

12 WC 6426
15 IWCC 0163
Page 1
STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH WYSE,

Petitioner,

vs.

NO: 12 WC 6426
15 IWCC 0163

GSI TECHNOLOGIES, LLC.

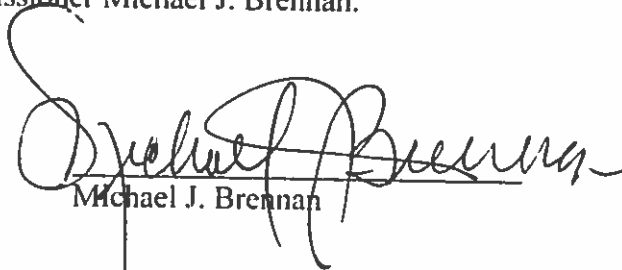
Respondent,

ORDER OF RECALL UNDER SECTION 19(f)

This cause comes before the Commission pursuant to Respondent's Motion to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission grants Respondent's 19(f) Motion and hereby recalls its Decision and Opinion on Review dated March 9, 2015 due to a clerical error contained therein.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated March 9, 2015, is hereby recalled pursuant to Section 19(f) of the Act and a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order. The parties should return their original Decision to Commissioner Michael J. Brennan.

DATED: APR 2 - 2015
MJB/tdm
052


Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify <input type="checkbox"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH WYSE,

Petitioner,

vs.

NO: 12 WC 6426
15 IWCC 0163

GSI TECHNOLOGIES, LLC,

Respondent.

CORRECTED 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 temporary total disability (TTD), penalties, and evidentiary rulings, 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. 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 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. Based on the totality of the evidence, the Commission finds that the Petitioner is entitled to TTD benefits from February 27, 2013 through August 28, 2013, and Section 19(l) penalties of \$1,020.00. All else is affirmed and adopted.

The facts establish that Petitioner returned to work on February 25, 2013 and worked part of the next day, February 26, 2013, before leaving due to pain. Petitioner presented to Dr. Thomas McGivney on February 26, 2013 complaining of pain. Dr. McGivney provided Mr. Wyse with restrictions of no lifting over 5 pounds, no repetitive or forceful grasping with the right arm, and no reaching or pushing or pulling with the right arm. The February 26, 2013 restrictions were more restrictive than the previous restrictions outlined in the January 23, 2013 FCE.

On March 4, 2013, Kelli Franks sent Petitioner an e-mail indicating that GSI Technologies could not accommodate the new restrictions. The Respondent obtained a Section 12 examination from Dr. Babak Lami on April 1, 2013. Dr. Lami found Petitioner to be at MMI and gave him no work restrictions.

Petitioner was then seen by Dr. Gregory Milani of Rush Copley on April 11, 2013. Petitioner was informed about the addictive/sedative nature of the medication and instructed not to “drink/drive/work” while taking medication. Petitioner reported that the pain interfered with his work. It was noted that secondary gains included a workers’ compensation claim. Petitioner was referred to pain management and physical therapy. Ms. Franks testified that the Respondent never consulted a doctor to see if Petitioner could perform his job duties without pain medication.

The Commission finds that the Respondent offered no plausible reason as to why TTD benefits were not paid effective February 27, 2013. The Respondent admitted, in its e-mail dated March 4, 2013, that they could not accommodate the new restrictions. They did not obtain a medical opinion disputing the reasonableness of the February 26, 2013 restrictions until April 1, 2013. The Respondent’s subjective belief that the February 26, 2013 restrictions were unreasonable is vexatious given the restrictions could not be accommodated and Respondent had no medical opinion to the contrary.

The Commission further finds the opinions of Dr. McGivney’s more persuasive than the opinion of Dr. Lami. Dr. McGivney’s opinion is supported by the opinions of all the other doctors and the medical evidence. The doctors have recommended continued medical treatment in an attempt to determine the cause of Petitioner’s ongoing symptoms including a cervical MRI to determine whether a non-union of the fusion exists.

The Commission, therefore, awards Petitioner TTD benefits from February 27, 2013 through August 28, 2013.

The Commission finds the non-payment of TTD benefits between February 27, 2013 and April 1, 2013 was unreasonable and vexatious. While the Respondent may have not agreed with the February 26, 2013 restrictions, they did not obtain a medical opinion disputing the

reasonableness of the restrictions until April 1, 2013 despite acknowledging on March 4, 2013 that they could not accommodate the restrictions. Therefore, the Commission awards Petitioner Section 19(l) penalties of \$1,020.00 for the non-payment of TTD benefits between February 27, 2013 and April 1, 2013. The Commission declines to award penalties pursuant to Section 19(k) and Section 16.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 29, 2014, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of \$567.51 per week for a period of 101 weeks, December 7, 2011 through December 16, 2011, April 25, 2012 through February 24, 2013, February 27, 2013 through August 28, 2013, and August 28, 2013 through March 24, 2014, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$8,070.53 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the prospective MRI and CT scans of the cervical spine pursuant to Section 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner additional compensation of \$1,020.00 as provided in Section 19(l) 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 \$38,800.00. 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:

APR 2 - 2015

MJB/tdm
O: 1-6-15
052



Michael J. Brennan



Thomas J. Tyrrell



Kevin W. Lamborn

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

WYSE, JOSEPH

Employee/Petitioner

Case# 12WC006426

GSI TECHNOLOGIES LLC

Employer/Respondent

15IWCC0163

On 4/29/2014, 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 0.45% 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:

2986 PAUL A COGHLAN & ASSOC PC
15 SPINNING WHEEL RD
SUITE 100
HINSDALE, IL 60521

2284 LAW OFFICES OF COZZI & GOGGIN-WARD
KATRINA ROBINSON
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Joseph Wyse
Employee/Petitioner

Case # 12 WC 6426

v.

Consolidated cases: _____

GSI Technologies LLC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Joshua Luskin**, Arbitrator of the Commission, in the city of Chicago, on **March 10, 2014 and March 24, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/7/2011**, 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 **\$44,265.60**; the average weekly wage was **\$851.26**.

On the date of accident, Petitioner was **37** 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 **\$27,726.92** for TTD, **\$.00** for TPD, **\$.00** for maintenance, and **\$.00** for other benefits, for a total credit of **\$27,726.92**.

Respondent is entitled to a credit of **\$.00** under Section 8(j) of the Act.

ORDER

See attached decision.

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 Joshua Luskin

25 April 2014
Date

ICArbDec19(b)

APR 29 2014

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOSEPH K. WYSE,)

Petitioner,)

vs.)

GSI TECHNOLOGIES, LLC,)

Respondent.)

No. 12 WC 06426

15IWCC0163

ADDENDUM TO ARBITRATION DECISION

This matter was heard pursuant to Sections 8(a) and 19(b) of the Act.

STATEMENT OF FACTS

The petitioner, 37 years old on the accident date of December 7, 2011, has been a press operator since the age of 18. He worked for the respondent for approximately six years before the date of loss. On December 7, 2011, he injured his neck while moving dies and performing an inventory check. He reported the injury to his supervisor. Accident and notice were not disputed.

On December 7, 2011, the petitioner presented to his family physician at Rush-Copley Medical Center. He reported a history of a work accident a week prior to that point with worsening pain since, which had become severe two days before with burning into the right shoulder. X-rays were normal. He was prescribed muscle relaxants, no heavy lifting and physical therapy. On December 16, 2011, he reported improved pain and was diagnosed with a resolving trapezius and cervical strain. He was released to work at his request. See PX3.

On January 24, 2012, he presented to Dr. McGiveny at Castle Orthopedics. He described pain over the last two months following several days of moving boxes during an inventory process. He reported pain radiating down the right arm into the hand. Dr. McGiveny recommended an MRI and physical therapy. PX3.

On February 2, 2012, a cervical MRI demonstrated disk dessication and spondylosis at C5-6 with an associated right-sided disk protrusion, and a small central herniation at C4-5 without cord effacement or stenosis. See PX3.

On March 5, 2012, Dr. McGiveny reviewed the MRI and noted the C5-6 disk. He noted some relief of symptoms and recommended pain injections; Dr. McGiveny advised

he did not think the petitioner was presently a surgical candidate. PX3, PX5.

On March 19, 2012, the petitioner was discharged from physical therapy with instructions to follow up with Dr. McGivney. PX5.

On March 27, 2012, the petitioner presented at Fox Valley Pain Management. He received a cervical epidural steroidal injection that day. PX4.

On April 25, 2012, Dr. McGivney saw the petitioner, who reported no relief from the injection. Dr. McGivney prescribed him off work for three weeks and renewed his physical therapy prescription. Dr. McGivney noted that if symptoms persisted he would recommend fusion at C5-6. Dr. McGivney renewed those recommendations on May 15, 2012. The petitioner began another course of physical therapy thereafter. See PX5.

On June 19, 2012, the petitioner saw Dr. McGivney, who recommended four additional weeks of physical therapy. Dr. McGivney recommended fusion from C5 through C7 absent improvement in physical therapy; it is not clear why the additional level was recommended at this time. PX5.

On August 1, 2012, the petitioner returned to Dr. McGivney with persistent complaints and Dr. McGivney recommended surgery. The petitioner reported that he was scheduled to go to court and Dr. McGivney noted there were some dates of service that had been paid for by workers' comp and some dates paid by the petitioner's group health provider. Dr. McGivney maintained the claimant off work pending surgery. PX5.

On August 21, 2012, the petitioner presented for a pre-surgical appointment with Dr. McGivney. He was noted to be scheduled for surgery at the C5-6 level only. PX5.

The petitioner underwent anterior C5-6 fusion surgery on August 29, 2012. No complications were noted. On September 4, 2012, Dr. McGivney noted good placement of the hardware and the petitioner was prescribed off work pending follow-up.

On September 25, 2012, Dr. McGivney noted the petitioner was "doing pretty well" and prescribed physical therapy, which began that day. See PX5. On October 2, 2012, the petitioner contacted his physician requesting a crossbow permit form for hunting purposes, which required a physician signature. PX5. The petitioner underwent physical therapy thereafter. PX5.

On October 23, 2012, the petitioner followed up with Dr. McGivney. X-rays showed the hardware in good position. Dr. McGivney maintained him in physical therapy. PX5. On November 20, 2012, the petitioner told Dr. McGivney that he had difficulty with weight and Dr. McGivney opined "I think at this point it is time to push him" and that "at 10 weeks, he is really exceeding the time frame that I had put on for him." Dr. McGivney recommended a work conditioning program and an FCE. PX5.

The petitioner entered a work conditioning program on November 26, 2012.

PX5. On November 30, he called Dr. McGiveny complaining of more pain, now radiating down the left arm rather than the right; Dr. McGiveny prescribed the petitioner additional medication. PX5.

On December 18, 2012, Dr. McGiveny saw the petitioner, who complained of left neck muscle cramps and additional pain in the right arm. Dr. McGiveny opined the left neck "is unrelated to anything we were dealing with" and that the right hand symptoms were "all non-physiological findings from a cervical disk" but noted the petitioner was concerned of "another disk going bad." Dr. McGiveny opined he could not explain the pain from a physiological standpoint as the x-rays looked solid with no pathology. He prescribed a new MRI to ensure nothing was being missed in the neck. See PX5.

The MRI was performed on January 8, 2013. It demonstrated the C5-6 fusion. C6 through T3 were normal. At C4-5 there was a "very small" central protrusion with no canal or foraminal stenosis. A very small syrinx was noted which had decreased in diameter compared to the presurgical MRI. PX5, RX6. Dr. McGiveny reviewed the MRI on January 11, 2013 and noted no new disk pathology, concluding that the symptoms were muscular only. In his report of January 15, 2013, Dr. McGiveny noted the MRI was normal and did not agree with the interpretation of the C4-5 bulge. Dr. McGiveny opined he did not have any objective evidence to correlate the petitioner's subjective symptoms and referred him for a FCE, noting the petitioner would likely be discharged thereafter. PX5, RX6.

The petitioner underwent the FCE on January 23 and 30, 2013. The petitioner ceased participation during the first day due to pain complaints, and the FCE was positive for multiple Waddell's non-organic signs and symptom magnification. The petitioner was rated at between light and medium physical work levels; however, the petitioner subjectively rated his ability to work as "none." See PX5, PX6, RX2. The petitioner testified he was taking prescription pain medication when he underwent the FCE, and therefore the FCE only revealed what he could do while on his pain medication, which is why his restrictions were later reduced below the FCE level; however, the medical records reveal that he was not taking pain medication at the time of the FCE. PX5.

On February 7, 2013, Dr. McGiveny saw the petitioner and reviewed the FCE. He opined the petitioner would not benefit from therapy and suggested possible job retraining given the restrictions on the FCE (20 pounds overhead, 37 pounds floor to waist, occasional carrying 20 to 50 pounds). He believed there was nothing left he could recommend and placed the petitioner at MMI at that time. PX5, RX6. He later faxed the FCE restrictions to the respondent on February 18, noting those would be the petitioner's prescribed restrictions. PX5, RX6.

On February 26, 2013, the petitioner presented to Dr. McGiveny complaining of increased pain after returning to work; Dr. McGiveny wrote a new work restriction note for the petitioner, reducing him to five pounds lifting and no use of the right arm or hand. He opined the petitioner might benefit from a pain specialist but physical therapy and work conditioning would not be of benefit. PX5, RX6.

The petitioner returned to work for the respondent on February 25, 2013. He underwent sedentary safety training that day. RX8. On February 26, 2013, he worked for approximately two hours in the morning, then complained of pain and left. He has not worked for the respondent since.

On April 1, 2013, the petitioner was seen for a Section 12 examination by Dr. Lami, who had previously seen the petitioner on August 1, 2012, prior to the fusion surgery. No sign of muscle atrophy was present and reflexes were symmetric. Following examination, Dr. Lami noted the postoperative MRI was benign and the x-rays showed no pathology. Dr. Lami noted signs of symptom magnification on the FCE and noted the petitioner complained of pain in the right arm in a non-anatomic distribution which did not correlate to any objective findings. He concluded the petitioner was at maximum medical improvement and could work at his regular job. He did not believe further medical care was required. See RX3.

On April 11, 2013, the petitioner presented to his primary care physician, Dr. Milani at Rush-Copely, with persistent neck pain. Dr. Milani recommended a diagnostic EMG test and referred the petitioner for a pain management consultation. PX3.

