STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vicky Jonas,
Petitioner,

vs.

NOS. 05 WC 42638
18 IWCC 428

State of Illinois/Pontiac Correctional Center,
Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

A Petition to Recall Decision pursuant to Section 19(f) of the Illinois Workers' Compensation Act to correct an error in the Decision and Opinion on Review of the Commission dated July 12, 2018, having been filed by Respondent herein, and the Commission having considered said Petition, the Commission is of the opinion that the Petition should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated July 12, 2018, is hereby recalled pursuant to Section 19(f).

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

DATED: AUG 10 2018

DLS/rm
46

Deborah L. Simpson
Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICKY JONAS,

Petitioner,

vs.

NO: 05 WC 42638 &
18 I.W.C.C. 428

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

Findings of Fact & Conclusions of Law

1. Petitioner testified on April 14, 2005 she worked for Respondent as a licensed practical nurse. On that day, she had to deliver insulin. She had to open "really big gates" which did not open automatically. As she pushed it open "something snapped in" her back and she felt pain. She reported the accident and obtained medical care.

2. Initially, she saw her primary care physician, Dr. Long, whom she saw for about nine months. After he provided conservative treatment, including physical therapy, he referred her to Orthopedic Associates of Kankakee. There, she continued with conservative treatment for about five months. Thereafter, she was referred to Dr. Malek, a neurosurgeon. Petitioner's condition continued to worsen and in April of 2006 she had a fusion at L2-3 with instrumentation.

3. After about three weeks, Petitioner "underwent a re-exploration" of her surgical site. Dr. Malek referred Petitioner to Dr. Kelly for pain management. On June 2, 2008, she had a temporary pain pump implanted, which was replaced by a permanent one in August of 2008. It was still implanted at the time of arbitration. Petitioner continued to treat with Dr. Kelly for the last 10 years. Injections and a stimulator did not help but the pain pump did provide some relief, though she was never pain free. Dr. Kelly monitors the pain medication infused by the pump. Petitioner has been off work since the accident. Additional surgery had been discussed. Petitioner was told that surgery could lead to her being wheelchair-bound for the rest of her life. She declined the surgery.

4. At Respondent's request, Petitioner saw doctors for Section 12 examinations. She saw Dr. Kornblatt on September 17, 2007 and she saw Dr. Patel on July 29, 2014. In December of 2015, Respondent also sent her to a voc rehab counselor, Ms. Helen Weber. They commenced a job search, which Petitioner still continues. She is required to submit a certain number of applications a week. She has submitted almost all of her applications on line. She had not yet received any interviews. She currently has a five-pound lifting restriction, with no excessive bending/stooping/reaching. Probably less than 10% of the jobs she applied for are actually within her restrictions. She then estimated that maybe about 3% are within her restrictions.

5. Petitioner was currently 59 years old. She has a GED, completed a CNA course, and became licensed as a practical nurse in 1989. Her LPN was kept open for 10 years, but she was unable to maintain the requirements. Currently, she has swelling in her legs, with throbbing, cramping, and stabbing pain while walking. She also has lumbar pain. Her pain ranges between 6/10 on a good day and 10/10 on a bad day. She had maybe two good days a week. She takes Percocet for break-through pain. She can walk about 30 minutes or stand about one hour before her pain increases. She has numbness down her right leg, almost every day.

6. Petitioner also testified that her 34-year-old daughter moved in with her and her husband two years previously. Petitioner has hired a housekeeper every other weekend since 2006. Her daughter does the housework in the interim. Petitioner has probably not mopped since the accident. If she had a job, she would have to get up and walk around after sitting an hour, and then she would have to lie down. She never hurt her back or had any of these symptoms prior to the accident.

7. The medical records indicate that after the accident, Petitioner first presented to her primary care physician. She was diagnosed with lumbar strain, prescribed medications and physical therapy, and taken off work.

8. Petitioner was referred to Dr. Santiago. She complained of 9/10 low back pain radiating into the left leg. Dr. Santiago diagnosed lumbar radiculopathy, refilled medications, kept her off work, and ordered an MRI. It was taken on June 5, 2005 and showed a broad-based bulge at L2-3 slightly deforming the ventral subarachnoid space with no root compression or canal stenosis, and multilevel arthropathy/arthrosis.

9. On June 9, 2005, Petitioner returned to Dr. Santiago. She continued to complain of low back pain radiating into the left leg. Dr. Santiago noted that the MRI did not show clear evidence of nerve root compression and therefore, her pain might be discogenic in nature. He noted an epidural steroid injection was indicated. Depending on her response, he might consider a CT.

10. On August 4, 2005, after he administered two epidural steroid injections, Dr. Santiago now noted that the MRI showed a broad-based superficial bulge at L2-3 and mild degenerative disc disease throughout the lumbar spine. She had two-days of relief from the second injection. Her pain currently went to her ankle. She was taking Darvocet and Flexeril. Dr. Santiago felt conservative treatment was exhausted and referred Petitioner to Dr. Malek for a second opinion.

11. Petitioner presented to Dr. Malek on August 17, 2005 for evaluation of back/leg pain, of equal severity, though worsening. She had physical therapy and injections, without significant relief. Her gait was antalgic and straight leg raise was positive on the right. The MRI showed multi-level desiccation and possible herniation on the right at L5-S1. Dr. Malek recommended an EMG and CT/myelogram. Later, Dr. Malek noted that the EMG was negative, and he could not tell whether there was evidence of a disc herniation. He ordered a discogram L2-S1. Dr. Malek noted the discogram was positive at L2-3. They discussed possible fusion. He would set her up with a second opinion.

12. On January 30, 2006, Petitioner returned to Dr. Malek after seeing Dr. DePhillips, who indicated that if the condition was bothering her sufficiently, it would not be unreasonable to consider a fusion or IDET. Petitioner preferred the more definitive fusion. Dr. Malek wanted an additional discogram prior to surgery to determine whether other levels should be addressed.

13. On April 3, 2006, Dr. Malek performed bilateral laminectomy with discectomy and decompression, nerve root decompression and foraminectomy at L2, bilateral discectomy at L2-3, posterior right-sided interbody graft with cage at L2-3, and "posterior segmented anterior fixation" with screws bilaterally at L2-3 for segmented instability at L2-3 incapacitating symptoms unresponsive to conservative treatment. However, it was noted that no instability was found in the surgery.

14. On April 21, 2006, Dr. Malek performed exploration of the wound and fusion and found excellent fusion, excellent placement, and no foraminal narrowing.

15. On August 4, 2006, Petitioner presented to Dr. Kelly on referral from Dr. Malek for chronic (4-10/10) back pain. The pain had been constant since her reported work accident. The pain persisted despite treatment including fusion surgery, though she reported the leg pain was more severe preop. Currently, low back pain was her main complaint and was using a TENS unit, without significant relief. She had also taken Darvocet and Oxycodone without benefit and was currently taking Valium and using a Fentanyl patch. Dr. Kelly diagnosed bilateral sacroiliitis and arachnoiditis, possible neuropathic back/right leg pain. He recommended bilateral SI joint injections.

16. On September 6, 2006, Petitioner reported significant relief from the SI injections, but it lasted only a few days. The pain returned and was at 8-9/10. Dr. Kelly diagnosed "postlaminectomy syndrome with pain in the basis of chronic nerve damage." He believed there was a component of axial mechanical pain likely due to SI arthropathy, improved on the left and more persistent on the right. He adjusted medication and provided her information on spinal cord stimulators.

17. At Respondent's request, on September 17, 2007 Petitioner presented to Dr. Kornblatt for an examination under Section 12 of the Act. After his review and summarization of Petitioner's medical treatment and his clinical examination, Dr. Kornblatt opined that Petitioner suffered a work injury which resulted in a lumbosacral strain and aggravation of preexisting lumbar degenerative disc disease and facet arthritis. The surgery was performed for chronic pain caused by the lumbosacral strain. She did not get relief from L2-3 fusion surgery, but rather developed chronic pain dysfunction and failed back surgery syndrome. She might need to have the hardware removed, but a spinal cord stimulator was not indicated. Presently, Petitioner was totally disabled.

18. On July 2, 2008, Petitioner returned to Dr. Kelly and reported 8-10/10 pain. Dr. Kelly refilled medications set up for a trial of intrathecal catheter for trial of intrathecal narcotics. Dr. Kelly continued to treat Petitioner with injections, medication, and the implantation of a trial spinal cord stimulator, which was considered failed.

19. On August 11, 2008, Dr. Kelly performed inpatient implantation of a programmable intrathecal pump and intrathecal catheter for failed back surgery syndrome. Petitioner returned to Dr. Kelly on numerous occasions thereafter and he would refill the pump and adjust dosage. The last such entry appears to be on August 8, 2016.

20. In August of 2014, Petitioner presented to Dr. Patel for another examination under Section 12. Dr. Patel noted that Petitioner presented using a 4-point cane, walking with an antalgic gait, and complaining mostly of back and right-leg pain. He reported her accident and medical treatment to date. She rated her pain as normally at 6/10, currently at 8/10, and worst at 10/10. The pain radiated down the right thigh, "somewhat diffusely." She reported she could stand for about 30 minutes and sit for about an hour. She reported no pain in her back or leg prior to the accident.

