knee replacements in his practice. He agreed that in one of his reports he indicated Petitioner seemed to be honest and forthright. On his first visit Petitioner reported he was pain-free prior to the accident. He would have no reason to dispute the characterization of highway maintenance work as relatively heavy duty work. He agreed that in his first report he opined that Petitioner tore his meniscus in the accident but he implied that he opined it aggravated his symptoms rather than aggravated his arthritis.

40. Dr. Milne agreed with the assessment of Dr. Morton that the best way for Petitioner to obtain maximum function was a knee replacement. But that was all dependent on the amount of pain that was not controllable by other means. He agreed that between 2005 and 2012 Petitioner underwent intermittent treatment but no surgery to his left knee. He also agreed that the last notation prior to the accident indicated Petitioner was pain-free in his knees; that was about 15 months prior to the accident. However, he could not say that the accident accelerated the need for knee replacement; he was offered arthroscopy several times between 2005 and 2012 and a knee replacement in 2012.

41. Dr. Milne also could not say whether whatever injuries Petitioner sustained in the accident resulted in the need for treatment because he was offered the same surgery dating back to 2005 or 2006. Dr. Milne again testified that he did not believe Dr. Morton's arthroscopic surgery was indicated or beneficial. Within several weeks of the surgery, knee replacement was again being considered. He refused to accept that the accident was even a factor in necessitating eventual knee replacement.

42. On redirect examination, Dr. Milne testified at the time of his second report he did not believe Petitioner had returned to baseline prior to the accident, but it was important to consider that he had surgery. He believed the literature supports the premise that arthroscopic surgery was not indicated for a 65 year old patient with a body mass index of well over 50, who had a known meniscus tear for at least seven or eight years, and who had full thickness cartilage loss in three compartments in his knee.

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In finding Petitioner proved his current condition was caused by the accident, the Arbitrator found the opinion of Dr. Morton credible. He also noted that Dr. Milne opined in his initial report that the meniscal tear was related to the accident as well as Petitioner's testimony about being pain-free prior to the accident and the notation of the onset of pain in the emergency department. The Arbitrator awarded Petitioner all medical expenses incurred thus far as well as prospective treatment recommended by Dr. Morton, including "the surgery." Respondent argues that the Arbitrator erred in finding causation noting the records of extensive treatment of the left knee prior to the accident. It also stresses that Dr. Morton did not have information about the extent of the previous treatment and therefore, his opinions were non persuasive.

The Commission finds that the accident either caused or aggravated Petitioner's meniscal tear making it more symptomatic necessitating treatment. In this regard, the Commission finds persuasive Petitioner's testimony about the onset of increased pain after the accident which was corroborated by the medical records. In addition, the Commission notes that despite his extensive underlying arthritis, Petitioner was apparently able to perform his relatively physically demanding job prior to the accident.

However, the Commission also finds that the accident did not permanently aggravate Petitioner's underlying and pre-existing arthritic condition of the left knee nor accelerate the need for eventual replacement. The Commission notes the extensive treatment Petitioner had for his arthritis prior to the date of accident. In addition, the Commission finds persuasive Dr. Milne's testimony and the fact that Petitioner was clearly an arthroplasty candidate prior to the accident, as corroborated by the medical records. The Commission finds less persuasive the opinion of Dr. Morton who did not have the benefit of the records of Petitioner's extensive previous treatment for knee arthritis. Therefore, the Commission concludes that the need for prospective treatment, and potentially knee replacement, is the result of the natural progression of his disease and not the result of Petitioner's work accident on March 4, 2014.

Based on the Commission's findings on causation, the Commission must determine what benefits are due based on the meniscus tear, or its aggravation. Regarding medical expenses, the Commission finds treatment for Petitioner's meniscus tear was reasonable and necessary. Even though Dr. Milne questioned the efficacy of arthroscopic knee surgery in light of Petitioner's extensive underlying arthritis and body habitus, at that time Petitioner was not ready for knee replacement and Dr. Morton was attempting to alleviate Petitioner's condition.

Therefore, the Commission awards medical expenses incurred through September 26, 2014. At that time Dr. Morton released Petitioner to work light duty and Petitioner was effectively released from treatment until he decided to have the knee replacement surgery. The next time Petitioner saw Dr. Morton, Dr. Morton indicated Petitioner returned for follow up for arthritis. In addition, in his deposition, Dr. Morton testified that the treatment Petitioner had thereafter was the same type of treatment he received prior to the work accident. Therefore, the Commission finds that after September 26, 2014, all subsequent treatment was provided to treat Petitioner's underlying arthritic condition, and therefore not related to his work accident/injury. In addition, because the Commission finds that all prospective treatment would be provided to treat the arthritis, the award of prospective medical expenses is vacated.

Regarding the issue of temporary total disability benefits, the Commission finds January 9, 2015 an appropriate date to terminate temporary total disability benefits. At that time Dr. Morton noted that Petitioner returned for follow up for arthritis and his knee improved to the point he did not want to proceed with knee replacement surgery at that time. Dr. Morton took Petitioner off work at that time but the Commission concludes that Dr. Morton took him off work due to his arthritic condition and not due to the meniscal tear or aggravation thereof.

On the issue of permanent partial disability, the Arbitrator awarded Petitioner 15% loss of the left leg. In so doing, the Arbitrator outlined the relative weight he gave to the five statutory factors in determining permanent partial disability. He gave "great" weight to Petitioner's high physical demand level occupation as highway maintainer and evidence of disability based on Petitioner's testimony. He gave "significant" weight to the aggravation of Petitioner's underlying arthritis, and he gave "minor/little" weight to Petitioner's future earning capacity and age (65).

The Commission finds interesting that the Arbitrator awarded a permanent partial disability award even though he ordered prospective treatment, indicating he did not find Petitioner to be at maximum medical improvement from his work-related injury. Nevertheless, the Commission finds the permanent partial disability award of loss of 15% of the left leg to be appropriate in this instance and in line with other Commission awards for operated meniscal tears. Petitioner seeks additional permanent partial disability benefits for Petitioner's leg as well as some permanency award for his concussion/post-concussion syndrome, and ankle. The Commission finds that Petitioner did not sustain his burden of proving any permanent disability from those injuries. Accordingly, the Commission affirms the permanent partial disability award.

The Commission also notes that there are clerical errors in the award of the Arbitrator. The number of weeks awarded for temporary total disability and permanent partial disability do not correctly correspond to the dates specified for temporary total disability or percentage of loss of the leg the Arbitrator purportedly awarded. It appears that the Arbitrator transposed the number of weeks awarded for temporary total disability and permanent partial disability in the award section. The Commission corrects those clerical errors in the award below.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $923.08 per week for a period of 31&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 pay to Petitioner the sum of $721.66 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 permanent loss of the use of 15% of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses incurred through September 26, 2014 under §8(a) of the Act pursuant to the applicable medical fee schedule.

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IT IS FURTHER ORDERED BY THE COMMISSION, that the Arbitrator's award for medical expenses incurred after September 26, 2014 and prospective medical treatment is 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: DEC 27 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-12/7/16
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

16IWCC0846

KNEFELKAMP, MARSHALL "STEVEN" Case# **14WC040164**
Employee/Petitioner

STATE OF IL/IDOT
Employer/Respondent

On 11/24/2015, 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 0.35% 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

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

1430 CENTAL MGMGT SERVICES
WORKERS' COMP MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

NOV 24 2015

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

16IWCC0846

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

Marshall "Steven" Knefelkamp
Employee/Petitioner

v.

State of IL/I.D.O.T.
Employer/Respondent

Case # **14** WC **40164**

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 **September 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 **March 4, 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 $**72,000.24**; the average weekly wage was $**1,384.62**.

On the date of accident, Petitioner was **65** 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 $**Any paid** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $**Any paid**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule or a PPO agreement (whichever is less) as provided in § 8(a) and § 8.2 of the Act.

Respondent shall authorize and pay for any treatment recommended by Dr. Morton, including but not limited to surgery.

Respondent shall be given credit for medical benefits that have been paid through its group carrier, 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 pay Petitioner temporary total disability benefits of $923.08/week for 32.25 weeks, commencing March 4, 2014, through May 25, 2015, as provided in § 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 53.75 weeks, because the injuries sustained caused the 15% 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.

Edward Lee
Signature of Arbitrator

11/23/15
Date

NOV 24 2015

STATE OF ILLINOIS)

) SS

COUNTY OF WILLIAMSON)

16IWCC0846

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Marshal "Steven" Knefelkamp

Employee/Petitioner

v. Case # 14 WC 40164

STATE OF ILLINOIS/ILLINOI DEPARTMENT OF TRANSPORTATION

Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner began his employment career in the U.S. Army where he did a year tour in Vietnam. (T. 17). Petitioner then served as a police officer in Belleville for 31 years. *Id.* During these careers, Petitioner suffered no traumatic injuries to his left knee. *Id.*

On March 4, 2014, Petitioner was employed by Respondent, Illinois Department of Transportation, as a highway maintainer. (T. 6). Petitioner's job duties included, fixing street signs, painting highways, picking up large debris, clearing snow, trimming foliage, and general maintenance of the highways. (T. 7). At the date of accident, Petitioner had been employed by I.D.O.T. for 12 years. (T. 6).

On March 4, 2014, Petitioner had just completed fueling up his work truck at the rear of the I.D.O.T's sign shop when he fell attempting to get into his work truck. (T. 8). Petitioner testified that he placed his left foot on the step up to his work truck, and, because the step was covered in

ice and snow, his foot slipped and was lodged between the step and the truck. *Id.* Petitioner lost his balance and fell backwards with his foot still lodged between the step and the truck. *Id.* Petitioner testified that he believed he would break his leg until the last moment when his foot snapped free. *Id.* Petitioner landed on concrete, knocking his head into a fuel pump island behind him. (T. 9). Petitioner testified that he had immediate pain in his head, left knee, ankle, and foot and that there was bruising in his left knee, ankle, and foot. *Id.* Petitioner testified at trial that he informed his superior directly after the accident, filled out an accident report, and called a number from an I.D.O.T. card which he was required to call. (T. 14).

On March 4, 2014, immediately following the accident, Petitioner presented at the Belleville Memorial Hospital Emergency Room for his left knee, ankle, and head. (PX3). Petitioner gave a 9/10 pain rating for his left knee, a 4/10 pain rating for his left ankle, and a 9/10 pain rating for his head. *Id.* Petitioner was diagnosed with having suffered a concussion. *Id.* Belleville ER completed x-rays on Petitioner's left knee which were negative for fractures. *Id.* Belleville proscribed Petitioner Hydrocodone, took him off work, and discharged him. *Id.*

On March 25, 2014, Petitioner came under the care of Dr. Steven Morton. (PX4). Dr. Morton's notes for March 4, 2014, record that Petitioner was continuing to experience symptoms of pain in his left knee, but that his other symptoms had resolved. *Id.* Dr. Morton's notes for this day also state, "[Petitioner] does have the preexisting condition of osteoarthritis but this [(Petitioner's current condition)] is markedly worse compared to what he had." *Id.* Dr. Morton placed Petitioner off work and ordered an MRI. *Id.*

On April 22, 2014, Belleville Hospital performed an MRI which revealed objective findings of severe chondromalacia of the medial femoral condyle, grade 3-4 chondromalacia of the medial tibial plateau, a diffuse maceration of the medial meniscus, MCL bursitis, a likely radial tear posterior horn lateral meniscus, and a near full thickness chondromalacia of the more medial aspect of lateral femoral condyle. (PX3).

On April 25, 2014, Dr. Morton reviewed Petitioner's MRI and recommended surgery to resolve the meniscus tears. (PX4).

On June 4, 2014 Dr. Morton performed left knee partial medial and partial lateral meniscectomies and chondroplasty of all three compartments. *Id.* The operative report notes that Petitioner tolerated the surgery well and was in a satisfactory condition afterwards. *Id.*

Petitioner continued to treat with Dr. Morton with follow-up appointments after surgery. *Id.* On July 15, 2014, Petitioner told Dr. Morton that he would like to proceed with a total left knee arthroplasty. *Id.* On January 9, 2015, Petitioner informed Dr. Morton that he was pleased with his progress following surgery and that he no longer wanted to continue with a total left knee arthroplasty. *Id.*

Before surgery, Petitioner testified that he was unable to stand for long periods of time, had to take steps one at a time, had trouble getting in and out of his vehicle, and experienced pain varying with his activity. (T. 14-15).

Following surgery, Petitioner testified that he was able to return to work within restrictions. (T. 15). Petitioner testified that the surgery improved his condition. *Id.*

Prior to his accident, Petitioner was missing no time because of his left knee; he was not working with any restrictions due to his left knee; he was not taking any medication for his left knee; nor was he taking any of these measures for his right knee. (T. 19). Following his accident, Petitioner had to miss time for medical reasons, including an ER trip where he presented with a 9/10 pain rating; Petitioner had objective findings of a torn meniscus requiring surgery; and Petitioner was placed on restrictions by Dr. Morton which prevented him from working full duty. (PX3; PX4).

Dr. Morton testified by way of deposition. (PX5). Dr. Morton testified that the injury which occurred on March 4, 2014 could cause meniscal tears. (PX5 12). Dr. Morton also testified that Petitioner's symptoms increased markedly following his accident. (PX5 13-14).

On September 8, 2014, Dr. Michael Milne performed an Independent Medical Examination. (RX6). In his examination Dr. Milne stated, "[Petitioner] reports an injury where he slipped and fell backwards. I believe [Petitioner] likely tore his meniscus at that time and he did have a preexisting condition of underlying arthritis as evidenced by his MRI and operation report." (RX6 9/8/14, 3). Further in the report, Dr. Milne says, "I believe he has an increase in symptoms as a result of his work related injury." *Id.* Dr. Milne believed that there was a 10% permanent partial disability rating based on the AMA guidelines for Petitioner's lateral meniscus tears, and a 15% permanent partial disability rating for Petitioner's knee arthritis. Although Dr. Milne stated that this predated the accident, he essentially acknowledged that Petitioner's arthritic condition was aggravated by his work injury on account of the "increase in symptoms as a result of his work related injury." *Id.* at p. 4.

Both Dr. Morton and Dr. Milne state that Petitioner tore his meniscus during his work injury on March 4, 2014. (PX5 12; PX6 3).

Issues of Law

Issue (C): Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

In order for an injury to be compensable it must arise out of and in the course of employment. *Caterpillar Tractor Co v. Industrial Comm'n*, 541 N.E.2d 665, 667 (Ill. 1989). Courts have held that "in the course of" refers to the time, place and circumstances of the injury. *Id.* The phrase "out of" refers to the nature of the task performed meaning that the injury must be connected to some risk created by the nature of the work, which is not commonly faced by the general public. *Id.*

Petitioner's injuries arose out of his employment. Slips and falls on an employer-provided lot when hazardous conditions are present are generally compensable. See *Mores-Harvey v. Indus. Comm'n,* 804 N.E.2d 1086 (Ill. App. 3rd Dist. 2004); *Archer Daniels Midland Co. v. Indus. Comm'n,* 437 N.E.2d 609 (Ill. 1982); *Hiram Walker & Sons, Inc. v. Indus. Comm'n,* 244 N.E.2d 179 (Ill. 1968); *Carr v. Indus. Comm'n,* 186 N.E.2d 280 (Ill. 1962); *De Hoyos v. Indus. Comm'n,*

185 N.E.2d 885 (Ill. 1962) (cases in which claimant fell in employer's ice-covered parking lot). In *Archer Daniels Midland Co. v. Indus. Comm'n,* 437 N.E.2d 609 (Ill. 1982), the Supreme Court specifically noted that, "Where the claimant's injury was sustained as a result of the condition of the employer's premises, this court has consistently approved compensation." *Id.*

Moreover, Petitioner was not simply walking through a parking lot. Petitioner was attempting to get into his work truck, that was operated only by employees, in an area open only to employees, a lot behind the sign shop,. (T. 8). In *Oller v. State of Illinois, Department of Transportation,* 11 I.W.C.C. 0765 (Ill. 2011), the court found that entering a work truck satisfied the "arising out of" element. Therefore, Petitioner was not exposing himself to a neutral risk, to which the general public is also exposed, but to a risk specific to his employment. The Arbitrator finds that Petitioner's act of entering his truck was one consistent with the course of his employment.

Petitioner's injuries occurred in the course of his employment. Petitioner was undisputedly on the premises of the I.D.O.T., during his normal working hours (T. 8).

Issue (E): Was timely notice of the accident given to Respondent?

After testimony was complete, Respondent's council stipulated that notice had been given. (T. 28). The Arbitrator stated that notice was no longer an issue in this case. (T. 29).

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

The court finds the opinion of Dr. Morton to be credible. Dr. Morton testified that he believed Petitioner's injury on March 4, 2014 either caused or significantly aggravated his symptoms following the accident. (PX5 12-14).

Despite disputing causation, Respondent's own IME, Dr. Milne, stated in his independent medical examination on September 8, 2014 that he believed Petitioner's injuries of meniscal tears were caused by his work related accident and that the increased symptoms were aggravated by same. (RX6 9/8/14, 3).

Both doctors opine that Petitioner's meniscal tears were caused by his work related accident on March 4, 2014.

Even if neither doctor had offered causation opinions, the evidence alone supports the finding that Petitioner's injuries are causally related to his accident. Before the accident, Petitioner had no work restrictions; he was not actively treating his left knee; and he reported no excessive pain in his left knee. After the accident, Petitioner was restricted to light duty; he presented at the Belleville ER with a 9/10 pain rating in his left knee; and he eventually required surgery on his left knee, which afforded him great relief. "[A] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Com.,* 442 N.E.2d 908 (Ill. 1982). Here, Petitioner was in good health, had an accident and suffered a subsequent injury, which by all evidence placed him in a condition of disability previously unknown.

Based upon the preponderance of the evidence, the Arbitrator finds that Petitioner met his burden of proof in establishing that his current condition of ill-being is causally related to his March 4, 2014 accidental 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?

The Arbitrator finds that all of Petitioner's medical care has been reasonable and necessary. Dr. Morton's approach to treating Petitioner's meniscal tears was conservative and reasonable. Dr. Morton reasonably ordered an MRI to assess Petitioner's injury. Upon objective findings of meniscal tears and the failure of prescription Hydrocodone to manage Petitioner's symptoms, Dr. Morton recommended surgery as the only permanent solution to the meniscal tears. Dr. Morton performed surgery and Petitioner tolerated the procedure well. Petitioner testified that the surgery brought him relief.

Respondent is therefore ordered to pay the medical bills contained in Petitioner's group exhibit and to authorize and pay for the treatment recommended by Dr. Morton, including but not limited to the surgery. Respondent shall have credit for expenses which have been paid through its group health coverage, but shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner claims entitlement to temporary total disability benefits from March 4, 2014, to May 25, 2015. The Arbitrator finds that Petitioner's claimed period of temporary total disability is supported by the evidence in the record.

The record shows that Petitioner was taken off work by Belleville ER. (PX3). Then, Petitioner was taken off work by Dr. Morton. On September 26, 2014, Dr. Morton released Petitioner to work with restrictions. Respondent did not have a position available to Petitioner until May 25, 2015. Respondent will therefore pay Petitioner temporary total disability benefits for 63 6/7 weeks from Petitioner's period of disability from March 4, 2014, through May 25, 2015.

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 are 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).

(i) **Level of Impairment**: The Arbitrator notes that even Respondent's IME, Dr. Milne, believed that Petitioner sustained significant disability as a result of his work accident. Dr. Milne believed that there was a 10% permanent partial disability rating based on the AMA guidelines for Petitioner's lateral meniscus

tears, and a 15% permanent partial disability rating for Petitioner's knee arthritis. Although Dr. Milne stated that this predated the accident, he essentially acknowledged that Petitioner's arthritic condition was aggravated by his work injury on account of the "increase in symptoms as a result of his work related injury." (RX6). The Arbitrator gives significant weight to this factor.

(ii) **Occupation**: Petitioner continues to serve as a highway maintainer. The Arbitrator notes that Claimant's job requires extensive use of his leg and knees to climb in and out of his truck and perform his job duties such as fixing street signs, painting highways, picking up large debris, clearing snow, trimming foliage, and general maintenance of the highways. (T. 7). The Arbitrator gives great weight to this factor.

(iii) **Age**: Petitioner was 65 years old at the time of his injury. He has diminished healing capacity as a result thereof. The Arbitrator places minor weight on this factor.

(iv) **Earning Capacity**: While there is no direct evidence of reduced earning capacity contained in the record; based on the severity of Petitioner's injuries, the requisite treatment, and the resulting disability, it is reasonable to conclude that such repercussions will manifest in the near future. The Arbitrator gives little weight to this factor.

(v) **Disability**: In support of the Arbitrator's decision relating to nature and extent of the injury, as previously stated, Petitioner was having no trouble with his left knee prior to the accident. In addition, he testified no problems even currently with his right knee. At Arbitration, Petitioner credibly testified that he has trouble when standing for long periods of time. It causes him to be off balance. (T.21) Climbing stairs and any kind of manual labor involving lifting are activities he avoids. He has difficulty climbing a ladder. When he leans forward, his knee gives out and he has actually fallen on occasion. Petitioner takes over the counter medication on a regular basis and occasionally takes prescription Hydrocodone.

Prior to the accident, Petitioner had ridden a motorcycle and helped coach softball. He was also a regular walker. Those activities have been adversely affected. The Arbitrator places great weight on this factor.

Based upon the aforementioned factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in the 15% loss of his left leg.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vernon Adams,
Petitioner,
vs.

NO: 14 WC 41708

Great Dane Trailers,
Respondent,

16IWCC0843

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 temporary total disability, causal connection, medical, prospective 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 December 4, 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 $3,700.00. 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: DEC 27 2016
o120816
DLG/mw
045

David L. Gore

Stephen J. Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ADAMS, VERNON
Employee/Petitioner

Case# **14WC041708**

16IWCC0843

GREAT DANE TRAILERS
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:

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

1872 SPIEGEL & CAHILL PC
MILES P CAHILL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

STATE OF ILLINOIS)
)SS.
COUNTY OF ROCK ISLAND)

☐ 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

VERNON ADAMS
Employee/Petitioner
v.
GREAT DANE TRAILERS
Employer/Respondent

Case # **14**WC **41708**

16IWCC0843

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 Arbitrator **Gregory Dollison** of the Commission, in the city of **Rock Island 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. ☐ 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 **10/21/2014**, 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 right shoulder condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$27,062.36**; the average weekly wage was **$520.43**.

On the date of accident, Petitioner was **23** 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 **$3,320.71** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and $0.00 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 provided by Methodist Medical Center for the MRI prescribed by Dr. Schupbach; the physical therapy charges from Stark County Physical Therapy and Rehab and the charge from Olson Chiropractic. The expenses shall be paid consistent with the medical fee schedule. Respondent is further entitled to a credit for all medical expenses paid.

Respondent shall pay Petitioner temporary total disability benefits of $346.95/week for 1-3/7 weeks, commencing 11/4/2014 through 11/13/2014, as provided in section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $312.26/week for 10 weeks, because the injuries sustained caused 2% loss of a man as a whole for a right shoulder strain.

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

12/2/15
Date

DEC 4 - 2015

Statement of Facts

Petitioner testified that he was employed by Respondent on October 21, 2014. On that day, he was changing a brake pad. He testified that while on his knees and reaching forward with his right arm to get a different pad, weighing approximately 100 lbs., the pad fell striking the top of his right shoulder. Petitioner indicated the pad then bounced off the ground and struck him again on his right shoulder towards the back. Petitioner testified that he heard a pop when that the incident occurred.

Petitioner testified that he reported the incident and filled out an accident report. In the report marked as Respondent's Exhibit # 4, Petitioner described "lifting pads" and injuring his right shoulder. Specifically, Petitioner wrote, "I went to put the lift pad clamp and the lift pad fell off and hit my collar bone." The Supervisor Report of Occupational Injury or Illness, dated October 21, 2014 and signed by Terry Graff, indicates Petitioner reported that he injured his right shoulder when a "lift pad slipped and hit his shoulder." (RX 5)

Petitioner testified that on the date of accident, Respondent sent him to Kewanee Hospital for a drug test in which he passed. (Also see PX 2) On the same day, Petitioner was seen by Dr. Paul H. Bonucci at the request of his employer. Dr. Bonucci prepared a Workers Compensation Physician Statement showing Petitioner described that "while holding an [approximately] 40 lb. metal piece on a trailer to be attached, it fell 6-12 inches striking [the] right shoulder area." The doctor recorded that Petitioner's subjective symptoms were pain at the right shoulder and clavicle. X-rays taken of the shoulder were negative for fractures. Dr. Bonucci diagnosed right shoulder contusion. The doctor provided that Petitioner should return to restricted duty on October 22, 2014 and full duty effective October 23, 2014. (RX 6) Petitioner testified that he was off one day and then returned to restricted duty.

