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

Ricky Reetz,

Petitioner,

vs. NO. 11 WC 25450

Winston Towers II,

Respondent,

ORDER OF RECALL UNDER SECTION 19(f)

The Commission on its own Motion pursuant to Section 19(f) of the Workers' Compensation Act recalls the Review Decision dated January 31, 2017.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision dated January 31, 2017 is hereby vacated and recalled pursuant to Section 19(f) in that the wrong Arbitrator's Decision was attached and contained therein. The parties should return their original Decision to Commissioner Mario Basurto.

IT IS FURTHER ORDERED BY THE COMMISSION that a Decision bearing the correct Arbitrator's Decision shall be issued simultaneously with this Order.

DATED: FEB 8 - 2017

Mario Basurto

Stephen J. Mathis

David L. Gore

MB/mas
43

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

Ricky Reetz,

Petitioner,

vs.

NO: 11 WC 25450
17IWCC0059

Winston Towers II,

Respondent,

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of 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 16, 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: FEB 8 - 2017

MB/mas
o:1/19/17
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION
CORRECTED

REETZ, RICKY
Employee/Petitioner

Case# **11WC025450**

17IWCC0059

WINSTON TOWERS II
Employer/Respondent

On 6/16/2016, 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:

0013 DUDLEY & LAKE LLC
THOMAS M LAKE
325 N MILWAUKEE AVE SUITE 202
LIBERTYVILLE, IL 60048

0507 RUSIN & MACIOROWSKI LTD
JOHN MACIOROWSKI
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

17IWCC0059

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

CORRECTED DECISION

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Ricky Reetz
Employee/Petitioner
v.
Winston Towers II
Employer/Respondent

Case # 11 WC 025450

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 **3/11/2016**. 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. ☒ 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 **§ 19(d) – Injurious Practices**

FINDINGS

On the date of accident, **May 27, 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 **$66,595.96**; the average weekly wage was **$1,280.50**.

On the date of accident, Petitioner was **52** 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 **$44,065.35** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$44,065.35**. The Parties stipulated that Petitioner was entitled to TTD benefits for the time period of 11/28/2012 through 11/25/2013 (51-6/7 weeks) and, in addition to TTD benefits being paid at the weekly rate of $699.45, Petitioner received the value of $1,000.00 per month in housing benefits.

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

ORDER

Respondent shall authorize and pay for the revision add-on spinal fusion procedure from L4-S1 as recommended by Dr. Bernstein in his letters of November 11, 2013, November 19, 2013 and as testified about in his Evidence Deposition of September 2, 2015, along with all related services, provided that Petitioner quits smoking, entirely. Additionally, Respondent shall authorize and pay for the continuing palliative treatment provided by Dr. Xia prior to the fusion surgery.

Respondent is entitled to a credit of $7,924.50 for TTD overpayment.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for temporary or partial 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

June 16, 2016
Date

ICArbDec19(b)

JUN 16 2016

17IWCC0059

STATEMENT OF FACTS

Petitioner was employed by Respondent as head of maintenance. He worked for Respondent for 35 years. His job duties include physical and non-physical work. He could delegate the more physical jobs to his subordinates. He was in charge of a 218 unit condominium and he had three co-workers that were subordinate to him.

Petitioner received monetary pay and the use of a condo unit as compensation for his employment. Petitioner pays $100.00 per month to rent the condo, because it is a 2 bedroom unit and his compensation package contemplates the use of a one bedroom unit. The Parties agreed that the value of the housing component of Petitioner's pay was $1,000.00 per month. The Parties agreed that the correct Average Weekly Wage was $1,280.50, via a Stipulation that was filed herein on March 23, 2016.

Prior to his May 27, 2011 work accident, Petitioner was in good shape from a physical standpoint. He had no real problems with his low back and certainly was not restricted from work regarding his low back. He was able to fully function in his job as head of maintenance for the Respondent prior to the work accident.

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on May 27, 2011. He was up on a ladder and twisted a valve, causing injury to his back. He felt immediate low back pain.

As a result of the work injury, he sought medical treatment from Dr. Steven Sclamberg, who is with Orthopedics of North Shore. Dr. Sclamberg recommended physical therapy and ultimately referred Petitioner to Dr. Charles Slack. Petitioner received physical therapy and several lumbar injections, none of which provided relief. Petitioner was ultimately referred to Dr. Theodore Fischer at Illinois Bone & Joint Institute. Petitioner's treatment with Dr. Fischer included a lumbar fusion at the L4-5 level on November 28, 2012. Subsequently, Petitioner was diagnosed with L4-L5 psuedoarthrosis. (PX 3, 4 & 5)

Petitioner testified that he never recalls Dr. Fischer telling him to stop smoking before or after his lumbar fusion. Petitioner has a smoking history of 1 ½ packs per day for more than 30 years. Dr. Fisher's records show that, as would be expected, Petitioner was advised to stop smoking.