On May 13, 2013, the petitioner saw Dr. McGiveny again. Dr. McGiveny noted he did not have the results from the EMG, but spoke to the physician who performed the EMG, "who did not find much of anything." RX6. Dr. McGiveny spoke with the patient at length and noted "I think there are definitely secondary issues going on with Joe." He opined the other disk was not causing the symptoms of which the petitioner complained, that he did not feel any further surgery would be of benefit, and suggested the petitioner seek another opinion. See RX6.

On June 5, 2013, the petitioner saw Dr. Ruban, a neurosurgeon, on referral from his family physician. The petitioner asserted there had been no change in his symptoms from before the surgery. Dr. Ruban reviewed the MRI, opined the instrumentation appeared to be in good position, and noted that while there was a small bulging disk above the fusion, it was not causing any stenosis. Dr. Ruban noted the EMG suggested a mild C6 radiculopathy on the left side. Dr. Ruban opined that the pain asserted by the petitioner was not coming from the cervical spine, that the MRI was unremarkable, and recommended against further intervention for the neck. He suggested consideration of a pain specialist or a rheumatologist for evaluation, as "I do not see any anatomic explanation for [the pain] at least on the basis of his cervical MRI." RX6.

On August 22, 2013, the petitioner sought another neurosurgical assessment, with Dr. Erickson. The petitioner reported bilateral hand paresthesias and pain in the forearm. Dr. Erickson noted the fusion appeared solid on the MRI and opined the petitioner might be suffering from RSD. He recommended against surgery as the C4-5 disk appeared small and the C6-7 disk did not show any significant disruption. RX6.

The respondent terminated the petitioner on August 28, 2013. RX10.

On October 31, 2013, the petitioner underwent a cervical spine MRI without contrast. It noted mild disk degeneration at C4-5 without significant canal stenosis or foraminal narrowing. The C6-7 level was assessed as benign. RX6.

On January 28, 2014, the petitioner saw Dr. Sheri Dewan, Dr. Erickson's colleague. She reviewed the October 31, 2013 MRI and noted mild degeneration at C4-5 and C6-7 without stenosis, but with a possible syrinx at the C-6 level. She recommended another cervical MRI, this time with contrast, and a CT of the cervical spine to evaluate possible nonunion of the fusion. She prescribed the petitioner off work, instructed him to cease hydrocodone, and told him to follow up after the imaging studies. See PX2.

The respondent had originally disputed the MRI and CT scans as not medically necessary pursuant to a utilization review. See RX4, RX5. However, following appeal of that finding, the utilization review reversed its position and the respondent agreed to authorize the cervical MRI and CT scans. See PX10, RX14.

ANALYSIS

On February 26, 2013, the petitioner apparently worked with Eric Knack, and the petitioner's job duties that day were a matter of some dispute, as the petitioner asserted to Dr. McGiveny that his restrictions had been exceeded. Mr. Knack did not testify; the respondent introduced printouts of the petitioner's Facebook posts which show an Eric Knack plays in a musical band with the petitioner away from work (see RX11, pp. 4, 12). The Arbitrator concludes this is the same person.

The respondent's HR Manager, Kelli Frank, testified she had requested that the petitioner bring in prescription medication so she could review what restrictions on his activities might be needed based on it. The petitioner admitted he never gave it to her.

The petitioner's Facebook posts further show him to be capable of using his right arm to lifting and holding in excess of five pounds without apparent difficulty. See RX11, pp 3, 10. While he made assertions of inability to drive at trial, he acknowledged driving to band practices during his testimony and admitted that no doctor prescribed him unable to drive. The petitioner testified he lives with his parents in Wedron, Illinois. He asserted that this is based in part on the financial and medical burdens from his case and that the increased driving based on that caused him difficulty. However, documents showed he actually moved in with his parents a year before the injury occurred. RX12. The petitioner then testified that moving had nothing to do with the work accident, but he had remained there because of the litigation and post-surgical difficulties. The Arbitrator finds his earlier testimony to be deliberately misleading.

The petitioner further testified that his symptoms never really abated following surgery and that the first few weeks were especially hard. The Arbitrator finds this testimony at the very least inconsistent with the petitioner's request for a hunting permit

on October 2, barely five weeks postoperatively. At worst, it is further evidence of a deliberate attempt to exaggerate his disability or engage in deception. This is entirely in line with Dr. McGiveny's assessment of the claimant's motives of secondary gain.

The respondent sent multiple documents to the petitioner, some of which were overtures of light duty work availability, others were FMLA and insurance information, and others of which were offers of job severance agreements. See PX11, RX10. The Arbitrator has considered each of these letters as well as the respective counsels' arguments towards how they should be interpreted. The petitioner did not act with any motivation towards any of the possibilities of a return to work; he asserted that he did not understand the offers. While the jobs were not well detailed, the petitioner did not act in good faith to clarify them, such as by presenting to observe the potential duties. He asserts that he wanted to go through his attorney, but did not actually attempt to take the respondent up on potential offers of light duty work. The Arbitrator does not find the respondent's actions deceptive or malicious, but rather due to understandable frustration.

The Arbitrator has fully considered the medical records as well as the substance and manner of the petitioner's testimony. The petitioner has demonstrated a serious lack of motivation towards a return to work and his own physicians have repeatedly noted a lack of clinical or objective evidence to substantiate his complaints. The petitioner asserted to Dr. Lami in 2013 that he could not hunt, but had sought a crossbow permit at the beginning of bow hunting season following the surgery. The Arbitrator notes multiple instances where the petitioner demonstrated a lack of forthrightness in his testimony, such as his assertion of using pain medication at the time of the FCE and his assertion of driving difficulties. The Arbitrator finds the petitioner has a serious credibility deficit. This informs the Arbitrator as to all issues in dispute.

OPINION AND ORDER REGARDING DISPUTED ISSUES

Causal Connection to the Injury

A claimant has the burden of proving by the preponderance of credible evidence all elements of the claim. *See, e.g., Parro v. Industrial Commission*, 260 Ill.App.3d 551, 553 (1993). While the initial accident was not disputed, and there appears to be a general consensus that the 2012 fusion surgery was causally related to the injury, the credibility of any residual complaints is highly suspect. The claimant's own doctors have advised that they cannot relate the extent of the ongoing description of symptoms to the observed pathology. While the right to recover benefits cannot rest upon speculation or conjecture (see *County of Cook v. Industrial Commission*, 68 Ill.2d 24 (1977)) a casual relationship to the cervical spine and the original fusion surgery, at least, has been established. Causation to any other condition does not appear to have been so established, but requested additional benefits at this time based on the fusion surgery will be addressed in each individual section, below.

Medical Benefits Pursuant To Section 8(a)

In accordance with the causal assessment above, and supported by the medical records and reports, the petitioner has established that the medical bills contained in PX1 are reasonable and causally related to the injury. The majority of the medical costs have already been satisfied. The respondent is directed to satisfy the remaining \$6,897.22 in outstanding medical bills and reimburse the claimant for \$1,173.31 in out of pocket expenses, all subject to the limits of Sections 8(a) and 8.2 of the Act; the Arbitrator notes the largest single outstanding expense is Castle Orthopedics, to whom substantial sums were already paid by the WC provider, and may represent fees exceeding the fee schedule, which should be eliminated. The respondent shall receive credit for any and all amounts previously paid, but shall hold the petitioner harmless, pursuant to 8(j) of the Act, for any group health carrier reimbursement requests for such payments.

Prospectively, the respondent shall authorize and pay for the prospective MRI and CT scans of the cervical spine within the limits of Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

The respondent submits the petitioner would be eligible for TTD only from April 25, 2012, through February 24, 2013. The petitioner submits for TTD eligibility for various individual dates in 2011 and 2012, as well as April 24, 2012 through February 24, 2013, and requests TTD from February 26, 2013 through March 24, 2014 (trial). See generally Arb.Ex.I.

The petitioner has substantiated TTD eligibility from December 7 through 16, 2011, and the Arbitrator awards this period.

The various individual dates in March 2012 as well as April 14, 2012, do not appear sufficiently corroborated by the credible medical records and are further contradicted by the petitioner's earning statement (RX13). Those are denied.

The petitioner was prescribed off work by Dr. McGiveny on April 25, 2012, and was released on February 24, 2013; this period is stipulated to and is awarded.

The petitioner worked the morning of February 26, 2013, and then returned to Dr. McGiveny. At that time, the petitioner's restrictions were significantly tightened despite no apparent change in his medical condition. Moreover, while Dr. McGiveny appears to base these restrictions on the petitioner's subjective complaints, he himself noted there was no objective evidence to substantiate those, and that the petitioner had motives of secondary gain. The Arbitrator views these restrictions very skeptically and further believes that the work offered at that time by the respondent was in good faith. The petitioner never followed up with regard to the overtures, though nebulous, of further employment as an evaluator which could have accommodated even more limited restrictions than the FCE would have emplaced. Dr. Lami is likely correct in his

assessment that the petitioner, from a purely physically objective point of view, would presently be capable of working his regular job, and that the current restrictions are more probably due to the claimant's subjective limitations. However, the Arbitrator concurs with Dr. Dewan that the objective evaluations to ensure that the fusion has solidified would be required before making a conclusive determination. As such, the petitioner cannot be reliably assessed at maximum medical improvement.

The respondent elected to terminate the claimant as of August 28, 2013. Despite the possibility that the claimant requires no further invasive care or therapy, and further despite the aforementioned lack of motivation and credibility of the claimant, he is not yet at MMI. As such, this case falls within the holding of *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 266 Ill.2d 132, 923 N.E.2d 266 (2010). The Arbitrator is left with no option but to award TTD from August 28, 2013, through the date of hearing, March 24, 2014.

In sum, the petitioner is entitled to TTD for 525 days, or 75 weeks. At the appropriate TTD rate of \$567.51, a total liability of \$42,563.25 results. Against this amount the respondent shall have credit for \$27,726.92 previously paid, resulting in present liability of \$14,836.33.

Penalties and Fees

The Illinois Supreme Court has long recognized the imposition of penalties is a question to be considered in terms of reasonableness. *Avon Products, Inc. v. Industrial Commission*, 82 Ill.2d 297 (1980); *Smith v. Industrial Commission*, 170 Ill.App.3d 626 (3rd Dist. 1988). In the *Avon* case, the Court looked to Larson on Workmen's Compensation for guidance, noting that penalties for delayed payment are not intended to inhibit contests of liability or appeals by employers who honestly believe an employee is not entitled to compensation. 3 A. Larson, Workmen's Compensation sec 83.40 (1980). In addition, when the employer acts in reliance upon responsible medical opinion, or where there are conflicting medical opinions, penalties are not ordinarily imposed. 3 A. Larson, Workmen's Compensation sec 83.40, at 15 - 636 (1980).

The respondent questioned a serious increase in the level of restricted activity despite no objective rationale for it and immediately secured a Section 12 evaluation. The Arbitrator believes the respondent's dispute was within the bounds of reasonableness and was not vexatious in its character. Penalties and fees are denied.

STATE OF ILLINOIS)
) SS
COUNTY OF EDGAR)

BEFORE THE ILLINOIS WORKERS'
COMPENSATION COMMISSION

Don Young,
Petitioner,

vs.

No. 10 WC 20979
14 IWCC 1070

Doncasters, d/b/a MECO,
Respondent.

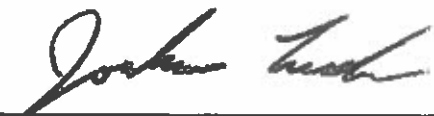
ORDER

Motion to Recall pursuant to Section 19(f) of the Act was filed by the Petitioner on December 26, 2014. The Commission finds that a clerical error exists in its Decision and Opinion on Review dated December 10, 2014, in the above captioned.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated December 10, 2014 is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein.

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

DATED: APR 6 - 2015



Joshua D. Luskin

jdl/wj
68

STATE OF ILLINOIS)
) SS.
COUNTY OF EDGAR)

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse <input type="text" value="Choose reason"/>	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify <input type="text" value="Choose direction"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Don Young,
Petitioner,

vs.

No. 10 WC 20979
14 IWCC 1070

Doncasters, d/b/a MECO,
Respondent.

CORRECTED DECISION AND OPINION ON REMAND
FROM THE APPELLATE COURT

This case appears on Remand from the Appellate Court, Fourth District, which reversed the Commission's denial of Petitioner's claim and remanded the matter to the Workers' Compensation Commission for further proceedings. Petitioner filed his Application for Adjustment of Claim, alleging a work-related injury to his left shoulder, on February 19, 2010. The case was tried before Arbitrator Stephen Mathis on August 25, 2011 in Mattoon, Illinois. On November 23, 2011, Arbitrator Mathis entered his Decision, finding that the accident did not arise out of Petitioner's employment with Respondent and denying all benefits. Petitioner appealed the Arbitrator's Decision to the Commission, and on October 29, 2012, the Commission majority affirmed and adopted the Arbitrator's Decision. On May 13, 2013, the Circuit Court of Edgar County confirmed the Commission's Decision, denying all benefits. Petitioner timely appealed to the Appellate Court, which reversed the Circuit Court and remanded the matter to the Commission for further findings.

Findings of Fact and Conclusions of Law

At arbitration, Petitioner testified he worked as a parts inspector for Respondent, ensuring that the parts met specifications, completing paperwork, placing the parts into appropriate containers, and entering data in a computer. The number of parts he inspected each day and their sizes and weights varied according to the order. Petitioner testified that on Friday, February 19, 2010, he was reaching into a box "about 36 inches deep or more and 16 by 16" to remove a "spring clip" for inspection. The clips were made of stainless steel formed into a semi-cone and weighed between 12 and 20 pounds. Petitioner testified that he had to "bend over into the box" and "reach down deep into it to retrieve" the last part for inspection. He could not fit both shoulders into the box at the same time, and he injured his left shoulder.

Petitioner noticed some slight pain in his left shoulder, but continued to work the remainder of his shift. By evening, his arm began hurting "quite a bit," and his condition worsened over the weekend. On Monday, he returned to work, but noticed a lack of mobility in his left shoulder. He testified that he had experienced no prior problems with his left shoulder, although he had injured his right shoulder while working for a different employer.