21. Dr. Patel opined that Petitioner sustained a lumbar sprain in the work-related accident. It did not respond to conservative treatment and she then had L2-3 fusion, which also did not provide any improvement. She had a pain pump, which at least allowed her to function. Currently, she had myofascial tenderness in the lumbar spine, which Dr. Patel attributed to deconditioning and normal accumulation of scar tissue postop. He opined that she suffered a lumbar sprain and surgery was performed. However, she exhibited non-dermatomal distribution of pain in the right leg and there was no significant nerve root entrapment in the imaging. He really was unsure of the source of her pain. Therefore, he could not rule out secondary gain as a cause for her pain.

22. Dr. Patel also noted that because of the chronic pain dysfunction, which necessitated the use of opioids for a long duration, she had significant central sensitization which heightened her pain perception and resulted in overall disability and dysfunction. He recommended stopping oral Percocet completely and reducing the narcotics in the pain pump. He recommended use of a nerve membrane stabilizer, such as Gabapentin or Lyrica. He did not believe she needed any additional treatment or evaluation. However, she would need work restrictions. He recommended an FCE, after which she would be at maximum medical improvement and be released to work based on the findings.

23. Petitioner submitted purported job search logs spanning from December 20, 2015 through September 17, 2016. It includes about 52 sheets comprising about 275 entries. All the entries indicate that the lead came from either Monster.Com or Indeed.Com. Results were reported as "none," "applied for," or "sent resume." The exhibit also includes responses from Indeed and Monster indicating that applications had been submitted, that applications were started and may or may not have been competed, or asking Petitioner for additional information or qualifications. There appears to 70 such responses. There was also a notation from Indeed.Com that she had applied for 60 positions and "saved" one. Some employers were named multiple times, and there certainly could be some duplications.

24. On April 1, 2016, a vocational rehabilitation counselor, Ms. Weber, reviewed Petitioner's job search logs. She noted that Petitioner documented 58 completed job applications to 46 individual employers, nine of which she applied multiple times. Ms. Weber noted that on average Petitioner applied for only 14 jobs per month, or about three a week. She opined that even allowing for a lull in the holiday season, Petitioner must devote more time to her jobs search activities. She noted 50 entries in which she was unable to verify the applications, with a few having no record of an application. Ms. Weber indicated that Petitioner could obtain employment within her restrictions and in her geographic area.

As noted above, the Arbitrator awarded Petitioner 300 weeks of permanent partial disability benefits representing loss of 60% of the person-as-a-whole. The Arbitrator cited a prior Commission decision in *Ballinger v. Montgomery Wards*, 98 I.W.C.C. 64402 (2007), as analogous to the instant claim. Respondent also cites *Ballinger* and seeks reduction of the award to loss of 40% of the person-as-a-whole.

In *Ballinger*, the claimant underwent a one-level cervical fusion, had physical therapy, treated at a pain clinic for several years, and was ultimately diagnosed with failed back syndrome and chronic pain. The claimant had not returned to work and the treating doctor declared him permanently disabled from employment. Nevertheless, the Commission found that the claimant was capable of sedentary work and awarded him loss of 50% of the person-as-a-whole. The Commission agrees with the Arbitrator that *Ballinger* is analogous to the instant claim. However, we see no reason to increase the award over that awarded in *Ballinger*. Accordingly, the Commission reduces the permanent partial disability award to 250 weeks representing loss of 50% of the person-as-a-whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $475.13 per week for a period of 487&4/7 weeks, in temporary total disability benefits.

IT IS FURTHER ORDERED BY THE COMMMISSION that Respondent pay to Petitioner the sum of $475.13 per week for a period of 109&2/7 weeks, in maintenance benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is granted credit of $214,698.14 in temporary total disability and maintenance payments made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $427.61 per week for a period of 250 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 50% 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.

DATED:

AUG 10 2018

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
O-6/28/18
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

18IWCC0428

JONAS, VICKY
Employee/Petitioner

Case# **05WC042638**

ST OF IL/DEPT OF CORRECTION
Employer/Respondent

On 11/21/2017, 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 1.41% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0575 REGAS GUBBINS & REGAS
MATTHEW T GUBBINS
ONE DEARBORN SQ SUITE 300
KANKAKEE, IL 60901

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

5002 ASSISTANT ATTORNEY GENERAL
JOSEPH BLEWITT
500 S SECOND ST
SPRINGFIELD, IL 62706

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

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

NOV 21 2017

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

18IWCC0428

STATE OF ILLINOIS)
)SS.
COUNTY OF **Peoria**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Vicky Jonas
Employee/Petitioner

v.

State of Illinois/Dept. of Corrections
Employer/Respondent

Case # **05** WC **42638**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Peoria**, on **9/21/16**. 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 _____

18IWCC0428

FINDINGS

On **4/14/05**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$34,589.00**; the average weekly wage was **$712.69**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$41,161.96** for TTD, **$0** for TPD, **$173,536.18** for maintenance, and **$0** for other benefits, for a total credit of **$214,698.14**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $475.13/week for 487 4/7 weeks, commencing 4/15/05 through 8/18/14, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $41,161.96 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner maintenance benefits of $475.13/week for 109 2/7 weeks, commencing 8/19/14 through 9/21/16, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $173,536.18 for maintenance benefits that have been paid.

Respondent shall pay Petitioner permanent partial disability benefits of $427.61/week for 300 weeks, because the injuries sustained caused the 60% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Michael K. Nowak, Arbitrator

10/19/17
Date

ICArbDec p 2

18IWCC0428

BACKGROUND

This is an accepted claim with the parties stipulating to accident and causation. The only issues in dispute are the nature and extent of Petitioner's disability and the amount due for TTD and/or maintenance. The parties stipulated and agreed that Respondent is entitled to credit of $214,698.14 for TTD and maintenance payments. AX1. It appears to the Arbitrator based upon Respondent's exhibit three that TTD was paid through July 2014 and maintenance was commenced August 1, 2014. Maintenance was last paid on May 15, 2016. RX3.

FINDINGS OF FACT

Petitioner, Vicky Jonas, was a licensed practical nurse employed by Respondent at Pontiac Correctional Center. On April 13, 2005, while at work and on-duty, Petitioner was pulling a heavy gate, which was stuck, and felt pain in her low back. Pain began radiating to her hips and thighs, she gave notice of this injury, and saw her primary care physician Dr. Jeffrey Long at the Medical Group of Kankakee County the next day. It was noted she was to be on vacation for the next week and one half, and she was instructed to return in 5 – 7 days if she was no better. PX1. One week later, Petitioner presented to Dr. Jeffrey Barra at the Medical Group of Kankakee County and she was diagnosed with a lumbar strain and prescribed physical therapy. Id. Petitioner was ordered off-work on 4/22/2005. Id.

Therapy did not improve her symptoms and she was referred to Dr. Juan Santiago-Palma at Orthopedic Associates of Kankakee who diagnosed her with left lumbosacral radiculopathy. PX3. An x-ray showed degenerative changes prominent at L1-L2 with fairly marked spurring, and less spurring at L1, L2, and L3. Id. An MRI showed a broad-based circumferential bulge at L2-L3. Id. Dr. Santiago-Palma performed steroid injections on 5/29/2005 and 6/29/2005. Id.

On 8/17/2005, Petitioner was seen by Dr. Michel Malek, a neurosurgeon, who performed a discogram, which implicated L2-L3 as the pain generator. PX4. Petitioner underwent L2-L3 posterior fusion on April 3, 2006. Id. Following the surgery, Petitioner had worsening of right leg pain and weakness, and underwent exploration of the fusion, which revealed excellent placement of plate and screws. PX5. This was performed on April 21, 2006. Id. She was prescribed PT, but only attended for one week due to pain.

Petitioner then saw Dr. James Kelly at Metro Area Pain Consultants on August 4, 2006, who recommended bilateral sacroiliac join injections, which she received on August 23. PX7. She was also evaluated by Dr. John Liu at Northwestern who recommended conservative treatment and no further surgery. Petitioner began PT at United Physical Therapy Services, but only attended for two weeks due to her high pain levels.

Dr. Kelly recommended a spinal cord stimulator to treat her new diagnosis of failed back syndrome. PX7. Petitioner submitted to her third EMG since the date of accident on 2/7/2007. PX7. The first two were normal, but the third showed lumbosacral radiculopathy at L5-S1. Id. Again she was prescribed physical therapy, and again was unable to complete the program due to pain. Id.

On April 13, 2007, she underwent a right L5-S1 injection, and did not report significant improvement.

On 8/13/2007, she received the spinal cord stimulator trial from Dr. Kelly. PX7. She did not report significant improvement, and the trial did not become permanent. Id.

On September 17, 2007, Petitioner presented to Dr. Michael Kornblatt for an examination pursuant to section 12 of the Act. PX8. Dr. Kornblatt reviewed her treatment history, her symptoms, her diagnostic tests, her medications, and performed a physical exam. Id. He opined that Petitioner suffered a lumbosacral strain and aggravation of a preexisting lumbar degenerative disc disease and facet arthritis as a result of her April 13, 2005 work accident. Id. He also opined that the accident necessitated surgery, which in turn resulted in "failed back surgery syndrome."