Petitioner testified that a couple of days later, he began to notice low back pain. He attempted to see Dr. Schupbach but could not see him until November 4, 2014. He then went to see Dr. Richard A. Olson, a chiropractor. Dr. Olson's records show Petitioner was seen on October 31, 2014. Dr. Olson recorded a history that Petitioner was struck by a 100 pound lift pad on the right shoulder and that "Immediately following the accident at work, the patient complained about remarkably severe constant sharp neck pain on both sides, present mid-back stiffness, moderately severe constant dull low back pain and remarkably severe constant burning shoulder pain on the right." Dr. Olson diagnosed 1.) cervical sprain/strain; 2.) thoracic sprain/strain; 3.) lumbar sprain/strain; and 4.) shoulder sprain/strain. Chiropractic treatment commenced therafter. (PX 6)

Petitioner returned to Dr. Olson on November 3, 2014. On that date, he complained of neck pain 9/10, ~~mid-back stiffness, dull low back pain 6/10, and constant right shoulder pain 10/10. The records indicate the~~ doctor administered chiropractic treatment to the cervical, thoracic, and the lumbar regions. The right shoulder was also treated. (PX 6)

On November 4, 2014, Petitioner saw Dr. Joshua Schupbach with a history of dropping a 100 pound piece of equipment onto his right clavicle and shoulder. Petitioner reported that he had severe pain in the shoulder and was not able to use his shoulder since the accident. Dr. Schupach assessed shoulder pain and ordered a MRI scan (PX 3) Dr. Schupbach also filled out a Workers' Compensation Physician Statement for Respondent indicating that the lift pad fell hitting the shoulder and clavicle causing pain in the right shoulder. Dr. Schupback also indicated Petitioner should be off work until the MRI was reviewed. (RX 7)

Petitioner underwent the right shoulder MRI on November 5, 2014. The impression was mild fraying of the bursal surface of supraspintitis tendon with minimal subacromial/subdeltoid bursitis. There was no evidence of full thickness rotator cuff tear. (PX 3)

Petitioner returned to Dr. Olson on November 7, 2014 and November 10, 2014. At the November 10th visit, Petitioner complained of constant burning neck pain (8/10), mid back stiffness, low back pain and right shoulder pain (8/10). An examination of the cervical region elicited a degree of muscle spasms on the right. There was edema elicited at C2 on the right and there was reduced motion elicited affecting the lower cervical region on the right. Petitioner received chiropractic treatment to the cervical, thoracic, and lumbar regions. The right shoulder was also treated. (PX 6)

Petitioner returned to Dr. Schupbach on November 13, 2014. The doctor documented that Petitioner's shoulder upper back pain and range of motion was slightly improved. Petitioner complained more of upper back between the shoulder blades discomfort and tightness. Petitioner also complained of slight numbness off and on in the right upper extremity. The doctor assessed shoulder pain and upper back pain on the right side. Physical therapy was ordered and Petitioner was returned to restricted duty. (PX 3)

Physical therapy took place at Stark County Physical Therapy and Rehabilitation Specialist. Petitioner was initially evaluated on November 17, 2014. Petitioner reported that he had returned to restricted duty and that his right shoulder was feeling better but now he was having upper back pain related to the injury. The clinical findings on that day were that of pain in the thoracic region as well as pain in the central mid-back. The aggravating factors were end range rotation and bending motions. Petitioner underwent 5 physical therapy visits with the last session being on November 26, 2014. At that time he reported that his shoulder was feeling much better and that he had occasional pain of the right thoracic paraspinal and medial scapular border. He had mild problems with forward bending. (PX 7)

Records submitted show Petitioner last saw Dr. Schupbach on December 1, 2014. Petitioner reported that his shoulder had improved and that he had full range of motion without much difficulty. He complained of pain in the mid to upper thoracic shoulder blade area. An examination demonstrated the right shoulder had good range of motion and he had tenderness in the spine and the upper thoracic spine without radiation. The assessment at that time was thoracic spine strain. Dr. Schupbach prescribed muscle relaxants and referred Petitioner to an orthopedic spine specialist. (PX3)

On December 11, 2014, Petitioner presented to Dr. Richard Kube with a history that on October 21, 2014, he was working underneath a trailer when a very large metal object that weighed roughly 47 pounds fell onto his right shoulder and back. The doctor recorded that Petitioner indicated he immediately noticed right upper extremity pain that radiated into the right elbow; he had pain between the shoulder blades and he had central lower lumbar pain. An examination that day revealed decreased range of motion with flexion of the lumbar spine. He had point tenderness in the central lower lumbar area. Dr. Kube diagnosed low back pain, recommended continued conservative care (physical therapy) and issued light duty work restrictions. (PX 5)

At Respondent's request, Petitioner underwent a Section examination with Dr. Kern Singh on January 22, 2015. Dr. Sing issued a report and testified via deposition in this matter. (RX 1, RX 2) Dr. Singh indicated that Petitioner provided an accident history that he was lifting a pad clamp weighing about 40 lbs. when it fell and struck his right shoulder and clavicle. At the time of examination, Petitioner reported low back pain that rated from 7/10 to 10. Dr. Singh indicated Petitioner reported that almost everything increases pain, particularly standing, climbing stairs, turning his head while driving, and pain that awaken him from sleep at night. Dr. Singh stated that during examination, Petitioner self-limited with range of motion to 5 degrees with bending forward, bending backwards and bending side-to-side. The doctor stated Petitioner displayed multiple positive Wadells findings and gross symptom magnification throughout the examination. (RX 2, pp.8-11) Dr. Singh

testified that he reviewed medical documentation and the accident reports completed by Petitioner. After reviewing same and performing the examination, the doctor opined that Petitioner had a lumbar muscle strain. Dr. Singh stated that he did not believe Petitioner sustained a work injury to his lumbar spine, based on review of the records submitted and the mechanism of injury. (RX 2, p.12) The doctor provided that when Petitioner related spinal complaints, none of the complaints were to a dermatomal pattern that was consistent with a spinal injury.(RX 2, p.13) The doctor stated that he was of the opinion that Petitioner did not suffer any type of trauma or injury to his low back. (RX 2, p.23)

Petitioner underwent a course of physical therapy commencing February 9, 2015. At the initial evaluation, the therapist recorded "...the patient states hypersensitivity to palpation throughout the thoracic and lumbar spine. Very light pressure palpation we have significant reproduction of symptoms. [I]t doesn't seem to offer any specific pattern." Petitioner's course of physical therapy continued through April 10, 2015. That day, the therapist recorded that Petitioner reported that he was having no more pain. He was able to move modified deadlift from 95-115 pounds with excellent form. Petitioner was discharged from therapy with a recommendation that he return work as tolerated. (PX 5)

Petitioner last saw Dr. Kube on April 13, 2015. The doctor recorded that Petitioner was doing excellent and reporting no pain. Dr. Kube indicated Petitioner was at maximum medical improvement and released Petitioner to full duty work. (PX 5)

Petitioner testified that he did not work from the date of accident through April 13, 2015. He received some workers' compensation benefits from October 31, 2014 through January 22, 2015 and some of his medical bills were paid. As of the date of the hearing, the Petitioner testified that he was working for a food factory as seasonal help. He works about 12 hours a day. He testified that his back feels tired and he avoids doing certain activities so that he does not hurt his back.

With respect to (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

It is apparent that Petitioner sustained an accidental injury on October 21, 2014. However, there are some inconsistencies between Petitioner's testimony and the records submitted. Petitioner completed an accident report indicating that he had sustained injury to his right shoulder and clavicle. The medical records including the records from Petitioner's treating physician Dr. Schupbach indicated, throughout the month of November, that he was being treated for and was reporting complaints concerning his shoulder. Dr. Schupbach's records are devoid of any indication or reference to lower back complaints. Petitioner did have some care with Chiropractor Olson indicating existence of lower back complaints. Despite those complaints Chiropractor Olson did not note any objective findings associated with the lumbar spine during his exams.

In order to find causal connection, it is necessary for a claimant to present appropriate proof that it is more probably true than not true that his physical condition is related to his accident. The medical evidence introduced at the time of trial included the report and deposition testimony of Dr. Singh. In his report and deposition, Dr. Singh indicated that based on the records he reviewed and more importantly, the mechanism of injury, would not cause Petitioner's lumbar condition of ill-being.

Petitioner did not present any causation opinion linking his lower back complaints to the accident of October 21, 2014. While medical opinions are not always necessary, and a chain of events analysis can support a finding of causation, in this instance, the discrepancy concerning the onset of lower back pain and the medical records indicating subjective complaints not borne out by the objective findings, do not support a chain of events analysis. Additionally, the medical records of chiropractor Olson as well as the medical records of Dr.

Kube do not discern a diagnosis or cause of Petitioner's complaints; nor identify any objective findings that would explain Petitioner's complaints. Accordingly, the Arbitrator finds that Petitioner's condition of ill being regarding his lower back is not causally related to the accident.

Based on the evidence adduced at the time of arbitration, it is clear that Petitioner sustained a sprain/strain to his right shoulder as a result of October 21, 2014. Records submitted show Petitioner last saw Dr. Schupbach on December 1, 2014 wherein Petitioner reported that his shoulder had improved and that he had full range of motion without much difficulty.

Based on the above, the Arbitrator finds that Petitioner right shoulder condition of ill-being is causally related to the accident sustained. The Arbitrator further finds that Petitioner failed to prove a causal relationship existed between his lumbar complaints of ill-being and the accident sustained.

With respect to (J) Were the medical services that were provided to the Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Having found that Petitioner's right shoulder condition of ill-being is causally related to the October 21, 2014 accident, the Arbitrator awards the expenses associated thereto, i.e., the charges from Methodist Medical Center for the MRI prescribed by Dr. Schupbach; the physical therapy charges from Stark County Physical Therapy and Rehab and the charge from Olson Chiropractic. The Arbitrator notes that because of the mechanism of injury, the chiropractic treatment to the cervical regions was not unreasonable.

With respect to (K) What temporary benefits (TTD) are in dispute, the Arbitrator finds as follows:

Petitioner testified to being off work from October 31, 2014 through April 13, 2015, representing a period of 23-4/7 weeks. Petitioner's initial treating physician, Dr. Bonucci, provided that Petitioner should return to restricted duty on October 22, 2014 and full duty effective October 23, 2014. Petitioner testified that he was off one day and then returned to restricted duty. On November 4, 2014, Petitioner saw Dr. Schupbach. The doctor assessed shoulder pain, ordered a MRI scan, and took Petitioner off work until the MRI was reviewed. Dr. Schupbach reviewed the MRI with Petitioner on November 13, 2014. The doctor ordered physical therapy and returned Petitioner to restricted duty.

Petitioner was initially evaluated for physical therapy on November 17, 2014. The records from Stark County Physical Therapy show Petitioner reported that he had returned to restricted duty and that his right shoulder was feeling better. The only other reference to Petitioner being off work were notations in the medical records of Dr. Kube who documented that Petitioner self-reported that he was not working. There is no record of a physician authorizing Petitioner off work.

Based on the above and incorporating the Arbitrator findings regarding causal relationship, the Arbitrator finds that Petitioner was temporarily and totally disabled from work for the period of November 4, 2014 through November 13, 2014.

With respect to (L) What is the nature and extent of the injury, the Arbitrator finds the following:

In determining the level of permanent partial disability for injuries that occur on or after September 1, 2011, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment"; (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; (v) evidence of disability corroborated by the treating medical records. (820 ILCS 305/8.1b)

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. (820 ILCS 305/8.1b)

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. As such the Arbitrator accords no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner testified that he was currently working full time 6 to 7 days a week. The Arbitrator gives some weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 23 years old at the time of the accident. Because of the length of time Petitioner will live with his permanent disabilities, the Arbitrator gives weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner testified that he was working full duty. There is no evidence to suggest the accident would effect his future earning capacity. 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 that Petitioner underwent physical therapy at Stark County Physical Therapy where he was last seen on November 26, 2014. Then, Petitioner reported that his shoulder was feeling much better and that he had occasional pain of the right thoracic paraspinal and medial scapular border. Also, Petitioner last saw Dr. Schupbach on December 1, 2014. At that time Petitioner reported that his shoulder had improved and that he had full range of motion without much difficulty. At trial Petitioner complained that his shoulder was "not as strong."The Arbitrator accords minimal weight to this factor.

Based upon the above, the Arbitrator finds Petitioner suffered 2% loss of use of a man as a whole for the right shoulder strain.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Adelsberger,
Petitioner,

vs. NO: 14 WC 42120,

16IWCC0817

State of Illinois
Dept. of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent partial disability, medical expenses, prospective 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. The Commission hereby 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 March 28, 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.

16IWCC0817

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: DEC 16 2016

Joshua D. Luskin

o-12/06/16
jdl/wj
68

Charles J. DeVriendt

Ruth W. White

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

ADELSBERGER, WILLIAM
Employee/Petitioner

Case# **14WC042120**

15WC008203

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

16IWCC0817

On 3/28/2016, 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 0.44% 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:

1053 JOSEPH L SAMUELSON PC
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BELLEVILLE, IL 62226

3291 ASSISTANT ATTORNEY GENERAL
DIANA 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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

MAR 28 2016

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

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)

William Adelsberger
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # 14 WC 42120

Consolidated cases: 15 WC 08203

16IWCC0817

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 K. Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, 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 _____

16IWCC0817

FINDINGS

On the date of accident, **12-1-14**, 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 **$83,689.23**; the average weekly wage was **$1,609.40**.

On the date of accident, Petitioner was **57** 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

Respondent shall authorize and pay for the medical treatment prescribed by Dr. Sola, including but not limited to, surgery pursuant to Sections 8(a) and 8.2 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.

Michael k. Nowak, Arbitrator

3/21/16
Date

MAR 28 2016

ICArbDec19(b)

FINDINGS OF FACT

Petitioner is a highway maintainer for the Illinois Department of Transportation. He has been so employed for the past 14 years. His job duties involve the performance of heavy manual labor to accomplish various tasks.

In November 2013 Petitioner was preparing vehicles for winter snow removal duty. During the course of these preparations Petitioner began to experience pain and discomfort in his left shoulder. On November 13, 2013 he sought treatment with Dr. James Sola, an orthopedic surgeon. Dr. Sola had previously treated Petitioner for knee and right elbow problems. Dr. Sola prescribed Celebrex and recommended physical therapy. When Petitioner returned to Dr. Sola in December 2013 it was noted that physical therapy had improved his condition. Petitioner then returned to Dr. Sola on January 23, 2014. Dr. Sola administered a cortisone injection to Petitioner's left shoulder and released him to return on an as needed basis. Dr. Sola's diagnosis at that time was tendinitis of the left shoulder. He was released without restriction at that time.

The following day, January 24, 2014, Petitioner was loading carbide bits/blades weighing between 40 and 50 pounds onto a pallet. These blades were approximately 1 inch thick and 4 feet in length. They are installed on IDOT trucks during snow removal. Petitioner testified that while lifting the 3rd or 4th blade his right hand slipped causing the full weight of the load to shift to his left arm. At that point he felt a stretching and painful sensation in the left shoulder. The accident was immediately reported. The accident was witnessed by a coworker; James Swain. Mr. Swain's witness statement corroborates Petitioner's description of the accident. Petitioner attempted to return to Dr. Sola right away for orthopedic consultation. Unfortunately, however Dr. Sola's office was unable to obtain authorization to treat Petitioner from Respondent's workers compensation administrator. (PX 2) Eventually Petitioner became frustrated and instructed Dr. Sola staff to simply bill his group insurance carrier for the treatment.

An MRI was performed on Petitioner's left shoulder on March 10, 2014. Petitioner returned to Dr. Sola on March 13, 2014. After reviewing the MRI and examining Petitioner Dr. Sola determined there were positive provocative signs of impingement, but no surgical lesions of the rotator cuff. (*Id.*.). Dr. Sola administered a cortisone injection to Petitioner's left shoulder and released him to full duty activity. Petitioner was able to perform his regular job duties, but continued to have occasional left shoulder difficulty. He returned to Dr. Sola on July 3, 2014 and received another cortisone injection. Dr. Sola maintained his earlier diagnosis of tendinitis and again released Petitioner without restriction. On October 23, 2014 Petitioner again returned to Dr. Sola. At that visit Dr. Sola noted Petitioner had good range of motion of the shoulder, a slightly positive Neer impingement sign, good strength with thumbs down abduction and to external rotation, and a negative Sulcus sign. There was no instability in the shoulder. Although Dr. Sola discussed various treatment possibilities, including surgery, he concluded that based on the improvement in symptoms he would not recommend further treatment at that time.

Petitioner continued to perform his regularly assigned work duties without restriction until December 1, 2014. On that date Petitioner was called in to work at 4:00 AM due to an ice storm. As he was attempting to get into his assigned truck he slipped on the ice covered step of the truck while holding onto the string with his left hand. When he slipped from the step his left shoulder popped and he fell to the ground landing on his left side. Petitioner testified he immediately suffered severe pain and discomfort in his left shoulder unlike any he had

previously experienced. The accident was immediately reported and a witness report was completed by Petitioner's coworker, Jonathan Dial. Mr. Dial's account completely corroborated Petitioner's description of the accident. He went on to state "I asked if he was ok but he did not answer so I figured he probably wasn't." (PX1). As a result of this accident Petitioner required immediate medical care. He was seen by Dr. Brian Erickson at Gateway regional hospital that morning. He was placed in a sling, given oral pain medication and instructed to follow up with a specialist. Dr. Erickson completed an initial Worker's Compensation medical report for Respondent dated December 1, 2014. On that form he indicated the diagnosis was "sprain left shoulder-possible muscle tear &/or rotator cuff injury."

Petitioner returned to Dr. Sola on December 5, 2014. Dr. Sola noted increased left shoulder pain, restricted range of motion, and difficulty lifting. Dr. Sola recommended physical therapy with rotator cuff protocol for range of motion and strengthening. Petitioner was, for the first time placed on work restrictions of no lifting, pulling or pushing greater than 10 pounds with the left arm. (PX 2). When Petitioner returned on December 18, 2014 Dr. Sola noted weakness with thumbs down abduction as well as external rotation. Dr. Sola's note states "the concern is the patient now has a traumatic rotator cuff tear with his weakness. If he does, he's going to require surgery sooner rather than later. I think we need to obtain an MRI to evaluate the rotator cuff." (*Id.*). An MRI was then performed on December 31, 2014 which revealed a high-grade bursal surface tear of the anterior and lateral fibers of the supraspinatus tendon...increased T2 signal undermining the superior aspect of the labrum extending...to the insertion of the biceps tendon... [and] fluid within the subacromial-subdeltoid bursa..." which it was felt could relate to "mild bursitis or potentially a small full thickness component of the high-grade partial-thickness tearing of the supraspinatus tendon." (PX5). The Arbitrator notes that the findings of this scan are significantly greater than those revealed on the MRI of March 10, 2014.

When Petitioner returned to Dr. Sola he reviewed the most recent MRI study and concluded Petitioner had suffered a traumatic partial-thickness or possibly a full thickness tear of the rotator cuff. Dr. Sola recommended an arthroscopic acromioplasty and repair, but if the operative findings revealed that the tear of the rotator cuff was greater than 50% the procedure would be converted to an open rotator cuff debridement and repair. (PX 2). Petitioner was to remain on the previously imposed work restrictions until surgery is completed. Dr. Sola then prepared a narrative report dated February 25, 2015 in which he wrote:

> I am currently treating Mr. Adelsberger for a rotator cuff tear in his left shoulder. At this time, I have recommended surgical repair of his rotator cuff. I do believe that the patient's injury in December of 2014 substantially aggravated his condition to the extent that it now requires surgery. I also believe to a reasonable degree of medical certainty that the medical services provided to Mr. Adelsberger became necessary secondary to his injury in December of 2014....(*Id.*)

On May 20, 2015 Dr. Nogalski performed a section 12 examination at Respondent's request. Dr. Nogalski reviewed Petitioner's medical records and conducted a physical examination. Dr. Nogalski concluded Petitioner was suffering from "baseline rotator cuff tendinopathy and some impingement issues which have pre-existed for some time." He did not believe Petitioner had a tear of the rotator cuff and did not believe he was in need of any continuing treatment. (RX4)

Clearly, these opinions are in direct opposition to the opinions of Dr. Sola, Dr. Huyette (the radiologist who interpreted the March 10, 2014 MRI scan), and Dr. Taves (the radiologist who interpreted the December 31, 2014 MRI scan).

As of the date of hearing Petitioner remained symptomatic and wishes to proceed with the treatment recommended by Dr. Sola.

CONCLUSIONS

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

Issue (O): Is Petitioner entitled to any prospective medical care?

The issue presented in these consolidated cases is whether Petitioner is entitled to prospective section 8(a) medical benefits, in particular the surgical procedure(s) prescribed by Dr. Sola, as a result of either his January 24, 2014 or December 1, 2014 accidents. The Respondent does not dispute the reasonableness or necessity of the recommended treatment, but only its liability for that treatment based on the issue of causal connection, thus the issues will be considered jointly.

The Arbitrator finds the opinions of Dr. Sola, Petitioner's treating orthopedic surgeon, to be more persuasive than those of Dr. Nogalski. Dr. Sola's opinions are supported by the diagnostic testing and corroborated by the findings of Dr. Huyette and Dr. Taves. Dr. Nogalski's opinions are at odds with the diagnostic findings.

Prior to January 24, 2014, Petitioner had some minor tendindits of the rotator cuff which "may have been" due to excessive lifting at work. Irrespective of its origin, Dr. Sola's records reflect this was a minor condition which resolved with conservative care. Petitioner's activities were never restricted and he was released from Dr. Sola's care on January 23, 2014.

On January 24, 2014, Petitioner injured his left shoulder lifting a forty to fifty pound carbide blade. The Arbitrator finds that as a result of the January 24, 2014 accident, Petitioner sustained injuries to his left shoulder which substantially aggravated his pre-existing left shoulder tendinitis and caused non-surgical rotator cuff pathology. As a result of this accident, Petitioner was required to seek medical care from Dr. Sola. Treatment for his injuries was significantly delayed due to Respondent's failure to respond to Dr. Sola's request for treatment authorization. Despite the delay, Dr. Sola did eventually treat Petitioner from March 6, 2014 to October 23, 2014. During this period, Petitioner's condition of ill-being improved and on October 23, 2014 he was released from care without restrictions. Dr. Sola's final diagnosis was a probable, non-surgical small rotator cuff lesion which had improved with conservative treatment. He did not recommend any further treatment at that time.

On December 1, 2014, Petitioner suffered a major injury to his left shoulder. As a result of this injury his clinical presentation changed significantly, demonstrating restricted range of motion and weakness of the left arm. Further, the December 31, 2014 MRI scan revealed a demonstrative change in his pathology including a high grade bursal surface tear of the supraspinatus tendon and fluid within the subacromial-subdeltoid bursa, indicative of a full thickness tear of the supraspinatus tendon.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner's condition of ill-being up to December 1, 2014 is causally related to his accident of January 24, 2014 and Petitioner's current condition of ill-being is causally related to his accident of December 1, 2014. The Arbitrator further finds Petitioner's need for the prospective medical treatment, including surgical intervention, is related to the injury on December 1, 2014. Respondent shall authorize and pay for the medical treatment prescribed by Dr. Sola, including but not limited to, surgery pursuant to Sections 8(a) and 8.2 of 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

Luis Yanez,

Petitioner,

vs.

NO: 15 WC 04000
15 WC 04004

16IWCC0809

R & L Shared Services,

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, prospective medical, temporary total disability, causal connection 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 February 17, 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

16IWCC0809

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 $60,000.00. 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: DEC 16 2016

MB/mas
o:11/17/16
43

Mario Basurto

David L. Gore

Stephen Mathis

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

YANEZ, LUIS
Employee/Petitioner

Case# **15WC004000**

15WC004004

R&L SHARED SERVICES
Employer/Respondent

16IWCC0809

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:

0815 LUIS A ACEVES & ASSOC PC
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CHICAGO, IL 60647

1505 SLAVIN & SLAVIN
BRIAN H DRISCOLL
100 N LASALLE ST SUITE 2500
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
19(b)

16IWCC0809

LUIS YANEZ
Employee/Petitioner

v.

R & L SHARED SERVICES
Employer/Respondent

Case # **15** WC **4000**

Consolidated cases: **15 WC 4004**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **MARIA BOCANEGRA**, Arbitrator of the Commission, in the city of **Chicago**, on **December 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. ☒ 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 Treatment**

16IWCC0809

FINDINGS

On the date of accident, **10/15/14 & 12/31/14**, 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 **$49,476.96**; the average weekly wage was **$951.48**.

On the date of accident, Petitioner was **31** years of age, ***single*** 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 **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$2,000.00** for other benefits (advance against permanency), for a total credit of **$2,000.00**. 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 **$643.32/week** for **36-2/7th weeks**, commencing **2/12/2015** through **5/7/2015** and **6/17/2015** through **12/4/2015**, as provided in Section 8(b) of the Act.

Respondent shall pay directly to Petitioner the reasonable and necessary medical services of **$38,543.27**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a 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 Section 8(j) of the Act.

Respondent shall pay for and authorize the non-fusion surgical recommendations made by Dr. Kuo.

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

2-16-2016
Date

FEB 17 2016

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FINDINGS OF FACT

Luis E. Yanez ("Petitioner") testified that at the time of his work accidents he was 31 years old, married with one dependent child. Further, at that time, Petitioner had been employed with R&L Shared Services ("Respondent") as a semi-truck driver for approximately 6 months prior to the initial accident. Petitioner testified that the Respondent is a trucking business. Petitioner testified that his job duties included driving and delivering freight loads in a semi-truck to various destinations, including loading and unloading of freight, depending on whether the destination was local.

15 WC 4000 D/A: 10/15/14:

Petitioner testified that on October 15, 2014, he worked for Respondent and was injured while unloading chemical totes weighing 3,000 pounds from the back of his truck with a hand jack. Specifically, he testified that he began pulling the load using the hand jack and about half-way through, the jack stopped and locked up and he felt a sharp pain go up his back and neck. He said the pain was immediate. Petitioner testified he had no prior neck or back issues before this incident.

Petitioner was sent to Occupational Health Centers where a consistent history was noted. Px1. The mechanism of injury listed was pulling of boxes. Petitioner was noted to have sharp lower back pain, palpation of the cervical spine and lumbar were positive and Waddell testing was negative. Lumbar range of motion was decreased, straight leg was negative bilaterally and gait was normal. Assessment was lumbar and cervical strain. He was prescribed medications, physical therapy and light duty work of no lifting greater than 20 lbs., no pushing/pulling greater than 40 lbs. and no bending more than 6 times per hour.

On October 17, 2014, Petitioner began physical therapy also at Occupational Health Centers. Px1. Petitioner's job listed was as a truck driver with primary duties of reaching, sitting, driving, standing and walking. History was negative for prior "...injuries or impairments to the affected area." Examination was consistent with lumbar strain.