Following surgery, Petitioner was sent by Respondent for a §12 examination by Dr. Avi Bernstein on August 12, 2013. He was informed by Dr. Bernstein that he had a failed fusion as well as a drop foot condition in the right foot. Subsequent to the IME, Dr. Bernstein became Petitioner's treating physician. Dr. Bernstein's diagnosis is: "known psuedoarthrosis at L4-L5 and advanced degenerative disc disease at L5-S1. Dr. Bernstein believes that Petitioner requires a revision add-on fusion, L4-S1. After discussing in detail the pros and cons of this surgery, Petitioner testified that he, in fact, would like to undergo the surgery proposed by Dr. Bernstein. He testified that he would like to be pain free and would like to be able to work without the need for medications or a back brace.

Petitioner testified that following the lumbar surgery that occurred on November 28, 2012, his low back condition has not improved. In fact, he still has low back pain with pain radiating down the right leg. He also has experienced foot drop symptoms in his right foot following surgery. The right drop foot condition essentially leads him to drag or shuffle his right foot when walking. This was something new since the surgery.

Petitioner last saw Dr. Bernstein in May of 2015. At that time, the plan was for Petitioner to undergo a two level fusion at the L4-5 and L5-S1 levels. Petitioner reiterated his desire to have the surgery. He is simply waiting for approval at this point in time. (PX 2)

Petitioner has also received treatment from a pain management doctor, Dr. Tian Xia. He has been seeing Dr. Xia since August of 2014 and receives medications including Norco (4 times a day), Tramadol (3 times a day), Gabapentin (2 times a day) as well as muscle relaxers (3 times a day). (PX 7) He also applies a salve to his low back. In addition to the pain medications, Petitioner requires the use of a back brace when he works. If Petitioner goes off of his pain medications, his pain increases, making work much more difficult.

Petitioner was off work and paid TTD benefits of $699.45/week beginning November 27, 2012. Petitioner returned to work on November 26, 2013. Petitioner needed to return to work in order to continue living in the condo. For several months thereafter, until February 11, 2014, he received his weekly TTD check. Petitioner felt that this was money due and owing to him. At trial, Respondent sought a credit for this overpayment.

Petitioner's testimony regarding his smoking was not very clear. Initially, he felt he reduced his smoking from essentially two packs to one pack a day in July of 2015. He later testified that this could actually be a later date. Petitioner does know that in 2016 he has reduced his cigarette consumption to one pack per day in anticipation of having further lumbar fusion surgery. Dr. Xia's chart of January 7, 2016 says that Petitioner has quit smoking (as of December of 2014!). (PX 7) Petitioner also testified that he would quit smoking, per the direction of Dr. Bernstein, once his surgery is scheduled.

Petitioner's PCP, Dr. Bajgrowicz, charted that Petitioner was smoking 2.0 PPD for 30 years in a note of 9/2/2015, when Petitioner was seen for a bee sting. The remainder of the PCP's EMR records do not mention smoking, including a visit for a URI/pharyngitis on 2/10/2015. (RX 6)

Aida Kovacevic testified on behalf of Respondent. She works for Chicagoland Community Management, which is the managing company for Respondent. She has been the property manager since May of 2014. She authenticated Respondent's Exhibit No. 4, which is the work attendance record for the Petitioner for the time period of 11/1/2013 to 10/20/2015. She considers herself Petitioner's supervisor. Although she knows what Petitioner does on a regular basis, she does not actually see him perform his work duties very much. She did say that Petitioner has good work attendance. Moreover, she believes that Petitioner is trustworthy and hardworking.

The evidence deposition of Avi Bernstein, M.D. was submitted as Petitioner's Exhibit 1. Dr. Bernstein is a board certified orthopedic surgeon, exclusively treating conditions related to the spine. He performs between 200 and 250 spine surgeries per year. In this case, he became involved as an independent medical examiner and,

subsequently, became Petitioner's treating physician. Dr. Bernstein reviewed many records, including those from Dr. Fischer, Dr. Sclamberg, St. Joseph's Hospital, Open MRI of Chicago, Lakeshore Open MRI, and Total Rehab as well as IME reports from Dr. Alexander Ghanayem and Dr. Kevin Walsh. Benstein first saw Petitioner on August 12, 2013 for an independent medical examination. In connection with the exam, he also reviewed a CT scan from June 18, 2013, as well as a lumbar MRI of August 15, 2011. He understood that Petitioner underwent a lumbar surgery on November 28, 2012 in the nature of a posterior decompression and fusion at the L4-5 levels. Dr. Bernstein's assessment of Petitioner as of the August 12, 2013 visit was status post lumbar fusion. Petitioner had a failed fusion at the L4-5 level; Petitioner had a partial foot drop on the right side as a complication of the lumbar fusion; as well as a severely degenerated disc at the L5-S1 level that was a potential contributing pain generator. A myelogram and post-myelogram CT confirmed the Psuedo arthrosis. Benrstein believes that the post-surgical CT scan clearly identifies a failed fusion.