He noted "there may be some retropulsion of the posterior lumbar interbody fusion internal fixation device, which may be causing pain and disability. It is possible that the claimant may necessitate an anterior spinal procedure for removal of the interbody case and repair of the L2-3 interbody fusion." Id. He continues, "Presently, the claimant is totally disabled due to chronic pain dysfunction…[she] has yet to reach maximum medical improvement regarding the spinal surgery, which was performed April 13, 2006." Id.

Petitioner continued to report significant pain while seeing Drs. Kelly and Malek. PX4, PX7. An intrathecal implantable pain pump trial was performed on June 2,2008, this time with significant improvement of symptoms, and therefore the pump was permanently installed on August 11, 2008. PX7.

Petitioner returned to Dr. Malek on October 27, 2008, and he completed a work status report indicating "off-work" and wrote "permanent" on the same line. PX11. Petitioner continued to see Dr. Malek periodically until May 3, 2010, but no additional treatment other than monitoring was provided.

As of the date of hearing Petitioner remained under the care of Dr. Kelly on a regular basis for pain medicine refills, including her pain pump. PX7.

On August 18, 2014, Petitioner presented to Dr. Arpan Patel, a pain interventionalist and anesthesiologist, at Respondent's request pursuant to section 12 of the Act. RX1. He reviewed her treatment history, her symptoms, her diagnostic tests, and her medications. Id. At that time, she reported pain in her low back that radiates into her right buttock. Id. She reported 8/10 pain at the time of the exam, an average of 6/10 pain, and 10/10 pain at its worst. Id. He performed a physical exam. Id. He reviewed her work history and education. Id. He indicated he was "unsure as to the true nature of pain radiating into the right leg and cannot rule out secondary gain as a source of her complaints." Id. He also said long-term opioid usage has "heightened her perception of pain, and has resulted in her overall disability and dysfunction." Id. He recommended Petitioner cease the use of oral Percocet, as it offers only psychological relief, and reducing the overall opioids in her pain pump. Id. He opined Petitioner "will require some physical restrictions in order to perform work duties." Id. He indicated those restrictions could be determined following an FCE. He further noted 'A desk job type position with frequent stretching and moving capabilities would suffice. She may not be able to work a full eight-hour day." Id. No FCE was offered or performed.

Despite the opinion of Dr. Patel, Respondent did not provide vocational assistance. It appears from the record that on December 20, 2015 Petitioner began conducting a job search on her own. Petitioner's job search log was entered into evidence. PX12. It is unclear what, if any, actual vocational services or assistance were

provided to Petitioner. What is clear from the evidence in the record is that on April 1, 2016 Helen Weber, MS, CRC, of Creative Case Management, prepared a report in which she critiques Petitioner's job search log. The Arbitrator read and carefully considered her report. Ms. Weber noted that Petitioner had made 52 applications for work, with 46 individual employers, during the approximately 3 months prior to her report. The report indicates that a "reasonable individual" would to apply for more positions than Petitioner had. However, the report does not indicate what number of applications a "reasonable individual" should make in any given time period. Ms. Weber also pointed out that of the 52 applications mentioned in Petitioner's job log at the time she was unable confirm or refute that applications 35 of the applications were made because either the employers would not disclose information or no longer had records of applications. Her report further indicates that 7 of the employers had no record of Petitioner applying and that two of the employers had contacted Petitioner to schedule an interview but she failed to contact them to schedule. At trial Petitioner denied she was ever contacted for any interview. The report also points out that Petitioner applied to a number of employers more than once and that she applied for 4 positions that appeared to be either beyond her physical abilities or experience level. The Arbitrator notes that while she did apply to a number of employers more than once some of the applications were for different positions and with some the reapplications were spread over time. Petitioner testified that she was willing to attempt work beyond her restrictions in necessary. The Arbitrator notes there does not appear to have been any direction or suggestion given to Petitioner regarding the proper approach to making job search prior to Ms. Weber's critique of the job log.

It does not appear Ms. Weber ever passed any of her critiques on to Petitioner or offered any suggestion to improve the search. Petitioner testified that she became aware of Respondent's criticism of her job search and modified her search in order to make contacts more verifiable, which she appears to have done. PX12. Maintenance was last paid on May 15, 2016, but Petitioner's un successful job search continued through the date of hearing.

Petitioner did not submit evidence from a vocational professional.

CONCLUSIONS

The parties agree that Petitioner is not capable of returning to her former employment. The dispute concerns the period for which TTD is due and whether maintenance benefits are due at all.

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

There is no dispute that Petitioner was entitled to TTD immediately following the accident.

On October 27, 2008 Dr. Malek completed a work status report indicating "off-work" and wrote "permanent" on the same line. PX11. Petitioner continued to see Dr. Malek until May 3, 2010. As of the date of hearing Petitioner remained under the care of Dr. Kelly on a regular basis for pain medicine refills, including her pain pump. On August 18, 2014, Petitioner presented to Dr. Arpan Patel, at Respondent's request he opined Petitioner will require some physical restrictions in order to perform work duties, and that restrictions could be determined following an FCE. He further noted that she may not be able to work a full eight-hour day. No FCE was offered or performed. The Arbitrator finds Petitioner is entitled to TTD from the date of accident through August 18, 2014 when she was examined by Dr. Patel.

Despite the undisputed evidence that Petitioner could not return to her former employment, Respondent did not offer or provide vocational assistance. However, according to Respondent's payment records they began paying maintenance benefits on August 1, 2014. On December 20, 2015 Petitioner began conducting a job search on her own. Although perhaps less thorough than a job search conducted with professional guidance, Petitioner continued to perform her job search through the date of hearing. Further, when Respondent provided feedback regarding Petitioner's job search she modified her search as evidenced by PX12. In light of the fact that no professional vocational rehabilitation services were offered, as well as the record as a whole, The Arbitrator finds Petitioner's self directed job search was reasonable under the circumstances and that she is entitled to maintenance up to the date of hearing.

Respondent shall pay Petitioner temporary total disability benefits of $475.13/week for 487 4/7 weeks, commencing 4/15/05 through 8/18/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $41,161.96 for temporary total disability benefits that have been paid.

Respondent shall further pay Petitioner maintenance benefits of $475.13/week for 109 2/7 weeks, commencing 8/19/14 through 9/21/16, as provided in Section 8(a) of the Act. Respondent shall be given a credit of $173,536.18 for maintenance benefits that have been paid.

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

Petitioner seeks an award for permanent and total disability pursuant to Section 8(f) of the Act. In order to prove entitlement to an award of permanent and total disability benefits Petitioner must show: that by a preponderance of the medical evidence she is incapable of performing any work; that she is so handicapped that she will not be employed regularly in any well-known branch of the labor market; or that she has conducted a diligent but unsuccessful job search.

Dr. Malek completed a work status report on 10/27/2008 where he checked the box indicating "off-work" and wrote "permanent" on the same line. He also wrote "patient is permanently disabled." The next available treatment note from Dr. Malek is from 4/13/2009, where he writes "Restrictions are permanent" under the "Work Status" section. Dr. Patel states in his August 2014 IME that Petitioner "will require some physical restrictions in order to perform work duties." He further notes that restrictions may be set after Petitioner undergoes an FCE. He indicates that Petitioner could probably perform sedentary work, although she may not be able to work a full eight-hour work day. However, the Arbitrator finds that the somewhat cryptic notations of Dr. Malek are insufficient to meet Petitioner's burden of establishing entitlement to PTD benefits.

A claimant may also prove permanent and total disablement is by showing, by preponderance of the evidence, that she is so handicapped that she cannot be employed regularly in any well-known branch of the labor market. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 546–47, 50 Ill.Dec. 710, 419 N.E.2d 1159 (1981).

Ms. Weber, Respondent's vocational rehabilitation expert, at least implies in her report that Petitioner is capable of performing the duties of several jobs within Petitioner's geographic area. Petitioner offered no expert opinion to the contrary. There are recent cases in which odd lot determinations based upon the fact that there is no stable job market for a person of the claimant's age, skills, training, and work history have required

evidence from a rehabilitation services provider or a vocational counselor. *Westin Hotel v. Indus. Comm'n of Illinois*, 372 Ill. App. 3d 527, 545, 865 N.E.2d 342, 358 (2007). Here, there is no such evidence. The Arbitrator finds the evidence insufficient to establish Petitioner's entitlement PTD benefits due to the absence of a stable job market for a person of the claimant's age, skills, training, and work history.

Finally, Petitioner may prove permanent and total disablement is by showing a diligent but unsuccessful job search. *ABB* at 750. Although the Arbitrator has found Petitioner acted reasonably in her job search under the circumstances, i.e. with no professional assistance, for purposes of her entitlement to maintenance benefits, I am not convinced that the job search has been thorough enough to rule out the possibility of finding employment. Accordingly, therefore the Arbitrator finds that Petitioner has not met her burden of proving permanent and total disability using this method.