On October 20, 2014, Petitioner returned for therapy. Px1. He reported working restricted duty and feeling better with his pain having improved from 8/10 to 5/10. Pain was located in his cervical and lumbar spines. Physical therapy and restricted duty were continued. Petitioner continued in therapy on 10/21, 10/24 and 10/27. On October 27, 2014, Petitioner followed up with Dr. Paloyan. Px1. He no longer had neck pain but continued with moderate low lumbar pain. He had been working within the duty restrictions. Exam of the lumbar spine showed mild tenderness to palpation, midline lower lumbar tenderness at L4-5. Sensation was normal, gait was normal, Waddell testing was negative and lumbar range of motion was decreased. Restricted duty was continued. On October 30, 2014, Petitioner reported pain in the lower back was 3 out 10 with prolonged sitting and 6-7 out of 10 with driving secondary to bumps on the road. A job description was received and reviewed. Exam was consistent with a diagnosis of lumbar strain. Impairments identified as preventing Petitioner from performing standard activities of daily living and work activities were listed in the goals section and included bending, driving without pain, lumbar flexion, lumbar extension, hip extension and lumbar pain. Petitioner continued therapy on 11/5, 11/6, 11/10 and 11/13. Px1. On November 13, 2014, Petitioner was re-evaluated by Dr. Sorkin. Dr. Sorkin noted Petitioner reported increased pain with driving and standing up, intermittent and moderate in severity and located in the right lower back. On exam, tenderness was located in the area of L5-S1. Straight leg raise and Waddell tests were negative. Modified duty and therapy were continued. On November 21, 2014, Petitioner reported improvement and a desire to return to work as a

truck driver in line haul. He still had complaints of pain with forward bending. Petitioner was discharged from care, released to regular duty and placed at maximum medical improvement. Px1:56.

15 WC 4004 D/A: 12/31/14:

Petitioner testified that on December 31, 2014, Petitioner re-injured himself when he tried to pull a lever from a dolly that separated two trailers he was hauling. Occupational Health noted that Petitioner was injured after pulling a lever/heavy release bar to release a trailer from the truck. Px1:57. He advised Dr. Paloyan it was a recurrence of his low back pain. Petitioner testified that the back pain was more severe this time. Exam revealed tenderness at L4-S1 and decreased range of motion. Waddell testing was negative. Assessment was lumbar strain. Medications, therapy and light duty were prescribed. Petitioner was restricted from driving the company vehicle due to functional limitations.

On January 2, 2015, Petitioner returned to Dr. Paloyan. Px1. He described low back pain bilaterally in the sacroiliac regions, sharp and aching. Symptoms included back stiffness, decreased lateral bending, decreased extension, and decreased flexion without numbness or paresthesias. Assessment was unchanged. Petitioner began therapy that same date. Px1:64. Pain was felt most with bending and prolonged sitting. On January 9, 2015, Petitioner was re-evaluated by Dr. Paloyan. Petitioner was to continued restricted work, therapy and medications. Petitioner attended therapy on 1/13 and 1/16. On January 16, 2015, Petitioner was re-evaluated by Dr. Paloyan. Physical therapy was continued and the doctor noted an MRI would be ordered if no improvement was made.

On January 20, 2015, therapists noted positive straight leg raise and overall progress was slower than expected. Petitioner was ordered to undergo an MRI. On January 27, 2015, MRI revealed left foraminal protrusion at L5-S1 moderately narrowing the left foramen. Px2. On February 6, 2015, Dr. Paloyan read the MRI as showing L5-S1 disc protrusion but on the right side. Dr. Paloyan recommended that Petitioner be seen by a specialist.

On February 12, 2015, Petitioner sought medical treatment at AMCI – Beverly Park Medical Center. Px3. Petitioner described a work accident occurring October 2014 and recent most one occurring December 2014 after pulling on a large lever. Petitioner reported neck pain bilaterally into all fingers and back pain increased with bending and squatting. Petitioner reported having worked sedentary duty where he was required to sit for long periods in a metal chair. Functional limitations included driving. He was diagnosed with cervical sprain, cervical radiculitis, lumbar sprain and lumbosacral radiculitis, "causally related to the incident noted…" petitioner was removed from work and referred for a cervical MRI and pain management. On February 16, 2015, MRI of the lumbar spine was reviewed to show disc protrusion with nerve encroachment. Interventional treatment and nerve testing were considered. An MRI of the cervical spine as well as pain management consultation continued to be recommended. Petitioner complained of bilateral hand numbness and left foot intermittent radicular symptoms. On February 20, 2015, MRI of the cervical spine revealed C5-6 and C6-7 disc bulges/protrusions. Px4. Petitioner continued therapy at AMCI during the month of February. Px3. Petitioner testified that he worked light duty for Respondent until February 2015 and later again in May 2015 until he was fired for reasons unrelated to the these claims.

On March 3, 2015, Dr. Agrawal evaluated Petitioner. Px3. The doctor noted Petitioner's December 2014 work accident and complaints of neck pain, numbness into all fingers bilaterally and back pain worse with bending and squatting. Exam of the cervical spine revealed positive Spurling's bilaterally. Exam of the lumbar spine showed positive straight leg raise bilaterally, reproducing paresthesias in the feet. The doctor read the

lumbar spine MRI to show moderate localized left posterolateral disc protrusion extending into the left foramen with encroachment of the left L5 nerve root. He read the cervical MRI to show C5-6 and C6-7 disc bulges/protrusions. Assessment causally related the diagnoses and MRI findings to the work accident. A C6-7 interlaminar ESI and bilateral L5 transforaminal ESI were recommended along with EMG/NCV testing. Petitioner continued therapies during the month of March 2015.

On April 2, 2015, petitioner was re-evaluated by Dr. Agrawal, who continued Petitioner off of work and continued to recommend injections. The doctor also continued to recommend nerve testing to assess nerve injury versus nerve inflammation. On April 14, 2015, EMG/NCV of the upper extremity showed no electrodiagnostic evidence of cervical radiculopathy, plexopathy or neuropathy. Petitioner continued to complain, however, of numbness in the fingers bilaterally and radiating pain down the right arm as well. Spurling's maneuver was positive on the right. On April 21, 2015, EMG/NCV testing of the lower extremities showed no electrodiagnostic evidence of lumbar radiculopathy, plexopathy or neuropathy. Petitioner continued to complain, however, of pain radiating down both legs along with tingling in the both feet with prolonged sitting and walking. Petitioner continued therapies.

On April 27, 2015, Petitioner underwent bilateral L5 transforaminal epidural steroid injections at Peterson Surgical Center performed by Dr. Agrawal. Px3, Px5:1-2. On May 6, 2015, Petitioner reported to therapists numbness in the bilateral hands, left foot, great toes bilaterally and no upper extremity numbness, right lower extremity numbness to thigh and no left lower extremity symptoms.

Dr. Agrawal re-evaluated Petitioner and noted 50% temporary improvement. Px3:35. Petitioner reported that the bilateral foot tingling had resolved but noted a tingling sensation in the left leg with prolonged walking. Petitioner also reported more pronounced cervical symptoms following some relief of lumbar symptoms. The doctor recommended proceeding with cervical injections, an FCE, work conditioning and to return to work on restricted duty.

On May 11, 2015, Petitioner underwent a C6-7 intralaminar epidural steroid injection at Peterson Surgery Center performed by Dr. Agrawal. Px3, Px5:3-4. On May 18, 2015, Petitioner underwent a functional capacity evaluation recommended by Dr. Agrawal, which showed valid testing demonstrating Petitioner's ability to work at the medium category of work. Petitioner's job was noted to be at the heavy physical demand level. Following the FCE, Petitioner continued therapies. Px3.

On May 28, 2015, Petitioner was re-evaluated by Dr. Agrawal. Petitioner had 75% improvement for the first few days then the cervical pain increased. The doctor noted that Petitioner also continued with lumbar pain and that he remained an appropriate candidate for repeat lumbar injections. Restricted work was continued.

On June 4, 2015, Petitioner was examined by Dr. Avi Bernstein at the request of Respondent. Rx3. The doctor noted Petitioner's work accidents and that he complained of pain diffusely about the spine. The doctor interpreted the lumbar MRI as showing degenerative disc disease at L5-S1 along with left-sided foraminal disc herniation. He interpreted a subsequent MRI showing no disc herniation or nerve root compression or spinal stenosis. He opined Petitioner suffered cervical and lumbar strains without evidence of discogenic injury and that the disc herniation on MRI was not related to his work accident. Accordingly, Petitioner could return to work.

On June 18, 2015, Petitioner continued to complain of neck pain, stabbing in nature with intermittent numbness in the fingertips. Petitioner also continued to complain of lumbar pain with numbness in the left leg,

16IWCC0809

worse with driving over potholes and bending. Spurling's and straight raise testing were positive bilaterally. Further treatment was held and Petitioner was referred to Rebecca Kuo of MK Orthopedics. Petitioner was removed from work.

On July 10, 2015, Dr. Kuo evaluated Petitioner. Px6. Petitioner related that he reinjured himself in December 2014 after pulling on a dolly and had an increase in low back pain. Complaints included tingling and numbness to his toes and legs. It was worse with bending, sitting and walking. He related his back pain was worse than his numbness, tingling and leg pain. On exam, the lumbar spine was limited in flexion and extension. Neurologically, he was 5 out 5 and had 2+ reflexes. Straight leg raise was negative. X-rays demonstrated slight loss of disc height at L5-S1. MRI demonstrated disc bulge at L5-S1, left greater than right neural foramina as well as lateral recess with decreased nucleus pulpous signal and neural foraminal stenosis. The doctor assessed bilateral leg radiculopathy secondary to disc collapse at L5-S1 and disc herniation at L5-S1. Dr. Kuo opined that Petitioner had exhausted non-operative care and required a L5-S1 transforaminal lumbar interbody fusion. Dr. Kuo further ordered Petitioner to remain off work pending surgery. On July 23, 2015, Petitioner was released by Dr. Agrawal to the care of Dr. Kuo.

On August 21, 2015, Petitioner followed up with Dr. Kuo, noting he still was unchanged, awaited surgical approval and had been laid off of work. The doctor continued to express that Petitioner was an excellent candidate for a fusion, explaining that:

"[H]e has significant disc collapse along with an [sic] herniated disc and to just do a simple laminectomy and discectomy will leave him in a [sic] significant foraminal stenosis which would likely cause persistent issues despite adequate decompression. The best decompression would involve either a significant facectectomy [sic] or to increase the height of the disc which would actually require a fusion."

On October 9, 2015, Petitioner again followed up. Recommendations were unchanged. On November 9, 2015, Dr. Bernstein issued an addendum report, concluding that he did not agree with Dr. Kuo's recommendation for surgery. He based it on his prior examination of Petitioner as well as his review of additional records, including a negative EMG/NCV and additional radiographic studies.

Petitioner testified that he had never experienced any back or neck symptoms prior to these accidents. Petitioner testified he wishes to pursue further treatment as recommended by Dr. Kuo. Petitioner testified that he was fired while working light duty by the Respondent on June 16, 2015. Petitioner testified that he suffers from back pain on a daily basis, has trouble sleeping and feels pulsating sensation down his lower extremities. Petitioner further testified that prior to these accidents, he had never experienced back/neck pain, never sought medical treatment for back/neck pain and was able to fulfill his job duties without restrictions.

Without objection, Respondent offered into evidence surveillance video and still photographs, along with corresponding reports. Rx1-2. On cross, Petitioner identified himself as the man in the photos. The videos depict Petitioner driving a personal vehicle to and from various places; smoking outside a residence and the report indicates Petitioner made contact with the investigator.

16IWCC0809

CONCLUSIONS OF LAW

Credibility Assessment

The Arbitrator finds that Petitioner was credible and forthright in his testimony concerning his work, two accidents, subsequent medical treatment and current condition.

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

Regarding Petitioner's first accident in case number 15 WC 4000 for date of accident October 15, 2014, the Arbitrator concludes that Petitioner's lumbar condition of ill-being for that injury is causally related to his undisputed work accident, having resolved November 21, 2014. Petitioner credibly explained that he was injured when a hand jack became stuck while attempting to pull it. Petitioner had no prior history of pain, symptoms or injury to the low back. He explained he had an immediate onset of low back pain, which was diagnosed as a strain and treated conservatively. Petitioner testified he returned to regular work duties.

Regarding the second accident in case number 15 WC 4004 for date of accident December 31, 2014, the Arbitrator concludes that Petitioner's current condition of ill-being as to the cervical and lumbar spine is casually related to his work accident. Again, Petitioner credibly testified that he returned to regular duty following his first accident. While working, he sustained what he credibly described to doctors as a re-injury to the low back after attempting to pull a lever at work. Petitioner again noted an onset of low back pain and an onset of cervical/neck pain. Petitioner testified at trial that his low back pain was much more severe than the low back pain he felt immediately following the first accident. Petitioner once again began a course of conservative care. Petitioner was noted to have positive straight leg raise, left foraminal protrusion at L5-S1 moderately narrowing the left foramen. The Arbitrator notes Dr. Paloyan noted the protrusion appeared on the right rather than the left.

Petitioner sought his own care and was diagnosed by Dr. Foreman with cervical sprain, cervical radiculitis, lumbar sprain and lumbosacral radiculitis, all "causally related to the incident noted..." A new MRI of the lumbar spine showed disc protrusion with nerve encroachment. MRI of the cervical spine revealed C5-6 and C6-7 disc bulges/protrusions. During this time, Petitioner complained of bilateral hand numbness and left foot intermittent radicular symptoms. Petitioner underwent conservative care for both the cervical and lumbar spine.

Dr. Agrawal noted complaints of neck pain, numbness into all fingers bilaterally and back pain worse with bending and squatting. Exam of the cervical spine revealed positive Spurling's bilaterally. Exam of the lumbar spine showed positive straight leg raise bilaterally, reproducing paresthesias in the feet. Dr. Agrawal read the lumbar MRI to show encroachment of the left L5 nerve root. He read the cervical MRI to show C5-6 and C6-7 disc bulges/protrusions. He causally related the findings to Petitioner's most recent work accident. EMG testing of upper and lower extremities failed to find evidence of radiculopathy but Petitioner continued to present with symptoms of same, including positive Spurling's and positive straight leg raise. Injections were scheduled and Petitioner underwent one lumbar injection with temporary improvement. Dr. Agrawal opined Petitioner was a candidate for further pain management yet released Petitioner from care to Dr. Kuo.

Petitioner was eventually evaluated by Dr. Kuo, who noted Petitioner continued to suffer from low back pain symptoms and opined Petitioner exhausted conservative care and was a candidate for a lumbar fusion at L5-S1. The Arbitrator has considered the surveillance video and still photographs and does not find these to be

significant. The video depicts Petitioner driving a personal vehicle; a vehicle which he was allowed to drive. Petitioner also disclosed to his providers that driving over potholes and bumps further exacerbated his low back symptoms. Had his doctors wanted to restrict him from all driving knowing this information, they could have done so. Rather, restrictions were placed on driving the work truck. The Arbitrator also has considered Dr. Bernstein's opinions in this matter and does not find them reliable. Dr. Bernstein stated Petitioner had diffuse complaints on exam but Petitioner's medical records demonstrate otherwise; Petitioner has very specific symptoms and complaints of pain with various activities, along with tingling and numbness to the legs. The Arbitrator relies on Petitioner's treatment records over the opinions of Dr. Bernstein. Based on a preponderance of the evidence, the Arbitrator finds Petitioner's current condition of ill-being casually related to the December 31, 2014 work accident.

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?

Arbitrator concludes based on the totality of the evidence that the medical treatment that has been rendered has been reasonable and necessary. Arbitrator further concludes that Respondent has not paid all appropriate charges. At trial, Petitioner submitted the following bills:

AMCI Beverly Park Medical Center		Px3a
#146172	$125.00	
#145702	$2,740.00	
#145616	$14,382.00	
Archer Open MRI	$2,400.00	Px4a
Peterson Medical Surgicenter	$14,779.00	Px5a
Peterson Surgicenter Anesthesia	$1,440.00	
MK Orthopedics	$412.04	Px6a
EQMD	$2,139.23	Px7a
Quest Technologies	$126.00	Px8
TOTAL	**$38,543.27**	

Therefore, Respondent shall pay directly to Petitioner the reasonable and necessary medical services of **$38,543.27**, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a 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 Section 8(j) of the Act.

ISSUE (K), (O) Is Petitioner entitled to any prospective medical care?

As an initial matter, the Arbitrator notes that no further treatment is recommended for Petitioner's lumbar spine as it relates to 15 WC 4000 for the first accident. Similarly, no further treatment is recommended for Petitioner's cervical spine as it relates to 15 WC 4004 for the second accident. At issue is whether Petitioner is in need of and otherwise entitled to any prospective medical care as it relates to the lumbar spine in case 15 WC 4004 for the second accident.

In support of his request for lumbar fusion surgery, Petitioner relies on the opinion of Dr. Kuo, who declared Petitioner a candidate for same. Dr. Kuo noted Petitioner had exhausted conservative care. The Arbitrator is not persuaded Petitioner is a candidate for fusion surgery at this time for several reasons. First, Dr. Kuo did not review or otherwise consider negative EMG/NCV testing, which failed to detect lumbar

radiculopathy. The Arbitrator notes, however, Petitioner's subsequent medical records continued to document radiating pain down both legs bilaterally and numbness and tingling down the left leg. This would seemingly be consistent with Dr. Bernstein's interpretation of the first MRI showing left-sided herniation. Second, Dr. Kuo noted x-rays of the lumbar spine showed "slight loss of disc height at L5-S1," but later commented that Petitioner suffered "significant disc collapse" at the same level, stating that fusion would correct this. These two vastly different comments were not reconciled. The Arbitrator notes that disc collapse aside, there does appear to be herniation, left greater than right, decreased nucleus pulpous signal and neural foraminal stenosis. Again, evidence of disc herniation was conceded by Dr. Bernstein. Third, Dr. Kuo noted Petitioner had exhausted all conservative care. However, it was not explained by Dr. Kuo or by Petitioner at trial why only one lumbar injection was performed when he remained, according to Dr. Agrawal, a candidate for further injections. Fourth, there is no evidence of instability noted in any clinical setting or by way of, for example, flexion/extension x-ray films. Thus, while Petitioner may have evidence of some mechanical low back pain without radicular symptoms, there is no evidence documented of slippage or instability at any lumbar segment.

In summary, the evidence does not support fusion surgery. The evidence, as commented on by both Dr. Kuo and Dr. Bernstein, show disc herniation at L5-S1, left greater than right. Dr. Kuo noted foraminal stenosis and decreased disc signal. In denying the proposed fusion surgery, the Arbitrator notes Dr. Kuo credibly gave alternative treatments to fusion surgery, including laminectomy, discectomy and facetectomy, which are supported by the evidence. Therefore, Respondent shall pay for and authorize the non-fusion surgical recommendations made by Dr. Kuo.

ISSUE (L) What temporary benefits are in dispute?

Having found in favor of Petitioner on the foregoing issues, the Arbitrator resolves the temporary total disability dispute in favor of Petitioner. At trial, Petitioner testified he worked light duty following the second accident until February 2015 and again in May 2015 until he was fired in June 2015 for reasons unrelated. Petitioner's testimony was unrebutted in this regard and Ax1 specifies missed time as follows: 2/12/2015 – 5/4/2015 and 5/17/2015 – 12/4/2015. Despite denying fusion surgery, the Arbitrator finds that Petitioner's lumbar condition has not yet stabilized and that he is need of further treatment. Therefore, TTD is appropriate.

Respondent shall pay Petitioner temporary total disability benefits of **$643.32/week** for **36-2/7th weeks**, commencing **2/12/2015** through **5/7/2015** and **6/17/2015** through **12/4/2015**, as provided in Section 8(b) of the Act, which reflects time off of work as a result of the December 31, 2014 accident in case 15 WC 4004. Respondent shall be given a credit for any for temporary total disability benefits that have been paid against this award.

Signature of Arbitrator

2-16-2016
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Adelsberger,
Petitioner,

vs.

NO: 15 WC 08203

16IWCC0816

State of Illinois
Dept. of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent partial disability, medical expenses, prospective 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. The Commission hereby 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 March 28, 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.

16IWCC0816

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: DEC 16 2016

Joshua D. Luskin

Charles J. DeVriendt

Ruth W. White

o-12/06/16
jdl/wj
68

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

ADELSBERGER, WILLIAM
Employee/Petitioner

Case# **15WC008203**

14WC042120

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

16IWCC0816

On 3/28/2016, 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 0.44% 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:

1053 JOSEPH L SAMUELSON PC
5111 W MAIN ST
BELLEVILLE, IL 62226

3291 ASSISTANT ATTORNEY GENERAL
DIANA 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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
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

MAR 28 2016

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

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)

William Adelsberger
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # 15 WC 08203

Consolidated cases: 14 WC 42120

16IWCC0816

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 K. Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, 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 _____

16IWCC0816

FINDINGS

On the date of accident, **1-24-14**, 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 **$83,689.23**; the average weekly wage was **$1,609.40**.

On the date of accident, Petitioner was **57** 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

Prospective medical benefits are awarded in 14 WC 42120.

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.

Michael K. Nowak, Arbitrator

3/21/16
Date

ICArbDec19(b)

MAR 28 2016

FINDINGS OF FACT

Petitioner is a highway maintainer for the Illinois Department of Transportation. He has been so employed for the past 14 years. His job duties involve the performance of heavy manual labor to accomplish various tasks.

In November 2013 Petitioner was preparing vehicles for winter snow removal duty. During the course of these preparations Petitioner began to experience pain and discomfort in his left shoulder. On November 13, 2013 he sought treatment with Dr. James Sola, an orthopedic surgeon. Dr. Sola had previously treated Petitioner for knee and right elbow problems. Dr. Sola prescribed Celebrex and recommended physical therapy. When Petitioner returned to Dr. Sola in December 2013 it was noted that physical therapy had improved his condition. Petitioner then returned to Dr. Sola on January 23, 2014. Dr. Sola administered a cortisone injection to Petitioner's left shoulder and released him to return on an as needed basis. Dr. Sola's diagnosis at that time was tendinitis of the left shoulder. He was released without restriction at that time.

The following day, January 24, 2014, Petitioner was loading carbide bits/blades weighing between 40 and 50 pounds onto a pallet. These blades were approximately 1 inch thick and 4 feet in length. They are installed on IDOT trucks during snow removal. Petitioner testified that while lifting the 3rd or 4th blade his right hand slipped causing the full weight of the load to shift to his left arm. At that point he felt a stretching and painful sensation in the left shoulder. The accident was immediately reported. The accident was witnessed by a coworker; James Swain. Mr. Swain's witness statement corroborates Petitioner's description of the accident. Petitioner attempted to return to Dr. Sola right away for orthopedic consultation. Unfortunately, however Dr. Sola's office was unable to obtain authorization to treat Petitioner from Respondent's workers compensation administrator. (PX 2) Eventually Petitioner became frustrated and instructed Dr. Sola staff to simply bill his group insurance carrier for the treatment.

An MRI was performed on Petitioner's left shoulder on March 10, 2014. Petitioner returned to Dr. Sola on March 13, 2014. After reviewing the MRI and examining Petitioner Dr. Sola determined there were positive provocative signs of impingement, but no surgical lesions of the rotator cuff. (*Id.*.). Dr. Sola administered a cortisone injection to Petitioner's left shoulder and released him to full duty activity. Petitioner was able to perform his regular job duties, but continued to have occasional left shoulder difficulty. He returned to Dr. Sola on July 3, 2014 and received another cortisone injection. Dr. Sola maintained his earlier diagnosis of tendinitis and again released Petitioner without restriction. On October 23, 2014 Petitioner again returned to Dr. Sola. At that visit Dr. Sola noted Petitioner had good range of motion of the shoulder, a slightly positive Neer impingement sign, good strength with thumbs down abduction and to external rotation, and a negative Sulcus sign. There was no instability in the shoulder. Although Dr. Sola discussed various treatment possibilities, including surgery, he concluded that based on the improvement in symptoms he would not recommend further treatment at that time.

Petitioner continued to perform his regularly assigned work duties without restriction until December 1, 2014. On that date Petitioner was called in to work at 4:00 AM due to an ice storm. As he was attempting to get into his assigned truck he slipped on the ice covered step of the truck while holding onto the string with his left hand. When he slipped from the step his left shoulder popped and he fell to the ground landing on his left side. Petitioner testified he immediately suffered severe pain and discomfort in his left shoulder unlike any he had

previously experienced. The accident was immediately reported and a witness report was completed by Petitioner's coworker, Jonathan Dial. Mr. Dial's account completely corroborated Petitioner's description of the accident. He went on to state "I asked if he was ok but he did not answer so I figured he probably wasn't." (PX1). As a result of this accident Petitioner required immediate medical care. He was seen by Dr. Brian Erickson at Gateway regional hospital that morning. He was placed in a sling, given oral pain medication and instructed to follow up with a specialist. Dr. Erickson completed an initial Worker's Compensation medical report for Respondent dated December 1, 2014. On that form he indicated the diagnosis was "sprain left shoulder-possible muscle tear &/or rotator cuff injury."

Petitioner returned to Dr. Sola on December 5, 2014. Dr. Sola noted increased left shoulder pain, restricted range of motion, and difficulty lifting. Dr. Sola recommended physical therapy with rotator cuff protocol for range of motion and strengthening. Petitioner was, for the first time placed on work restrictions of no lifting, pulling or pushing greater than 10 pounds with the left arm. (PX 2). When Petitioner returned on December 18, 2014 Dr. Sola noted weakness with thumbs down abduction as well as external rotation. Dr. Sola's note states "the concern is the patient now has a traumatic rotator cuff tear with his weakness. If he does, he's going to require surgery sooner rather than later. I think we need to obtain an MRI to evaluate the rotator cuff." (*Id.)*. An MRI was then performed on December 31, 2014 which revealed a high-grade bursal surface tear of the anterior and lateral fibers of the supraspinatus tendon...increased T2 signal undermining the superior aspect of the labrum extending...to the insertion of the biceps tendon... [and] fluid within the subacromial-subdeltoid bursa..." which it was felt could relate to "mild bursitis or potentially a small full thickness component of the high-grade partial-thickness tearing of the supraspinatus tendon." (PX5). The Arbitrator notes that the findings of this scan are significantly greater than those revealed on the MRI of March 10, 2014.