It is Dr. Bernstein's opinion that the L5-S1 level should have been addressed during the initial surgery because it was clearly a pathologic level. In his opinion, it was silly to leave this level untreated. He believes that the pain complaints made by Petitioner are attributed to the L5-S1 level. He stated that if the L5-S1 level was not treated initially in the fusion, the stress transfer to that abnormal level alone can cause severe pain. It is Dr. Bernstein's opinion that the L5-S1 level and its problems are a combination of a pre-existing condition superimposed by the work accident. Additionally, the stressors from the lumbar fusion contribute to the problem. It is his opinion that the lumbar fusion Petitioner underwent in November of 2012 transferred stress to the L5-S1 level. Dr. Bernstein believes that even though the fusion failed, the level fused is much stiffer and would transfer stress to the adjacent levels. Dr. Bernstein believes that the pre-existing condition in Petitioner's lumbar spine was aggravated as a result of the work accident. He also believes Petitioner suffered a disc herniation at the L4-5 level as a direct result of the work accident.

As far as the partial foot drop is concerned, the L5 nerve root is the nerve root that would cause the foot drop. The L5 nerve root leaves through the L5-S1 level. Prior to the work accident and prior to the lumbar fusion performed by Dr. Fischer, Petitioner never experienced foot drop issues.

Dr. Berstein believes that Petitioner is highly motivated and a candidate for further lumbar surgery to reduce pain and increase function. The surgery Dr. Bernstein proposes is in two stages. The first stage is going through the belly, basically removing bone graft at the L4-5 disc space and putting a cage in front of the spine, moving down to the L5-S1 level and heightening that disc space by putting a cage into the disc space. The second stage of the operation would be coming from the back side, pulling out the hardware at L4-5 and then putting in fresh hardware from L4-5 through S1. This would bridge both levels by adding more bone graft posteriorly. This approach would give Petitioner the highest likelihood of fusion success. The recovery for a one versus two level fusion as well as the post-surgical care would be no different. If there was only a one level fusion performed at L4-5, the right foot drop from the L5 nerve root would be a problem that would be unaddressed. The two level fusion, including the L5-S1 level will address the right foot drop problem. If only one level is fused at L4-5, it is likely the Petitioner would continue to have foot drop. If the L5-S1 level is the current pain generator and if only a L4-L5 fusion is done, Petitioner will still have pain complaints. If surgery is to be performed, the L5-S1 pathology should be addressed.

Since his last visit, Petitioner continues to take pain medication and was still in need of the two level fusion that Dr. Berstein is recommending. If Petitioner does not undergo the recommended surgery, the condition he presented to Dr. Bernstein in May of 2015 would be permanent and would not get any better. Without surgery, the Petitioner would have difficulty continuing to perform his job and would have difficulty in life in general.

Currently, Petitioner sees Dr. Tian Xia, who is a pain physician. Dr. Bernstein finds it reasonable for Petitioner to continue to treat with Dr. Xia. Dr. Bernstein confirms that the initial surgery performed by Dr. Fischer was directly related to the work accident. The foot drop that Petitioner experiences is a direct result of

complications from the surgery performed by Dr. Fischer. Dr. Bernstein testified that there is a correlation between smoking and the advancement of degenerative disc disease. According to Bernstein's chart, Petitioner had quit smoking in January of 2015. There is an increased risk of a fusion failing to heal if the patient continues to smoke cigarettes. Petitioner's continued smoking after the first fusion and after being told to cease smoking could have resulted in the psuedoarthrosis. (PX 1)

Petitioner also underwent §12 examinations by Dr. Alexander Ghanayem and Dr. Kevin Walsh at Respondent's request. (RX 1, 8) Dr. Ghanayem thought that the accident at least aggravated Petitioner's low back condition and later concurred with the proposed L4-L5 decompressive procedure with fusion. (RX 1) Dr. Walsh concurred that the accident aggravated Petitioner's low back at L4-L5 and with the diagnosis of psuedoarthrosis. Dr. Walsh thought that this condition could be remedied by a redo fusion at L4-L5. An extension of the fusion to L5-S1 would not be unreasonable, but it would not be related to the accident. (RX 8)