Prior to Arbitration, Respondent asked Petitioner to reenact his accident, and Petitioner was photographed as he demonstrated how he had reached into the box. Petitioner introduced the February 25, 2010 photo showing how he had bent over to reach the spring clip from the box, and the photo was part of an "Accident & Counter Measure Report" prepared by Respondent. Respondent listed the cause of Petitioner's accident as "over extended reaching limits."

Petitioner sought medical treatment on February 25, 2010 from Dr. Leland Phipps, Respondent's company doctor. Dr. Phipps noted that Petitioner was injured when he "stretched extra" while reaching into a box and felt a pop in his shoulder. Dr. Phipps ordered x-rays and returned Petitioner to work with the restriction that he not raise his arm above shoulder level. Petitioner testified that Respondent did not modify his job duties and he could not perform his job as he normally would, due to his slower pace and need to rely on co-workers for assistance in lifting large objects. Dr. Phipps ordered physical therapy and an MRI. On April 8, 2010, the doctor noted that the MRI showed a small tear in the supraspinatus and referred Petitioner to Dr. Louis Angelicchio at Sports Medicine Institute of Indiana.

On April 20, 2010, Dr. Angelicchio noted that Petitioner was injured while overstretching his left arm and shoulder reaching into a box. Petitioner's MRI was "consistent with a partial thickness tear of the rotator cuff, degenerative changes at the AC joint, subacromial bursitis, and some mild degenerative changes." Dr. Angelicchio recommended surgery.

Dr. James Kohlmann performed a Section 12 examination for Respondent on July 15, 2010. Petitioner again explained the mechanism of his injury as reaching down into a box to retrieve a part for inspection. Dr. Kohlmann concluded that Petitioner had significant degenerative changes in his left shoulder that may have been asymptomatic prior to his work accident and that the injury Petitioner described substantially aggravated his pre-existing and asymptomatic shoulder arthritis and bursitis. The doctor agreed with Dr. Angelicchio's recommendation of surgery.

Petitioner testified that he decided to treat with Dr. Kohlmann due to insurance coverage issues. Dr. Kohlmann performed left shoulder surgery on October 1, 2010 to address Petitioner's AC joint arthritis, full-thickness rotator cuff tear, and supraspinatus tendon bursitis. Following surgery, Petitioner performed physical therapy and followed up with Dr. Kohlmann, who released him to return to work full duty in January 2011.

This matter was tried before Arbitrator Stephen Mathis in Mattoon, Illinois on August 25, 2011. Arbitrator Mathis entered his Decision on November 23, 2011, denying all benefits for Petitioner's failure to prove that he suffered an accident that arose out of his employment with Respondent. The Arbitrator found that merely reaching down is an activity of daily living; he

found no increased risk of injury peculiar to Petitioner's job duties or created by his employment. Arbitrator Mathis concluded that "[t]he chronology of Petitioner's left shoulder problem was more consistent with natural degeneration rather than the result of any acute event."

On November 9, 2012, the Commission, with a dissent by Commissioner Tyrrell, affirmed and adopted the Arbitrator's Decision, but struck the line cited above based on the absence of medical opinions supporting a finding that Petitioner's condition was merely degenerative. The Circuit Court of Edgar County confirmed the Commission Decision on May 13, 2013, and Petitioner timely appealed to the Appellate Court.

The Appellate Court filed its Decision on July 7, 2014, reversing the Circuit Court's judgment and remanding the matter to the Commission for further proceedings consistent with its ruling. The Court determined that Petitioner's injury arose out of an employment-related risk and was compensable, based upon its finding that the "evidence unequivocally shows claimant was performing acts that the employer might reasonably have expected him to perform so that he could fulfill his assigned duties on the day in question." The Court further determined that the Commission erred in applying standards related to a neutral risk. The Appellate Court found that the risk encountered by Petitioner here was not a neutral risk, but an employment-related risk. The test to be applied, therefore, was not the "greater risk than the general public" applied to neutral risks. The Court found Petitioner was exposed to a risk distinctly associated with the claimant's employment as he was "performing acts the employer might reasonably have expected him to perform incident to his assigned duties and, as a result, his injury arose out of his work for the employer." The Court deemed Petitioner's reaching into the box as an act that was "incidental to the fulfillment of his job-related duties." The Court concluded that "[a]lthough the act of 'reaching' is one performed by the general public on a daily basis, the evidence in this case established the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury."

The Court found its decision in this matter consistent with its holding in *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, par. 19, 990 N.E.2d 901. In *Autumn Accolade*, the claimant was a caregiver at an assisted living facility who injured her cervical spine while assisting a resident in the shower. The claimant extended her left arm to remove a soap dish that was causing suds to accumulate in the shower. As she held the resident with her right arm and removed the soap dish with her left, she felt a pop in her neck and pain travel down her right arm. The Court found that the claimant was engaged in an activity she might reasonably be expected to perform incidental to her assigned duties and concluded that her injury was compensable under the Act.

Pursuant to the instructions of the Appellate Court in its review of this case, the Commission finds that Petitioner proved that his injury arose out of and in the course of his employment. Petitioner seeks related temporary total disability, medical expenses, and permanent partial disability benefits.

TTD. Prior to the Arbitration Hearing on August 25, 2011, the parties stipulated to Petitioner's average weekly wage of \$595.28, which yields a temporary total disability rate of \$396.85, and to the period of temporary total disability from October 1, 2010 through November 22, 2010, or 7-3/7 weeks. Accordingly, Respondent is ordered to pay Petitioner \$2,948.03 in temporary total disability benefits. Respondent is given credit for all amounts paid.

Medical Expenses. On the Request for Hearing filed prior to the Arbitration Hearing on August 25, 2011, Petitioner alleged outstanding medical expenses of \$35,501.52. Arbitrator's Exhibit 1 attachment. The attachment, which also appears in Petitioner's Exhibit 6, revealed that Respondent had paid all of Petitioner's medical bills except for October 1, 2010 charges from Provena Covenant Medical Center associated with Petitioner's surgery on that date and charges for his pre-operative tests and post-operative physical therapy. Respondent did pay Dr. Kohlmann's bills associated with that surgery, and Petitioner's group health carrier, Tri-Care, paid Paris Community Hospital's charges for Petitioner's pre- and post-operative medical care, including physical therapy.

Respondent claimed no credit under Section 8(j) for medical benefits paid by Petitioner's group health insurer, Tri-Care. Therefore, no credit is awarded for those payments.

The Commission further notes that Respondent raised no objection to the reasonableness and necessity of the shoulder surgery and post-operative treatment. Its only objection to liability was its argument that no compensable accident had occurred. Dr. Kohlmann, who performed a Section 12 exam at Respondent's request, found Petitioner's condition to be causally related to his February 19, 2010 accident and further found surgery to be reasonable and necessary to relieve Petitioner from the effects of his work injury. The Commission finds that Petitioner's medical expenses as submitted in evidence were reasonable and necessary.

Pursuant to the Appellate Court's instructions, the Commission orders Respondent to pay all reasonable and necessary medical expenses, as documented in Petitioner's Exhibit 6. Respondent is to receive credit for all payments made on its behalf.

Permanent Partial Disability. Petitioner testified that he still suffers a small amount of pain in his shoulder and is unable to reach for things in the same way he did before his injury. However, his complaints were not sufficient to require additional treatment. He did undergo arthroscopic surgery to repair his full thickness rotator cuff tear, an anterior acromioplasty, and open distal clavicle resection, as well as post-operative physical therapy. Following his surgery on October 1, 2010, Petitioner experienced some residual pain complaints and reported hearing snapping and popping sounds in his shoulder. Dr. Kohlmann diagnosed him with incompletely resolved bursitis on January 27, 2011, his last appointment before his arbitration hearing on August 25, 2011.

Petitioner testified that prior to this accident, he had a work restriction limiting lifting to 25 pounds. He testified that because Respondent had a policy of no workers lifting more than that amount, he was able to work full duty. Following his shoulder surgery, Petitioner returned to work again at full duty. Based upon the foregoing, the Commission finds that Petitioner suffered a loss of use of 10% of the person as a whole as a result of his January 29, 2010 work-related accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses documented in Petitioner's Ex. 6, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$396.85 per week for a period of 7-3/7 weeks, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

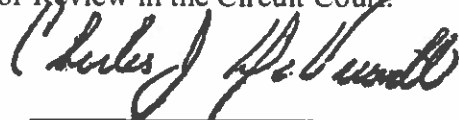
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$357.17 per week for a period of 50 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 10% of the person-as-a-whole.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$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 the Circuit Court.

DATED: APR 6 - 2015



Charles J. DeVriendt

o-12/02/14
drd/dak
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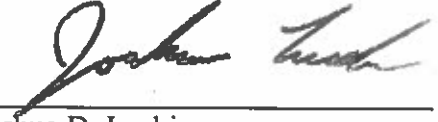


Ruth W. White

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on 12/02/2014 before a three member panel of the Commission including members Dan Donohoo, Charles DeVriendt and Ruth White, at which time Oral Arguments were heard. Subsequent to Oral Arguments and prior to the departure of member Dan Donohoo on 2/23/2015, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued while former member Dan Donohoo still held his appointment.

Although I was not a member of the panel in question at the time Oral Arguments were heard, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how the departing member voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.



Joshua D. Luskin

STATE OF ILLINOIS)
) SS.
COUNTY OF)
 WILLIAMSON

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Kingston,

 Petitioner,

vs.

NO: 12 WC 11232

Wal-Mart,

 Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission finds that a clerical error exists in its Decision and Opinion on Review dated February 26, 2015, in the above captioned.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated February 26, 2015, is hereby vacated and recalled pursuant to Section 19(f) for clerical error contained therein.

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

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: APR 8 - 2015
TJT:yl


Thomas J. Tyrrell

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLAMSON)

<input checked="" type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse <input type="text" value="Choose reason"/>	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify <input type="text" value="Choose direction"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Kingston,
Petitioner,

vs.

NO: 12 WC 11232
15 IWCC 149

Wal-Mart,
Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, 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 June 9, 2014, is hereby affirmed and adopted.

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

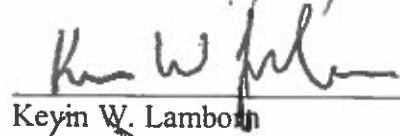
IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of \$40,900.00. 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:
TJT:yl
o 2/17/15
51

APR 8 - 2015


Thomas J. Tyrrell


Kevin W. Lamborn


Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GUSTON, MARK

Employee/Petitioner

Case# 12WC011232

WAL-MART

Employer/Respondent

15 IWCC0149

On 6/9/2014, 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:

5236 CULLEY FEIST KUPPART & TAYLOR
KREIG B TAYLOR
617 E CHURCH ST SUITE 1
HARRISBURG, IL 62946

0560 WIEDNER & McAULIFFE LTD
MATTHEW J ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CLAYTON, MO 63105

STATE OF ILLINOIS)
)SS.
 COUNTY OF WILLIAMSON)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
 ARBITRATION DECISION

Case # 12 WC 11232

MARK KINGSTON
 Employee/Petitioner
 v.
WAL-MART
 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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **April 2, 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 February 1, 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 \$19,416.89; the average weekly wage was \$373.40.

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

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

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

Respondent shall be given a credit of \$895.70 for TTD, \$0 for TPD, \$0 for maintenance, and \$0 for other benefits, for a total credit of \$895.70. (This credit is not applied toward the TTD award below – see Memorandum of Decision of Arbitrator).

Respondent is entitled to a credit of \$26,638.79 under Section 8(j) of the Act.

ORDER

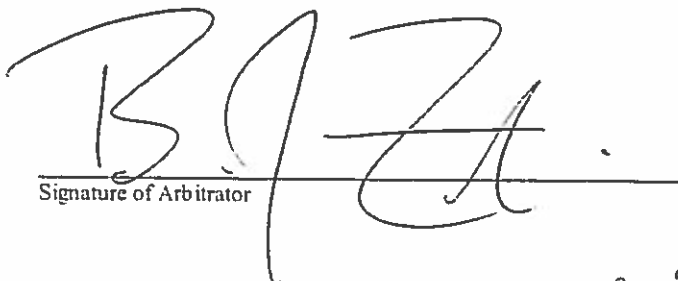
Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 15 and as provided in Sections 8(a) and 8.2 of the Act. Respondent shall have all applicable credit pursuant to Section 8(j) of the Act (as noted above).

Respondent shall pay Petitioner temporary total disability benefits of \$248.93 for 12 3/7 weeks, commencing September 17, 2012 through December 12, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of \$224.04/week for 50 weeks, because the injuries sustained caused the 10% loss of use to the body as a whole as provided in Section 8(d)2 of the Act.

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

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


Signature of Arbitrator

05/29/2014
Date

JUN 9 - 2014

1517000149

STATE OF ILLINOIS)
)SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MARK KINGSTON
Employee/Petitioner

Case # 12 WC 11232

v.

WAL-MART
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

On February 1, 2012, Petitioner, Mark Kingston, was employed as an inventory management employee for Respondent, Wal-Mart. On that date between the time of approximately 1:00-1:30 a.m., Petitioner claims he injured his left shoulder while performing his regular work duties. Petitioner testified that he was in the storage area of Respondent's Harrisburg, Illinois facility and on a ladder when the accident took place. Petitioner testified that while on the ladder he was reaching into a box of candy, which was on an upper shelf and which required him to reach across his body and above his head. Petitioner also testified that the box in which he was reaching in to retrieve the candy items was closed with the flaps down. Petitioner testified that immediately after reaching into said box, he felt a sudden and intense pain his left shoulder. Hoping that the pain would alleviate itself, Petitioner continued working until his lunch break at around 2:00 a.m. After finishing lunch and still continuing to have pain in his shoulder, Petitioner notified the onsite supervisor of his accident and completed accident forms. Petitioner finished out his shift on the date of the accident.

Following this incident, Petitioner sought treatment from his primary care physicians at the Primary Care Group in Harrisburg on February 2, 2012. The office note from the February 2, 2012 visit indicates that Petitioner reported an injury while on a ladder at work the day before at around 1:00 a.m. when he was reaching to get a box. He also reported his shoulder pain increased significantly following the accident. (Petitioner's Exhibit (PX) 1). Petitioner was treated conservatively with pain medications and physical therapy and was kept off of work. (PX 1; PX 2).