Although consideration has been given to section 8(d)1 of the Act, there is insufficient evidence in the record upon which to base an award of wage differential benefits.

The Arbitrator therefore finds that an award of permanent partial disability is appropriate in this case. The Arbitrator has looked to the case of *Ballinger, v. Montgomery Wards* 98 IL. W.C. 64402 for guidance. In that case the claimant sustained injuries and underwent a 1-level cervical fusion, attended physical therapy, treated at pain clinics for several years, and was ultimately diagnosed with failed back syndrome and chronic pain. The claimant did not return to work. The treating physician declared that petitioner "is permanently disabled from any gainful employment," but the Commission found that the claimant was capable of sedentary work with being given the ability to change positions and limit lifting. The Commission awarded 50% man-as-a-whole.

The facts are similar to the case at bar, except this case involves a lumbar fusion and not a cervical fusion. Based upon the foregoing and the record taken as a whole, the Arbitrator finds the injuries sustained by Petitioner caused the 60% loss of the person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS – ILLINOIS WORKERS' COMPENSATION COMMISSION,
Petitioner,

18IWCC0497

vs. No: 15 INC 198

MICHAEL HANFELDER, INDIVIDUALLY
& D/B/A HANFELDER TREE SERVICE,
Respondents

DECISION AND OPINION ON PETITION FOR
FINES FOR INSURANCE NON-COMPLAINCE

This matter comes before the Commission on the Commission's Motion for Imposition of Fines for Failure to Maintain Workers' Compensation Insurance. A hearing was held before Commissioner Simpson on July 11, 2018 in Collinsville. Petitioner was represented by the Office of the Attorney General. Neither Respondent nor counsel on behalf of Respondent appeared and the matter was heard *ex parte*.

Michael Cummins testified he works as an investigator for the Insurance Compliance Division of the Workers' Compensation Commission. He began to investigate whether Respondent had workers' compensation insurance after an Application for Adjustment of Claim was filed in 2015 naming Respondent as his employer and the Injured Workers' Benefit Fund as an additional respondent.

Mr. Cummins identified a certified copy of a report from the National Council on Compensation Insurance which indicated Respondent currently did not have workers' compensation insurance. He also identified documents from the Illinois Department of Revenue, Illinois Department of Employment Security, and the United States Occupation Safety and Health Administration all verifying that Respondent had employees. In addition, in a conversation he had with Mr. Hanfelder, he did not dispute the fact that he had employees.

18IWCC0497

Mr. Cummins also testified that Mr. Hanfelder informed him that he acknowledged receipt of the Notice of Hearing and that he was hiring a lawyer. On September 12, 2016, Mr. Cummins received a call from attorney Joe Papa who indicated he represented Respondent and asked for a settlement offer. On March 1, 2018, he called Mr. Papa and informed him that the Office of the Attorney General was ready for trial and the review date was May 2, 2018. On that date, Mr. Cummins received a call from Mr. Papa's office asking that the review date be continued. It was continued to July 11, 2018, and Respondent was properly served with notice of the change of review date. That was the last time Mr. Cummins had contact with Respondent or a lawyer on Respondent's behalf. As noted above neither Respondent or a lawyer on Respondent's behalf appeared at the instant hearing.

Mr. Cummins noted that during his conduct of business, Respondent had workers' compensation insurance intermittently. He noted that Respondent did not have workers' compensation insurance coverage for a total of 2,095 days of operation. The statutory fine for non-compliance with the requirement to maintain workers' compensation insurance is $500.00 a day. Therefore, the statutory fine would be $1,047,500.00. The Commission notes that because Respondent occasionally had workers' compensation insurance, he was aware of the requirement to maintain such insurance and his non-compliance was intentional and willful. Accordingly, the Commission imposes the statutory fine of $1,047,500.00.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's request for fines for non-compliance with the requirement of maintaining workers' compensation insurance is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Michael Hanfelder, individually and doing business as Hanfelder Tree Service, pay to the Commission $1,047,500.00 for knowingly and intentionally failing to maintain workers' compensation insurance for 2,095 days, pursuant to §4(d) of the Act.

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

DATED: AUG 13 2018

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
R-7/11/18
46

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Illinois Workers' Compensation Commission,
Insurance Compliance Division,
Petitioner,

vs. NO. 12 INC 229

Theresa Avalos, Individually and as president;
Arthur Avalos individually and as secretary; and
Avalos Metals, Co., Inc.
Respondent.

ORDER

Petition for Respondent's motion for penalties under §4 of the Act herein and due notice given, this cause came before Commissioner Gore March 1, 2016. The Commission having jurisdiction over the persons and subject matter and after being advised in the premise finds:

- This matter was previously brought against Respondents here by the Illinois Workers' Compensation, Insurance Compliance Division for failure of Respondents to obtain and maintain workers' compensation coverage from July 20, 2005 through the date of hearing. Respondent has been in operation since 1998.

- Petitioner became aware of Respondent's non-compliance to obtain and maintain workers' compensation insurance coverage as two employees of Respondent had filed Applications for Adjustment of Claim due to injuries sustained while working at Respondent facility (11 WC 46701-Alvada, and 12 WC 03759-Arriaga).

- The matter was heard and discussed previously regarding Respondent's failure to have workers' compensation insurance. Respondents, in fact, had a number of employees and the Respondents knowingly and willingly failed to obtain and maintain workers' compensation of a period of many years. An insurance compliance settlement agreement was signed by Respondent representative, Arthur Avalos, and a representative from the IWCC Insurance Compliance Division (in 2014), wherein Respondent agreed to pay $25,000.00, as penalty for the non-compliance with the Act, as to the past failure to have and maintain workers' compensation insurance coverage. Additionally, Respondent agreed

to obtain and maintain workers' compensation insurance coverage going forward and Petitioner would suspend further action.

- Respondent had been advised by Petitioner's counsel previously to obtain the coverage as well as obtaining counsel for representation.

- From the time of that agreement through the time of this hearing, Respondent's failed to meet their obligation of paying the $25,000 and further failed to obtain any workers' compensation insurance coverage. Thereafter, Petitioner filed the motion for an emergency work-stop order on September 21, 2015 with proper notice provided to Respondent of this hearing.

- Petitioner previously (September 29, 2015) evidenced that Respondent is subject to the Illinois Workers' Compensation Act via Sections 2, 4(d), 4(a), and Section 7100.100 of the Illinois Administrative Code. Petitioner further noted Respondents being subject to the mandatory provisions of the Act via Section 3(8), therein stating, "Any enterprise in which sharp edged cutting tools, grinders, or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery", as well as Section 3(15), therein stating, "Any business or enterprise in which electric, gasoline or other power driven equipment is used in the operation thereof".

- Respondent operates a metal recycling center (Avalos Metal, Co.) where they take in aluminum and other metals (like brass and copper) to recycle. Machines are operated in the process for cutting and baling. The process also includes the operation of a forklift, and vehicles for transporting the materials.

- At the September 29, 2015 hearing Petitioner submitted evidence of the prior agreement, as well as, evidence of the insurance non-compliance. Petitioner further submitted photos and the testimony of Investigator Wilson who performed an investigation and surveillance of Respondents' facility. Investigator Wilson provided photos of Respondents' facility (days prior to this hearing), noting Respondent still operating despite not obtaining the required workers' compensation insurance coverage.

- Respondent, pro se, at that hearing acknowledged the prior hearing and discussions, and settlement agreement. Further, Respondent acknowledged that he had not paid the required $25,000 penalty, nor had he obtained the legally required workers' compensation coverage.

- As a result of the September 29, 2015 hearing, the Commission issued a cease and desist, work-stop order.

- Respondents were personally served December 31, 2015 regarding this current motion for penalties under §4(d) of the Act. The matter came before Commissioner Gore and Mr. Avalos was present without representation, January 15, 2016. At that time Mr. Avalos was advised to hire an attorney and appear at the next hearing, March 1, 2016. On March 1, 2016 this matter came before Commissioner Gore on this Petitioner's motion for penalties at that time. Respondent failed to appear either personally or through an attorney.

As noted in the prior order, the Commission finds that Respondents' facility is of the type considered under Section 4(a) that creates "an immediate serious danger to the public, safety, and welfare" sufficient in magnitude to justify service by the Commission of a work-stop order for non-compliance. The Commission notes that companies who do not comply with the Act forces the IWCC to handle such uninsured Respondent claims via the Injured Workers' Benefit Fund (IWBF), thereby, creating an additional burden on the State of Illinois in such matters. The Commission here notes the gravity of matter with Respondent's flagrant and continual disregard for the applicable statutes and settlement agreement. Further, the Commission notes that considering Respondents' course of conduct, by failing to comply with the Act in obtaining workers' compensation insurance coverage and further by failing to meet the provisions of the prior settlement agreement, Respondents here are unlikely to secure and pay for workers' compensation coverage in the future. The Commission finds no mitigating factors evidenced; Respondents only excuse being the cost of coverage. Respondents simply have repeatedly failed to obtain, maintain and pay for workers' compensation insurance as required by the Act and failed to meet their prior commitments. The Commission, herein finds that Respondents flagrant disregard of the Act and prior agreement warrants imposition of further penalties beyond the prior $25,000.00 that had been agreed by the parties and totally disregarded by Respondent (individually and as Avalos Metals co. Inc.). The Commission further advises Respondents, that in addition to the imposed penalties, under §4(d) of the Act Respondents failure to obtain the required workers' compensation may result in Respondents being prosecuted for a Class 4 felony for knowingly failing to provide said coverage, especially given the dangerous nature of the business.