The evidence deposition of Kevin Walsh, M.D., was submitted as Respondent's Exhibit 8. He is a board certified orthopedic surgeon. Dr. Walsh is a general orthopedic surgeon and performs surgery on the shoulders, elbows, wrists, knees and hips. He last did spine surgery about 10 years ago. He saw Petitioner for an IME on December 26, 2013. He was aware of Petitioner's work related accident of May 27, 2011. Upon his review of records, he identified evidence of a disc protrusion/herniation at the L4-5 level. Petitioner reported that he smokes a pack of cigarettes a day at the time of the IME exam. Smoking has a deleterious effect on discs. Smokers have a higher risk of low back pain and disc herniations. Failed fusions can result partially from smoking. Petitioner underwent lumbar surgery on November 28, 2012 (L4-L5 fusion with instrumentation). Dr. Walsh believes that adjacent level stress from a fusion usually takes 10 years or greater from the date of surgery to manifest. Smoking increases a patient's risk for a non-union fusion. Upon review the post-surgical CT scan Walsh identifies evidence of pseudoarthrosis as well as degenerative changes at the L5-S1 level. Upon physical exam the Petitioner had no evidence of sciatica. Dr. Walsh's diagnosis at the time of the IME exam was: lumbar strain, spondylolisthesis, lumbar spinal stenosis, status post L4-L5 posterolateral fusion,

pseudoarthrosis at fusion site and degenerative disc disease at L5-S1. The lumbar sprain and the aggravation of the spondylolisthesis at L4-5 was, in Walsh's opinion, related to the work accident. He believes the L5-S1 condition is degenerative and not caused by the work accident. There is no evidence that the accident aggravated or accelerated the L5-S1 level pathology. He understands that a two level fusion was proposed by Dr. Bernstein. However, Dr. Walsh feels that it is reasonable to proceed with a revision fusion at L4-L5 as a result of the work accident because the patient did have evidence of a non-union, pseudoarthrosis at the L4-L5 level. It would be reasonable to revise the L4-L5 level because of the failure of the fusion. It is also his opinion that the L5-S1 level pathology, was not causally related to the work accident and the L5-S1 level was not injured in the work accident.

On cross-examination, Dr. Walsh testified that he does about 100 IMe's per year. Dr. Walsh is a general orthopedic surgeon and does not perform spine surgery. He would not hold himself out as a specialist in spine surgery. He would refer spine surgery patients to a colleague in his own group. The last office note he has from Dr. Bernstein's office was dated November 19, 2013. He has not reviewed any additional records from Dr. Bernstein following the IME. He has not reviewed any of the records from the pain management doctor, Tian Xia, M.D. He does not know what, if any, pain medication Petitioner had taken in 2014 and 2015. He agrees with one of the other Respondent IME physicians, Dr. Alexander Ghanayem, that the initial surgery performed by Dr. Fischer was causally related to the work accident. He agrees that there is a failed fusion at L4-5. He believes it would be reasonable for Petitioner to undergo a revision at the L4-L5 area. He agrees that if the Petitioner is on pain medication for two years and his surgeon feels L4-L5 and L5-S1 are the generators of pain, then it is certainly reasonable to perform a two level fusion, if the surgeon believes the pain is coming from those two levels. He does not doubt that Dr. Bernstein accurately described a right foot drop upon his examination. He just did not find the same thing upon his own examination of Petitioner. Although he doesn't believe there is imaging evidence of nerve damage, he does concede that the nerve emanating from the L5-S1 level would innervate the dorsiflexion of the ankle. One of the possible causes of a foot drop would be the L5

nerve root. The L5 nerve root potentially passes through the L5-S1 space. The foot drop complaint would be a new complaint following the surgery. Foot drop is a potential complication from L4-L5 fusion surgeries. Dr. Walsh agrees that if a fusion was only done at the L4-5 level, this could put added stress on the L5-S1 level. (RX 8)

The reports and records from Dr. Charles Slack were introduced as Petitioner's Exhibit 's 3 and 4. Dr. Slack's records clearly verify that Petitioner injured his lumbar spine as a result of the work accident. Ultimately, Dr. Slack referred Petitioner to Dr. Theodore Fischer. Dr. Fischer's surgical report is included in Petitioner's Exhibit 4. Dr. Fischer ultimately performed lumbar surgery on November 28, 2012. His operative report is contained in Petitioner's Exhibit 4. The surgical report notes that the risks of surgery "include but are not limited to blood loss, infection, nerve damage, dural tears, adjacent segment disease particularly at the L5-S1 level where he has degeneration already..." Dr. Fischer's records demonstrate that Petitioner was smoking and that he was advised of the detrimental effects of smoking and the possibility of failing to cease smoking leading to a nonunion requiring more surgery. (PX 4)

Petitioner's most recent medical treatment comes from a pain management physician, Dr. Tian Xia from Integrated Pain Management. These records are included in Petitioner's Exhibit 7. Petitioner has been under the care of a pain management doctor and has been taking pain medication starting in August of 2014 through the date of hearing.