When Petitioner returned to Dr. Sola he reviewed the most recent MRI study and concluded Petitioner had suffered a traumatic partial-thickness or possibly a full thickness tear of the rotator cuff. Dr. Sola recommended an arthroscopic acromioplasty and repair, but if the operative findings revealed that the tear of the rotator cuff was greater than 50% the procedure would be converted to an open rotator cuff debridement and repair. (PX 2). Petitioner was to remain on the previously imposed work restrictions until surgery is completed. Dr. Sola then prepared a narrative report dated February 25, 2015 in which he wrote:

> I am currently treating Mr. Adelsberger for a rotator cuff tear in his left shoulder. At this time, I have recommended surgical repair of his rotator cuff. I do believe that the patient's injury in December of 2014 substantially aggravated his condition to the extent that it now requires surgery. I also believe to a reasonable degree of medical certainty that the medical services provided to Mr. Adelsberger became necessary secondary to his injury in December of 2014....(*Id.*)

On May 20, 2015 Dr. Nogalski performed a section 12 examination at Respondent's request. Dr. Nogalski reviewed Petitioner's medical records and conducted a physical examination. Dr. Nogalski concluded Petitioner was suffering from "baseline rotator cuff tendinopathy and some impingement issues which have pre-existed for some time." He did not believe Petitioner had a tear of the rotator cuff and did not believe he was in need of any continuing treatment. (RX4)

Clearly, these opinions are in direct opposition to the opinions of Dr. Sola, Dr. Huyette (the radiologist who interpreted the March 10, 2014 MRI scan), and Dr. Taves (the radiologist who interpreted the December 31, 2014 MRI scan).

As of the date of hearing Petitioner remained symptomatic and wishes to proceed with the treatment recommended by Dr. Sola.

CONCLUSIONS

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

Issue (O): Is Petitioner entitled to any prospective medical care?

The issue presented in these consolidated cases is whether Petitioner is entitled to prospective section 8(a) medical benefits, in particular the surgical procedure(s) prescribed by Dr. Sola, as a result of either his January 24, 2014 or December 1, 2014 accidents. The Respondent does not dispute the reasonableness or necessity of the recommended treatment, but only its liability for that treatment based on the issue of causal connection, thus the issues will be considered jointly.

The Arbitrator finds the opinions of Dr. Sola, Petitioner's treating orthopedic surgeon, to be more persuasive than those of Dr. Nogalski. Dr. Sola's opinions are supported by the diagnostic testing and corroborated by the findings of Dr. Huyette and Dr. Taves. Dr. Nogalski's opinions are at odds with the diagnostic findings.

Prior to January 24, 2014, Petitioner had some minor tendindits of the rotator cuff which "may have been" due to excessive lifting at work. Irrespective of its origin, Dr. Sola's records reflect this was a minor condition which resolved with conservative care. Petitioner's activities were never restricted and he was released from Dr. Sola's care on January 23, 2014.

On January 24, 2014, Petitioner injured his left shoulder lifting a forty to fifty pound carbide blade. The Arbitrator finds that as a result of the January 24, 2014 accident, Petitioner sustained injuries to his left shoulder which substantially aggravated his pre-existing left shoulder tendinitis and caused non-surgical rotator cuff pathology. As a result of this accident, Petitioner was required to seek medical care from Dr. Sola. Treatment for his injuries was significantly delayed due to Respondent's failure to respond to Dr. Sola's request for treatment authorization. Despite the delay, Dr. Sola did eventually treat Petitioner from March 6, 2014 to October 23, 2014. During this period, Petitioner's condition of ill-being improved and on October 23, 2014 he was released from care without restrictions. Dr. Sola's final diagnosis was a probable, non-surgical small rotator cuff lesion which had improved with conservative treatment. He did not recommend any further treatment at that time.

On December 1, 2014, Petitioner suffered a major injury to his left shoulder. As a result of this injury his clinical presentation changed significantly, demonstrating restricted range of motion and weakness of the left arm. Further, the December 31, 2014 MRI scan revealed a demonstrative change in his pathology including a high grade bursal surface tear of the supraspinatus tendon and fluid within the subacromial-subdeltoid bursa, indicative of a full thickness tear of the supraspinatus tendon.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner's condition of ill-being up to December 1, 2014 is causally related to his accident of January 24, 2014 and Petitioner's current condition of ill-being is causally related to his accident of December 1, 2014. The Arbitrator further finds Petitioner's need for the prospective medical treatment, including surgical intervention, is related to the injury on December 1, 2014. Respondent shall authorize and pay for the medical treatment prescribed by Dr. Sola, including but not limited to, surgery pursuant to Sections 8(a) and 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ 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

Javier Moreno,
Petitioner,
vs.

16IWCC0831

NO: 15 WC 10078

Not Just Grass, 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 issues of accident, medical expenses, temporary total disability, penalties, first attorney fee petitition 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 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.

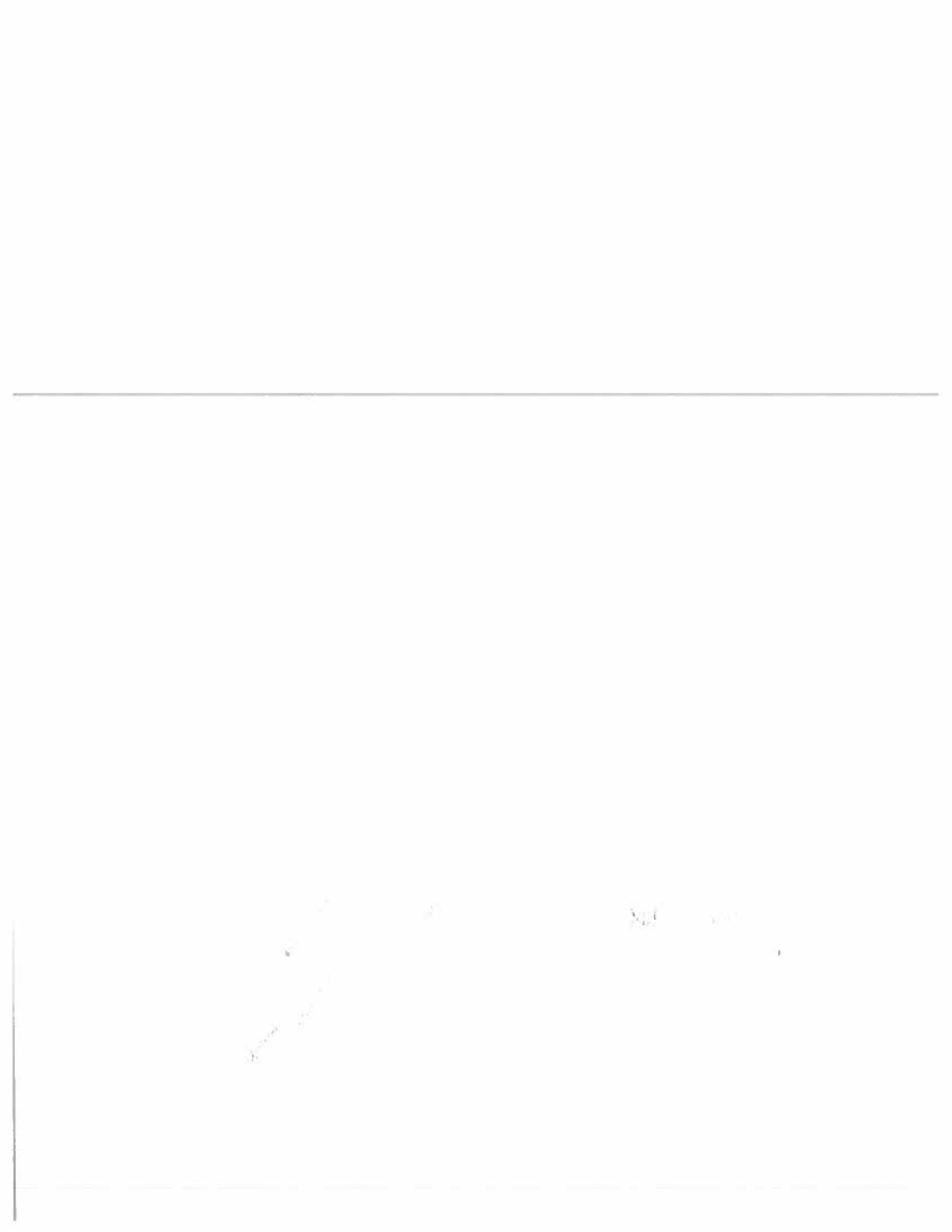
The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 2 2 2016
KWL/vf
O-11/1/16
42

Kevin W. Lamborn

Michael J. Brennan

Thomas J. Tyrrell



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

16IWCC0831

MORENO, JAVIER
Employee/Petitioner

Case# **15WC010078**

14WC032681

NOT JUST GRASS INC
Employer/Respondent

On 2/22/2016, 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 0.41% 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:

1922 STEVEN B SALK & ASSOC LTD
DAMIAN R FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

5687 POWELL & PISMAN PLLC
MARITSHA GARCIA ESQ
875 N DEARBORN ST 4TH FL
CHICAGO, IL 60610

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ 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)

16IWCC0831

Javier Moreno
Employee/Petitioner

v.

Not Just Grass, Inc.
Employer/Respondent

Case # 15 WC 10078

Consolidated cases: 14 WC 32681

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 **Brian Cronin**, Arbitrator of the Commission, in the cities of **Wheaton and Geneva**, on **6/29/15 and 7/10/15**. 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, **8/25/14**, 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 not* given to Respondent.

In the year preceding the injury, Petitioner earned **$31,200.00**; the average weekly wage was **$600.00**.

On the date of accident, Petitioner was **32** years of age, *married* with **3** dependent children.

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

As Petitioner failed to prove the issues of accident and notice, the Arbitrator hereby denies benefits. All other issues are rendered moot.

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

February 19, 2016
Date

ICArbDec19(b)

FEB 22 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

19(b) ARBITRATION DECISION

Javier Moreno

16IWCC0831

v.

Case # 15 WC 10078
Consolidated with 14 WC 32681

Not Just Grass, Inc.

FINDINGS OF FACT:

On August 25, 2014, Petitioner worked as a general laborer for Respondent, which is a landscaping company. Petitioner testified on cross-examination that he began working for Respondent early that same month. Petitioner testified that when he started working for Respondent, he was not having any problems with his body and that he was "completely fine to work." Petitioner acknowledged that he had a prior right shoulder injury.

Petitioner's job duties for Respondent included lifting rocks, stones, heavy machines and trees, as well as mowing lawns and trimming trees. His work hours were from 7:00 a.m. to 5:30 p.m. Sometimes he worked until 6:00 p.m.

Petitioner testified that on the morning of August 25, 2014, he and his supervisor, Zak, lifted and moved 5 flagstones from one pallet to another pallet and that each flagstone weighed approximately 150 pounds. After Zak left the scene, Petitioner testified, he started feeling "a low pain in [his] back like real light in [his] lower back."

Petitioner did not seek medical care for any lower back complaints at that time. Petitioner testified that he did not think it was an emergency and did not think he needed to see a doctor. Petitioner testified that he thought the pain would go away.

Petitioner testified that on September 5, 2014, he first reported this accident

Petitioner worked the remainder of the day on August 25, 2014, and subsequently worked on August 26, 27, 28 and 29, 2014. During that time, Petitioner made no complaints of back pain to Zak or any co-workers.

Early Saturday morning on August 30, 2014, Petitioner was involved in a physical altercation/assault in a bar in Aurora, Illinois. Petitioner testified that he

was hit in the head with a glass beer bottle, knocked out for a brief period of time, and kicked in the head by unknown assailants. Petitioner was robbed of a gold chain and pendant at that time.

Immediately following the physical altercation/assault, Petitioner walked home. His wife called the police, and then Petitioner and the police officer completed a report.

Respondent introduced into evidence the records of the Aurora Police Department relative to that incident, which was reported at 3:10 a.m. and took place at the "North End Tap." (Rx.2) The police officer characterized the type of injury sustained as "minor" and consisting of "abrasions/scratches" to Petitioner's head and right forearm. (Rx.2)

Petitioner was taken by ambulance to the Emergency Room at Presence Mercy Medical Center. Petitioner presented to the ER at 3:59 a.m. The following letters were written above the signature line on the "Consent to and Conditions for Treatment" form: "*PT ETOH.*" Petitioner's blood alcohol level was found to be at .21. (Px. 25)

Leilani LaBianco, M.D., examined Petitioner and performed a review of systems. Although Petitioner complained of head pain and right arm abrasions, he did not voice any complaints of lumbar pain, hip pain, leg pain or groin/testicle pain. The medical records further indicate that Petitioner had not experienced a loss of consciousness. (Px. 25)

The long weekend of August 30 - September 1, 2014 was Labor Day Weekend and Petitioner was not scheduled to work on these days. After informing "Greg" of the altercation, Petitioner took off 2 workdays (September 2nd and 3rd) and did not return to work for Respondent until the morning of September 4, 2014. Petitioner denied that he performed lighter-duty work on September 4th, and stated that he mowed lawns and used the weed whacker and blower that day.

Petitioner testified that on September 5, 2014, he worked for Respondent. While he was standing up, Petitioner bent over, grabbed a 30-pound, 6-liter gas can with his right hand but "never lift[ed] the can" when he felt his back "pop." Petitioner testified that he did not feel pain immediately when he bent over. He testified that after he grabbed the can and was ready to lift it up, his body got tight and he heard a pop in his back. He experienced pain in his low back, could not move and was stuck in that position for approximately 15 minutes.

Petitioner testified that on September 5, 2014, at about 6:00 p.m. at the shop, he gave notice to "Greg" at the company of his August 25, 2014 and September 5, 2014 accidents. Petitioner further testified that when he saw Greg, "Zak and the other workers" were around them, and he told Greg that two weeks earlier on

August 25th when he and Zak were lifting stones he felt light pain in his back and also told Greg what had happened that morning when he bent over to try to lift the gas can.

Petitioner's Counsel called Gregory Voirin, owner of Respondent, as an adverse witness. Mr. Voirin testified that Petitioner began working for him in either late July or early August 2014 as a laborer/landscaper. Mr. Voirin acknowledged that Petitioner worked for him on August 25, 2014, but that Petitioner did not advise him of an August 25, 2014 work accident. Mr. Voirin acknowledged that Petitioner did advise him on September 5, 2014 of an accident that took place on September 5, 2014 (the subject of the Decision for case #14 WC 32681), but did not advise him of an accident that took place on August 25, 2014.

Mr. Voirin testified that if one of his employees moves the gas can from the trailer to the ground, he would have to pick it up to get gas to put in the trimmer or whatever equipment he was using.

Mr. Voirin testified that in the earlier part of the day on September 5, 2014, Zak called him and told him that Petitioner had an incident and hurt his back. Mr. Voirin testified that in that conversation with Zak, an August 25th incident never came up. Mr. Voirin testified that later that same day, at approximately 5:30 p.m., Petitioner personally reported the September 5th incident to him. Zak, Lupe and Emmanuel were in the vicinity at the time - "maybe within earshot" - but it was Petitioner who was telling him the story.

Mr. Voirin further testified that it was not until the actual trial date of June 29, 2015, when he spoke with Respondent's Counsel, that he first became aware of Petitioner's allegations with respect to an alleged accident of August 25, 2014.

Petitioner testified that prior to September 5th, he never felt pain going down his back and into his left testicle.

During his September 5, 2014 conversation with Mr. Voirin, Petitioner testified, he requested that Voirin help him and maybe take him to the hospital. Mr. Voirin paid Petitioner, said nothing, took his truck and left the premises. One-half hour later, Zak phoned Petitioner and told him that Greg did not want him to show up for work the next day.

On Monday, September 8, 2014, Petitioner and Greg Voirin had a text message conversation. Petitioner told Mr. Voirin that he feels terrible, even with the medication, and that he is going to see the doctor that and will text Voirin to let him know what he or she said. Mr. Voirin told Petitioner that he needed for him to get better and to be completely healed before he would allow Petitioner to return to work. Mr. Voirin also stated that he was not going to pay Petitioner until he is healthy and back working. Later that day, Mr. Voirin texted the following: "Javier. If you start the claim I can't have you work because you may get more hurt." (Px.23)

Petitioner sought treatment that day at Rush-Copley Medical Center for left-sided back pain that radiated to the left groin. Petitioner told the medical staff there that his symptoms started 2 days ago when he was trying to pick up a gas can. He was initially diagnosed with an acute lumbar strain and instructed to remain off work the rest of the day. (Px.1)

On September 23, 2014, Petitioner presented to Samir Sharma, M.D., who is a board-certified anesthesiologist associated Illinois Orthopedic Network. (Px.2) The HISTORY/INDICATIONS section of Dr. Sharma's INITIAL CONSULTATION NOTE includes the following:

"This is a 32-year-old gentleman who sustained a work-related injury on 09/05/2014 while he was employed as a landscaper. He was doing a job including repetitive bending, twisting, moving locks (sic) that were over 100 pounds in weight, when he felt a slight strain which was aggravated when the patient was bending to lift a gas can to fill a lawnmower. The patient states at that time he bent forward and felt a strain in his left low back and aggravated it as he was going to a standing position. The patient states that happened around 10:30 a.m. on 09/05/2014, and it was reported to his supervisor at approximately 11:30 a.m. . . . " (Px.2)

In the CHIEF COMPLAINT section of the handwritten 9/23/14 HISTORY FORM, the medical professional wrote: "Pt works in landscaping. Pt bent over to pick up gas can. Pt states he couldn't get upright no more. Pt had a sudden sharp pain in low back. Pt states a week before accident Pt lifted a heavy rock but didn't think nothing of it + cont. working." (Px.2)

Dr. Sharma prescribed medication and physical therapy, and took Petitioner off work at that time. Later, he administered 2 injections to Petitioner's low back. (Px.2) Petitioner participated in a physical therapy program at Nuestra Clinica de Aurora. (Px.3) Petitioner then began treating with orthopedic surgeon Geoffrey R. Dixon, M.D., who has recommended surgery. (Px.2)

Petitioner underwent his first session of physical therapy at Nuestra Clinica de Aurora on September 24, 2014. (Px. 3) Dr. Sharma reviewed the MRI on October 21, 2014 and noted a left lateral L4-5 disk herniation contributing to moderate lateral recess and foraminal stenosis. (Px.2) Post-MRI, Dr. Sharma ordered 4 more weeks of physical therapy and advised Petitioner he could return to work with restrictions. As of December 2, 2014 Dr. Sharma opined that Petitioner symptoms were secondary to the work-related injury on September 5, 2014. (Px.2)

On January 29, 2015, at the request of Respondent and pursuant to Section 12 of the Act, Petitioner presented to neurosurgeon Matthew J. Ross, M.D., for an examination. (Rx.3) After taking a history, conducting a physical examination, viewing a CD containing an MRI of Petitioner's lumbar spine and reviewing the

treatment records that were forwarded to him, Dr. Ross offered his IMPRESSION, which includes the following:

"Mr. Moreno has low back and left sciatic pain following his work incident on September 5, 2014. By history, Mr. Moreno started becoming symptomatic a week or 2 earlier with lifting heavy rocks at work. There was no actual accident or specific injury that occurred on September 5, 2014. Mr. Moreno simply bent forward to pick up the can of gasoline and experienced back pain. He specifically denies making any effort to actually lift the gasoline can. Although Mr. Moreno did not have an accident or over stress (sic) injury of his back on the date of major pain flare-up, his history of low level back pain following lifting rocks suggests that his injury actually occurred earlier. The L4-5 disk may have been initially injured lifting the rocks. The bending forward to lift the gas can may literally have been the straw that broke the camel's back. It is not uncommon to see disk herniation in evolution begin as back pain, and then erupt as sciatic pain following a trivial event. As a result, I am of the opinion that there is a causal relationship between Mr. Moreno's work activities and his left sciatic pain and need for additional medical treatment."

After reviewing the Presence Mercy Hospital records of August 30, 2014, Dr. Ross wrote, in pertinent part, the following: "The ER physician specifically did not notice any evidence of trauma to the neck or back." (Rx.3)

Petitioner testified that when he presented to Dr. Ross for an examination, he gave Dr. Ross the same story he gave at trial about the way the accidents happened. Petitioner was sure of that.

On September 26, 2014, Petitioner filed an Application for Adjustment of Claim in which he alleged that on September 5, 2014, he sustained a serious/permanent injury to his man as a whole at work. The case was assigned case # 14 WC 32681. (Px.16)

On April 1, 2015, Petitioner filed an Application for Adjustment of Claim in which he alleged that on August 25, 2014, he sustained a back injury as a result of heavy lifting at work. The case was assigned case # 15 WC 10078. (Px.17)

The Commission file indicates that on May 20, 2015, Petitioner filed a Petition for an Immediate Hearing Under Section 19(b) of the Act against Respondent for case numbers 14 WC 32681 and 15 WC 10078 and set it on Arbitrator Cronin's June 18, 2015 status call in Wheaton. The Arbitrator notes that in his 19(b) Petition for case number 15 WC 10078, Petitioner claims that on August 25, 2014, as a result of heavy lifting while working for Respondent, he sustained a disc herniation at L4-5, nerve root compression and disc protrusion at L5-S1. At the June 18, 2015 status call, the parties agreed on a trial date of June 29, 2015.

Aside from his attempts to return to work for Respondent, Petitioner acknowledged on cross-examination that he never sought work with another employer.

CONCLUSIONS OF LAW:

In support of his decision with regard to issue (C) "Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?", the Arbitrator concludes as follows:

Petitioner testified that on August 25, 2014, he experienced "a low pain in [his] back like real light in [his] lower back" after lifting and moving, with Zak, 5 flagstones that weighed 150 pounds each. Petitioner did not specify the location of the low back pain – right, left or center.

Petitioner testified that he experienced such back pain after Zak left the scene.

Petitioner did not complain of back pain to Zak or any of his co-workers at that time. He finished the workday on August 25, 2014, and worked full-time, full-duty on August 26, 27, 28 and 29. He did not seek treatment at that time.

After a full day of work on Friday, August 29, 2014, Petitioner proceeded to go out to a bar at 10:00 that night.

Following his physical altercation/assault at the bar in the early morning hours of August 30, 2014, Petitioner was taken to Presence Mercy Hospital. Petitioner had been struck over the head with a beer bottle and kicked in the head by 2 unknown assailants. The ER physician found no evidence of cervical or lumbar trauma. Although Petitioner voiced complaints of head pain and right arm abrasions, he made no complaints of low back pain at that time.

Despite the fact that Petitioner took Saturday, Sunday and Monday off over the Labor Day Weekend (he was not scheduled to work those days), he asked for and received 2 days off work (September 2nd and 3rd) from Greg after Petitioner informed him of the physical altercation/assault that occurred.

On September 4, 2014, Petitioner's job duties included mowing lawns and using the weed whacker and blower.

There is no testimony to indicate that Petitioner experienced ongoing low back pain from August 25, 2014 to September 5, 2014.

On the morning of September 5, 2014, Petitioner bent over or bent forward in order to lift up a gas can and experienced pain in his low back. Please see Decision for case # 14 WC 32681.

On September 8, 2014, Petitioner first sought treatment at Rush-Copley Hospital for left-sided low back pain that radiated into his groin on the left side. At that time, he made no mention of any rock-lifting incident or of anything occurring on August 25, 2014. In fact, at that time, Petitioner told the Rush-Copley medical staff, *inter alia*, the following:

"... symptoms started 2 days ago when he was trying to pick up a gas can."

The Arbitrator places significant weight on the history Petitioner reported to the Rush-Copley staff on September 8, 2014. Please see Sleeter v. Indus. Comm'n, 805 N.E.2d 1227, 282 Ill. Dec. 210 (4th Dist. 2004)

Petitioner testified, and the Application for Adjustment of Claim indicates, that he lives in Aurora, Illinois. Petitioner testified that a "guy at the laundromat" referred him for medical treatment to Illinois Orthopedic Network, 712 N. Dearborn St., Chicago, IL. Petitioner's lawyers, Illinois Injury Lawyers, have offices at 875 N. Dearborn St., Chicago, IL. At 10:09 and 10:46 a.m. on September 23, 2014, Lola of Illinois Injury Lawyers spoke with Petitioner about this case. (Edelman Exhibit A)

Petitioner testified that Illinois Orthopedic Network sent a car to Aurora, IL, to pick him up and take him to their clinic at 712 N. Dearborn St., Chicago, IL.

In the Initial Consultation Note dated September 23, 2014, 2:21 p.m., Dr. Sharma of Illinois Orthopedic Network, 712 N. Dearborn St., Chicago, described Petitioner's job as one that includes repetitive bending, lifting, twisting, moving locks (sic) that were over 100 pounds in weight. The doctor noted that Petitioner felt a slight strain, which was aggravated when he was bending to lift a gas can to fill a lawnmower.

In the CHIEF COMPLAINT section of the handwritten 9/23/14 HISTORY FORM, a medical professional wrote: "Pt works in landscaping. Pt bent over to pick up gas can. Pt states he couldn't get upright no more. Pt had a sudden sharp pain in low back. Pt states a week before accident Pt lifted a heavy rock but didn't think nothing of it + cont. working." There is no indication as to who completed this form.

One week prior to September 5, 2014 was August 29, 2014.

When Dr. Ross examined Petitioner on January 29, 2015, he wrote: "**By history**, Mr. Moreno started becoming symptomatic a week or 2 earlier with lifting heavy rocks at work." (Emphasis added) The Arbitrator draws the reasonable inference that "by history" suggests it is based just on Petitioner's word because there are no concurrent medical records to corroborate his claim.

Based on the foregoing, the Arbitrator finds that Petitioner failed to prove that on August 25, 2014, he sustained an accident that arose out of and in the course of her employment by Respondent.