The Commission further accesses penalties of $100.00 per day from the prior hearing September 29, 2015 through the hearing of March 1, 2016, 153 days (total additional penalties $15,300.00).

IT IS AGAIN THEREFORE ORDERED BY THE COMMISSION that the Respondents herein, individually and as Avalos Metals, Co. Inc., cease and desist, work-stop, all business operations at the current or other addresses.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent immediately pay the prior accessed fine agreement ($25,000.00) plus interest plus the current penalty assessment ($12,300.00). (Total past and current penalties assessed at $40,300.00 plus interest)

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

The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

David L. Gore

DATED: AUG 15 2018

David L. Gore

8/8/16
DLG/jsf
045

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

Vicky Jonas,
Petitioner,

vs. NOS. 05 WC 42638
18 IWCC 428

State of Illinois/Pontiac Correctional Center,
Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

A Petition to Recall Decision pursuant to Section 19(f) of the Illinois Workers' Compensation Act to correct an error in the Decision and Opinion on Review of the Commission dated July 12, 2018, having been filed by Respondent herein, and the Commission having considered said Petition, the Commission is of the opinion that the Petition should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated July 12, 2018, is hereby recalled pursuant to Section 19(f).

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

DATED: AUG 10 2018

DLS/rm
46

Deborah L. Simpson
Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify: Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

VICKY JONAS,

Petitioner,

vs.

NO: 05 WC 42638 &
18 I.W.C.C. 428

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

Findings of Fact & Conclusions of Law

1. Petitioner testified on April 14, 2005 she worked for Respondent as a licensed practical nurse. On that day, she had to deliver insulin. She had to open "really big gates" which did not open automatically. As she pushed it open "something snapped in" her back and she felt pain. She reported the accident and obtained medical care.

2. Initially, she saw her primary care physician, Dr. Long, whom she saw for about nine months. After he provided conservative treatment, including physical therapy, he referred her to Orthopedic Associates of Kankakee. There, she continued with conservative treatment for about five months. Thereafter, she was referred to Dr. Malek, a neurosurgeon. Petitioner's condition continued to worsen and in April of 2006 she had a fusion at L2-3 with instrumentation.

3. After about three weeks, Petitioner "underwent a re-exploration" of her surgical site. Dr. Malek referred Petitioner to Dr. Kelly for pain management. On June 2, 2008, she had a temporary pain pump implanted, which was replaced by a permanent one in August of 2008. It was still implanted at the time of arbitration. Petitioner continued to treat with Dr. Kelly for the last 10 years. Injections and a stimulator did not help but the pain pump did provide some relief, though she was never pain free. Dr. Kelly monitors the pain medication infused by the pump. Petitioner has been off work since the accident. Additional surgery had been discussed. Petitioner was told that surgery could lead to her being wheelchair-bound for the rest of her life. She declined the surgery.

4. At Respondent's request, Petitioner saw doctors for Section 12 examinations. She saw Dr. Kornblatt on September 17, 2007 and she saw Dr. Patel on July 29, 2014. In December of 2015, Respondent also sent her to a voc rehab counselor, Ms. Helen Weber. They commenced a job search, which Petitioner still continues. She is required to submit a certain number of applications a week. She has submitted almost all of her applications on line. She had not yet received any interviews. She currently has a five-pound lifting restriction, with no excessive bending/stooping/reaching. Probably less than 10% of the jobs she applied for are actually within her restrictions. She then estimated that maybe about 3% are within her restrictions.

5. Petitioner was currently 59 years old. She has a GED, completed a CNA course, and became licensed as a practical nurse in 1989. Her LPN was kept open for 10 years, but she was unable to maintain the requirements. Currently, she has swelling in her legs, with throbbing, cramping, and stabbing pain while walking. She also has lumbar pain. Her pain ranges between 6/10 on a good day and 10/10 on a bad day. She had maybe two good days a week. She takes Percocet for break-through pain. She can walk about 30 minutes or stand about one hour before her pain increases. She has numbness down her right leg, almost every day.

6. Petitioner also testified that her 34-year-old daughter moved in with her and her husband two years previously. Petitioner has hired a housekeeper every other weekend since 2006. Her daughter does the housework in the interim. Petitioner has probably not mopped since the accident. If she had a job, she would have to get up and walk around after sitting an hour, and then she would have to lie down. She never hurt her back or had any of these symptoms prior to the accident.

7. The medical records indicate that after the accident, Petitioner first presented to her primary care physician. She was diagnosed with lumbar strain, prescribed medications and physical therapy, and taken off work.

8. Petitioner was referred to Dr. Santiago. She complained of 9/10 low back pain radiating into the left leg. Dr. Santiago diagnosed lumbar radiculopathy, refilled medications, kept her off work, and ordered an MRI. It was taken on June 5, 2005 and showed a broad-based bulge at L2-3 slightly deforming the ventral subarachnoid space with no root compression or canal stenosis, and multilevel arthropathy/arthrosis.

9. On June 9, 2005, Petitioner returned to Dr. Santiago. She continued to complain of low back pain radiating into the left leg. Dr. Santiago noted that the MRI did not show clear evidence of nerve root compression and therefore, her pain might be discogenic in nature. He noted an epidural steroid injection was indicated. Depending on her response, he might consider a CT.

10. On August 4, 2005, after he administered two epidural steroid injections, Dr. Santiago now noted that the MRI showed a broad-based superficial bulge at L2-3 and mild degenerative disc disease throughout the lumbar spine. She had two-days of relief from the second injection. Her pain currently went to her ankle. She was taking Darvocet and Flexeril. Dr. Santiago felt conservative treatment was exhausted and referred Petitioner to Dr. Malek for a second opinion.

11. Petitioner presented to Dr. Malek on August 17, 2005 for evaluation of back/leg pain, of equal severity, though worsening. She had physical therapy and injections, without significant relief. Her gait was antalgic and straight leg raise was positive on the right. The MRI showed multi-level desiccation and possible herniation on the right at L5-S1. Dr. Malek recommended an EMG and CT/myelogram. Later, Dr. Malek noted that the EMG was negative, and he could not tell whether there was evidence of a disc herniation. He ordered a discogram L2-S1. Dr. Malek noted the discogram was positive at L2-3. They discussed possible fusion. He would set her up with a second opinion.

12. On January 30, 2006, Petitioner returned to Dr. Malek after seeing Dr. DePhillips, who indicated that if the condition was bothering her sufficiently, it would not be unreasonable to consider a fusion or IDET. Petitioner preferred the more definitive fusion. Dr. Malek wanted an additional discogram prior to surgery to determine whether other levels should be addressed.

13. On April 3, 2006, Dr. Malek performed bilateral laminectomy with discectomy and decompression, nerve root decompression and foraminectomy at L2, bilateral discectomy at L2-3, posterior right-sided interbody graft with cage at L2-3, and "posterior segmented anterior fixation" with screws bilaterally at L2-3 for segmented instability at L2-3 incapacitating symptoms unresponsive to conservative treatment. However, it was noted that no instability was found in the surgery.

14. On April 21, 2006, Dr. Malek performed exploration of the wound and fusion and found excellent fusion, excellent placement, and no foraminal narrowing.

15. On August 4, 2006, Petitioner presented to Dr. Kelly on referral from Dr. Malek for chronic (4-10/10) back pain. The pain had been constant since her reported work accident. The pain persisted despite treatment including fusion surgery, though she reported the leg pain was more severe preop. Currently, low back pain was her main complaint and was using a TENS unit, without significant relief. She had also taken Darvocet and Oxycodone without benefit and was currently taking Valium and using a Fentanyl patch. Dr. Kelly diagnosed bilateral sacroiliitis and arachnoiditis, possible neuropathic back/right leg pain. He recommended bilateral SI joint injections.

16. On September 6, 2006, Petitioner reported significant relief from the SI injections, but it lasted only a few days. The pain returned and was at 8-9/10. Dr. Kelly diagnosed "postlaminectomy syndrome with pain in the basis of chronic nerve damage." He believed there was a component of axial mechanical pain likely due to SI arthropathy, improved on the left and more persistent on the right. He adjusted medication and provided her information on spinal cord stimulators.

17. At Respondent's request, on September 17, 2007 Petitioner presented to Dr. Kornblatt for an examination under Section 12 of the Act. After his review and summarization of Petitioner's medical treatment and his clinical examination, Dr. Kornblatt opined that Petitioner suffered a work injury which resulted in a lumbosacral strain and aggravation of preexisting lumbar degenerative disc disease and facet arthritis. The surgery was performed for chronic pain caused by the lumbosacral strain. She did not get relief from L2-3 fusion surgery, but rather developed chronic pain dysfunction and failed back surgery syndrome. She might need to have the hardware removed, but a spinal cord stimulator was not indicated. Presently, Petitioner was totally disabled.