Petitioner was then referred to an orthopedic physician, Dr. John Wood. Dr. Wood first met with Petitioner on February 23, 2012, at which time he performed a physical examination and reviewed an MRI. Dr. Wood's plans at that time were for aggressive formal physical therapy. He placed Petitioner on work restrictions of no lifting greater than 5 pounds with the left arm, no lifting greater than 10 pounds with both arms, to avoid repetitive activities with the left arm, and to avoid climbing and overhead activities. Dr. Wood on that date also provided to Petitioner a left shoulder steroid injection. (PX 3). Petitioner returned to work on March 23, 2012. Petitioner was paid temporary total disability (TTD) benefits at that time.

After conservative treatment with Dr. Wood and continuing through physical therapy without relief, Petitioner was referred to Dr. Jeffrey McIntosh, an orthopedic surgeon. Petitioner first met with Dr. McIntosh on

May 2, 2012. After taking a history and performing a physical examination, Dr. McIntosh initially diagnosed Petitioner as having a strain to his shoulder. Dr. McIntosh provided another injection to Petitioner's shoulder and requested a follow-up appointment. Petitioner next saw Dr. McIntosh on May 30, 2012, at which time Dr. McIntosh recommended surgery. (PX 8; PX 11, Dep. Exh. 2).

On August 22, 2012, Petitioner was evaluated by Dr. Michael Nogalski at the request of the Respondent pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act"). After performing a physical examination, Dr. Nogalski provided the impression of left shoulder pain, possible resolving capsulitis and generalized bicipital tendinopathy/bicipital physical exam findings. (RX 11, Dep. Exh. C). Dr. Nogalski testified that it was his opinion within a reasonable degree of medical certainty that Petitioner's accident was not the cause of his left shoulder condition. (RX 11, pp. 12-13). Dr. Nogalski also provided an AMA impairment rating of 3% of the upper extremity. (RX 12).

On September 17, 2012, Dr. McIntosh performed a left shoulder arthroscopy, debridement of a partial rotator cuff tear, debridement of a labral tear, and a biceps tenotomy and tenodesis. His post-operative diagnosis was a partial tear of the rotator cuff, a glenoid labral tear, and a biceps tendon tear. (PX 8; PX 11, Dep. Exh. 2). Dr. McIntosh referred Petitioner to physical therapy, which Petitioner attended at Integrated Health, and ultimately plateaued. (PX 6). Petitioner last saw Dr. McIntosh on December 12, 2012, at which time he was released to return to work full duty with a note to return in six weeks to make sure Petitioner had made an appropriate transition to full duty. (PX 9).

After being released to full duty, Petitioner was terminated from his employment with Respondent on January 13, 2013, at which time Petitioner lost all group health insurance benefits. Respondent cited lack of available positions as its reasoning for terminating Petitioner. (RX 7). As Petitioner's case had been denied since April 26, 2012, the majority of Petitioner's medical expenses were paid by his group insurance through his employment. (See RX 9; RX 10). After losing his group insurance, Petitioner could not afford to follow-up with Dr. McIntosh as requested by the doctor in his December 12, 2012 office note.

On March 5, 2013, Dr. McIntosh's deposition was taken. Dr. McIntosh testified within a reasonable degree of medical certainty that Petitioner's complaints were causally related to the February 1, 2012 accident at work. (PX 11. Pp. 14-15). Dr. McIntosh outlined his opinion as to causation in a letter dated January 30, 2013. (PX 7).

Petitioner testified that he still experiences pain throughout his left arm, including his shoulder, bicep, and hand. He indicated that he experiences significant pain when lifting his arm overhead. Petitioner also testified that he is unable to perform many of the activities that he once could do before the accident, such as lifting weights and playing the guitar. Petitioner is currently prescribed pain medications by his primary care physician, which he continues to take on a regular basis for the pain associated with his left arm. Petitioner currently works at a car wash, where he makes change for customers and sprays tires with cleaning fluid.

Rebecca Weiss, Respondent's Asset Protection Manager at its Harrisburg location, testified that she reviewed extensive camera footage in the storage area Petitioner was working during the timeframe in question. She did not view any evidence of the incident as described by Petitioner. She believed there were cameras positioned in about 90% of the storage area aisles, but cameras were not always on both ends of the aisles. Petitioner testified that at the time of his work accident, candy was being stored in multiple aisles, and not just in the typical candy storage aisle, as Valentine's Day was approaching, and there was an abundance of candy in storage in preparation for that holiday. Ms. Weiss confirmed that Respondent sold a large amount of candy during the time leading up to Valentine's Day. Ms. Weiss also testified that if there was footage that existed and that was not reviewed that depicted Petitioner's accident, it would have been deleted by the time of trial. Petitioner viewed the surveillance in

question, and agreed that it did not show his accident. He testified that the storage area was quite large, and further confirmed Ms. Weiss' testimony that there were not cameras positioned on every aisle in the storage room.

CONCLUSIONS OF LAW

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

The Arbitrator finds the testimony of Petitioner to be credible. Petitioner testified that on February 1, 2012, at approximately 1:00-1:30 a.m., he injured his left shoulder while performing his work duties with Respondent. Petitioner testified that he was on a ladder in the storage area and was reaching into a box of candy. Petitioner indicated that the box was on an upper shelf and caused Petitioner to reach across his body and overhead in order to retrieve the items from the box. Additionally, Petitioner testified that the flaps of the box were positioned downward, causing friction when pulling the items out of the box. There were no witnesses to the accident and Petitioner's testimony regarding the accident was un rebutted.

Petitioner testified that he continued to work on that date but with pain. Petitioner testified that after the time of the accident his left arm began to draw up and use of his left arm became limited. Petitioner thereafter presented to his primary care physician and continued to treat for pain associated with his left shoulder up to the time of his release from Dr. McIntosh and physical therapy.

Respondent submitted various surveillance footage of the storage area in question on or about the date of the accident, none of which depicted the accident. The Arbitrator does not find the surveillance videos submitted by Respondent to be persuasive in denying that the accident as described by Petitioner occurred. Respondent's witness, Ms. Weiss, testified that the videos submitted were not exhaustive and there may in fact have been other videos from the date in question which were not submitted in to evidence and which potentially could have shown the accident as described by Petitioner. Petitioner's credible testimony, coupled with the medical evidence, reveals that an ~~accident did in fact occur on February 1, 2012.~~

The Arbitrator concludes that the accident as described by Petitioner as occurring on February 1, 2012 was an accident which arose out of and in the course of Petitioner's employment with Respondent.

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

The Arbitrator finds the opinion of Petitioner's primary treating physician, Dr. McIntosh, to be credible, and hereby adopts his opinions. Dr. McIntosh diagnosed Petitioner with a partial tear of the rotator cuff, glenoid labral tear and biceps tendon tear, and after conservative measures failed, Dr. McIntosh performed a left shoulder arthroscopy, debridement of a partial rotator cuff tear, debridement of a labral tear, and a biceps tenotomy and tendodesis. Dr. McIntosh opined that Petitioner's condition and the need for surgery that he performed were related to the accident of February 1, 2012.

The Arbitrator is not persuaded by the opinions of Respondent's examining physician in regard to the issue of causal connection. At the time Dr. Nogalski evaluated Petitioner, Dr. McIntosh had not yet performed surgery and had not provided his pre-operative diagnoses as indicated in his operative report dated September 17, 2012.

Based on the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury.

Issue (J): Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator concludes that all of the medical treatment provided to Petitioner's left shoulder condition was reasonable and necessary, and that Respondent is responsible for payment of the medical bills associated therewith. Respondent shall therefore pay reasonable and necessary medical services as identified in Petitioner's Exhibit 15, as provided in Sections 8(a) and 8.2 of the Act.

Issue (K): What temporary benefits are in dispute? (TTD)

Petitioner was off of work from September 17, 2012 through December 12, 2012, for which he was not paid any TTD benefits. This period of time represents the date of surgery through the date of the full duty release by Dr. McIntosh. Based upon the finding that Petitioner's accident arose out of and in the course of his employment with Respondent and that Petitioner's condition of ill-being is causally related to said accident and that Petitioner's treatment was therefore causally related to said accident, Respondent shall pay to Petitioner TTD benefits for the aforementioned period. The parties stipulated that the credit Respondent asserted for TTD benefits paid was for a prior period of TTD, and not the period at issue. Therefore, no credit is applied to the foregoing TTD award.

Issue (L): What is the nature and extent of the injury?

Petitioner's date of accident falls after September 1, 2011, and therefore Section 8.1b of the Act shall be discussed concerning the permanent partial disability (PPD) award being issued.

Concerning Section 8.1b(b)(i) of the Act (reported level of impairment per the AMA Guides), Dr. Nogalski concluded Petitioner's impairment rating to be 3% of the left upper extremity. Some weight is placed on this factor when determining the permanency award.

With respect to Section 8.1b(b)(ii) of the Act (Petitioner's occupation), the Arbitrator notes that Petitioner worked as an inventory management employee for Respondent. Petitioner's duties would require him to move large boxes, get up and down off of ladders, and use his shoulder and arms on a regular basis. Petitioner has difficulty lifting his left arm overhead and still experiences pain in his left arm, shoulder, bicep and hand. Since his termination from Respondent's employ, Petitioner works at a car wash, where he makes change for customers and sprays tires with cleaning fluid. While Petitioner likely is using his arms much less with his current job versus his job with Respondent, he nonetheless uses his arms with his job duties, and the Arbitrator gives weight to this factor when determining the PPD award.

Concerning Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of injury), Petitioner was 42 years old at the time of the accident. The Arbitrator considers Petitioner to be a somewhat younger individual and concludes that Petitioner's PPD will be moderately greater than that of an older individual because Petitioner will have to live and work with the consequences of the injury for a longer period of time. The Arbitrator places some weight on the factor of age in determining the PPD award.

Regarding Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), Petitioner testified he currently works at a car wash. No evidence was established regarding whether Petitioner's earning capacity has been affected by this injury, and therefore no weight is afforded this factor.

Finally, with regard to Section 8.1b(b)(v) of the Act (evidence of disability corroborated by Petitioner's treating medical records), the Arbitrator notes that Petitioner has sustained permanent partial disability to the left shoulder. Petitioner had multiple injections to the left shoulder and attended physical therapy before ultimately

undergoing a left shoulder arthroscopy, debridement of a partial rotator cuff tear, debridement of a labral tear, and a biceps tenotomy and tenodesis. The post-operative diagnosis was a partial tear of the rotator cuff, a glenoid labral tear, and a biceps tendon tear. Petitioner testified that he currently experiences pain in his left arm, shoulder, bicep and hand. He is unable to lift overhead without difficulty and is unable to perform many of the activities that he once could before the accident, such as lifting weights and playing the guitar. As stated earlier, the Arbitrator found Petitioner to be a credible witness at trial who testified in an open and forthcoming manner. Great weight is placed on the foregoing factor when determining the PPD award.

The determination of PPS is not simply a calculation but an evaluation of all five of the aforementioned factors stated in Section 8.1b of the Act. In making a PPD evaluation, consideration is not given to any single factor as the sole determinant. Applying Section 8.1b of the Act, the Arbitrator finds that Petitioner sustained the 10% loss of use to the person as a whole as a result of his work injury.

09 WC 9453
15 IWCC 0216

Page 1

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

Before the Illinois Workers'
Compensation Commission

LUIS VASQUEZ,

Petitioner,

vs.

No. 09 WC 9453
15 IWCC 0216

JAMES MCHUGH CONSTRUCTION,

Respondent.

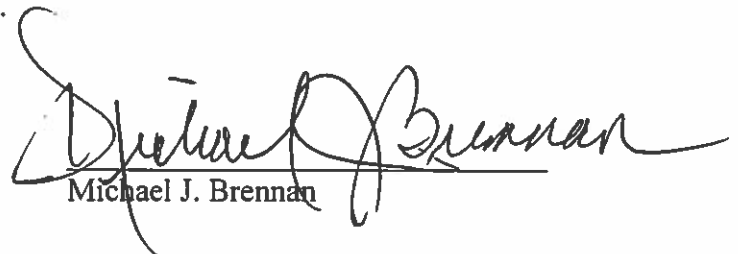
ORDER

The Commission on its own Motion recalls the Decision and Opinion on Review of the Illinois Workers' Compensation Commission dated March 26, 2015 under Section 19(f) of the Act.

The Commission is of the opinion that the Commission's Decision and Opinion on Review dated March 26, 2015 should be recalled due to a clerical error. Page two of the Decision should read 30% loss of use of the man-as-a-whole, not 15% man-as-a-whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated March 26, 2015 is hereby recalled and a Corrected Decision and Opinion on Review is issued simultaneously. The parties should return their original decisions to Commissioner Michael J. Brennan.

Dated: **APR 10 2015**


Michael J. Brennan

4-9-15
MJB:tdm
052

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify <input type="checkbox"/> up	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LUIS VASQUEZ,

Petitioner,

vs.

NO: 09 WC 9453
15 IWCC 0216

JAMES MCHUGH CONSTRUCTION,

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 medical, 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.

Mr. Vasquez sustained an undisputed work-related injury when he fell 12 feet to the ground and lost consciousness on May 23, 2008. His injuries consisted of a lacerated spleen that required a splenic artery embolization, an orbital fracture, facial bone fractures, left lung pneumothorax, a maxillary sinus fracture, and a concussion. The medical records reveal that the fractures had healed as of August 25, 2008; however, Petitioner continued to experience migraine headaches through May 2012. Petitioner testified that he continues to experience headaches once a week, which can be severe at times. Based on the significant injuries, the Commission finds Petitioner sustained 30% loss of use pursuant to Section 8(d)(2) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 1, 2013, 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 \$1,053.57 per week for a period of 19 weeks, May 27, 2008 through June 17, 2008 and May 12, 2009 through August 30, 2009, 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 \$636.15 per week for a period of 150 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused the loss of use of 30% man-as-a-whole.

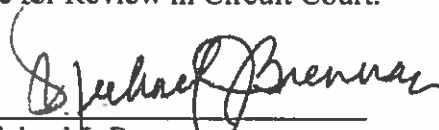
IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

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: APR 10 2015

MJB/tdm
O: 2-3-15
052



Michael J. Brennan



Thomas J. Tyrrell



Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

VASQUEZ, LUIS

Employee/Petitioner

Case# **09WC009453**

JAMES McHUGH CONSTRUCTION CO

Employer/Respondent

15IWCC0216

On 10/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% 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:

4678 PARENTE & NOREM PC
PARAG P BHOSALE
221 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

1109 GAROFALO LAW FIRM
JAMES R CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Luis Vasquez
Employee/Petitioner

Case # 09 WC 9453

v.