Respondent disputes causal connection and asserts a §19(d) defense based upon Petitioner's smoking. Respondent also disputes causal connection regarding the L5-S1 portion of the proposed fusion, based upon the opinion of Dr. Walsh that this level of Petitioner's spine was not affected by the accident or the first fusion procedure in any way (not causally related, no acceleration, aggravation or exacerbation). Per Dr. Bernstein's November 19, 2013 chart, Respondent's carrier will only approve the revision of the posterior L4-L5 fusion. (PX 1, 2)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Statement of Facts in support of the Conclusions of Law set forth below.

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 that Petitioner's current condition of ill-being regarding his lumbar spine (status post lumbar strain and herniated disc at L4-L5 with aggravation of DDD leading to the L4-L5 fusion performed by Dr. Fischer with residual foot drop and psuedoarthrosis at L4-L5 and symptomatic DDD at L5-S1, leading to the recommended revision and add-on fusion L4-S1 offered by Dr. Bernstein) to be causally related to the injury.

The Arbitrator bases this decision on the credible testimony of Petitioner, the medical records and the credible and persuasive opinions of Dr. Bernstein. Dr. Bernstein is a well-regarded spinal surgeon, performing 200-250 spinal surgeries per year. His opinion is given more weight than Dr. Walsh, a general orthopedist who does not currently perform spinal surgery.

While Petitioner's smoking has likely had a negative effect on his spinal health and probably contributed to the failure of the fusion done by Dr. Fischer, the Arbitrator does not find that it was sufficient enough to become a superseding intervening cause of Petitioner's current lumbar spine condition, thus breaking the causal connection chain between the injury and Petitioner's current condition of ill-being.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Petitioner is entitled to prospective medical care as proposed by Dr. Benrstein in his deposition (Anterior/Posterior Revision add-on fusion L4-S1), along with all related services (including, obviously, a vascular surgeon assist given the anterior approach and Petitioner's prior surgical history) based upon the Arbitrator's finding regarding causation, above and the credible and persuasive testimony of Dr. Bernstein. Dr. Fischer tried to be conservative and only fuse L4-L5 (although the DDD condition of L5-S1 was appreciated) and the fusion failed. Dr. Bernstein's opinion that both

L4-L5 and L5-S1 should be addressed in any future procedure is persuasive and correct. If Petitioner would not have had the injury, the first fusion and the sequelae of the foot drop and the psuedoarthrosis would likely not have occurred. The procedure offered by Dr. Bernstein gives Petitioner the best chance for a better quality of life and to be able to continue to do his job.

The Arbitrator makes this finding on the condition that Petitioner stop smoking cigarettes. If Petitioner fails to do so, he is courting disaster and faces the likelihood of another failed fusion after undergoing major surgery with all of the risks, pain, disability and costs associated therewith. The Arbitrator does believe that Petitioner genuinely wishes to undergo the L4-S1 A/P fusion and will stop smoking to try to obtain a good result. Dr. Bernstein believes that Petitioner is highly motivated to receive an increase in function and relief of pain. Petitioner will need to stop smoking to have the best chance at a good outcome from the proposer surgery. If Petitioner fails to stop smoking, then Respondent should decline authorization of the surgery and file a §19(d) Motion.

Given the Arbitrator's findings on causation and on this issue, Petitioner is entitled to reasonable continued palliative care from Dr. Xia in order to alleviate his failed back surgery symptoms.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

Subsequent to the trial, the Parties entered a stipulation, agreeing on the AWW of $1,280.50. At trial, the Parties agreed that the correct weekly payment rate for TTD benefits was $699.45, because Petitioner also received the value of his housing benefit while he was off work. The proofs show that Petitioner is entitled to TTD from 11/28/2012 (the date of surgery) through 11/25/2013 (he returned to work on 11/26/2013), a period of 51-6/7 weeks. Petitioner was paid $44,065.35 in TTD benefits. (RX 2) Accordingly, the Arbitrator finds that Respondent is due a credit of $7,924.50 for TTD overpayment.

WITH RESPECT TO ISSUE (O) §19(d) INJURIOUS PRACTICES, THE ARBITRATOR FINDS AS FOLLOWS:

Given the evidence adduced, the Arbitrator finds that Petitioner did not engage in insanitary or injurious practices within the meaning of §19(d) of the Act. Petitioner's continued smoking of cigarettes after undergoing spinal fusion surgery was not a good choice, but the Arbitrator does not find that a reduction or suspension of compensation is appropriate.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Riley,
Petitioner,

vs.