In support of his decision with regard to issue (E) "Was timely notice of the accident given to Respondent?", the Arbitrator concludes as follows:

Petitioner testified that on September 5, 2014, at about 6:00 p.m. at the shop, he gave notice to "Greg" at the company of his August 25, 2014 and September 5, 2014 accidents. Petitioner further testified that when he saw Greg, "Zak and the other workers" were around them, and he told Greg that two weeks earlier on August 25th when he and Zak were lifting stones, he felt light pain in his back and also told Greg what had happened that morning when he bent over to try to lift the gas can.

Greg Voirin testified that in the earlier part of the day on September 5, 2014, Zak called him and told him that Petitioner had an incident and hurt his back. Mr. Voirin testified that in that conversation with Zak, an August 25th incident never came up. Mr. Voirin testified that later that same day, at approximately 5:30 p.m., Petitioner personally reported the September 5th incident to him. Zak, Lupe and Emmanuel were in the vicinity at the time - "maybe within earshot" - but it was Petitioner who was telling him the story. Mr. Voirin denied that Petitioner ever advised him of an August 25, 2014 work accident.

Mr. Voirin further testified that it was not until the actual trial date of June 29, 2015, when he spoke with Respondent's Counsel, that he first became aware of Petitioner's allegations with respect to an accident of August 25, 2014.

The Arbitrator notes that on April 1, 2015, Petitioner filed an Application for Adjustment of Claim in which he alleged an August 25, 2014 accident while working for Respondent. Moreover, on May 20, 2015, Petitioner filed a 19(b) Petition for a claim against Respondent with an August 25, 2014 date of accident.

The Arbitrator finds that Mr. Voirin lacks credibility.

Notwithstanding this finding, the Arbitrator also questions Petitioner's credibility. It is Petitioner's burden of proof. The Arbitrator notes that April 1, 2015 is the first time that August 25, 2014 is identified, in any document or medical record, as a date of accident or incident. On September 8, 2014, Petitioner made no mention of an August 25, 2014 incident or of any rock-lifting activity. During the course of treatment with Dr. Sharma and Nuestra Clinica and during his examination by Dr. Ross, Petitioner reported a rock-lifting activity, but did not identify a date.

Therefore, the Arbitrator finds that Petitioner's testimony with regard to a conversation with Greg on September 5, 2014, in which Petitioner stated:

"... and I told him two weeks before, it was August 25, Zak and me were lifting some stones ..." (Tr. 32)

lacks credibility.

If Petitioner knew, on September 5, 2014, that it was on August 25, 2014 that he sustained an earlier injury to his low back while lifting rocks, why didn't he give that date to Rush-Copley, Dr. Sharma, Nuestra Clinica or Dr. Ross?

Moreover, the Arbitrator finds that there is insufficient evidence to find that Zak or any of Petitioner's co-workers were actually party to the conversation Petitioner had with Greg Voirin on September 5, 2014.

Based on the foregoing, the Arbitrator finds that Petitioner failed to prove that he provided timely notice of an alleged August 25, 2014 accident to Respondent.

Compensation is hereby denied. All other issues are moot.

Brian Cronin
Arbitrator

2-19-2016
Date

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 KANE)	☐ 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

43

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

Case # **15** WC **15332**

v.

Consolidated cases: **15 WC 15331 issued in a separate decision**

CATERPILLAR INC.
Employer/Respondent

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.

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

Regina Julun,

Petitioner,

vs.

NO: 15 WC 18016

Pace Suburban Bus Service,

16IWCC0827

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, causal connection, medical expenses, prospective medical expenses, temporary total disability, 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 affirms the Arbitrator's Decision in all respects. With regard to the issue of accident, the Commission notes that it viewed the video evidence in its entirety. Respondent's Exhibit (5) consisted of two discs of footage from eight different camera angles. The Commission is of the opinion that the Petitioner did not sustain an accident in the course of her employment.

While the Petitioner was riding on the bus depicted in the video footage in evidence, the bus was impacted by another vehicle on the front driver's side. The vehicle left the scene. The bus was moving for approximately two seconds before impact so it was not traveling at a high rate of speed. The Petitioner was standing next to the driver of the bus at the point of impact. When the driver of the bus applied the brakes at the moment of impact, the Petitioner lunged

16IWCC0827

slightly forward. The Petitioner braced herself by holding onto the driver's seat with her left hand, while maintaining her grip on a beverage cup in the right hand.

Accordingly, the Commission finds that the Petitioner's testimony with regard to the incident depicted in the video footage is not credible.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 28, 2016 is hereby affirmed and adopted.

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 the 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: DEC 2 2 2016

O: 11/1/16
TJT/ gaf
51

Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

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

JULUN, REGINA
Employee/Petitioner

Case# **15WC018016**

PACE SUBURBAN BUS SERVICE
Employer/Respondent

16IWCC0827

On 1/28/2016, 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:

1067 ANKIN LAW OFFICE LLC
SCOTT GOLDSTEIN
162 W GRAND AVE
CHICAGO, IL 60654

1505 SLAVIN & SLAVIN
PATRICK SHIFLEY
20 S CLARK ST SUITE 510
CHICAGO, IL 60603

16IWCC0827

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)

REGINA JULUN
Employee/Petitioner

v.

PACE SUBURBAN BUS SERVICE
Employer/Respondent

Case # **15** WC **18016**

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, Illinois**, on **December 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. ☒ 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 _____

16IWCC0827

FINDINGS

On the date of accident, **May 21, 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*** 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 $; the average weekly wage was **$550**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **1** dependent children.

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

Respondent shall be given a credit of **$4,768.50** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of **$4,768.50** under Section 8(j) of the Act.

ORDER

Because the accident did not arise out of work, and was not causally connected to said employment, benefits 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.

Signature of Arbitrator

1-28-16
Date

ICArbDec19(b)

JAN 2 8 2016

BEFORE THE ILLINOIS WORKER'S COMPENSATION COMMISSION

REGINA JULUN Petitioner, v. PACE SUBURBAN BUS SERVICE Respondent.	Case No.: 15 WC 18016

MEMORANDUM OF DECISION OF ARBITRATOR

In support of the Arbitrator's Decision related to: **(C) Did an accident occur that arose out of and in the course of the Petitioner's employment by the Respondent?; (F) Whether the Petitioner's present condition of ill-being is 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) Is Petitioner entitled to any prospective medical care? (L) What temporary total disability benefits are in dispute?; (M) Should penalties or fees be imposed upon Respondent?;** The Arbitrator finds the following facts:

TESTIMONY AND RECORDS OF PETITIONER

Petitioner testified that she is employed by Respondent, Pace, as a student bus operator. (TR. P. 8) Petitioner testified that she was so employed on May 21, 2015. (TR. P. 8)

On January 23, 2015, prior to the alleged date of accident, the Petitioner was seen at Midwest Family Wellness at Thorek Hospital. No record of this visit was introduced by either party; however, billing records introduced by the Petitioner demonstrate that the Petitioner was treated for ICD-9 code 7245. The Arbitrator takes judicial notice that this code indicated treatment for backache. (Px 1)

Petitioner testified that she was standing up near the driver's side front of a Pace bus on May 21, 2015, in the course of her training. (TR. P. 9) The bus was struck by a small SUV on the

driver's side front. (TR. P. 9) At that time Petitioner claimed to have been jolted forward into the back of the driver's chair. (TR. P. 9) Petitioner testified that both sides of her body came into contact with the driver's chair, but more so her left. (TR. P. 10) Petitioner testified that she tried to catch herself by holding on to something. (TR. P. 9) Petitioner testified that her left hand touched the headrest of the driver's chair, and got caught in the headrest. (TR. P. 11, 12) Petitioner testified that the full length of her body from her collar bone through her knees impacted the chair in front of her. (TR. P..35) Petitioner testified that her right hand tried to grab the fare box. (TR. P. 12, 34) Petitioner testified that both of her knees came into contact with the chair in front of her. (TR. P. 13) Petitioner testified that her momentum was sufficient to carry her past the chair. (TR. P.13)

Petitioner testified that the driver attempted to catch her, and was partially able to do so. (TR. P.14)

Petitioner testified that she immediately felt pain in her neck, back, both hands, and both legs. (TR. P. 10) Petitioner testified that she sat down in the first seat of the passenger side of the bus. (TR. P.15)

Petitioner testified that the bus driver asked her if she needed medical assistance. (TR. P. 15) Petitioner testified that she informed the driver she would need medical assistance. (TR. P.15) Petitioner stated that this was while she was sitting down after the accident. (TR. P. 37) She testified that at this time she was experiencing pain in both hands, knees, ankles, neck, and back. (TR. P. 37)

Petitioner testified that in the time immediately after the accident her back pain was a 9 out of 10 (TR. P. 39), her legs were an 8 out of 10. (TR. P. 39)

A Rosemont Fire Department ambulance came to the scene of the accident. (TR. P. 16, Px 2 p 12) The records of Rosemont Fire Department provide a history of a motor vehicle collision with the Petitioner striking her left knee and left shoulder on the wall of the bus. Petitioner denied a fall. Petitioner specifically denied head, neck or back pain. Petitioner had no other complaints. (Px 2 p 12) Petitioner was taken to Lutheran General Hospital. (TR. P. 17)

Records of Lutheran General Hospital show that the Petitioner was seen on May 21, 2015 at 7:30 a.m., and that she then reported a history of a vehicle accident while standing. She presented with left shoulder pain, left knee pain, and mild back tenderness. At that time she was noted to have a full and complete range of motion in her shoulder, knees and back. (Px 2 p 21) Petitioner was noted to have no head/neck injury and to have a supple neck. (Px 2 p 21 – 22) Her pain was noted to be a 4 on the numeric rating scale. (Px 2 p 27) Petitioner was released at 9:24 a.m. after signing her discharge instructions. (TR. P.17)

The Petitioner elected to visit a second emergency room that day. (TR. P. 17) She testified that she went for observation, because she was still in pain. (TR. P.17)

Petitioner was treated at Thorek Memorial Hospital, arriving at 12:03 p.m. (Px 3 p 1) At that time she gave a history of having been pushed into the back of the driver's seat and complained of pain to her left shoulder and left back. (Px 3 p 3) At that time the Petitioner denied joint pain, joint stiffness, and gait problems. (Px 3 p 3) A physical exam notes that the petitioner had a normal neck, with full range of motion, and no neck complaints. (Px 3 p 3) Petitioner had a normal back examination, and a full range of shoulder motion. (Px 3 p 3) Petitioner's extremities were noted to have a normal range of motion, and no evidence of injury. (Px 3 p 3)

The visit notes indicate that at this time the Petitioner requested x-rays. Her treating ER physician at Thorek noted that he saw no clinical need for x-rays. (Px 3 p 3)

Records of Thorek Memorial Hospital indicate that the Petitioner had an active prescription for acetaminophen/codeine beginning November 10, 2014. (Px 3 p 1-2) Petitioner was noted to have put on a right wrist brace. (Px 3 p 3) Petitioner reported that she carried that with her for her chronic carpal tunnel. (Px 3 p 3)

Petitioner testified that she received a referral to a chiropractor, Dr. Jamie Vandenelzen, from her sister and began treatment on May 22, 2015 (TR. P. 18,19, PX 6) Petitioner said that Dr. Vandenelzen treated her symptoms in her neck, back, both hands and both legs. (TR. P.20)

On May 22, 2015, Dr. Vandenelzen found negative Tinel's and Phalen's signs. (Px 6) Petitioner treated with Dr. Vandenelzen through July 24, 2015. (Px 6) During that time Dr. Vandenelzen made note of Petitioner's subjective pain. On May 22, 2015 Petitioner's reported pain figures were as follows: neck 9/10, left wrist 9/10, right wrist 9/10, lower back 9/10, left knee 7/10, right knee 7/10. (Px 6)

Records of Illinois Orthopedic Network include an off work note, treatment orders, occupational therapy and physical therapy orders dated May 22, 2015. No records of an exam for May 22, 2015 are included in records provided by either the Petitioner or the Respondent. (Px 8, RX 3) A medical bill included in the record includes a bill for that date for procedure L3906. The Arbitrator takes Judicial Notice that this procedure is fabrication of a custom wrist orthotic. (Px 1)

Petitioner was referred to a pain doctor, Dr. Neeraj Jain, by Dr. Vandenelzen, and began treatment on June 3, 2015, at Pinnacle Pain Management. She gave a history of collision with a small SUV moving at high speed. Petitioner reported having been jarred about and hitting the front divider, and feeling immediate pain in the neck, back, and knees. (Px 4) Petitioner reported ongoing pain in her neck, back, wrists, and knees. (Px 4) Petitioner denied radicular symptoms.

Petitioner admitted a history of carpal tunnel, and treatment for same. Petitioner was noted to have a negative straight leg raise, negative Spurling's test, and a full range of motion in her knees. (Px 4)

On June 5, 2015 Petitioner was seen by her primary care physician at Midwest Family Wellness at Thorek Hospital. (Px 7) At that time her history stated she had been thrown backward hitting her mid back on a bench-seat. (Px 7) She now complained of suffering pain in her knees, hips, and shoulders. (Px 7) Petitioner was ambulating normally. (Px 7) Petitioner had a full range of motion in her neck, and her neck was supple. (Px 7)

Petitioner underwent a lumbar MRI on June 9, 2015. (TR. P. 21) The MRI showed no herniations. (Px 4) The MRI showed no central canal stenosis. (Px 4) Mild facet joint hypertrophy was present at L2-3 through L4-5.

Petitioner also underwent a cervical MRI on June 9. MRI showed mild cervical degenerative changes, without evidence of herniation, stenosis or narrowing. (Px 4)

Petitioner underwent x-rays of both knees on June 9, 2015. X rays showed no evidence of acute fracture or dislocation, and no significant arthritic changes. (Px 8)

Petitioner was seen on June 12, 2015 at Illinois Orthopedic Network. (TR. P. 21) At this time she reported that her knee pain had developed after prolonged standing. (Px 5) At that time the Petitioner reported 10 out of 10 pain from her neck down to her back, as well as bilateral wrist pain. She had full upper extremity strength, full deep tendon reflexes, and a full range of motion in her low back. Tinel, Phalen, Suck, Kienbock and Finkelstein exams were all negative. (Px 5)

On June 17, 2015, Petitioner was seen at Pinnacle Pain Management for follow up care. She reported substantial neck and low back pain, bilateral knee pain. Petitioner was noted to be

receiving treatment from a hand specialist for her carpal tunnel syndrome. Her Spurling's Test was negative, and She reported pain of 10 out of 10. (Px 4)

On June 17, as a diagnostic criterion given for facet joint injection, Petitioner's treater noted that she had no lumbar herniation on her MRI. (Px 4)

On June 22, 2015 Petitioner reported her subjective pain to Dr. Vandenelzen. Her reported pain figures were as follows: neck 4/10, left wrist 5/10, right wrist 5/10, lower back 6/10, left knee 5/10, right knee 5/10. (Px 6)

Petitioner underwent MRI testing of her knees on July 1, 2015 at Archer Open MRI. (TR. P. 23, Px 8) The MRI of the both knees found no evidence of a cartilage, ligament, or tendon tear. A small amount of fluid similarly located in each knee was deemed to be physiologic. (Px 8)

On July 7, 2015, Petitioner was seen at Pinnacle Pain Management for bilateral L4/5 L5/S1 facet joint injection. (Px 4)

On July 13, 2015, Petitioner reported her subjective pain to Dr. Vandenelzen. Her reported pain figures were as follows: neck 4/10, left wrist 3/10, right wrist 3/10, lower back 5/10, left knee 2/10, right knee 2/10. (Px 6)

On July 15, 2015, Petitioner was seen at Pinnacle Pain Management for follow up care. She reported substantial low back pain, bilateral knee pain, neck pain radiating into her upper extremities, and pain 10 out of 10. (Px 4) No objective physical examination techniques are noted. (Px 4)

On July 24, 2015, Dr. Vandenelzen's final record reports the following pain figures: Neck 2/10, Left wrist 2/10, right wrist 2/10, lower back 4/10, left knee 2/10, right knee 2/10.

The figures had consistently decreased since her first visit. At this time she was reported to have a full range of motion in her cervical spine and lumbar spine.

On July 30, 2015, Petitioner was seen at Midwest Family Wellness regarding an IUD. Physical exam showed that Petitioner was ambulating normally, her neck was supple with a full range of motion. Petitioner had normal movement of all extremities. (Px 7)

On August 5, 2015, Petitioner was seen again at Midwest Family Wellness for joint complaints stemming from her accident. Physical exam showed that Petitioner was ambulating normally, had normal movement of her extremities, and her neck was supple. Petitioner was noted as obese. (Px 7) The musculoskeletal exam showed Petitioner was putting forth poor effort, and noted several areas of inconsistencies in the reported subjective and objective findings. (Px 7) Petitioner was referred for an FCE at Thorek Hospital, and x-rays. (Px 7)

X-rays taken on August 5, 2015 show an unremarkable lumbar spine, an unremarkable thoracic spine, an unremarkable right knee, an unremarkable left knee, an unremarkable left wrist, an unremarkable right wrist, and straightening of the cervical lordosis. (Px 7)

On August 11, 2015, Petitioner was seen at Illinois Orthopedic Network. At that time she reported pain of 7/10. She claimed to have stopped taking her pain medications as they were not helping her. (Px 5) Petitioner's MRIs were within normal limits, except for very mild facet arthropathy at L4/5-L5/S1. (Px 5) At that time she had negative bilateral straight leg tests, as well as negative Shuck's, Watson's, Kienbock's, and Finkelstein's tests. Petitioner had normal upper extremity strength, full range of motion in her wrists, and full range of motion in the low back. (PX 5)

On August 21, 2015, Petitioner was seen by Dr. Dixon at Illinois Orthopedic Network. At that time she had a negative straight leg raise, normal extremity strength, and sensation to

pinprick. (Px 5) Dr. Dixon examined her cervical and lumbar MRIs and stated that she had mild spondylitic changes without herniation, compression or stenosis. (Px 5)

On August 23, 2015, Petitioner was seen at Pinnacle Pain Management for follow up care. At that time she complained of consistent wrist swelling, ankle swelling, and knee swelling, substantial neck pain and low-back pain. (Px 4) Petitioner rated her pain as 10 out of 10. (Px 4) At this time it was noted that treatment of her pain by injection had resulted in an increase of her pain, and that the Petitioner should be discharged from care. (Px 4) No objective physical examination techniques are noted. (Px 4)

On September 1, 2015, the Petitioner reported to Midwest Family Wellness for care for hand and leg swelling. At that time she was noted to have limited ambulation but normal gait, a supple neck with full range of motion, and limited range of motion in the extremities. (Px 7)

On September 10, 2015, the Petitioner underwent a bilateral EMG. At that time she exhibited normal distal latencies and amplitudes. Testing revealed chronic bilateral L5 radiculopathy. (Px 4)

On September 25, 2015, Petitioner was seen by Dr. Dixon. Upon review of the EMG, Dr. Dixon stated that there were no indications for surgery at that time. (Px 5)

On September 29, 2015, Petitioner was seen at Pinnacle Pain Management for bilateral L5/S1 transforaminal epidural steroid injection. (Px 4) The Petitioner reported that the epidural injection resulted in 0% relief from her symptoms. (Px 4)

On October 4, 2015, Petitioner was seen at Pinnacle Pain Management for bilateral C4/5 and C5/6 facet joint injections. The Petitioner reported that the facet joint injections resulted in 0% relief from her symptoms. (Px 4)

On October 21, 2015, Petitioner was seen at Pinnacle Pain Management for follow-up care for recalcitrant neck pain and severe bilateral low-back pain radiating into her lower extremity. (Px 4) At that time she reported a pain of 10 out of 10. (Px 4) Her straight leg raise indicated only hamstring tightness. (Px 4)

On October 22, 2015 Petitioner returned to Midwest Family Wellness for follow-up on her car accident. She made complaint of a bulging disc at L5, treatment by a neurologist and pain specialist, and constant pain. Petitioner was noted to ambulate normally, to have full range of motion in her neck, normal movement of all extremities, and normal gait. (Px 7)

October 27, 2015 CT of Petitioner's lumbar spine post discogram reveals that the Petitioner's spine alignment was within normal limits. L2/3 through L5/S1 all showed normal discs. There did not appear to be radial tears at any level. (Px 4)

Petitioner testified that she has been under care since the time of the accident until the date of the hearing. (TR. P.24) Petitioner testified that at the time of the hearing she was feeling pain in her back, hands, and knees. (TR. P. 27)

Petitioner testified that she had never had back or neck pain before. (TR. P.27, 28) Petitioner admitted to a prior history of carpal tunnel syndrome. (TR. P.28) Petitioner testified that she had been using braces on her hands prior to the time of the accident. (TR. P.28,29) Prior to the accident she experienced "real bad pain, numbness, tingling, and real bad severe pain in [her] hands." (TR. P. 29) Petitioner testified that she had to ice her hands 2 – 3 times per week prior to the accident, and 3 – 4 times per week after the accident. (TR. P. 32)

Petitioner admitted on cross examination that she had been treating for carpal tunnel syndrome since she was young, and that she had been taking ibuprofen for her carpal tunnel syndrome prior to the accident. (TR. P. 42)

Petitioner testified that Dr. Vandenelzen prescribed her hydrocodone for her hands. (TR. P. 42 – 43) The Arbitrator takes Judicial Notice that a licensed chiropractor in Illinois is a person licensed to treat "without the use of drugs". Medical Practice Act of 1987, 225 ILCS 60/2.

Petitioner testified that she is treating for her carpal tunnel syndrome with Dr. Brittany Macleod, a hand specialist. (TR. P. 44) However, no treatment by a hand specialist is in the record. On the contrary, records mention Brittany Macleod, P.A., as the Physician Assistant attending Petitioner at Illinois Orthopedic Network. (Px 8)

Petitioner testified that her perceived need to see a hand specialist has not changed because of the accident. (TR. P. 44 – 45)

Petitioner testified that the pain in her low back is a 10 out of 10 every day. (TR. P. 33) She testified further that she is in pain 24 hours a day 7 days a week. (TR. P. 48) Petitioner testified that her back, neck and knee pain are constant, but that her wrist pain comes and goes. (TR. P. 49)

Petitioner testified that her back pain would not have prevented her from attending the hearing if she had omitted her pain medication on that day. (TR. P 39 -40)

TESTIMONY OF LEO MIRANDA AND VIDEO EVIDENCE

Leo Miranda testified that he is an employee for Respondent and has been employed with them for 23 years. (TR. P. 51) Mr. Miranda testified that on May 21, 2015 his occupation was assistant safety and training manager. (TR. P. 51) Mr. Miranda testified that one of his duties was to review and preserve accident videos from buses which had been involved in an accident. (TR. P. 52 – 54)

Leo Miranda testified that he had preserved video of the accident of May 21, 2015, and of the time after the accident until the Petitioner had left with an ambulance. (TR. P. 63) Copies of

the video as two electronic files were introduced into the record as Respondent's Exhibit 5, and Mr. Miranda demonstrated operation of the video software. The video shows several views of the interior and exterior of the bus. The views are identified by both number and by name. Some of the views have accompanying audio, others do not. All views have a time stamp on them.

Review of the video begins with the Petitioner standing behind the driver of a stopped bus. The Petitioner is visible from two angles. Moving forward, the accident happens at approximately 6:56:56. In the time immediately before the accident, the bus finishes loading passengers, and slowly accelerates forward. The Petitioner's hand can be seen on a vertical yellow hand rail in the view of the camera labeled "Front Door". The Petitioner releases her grip on the rail and is speaking with the driver of the bus. At this time a maroon SUV right turns in front of the moving bus. Impact is made between the vehicles at the driver's side corner of the bus.

At the moment of the impact the Petitioner's left hand can be seen to come forward and to grip the top interior corner of the bus driver's seat. At all times the Petitioner's left hand is visible and at no time does it become "caught" in the seat.

Petitioner is brought forward as the bus stops. It does not appear that her shoulder or left side of her body makes contact with the driver's seat. Petitioner steps forward and to the right of the driver's seat. Her right leg appears to come forward, and then she appears to overbalance forward, bending at the hips. Petitioner begins to lean forward, maintaining a hold on the driver's seat with her left hand. Her right shoulder and arm begin to come forward and down as her trunk leans forward. Visible in Petitioner's right hand is a cup.

During forward motion the Petitioner's head does not appear to have suffered from sudden or violent motion.

Petitioner appears to bring her right hand forward toward the fare box of the bus. As Petitioner steps forward her right arm and shoulder come down and across her body. No impact between the Petitioner and the fare box is visible. Petitioner maintains her grip on the cup throughout the accident. Petitioner's right hand becomes obscured by the bus driver's head without visibly impacting any part of the bus or fare box.

As the bus comes to a stop, Petitioner steps back and stands up straight. Viewing the video on single frame, it is possible to see that the bus driver has extended his right arm, and has placed his right hand between the Petitioner's arm and the front of the bus. As the Petitioner moves back to an upright posture, the bus driver's arm sweeps back with her, aiding her in recovering her balance. Petitioner can be seen to still have a grip on the cup in her hand.

After the accident Petitioner is seen sitting in a passenger seat of the bus. On the Rear Door view at approximately time stamp 6:57:54 the bus driver can be heard making a call to Pace dispatch. After 6:58:30 the bus driver can be heard asking if everyone is okay. The Petitioner responds that everyone is okay, and the bus driver so reports.

While sitting the Petitioner is seen in apparent good health, gesturing with either hand, turning her head and body, and texting.

The Petitioner is seen to get up out of the passenger seat at approximately 7:00:19. The Petitioner stands on the bus, steps out of the bus, inspects the front of the bus, return to the bus, and stands in the bus until approximately 7:11:25. At no time during this period does the Petitioner appear to ambulate with difficulty.

At approximately 7:00:40 the bus driver can be heard handing out cards for the passengers to fill out. The bus driver can be heard on the rear door camera stating "as long as everybody is okay" and "there were no injuries".

At approximately 7:06:40, the Petitioner can be heard on the rear door camera to tell the bus driver "my leg hurts a little bit". The audio becomes indistinct, but the bus driver can be heard to ask if she is okay, to ask if she is sure she is okay.