Consolidated cases: N/A

James McHugh Construction Co.
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 **Barbara N. Flores**, Arbitrator of the Commission, in the city of **Chicago**, on **July 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned **\$54,785.12**; the average weekly wage was **\$1,580.35**.

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 as explained *infra*.

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

Respondent shall be given a credit of **\$20,168.26** for TTD, **\$0** for TPD, **\$0** for maintenance, and **\$0** for other benefits, for a total credit of **\$20,168.26**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **\$1,053.57/week** for 19 weeks, commencing **May 27, 2008** through **June 17, 2008** and commencing **May 12, 2009** through **August 30, 2009**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **May 23, 2008** through **July 17, 2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of **\$20,168.26** for temporary total disability benefits that have been paid.

Medical Benefits

As explained more fully in the Arbitration Decision Addendum, Petitioner failed to prove causal connection between his claimed current neurological, psychological, cervical, or left shoulder conditions of ill being and his work accident on **May 23, 2008** or that the medical bills were for reasonable and medically necessary treatment of any causally related condition. Thus, Petitioner's claim for payment of the unpaid medical bills is denied.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of **\$636.15/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.

15 I M CC 0216

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

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



Signature of Arbitrator

September 30, 2013

Date

OCT 1, - 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*

Luis Vasquez
Employee/Petitioner

Case # 09 WC 9453

v.

Consolidated cases: N/A

James McHugh Construction Co.
Employer/Respondent

15IWCC0216

FINDINGS OF FACT

The issues in dispute include causal connection, medical bills, Petitioner entitlement to a period of temporary total disability benefits, and the nature and extent of Petitioner's injury. Arbitrator's Exhibit¹ ("AX") 1. The parties have stipulated to all other issues. AX1.

Background

Petitioner testified that he is a journeyman carpenter and has been so employed for approximately 13 years since March of 2000. Prior to his injury at work, Petitioner testified that he was a lead man and foreman overseeing the work of others. Petitioner also did concrete framing, which was physical work that required him to be quick on his feet.

Petitioner testified that he was working on a scaffold approximately 10-12 feet high at a residential project and framing a wall so that it would be ready for concrete. He testified that someone asked him for something and he turned around trying to grab it for them and slipped. Petitioner testified that the next thing he knew, he was in the hospital.

Medical Treatment

Petitioner testified that he was at Northwestern Memorial Hospital for four days. He understood that he fractured his left eye socket, had a bilateral rib fracture, and a spleen laceration. Petitioner also testified that his neck and back hurt. He testified that he spent some time in a neck brace.

The emergency room medical records reflect that Petitioner reported a 12 foot fall while he "[w]as working at construction site and fell into hole, landed on his left side." PX5. Petitioner lost consciousness at the time of the accident and reported pain to emergency room personnel including pain in the "left chest/flank, around L eye/swelling, and neck pain[.]" shortness of breath, headaches and blurred vision. *Id.* Petitioner underwent a head CT, a spine CT, chest/abdomen/ pelvis CT, and a pelvis x-ray. *Id.* Petitioner had a bilateral 1st rib fracture, mild cervical degenerative changes, extensive/complex spleen laceration with active extravasation, a small left pneumothorax, several facial bone fractures, a very small orbital forehead fracture and a maxillary sinus fracture. *Id.* Petitioner underwent a visceral angiogram, splenic artery embolization and remained in the hospital for observation. *Id.* He also had a plastic surgery consultation; however, there was no acute indication for plastic surgery. *Id.* Petitioner was discharged on May 26, 2008 with prescriptions for pain medications and

¹ The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party. Joint exhibits are denominated "JX." Exhibits attached to depositions will be further denominated with "(Dep. Exh. _)."

instructions to follow up with his own physicians and the emergency room if necessary. *Id.* Petitioner was released to return to full duty work effective Monday, June 9, 2008. RX1.

Petitioner testified that he was off work on May 27, 2008 and remained off work until June 23, 2008. Petitioner testified that he chose to seek medical treatment with Dr. Demaertelaere at the Hedges Clinic.

Dr. Demaertelaere first saw Petitioner on June 6, 2008. PX2 at 38-41. Petitioner reported significant pain in the left side and shoulder, requested Norco, and reported pain when breathing deeply. *Id.* Petitioner also reported that he slept in a recliner. *Id.* After an examination, Dr. Demaertelaere diagnosed the Petitioner with fractured ribs, a fractured orbital, a concussion and a traumatic spleen tear. *Id.*

On June 16, 2008, Petitioner returned to Dr. Demaertelaere reporting improved pain levels, but still has bad days with regard to his ribs, continued headaches although less frequent, continuing to sleep in a recliner, and feeling frustrated more easily. PX2 at 31-34. Dr. Demaertelaere ordered physical therapy for the left first rib fracture, neck pain, and shoulder pain for one month. *Id.* Petitioner underwent physical therapy at ATI beginning on June 18, 2008 and was upgraded to a work conditioning program as of July 2, 2008. PX2 at 26; PX8 at 30, 41.

Petitioner returned to Dr. Demaertelaere on July 3, 2008 reporting improvement with regard to the rib fractures, having returned to work performing mostly sedentary, paperwork, and driving tasks (which Dr. Demaertelaere noted Petitioner seemed to enjoy), minimal shortness of breath with one episode of tight chest pain lasting 45 minutes the prior weekend, and improving mood. PX2 at 27-30.

On July 24, 2008, Dr. Demaertelaere noted that the Petitioner stated that he "felt great," but still felt sore at the end of the day. PX2 at 20-23; RX2. He also reported that he had not needed any anxiety medication for well over a week and that his mood was much better. *Id.* Dr. Demaertelaere noted that Petitioner felt much improved and that he was anxious to return to full duty work. *Id.* He cleared Petitioner for full duty work and set up a visit in three weeks, if necessary; otherwise Petitioner could return as needed. *Id.*

A work conditioning progress note dated July 25, 2008 reflects that Petitioner was functioning at a medium physical demand level while his carpenter position was deemed to be at the heavy physical demand level per the U.S. Department of Labor's Dictionary of Occupational Titles, but that Petitioner was working light duty while participating in work conditioning and that he appeared to be "very functional." PX2 at 18; PX8 at 9. Petitioner underwent work hardening at ATI for his left 1st rib fracture and neck pain from July 14, 2008 through August 1, 2008. PX8.

At trial, Petitioner testified that during this period of treatment he was experiencing headaches that were worsening, mood swings, depression, hyperventilation, and short term memory problems. Petitioner testified that on his release back to full duty work he thought that he was doing ok, but as he continued working his headaches became more intense and the depression became worse. Petitioner testified that he was not able to work as efficiently as before.

Petitioner returned to Dr. Demaertelaere on August 14, 2008 reporting feeling much better and working full duty without more than the occasional "twinge" regarding his rib pain. PX2 at 15-17; RX3. Petitioner also reported mood swings after he stopped taking his medicine, which made him worry excessively and get angry without reason. *Id.* Petitioner also reported a panic attack approximately 2 weeks after stopping the medicine and having to step away to be alone until the sensation went away. *Id.* Petitioner began taking his medication at

night and felt much better, however Dr. Demaertelaere indicated that if at Petitioner's return visit Petitioner had not seen significant improvement he should see a counselor/psychologist. *Id.*

In a note dated August 25, 2008, Dr. Demaertelaere indicated that Petitioner's fractures were healed. PX2 at 14.

On September 29, 2008, Petitioner returned to Dr. Demaertelaere reporting that his chest pain had resolved and he almost never got pain anymore, however Petitioner also reported feeling depressed at times and more nervous and anxious at work. PX2 at 11-13. Petitioner reported that he was able to handle only one thing at a time whereas he used to be able to handle "10 things at once[.]" *Id.* Dr. Demaertelaere referred Petitioner to a psychologist, Dr. Moran². *Id.*

Section 12 Examination

Petitioner was evaluated by Dr. Shenker at Respondent's request on January 14, 2009. RX4-RX5. At the time of his examination, Petitioner reported headaches over the top of his head which extended to the occipital area and were more marked on the right side where he noted a pressure sensation. RX5. Petitioner also reported nonstop headaches over the prior three weeks, intermittent dizziness with fast moves and bending over, some intermittent visual blurring with headaches, and trouble focusing/concentrating/remembering things, which he attributed to having a constant headache. *Id.* Petitioner also reported not sleeping well, waking up 3 to 5 times a night, feeling tired in his legs with associated numbness and tingling, feeling short tempered with irritability and mood swings although that was improving, cramps in his right hand, and no hearing, speech, level of consciousness, taste, or smell problems. *Id.*

Dr. Shenker noted that his "neurologic examination at that time failed to reveal any objective evidence of neurologic impairment." RX4. Additionally, Dr. Shenker noted his review of Petitioner's treating medical records and that "[a]t this point, I do not believe that there is a neurologic explanation for this patient's complaints of worsening short-term memory, given the fact that the incident at work occurred eight months ago. Neither do I believe that his complaints of progressively increasing headaches would fit into the normal chronology of post-traumatic intensity." *Id.* Dr. Shenker recommended a brain MRI with and without contrast for the sake of thoroughness, but indicated that Petitioner was able to work in a full duty capacity as he had been doing for some time. *Id.*

Dr. Shenker diagnosed Petitioner with a head injury with loss of consciousness accompanied by both retrograde and antero-grade amnesia that qualified him as having suffered a cerebral concussion, bilateral rib fractures, a left pneumothorax, lacerations of the spleen, and you will about the left orbital floor for which there was no indication for surgery. RX5. Dr. Shenker opined that these diagnoses were related to his work injury sustained on May 23, 2008, but that Petitioner's current headaches were not related to the incident on that date because of the length of time that had elapsed. *Id.* Dr. Shenker also opined that Petitioner did not need any additional treatment or diagnostic studies as it related to his work injury sustained on May 23, 2008, that he did not require any work restrictions and could work full duty, and that he was at maximum medical improvement. *Id.*

² The Arbitrator notes that it is unclear whether Petitioner ever saw Dr. Moran and no treating records were submitted from this physician.

Continued Medical Treatment

On January 20, 2009, Petitioner underwent a brain MRI with and without contrast as referred by Dr. Demaertelaere. PX6; RX6. The interpreting radiologist noted several punctuate areas of T2/FLAIR hyper intensity seen in the subcortical and periventricular white matter which may represent early microvascular ischemic changes or post inflammatory change, but an otherwise normal MRI. *Id.*

On February 5, 2009³, Petitioner saw his primary care physicians, Dr. Singla or Dr. Gutta, reporting that he had “migraines all the time, was in an accident from work, May '07, blurry [sic] vision. pain management[.]” PX3 at 5; PX4 at 27. He provided a history that he sustained a work-related fall landing on his head in May of 2007 when he fell 10 feet from a scaffold and that he was off work for one month and sustained for broken ribs, a left eye socket fracture, a punctured lung, and a spleen rupture. *Id.* He also reported headaches which he did not notice at first, increased pain over time, that over-the-counter medications were not helping, and that his headaches became unbearable in December of 2008 and he could not work. *Id.* Petitioner also reported blurry vision in both eyes only when his headaches were severe, that he was awaiting a follow up with the neurologist, and that he “can’t take it anymore[.]” *Id.*

Dr. Shenker – Addenda & Continued Medical Treatment

Respondent’s Section 12 examiner, Dr. Shenker, issued an addendum report dated February 13, 2009 in which he indicated his review of additional materials including Petitioner’s January 20, 2009 brain MRI. RX7. Dr. Shenker noted that the microvascular ischemic changes seen in the MRI were not related to Petitioner’s injury at work, there was no evidence of brain contusions that would have been consistent with cerebral trauma, and that such microvascular disease was not attributable to trauma. *Id.* Dr. Shenker further noted his review of Dr. Demaertelaere’s January 27, 2009 record in which he referenced Petitioner’s ongoing headache complaints and referred Petitioner to a neurologist for consultation. *Id.* Dr. Shenker reiterated that Petitioner did not require further diagnostic testing or treatment is related to his injury at work, specifically a cerebral contusion, and that Petitioner could return to work as a carpenter without limitations. *Id.*

On February 17, 2009, Dr. Singla or Dr. Gutta, diagnosed Petitioner with migraine headaches. PX4 at 26.

Respondent’s Section 12 examiner, Dr. Shenker, issued another addendum report dated March 2, 2009 after reviewing additional treating records to that date. RX8. Dr. Shenker maintained his opinion that Petitioner required no further medical treatment and could work without restrictions, that he sustained a cerebral concussion, but had no evidence of ongoing neurological problems, and that Petitioner’s headaches and complaints of worsening short term memory were not related to his injury at work on May 23, 2008, noting that progressive increasing headaches “would not fit into the normal chronology of posttraumatic headaches.”

On April 14, 2009, Petitioner was admitted to Provena St. Joseph Medical Center for management of daily headache syndrome and intractable postconcussive headaches. PX9 at 19-20. Petitioner reported that he had intractable pain and “[h]e apparently was at a job site and fell several stories and landed on his head. This was associated with loss of consciousness. Since that time he has had persistent severe headaches which initially began shortly after his fall. He had been through multiple treatments in the past; however, has not been able to

³ The Arbitrator notes that it appears that this progress note continued onto the back of a double-sided page, but it was not submitted into evidence.

get any relief and subsequently was admitted for nausea, vomiting, abdominal pain and severe dysfunction in his life secondary to the headaches." PX9 at 21.