18. On July 2, 2008, Petitioner returned to Dr. Kelly and reported 8-10/10 pain. Dr. Kelly refilled medications set up for a trial of intrathecal catheter for trial of intrathecal narcotics. Dr. Kelly continued to treat Petitioner with injections, medication, and the implantation of a trial spinal cord stimulator, which was considered failed.

19. On August 11, 2008, Dr. Kelly performed inpatient implantation of a programmable intrathecal pump and intrathecal catheter for failed back surgery syndrome. Petitioner returned to Dr. Kelly on numerous occasions thereafter and he would refill the pump and adjust dosage. The last such entry appears to be on August 8, 2016.

20. In August of 2014, Petitioner presented to Dr. Patel for another examination under Section 12. Dr. Patel noted that Petitioner presented using a 4-point cane, walking with an antalgic gait, and complaining mostly of back and right-leg pain. He reported her accident and medical treatment to date. She rated her pain as normally at 6/10, currently at 8/10, and worst at 10/10. The pain radiated down the right thigh, "somewhat diffusely." She reported she could stand for about 30 minutes and sit for about an hour. She reported no pain in her back or leg prior to the accident.

21. Dr. Patel opined that Petitioner sustained a lumbar sprain in the work-related accident. It did not respond to conservative treatment and she then had L2-3 fusion, which also did not provide any improvement. She had a pain pump, which at least allowed her to function. Currently, she had myofascial tenderness in the lumbar spine, which Dr. Patel attributed to deconditioning and normal accumulation of scar tissue postop. He opined that she suffered a lumbar sprain and surgery was performed. However, she exhibited non-dermatomal distribution of pain in the right leg and there was no significant nerve root entrapment in the imaging. He really was unsure of the source of her pain. Therefore, he could not rule out secondary gain as a cause for her pain.

22. Dr. Patel also noted that because of the chronic pain dysfunction, which necessitated the use of opioids for a long duration, she had significant central sensitization which heightened her pain perception and resulted in overall disability and dysfunction. He recommended stopping oral Percocet completely and reducing the narcotics in the pain pump. He recommended use of a nerve membrane stabilizer, such as Gabapentin or Lyrica. He did not believe she needed any additional treatment or evaluation. However, she would need work restrictions. He recommended an FCE, after which she would be at maximum medical improvement and be released to work based on the findings.

23. Petitioner submitted purported job search logs spanning from December 20, 2015 through September 17, 2016. It includes about 52 sheets comprising about 275 entries. All the entries indicate that the lead came from either Monster.Com or Indeed.Com. Results were reported as "none," "applied for," or "sent resume." The exhibit also includes responses from Indeed and Monster indicating that applications had been submitted, that applications were started and may or may not have been competed, or asking Petitioner for additional information or qualifications. There appears to 70 such responses. There was also a notation from Indeed.Com that she had applied for 60 positions and "saved" one. Some employers were named multiple times, and there certainly could be some duplications.

24. On April 1, 2016, a vocational rehabilitation counselor, Ms. Weber, reviewed Petitioner's job search logs. She noted that Petitioner documented 58 completed job applications to 46 individual employers, nine of which she applied multiple times. Ms. Weber noted that on average Petitioner applied for only 14 jobs per month, or about three a week. She opined that even allowing for a lull in the holiday season, Petitioner must devote more time to her jobs search activities. She noted 50 entries in which she was unable to verify the applications, with a few having no record of an application. Ms. Weber indicated that Petitioner could obtain employment within her restrictions and in her geographic area.

As noted above, the Arbitrator awarded Petitioner 300 weeks of permanent partial disability benefits representing loss of 60% of the person-as-a-whole. The Arbitrator cited a prior Commission decision in *Ballinger v. Montgomery Wards*, 98 I.W.C.C. 64402 (2007), as analogous to the instant claim. Respondent also cites *Ballinger* and seeks reduction of the award to loss of 40% of the person-as-a-whole.

In *Ballinger*, the claimant underwent a one-level cervical fusion, had physical therapy, treated at a pain clinic for several years, and was ultimately diagnosed with failed back syndrome and chronic pain. The claimant had not returned to work and the treating doctor declared him permanently disabled from employment. Nevertheless, the Commission found that the claimant was capable of sedentary work and awarded him loss of 50% of the person-as-a-whole. The Commission agrees with the Arbitrator that *Ballinger* is analogous to the instant claim. However, we see no reason to increase the award over that awarded in *Ballinger*. Accordingly, the Commission reduces the permanent partial disability award to 250 weeks representing loss of 50% of the person-as-a-whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $475.13 per week for a period of 487&4/7 weeks, in temporary total disability benefits.

IT IS FURTHER ORDERED BY THE COMMMISSION that Respondent pay to Petitioner the sum of $475.13 per week for a period of 109&2/7 weeks, in maintenance benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is granted credit of $214,698.14 in temporary total disability and maintenance payments made.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $427.61 per week for a period of 250 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 50% 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.

DATED:

AUG 10 2018

Deborah L. Simpson

David J. Gore

Stephen J. Mathis

DLS/dw
O-6/28/18
46

15 WC 19757
Page 1

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

Donna Carter,
Petitioner,

vs. NOS. 15 WC 19757

Hoyleton Ministries,
Respondent.

ORDER OF RECALL UNDER SECTION 19(F)

A Motion to Recall Commission Order pursuant to Section 19(f) of the Illinois Workers' Compensation Act to correct an error in the Order of the Commission dated July 20, 2018, having been filed by Respondent herein, and the Commission having considered said Motion, the Commission is of the opinion that the Motion should be granted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Order dated July 20, 2018, is hereby recalled pursuant to Section 19(f).

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Order shall be issued simultaneously with this Order.

DATED: AUG 8 - 2018

DLS/rm
46

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DONNA CARTER,
Petitioner,

vs. No: 15 WC 19757

HOYLETON MINISTRIES,
Respondent

CORRECTED ORDER

This matter comes before the Commission on Petitioner's petition for penalties pursuant to §19(k) and §19(l), and fees pursuant to §16, of the Act. A hearing was held before Commissioner Simpson on May 4, 2018 in Mt. Vernon, the parties were represented by counsel, and a record was taken.

The Commission approved a settlement of the instant claim on August 1, 2017. The settlement provided Petitioner be paid a total of $31,625.00, representing loss of 25% of the person-as-a-whole. The contract also provides that Respondent pay medical bills that were causally related to the alleged accident of April 29, 2015, as outlined in Petitioner's exhibit. At the instant hearing, Petitioner's lawyer asserted that Respondent underpaid a medical bill. Respondent defended its payment based on its interpretation of the medical fee schedule. Both parties submitted deposition testimony.

Laurie Thiemann testified by deposition on February 21, 2018. She is business manager for Frontenac Surgery Center and oversees billings and collections and held that position for almost eight years. Prior to this employment, she worked in medical billing for 21 years. She testified she is familiar with the workers' compensation medical fee schedule. She became familiar with the schedule when she assumed her current job. Generally, a claim is brought to her attention monthly because of an issue concerning payment. A bill involving treatment of Petitioner for surgery performed by Dr. Raskas was one such matter. Ms. Thiemann testified that Respondent's insurer paid a total of $18,727.15 but the bill was "shorted $17,420.62." Normally, they would send an appeal to the carrier, but in this instance, Petitioner's lawyer called her and indicated they would try to resolve the matter without an actual appeal.

Ms. Thiemann indicated that a procedure included in the billing was not paid at all. She explained that if there is no specific payment amount for a specific procedure code, the fee schedule requires that the bill be paid at 53.2% of the billed charges. When Frontenac received payment on December 26, 2017, it was accompanied with an explanation that a charge was "denied" under the fee schedule because "all charges rendered in an operative session are subject to a single fee schedule amount." She has never seen that in the fee schedule and no other carrier had cited that provision in explaining reimbursement. She and another employee executed an affidavit specifying the alleged underpayment.

On cross, Ms. Thiemann agreed that Respondent's exhibit 1 had the same information as Frontenac's billing statement, Petitioner's exhibit 1, with the same procedures, same implants, and same charges indicated. She noted that first line item in the bill had been paid correctly, but charges for implants had been underpaid by $345.75, and some line items were not paid at all. Ms. Thiemann opined that Frontenac properly billed for three procedures and should be paid for them. She based that opinion on the provision that a procedure not specified in the schedule should be paid at 53.2% of the billed charges. She also noted that Frontenac uses a coding assistance website and none of the prescribed codes are considered bundled services. Ms. Thiemann searched the fee schedule trying to find the language in the explanation accompanying payment, but she acknowledged that she did not consult the rules of the Commission.

Rosie Gonzalez testified by deposition on April 19, 2018. She adjusted the bill from Frontenac in the instant claim. She did so by using the workers' compensation medical fee schedule. She sent an explanation with the payment. She cited paragraph C which provides that "the schedule is a partial global reimbursement schedule, and that all charges rendered during the operative sessions are subject to a single fee schedule amount except" sections that correspond to implants and lab work. She took the highest billed amount and reimbursed it at 53.2% of billed charges. She did not pay other billed charges based on her interpretation of the language she cited. Ms. Gonzalez testified that Frontenac billed a total of $18,368.00 for implants, involving two separate bills. She paid a total $11,131.25 for those bills based on the fee schedule rate for implants which basically provides for a 25% mark up from manufacturers' invoice price. She got the manufacturing invoice price from Frontenac.