NOS. 13 WC 39135
17 IWCC 83

Cook County Sheriff's Office,
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 February 10, 2017 *sua sponte*. After reviewing the Decision on Review, the Commission recalls the Decision for the purpose of correcting the clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated February 10, 2017, is hereby recalled pursuant to Section 19(f).

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

DATED: FEB 23 2017

RWW/rm
46

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Riley,

Petitioner,

vs.

NO: 13 WC 39135
17 IWCC 0083

Cook County Sheriff's Office,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, and permanent partial disability and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of causal connection. The Commission further modifies the Arbitrator's award of medical expenses, temporary total disability, and permanent partial disability consistent with our findings and conclusions set forth below.

Petitioner, a 48-year-old correctional officer, sustained injuries arising out of and in the course of his employment by Respondent on November 1, 2013. As set forth in the Arbitrator's statement of facts, at approximately 7:00 p.m. Petitioner was performing a search for contraband hidden in the ceiling of a shower room. Standing on milk crates, Petitioner reached with his left arm into the hole where a light fixture had been removed. Petitioner accidentally grasped an exposed electrical wire and was electrocuted. Petitioner testified that he felt shocks all over his body and fell backward against the shower wall, striking his upper back, neck, and head. Petitioner complained of intractable neck and left arm pain resulting from the accidental injury. He sought an award of workers' compensation benefits for lost time, medical treatment including a cervical fusion on March 6, 2014, and permanent partial disability for the loss of use of the person as a whole under §8d(2) of the Act. Petitioner was released to return to his regular job activities without restrictions on June 11, 2014.

In a Decision dated March 1, 2016, the Arbitrator found that Petitioner failed to prove causal connection between the cervical fusion and the accidental electrocution injury he sustained on November 1, 2013. The Arbitrator found that Petitioner's testimony that he hit his head, neck, and shoulder area against the wall was inconsistent with other evidence offered at arbitration. The Arbitrator denied medical expenses and temporary total disability related to the cervical fusion. We find that the Decision of the Arbitrator is not supported by a preponderance of the evidence and we reverse to award benefits under the Act.

The evidence shows that immediately after Petitioner was electrocuted, he fell back against the shower wall. We rely on the testimony of Petitioner, whose description of the accident is overall corroborated and confirmed by the testimonies of Officer Green and Sergeant Rodriguez. Officer Green and Sergeant Rodriquez were both present when the accident occurred. Neither Officer Green nor Sergeant Rodriguez contradicted the material facts of Petitioner's description of the accident.

Officer Green testified that he was facing Petitioner at the time of the accident on November 1, 2013. He recalled that Petitioner was standing on a milk crate in order to reach the ceiling of the shower stall. He estimated that there was an 18 inch to 2 foot gap between Petitioner and the wall behind him. Officer Green testified, "Riley reached his hand up there and all of a sudden there was a pow and a big shock with sparks and we all ducked." (T. 54) When he looked back up he saw Petitioner "up against the wall." He testified that he asked Petitioner if he was alright and then after a moment he helped Petitioner step down off of the milk crate. He testified that Petitioner appeared dizzy and reddened. He believed that Sergeant Rodriguez assisted in helping him carry Petitioner from the shower room to the break room. Officer Green agreed that he did not actually see Petitioner's body make initial contact with the wall, but when he looked up Petitioner's head and shoulders were leaning against the wall.

Sergeant Rodriguez testified that he was present standing just outside the shower room when Petitioner's accident occurred on November 1, 2013. Sergeant Rodriguez recalled seeing Petitioner standing on a milk crate and pulling items out of the ceiling. He testified that he saw the exposed wire protruding from the hole in the ceiling. Suddenly, "*there was like a pop and a giant spark flew, so I got out of the way.*" (T. 67) Sergeant Rodriguez testified that he ducked to the side of the door for a few seconds and when he looked back in he saw Petitioner "slumped" against the wall. On further questioning, he agreed that he actually saw Petitioner's neck and shoulder area against the wall. He testified that he asked Petitioner if he was alright and then he and Officer Green helped Petitioner out of the shower area to the break room. Sergeant Rodriguez recalled that Petitioner "didn't seem normal" after the accident.

Officer Green and Sergeant Rodriquez completed accident reports on November 1, 2013. The reports do not contradict the testimony at hearing. Sergeant Rodriquez's reports do not specifically mention that Petitioner fell back and struck the wall. (PX12, PX13) Officer Green's report states that "Officer Riley fell back and didn't look good." (PX14) Petitioner completed his accident report one day later on November 2, 2013. He reported that he was "zapped" by an electrical cable in the presence of Officer Green and Sergeant Rodriquez and that he injured his neck and his left shoulder, arm, and leg, and had tingling in the left hand. The report does not mention striking the wall or falling. The Arbitrator found it unbelievable that Petitioner would fail to mention that he struck the wall when he made his own report the day after the accident. We acknowledge the absence of a report of a fall in Petitioner's accident report. However, we also note that Petitioner's report is not the earliest subjective history of the mechanism of injury. Petitioner spent approximately 16 hours in Mt. Sinai Hospital before completing his accident report for Respondent, and we note Petitioner's history as recorded by several examining physicians over the course of his hospital stay.