Petitioner also had an in-patient neurology consultation while at the hospital with Dr. Gulati on April 15, 2009. PX9 at 22-23. He reported having daily headaches in the morning and at bedtime since his accident at work that were pounding, throbbing, and severe to a level of 10/10 with nausea, but no vomiting, and photophobia. *Id.* Petitioner denied neck pain or preceding aura or associated neurological symptoms, no associated TMJ symptoms, relief with use of Relpax, and a few occasions of lightheadedness and some blurred vision associated with the headaches. *Id.* On examination, Dr. Gulati noted normal cervical spine movements, no myofascial or TMJ tenderness, normal Fundi and visual fields, no papilledema, normal eye movements, no nystagmus or facial asymmetry, normal language and speech functions, no pronator sign, normal muscle tone/strength/ordination/gait, normal balance, symmetrical reflexes, no Babinski's sign, and normal sensation. *Id.* Dr. Gulati noted that Petitioner had a normal neurological examination, diagnosed him with post traumatic syndrome of daily headaches sometimes severe throbbing disabling headaches and symptoms of impaired concentration/memory and panic-like attacks, and ordered additional prescription medications. *Id.*

Petitioner was discharged on April 18, 2009 with a final diagnosis of daily headache syndrome, post traumatic headache disorder and good improvement with use of Reglan and DHE. PX9 at 19-20. Petitioner was instructed to follow up with Dr. Gelbort for further neuropsychological testing. *Id.*

On April 24, 2009, Petitioner returned to Dr. Gulati for evaluation of symptoms of headaches that he reported that he had since his injury at work. PX10 at 23-24. Petitioner provided an accident history and reported that he was at work on May 23, 2008 on a scaffold about 10 feet in the air when "he apparently fell and was injured and was unconscious for a few minutes." *Id.* Petitioner reported that "[h]e first remembers a co-worker talking to him and ambulance was called. He remembers being 'in and out' of consciousness at that time and was out of work for about three weeks. [Petitioner] has had daily headaches since. He awakens in the morning with a headache and goes to bed with a headache; headache is bi-frontal to posterior head with pounding, throbbing headache was sharp pains at times in the top of head. Headache is often as severe as 10 on a scale of 0-10 with nausea though without vomiting, often with photophobia. He denies any neck pain associated or ear pain though occasionally has TMJ pain. He will obtain some relief with use of Relpax. He is unaware of any headache precipitants. He does not seem to consume much of any of the headache precipitants. The remainder of neurologic review of systems is negative except for intermittent ringing tinnitus, occasional lightheadedness and sometimes blurring of vision in Association with headaches. Patient has no prior history of headaches." *Id.* Dr. Gulati noted that Petitioner had a normal neurological examination and that Petitioner's May 23, 2008 CT scan was negative. *Id.* He diagnosed Petitioner with post-traumatic syndrome of daily headaches sometimes severe, throbbing, disabling headaches and symptoms of impaired concentration/memory and panic-like attacks since his injury, and adjusted Petitioner's prescription medications. *Id.*

On May 12, 2009, Dr. Singla or Dr. Gutta diagnosed Petitioner with post-concussive syndrome and headaches. PX4 at 24. On June 9, 2009, Petitioner reported poor memory. PX4 at 23. On June 16, 2009, Petitioner saw Dr. Gulati and reported seeing a therapist for panic attacks. PX10 at 20.

During this treatment, Petitioner began seeing Elizabeth Zavodny, Psy.D ("Dr. Zavodny") on May 5, 2009. PX7. Petitioner testified that he saw Dr. Zavodny as referred by Dr. Singla for depression, mood swings and panic attacks.

Dr. Zavodny authored a report dated June 25, 2009 covering Petitioner's treatment with her from May 5, 2009 through June 23, 2009. PX7 at 3-6. Petitioner "...reported continued difficulty with concentration, anxiety, decreased self-care, increased outbursts of anger, frequent headaches, loss of self-confidence and prior (but post-incident) sleep difficulties." *Id.* Petitioner also reported suicidal thoughts, with no well-formed plan or intention, occurring after meeting with Ms. Jackson and that the severity levels of his symptoms were much greater than he previously reported to either Dr. Grimm or Ms. Jackson. *Id.* Dr. Zavodny recommended 2-3 additional psychotherapy sessions to assist with sleep difficulties and to maintain or improve his other symptoms, and an additional 4-5 sessions after Petitioner was released to work by his physician to help him handle the transition back to work. *Id.*

Section 12 Examination – Dr. Grimm

On July 3, 2009, Petitioner saw Bill Grimm, Ph.D ("Dr. Grimm") at Respondent's request for a neuropsychological evaluation. RX9. Dr. Grimm authored a report dated July 17, 2009 after examining Petitioner, reviewing various treating medical records, and in which he rendered various opinions. *Id.*

Among other treating records, Dr. Grimm referenced a neuropsychological evaluation of Dr. Gelbort on April 29, 2009 and May 13, 2009⁴ in which Dr. Gelbort noted that "[Petitioner] has endorsed many items as a result of tending to over report upset and symptomatology also feeling feelings of emotional distress, anxiety, a strong tendency to worry, and that emotional sensitivity". In any event, [Dr. Grimm noted that] Dr. Gelbort thought that [Petitioner] had suffered a concussion as a result of his work-related accident, but that he has essentially recovered from that. He also thought that [Petitioner's] anxiety was the most limiting factor, and appeared to suppress his capacity for attention and concentration. He thought that continued counseling and medical treatment was warranted." *Id.* Dr. Grimm also reviewed Dr. Zavodny's reports, but noted that her daily progress notes were not provided to him. *Id.*

Dr. Grimm also noted Petitioner's report that "[s]ince the last evaluation on 10-22-08, [Petitioner] tried to follow through with some psychotherapy with one person, but reported that individual was not able to accommodate his scheduling issues. Instead of immediately seeking treatment elsewhere, he stated that he put the counseling/psychotherapy on hold in order to address some very troubling headaches which became very severe at times." *Id.*

Petitioner also reported that "[s]ince last seen, [Petitioner] stated that he quit drinking alcohol altogether about 8 months ago. He specifically commented about recalling an item from the Personality Assessment Inventory concerning whether other people thought he was drinking too much. He stated that previous to 8 months ago, he answered 'yes' to such an item, and openly acknowledged that his alcohol consumption was an issue between himself and [sic] his wife. Since he stopped drinking about 8 months ago, he indicated his response to the PAI item would currently be 'no'." *Id.*

Petitioner further reported that "[s]ince last seen in October, 2008, [he] reported additional stress within his life. Approximately 1 month ago, he said that his wife had lost her job as a unit secretary at Provena St. Joseph Medical Center, and was currently looking for a new job. He also reported that his mother-in-law had been hospitalized about a month ago, and that his wife had to take care of her. His father-in-law also reportedly has significant health problems, which [Petitioner] described as something in his chest which might explode, possibly referring to an aneurysm. In response to these stressors, [Petitioner] stated that he checks in on his in-

⁴ The Arbitrator notes that Dr. Gelbort's records from these dates were not submitted into evidence.

laws to make sure they are safe. He commented that 'it's like having another child'. He stated that his wife was thinking about divorcing him, and by December, 08, he became aware that she had already contacted a divorce attorney. He stated that it was during that period of time that he experienced increased anxiety, headaches, and mood swings. It was also before he stopped drinking." *Id.*

Ultimately, Dr. Grimm noted that Petitioner's current neuropsychological test results were worse and in performance of various concentration and attention deployment test as compared with prior tests obtained in October of 2008 and worse than testing conducted only a few months ago, which he noted did not conform with known recovery from an uncomplicated concussion especially one which was experienced over a year ago. *Id.* Thus, Dr. Grimm opined that it was unrelated to his work accident on May 23, 2008. Dr. Grimm also noted that "[o]ther evaluation findings included significant evidence of over-reporting of symptoms or symptom magnification, probably reflective of a naive cry for help instead of blatant dissimulation." *Id.* Dr. Grimm further noted that the most significant finding at Petitioner's evaluation was the "convergence of multiple [unrelated] sources of stress impacting [his] sense of well-being[.]" including marital discord, concern over his drinking, financial matters associated with his wife's recent unemployment, and stress associated with ongoing supervision and care of elderly extended family members. *Id.*

Dr. Grimm reiterated that Petitioner was reporting "extreme levels of stress to such an extent that his current life circumstances would appear to be in a state of intense turmoil" and that the "aforementioned indications of symptom magnification probably represent an unsophisticated attempt to amplify his concerns as a cry for help, and not necessarily reflective of blatant dissimulation." *Id.* Dr. Grimm noted that it "was indeed surprising that there was no mention of not only the stresses impacting [Petitioner], problematic alcohol use, or the fact that his wife was threatening to divorce him, in the reports of Drs. Gelbort and Zavodny[.]" and he noted Petitioner's indication that "he and his wife were hoping to move towards reconciliation, and have agreed to seek out marital counseling" which he opined was unrelated to Petitioner's injury at work. *Id.*

Ultimately, Dr. Grimm opined that Petitioner was at maximum medical improvement and that his ongoing psychological conditions were unrelated to his accident at work. *Id.*

Continued Medical Treatment

From July 9, 2009 through May 25, 2010, Petitioner continued to see Dr. Singla or Dr. Gutta reporting some improvement, no change in his memory, and during which time his diagnoses remained the same. PX4 at 15-22.

On August 11, 2009, Petitioner returned to Dr. Gulati reporting improving headaches which were not daily anymore and mild at the top of his head for which he did not take medication. PX10 at 19. Petitioner also reported occasional severe headaches that were responsive to prescription medication and a significant complaint of ringing in the ears for which Dr. Gulati referred Petitioner to Dr. Kron. *Id.* Petitioner also provided a headache diary which showed too bad headaches and one mild headache to that date in the month of August. *Id.* Petitioner's physical and neurological examinations were normal. *Id.* Dr. Gulati increased Petitioner's Topamax to 100 mg and released him to return to work full duty effective August 31, 2009. *Id.*; RX10.

Petitioner testified that his last visit with Dr. Zavodny was on August 20, 2009. He testified that there were other problems and mood swings and panic attacks where he would yell at his kids for no reason. Petitioner

testified that he has two children aged 21 and 13 years old. Petitioner also testified that, after the headaches and panic attacks increased, he started drinking alcohol more.

Petitioner testified that he received a full duty release back to work from Dr. Gulati on August 31, 2009 and that he went back to work, but was not hired. On the same date, August 31, 2009, Dr. Zavodny authored a report dated covering Petitioner's treatment with her on August 6 and 20, 2009. PX7 at 7-13.

As with her first report, Dr. Zavodny dedicated much of her second report to identifying what she considered were errors and omissions in the reports authored by Dr. Grimm without indicating much objective or unbiased information on which she based her assessments or treatment recommendations. *Id.* Dr. Zavodny noted that Petitioner's sleep disturbances had improved and were manageable and she agreed with Petitioner's release back to full work by his physician at the end of August. *Id.* Petitioner testified that he found the meetings with Dr. Zavodny helpful and that further visits after August 20, 2009 were not authorized.

Petitioner saw Dr. Gulati on November 5, 2009 reporting one mild headache monthly for which he took no medication. PX10 at 18. Approximately 3 ½ months later, Petitioner returned to Dr. Gulati on February 16, 2010 reporting "[decreased] memory c/o 'hallucinations' – daydream – Dr. Singla d/c'd the Armitrip. of speaking to wife & during sex c/o HA – 'very mild' ha – 'Not at all' 'memory issues' 'has to keep reminding self [.]'" PX 10 at 17. Dr. Gulati noted that Petitioner was much improved symptomatically. *Id.*

On June 11, 2010, Petitioner saw Dr. Gulati reporting headaches 3 to 4 times per week that started two weeks after discontinuation of Topamax, "- Anxiety - has learnt to deal with it, - seen therapist, - depression - feels memory not influenced by Topamax[.]" PX10 at 16. Dr. Gulati noted that Petitioner "first returned to work today[.]" He referred Petitioner to Dr. Singla for depression, increased Petitioner's Topamax to 50 mg, and scheduled a follow-up visit in two months. *Id.*

On June 15, 2010, Petitioner returned to his primary care physician (Dr. Singla or Dr. Gutta) reporting anxiety, depression, mood swings, feelings of helplessness, lack of motivation, difficulty getting things done around house, and anhedonia. PX4 at 14. He was diagnosed with major depressive disorder and referred to Dr. Gulati for anti-depressants. *Id.*

On September 21, 2010 and October 12, 2010, Petitioner saw Michael Gelbort, Ph.D ("Dr. Gelbort") as referred by Dr. Singla. PX1 at 5-6. Petitioner reported that he "had headaches and other complaints since falling 8 to 10 feet off a wall in May 2008. HE was diagnosed with a concussion and left orbital socket fracture. He had complaints of poor short-term memory and mood swings with panic attacks at the time of his original evaluation." *Id.* Dr. Gelbort noted that Petitioner previously underwent evaluation in April and May of 2009. *Id.* At the time of his evaluation, Petitioner reported continued photophobia and noise sensitivity with constant tinnitus, poor appetite and weight loss, no drug or alcohol use, for cigarettes per day, difficulty with organization and that the "'biggest factor is memory it is so bad.'" *Id.* Petitioner also reported reading and comprehension difficulty, problems with attention and concentration, slow processing speed, and distractibility. *Id.* Dr. Gelbort noted that Petitioner "presents much like patients who benefit from and if they are able to take psycho stimulant medications." *Id.*

After administering IQ tests and other examinations, Dr. Gelbort noted that Petitioner was describing moderate to severe emotional distress with anxiety and anhedonia, frequent worrying about something or someone, perceived difficulty with attention and concentration, and difficulty making poor decisions. *Id.* He further noted that Petitioner's emotional condition was much more limiting than the mild cognitive suppressions and he

showed indication of symptoms of a major depression as well as a mild tendency to somatize. *Id.* He recommended medical treatment for depression and cognitive behavioral psychotherapy. *Id.*

Petitioner continued to see his primary care physicians from July 13, 2010 through November 29, 2011 regarding his headaches. PX4 at 4-13. Petitioner also saw Dr. Gulati on September 7, 2010, November 23, 2010, March 1, 2011, and August 26, 2011 during which time Dr. Gulati maintained his posttraumatic headache syndrome diagnoses with additional diagnoses of depression and memory disturbances. PX10 at 12-15. On August 26, 2011, Dr. Gulati noted that Petitioner was under "a lot of stress (daughter [with diagnosis] of lymphoma)[.]" PX10 at 12.

Approximately eight months later, on April 17, 2012, Petitioner saw his primary care physician reporting left shoulder pain. PX4 at 3. Petitioner had decreased shoulder range of motion and a left shoulder MRI was ordered. *Id.* On April 28, 2012, Petitioner underwent the recommended left shoulder MRI. PX4 at 29-30. The interpreting radiologist noted showed a focal full thickness tear involving anterior footprint of supraspinatus tendon with more extensive articular surface tearing involving the remainder of the transverse thickness of the supraspinatus tendon, abnormal signal posterior superior labrum could represent labral degeneration or subtle tear, no focal para-labral cyst, and mild hypertrophy of the acromioclavicular joint. *Id.* Petitioner also underwent orbit x-rays which showed no evidence of radiopaque foreign body. PX4 at 28.