On cross, Ms. Gonzalez testified she worked for Metropolitan Insurance Company for 10 years and never worked in the medical field, medical billing, medical coding, or had any experience in medical billing. She gets Christmas bonuses, but never received any other bonuses. She denied she had any financial incentive to pay as little as possible on claims. She only works on Workers' Compensation claims and works claims in Texas and California as well as Illinois. Each state has its own medical fee schedule.

Ms. Gonzalez agreed that the medical fee schedule refers to billing for multiple procedures done in a single surgery, which is considered a modifier for multiple procedures. She assumed that Frontenac billed correctly and did not inform them about the modifier. She agreed that she did not pay any bills in the instant claim until more than two years after the surgery; there was an IME that indicated she did not need surgery. Her company did not even know she had the surgery. She did not know whether the procedures were independently billable. She believed Ms. Thiemann billed the implants at 50% over invoice.

On redirect, Ms. Gonzalez testified that if there is a modifier on an invoice there would be different guidelines on whether it was a separate operation (modifier 59) or multiple procedures (modifier 58). Under a modifier 58 scenario, she would have paid for first procedure at 100% and the second at 50%.

On re-cross, Ms. Gonzalez did not assume the bill involved a multiple-procedure operation; she does not assume, she looks at the bill. She could not infer that a multiple-procedure surgery was performed from the bill itself.

It appears from the record before us that the basis of the instant dispute is different interpretations of how much the insurer should pay based on the invoices Frontenac submitted to it. The Commission does not have sufficient information to determine definitively whose interpretation is correct. We certainly do not have sufficient information to find that Petitioner proved Respondent alleged underpayment was unreasonable and vexatious. In addition, Commission is perplexed why Frontenac did not go forward with the appeal process with the insurer, which Ms. Thiemann testified would be the normal procedure when an underpayment is suspected. This divergence from normal policy could be rooted in the tendency to rush to litigation rather than attempting to negotiate a resolution. Hopefully, in the appeal process any mistake and/or misunderstanding in the billing and/or payment process can be resolved.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's petition for penalties pursuant to §19(k), §19(l), and fees pursuant to §16 of the Act is denied.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 8 - 2018

Deborah L. Simpson

David L. Gore

Stephen J. Mathis

DLS/dw
R-5/4/18
46

STATE OF ILLINOIS)
) SS
COUNTY OF MCHENRY)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY CASSENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 16 WC 13153
	)	18 IWCC 0408
TCH CONSTRUCTION,	)	
	)	
Respondent.	)	

ORDER

This matter comes before the Commission on Respondent's Petition to Recall the Commission Decision to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated June 29, 2018, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Kevin W. Lamborn.

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

Kevin W. Lamborn

DATED: AUG 2 - 2018
KWL/mav
42

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIMOTHY CASSENS,

Petitioner,

vs.

NO: 16 WC 13153
18 IWCC 0408

TCH CONSTRUCTION, INC.,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, incurred medical expenses, TTD, and PPD, and being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto and made a part hereof, as stated below.

Petitioner and a coworker, Jose Sandoval ("Sandoval"), on January 21, 2016, were employed by Respondent as carpenters and were tasked to perform work at the residence of Respondent's Vice President, Mark Walker ("Walker"). Petitioner claims to have slipped on the ice at the worksite while walking to a boathouse where construction materials were stored and fell onto his right elbow. Petitioner testified that it was his intention to lock the boathouse.

The presiding Arbitrator found Petitioner failed to prove by a preponderance of the evidence that he sustained injuries that arose out of and in the course of his employment with Respondent on January 21, 2016. In so finding, the Arbitrator concluded "the sheer volume of the Petitioner's varied and inconsistent histories of the January 21, 2016, incident coupled with

the contradictory testimony and documents undermine his claim that he suffered accidental injuries arising out of and in the course of his employment." The Commission acknowledges Petitioner's medical records conflict with the history Petitioner presented at his arbitration hearing but finds Petitioner's testimony credible and reconciles to the Commission's satisfaction any discrepancy between the history Petitioner proffered and the histories contained in Petitioner's medical record.

Petitioner testified to slipping and falling while on the worksite. Sandoval, Respondent's only other employee at the worksite, did not contradict this testimony. Sandoval testified that he did not see Petitioner slip and fall and stated that he did not have his eyes on Petitioner all day. No witnesses were produced to contradict Petitioner's testimony.

Petitioner and Sandoval both testified that they spoke to each while working at the worksite that day, though their testimony diverged with respect to whether Petitioner slipping and falling was discussed. Petitioner testified that he told Mr. Sandoval about his fall. Sandoval testified that Petitioner did not say anything to him about falling on ice.

Petitioner testified that he reported the incident to Walker at 4:29pm on the day of the incident. Mr. Walker testified to speaking with Petitioner at that time and to the conversation being about Petitioner slipping and falling. Petitioner and Walker both testified to having a conversation earlier that day at about 2:56pm that did not touch upon Petitioner slipping and falling. Petitioner testified that he didn't inform Walker of his slipping and falling because his mind at that time was on what the HVAC workers who were working on the house found in the house.

The Arbitrator noted Petitioner's testimony and his medical records both made mention of a driveway. The Arbitrator also noted the medical records indicated that Petitioner fell in his own driveway. Petitioner testified that he told his medical providers that he fell on "the" driveway and it was subsequently interpreted that he was speaking of his own driveway. Julie Cassens ("Cassens"), Petitioner's wife, testified that Petitioner never fell in their own driveway.

The Commission finds Petitioner to be credible and finds, further, the discrepancies between Petitioner's testimony and his medical records and the testimony of both Walker and Sandoval to be not so significant as to find Petitioner otherwise. Accordingly, the Commission finds Petitioner satisfied his burden of proving that the accident he experienced on January 21, 2016, and the resultant injury to his right upper extremity arose out of and in the course of his employment with Respondent.

The injury to Petitioner's right shoulder resulted in him presenting to Mercy Harvard Hospital on the day of the accident. There, he was examined, underwent x-rays, and was discharged with a referral for him to his primary care physician. The following day, on January 22, 2016, he presented to the offices of his primary care physician, Family Medicine for McHenry County. He was seen by Katherine Galias, DNP, as his primary care physician was

unavailable. She ordered Petitioner to undergo an MRI with an additional instruction for him to see Dr. Rolando Izquierdo, Jr., if the MRI revealed any damage to his right shoulder. The MRI was undertaken on January 26, 2016, and revealed multiple injuries to Petitioner's right shoulder. Per the instruction given to him, he presented to Dr. Izquierdo on January 28, 2016.

Dr. Izquierdo examined Petitioner on January 28, 2016, and diagnosed him as having an either an unspecified tear of the rotator cuff or rupture of the right shoulder as well as a supraspinatus tear with retraction, also in the right shoulder. Dr. Izquierdo recommended Petitioner undergo a right shoulder arthroscopy with possible biceps tenodesis. That surgery was performed on March 18, 2018, and resulted in findings of a right shoulder large full-thickness rotator cuff tear, right shoulder subacromial impingement, and right shoulder bicipital tendinosis, partial thickness tearing and instability. These findings were treated with a right shoulder arthroscopic repair of the large full-thickness rotator cuff, right shoulder arthroscopic biceps tenodesis, and right shoulder arthroscopic subacromial decompression with anterior acromioplasty.

Postoperatively, Petitioner continued to treat with Dr. Izquierdo and concurrently underwent physical therapy at Poplar Grove Physical Therapy. Both Dr. Izquierdo's records and the physical therapy records revealed the steady improvement of Petitioner's right shoulder. By August 9, 2016, Petitioner no longer took pain medication and, by September 12, 2016, had 0/10 pain at rest and 3/10 pain with activity. As of September 12, 2016, Dr. Izquierdo recommended Petitioner continue with a home exercise program, gradually resume activities, and take a NSAID as necessary. Dr. Izquierdo released Petitioner from his care that day, offering to reevaluate Petitioner at Petitioner's convenience.

An element of Dr. Izquierdo's regimen for treating Petitioner was to preclude Petitioner from resuming his normal and usual work activities. From January 28, 2016, the day Petitioner was first seen by Dr. Izquierdo, through August 9, 2016, Petitioner was found capable of working only at a light duty physical demand level. Respondent was unable to accommodate Petitioner's limited capacity to work. Dr. Izquiedro released Petitioner to resume his normal and usual work activities without restrictions on August 9, 2016. Petitioner did not return to work for Respondent and, instead, opted to work as a carpenter for another employer.

Petitioner, as of the time of the arbitration hearing, had been working as a carpenter for another employer for a month-and-a-half. He testified to having a pain in his neck that he believes will be permanent and to having pain in his right shoulder when he awakens in the morning. He testified further that his shoulder will be very, very sore from using it all day. He treats this soreness with Ibuprofen and has not sought medical care for his shoulder since September 12, 2016.