At 7:15:30, at the exact change between the first and second video file, the EMS personnel arrive. The Petitioner identifies herself as the injured party. She states that her leg and arm hurt, while indicating her left forearm and pinky. Asked "how are you doing" Petitioner responds with "I'm all right". Indistinct discussions with the EMTs are held by the Petitioner and the bus driver.

At 7:17:05 the Petitioner speaks to the EMTs again. A description of the accident is given, the audio indistinct on all cameras. The Petitioner is asked if she has any trouble walking. On the Rear Door camera, she is heard to reply "I'm okay.." and "knee hurt…". The Petitioner is able to stand up unassisted, walk off the bus, and leave with the EMTs.

At no time is the Petitioner heard to make mention of or gesture to her neck, shoulder, right forearm, wrists, or back.

Leo Miranda testified that he joined the Petitioner at Thorek Hospital on May 21, 2015. (TR. P. 70) Leo Miranda testified that at that time Petitioner complained to him of injury to her wrist. (TR P 70)

Leo Miranda testified that he and the Petitioner left Thorek Hospital together. (TR. P.72) While leaving, the Petitioner commented to Mr. Miranda that she wasn't uncertain if she would continue with her employment with Pace. (TR. P. 72, 76) They then returned to Respondent's offices. (TR. P.72) Due to her concerns, the Petitioner spoke in private with a union representative.

CORRESPONDENCE OF PARTIES

On August 3, 2015, the Respondent's counsel emailed Petitioner's counsel stating that the Petitioner was receiving benefits under 8(a) and 8(b). (Rx 7)

On August 4, 2015, the Respondent's counsel mailed Petitioner's counsel a letter memorializing a conversation between counsel that the Petitioner was receiving benefits. The letter then reports that the Respondent had not received medical records for a month, requests medical records, and cautions a potential termination of TTD without medical records. (Rx 7)

On August 20, 2015, the Respondent's counsel mailed Petitioner's counsel a letter terminating the Petitioner's benefits for failure to provide treatment records since June 17, 2015. (Rx 7)

On August 25, 2015, the Petitioner's counsel emailed the Respondent's counsel with medical records. (Rx 7) Petitioner's counsel replied that he would review the records and advise the Respondent. (Rx 7)

On September 1, 2015, the Respondent's counsel emailed the Petitioner's counsel a copy of a letter dated August 31, 2015. That letter stated that there was insufficient information to determine Respondent's liability to pay benefits. (Rx 7)

On October 7, 2015, the Respondent's counsel mailed the Petitioner's counsel a letter stating that the injury was being denied based upon the factual history of the accident. (Rx 7)

On October 14, 2015, the Respondent's counsel mailed the Petitioner's counsel a letter memorializing a discussion between counsel and stating the Respondent did not believe the Petitioner had been injured by the accident on May 21, 2015. (Rx 7)

On October 15, 2015, the Respondent's counsel mailed the Petitioner's counsel a request for a list of all of the Petitioner's treating physicians. (Rx 7)

On October 16, 2015, the Respondent filed a Response to the Petitioner's 19(b) hearing. (Rx 6)

On October 22, 2015, the Petitioner's counsel mailed the Petitioner's counsel a letter listing Advocate Lutheran General, Thorek Hospital and Medical Center, Advanced Spine & Rehab, and Illinois Orthopedic Network as Petitioner's treaters. (Rx 7)

On November 6, 2015 the Respondent's counsel mailed the Petitioner's counsel a letter forwarding Thorek Hospital's refusal to comply with Respondent's subpoena and Respondent' request for an authorization. (Rx 7)

On November 9, 2015 the Respondent's counsel emailed the Petitioner's counsel detailing which records were in his possession, stating that the records of Pinnacle Pain Management and Thorek Hospital were not. Respondent's counsel repeated the demand for a HIPAA authorization, and requested the name of the Petitioner's hand specialist. (Rx 7)

The Arbitrator was able to observe the Petitioner during her testimony and during the testimony of Leo Miranda. During that time the Petitioner both sat, and stood. She gave no evidence of difficulty, pain, or agitation.

EVIDENTIARY ISSUES

The Respondent made objection to the admission of the records of Thorek Hospital on the grounds that the Petitioner had failed to comply with Rule 7110.70(c), and had failed to provide authorization for those records. Furthermore, the correspondence between the parties indicates that the Petitioner omitted the records of Midwest Family Wellness at Thorek Hospital when disclosing her treaters. Finally, treatment at Midwest Family Wellness at Thorek Hospital is not disclosed on Petitioner's 19(b) form.

The Respondent was able to receive copies of the records of Midwest Family Wellness at Thorek Hospital but not those of Thorek Hospital itself. It is noted that the Respondent's Subpoena for the Midwest Family Wellness at Thorek Hospital records is dated November 30, 2015, when trial in this matter took place 4 days later on December 4, 2015. Despite requesting "any and all" medical records, the Respondent only received those dating from June 5, 2015 through the present. (Rx 4)

The Arbitrator notes that the bill for medical services from Midwest Family Wellness included in Petitioner's records is different that received by the Respondent. (Rx 4, Px 1) The Petitioner's bill includes treatment for 1/23/15 and for 3/20/15, while the bill in Respondent's Exhibit 1 does not. (Rx 4, Px 1)

In light of Rule 7110.70(c), *Ghere*, and the Illinois Common Law Rules of Evidence regarding spoliation (as adopted by Commission Rule 7110.80(e)(3), and in light of the Petitioner's claim for injury to her back, the Arbitrator now comes to the conclusion that the Petitioner was in possession of evidence which was relevant to this matter, which the Respondent was not in possession of, and which the Petitioner improperly withheld from the Respondent by means of violation of Rule 7110.70(c).

The Arbitrator will therefore assume that the record of treatment for January 23, 2015 would be evidence at odds with the Petitioner's claims.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Petitioner has failed to meet her burden of proof by a preponderance of the credible evidence that an injury occurred on May 21, 2015 which arose out of and in the course of her employment with Respondent.

In Illinois, a Petitioner must establish that their injury arose out of and in the course of their employment. *Paganelis v. Industrial Comm'n*, 132 Ill.2d 468, 480 (1989). For an injury to "arise out of" employment, it must have its origin 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 must show, through a preponderance of the credible evidence, that the injury was caused or aggravated by the work accident, and not simply a result of a normal daily activity. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 214 (2003).

Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and medical records, may be taken to indicate unreliability. *Gilbert v. Martin & Bayley/Hucks*, 08 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

The Arbitrator finds that the Petitioner's testimony is not credible. The Petitioner's testimony is contradicted by elements of the medical records put into evidence by the parties. The Petitioner's testimony regarding the onset of her pain, the intensity of her pain, the distribution of her symptoms, and her history of treatment for back injury are all contradicted by her medical records. Furthermore, her medical records are not consistent among each other. The Arbitrator finds that the Petitioner has not entered credible evidence that she was injured in an accident arising out of her employment.

Onset of Pain

The Petitioner did not testify credibly regarding the onset of her pain. Her testimony regarding the onset of immediate pain is contradicted by the EMS records, the records of Lutheran General, and the video of the accident.

It was the testimony of the Petitioner that she immediately felt pain in her neck, back, both hands and both legs. (TR. P. 10) It was her testimony that her back pain at that time was a 9 out of 10 and her leg pain an 8 out of 10. (TR. P. 39)

Contradicting the Petitioner's testimony, the records of Rosemont Fire Department show the that Petitioner denied neck or back pain at the scene of the accident. (Px 2 p 12) The Records of Lutheran General Hospital show that that the Petitioner presented with no neck injury. (Px 2 p 21-22) Those records show that the Petitioner claimed pain of a 4 out of ten at that time. (Px 2 p 27) Finally, the video evidence shows that the Petitioner reported only injury to her left arm and leg to the Rosemont Fire Department.

Therefore the Arbitrator finds that the Petitioner did not testify credibly regarding her onset of pain.

Intensity of Pain

The Petitioner did not testify credibly regarding the intensity of her pain. Her testimony regarding the intensity of her pain is contradicted by the EMS records, the records of Lutheran General, and the video of the accident.

It was the testimony of the Petitioner that her back pain is a 10 out of 10 every day. (TR. P. 32)

Contradicting the Petitioner's testimony, the records of Dr. Vandenelzen show that the Petitioner's reported subjective pain decreased steadily from initial reporting in every location of reported pain. The Arbitrator specifically notes that while the July 13, 2015 of Dr. Vandenelzen show various pains in the range of 5 – 2 /10, the July 15 records of Pinnacle Pain Management show reported pain 10 out of 10, and claim treatments had only been minimally beneficial (Px 4)

Finally, the Arbitrator notes the abundance of negative objective tests, such as the negative straight leg raise tests and Spurling tests. Additionally, a musculoskeletal exam at Midwest noted the Petitioner was putting forth poor effort, and noted several areas of inconsistencies in the reported subjective and objective findings. (Px 7)

Therefore the Arbitrator finds that the Petitioner did not testify credibly regarding the intensity of her pain.

The Distribution of Her Symptoms

The Petitioner did not testify credibly regarding the distribution of her symptoms. Her testimony regarding the distribution of her symptoms is contradicted by her medical records, and the video of the accident.

It was the testimony of the Petitioner that she immediately felt pain in her neck, back, both hands and both legs. (TR. P. 10) It was her testimony that she continues to feel pain in each of those locations through the date of her testimony. (TR. P. 27)

In the time immediately after the accident, the Petitioner reported pain only in her left arm and knee. (Rx 5) At Lutheran General Hospital, Petitioner complained of left shoulder pain, left knee pain, and mild back tenderness. (Px 2 p 21) Later that day, at Thorek Hospital, Petitioner claimed of left shoulder and left back pain. (Px 3 p 3) On June 5, 2015 Petitioner complained to her general practitioner of suffering pain in her knees, hips, and shoulder. (Px 7)

Therefore the Arbitrator finds that the Petitioner did not testify credibly regarding the distribution of her symptoms.

History of Treatment for Back Injury

The Petitioner did not testify credibly regarding the history of her need for back treatment. Petitioner testified that she had never had back or neck pain before. (TR. P.27, 28) However, the

medical bills submitted identify that the Petitioner received treatment for backache on January 23, 2015. Furthermore, the medical record of January 23, 2015, not in evidence, must be assumed to be inimical to the Petitioner's interests. For that reason the Arbitrator does not believe the Petitioner has credibly testified as to the history of her treatment for back injury.

The Petitioner's Testimony and Records are Not Credible

The Petitioner's has not testified credibly as to the onset of her symptoms, the distribution of those symptoms, the intensity of those symptoms, and her history of treatment. The Petitioner's medical records are contradicted by each other, and include hallmark signs that they are not credible. Petitioner's failure to present full effort, negative objective tests, and inconsistent physical abilities are all noted by Petitioner's treaters. The Arbitrator therefore finds that the Petitioner has not entered credible evidence that she suffered an injury arising out of an in the course of her employment.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Because Petitioner failed to establish that her accident arose out of and in the course of her employment with Respondent, the Arbitrator finds that Petitioner's present condition of ill-being is not causally related to the injury.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (J), WERE THE MEDICAL SERVICES REASONABLE AND NECESSARY, HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Because of the findings on issues (C) and (F) above, the Arbitrator denies benefits for medical services.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Because of the findings on issues (C) and (F) above, the Arbitrator denies prospective medical care.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (L), WHAT IS THE AMOUNT DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Because of the findings on issues (C) and (F) above, the Arbitrator denies benefits for temporary total disability.

IN SUPPORT OF THE ARBITRATOR'S DECISION REGARDING (M), SHOULD PENALTIES OR FEES BE IMPOSED UPON RESPONDENT, THE ARBITRATOR CONCLUDES AS FOLLOWS:

Because of the findings on issues (C) and (F) above, the Arbitrator denies penalties and fees.

1·28·16
Date

Honorable 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

William Edminston,
Petitioner,

vs.

NO: 15 WC 21181
15 WC 32771

Ambar, Inc.,
Respondent.

16IWCC0787

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, causation, prospective medical care, 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 finds there are some minor errors contained in the Arbitrator's decision. On page five of the Arbitrator's decision, the Arbitrator listed the date of accident as May 15, 2015 when the alleged date of accident is actually May 14, 2015. Also on page five of the decision, the Commission finds that the Arbitrator's reference to Dr. in the middle of Petitioner's name should be stricken and substituted with Petitioner's middle initial "D". Lastly, the Commission finds on page nine of the decision and again on page fifteen of the decision, the Arbitrator indicated that Petitioner completed a questionnaire in which he denied that he was seeking medical care as a result of a job related accident when the Petitioner actually marked that the problem was work related on the questionnaire.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 18, 2016 is hereby affirmed and adopted.

16IWCC0787

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $15,806.38 for payment of temporary total disability benefits and $6,860.29 for payment of non-occupational disability benefits paid 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: DEC 7 - 2016

O: 11/17/16

MB/jm

43

Mario Basurto

David L. Gore

Stephen Mathis

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

EDMISTON, WILLIAM D
Employee/Petitioner

Case# **15WC021181**

15WC032771

AMBAR INC
Employer/Respondent

16IWCC0787

On 2/18/2016, 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:

0222 GOLDBERG WEISMAN & CAIRO
JAMES NAWROCKI
ONE E WACKER DR SUITE 3900
CHICAGO, IL 60601

1109 GARFALO SCHREIBER & STORM
DEREK STORM
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

16IWCC0787

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)

WILLIAM D. EDMISTON,
Employee/Petitioner

v.

AMBAR, INC.,
Employer/Respondent

Case # **15** WC 21181

Consolidated cases: **15 WC 32771**

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 **December 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. [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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

16IWCC0787

FINDINGS

On the date of accident, **May 14, 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*** 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 **$83,789.16** ; the average weekly wage was **$1,611.33**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **2** children under 18.

Respondent shall be given a credit of **$15,806.38** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$15,806.38**.

Respondent is entitled to a credit of **$6,860.29** under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence that an accident occurred which arose out of and in the course of his employment 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.

16IWCC0787

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)

WILLIAM D. EDMISTON,
Employee/Petitioner

v.

AMBAR, INC.,
Employer/Respondent

Case # **15** WC **32771**

Consolidated cases: **15 WC 21181**

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 **December 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

B. ☐ 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 _____

16IWCC0787

FINDINGS

On the date of accident, **May 14, 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* 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 **$83,789.16** ; the average weekly wage was **$1,611.33**.

On the date of accident, Petitioner was **33** years of age, ***married*** with **2** children under 18.

Respondent shall be given a credit of **$15,806.38** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$15,806.38**.

Respondent is entitled to a credit of **$6,860.29** under Section 8(j) of the Act.

ORDER

The Petitioner has not proven, by a preponderance of the evidence that an accident occurred which arose out of and in the course of his employment 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.

16IWCC0787

FINDINGS OF FACT

The disputed issues in case number 15 WC 21181 are: 1) accident; 2) causal connection; 3) temporary benefits; and 4) whether the petitioner is entitled to prospective medical care. The accident date claimed is May 15, 2015 and Petitioner is claiming a discreet injury. *See,* AX1. The disputed issues and date of accident in case number 15 WC 32771 are exactly the same as in the prior case however, the petitioner is claiming a repetitive trauma. *See,* AX2.

Petitioner's testimony

Mr. William Dr. Edmiston (the "petitioner") testified that he has worked for approximately ten (10) years as an ironworker and that his primary duties were "rod busting." This type of work would require him to shake out bundles of rebar, which would then be carried manually from the point of delivery to the point of installation. Depending on the amount of rebar being carried, it would either be done individually by the petitioner or with the aid of a coworker. The petitioner would lift approximately one hundred (100) pounds.

When carrying the rebar, the petitioner would have to walk across the subfloor, which could be partially covered with rebar that had been previously installed. At some jobsites, the subfloor would be made of a corrugated pan and deck type roofing, which made walking more difficult.

The petitioner was hired as an ironworker by Ambar Inc. (the "respondent"), to work at the River Point project in Chicago, on December 5, 2014. Prior to this date, the petitioner had experienced pain and problems in his back for which he sought medical care.

Prior medical history

The records of the petitioner's personal chiropractor, Dr. Robert Pyne, were introduced into evidence as Petitioner's Exhibit #1. The petitioner confirmed that the information contained in Dr. Pyne's records is accurate. These records indicate that on February 6, 2008, the petitioner was examined by Dr. Pyne, complaining of low back pain which radiated into both legs. He was also experiencing spasms in his low back. From February 6, through December 1, 2008, the doctor performed chiropractic manipulation; ultrasound; electrical stimulation; and applied hot packs to the petitioner's low back, on seven (7) occasions.

Petitioner presented to Dr. Pyne on December 1, 2008, at which time he continued to complain of midline low back pain, described as a chronic dull ache in his low back. The doctor noted bilateral lumbar spasms. Dr. Pyne again administered chiropractic manipulation, ultrasound, electrical stimulation, and hot packs to the petitioner's low back.

From December, 2008 through December, 2009 Dr. Pyne administered the same medical care outlined above to the petitioner's low back on five (5) occasions.

The petitioner was examined by Dr. Pyne on December 14, 2009, continuing to complain of low back pain again describing it as a chronic ache in the low back. The same treatment as outlined above was rendered by Dr. Pyne.

On March 29, 2010, the petitioner indicated to Dr. Pyne that he was experiencing pain in his low back which radiated bilaterally into his buttocks. The same medical care as outlined above was rendered to the petitioner at that point in time.

Between March 29, 2010 and January 21, 2011 the petitioner continued to seek treatment from Dr. Pyne on four (4) separate occasions complaining of low back stiffness and pain. The same treatment as outlined above was provided by Dr. Pyne.

In the years 2011 and 2012 the petitioner sought medical care with Dr. Pyne, on at least five (5) occasions, for complaints of low back pain; sometimes with radiation of the pain in the lower extremities; and sometimes without. This medical care continued into 2013, at which time the petitioner was treated by Dr. Pyne for complaints of low back pain and bilateral leg pain on five (5) occasions.

In February, 2014, the petitioner continued treatment with Dr. Pyne, complaining of low back pain. The doctor performed the same treatment as outlined above, but added acupuncture as one of the treatment modalities.

On August 27, 2014, the petitioner was seen by Dr. Pyne complaining of constant pain in his right flank. The doctor noted the petitioner was suffering from spasms in his low back and performed chiropractic manipulation, ultrasound, electrical stimulation, hot packs, and acupuncture.

All of the treatment by Dr. Pyne outlined above was performed prior to the petitioner commencing his employment with the respondent on December 5, 2014. The petitioner testified that the medical care rendered by Dr. Pyne from February of 2008 through August of 2014 was associated with his work as an ironworker; and that the work that he performed during this period, necessitated the aforementioned medical care.

Prior to commencing his work for Respondent at the River Point project, the petitioner underwent safety training mandated by the general contractor, Lend Lease. As part of the safety training, the petitioner testified that he was instructed to immediately report all work-related injuries to the supervisor on duty.

After undergoing the safety training, the petitioner began working for the respondent at the River Point project, as an ironworker foreman. According to the petitioner, his job activities would include

lifting and carrying rebar from the delivery site to the installation site. Again, the lifting and carrying of the rebar would be done either individually or in pairs depending on the amount of rebar being lifted. The rebar would be carried over the subfloor, which at times had partial rebar already installed. At the River Point project, they worked on a pan and deck roof which, according to the petitioner, was more difficult to walk on.

Petitioner's testimony

On the date of the alleged accident, May 14, 2015, the petitioner began his workday at 8:00 a.m., laying out the plans for the rebar that was to be installed. Thereafter, the rebar was shaken out, sorted, then carried to the installation site. Under direct examination the petitioner testified that on the date of his alleged accident, he was carrying rebar for approximately three hundred (300) feet. Later, under cross-examination, the petitioner indicated that he may have overestimated the distance and it was probably closer to 180 to 200 feet. The petitioner further testified that when he began work on May 14, 2015, his back was sore.

At the conclusion of his shift at 4:30 p.m., the petitioner testified that his back was still sore. At this time, he did not report a work-related injury to his supervisor or the onsite safety manager for the general contractor, Lend Lease. He left the jobsite located at Lake and Canal Streets in Chicago in his personal vehicle and drove home to Alsip. The petitioner confirmed that this was at least a twenty-eight mile drive which took him well over one hour. He did not seek medical care that evening.

The next day, May 15, 2015 the petitioner contacted his supervisor and stated that he would not be in for work that day. He did not tell the supervisor that he had sustained a work-related injury involving his back.

Further treatment

On May 15, 2015 the petitioner again sought care with Dr. Pyne, his personal chiropractor, complaining of low back and right hip pain. There is no documentation in Dr. Pyne's records of the petitioner claiming that he sustained a work injury on May 14, 2015. Dr. Pyne performed the same treatment that he had previously performed for the petitioner, i.e., chiropractor manipulation, electrical stimulation, hot packs and acupuncture. PX1.

On May 18, 2015 the petitioner testified that he contacted the safety manager for the general contractor, Lend Lease, and reported a work-related injury. The petitioner, however, could not recall the name of the individual to whom he spoke.

On May 19, 2015 the petitioner sought medical care at Concentra and their records were introduced as Petitioner's Exhibit #2. It was noted that his height was 6'2" and his weight was 277 pounds. A history was taken in which Petitioner specifically denied any injury to his low back or right hip. Rather, the petitioner stated that he had been experiencing pain in his back and right hip since the

preceding Thursday, but it "has been nagging him for weeks now." The petitioner further indicated to the physicians at Concentra that he had never had any previous injuries to his hip or low back.

The physicians at Concentra recommended a course of medical care for the petitioner consisting of physical therapy, medications, and x-rays. They also released him to return to work in a restricted capacity. At no time during this examination or any of the subsequent examinations of the petitioner did any of the physicians at Concentra, opine that there existed a causal relationship between the petitioner's complaints in his low back and a work-related injury occurring on May 14, 2015.

The petitioner testified that after his examination at Concentra, he did not contact the respondent to determine whether they had restricted work available for him.

The petitioner was again examined at Concentra on May 21, 2015. Once again, he was released to return to work in a restricted capacity. The petitioner admitted that he made no attempt to contact his employer to determine whether they had restricted work available for him.

The petitioner was again examined at Concentra on May 28, 2015 and again released to return to work in a restricted capacity. The petitioner testified that he made no attempt to contact his employer to determine whether they had restricted work available for him. PX2.

The petitioner testified that on June 2, 2015, he received a message from Mr. Michael Freiberg, the superintendent for the respondent. The petitioner stated that the voicemail from Mr. Freiberg advised him that the respondent had restricted work available for him and Mr. Freiberg requested that the petitioner contact him to discuss a return to work in a restricted capacity. The petitioner also stated that he made no attempt to return the telephone call of Mr. Freiberg regarding a return to work in a restricted capacity.

On June 10, 2015, a letter was sent by YORK, the claims administrator for the respondent, to the petitioner advising him of the availability of restricted work. The petitioner admits receiving this letter which was introduced into evidence as Respondent's Exhibit #2. After receiving the letter, the petitioner admits that he made no attempt to contact either Mr. Michael Freiberg or YORK to discuss a return to work in a restricted capacity.

On June 8, 2015, the petitioner sought care with Dr. Atkenson, who was referred by his chiropractor, Dr. Pyne. Dr. Atkenson's records were introduced into evidence as Petitioner's Exhibit #3; and in part as Respondent's Exhibit #1.

The doctor requested that he complete a questionnaire which was introduced as Respondent's Exhibit #1. The petitioner admitted that he completed this questionnaire; and that answers contained on this document are in his handwriting. On the questionnaire, the petitioner was asked to describe in his

own words his chief complaints. In response, the petitioner stated "low back, right hip pain." On the same document, the petitioner was expressly asked: Have you ever had a problem with this part of your body before? In response, the petitioner stated "No."

The Arbitrator notes that the petitioner's statement to Dr. Atkenson that he had never had any problems with his low back prior to his examination with the doctor is a false statement. The petitioner had an extensive history of treating for complaints of low, radiating back pain with Dr. Pyne, for approximately six years.

On the questionnaire, the petitioner was also asked whether the condition for which he was seeking medical care was as a result of a job related accident; and in response the petitioner stated that it was not.
On June 8, 2015 the petitioner was examined by Dr. Atkenson, whose report indicates that the petitioner complained of low back pain, which began without any history of trauma. Rather, the petitioner had been experiencing the pain in his low back for approximately six (6) weeks prior to the examination. The Arbitrator notes that this would place the commencement of the petitioner's low back pain sometime in late April, 2015 and not May 14, 2015 as he now alleges. PX3.

In Dr. Atkenson's report, in the historical section, notes that the petitioner told him that he had "no treatment for this or similar conditions prior to his visit." Once again, the Arbitrator notes that this statement is false in that the petitioner had extensive prior treatment to his low back before June 8, 2015. It would appear that Dr. Atkenson's recommendations and opinions were based upon this misleading statement made to him by the petitioner.

In a review of Dr. Atkenson's records, the Arbitrator notes that he never opined that there existed a causal relationship between the condition being diagnosed in the petitioner's low back and right hip as occurring on or manifesting itself on May 14, 2015, due to an accident. In short, Dr. Atkenson never rendered an opinion that there existed a causal relationship between the condition for which he was treating the petitioner and a work accident or the petitioner's employment activities. PX3.

At the request of Dr. Atkenson, the petitioner had an MRI of his lumbar spine on June 11, 2015, which demonstrated facet arthropathy and disc bulges at multiple levels in the petitioner's lumbar spine. The MRI did not however, note any disc herniation, causing nerve root compression in the petitioner's lumbar spine.

The petitioner was seen by Dr. Atkenson on June 15, 2015, who indicated that the MRI demonstrated a disc protrusion at L5-S1, with narrowing of both lateral releases. The doctor did not state that there was a disc herniation, causing nerve root compression at this or any other level in the petitioner's lumbar spine. In addition, Dr. Atkenson did not opine that there existed a causal relationship

between the condition of ill-being in the petitioner's lumbar spine and a work accident or the petitioner's employment activities on May 14, 2015.