On January 17, 2012, Petitioner returned to Dr. Gulati for follow-up regarding his posttraumatic headache syndrome. PX9 at 72; PX10 at 10-11. Petitioner reported doing much better than before, no severe headaches or new symptoms since his last visit in August of 2011, and working full time and keeping very busy. *Id.* Petitioner's physical and neurological examinations were normal. *Id.* Dr. Gulati diagnosed Petitioner with posttraumatic headache syndrome with headache disorder consistent with posttraumatic vascular or common migraine headaches that were managed well with current medication dosages. *Id.*

Petitioner testified that Dr. Singla referred him to Dr. Puppala. Petitioner testified that he had problems moving his arms, and numbness and pain.

On April 28, 2012, Petitioner underwent a left shoulder MRI as ordered by Dr. Singla which the interpreting radiologist noted showed a focal full thickness tear involving the anterior foot print of the supraspinatus tendon with more extensive articular surface tearing along the remainder of the transverse thickness of the supraspinatus tendon, abnormal signal posterior superior labrum which could represent labral degeneration or a subtle tear, no focal paralabral cyst, and mild hypertrophy at the acromioclavicular joint. PX9 at 83-84. Petitioner also underwent an orbital foreign body MRI which showed no radiopaque foreign body. PX9 at 85.

On May 15, 2012, Petitioner returned to Dr. Gulati for follow-up regarding his post traumatic headache syndrome. PX9 at 70; PX10 at 8-9. Petitioner reported no bad headaches, feeling quite well, no neck pain, speech difficulty, visual disturbance, or extremity symptoms, and working without any problems. *Id.* Petitioner's physical and neurological examinations were normal. *Id.* Dr. Gulati diagnosed Petitioner with daily headache syndrome with migraine-like headaches of posttraumatic origin much improved now. *Id.*

On May 26, 2012, Petitioner underwent a cervical spine MRI without contrast as ordered by Dr. Puppala. PX9 at 80-81. The interpreting radiologist noted the following: (1) mild to moderate spinal stenosis scattered along the cervical spine most pronounced at C3-C4 and C5-C6 where there was, at most, a slight anterior impression on the cord at these levels without cord edema, spinal stenosis related to disc bulging, posterior lateral osteophytes, and hypertrophy of the posterior elements; (2) mild to moderate foraminal narrowing scattered

along the mid to lower cervical spine related to degenerative changes; and (3) a 12 mm focus of increased T1 signal noted along the posterior midline of the nasopharyngeal wall and may represent a complex cyst although it was not well evaluated and should be clinically correlated possibly with a follow-up MRI. *Id.* Petitioner also underwent another orbital foreign body MRI which showed no metallic foreign bodies in the orbits. PX9 at 82.

On November 20, 2012, Petitioner returned to Dr. Gulati for follow-up regarding his post traumatic headache syndrome. PX9 at 68; PX10 at 7. Petitioner reported he had no headaches since his last visit, no new complaints, and no neck pain, numbness, speech difficulty, or balance difficulty. *Id.* Petitioner's physical and neurological examinations were normal. *Id.* Dr. Gulati diagnosed Petitioner with posttraumatic headaches syndrome with common migraine and daily headache syndrome now much result; "He is currently headache free." *Id.*

Additional Information

Started working for another employer and began working full time 40 hours per week when he was able to, but testified that he then works 25-30 hours per week because he was not able to physically do 40 hours a week due to headaches and pain in the neck. On cross examination, Petitioner testified that since his return to work to Saachi (not Respondent) he has also worked for another company, Araiza Construction, as a journeyman carpenter.

Regarding his current condition, Petitioner testified that he still has headaches once per week that last between 1 and 4 hours. Petitioner testified that he is able to work when the headaches are not so severe but when they are, he has to take time off. Petitioner testified that he does not take any prescription medication for the headaches, but takes Tylenol as needed. He also testified that his ribs are tender particularly when he leans against something or when it is humid. Petitioner also testified that he sometimes has difficulty breathing. Regarding his depression, Petitioner testified that he still takes medication for depression including Prestig as prescribed by Dr. Gulati or Dr. Singla who manage the medical treatment for that condition. Regarding his spleen injury, Petitioner testified that he does not take any medication. Petitioner testified that his spleen is dead; that it was cauterized. He also testified that scratches are easily infected.

Petitioner testified that he had no problems with re-occurring severe headaches, depression, nausea, vomiting, and that he had no rib, broken bones, neck, back, shoulder or abdominal injury before his accident at work. He also testified that he had not visited any psychiatrist, psychologist or therapist before his accident at work.

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 trial as follows:

In support of the Arbitrator's decision relating to Issue (F), whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following:

The Arbitrator finds that Petitioner has established causal connection between his accident at work on May 23, 2008 and several injuries from which he recovered. Namely, Petitioner sustained a fractured rib, a lacerated spleen, a suspected left eye orbital fracture that did not require surgery, a left lung pneumothorax, a concussion, and neck and shoulder pain. In so finding, the Arbitrator notes that the emergency room records contain objective diagnostic and clinically correlated evidence of such injuries. Petitioner continued to treat with his primary care physicians and was released back to full duty work after a short course of physical therapy and work conditioning. Indeed, Petitioner was released to full duty work by Dr. Demaertelaere as of July 24, 2008 and by the time he returned to see Dr. Demaertelaere on August 14, 2008, Petitioner reported feeling much better and working full duty without more than the occasional "twinge" regarding his rib pain. Thus, the Arbitrator finds that Petitioner established causal connection between these conditions and his accident at work through his return to full duty work and discharge from care by Dr. Demaertelaere.

While Petitioner argues that he also sustained a torn left rotator cuff and has cervical bulges attributable to his May 23, 2008 work accident, the Arbitrator notes that there is a large gap in time, of years, between Petitioner's initial neck and shoulder pain complaints (which the records reflect had resolved and after which Petitioner returned to full duty work for Respondent and then two other employers) and the diagnostic films taken in April and May of 2012. Thus, the Arbitrator finds that Petitioner failed to prove that he sustained any disc bulges in the cervical spine or a torn left rotator cuff as a result of his injury at work in 2008 or any causal connection between these conditions and his work accident on May 23, 2008.

Aside from the aforementioned conditions, Petitioner has been diagnosed with psychological and neurological conditions including depression and posttraumatic headaches based almost, if not entirely, and exclusively on his subjectively reported symptoms. The Arbitrator finds that Petitioner failed to prove any causal connection between these conditions and his accident at work. In so concluding, the Arbitrator finds that Petitioner's testimony at trial was not credible and notes that his reports to various treating physicians and Section 12 examiners about the accident itself and his subsequent symptoms are inconsistent. These reports also became magnified and, indeed, wholly localized to the head as his treatment progressed, which is contradicted by initial emergency room and early treating records. Moreover, Petitioner's complaints about headaches, memory loss, anger, depression, and difficulty concentrating only increased as time went on after periods of no headaches or minimal headaches which, notably, coincide with the onset of marital discord, increased drinking, his wife's loss of her job, and ongoing increased care being rendered to his in-laws. Petitioner's reliance on the opinions of Dr. Zavodny is misplaced.

The Arbitrator is not persuaded by the opinions of Petitioner's treating physicians, or Dr. Zavodny in particular, given the conclusory nature of her opinions and lack of progress notes which would reveal specific issues discussed in Petitioner's psychological treatment sessions. In both of her reports, Dr. Zavodny dedicated much effort in identifying what she considered were errors and omissions in the reports authored by Dr. Grimm and submitted a bill including a \$200 charge for "evaluation of prior records[.]" Dr. Zavodny failed to specify

credible or objective medical information, if any, leading to her conclusions about Petitioner's condition and the objective bases for her treatment recommendations based on her individual assessment of Petitioner; rather, she devoted the majority of her reports to disagreeing with Dr. Grimm, assigning blame to Respondent's insurer (AIG) for delays in treatment which is contradicted by Petitioner's reports to Dr. Grimm, unquestionably accepting Petitioner's reports to her which are not documented in progress notes revealing Petitioner's actual reports to Dr. Zavodny and which were not submitted at trial, and basing her opinions and conclusions, in part, on the hearsay reports of Petitioner's wife. Given the foregoing, the Arbitrator finds that Dr. Zavodny's reports are lacking in objective evidence to support her conclusions and notes that they appear to have been prepared for the purpose of litigation instead of for purely medical assessment or treatment.

To the contrary, the Arbitrator finds that opinions of Dr. Shenker and Dr. Grimm are persuasive in this case. These physicians note the complete lack of objective evidence of any neurologic impairment of Petitioner in any diagnostic tests, their neurologic examinations, or the neurologic examinations of Petitioner's treating physicians and Petitioner's tendency toward symptom magnification, which is evident when comparing Petitioner's testimony at trial with documentary record evidence.

Also, the Arbitrator notes that Petitioner failed to submit into evidence the neuropsychological evaluations of Dr. Gelbort from April 29, 2009 and May 13, 2009, which Dr. Grimm noted reflected Dr. Gelbort's notations of Petitioner's tendency to over-report symptomatology and that, while Petitioner "had suffered a concussion as a result of his work-related accident[...] he has essentially recovered from that." The Arbitrator infers that these reports would have been adverse to Petitioner's position that his claimed psychological and neuropsychological conditions are work-related to any degree.

Thus, in light of the record as a whole, the Arbitrator finds that Petitioner's claimed neurological or psychological conditions of ill-being are not related to his work accident on May 23, 2008.

In support of the Arbitrator's decision relating to Issue (J), whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

Petitioner submitted medical bills from Provena Medical Center (\$3,628.00), Provena St. Joseph Medical Center (\$485.00), Dr. Gelbort (\$1,597.28), and Dr. Singla (\$235.10). As explained above, Petitioner failed to establish any causal connection between his claimed current neurological, psychological, cervical spine, or left shoulder conditions of ill-being and his work accident. Thus, the Arbitrator finds that these medical bills are not for reasonable and necessary medical care for conditions related to his accident at work. Petitioner's claim for payment of these outstanding medical bills is denied.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to temporary total disability benefits, the Arbitrator finds the following:

The parties have stipulated that Petitioner was temporarily and totally disabled from May 27, 2008 through June 17, 2008 after which time the Petitioner was authorized to return to work. The parties also stipulated that Petitioner was temporarily and totally disabled from May 12, 2009 through August 30, 2009. Thus, Petitioner is entitled to temporary total disability during these periods of time. However, Respondent disputes that Petitioner was disabled from January 31, 2009 through May 11, 2009.

As explained above, the Arbitrator finds that Petitioner failed to establish causal connection between his

claimed neurological or psychological conditions and his work accident. The Arbitrator also finds Respondent's Section 12 examiners', Dr. Shenker and Dr. Grimm, opinions and conclusions to be credible and consistent with the medical evidence as a whole, which reflect that Petitioner suffered no neurological or psychological injury as a result of his work accident as evidenced by the negative CT scan upon Petitioner's original hospitalization, his consistent and repeatedly normal neurological examinations conducted by Dr. Gulati (Petitioner's treating physician) and Dr. Grimm. Thus, Petitioner's claim for temporary total disability from January 31, 2009 through May 11, 2009 is denied.

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 credible and objective evidence that Petitioner sustained multiple injuries including a surgically repaired spleen laceration, an orbital bone and facial fractures that required no surgical intervention, broken ribs and associated ribs, neck and shoulder pain that were treated conservatively all of which the medical records show healed/resolved, and which reflects that Petitioner returned to full duty work as a carpenter months after his accident—the Arbitrator finds that Petitioner has established permanent partial disability to the extent of 15% loss of use of the person as a whole pursuant to Section 8(d)(2).

11 WC 46880
15 IWCC 0104
Page 1

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input type="checkbox"/>	PTD/Fatal denied
<input checked="" type="checkbox"/>	None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nick E. Sullivan,
Petitioner,

vs.

NO: 11 WC 46880
15 IWCC 0104

State of Illinois/Menard Correctional Center
Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

A Petition under Section 19(f) of the Illinois Workers' Compensation Act to Correct Clerical Error in the Decision of the Commission dated February 5, 2015 having been filed by Petitioner herein. Upon consideration of said Petition, the Commission is of the Opinion that it should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated February 5, 2015 is hereby vacated and recalled pursuant to Section 19(f) for clerical errors contained therein.

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

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: APR 16 2015

KWL:vf

42



Kevin W. Lamborn

STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

<input type="checkbox"/> Affirm and adopt	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/> Modify	<input type="checkbox"/> PTD/Fatal denied
	<input type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NICK E. SULLIVAN,
Petitioner,

vs.

NO: 11 WC 46880
15 IWCC0104

STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER,
Respondent.

CORRECTED 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 the nature and extent of Petitioner's permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission modifies the Decision of the Arbitrator only to the extent that it reduces the benefits awarded under Section 8(e) of the Act. Petitioner had been found to have lost 17.5% loss of use of both his left arm and right arm following treatment for bilateral cubital tunnel syndrome. The Decision of the Arbitrator noted Petitioner continued to notice significant scar tissue pain that increases under certain circumstances as well as a dull throbbing pain in his elbows after performing excessive work or with any yard work. The Commission finds the infrequent occurrence of pain and the lack of treatment for said pain, when present, justifies its action.

Petitioner testified to noticing significant scar tissue pain but did not testify as to the frequency in which he experienced it. He only noted that resting his elbows in a chair in a certain way results in a very intense pain. He indicated this pain is not produced when he sits on a couch or a sofa. He claimed that "I don't do it all the time." This is interpreted as an indication that he

does not sit in a chair all the time. In not sitting in a chair "all the time" would lessen the frequency in which Petitioner would experience the claimed pain.

He also testified to experiencing, on occasion, a dull throb at the end of the day if he performs "excessive work or anything in the yard or anything to with the job a lot." Per Petitioner, the dull throb is not constant but occasional and appears to occur only with certain activities.