Petitioner arrived via ambulance at Mt. Sinai Hospital before 8:00 p.m. The ER nurse took Petitioner's history of performing a search in the jail, standing on milk crates, and reaching his hand into the ceiling where he was electrocuted by loose wires. The ER nurse noted that Petitioner felt the shock from his head to his toes. The attending ER physician took Petitioner's history of having been electrocuted about one hour earlier, with current complaints of pain in the left arm, chest, and neck. The doctor noted "no fall." A cervical spine CT scan showed no acute abnormalities. Petitioner was admitted into the hospital for overnight testing and observation. The nursing notes show that Petitioner complained of pain and difficulty moving his left shoulder. He was treated with pain medication and muscle relaxers and placed in a left arm sling. Petitioner was reexamined by the resident physician at approximately 10:30 p.m. The resident physician noted that Petitioner was being kept

under observation after he presented with numbness in the body after electrical wires fell on him at work in Cook County Jail. The resident noted no obvious injury other than redness around the neck. An EKG, CT scan of the brain, and blood testing were all normal and Petitioner was not found to have any neurological deficits. The resident physician noted neck spasms and left shoulder pain.

Early in the morning of November 2, 2013, Petitioner was examined by an internal medicine physician. The doctor took Petitioner's history of a brief episode of jerking movements after shock from electric cables. Petitioner complained of left shoulder pain and the doctor recommended an orthopedic consultation to rule out dislocation. A left shoulder x-ray was performed and the report indicated no acute abnormalities. Petitioner was examined by an orthopedic surgeon prior to being discharged from the hospital. The orthopedic surgeon took Petitioner's history of sustaining electric shocks when an exposed wire came in contact with his head. The doctor further noted that Petitioner felt electricity through his left arm and fell backward against the wall but did not fall down. The doctor noted Petitioner did not remember the exact details. Petitioner complained of neck and left shoulder pain and numbness and tingling. On exam, the doctor noted limited abduction of the left shoulder and guarding due to pain. The doctor confirmed there was no facture or dislocation. He recommended Petitioner remain in a left arm sling and return to the orthopedic clinic in two weeks. Petitioner was discharged from the hospital just after 12:30 p.m. on November 2, 2013.

Petitioner followed up with his primary care physician, Dr. Pethkar, two days later on November 4, 2013. Dr. Pethkar took Petitioner's history of striking his head against the floor and the wall and having complaints of severe soreness and stiffness in his neck, difficulty walking, and numbness in his left arm. Dr. Pethkar concluded that Petitioner's symptoms were caused by the extensive electrical shocks he received during the accident and he took Petitioner off of work. We note that Dr. Pethkar's history mentioning Petitioner striking his head against the floor is not consistent with the rest of the evidence, including Petitioner's own testimony. However we do not find this inconsistency to be fatal to Petitioner's claim in light of all of the evidence.

We do not find that striking the wall alone caused Petitioner's injuries. Rather, we find that the entirety of the accident - the electrocution, jerking, the loss of balance and falling backward, striking the wall, is causally related to Petitioner's current condition of ill-being. The preponderance of the evidence shows that the accident caused the acute onset of Petitioner's neck and left arm symptoms. Consistent with the witnesses' testimony, the contemporaneous medical records provide a history that the Petitioner was shocked while reaching overhead and that he fell backward after being shocked. We find that this mechanism of injury is supported by the preponderance of the evidence.

We further address causal connection in light of our findings above. We find that the timing of and type of symptomatology that Petitioner developed immediately after the accident is consistent with the cervical condition treated by Dr. Mataragas with a fusion surgery on March 6, 2014. Petitioner was diagnosed with herniated discs at C4-5 and C5-6 and radiculopathy. After failing to obtain relief from a course of physical therapy and three epidural steroid injections Petitioner had surgery consisting of a C5-6 and C6-7 anterior cervical fusion with C6-7 hemi-corpectomy and anterior cervical osteotomy with the excision of herniated cervical discs. Dr. Mataragas testified that Petitioner gave him a history of being electrocuted and thrown against a wall on November 1, 2013. Dr. Mataragas testified that assuming Petitioner's history was truthful and also assuming that Petitioner had no prior neck and left shoulder pain, Dr. Mataragas would agree that the need for surgery was causally related to the accident. Dr. Mataragas was questioned regarding the November 1, 2013 ER records which are absent any mention of hitting the wall and the November 2, 2013 hospital records noting a fall against the wall. Dr. Mataragas testified that the two records were not necessarily inconsistent, however one was more detailed. Dr. Mataragas testified that either being jerked or striking the wall could disrupt cervical discs. (PX9, P. 32)