The petitioner was re-examined at Concentra on July 2, 2015. Although he was released to return to work in a restricted capacity, he made no attempt to contact his employer to seek a return to work.

On July 15, 2015, at the request of his employer, the petitioner was examined by Dr. Singh, a board certified orthopaedic surgeon. PX3.

On August 10, 2015 the petitioner was re-examined by Dr. Atkenson. An FCE was performed pursuant to Dr. Atkenson's recommendation on September 25, 2015. The FCE narrative report, without the questionnaire, is contained in Dr. Atkenson's records as introduced as Petitioner's Exhibit #3. The petitioner was found capable of performing activities in the light to medium physical demand level. The petitioner testified that after the FCE, he made no attempt to return to work for the respondent, at a light to medium physical demand level.

Dr. Atkenson has recommended epidural steroid injections for the petitioner's low back however, the Arbitrator notes that nowhere in Dr. Atkenson's records as introduced as Petitioner's Exhibit #3 did he opine that the need for this medical care is causally related to an accident occurring or manifesting itself on May 14, 2015. PX3.

As of the date of trial, December 28, 2015, the petitioner indicated that he continues to experience low back pain with radiation of pain into both of his hips. He also experienced occasional numbness in his left leg.

Testimony of Mr. Matthew Austin

Petitioner called Mr. Austin, who testified that for the last six (6) years, he has been an iron worker/business agent who finds employment for other ironworkers; and he is a member of Local 1. He knows the petitioner and has witnessed him doing rebar work. He was shown Petitioner's exhibit #4, a "fit for duty" letter. He did not prepare it nor did he know if the respondent had received a copy. He testified that all iron workers work hard, including foremen.

Testimony of Mr. Mark Curran

In his case in chief the petitioner presented the testimony of Mr. Mark Curran. Mr. Curran testified that he is a journeyman ironworker having worked in this trade since May of 1996. Mr. Curran worked as an ironworker at the Trump Tower project which commenced in May of 2007. At this project, Mr. Curran worked as an ironworker performing rod busting. This required him to shake out bundles of rebar, carry them from the delivery site to the installation site; and to do so he would have to walk over the subfloor which could be covered with previously installed rebar. The rebar would be

carried individually or with a partner depending on the weight and amount of rebar being carried. The diameters and the weight of the rebar would vary as well.

Mr. Curran indicated that the Trump project ended in approximately 2008. Subsequent to that point he has continued to work as an ironworker, but he did not work for the respondent at the River Point project anytime between December, 2014 and May of 2015. As such, he admitted that he had no firsthand knowledge of the petitioner's work duties at the River Point project. Accordingly, Mr. Curran conceded that he could not state that the work performed at the River Point project was the same as the work being performed at the Trump project from 2005 to 2008.

Testimony of Mr. Michael Freiberg

Mr. Freiberg was called to testify by both the petitioner and the respondent, in their cases in chief. Mr. Freiberg stated that he has been employed with the respondent for the nineteen (19) years; the first fourteen (14) of which were spent as an ironworker. He is still a member of Local Ironworkers' 1, as is the petitioner.

During his last five years of employment with the respondent he has acted as the superintendent. His job duties include overseeing the downtown projects for the respondent, include training of the respondent's employees on the standard procedure for reporting work related injuries. Mr. Freiberg was the supervisor over Petitioner at the River Point project from December, 2014 through May of 2015; and testified that the River Point project and the project depicted in the DVD are substantially the same. PX6.

During this period, Mr. Freiberg also oversaw two other projects in Chicago, where the workforce would fluctuate between sixty to one hundred employees. The respondent did not employ a fulltime safety director, as this role was, in part, assumed by Mr. Freiberg. The general contractor at the River Point project, however, did have a fulltime safety director onsite. In addition, the general contractor provided onsite medical care for injuries occurring at the River Point project.

All employees who started work at the River Point project, including the petitioner, were required to undergo safety training by the respondent and the general contractor, Lend Lease. As part of the training, the petitioner, as well as all other workers, were informed of the standard rule for immediately reporting work-related injuries to the onsite supervisor or safety manager. The daily sign-in sheets also cited the safety rules, which were in effect on May 14, 2015, the date of the petitioner's alleged accident.

Mr. Freiberg further testified that shortly after the petitioner began to work at the River Point project on December 5, 2014, he was made an ironworker foreman. As such, the petitioner would have supervisory responsibilities over his crew. On the date of the alleged accident, the petitioner had eight ironworkers working under his supervision. Mr. Freiberg estimated that as an ironworker foreman

the petitioner would spend approximately 40% of his day performing the normal job duties of an ironworker such as carrying and tying down rebar; with the balance of 60% of his day spent performing supervisory activities such as the layout of rebar and coordination of the work to be performed that day.

Mr. Freiberg indicated that the petitioner did not report a work-related injury to him on May 14, 2015. To his knowledge, the petitioner did not report a work-related injury to any member of his supervisory team or the general contractor's onsite safety manager on this date. The first reporting by the petitioner did not occur until the following week.

Lastly, Mr. Freiberg testified that on June 2, 2015, he attempted to contact the petitioner and called him on his cellphone. The purpose of Mr. Freiberg's call was to apprise the petitioner of the availability of restricted work. He left a message for the petitioner on his cellphone to this effect. From the date of this telephone message on June 2, 2015 through the date of trial, December 28, 2015, the petitioner has never contacted him to seek work in a restricted capacity.

CONCLUSIONS OF LAW

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

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 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 is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

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 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).

In addition, the Arbitrator notes that this Commission has repeatedly held that medical opinions on the issue of causation, particularly in a repetitive trauma situation, must be based upon an accurate understanding of the petitioner's pre-existing medical condition. If the opinion of the physician is based upon false or inaccurate information, then the Commission has routinely rejected those medical opinions. *See, Minder v. McDonald's*, 08IWCC784; *Diepen v. Commonwealth Edison Company*, 08IWCC869; *Spontak v. Rehab Institute of Chicago*, 08IWCC655; and, *Tobin v. State of Illinois Department of Corrections*, 08IWCC636.

In repetitive trauma situations, the date of accident is the date on which the injury "manifested itself." *Peoria County Bellwood*, supra. The Illinois Supreme Court stated that the phrase "manifests itself" means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment activities would have become plainly apparent to a reasonable person. *Peoria County Bellwood*, supra.

In the subject case, the petitioner has requested that this Arbitrator find that his medical condition is causally related to his employment activities with the respondent and that the condition manifested itself on May 14, 2015. The evidence introduced at trial, does not support this conclusion.

The Arbitrator notes that the petitioner was examined by the physicians at Concentra on May 19, 2015 and expressly denied any prior injuries to his hip or low back. During his testimony, the petitioner attempted to explain this statement by indicating that he never has had any prior "injuries" to the

aforesaid body parts. If this was the only time that the petitioner made this or a similar statement, this may have been a plausible explanation, but given the statements made by the petitioner to his chosen physician, Dr. Atkenson, the Arbitrator rejects the petitioner's explanation.

The petitioner voluntarily chose to seek medical care with Dr. Atkenson upon referral by his chiropractor, Dr. Pyne. His first examination with Dr. Atkenson took place on June 8, 2015. Prior to the examination the petitioner was required to complete a questionnaire which was introduced into evidence as Respondent's Exhibit #1. On the questionnaire the petitioner was asked to describe in his own words the problems for which he was seeking medical care with Dr. Atkenson. In response, the petitioner stated "low back, right hip pain". A few questions later, on the same questionnaire the petitioner was asked if he ever had a problem with this part of your body before, to which he stated "No". Later, the questionnaire asked the petitioner was to describe what treatment he had previously undergone to the body parts at issue. In connection therewith, the petitioner noted that he had undergone physical therapy, but he did not mention any of the six years of chiropractic care that he had undergone with Dr. Pyne before being examined by Dr. Atkenson on June 8, 2015.

When reviewing the histories provided by the petitioner to the physicians at Concentra and to Dr. Atkenson, it is clear to the Arbitrator that the petitioner attempted to mislead these physicians by indicating to them that he had no prior problems with his low back before May 14, 2015. The evidence introduced at trial clearly establishes that this is a false statement; and that the petitioner had been under medical care to his low back for a significant amount of time before the alleged accident. Consequently, based upon this evidence, the Arbitrator finds that the petitioner's testimony lacks credibility.

The petitioner alleges that he sustained a specific identifiable accident during which he injured his back on May 14, 2015, as well as repetitive trauma. On this day the petitioner worked with at least eight other ironworkers at the River Point project. Yet, the petitioner did not present the testimony of any coworker to whom he mentioned the alleged accident; to whom he may have complained of pain or problems involving his back; or who witnessed the petitioner manifesting symptoms consistent with pain or problems in the low back. The Arbitrator finds it highly implausible that the petitioner could work for the entire day, have a discreet injury to his low back, yet not have mentioned this to a single coworker during the course of the workday.

In addition, the Arbitrator notes that the petitioner admitted that he was trained to immediately report all work-related injuries to his supervisor or the onsite safety manager for the general contractor. Despite this training, the petitioner did not follow the agreed upon procedure and report the accident to his employer or the general contractor on May 14, 2015. Rather, the petitioner simply left the jobsite and drove himself home. It was not until several days later, on May 18, 2015, that the petitioner claims that he reported the accident to the safety manager for the general contractor.

16IWCC0787

The petitioner sought medical care with his personal chiropractic physician, Dr. Pyne on May 15, 2015. There is no documentation in the doctor's records of the petitioner relating that he had sustained a work injury the prior day. The Arbitrator finds it highly unlikely that the petitioner would have sustained a work injury on May 14, 2015 as he alleges, sought medical care the next day, but not mention this event to his doctor. The Arbitrator further notes that the complaints of the petitioner articulated to Dr. Pyne on May 15, 2015 were essentially the same as those that he provided over the preceding six years. The medical care rendered by the doctor was exactly the same as that rendered over the preceding six years.

As previously stated, the petitioner was examined by Concentra on May 19, 2015 and expressly denied any specific injury occurring at work. Rather, the petitioner stated that his back had been "nagging him for weeks now." It is impossible to reconcile the petitioner's statement that he had no accident at work to Concentra with his request to this Arbitrator to find that he had an accident at work on May 14, 2015.

As noted above, the petitioner was examined by Dr. Atkenson on June 8, 2015. On the questionnaire that the petitioner completed for Dr. Atkenson and during his examination with Dr. Atkenson, the petitioner expressly stated that he did not sustain a work injury. Rather, the petitioner indicated that he had been experiencing back pain for a period of six weeks. In reality, the Arbitrator notes that the petitioner had been experiencing back pain for a period of six years for which he had been seeking medical care. Again, it is impossible to reconcile the petitioner's statements to the doctors at Concentra and Dr. Atkenson with his current allegation of having sustained a work accident to his back on May 14, 2015.

The Arbitrator further notes that the reports of Dr. Singh fully outline the basis of his opinion on the issue of causation. The Arbitrator notes that in addition to conducting a very thorough clinical evaluation of the petitioner, Dr. Singh reviewed the medical records for the care and treatment rendered to the petitioner; viewed the actual MRI of the petitioner's lumbar spine completed on June 11, 2015; and had occasion to view photographs of the worksite and a video of an ironworker installing rebar at the jobsite in question. No such information was tendered to, reviewed by, or commented upon by Dr. Atkenson in the medical records, which were introduced as Petitioner's Exhibit #3.

After undertaking a thorough clinical evaluation of the petitioner and reviewing the information outlined above, Dr. Singh opined that neither the alleged accident of May 14, 2015 nor the petitioner's employment activities as an ironworker for the respondent, caused or aggravated his subsequent medical condition. It was Dr. Singh's opinion that the petitioner's complaints were non-anatomical in nature; that the neurological and strength testing were normal; that the MRI demonstrated age appropriate findings; and thus, the petitioner's subjective complaints could not be objectively verified.

The Arbitrator finds that Dr. Singh has provided a very cogent and scientific explanation for his opinion on causation. Given this fact as well as the fact that this is the only medical opinion provided to this Court expressly addressing the issue of causation, the Arbitrator finds the opinion of Dr. Singh to be persuasive and adopts it.

The Arbitrator finds that this petitioner has failed to prove, by a preponderance of the evidence, that he sustained accidental injuries arising out of and in the course of his employment on May 14, 2015; either a discreet injury or repetitive trauma therefore, not benefits are awarded, pursuant to the Act. In that the petitioner has not proven a compensable accident, the remaining disputed issues in each case are moot and will not be addressed.

16IWCC0787

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
15WC22181 & 15WC32771
SIGNATURE PAGE

Signature of Arbitrator

February 18, 2016
Date of Decision

FEB 18 2016

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

Michael A. Rice,

Petitioner,

16IWCC0848

vs.

NO: 16 WC 2104

Corporate Services Inc (Loaning)
Anfinsen Plastic Molding Co Inc (Borrowing),

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Resopndent herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical expenses, 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 April 20, 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.

16IWCC0848

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 $10,000.00. 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: DEC 27 2016
o12/14/16
RWW/rm
046

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

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

16IWCC0848

RICE, MICHAEL A
Employee/Petitioner

Case# **16WC002104**

CORPORATE SERVICES INC (LOANING)
ANFINSEN PLASTIC MOLDING COMPANY INC (BORROWING)
Employer/Respondent

On 4/20/2016, 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 0.35% 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.

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16IWCC0848

16IWCC0848

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
ARBITRATION DECISION
19(b)

Michael A. Rice
Employee/Petitioner

v.

Corporate Services, Inc., (Loaning)
Anfinsen Plastic Molding Company, Inc. (Borrowing)
Employer/Respondent

Case # **16** WC **2104**

Consolidated cases: **None**

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 **New Lenox**, on **March 10, 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 _____

FINDINGS

On the date of accident, **January 8, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* 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 6 weeks worked prior to the injury, Petitioner earned **$2,102.25**; the average weekly wage was **$350.38**.

On the date of accident, Petitioner was **44** 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

Respondent shall pay Petitioner the reasonable, necessary and causally related medical expenses incurred in the care and treatment of his causally related condition pursuant to Sections 8 and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$233.59**/week for **8-2/7** weeks, commencing **January 13, 2016** through **March 10, 2016**, as provided in Section 8(b) of the Act.

The Respondent shall authorize and pay for the prospective medical treatment recommended by Petitioner's treating physicians pursuant to Sections 8 and 8.2 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.

Carolyn M. Doherty

Signature of Arbitrator

4/15/16

Date

ICArbDec19(b)

APR 20 2016

FINDINGS OF FACT

On January 8, 2016, the petitioner, Michael A. Rice, was a laborer loaned by the respondent Corporate Services, Inc. (Corporate), to the borrowing employer, Anfinsen Plastic Molding Company, Inc. (Anfinsen). (R.9) Both the loaning and borrowing employers are named respondents. By the stipulation entered into the record, Respondent's counsel at trial entered an appearance on behalf of both respondents as loaning and borrowing employers. (R.5)

Petitioner testified that he was hired by Corporate on November 18, 2015. (R9) He was thereafter loaned to the respondent Anfinsen on that date. At Anfinsen petitioner began working in the parts assembly department for the first three days of that work week for which he was paid $8.25 per hour. (R.10 & RX1) The following Thanksgiving week petitioner worked two days in the mold set-up department where he began earning $12.00 per hour. (R.10). Petitioner testified that he continued to work in the mold set-up department through the rest of November up through December 24, 2015. He was off work for the week of December 27, 2015 through January 2, 2016, returning to work on January 4, 2016. (R.15)

Petitioner described his job duties setting up injection molds. Petitioner testified that he was required to set up molds ranging from 12 inches by 12 inches to molds as large as 4 feet by 5 feet. (R.16) Some of the larger molds weighed up to 2,000 pounds. (R.16) To set these molds his Anfinsen co-worker, Myron Blish, would lower the molds into the press by chain using a forklift. Petitioner would trigger the rams of the mold press to hold the two halves of the mold together while the he would then clamp the halves of the mold to the press itself. (R.17) This would allow the injection of plastic into the mold and allow the rams to pull apart the two halves to remove the finished plastic piece from the mold. (R.17)

To attach the halves of the mold to the press, the petitioner had to secure them with C-clamps. Each C-clamp was approximately seven to eight inches long, oval and made of steel. (R.18) Each mold would require a minimum of eight such clamps. (R.19) Petitioner would start each clamp by using a ratchet to initially tighten. Petitioner would then use a three foot long breaker bar with a socket attached to torque down the C-clamp with as much physical force that he could provide. (R.20) Petitioner testified that he used his entire body to tighten the clamps, pulling as hard has he could multiple times on each clamp with enough force to lift himself off of the ground to tighten the clamp. (R.20-21) Petitioner testified that his function required him to work in awkward positions, climbing on top of the molds to torque or lying beneath the molds to clamp them securely. (R.22&69) Petitioner testified that he was required to perform three to four such set-ups per day. (R.19) However, he would also have to break down the prior set-ups three to four times per day, breaking loose the C-clamps which were already extremely tight. (R.19)

Petitioner testified that approximately Wednesday, January 6, 2016, while performing his work duties, he began to experience low back ache. Prior to this time petitioner had never experienced any low back pain or soreness. (R.23) He identified the area of soreness in his back to the Arbitrator who noted the ache was at his mid back at approximately the belt line. (R.23) He began to experience tingling down his right leg. (R.23) Petitioner testified that he continued to work that Wednesday, Thursday and into Friday, January 8, 2016. (R.24) He testified that during this time he experienced worsening low back pain. (R.24)

Petitioner testified that while torqueing down C-clamps on the morning of Friday, January 8, 2016, he had a significant increase of low back pain such that he had difficulty bending over and walking. He testified that he had not experienced such pain before in his life. (R.25) Petitioner testified that he became aware that his work

duties, torqueing the C-clamps, was causing the increase of low back pain. (R.25) Petitioner testified that Myron noted his and advised the petitioner to "go home and soak". (R.28) Petitioner testified that he did not seek medical attention that day, nor did he report a work injury to his supervisor at Anfinsen that day. Petitioner testified that the reason he did not was that he feared losing his job after being unemployed for a long time, and that he hoped his condition would improve over the weekend. (R.25)

Petitioner testified that on the evening of Friday, January 8, 2016, he went to the offices of Corporate to pick up his paycheck. At that time he spoke to the secretary who was handing out the checks. Petitioner testified that she generally inquired as to how he was doing. Petitioner responded that he hurt his back while working, but that he felt it would go away. She wished him well. (R.27-28) Petitioner testified that a Corporate management employee identified as "Judy" was present during the conversation. (R.28)

Over the weekend the petitioner testified that his condition did not improve. (R.29) On Monday, January 11, 2016 it is agreed that petitioner called into the Corporate offices to advise that he was unable to work that day. (R.31) Petitioner advised the Corporate representative that he had been experiencing back pain, was unable to sleep and had difficulty getting out of bed that morning. (R.31) However, petitioner admitted that he did not discuss how his back pain occurred. (R.31) At that time petitioner testified that he still hoped the pain would subside. (R.31)

On Tuesday, January 12, 2016 the petitioner did return to work. He testified that his pain was even worse. He had difficulty bending and spent the day performing lighter maintenance such as cleaning and picking up trash. (R.33) On Wednesday, January 13, 2016 the petitioner again called to the Corporate offices at approximately 8:00 a.m. At that time he spoke to who he believes to be "Judy", Corporate's office worker. (R.33) Petitioner testified that he advised Judy that he was unable to work and that he wanted to file a workers' compensation claim. Petitioner testified that he asked that he be sent to the company's clinic for treatment. (R.33) Judy advised him that someone would call him back. (R.33)

At approximately 1:00 p.m. to 2:00 p.m. that day petitioner was called by Edie Standley, Corporate's Branch Manager. (R.35&74) Edie advised that he must come in to the office to file a written accident report before he could be referred for medical attention. (R.36) Petitioner advised that he did not drive. Later, he received a voicemail from Edie stating he could go to the Dreyer Occupational Clinic, and later file an accident report. (R.36)

Petitioner testified that he went to the Dreyer Clinic later that evening. (R.37) He testified that he advised the doctor that he had hurt his back using a breaker bar with molds. (R.37) The Occupational Health Services/Medicine Report from Dreyer Medical Clinic dated 1/13/16 indicates a date of injury of 1/8/16. The documented history indicates, "... states that approximately 4 to 5 days ago began experiencing low back pain. He states that the pain occurred gradually. He was performing fairly heavy lifting activities during the day of the incident and states in the afternoon that he noticed increasing pain. He took the next day off. Tried to come back to work the made it through the day and then returns in to the clinic. Today he stating that he does not feel capable of return to work as the pain has gotten much worse over the last few days. He reports the pain to be isolated in the low lumbar region. There is some radicular component into the proximal right thigh but this is intermittent. He reports he is having significant difficulty standing or sitting for any length of time and is having trouble flexing and extending his back. ..." PX 1.

During the examination on that date January 13, 2016, petitioner was noted to have difficulty getting up from a seated position, moving very slowly, and holding himself in a guarded position with very little spontaneous low back motion. The physician noted moderate-to-severe functional disability with regard to his low back with loss

of lordotic curve and paraspinal tenderness bilaterally with increased tone. The occupational physician concluded that the petitioner sustained an overuse sprain and lumbosacral strain with moderate-to-severe functional disability. He was advised to apply ice and heat, advised to stretch and taken off of work. He was to return to the clinic on January 18, 2016 with the hopes of returning him to some sort of limited work duties. (PX1). Petitioner was taken off work. PX 1.

Further, the "Workers' Compensation Preliminary Report", dated January 13, 2016, notes that the occupational clinic was informed that the date of injury was January 8, 2016, that the injury was to petitioner's lower back and that "authorization" was given by "Judy C." (PX1) This document further reflects, "Patient states he has low back pain from lifting and pulling heavy 4000lb molds." PX 1.

Petitioner testified that he faxed the off work notice to Corporate and returned to the occupational clinic on January 18, 2016 as directed. (R. 39) (PX1) Petitioner testified that he was feeling a little better because he had been off of his feet since his last clinic visit. (R. 40) At Dreyer on 1/18/16, Petitioner reported he had been off work since Wednesday and that he continued to have significant pain although he reported that he was improving. The pain was reported at mid low back with occasional right hip pain. Petitioner denied radiating pain to the legs or tingling, numbness or weakness. Petitioner was diagnosed with a lumbar strain and advised to start physical therapy and allowed to return to work with a 10 pound lifting restriction. (R.40-41&PX1) His follow up was set for 1/25/16. PX 1.

Petitioner testified that he brought the work release with the 10 pound lifting restriction to Corporate on 1/18/16. (R.41) Petitioner testified that he spoke to Edie and was told no light duty was available. (R. 42). Edie provided a document to the petitioner and asked that he sign same. Petitioner read the document and noted that it was a declination of acceptance of light duty. He refused to sign and signed a document indicating he would accept light duty. (R.42-43) He was then offered a second document which Edie asked him to sign. That document stated that petitioner was resigning his position. Again, he refused to sign. At that point he sought legal counsel. (R.43) Petitioner later asked that the accident report be sent to him to review and fill out. Edie refused to accept the accident report via fax. (R. 45).

At that time petitioner had intended to continue treating with the occupational clinic. However, respondent cancelled all further scheduled treatment. Petitioner was never provided with a written explanation as to why his medical benefits were terminated. He has not been paid ttd at any time for this claim. Petitioner offered unrebutted evidence that he continued to call Corporate every day to ask if they had suitable light duty available. He was always advised that they did not, and would not, until he completed the accident report in person. (R.45) Petitioner chose to treat with Dr. Ashraf Darwish of Hinsdale Orthopaedic Associates, S.C. (PX2) Once again the petitioner provided a history of working setting up molds at Anfinsen, and that on January 8, 2016, he felt increased pain in his lower back with numbness and tingling into his right leg while performing his duties. There is no history of prior back pain or radiculopathy. The history notes that the incident was reported to his employer and petitioner began treatment with the occupational clinic, but that treatment was summarily terminated by his employer.

Physical examination by Dr. Darwish of the petitioner's lumbar spine on February 2, 2016 notes flexion of only 20 degrees with pain, extension to 5 degrees with pain, tenderness present over the left paraspinal and right paraspinal, and neurologically a decreased sensation in the right thigh and calf. X-Rays revealed loss of normal lumbar lordosis; T12-L2 moderate to severe degenerative changes with no loss of disc height; anterior endplate osteophytes; L2-L5 mild degenerative changes with loss of disc height; L5-S1 pars defect resulting in a Grade I spondylolisthesis with severe degenerative changes and notable loss of disc height. Dr. Darwish diagnosed the

petitioner with a sprain of ligaments of the lumbar spine; spondylolisthesis of the lumbosacral region; radiculopathy of the lumbar region; intervertebral disc degeneration of the lumbar region and low back pain.

It is Dr. Darwish's opinion that the petitioner developed his back pain and right sided radiculopathy as a result of his work related injury. PX 2. Dr. Darwish ordered an MRI of petitioner's lumbar spine in a high field, closed MRI machine, to be able to provide a more accurate diagnosis and treatment plan. In the meantime, petitioner was referred to Dr. Tubic for consultation regarding an L5-S1 epidural steroid injection and facet injections. Petitioner was further advised to start physical therapy. He has been kept off of any work to the present time.