Petitioner acknowledged that he has returned to his usual occupation as a correctional officer and is working full duty. He also acknowledged that he is not taking an over-the-counter pain medication. His medical records reflect no current subscriptions for pain medication.

The Commission finds Petitioner successfully recovered from bilateral cubital tunnel treatment as evidence by his return to full duty and his lack of need for any pain medication. To the end, the Commission finds Petitioner sustained a 15% loss of use of his right arm, his dominant arm, and a 10% loss of use of his left arm.

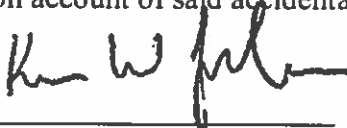
IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$678.32 per week for a period of 37.95 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 15% loss of use of his right arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of \$678.32 per week for a period of 25.3 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 10% loss of use of his left arm.

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.

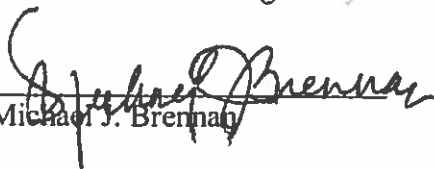
DATED: APR 16 2015
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O: 01/26/15
42



Kevin W. Lamborn



Thomas J. Tyrrell



Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

15IWCC0104

Case# 11WC046880

SULLIVAN, NICK E

Employee/Petitioner

MENARD CORRECTIONAL CENTER

Employer/Respondent

On 6/9/2014, 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:

4852 FISHER KERHOVER & COFFEY
JASON E COFFEY
PO BOX 191
CHESTER, IL 62233

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON L WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN - 9 2014



Ronald A. Mandia
RONALD A. MANDIA, ACTING SECRETARY
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

15 IWCC 0104
Case # 11 WC 46880

NICK E. SULLIVAN
Employee/Petitioner

v.

MENARD CORRECTIONAL CENTER
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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Herrin**, on **April 3, 2014**. By stipulation, the parties agree:

On the date of accident, **October 31, 2011**, 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 **\$58,788.08**, and the average weekly wage was **\$1,130.54**.

At the time of injury, Petitioner was **32** years of age, *single* with **1** dependent child.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit for all TTD paid, **\$0.00** for TPD, **\$0.00** for maintenance, and **\$0.00** for other benefits.

15 IWCC 0104

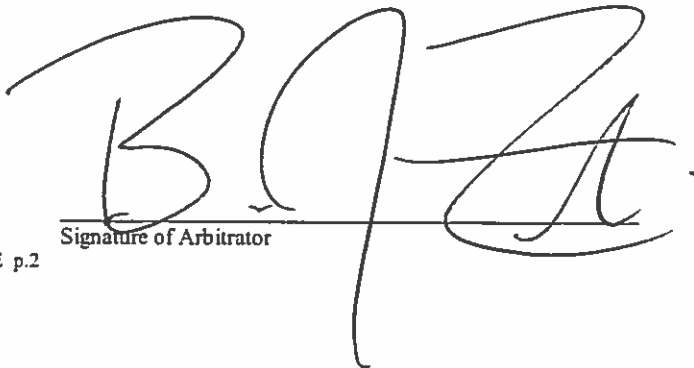
After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of \$678.32/week for a further period of 88.55 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the 17.5% loss of use to the right arm/elbow and the 17.5% loss of use of the left arm/elbow.

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

05/29/2014
Date

ICArbDecN&E p.2

JUN 9 - 2014

STATE OF ILLINOIS)
) SS
COUNTY OF WILLIAMSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

NICK E. SULLIVAN
Employee/Petitioner

15IWCC0104

Case # 11 WC 46880

v.

MENARD CORRECTIONAL CENTER
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

The parties stipulated that on October 31, 2011, Petitioner, Nick Sullivan, a 32 year old correctional officer, sustained injuries to both his right arm/elbow and left arm/elbow while working for Respondent, Menard Correctional Center. Respondent initially disputed the issue of accident at trial, but following the testimony of Petitioner, made an oral motion to amend the Request for Hearing Form (Arbitrator's Exhibit 1) indicating a stipulation that Petitioner suffered a work accident which manifested itself on October 31, 2011.

Petitioner underwent nerve conduction studies per Dr. Daniel Phillips on October 31, 2011, which demonstrated mild-moderate predominantly demyelinating bilateral ulnar neuropathies across the elbows. (Petitioner's Exhibit (PX) 1, p. 3). Following the nerve conduction studies, Petitioner was referred to Dr. David Brown, a hand surgeon. Dr. Brown first treated Petitioner for this issue on May 29, 2013, noting he previously treated Petitioner for bilateral carpal tunnel syndrome and released from him treatment in March 2010. Dr. Brown stated Petitioner began to develop a gradual onset of numbness and tingling along the ulnar aspect of both of his hands in his little finger, ring finger and occasionally the middle finger. (PX 2, p. 1). Dr. Brown felt Petitioner's new symptoms and physical examination findings were consistent with bilateral cubital tunnel syndrome and accordingly issued Petitioner elbow splints to wear at night and recommended he take a non-steroidal anti-inflammatory medication. (PX 2, p. 2).

Petitioner testified at trial to several job duties which he characterized as involving heavy gripping and grasping. The job duties included: bar rapping; repetitive turning of Folger-Adams keys; pulling/pushing on heavy cell doors; and cuffing and un-cuffing of inmates. Petitioner further testified he had no hobbies outside of his employment which were as hand-intensive as the job duties described.

Petitioner also testified about a prior work-related injury. Petitioner had made a previous workers' compensation claim for a repetitive trauma injury involving carpal tunnel syndrome. Petitioner stated the previous claim was resolved through settlement contracts, and Petitioner acknowledged the previous claim had nothing to do with his arms, and he received no monies for permanent partial disability to his arms in the prior settlement.

After a second nerve conduction study on August 5, 2013 showed deterioration of Petitioner's condition as compared to the prior study of October 31, 2011, Dr. Brown recommended surgical intervention. (PX 2, p. 5). Dr. Brown performed a decompression of the ulnar nerve in the right cubital tunnel on December 13, 2013. (PX 2, p.

22). Dr. Brown also performed a decompression of the ulnar nerve in the left cubital tunnel on January 10, 2014. (PX 2, p. 28). Following these two surgical procedures, Petitioner remained off work at the recommendation of Dr. Brown and was paid temporary total disability (TTD) benefits by Respondent.

Petitioner underwent a course of physical therapy at the request of Dr. Brown at Apex Physical Therapy following both surgeries. (PX 3). Following the course of physical therapy, Dr. Brown released Petitioner to full duty with no restrictions on February 17, 2014. At his last visit with Dr. Brown, Petitioner noted swelling in his left elbow with overuse. (PX 2, p. 34). Petitioner was found to have good active range of motion of both elbows and Dr. Brown felt Petitioner had done very well and had no further specific recommendations. (PX 2, p. 34).

Petitioner testified that, since being released by Dr. Brown, he notices significant scar tissue pain, that if he sets his arm on a chair and hits a certain point he has very intense pain. However, he has also noticed the feeling coming back in his hands. Petitioner further testified when he performs excessive work or anything in his yard, he will feel a dull throbbing pain at the end of the day in his elbows.

CONCLUSIONS OF LAW

Petitioner's date of accident falls after September 1, 2011, and therefore Section 8.1b of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq.* (hereafter the "Act") shall be discussed concerning the permanent partial disability (PPD) award being issued. It is noted when discussing the permanency award being issued that no PPD impairment report pursuant to Sections 8.1b(a) and 8.1b(b)(i) of the Act was offered into evidence by either party. This factor is thereby waived.

With regard to Section 8.1b(b)(ii) of the Act (Petitioner's occupation), Petitioner's is employed as a correctional officer. Petitioner's credible testimony indicated his job entails several repetitive duties involving his upper extremities. Further, Petitioner testified he feels a dull throbbing ache in his elbows with excessive work. Accordingly, the Arbitrator concludes that Petitioner's PPD will be larger based on this regard than an individual who performs lighter work, and therefore great weight is afforded this factor when determining the PPD award.

Regarding Section 8.1b(b)(iii) of the Act (Petitioner's age at the time of the injury), Petitioner was 32 years old at the time of manifestation of his repetitive trauma injuries. The Arbitrator considers Petitioner to be a younger individual and concludes that Petitioner's PPD will be more extensive than that of an older individual because he will have to live and work with the disability longer. Great weight is placed on this factor when determining the permanency award.

With respect to Section 8.1b(b)(iv) of the Act (Petitioner's future earning capacity), there is no alleged future earning capacity issue in question, and no weight is therefore given in this regard.

Concerning Section 8.1b(b)(v) of the Act (evidence of disability corroborated by Petitioner's treating medical records), evidence of disability in Petitioner's treating medical records finds that Petitioner's bilateral cubital tunnel syndrome was treated surgically and has now healed. Dr. Brown noted swelling in Petitioner's left elbow with overuse. Petitioner testified he feels a dull throbbing pain in his elbows with excessive work. Great weight is placed on this factor when determining the PPD award.

The determination of PPD is not simply a calculation, but an evaluation of all five factors as stated in the Act. In making this evaluation of PPD, consideration is not given to any single enumerated factor as the sole determinant. Therefore, applying Section 8.1b of the Act, Petitioner has sustained accidental injuries that caused the 17.5% loss of use of the right arm/elbow and the 17.5% loss of use to the left arm/elbow.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

<input type="checkbox"/> Affirm and adopt (no changes)	<input type="checkbox"/> Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/> Affirm with changes	<input type="checkbox"/> Rate Adjustment Fund (§8(g))
<input type="checkbox"/> Reverse <input type="text" value="Choose reason"/>	<input type="checkbox"/> Second Injury Fund (§8(e)18)
<input type="checkbox"/> Modify <input type="text" value="Choose direction"/>	<input type="checkbox"/> PTD/Fatal denied
	<input checked="" type="checkbox"/> None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Louis E. Jogmen,
Petitioner,

vs.

NO. 11WC 10049
15IWCC0218

City of Park Ridge Police Department,
Respondent.

CORRECTED DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the circuit court. The circuit court reversed the Commission's decision on the accrual of benefits and remanded the matter to the Commission "for a determination of benefits in accordance with this Opinion and Order" for injuries to sustained to petitioner's left shoulder and elbow sustained while moving file cabinets for respondent City of Park Ridge. The Commission hereby complies with the order of the circuit court.

The following evidence is pertinent on remand. The evidence adduced at the arbitration hearing shows Petitioner underwent medical treatment that included a course of conservative therapy followed by arthroscopic left shoulder surgery on October 27, 2011. He received TTD benefits from October 27, 2011 through February 5, 2012 related to the left shoulder and returned to full duty.

Petitioner later underwent surgery to his left elbow on July 2, 2012. He received TTD benefits from July 2, 2012 through July 26, 2012. Petitioner returned to modified work at full salary on July 27, 2012. The Petitioner was determined by his treating physician, Dr. Vitosky, to be at MMI with respect to both conditions on February 26, 2013 and the Petitioner was discharged from care. This was not disputed and hence is the law of the case.

The petitioner is left hand dominant. The arbitrator awarded PPD for the loss of 20% of the Petitioner's left arm pursuant to section 8(e) of the Act. The arbitrator found that the Petitioner suffered the loss of 12% of the person-as-a-whole pursuant to section 8(d) (2) of the Act with respect to the left shoulder injury. She ordered as follows:

“Respondent shall pay Petitioner permanent partial disability benefits of \$664.72/week for 50.6 weeks, because the injuries sustained caused the 20% loss of the left arm as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of \$664.72/week for 60 weeks, because the injuries sustained caused the 12% loss of the person as a whole, as provided in Section 8 (d) 2 of the Act.

Respondent shall pay Petitioner the permanent partial disability benefits that have accrued from February 26, 2013 through April 16, 2013, and shall pay the remainder of the award, if any, in weekly payments.”

The arbitrator found that the date of accrual for both awards was February 26, 2013, that being the date of MMI relating to both injuries as determined by Petitioner's physician, Dr. Visotsky who released the Petitioner from treatment on that date. The Petitioner filed a Petition for Review of the arbitrator's decision on the issue of accrual date of PPD. The Commission affirmed and adopted the arbitrator's decision on June 3, 2014.

On judicial review, the circuit court entered an opinion and order on November 13, 2014 which stated:

“ A. The decision of the Illinois Workers' Compensation Commission is reversed and remanded for determination of benefits in accordance with this Opinion and Order.”

The circuit court ordered that the accrual of benefits would commence at the time TTD benefits were terminated. Thus the circuit court ruled PPD would begin accruing on the shoulder injury on February 5, 2012. The PPD for the arm injury would begin accruing on July 27, 2012. No further appeal from the circuit court's ruling was taken.

The Commission notes with respect to the award of 20% loss of use of the left arm pursuant to section 8(e) of the Act the circuit court's award had fully accrued by July 18, 2013, whereas the Commission's award would have fully accrued by February 17, 2014. Regarding the award of 12% of the person as a whole the circuit court's award would have fully accrued by March 31, 2013, whereas the Commissioner's award would have fully accrued by April 22, 2014.

The circuit court referenced two cases in support of its ruling that in the present case the petitioner's awards under 8(e) and 8(d)(2) respectively should accrue at the date of termination of TTD. Both of the cited cases: *Lester v. Industrial Commission*, 256 Ill. App. 3d 520 (1st Dist.

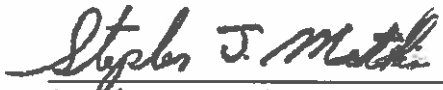
Page 3

1993) and *Greene Welding and Hardware v. Workers' Compensation Comm'n*, 396 Ill. App. 3rd 754 (4th Dist. 2009) involve amputation which is dramatically different from the injuries sustained in the present case. The full nature and extent of an amputation injury is obvious immediately at the time of occurrence. This is not the case with the injuries sustained by petitioner in the present case. See 7 Larson's Workers' Compensation Law §86.02 ("The typical schedule provides that, after the injury has become stabilized and its permanent effects can be appraised, benefits described in terms of regular weekly benefits for specified numbers of weeks shall be paid...").

Although the Commission may not necessarily agree with the circuit court's analysis we are mandated to follow it. That having been said, this matter is now moot as the period of accrual has been fulfilled under either analysis.

DATED:
SM/msb
o-4/17/14
44

APR 17 2015



Stephen J. Mathis

Mario Basurto



David L. Gore