Dr. Troy, Respondent's §12 examiner and an orthopedic surgeon, opined that Petitioner's condition was degenerative rather than the result of trauma. He testified that he did not review any ER records indicating that there had been a fall. However, Dr. Troy admitted during his deposition testimony that causal connection was possible assuming that Petitioner had no prior treatment or symptoms and sustained the injury as described. Dr. Troy agreed that the surgery appeared to have vastly improved Petitioner's symptoms. He agreed that surgery was reasonable and necessary treatment in light of Petitioner's condition and presentation. (RX2, P. 57) Dr. Moisan, Respondent's other §12 examiner and an internal medicine physician, opined that Petitioner's underlying cervical spondylosis was transiently aggravated to the point where it became symptomatic as a result of the accident. Although Dr. Moisan believed that the aggravation was temporary, he agreed that the records did not show that Petitioner reported any relief of his symptoms. Dr. Moisan agreed that Petitioner's underlying cervical spondylosis would have made him more susceptible to injury. (RX3, P. 72) Dr. Moisan also agreed that the surgery was reasonable; however it was his opinion that the surgery addressed Petitioner's pre-existing multi-level cervical spondylosis (RX3, P. 74)

During the surgery on March 3, 2014, Dr. Mataragas confirmed the presence of herniated discs at C4-5 and C5-6, and that the herniations at these levels were producing mass effect upon the nerve roots especially on the left side. Even if Petitioner had some preexisting cervical degenerative disc disease, there is no evidence that he had any complaints of neck and left shoulder pain prior to November 1, 2013. We find that Petitioner's medical treatment was reasonable and necessary to treat or cure the effects of his work-related injury.

The evidence shows that Petitioner was not medically cleared by his physicians to return to work until he completed his treatment in June of 2014. Petitioner returned to his regular job duties on June 11. 2014. We find that Petitioner is entitled to temporary total disability benefits from November 2, 2013 through June 10, 2014.

We find that Petitioner sustained the 20% loss of use of the person as a whole under §8(d)2. Our findings on the issue of the nature and extent of the injury take into account the §8.1b factors for determination of permanent partial disability. With respect to the first factor, as the Arbitrator noted, neither party submitted medical evidence documenting an impairment rating and this factor is given no weight. Secondly, Petitioner is currently employed as a correctional officer for Respondent. The evidence shows that Petitioner was able to return to his regular job duties without restrictions. Third, Petitioner was 48-years-old at the time of the injury. No evidence was presented as to how the Petitioner's age might affect his disability. Fourth, no evidence suggests a diminishment in Petitioner's future earning capacity as a result of his injury. Petitioner testified that six months after he returned to work he applied for and subsequently obtained a transfer into inmate processing. Petitioner testified that as a correctional officer in inmate processing he is no longer required to do any lifting or perform any searches. He offered no evidence that his job transfer was related to his medical condition. Finally, we consider the evidence of disability corroborated by the treating medical records. On June 4, 2014, Dr. Mataragas's physician's assistant noted that Petitioner was feeling much better and was happy with the results of surgery although he was still working on regaining strength in his arm. After Petitioner's last physical therapy visit on June 18, 2014, the therapist noted that Petitioner had continued neck discomfort and fatigue, although he reported that he was stronger. Petitioner reported that he continued to wear his neck brace occasionally. We additionally note Dr. Troy's examination of Petitioner at the request of Respondent on October 23, 2014. Dr. Troy performed a physical examination and found Petitioner's strength to be 5/5 in all areas other than grip strength which was 4/5. Petitioner complained of pain radiating down both shoulders, his back, and down his left arm. Petitioner complained of weakness in his left arm and numbness in his fingers. It was Dr. Troy's opinion that Petitioner displayed some self-limiting behaviors. At arbitration on October 7, 2015, Petitioner testified that he still had residual pain in his neck and weakness in his left arm. He testified that he occasionally wears his cervical collar at night and he takes Advil or Aleve twice a day for pain. Based upon consideration of the above factors, the evidence supports and award of permanent partial disability equal to 20% loss of use of the person as a whole as provided in §8(d)2 of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $783.94 per week for a period of 31 4/7 weeks, from November 2, 2013 through June 10, 2014, 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 $705.55 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 20% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is ordered to pay medical expenses of $192,907.35 set forth in Petitioner's Exhibit 10 and pursuant to §8(a) and §8.2 of the Act.

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

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

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: FEB 2 3 2017
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