Currently, petitioner is in physical therapy at ATI. (PX3) Those bills have not been paid. The MRI has not been authorized nor has the referral to Dr. Tubic. Petitioner remains off work per Dr. Darwish. Petitioner testified that he continues to experience pain in his low back 60% of his day. Any movement increases the pain. If he stands more than 10-15 minutes the pain increases. (R.50) He tries to change standing and sitting positions to alleviate the pain. The physical therapy helps but does eliminate the pain. (R.51). Petitioner has not received TTD benefits and would like to undergo the prescribed treatment. (R.52)

On cross-examination the petitioner testified that he did not report his injury on January 6, or January 7, 2016. He did speak to the secretary at Corporate the evening of Friday, January 8, 2016. (R.54) At that time he advised her of the fact that he hurt his back at the Anfinsen job, but that he hoped it would subside over the weekend. Further, the secretary never asked him to fill out any report. (R.57) He is aware of the company policy requiring him to report injuries. (R.56) He did not report his injury to Myron or his supervisor from Anfinsen at any time prior to January 13, 2016. (R.58) He did not mention to the treating physician that his back initially began to ache on January 6, 2016. (R.59) Petitioner denies telling the treating physician at Dreyer Occupational Clinic that he hurt his back performing heavy lifting. (R.60)

On re-direct the petitioner noted that Myron is not his supervisor. Further, the treating physician at the Dreyer Occupational Clinic never asked him to review or correct the history noted. (R.61)

Respondent called as its witness, Myron Blish. (R.63) Mr. Blish is a direct employee of the respondent, Anfinsen and testified on behalf of the respondents. (R.63) Mr. Blish's job is to set-up the molds and was training the petitioner for approximately two months prior to his work injury. Mr. Blish considered the petitioner a good worker. (R.64)

Mr. Blish testified that he recalled the date of January 8, 2016 and that the petitioner seemed fine to him. He did not notice the petitioner showing signs of physical pain. Petitioner never mentioned that he was in pain or that he hurt himself on the job. Mr. Blish admits that the petitioner would not have been required to report an injury to him. (R.65) Mr. Blish remembers that the petitioner did not work on Monday, January 11, 2016 and that the petitioner returned to work the next day, January 12, 2016. (R.65)

Mr. Blish testified that he specifically recalled a conversation with the petitioner on Tuesday, January 12, 2016 wherein he asked the petitioner where he was the prior Monday. Mr. Blish testified that the petitioner told him he hurt his back over the weekend. (R.67) Further, Mr. Blish testified that the petitioner did not show signs of pain while he worked that Tuesday. Petitioner did not say his back pain was work related. (R.67)
On cross-examination Mr. Blish claimed he had a full recollection of the petitioner from January 8, 2016. However, he could not remember anything which made that date stand out. It was, in Mr. Blish's opinion, like any other Friday. He only worked with the petitioner for a few months. (R.68) Mr. Blish admits that the petitioner's job requires the use of the three foot breaker bar and that it is a very physical job. Although Mr.

Blish states that the petitioner offered that he had hurt his back over the weekend, Mr. Blish testified that he did not ask any follow up questions. Mr. Blish states that the petitioner looked fine that Tuesday, January 12, 2016. (R. 70).

Respondent offered the testimony of Edie Standley, respondent Corporate's Branch Manager. Ms. Standley testified that her job duty is to generate revenue and staff her assigned offices. (R.74-75) As part of those duties, she investigates workers' compensation claims such as gathering reports and contacting medical providers. (R.76) Ms. Standley testified that the Corporate handbook advises employees to report injuries immediately. As long as the accident is reported, she will then direct the employee to the appropriate medical facility. (R.76) Ms. Standley noted that, typically when an employee calls in sick, the call is answered by a Corporate employee. Typically, if a work injury is mentioned, it is marked down. (R.80) Ms. Standley has no knowledge of a report being generated concerning the petitioner mentioning a work injury on January 8, 2016. Ms. Standley testified that Corporate staff members are told to do so. (R.81) Ms. Standley cautioned that she was not at the Aurora office on January 8, 2016, when the petitioner testified he advised the secretary of his back injury in the presence of Judy.

Ms. Standley testified from her records that the petitioner called in sick on Monday, January 11, 2016. (R. 81). She obtained this information from a notation created on that date. (R. 84). Ms. Standley does not know if a work accident was reported that day, as she did not want to "speak off the top of my head". (R.85) She admits that there was no investigation made at that time. (R.85) Ms. Standley testified from her records that the petitioner worked the following Tuesday and that she has no notation of a work related accident occurring at that time. (R.86)

Ms. Standley admitted becoming aware that the petitioner sustained a work injury on January 13, 2016. At that time she testified that she started an investigation. During that investigation she did not contact Myron directly. She became aware of Myron's statement, that the petitioner allegedly claimed he hurt his back over the weekend, only through a report tendered by someone at Anfinsen. Ms. Standley performed no further investigation with Anfinsen. (R.87)

Ms. Standley testified that Petitioner could not be present to provide a written accident report prior to being directed to a medical facility. (R. 87-88). In spite of this fact, she allowed the petitioner to be seen at the Dreyer Occupational Clinic on January 13, 2016. Ms. Standley testified on direct examination, and in response to the Arbitrator's own inquiry, that the petitioner's claim was denied because he did not fill out an accident report and that the facility where he was sent (Dreyer) did not follow Corporate's protocol for attending to injured employees. (R.89)

On cross-examination Ms. Standley testified that she was present at the arbitration hearing in her capacity as a Branch Manager for the respondent, Corporate. (R.89) She admits that she did have the opportunity to discuss the petitioner's work injury directly with him in a face-to-face setting on January 18, 2016. (R.90) The medical protocols that Ms. Stanley feels were not appropriately followed, and are a basis for her denial of this claim, are those of the respondent. (R.91) Ms. Standley never spoke directly with Myron regarding petitioner's alleged statements at any time during her investigation of the claim. (R.91) Ms. Standley received a written email of investigation from an employee identified as Randy at Anfinsen, and never made any further personal investigation. (R.91) Ms. Standley volunteered on cross-examination that she had "a lot of conversations so now they're a little bit jumbled". (R.92) While Ms. Standley alleges that she never reviewed the medical records from Dreyer, she did admit that she contacted Dreyer to investigate why they did not follow Corporate's own medical protocol. (R.93)

The petitioner was called on rebuttal. Petitioner denied that he ever had a conversation with Myron on Tuesday, January 12, 2016 wherein he stated that he had hurt himself over the weekend. On the date of the alleged conversation petitioner testified that he did not work on mold set-up, which was where Myron was assigned. (R.94) Petitioner testified that any statement made by respondent's witness, Myron Blish, in any way indicating that he had hurt his back over the previous weekend is false. (R.95) While he did not report a work injury on January 12, 2016, he did so on January 13, 2016 and sought medical attention. (R.97)

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?

The Arbitrator finds that based upon a preponderance of the credible evidence at trial, petitioner sustained a repetitive work injury which manifested itself on January 8, 2016. The Arbitrator finds the testimony of the petitioner to be most credible over that of Respondent's witnesses, Mr. Blish and Ms. Standley. It stands unrebutted that prior to approximately January 6, 2016 the petitioner had never experienced any pain in his low back or radiculopathy into his right leg. It is also unrebutted that Petitioner was performing extremely heavy physical activities for the respondents, including torqueing down C-clamps on molds numerous times per day. No witness provided any contrary evidence to the fact that torqueing down the C-clamps required the petitioner to use extreme force with his whole body, often in awkward positions. The Arbitrator further notes that while petitioner acknowledged some discomfort beginning around Wednesday, January 6, 2016, it was not until Friday, January 8, 2016, that the pain became so severe that he concluded it was the result of his work duties. Admittedly, he did not report the injury immediately. However, petitioner testified that he did have the weekend to rest and had recently returned to work after being unemployed for a period, leading him to try and cope with his condition. Likewise, while petitioner called off of work the following Monday, it is not inconsistent with someone trying to seek relief through the passage of time. When it became clear after returning to work Tuesday, January 12, 2016, that he was not improving, it is unrebutted that he did appropriately and timely report his work injury and seek medical attention from Ms. Standley as of 1/13/16. Respondent does not claim lack of notice.

The Arbitrator further finds that the initial treating records of Dreyer Clinic substantially support Petitioner's testimony. The Arbitrator is not dissuaded by the minor inconsistency in these records noting a reported lifting injury vs. use of a torque bar at work. The fact remains that Petitioner reported a relationship between his pain and work activities. Further, the Arbitrator notes that the "Workers' Compensation Preliminary Report" dated January 13, 2016, in the Dreyer Occupational Medical Records (PX1) quotes that "Patient states he has low back pain from lifting & pulling heavy 4000lb molds". That same document notes a date of accident of January 8, 2016 and that the injury was reported to "Judy C". Petitioner testified that he only knew Judy by her first name and would not have been able to provide her last initial to the occupational clinic.

The Arbitrator finds the testimony of Marvin Blish and Ms. Standley outweighed by the findings and conclusions of the medical providers at Dreyer Occupational Clinic and at Hinsdale Orthopaedic Associates. By Wednesday, January 13, 2016 the petitioner had been examined at the respondent's occupational clinic whose doctor noted that the petitioner had difficulty getting up from a seated position, was moving very slowly, and holding himself in a guarded position with very little spontaneous low back motion. The physician also noted moderate-to-severe functional disability with regard to his low back with loss of lordotic curve and paraspinal

tenderness bilaterally with increased tone. The occupational physician concluded that the petitioner sustained an overuse sprain and lumbosacral strain with moderate-to-severe functional disability. Dr. Darwish noted that the petitioner was experiencing painful extension and flexion along with left and right paraspinal tenderness. Significantly, he was noted to have neurologically decreased sensation in his right calf and thigh.

Accordingly, based on the foregoing, the Arbitrator finds that Petitioner sustained a work related injury arising out of and in the course of his employment for Respondent manifesting on January 8, 2016.

F. Is Petitioner's current condition of ill-being causally related to the injury? K. Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the foregoing findings on accident in the following findings on the issue of causal connection. The Arbitrator further finds that based upon the medical evidence submitted at trial, Petitioner's current condition of ill-being in his low back is causally related to the accident of January 8, 2016. Accordingly, the Arbitrator further finds that Petitioner is entitled to the requested prospective medical care prescribed by his treating physicians at Hinsdale Orthopedics.

In so finding, the Arbitrator notes that the Dreyer occupational physician concluded that the petitioner sustained overuse sprain and lumbosacral strain with moderate-to-severe functional disability, due to the work injury of January 8, 2016. Likewise, Dr. Darwish concluded that petitioner developed his back pain and right sided radiculopathy as a result of his work related injury of January 8, 2016. Respondent offered no evidence in rebuttal. Therefore, the Arbitrator finds that the petitioner's current condition of ill-being with respect to his low back pain and right side radiculopathy is causally related to the work injury of January 8, 2016.

G. What were Petitioner's earnings?

The Arbitrator notes that the petitioner offered unrebutted testimony that he began his employment with the respondents on November 18, 2015. He worked three days that week and two days the following week due to the holiday of Thanksgiving. Petitioner continued to work for the respondents through the Christmas holiday and was off for the week between Christmas and New Year's. The Arbitrator notes that RX 1 and RX 3 document that Petitioner worked differing hours during 6 weeks of work for Respondent prior to 1/8/16. Using the documented number of weeks worked as opposed to Petitioner's less decisive testimony regarding "days worked" during those weeks, the Arbitrator finds that Petitioner earned $2,102.25, a sum to which the parties agree. Again using the documented weeks worked of 6 weeks, the Arbitrator calculates Petitioner's **AWW as $2,102.25/6= $350.38**.

J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based upon the Arbitrator's findings on the issues of accident and causal connection and on Respondent's liability dispute, the Arbitrator further finds that Respondent shall pay the reasonable, necessary and causally related medical expenses incurred by Petitioner pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

L. What temporary benefits are in dispute? TTD

The Arbitrator notes that the respondent's only dispute regarding petitioner's claim for TTD is as to liability. Having found accident and causal connection, the Arbitrator awards TTD benefits from January 13, 2016 through the date of hearing, March 8, 2016, a period of 8-1/7 weeks. The Arbitrator finds the petitioner's TTD rate to be $233.59. Petitioner is single with no dependents. Respondent shall receive credit for amounts paid, if any.

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALLEN ERB,

Petitioner,

16IWCC0845

vs.

98 WC 18098, 98 WC 18099, 98 WC 18100

PEABODY COAL CO.,

Respondent.

DECISION AND OPINION ON PETITION PURSUANT TO §§19(h), 8(a), & 8(b)

This matter comes before the Commission on Petitioner's Petition for Review Pursuant to Sections 19(h)/8(a)/8(b), of the Illinois Workers' Compensation Act." A hearing was held in Mt. Vernon on April 5, 2016 before Commissioner White. The parties were represented by counsel and a record was taken.

1. Petitioner testified that he was 68 years old. The last hearing he attended in this matter was in November 2011 on a previous Section 8(a)/19(h) petition. Since then he had right shoulder replacement in October 2014, and left shoulder repair on October 12, 2015, which had already been replaced. In that surgery they "severed some more muscles" as recommended by Dr. Yamaguchi. That surgery "helped quite a bit as far as the pain and stuff." Around February 2016 a similar procedure was also performed on the previously replaced right shoulder. He has not received any workers' compensation benefits from the time he first saw the doctor after 2011.

2. After the right shoulder replacement Petitioner had "a lot of increased pain and lack of movement." Since November 2011 he had considerably more weakness in the right shoulder because of the severed muscles; he basically has "no strength in [his] arms whatsoever anymore." Petitioner is right-hand dominant and it is almost impossible to get a gallon milk carton out of the refrigerator. It was also difficult to take a shower and he upgraded to a handicapped shower with a seat in it. He cannot reach above shoulder level with either arm, range of motion is worse on the left. He can't really fish anymore. He had to resume opioids because his shoulders hurt so much.

16IWCC0845

3. On cross examination, Petitioner testified he last worked in 1999 and began receiving social security disability benefits in October 2000. The November 2011 hearing was after he had the "reverse procedure on" his left shoulder. Petitioner agreed that at the original arbitration hearing in 2005 he claimed to be totally permanently disabled. He also made that claim in the 2011 hearing.

4. Petitioner had not looked for work since 2000. He did not remember whether he testified that he had no strength in his left or right arm in 2011. He did not remember whether he did not see Dr. Yamaguchi between November 2011 and May 7, 2014. He has had a total of eight surgeries on his shoulders. When he returned to Dr. Yamaguchi in May 2014 he did not tell him that he was on disability since 2000 or remind him that he had not worked since 1999.

5. On redirect examination, Petitioner testified he does not perform as many household chores as he did in 2011.

6. The previous 19(h)/8(a) proceedings were conducted after Petitioner had left shoulder replacement. Thereafter, Dr. Yamaguchi restricted Petitioner to 2-lbs lifting with no repetitive overhead lifting, outstretched motion, or vibratory activities. Petitioner testified he had difficulty with everyday activities and sleeping. He had not decided whether to have the recommended right-sided surgery because of complications after the left shoulder surgery. Respondent had paid all medical expenses to date.

7. On June 3, 2013, the Commission issued a decision on Petitioner's previous 8(a)/19(h) petition. The Commission granted Petitioner's 19(h) petition and awarded him an additional award of 30&2/7 weeks of temporary total disability benefits and awarded Petitioner an additional 100 weeks of permanent partial disability benefits representing an increase of 20% loss of the person-as-a-whole for a total loss of 70%.

8. The medical records reveal that on May 7, 2014, Petitioner presented to Dr. Yamaguchi for follow up for his right shoulder pain, which he rated as 10/10 pain. He wanted the same procedure on that shoulder as he had on the left, which was doing reasonably well. After his examination and review of x-rays, Dr. Yamaguchi noted that Petitioner's left shoulder was "doing very well." However, the right shoulder was "extremely painful with a massive irreparable cuff tear in context of cuff tear arthroplathy." Dr. Yamaguchi planned a "right reverse total shoulder replacement." He administered an injection and took Petitioner off work. On October 30, 2014, Dr. Yamaguchi performed reverse total right shoulder replacement for failed rotator cuff repair syndrome and cuff tear arthroplasty.

9. Petitioner returned to Dr. Yamaguchi on November 12, 2014 who indicated Petitioner was doing very well after right shoulder replacement and he already had active assisted elevation to 130 degrees. There was a small hematoma, but it was not clinically significant. The prosthesis was in good position. They would continue to push range of motion and stretching. Dr. Yamaguchi kept Petitioner off work.

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10. On January 7, 2015, Dr. Yamaguchi reported that Petitioner was still doing well and was happy overall, though he still had some soreness in the arm and felt weak. Dr. Yamaguchi started strengthening physical therapy. There is a work note indicating Petitioner may work with restrictions, but no restrictions were designated.

11. On April 8, 2015, Petitioner reported he was still having pain in the right shoulder. He indicated "that it was similar to what happened with the other shoulder in that he had an intra-articular injection that helped him quite a bit." Dr. Yamaguchi was "going to go ahead and get him an intra-articular injection of steroids" and took Petitioner off work.

12. On July 16, 2015, Dr. Yamaguchi noted that Petitioner reported mild pain in both shoulders, the etiology of which was unknown. The bilateral injections provided temporary relief. Dr. Yamaguchi was "going to get bilateral aspirations." Dr. Yamaguchi kept Petitioner off work.

13. On October 12, 2015, Dr. Yamaguchi performed left shoulder open release of the cortical brachialis, neurolysis of the axillary nerve, and I & D culture of glenohumeral joint for pain post reverse total replacement secondary to particulate synovitis to the shoulder or tension on the cortical brachialis.

14. On February 11, 2016, Dr. Yamaguchi noted that Petitioner was doing much better after the latest left shoulder surgery and wondered whether the same could be performed on the right, which remained very painful. Dr. Yamaguchi thought the surgery was reasonable because of the success on the left, even though the results were unpredictable. Petitioner was kept off work.

15. On May 12, 2016, Dr. Yamaguchi indicated that Petitioner was actually doing quite well after right cortical brachialis release with significantly reduced pain (there does not seem to be any operative report in the record). He appeared "to be on track to do as well as he did on the left side." Dr. Yamaguchi placed him at maximum medical improvement, released him from treatment, and recommended a functional capability evaluation.

Petitioner seeks additional temporary total disability benefits of 104&67 weeks, from May 7, 2014, when he first returned to Dr. Yamaguchi, through May 12, 2016 when he found Petitioner at maximum medical improvement. Respondent argues Petitioner is not entitled to temporary total disability benefits because he voluntarily took himself out of the work force by applying for social security disability. The Commission agrees with Respondent that Petitioner voluntarily took himself out of the work force. Petitioner testified that he had not worked since 1999 and had not even looked for work at any time since 2000. In addition, Petitioner accepted social security disability benefits, thereby confirming his intention not to work or seek employment. From the record before us, there is no evidence that Petitioner would have been more employable absent the most recent medical treatment. Therefore, the Commission finds that Petitioner is not entitled to additional temporary total disability benefits.

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Regarding permanency, Petitioner once again seeks an award of permanent total disability. Respondent counters that Petitioner's testimony about his disabilities was almost identical throughout all levels of the proceedings. Therefore, he has not proved any increased level of disability after the most recent surgeries.

In looking at the statutory factors in determining partial permanent disability, the Commission notes that because Petitioner has voluntarily removed himself from the labor force, he cannot show any future reduction of earning potential and the nature of his current occupation does not apply. Regarding the evidence of disability in the record, the Commission agrees that Petitioner's testimony regarding the extent of his permanent disability has not materially changed throughout the proceedings. In addition, neither Dr. Yamaguchi nor any other doctor has indicated that Petitioner suffered any increased disability from his recent medical treatment and there is no functional capability evaluation documenting Petitioner's current disability, even though one was recommended by Dr. Yamaguchi.

Therefore, there is no evidence corroborating an increase in Petitioner's disability. Accordingly, the Commission concludes that Petitioner has not sustained his burden of proving he has experienced any additional disability from his latest medical treatment or that he is entitled to any additional permanent disability benefits.

In addition, the Commission notes that even though Petitioner cited Section 8(a) in his petition, he does not seek payment of medical expenses. Therefore, the Commission concludes that there is no current controversy about medical expenses. Finally, based on our decision, the Commission finds that Respondent's denial of temporary total disability benefits was neither vexatious nor unreasonable. Therefore, Petitioner's request for penalties and fees is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition for Review Pursuant to Sections 19(h)/8(a)/8(b), of the Illinois Workers' Compensation Act is hereby denied.

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

DATED: DEC 27 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-12/7/16
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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

LILLI-ANN SACZEK,

Petitioner,

vs.

NO: 99 WC 53881

ROSEWOOD NURSING,

16IWCC0820

Respondent,

DECISION AND OPINION ON §19(h) AND §8(a) PETITION

This case comes before the Commission on Petitioner's §19(h) and §8(a) Petition, alleging a material increase in her disability resulting in additional permanent disability and claiming additional medical expenses following the previous arbitration hearing, which was held on November 23, 2005. A hearing on the current petition was held before Commissioner DeVriendt on February 21, 2014, in New Lenox, Illinois, and a record was made. The Commission, having considered the entire record, finds that Petitioner has failed to prove that she is entitled to additional medical expenses or permanency benefits.

Regarding the §19(h) petition, we note that the original Commission decision was issued on February 11, 2008, and Petitioner did not file her Petition until August 24, 2012, which is well beyond the 30 month time limit to modify the award under §19(h). Since Petitioner had not been awarded a wage differential under §8(d)1, the 60-month time limit does not apply. Therefore, we find that we have no jurisdiction to hear Petitioner's §19(h) petition and it is hereby dismissed.

We also find that Petitioner has failed to prove that she is entitled to additional medical expenses under §8(a) due to violations of the 2-doctor rule and the lack of supporting medical records. Respondent argues that all of Petitioner's claimed medical expenses are outside of the 2-doctor rule. Petitioner's brief claims that the bills in Px1 from Pain Center of Chicago are for pain treatment that was requested by Dr. Goldberg who was her treating surgeon and whose bills were paid in the previous decision. Petitioner's brief does not dispute Respondent's assertion that the other bills are outside of the 2-doctor rule. Petitioner only states, "The above listed medical expenses were reasonably required to cure or relieve Ms. Saczek from the effects of her chronic neck pain and cervical radiculopathy." (Petitioner's brief at 10). The following is an analysis of the medical expenses claimed in each of Petitioner's exhibits:

Px1 and Px3 - Pain Centers of Chicago

The previous Commission decision found that Dr. Goldberg had referred Petitioner to the Rehabilitation Institute of Chicago but that Petitioner had testified that Respondent refused to authorize this treatment so she sought treatment at Pain Centers of Chicago. There was no specific finding that Dr. Goldberg had referred Petitioner to the Pain Centers of Chicago but the outstanding balance of $80.80 was awarded. The Commission acknowledges that the previous hearing record does include a March 24, 2004 note from Dr. Goldberg that referred Petitioner to the "pain management center at St. Joseph hospital." It is not clear from the evidence whether this is the same entity as the Pain Centers of Chicago. Regardless, Petitioner is apparently arguing that her treatment at Pain Centers of Chicago is part of a continuation of this alleged referral by Dr. Goldberg. However, the first actual treatment record from Pain Centers of Chicago, after the November 23, 2005 arbitration hearing, is on December 7, 2009, over four years later. The Commission questions what happened to those four years of records if, in fact, Petitioner continued treating there. Furthermore, many of the records seem to be more for Petitioner's unrelated low back pain than her cervical condition.

We also find it interesting that Petitioner formerly treated with her primary care physician, Dr. Bertolini, but the last treating record in evidence was from March 6, 2001. Over eleven years later, on April 13, 2012, there is a phone note from Dr. Bertolini's office indicating that Petitioner is only able to treat with him or Dr. DePhillips and that Dr. DePhillips "does not get back to her" so she wanted a referral to the "Pain Clinic." This request for a referral is after Petitioner's treatment at Pain Centers of Chicago had already concluded and she had been discharged for testing positive for THC and cocaine on August 31, 2010. There is a handwritten "OK" on this April 13, 2012 phone note but it isn't clear who wrote that. Furthermore, there isn't any specific referral made to "Pain Centers of Chicago" and the Pain Centers of Chicago records don't mention any referral from Dr. Bertolini. It also doesn't make sense why Petitioner would have felt the need to request this generic referral to "Pain Clinic" from Dr. Bertolini if Dr. Goldberg had, in fact, referred Petitioner to the Pain Centers of Chicago back in 2004, and she had continued treating there.

Based on the above, we find that Petitioner has failed to prove that the bills from Pain Centers of Chicago are still part of any chain of referral from Dr. Goldberg.

Px2 – Injured Workers' Pharmacy; Px4 – Dr. Singh; and Px5 – Health Benefits

All of these prescriptions were prescribed by Dr. Singh at Health Benefits, who Petitioner testified that she chose to see herself. We find that all of these are denied based on the 2-doctor rule. Furthermore, the records of Dr. Singh end on May 2, 2011, even though the bills go through September 24, 2013. Therefore, most of the bills are not supported by medical records.

Px6 – IL Physicians Network; Px8 – St. Joseph's Hosp.; Px9 – Chicago Imaging; Px11 – IL Bone & Joint (Dr. Fisher)

We note that the bill in Px6 for $4,785.00 is also included in Px5 and it is for an MRI on November 1, 2010, ordered by Dr. Theodore Fisher. The other bills are for a CT

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myelogram and other tests. Petitioner never testified how she came to be seen by Dr. Fisher who she saw on October 7, 2010, January 5, 2011, and March 17, 2011. Dr. Fisher's records are in the form of a "To Whom It May Concern Letter" with no mention of any referring physician and no "cc:"s to any other physician. Interestingly, there is a referral note from Dr. Bertolini in Rx3 to "Dr. Theadore [sic] Fisher" but it is undated. Since there are no records from Dr. Bertolini from March 6, 2001 until the April 13, 2012 request by Petitioner for a referral to the "Pain Clinic" (as discussed above), it seems likely that this "referral" was given sometime after April 13, 2012. This was after Petitioner had already stopped treating with Dr. Fisher. The fact that Dr. Bertolini's records don't contain any copies of Dr. Fisher's records also supports a finding that this "referral" was not really a valid referral. Based on the 2-doctor rule, we deny all of the charges stemming from Dr. Fisher.

Px13 - Docs Drugs

Petitioner claims $815.63 in prescription expenses. We note that most of these were prescribed by Dr. Singh, which would be outside of the 2-doctor rule as discussed above, and are denied. Many of the other charges are for prescriptions ordered by other doctors and dates of service for which there are no supporting records in evidence. These are also denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) is hereby dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition under §8(a) is hereby 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: DEC 19 2016

Charles J. DeVriendt

Ruth W. White

Joshua D. Luskin

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