The Commission, in addition to finding Petitioner's January 21, 2016, accident resulted in the injury to Petitioner's right shoulder, also finds the same accident resulted in Petitioner requiring the medical treatment as described above as well as being temporarily totally disabled

from January 28, 2016, until August 9, 2016, also as described above. The Commission finds further Petitioner has residual symptomology that is construed to a permanent partial disability affecting Petitioner as a whole.

In reversing the Arbitrator with respect to accident and resultingly awarding Petitioner a benefit under Section 8(d)2 of the Act, the Commission determines Petitioner's level of disability by employing the factors as enumerated in Section 8.1(b) of the Act:

Section 8.1(b)(i) (Impairment Rating): As neither party submitted an impairment rating pursuant to Section 8.1(a) of the Act, the Commission places no weight on this factor.

Section 8.1(b)(ii) (Occupation of the Injured Employee): Petitioner was a foreman for Respondent but also performed the work duties of a carpenter for Respondent. Petitioner was working as a carpenter for Respondent at the time of his accident. Petitioner, upon being released to full work duty on August 9, 2016, elected to not return to work for Respondent but to work for another employer as a carpenter. Because Petitioner, in testifying at his arbitration hearing, failed to delineate how much time was spent in a supervisory capacity as a foreman versus how much time was spent as strictly a carpenter, the Commission cannot determine the physical impact Petitioner experiences working strictly as a carpenter as opposed to his former hybrid position as a foreman/carpenter. The Commission does, however, take into consideration Petitioner's abandonment of his position with Respondent in favor of a carpenter position for another employer for reasons not explained. Accordingly, the Commission places some weight on Petitioner's modestly changed job descriptions.

Section 8.1(b)(iii) (Age of the Injured Employee): Petitioner was 51-years old at the time of his accident. No testimony was offered as to how long Petitioner intended to work. The Commission is, therefore, unable to determine how long Petitioner will work with his permanent partial disability. The Commission, based on Petitioner's age at the time of his accident, presumes Petitioner will work another 10 to 15 years with his permanent partial disability weight. The Commission places some weight on this.

Section 8.1(b)(iv) (Future Earning Capacity): Petitioner suffered no diminution of his earning capacity as result of his permanent partial disability. His present and future earning capacity is controlled by the current union pay scale. The Commission places little weight on the factor.

Section 8.1(b)(iv) (Evidence of Disability Corroborated by Medical Records): The Commission does not conflate any testimony concerning any disability with the medical records. The Act requires the Commission to look to the medical records alone. Petitioner had completed physical therapy on August 4, 2016, and had been returned full duty work effective August 9, 2016. Petitioner's last medical record, dated September 12, 2016, note him experiencing 0/10 pain at rest and 3/10 pain with activity in his right shoulder

and popping in the same. That record, and the August 9, 2016, record before it, noted that he took no pain medication. The physical examination recorded Petitioner's right upper extremity strength to be 5/5 on a 0-5/5 scale with no impairment of range of motion noted. The recommendation for Petitioner was for him to continue with the home exercise program and gradually progress with activities. The Commission places great weight on Petitioner's medical records.

Reconciling Petitioner's as-testified-to current condition with his medical records, the Commission finds Petitioner testimony revealed some degree of embellishment as to his current condition. He testified to experiencing pain in his neck that he believed would be permanent. Dr. Izquierdo's record from August 9, 2016, had noted Petitioner indicated and/or found Petitioner had no neck pain and full range of motion of the cervical spine. The physical examination that was performed on September 12, 2016, recording findings of no neck pain and a neck that demonstrated full range of motion. This divergence between Petitioner's testimony and his medical records calls into question Petitioner's claim to waking up with pain in his shoulder and to his shoulder "being very, very sore" after a day's work, particularly as he told Dr. Izquiedro that he experienced on 3/10 pain with activity. That Petitioner, despite his as-testified-to current complaints, has not sought medical care after September 12, 2016, calls into question the actual extent of his permanent disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,091.21 per week for a period of 27-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $755.22 per week for a period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 10% loss of the person as a whole

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services billed in the total amount of $72,211.96, though reduced pursuant to §8(a) and §8.2 of the Act, if applicable.

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:
KWL/mav
O:05/01/18
42

AUG 2 - 2018

Thomas J. Tyrrell

Michael J. Brennan

DISSENT

I respectfully disagree with the decision of the majority and agree with the Arbitrator that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment on January 21, 2016. Accordingly, I would affirm and adopt the Arbitration Decision filed with the Commission on December 14, 2016.

The testimony of Sandoval and Walker is found to be more credible than the testimony of Petitioner and his wife, Cassens. Sandoval testified to having worked with Petitioner on the date of the claimed accident and was, at no time, told by Petitioner about any fall that he had experienced while working that day. He testified that he and Petitioner hung drywall after the time Petitioner purportedly hurt himself. He didn't notice Petitioner to be in any pain while hanging the drywall. He testified to learning that Petitioner's claimed workplace injury from Mark Walker, his and Petitioner's supervisor, almost two hours after he and Petitioner left the worksite for the day. Walker testified he spoke with Petitioner a few minutes before the end of the workday, at 2:56pm, but was not told of any accident or injury befalling. He testified of learning about the claimed accident and injury from Petitioner at 4:29pm on the day of the claimed accident. Neither Sandoval nor Walker were subjected to cross-examination.

Petitioner's testimony followed the testimony of Sandoval and Walker and, in part, only contradicted but did not refute the testimony of Sandoval. He testified that he told Sandoval about his fall after he returned from locking the boathouse. He testified that he could not raise his right arm after returning from the boathouse. Absent from the testimony was a claim that he informed Sandoval that he had, in fact, hurt himself in the fall and a denial that he helped Sandoval hang drywall after the time of the claimed fall. His testimony about what he told Walker did not contradict what Walker testified to but it was, in part, internally inconsistent. On direct examination, he testified that he did not tell Walker about his fall earlier in the day when they spoke at 2:56pm that day because he was thinking about what the HVAC workers had found on the jobsite. On cross-examination, however, he testified that he didn't tell Walker of his fall and injury because doing so would have put a "x" on his back. It was not elicited why he felt, after working for Respondent for over twelve (12) years, that reporting an injury would have been met with hostility. More significantly, uncertainty exists as to why he felt more comfortable telling Walker about the claimed fall and injury 4:29pm on the day of the claimed accident and injury than he did when he spoke to him only ninety (90) minutes earlier. He offered no

explanation to explain why was less at risk of having the "x" on his back at 4:29pm than at 2:56pm.

Petitioner's testimony, in part, also contradicted that of Cassens. He testified that he fell while walking to the boathouse. Cassens, however, testified, on direct examination, that Petitioner told her that he had fallen while walking from the boathouse. On cross-examination, Cassens testified that it was her testimony that Petitioner had told him that he fallen while walking away from the boathouse. No attempt was made to reconcile the conflicting history in their respective testimony.

Recognizing the possible conflict of interest of all those who testified, the most credible evidence in this case are the medical records. In no instance does Petitioner relate his symptoms to anything related to work. He presented to Mercy Harvard Hospital approximately four hours after the claimed injury where it was reported that he slipped on ice in his driveway. The following day, on January 22, 2016, he presented to both OrthoIllinois and to Family Medicine for McHenry County. At both, he was recorded as falling in his driveway. When asked about these histories at the arbitration hearing, Petitioner testified that he told the personnel at Mercy Harvard Hospital and Dr. Izquierdo simply that he fell in simply "the" driveway. Credulity is presumed with that claim.

Petitioner's medical records all imply that he fell in his own driveway. Petitioner counters the history recorded in the medical records with only his testimony and that of his wife. Petitioner testified that he told his medical providers that he fell on "the" driveway. It is found unusual that Petitioner did not provide a more specific description or location of the driveway on which claimed to have fallen on given the proximity in time between the claimed fall and the reporting said fall. Cassens, Petitioner's wife, testimony as to the claimed fall was simply a recitation as to what her husband purportedly told her. Her testimony that Petitioner did not fall on their driveway leaves open the possibility that Petitioner fell at a location other than in his own driveway.

Given Petitioner's failure to report any fall to Walker when they spoke at 2:56pm on January 21, 2016, and Sandoval's being unaware that Petitioner had been injured at any time prior to 4:45pm that day despite them working together from 7:00am until 3:00pm on January 21, 2016, it appears more likely than not, that if Petitioner fell on January 21, 2016, he did so away from the jobsite. This would explain why Petitioner did not tell Walker about being injured when they spoke at 2:56pm or why Sandoval wasn't aware that Petitioner was injured when they parted company. It would explain why Petitioner offered the testimony that he told his medical providers of falling simply onto "the" driveway. It would be consistent with Cassens' testimony that Petitioner did not fall onto their driveway.

More significant than the discrepancies between Petitioner's testimony and those of Sandoval and Walker is the discrepancy between Petitioner's testimony about the current condition and Dr. Izquierdo's medical records. Before the Arbitrator, as noted by the majority,

Petitioner complained of having permanent neck pain. Dr. Izquierdo's medical records, from his April 21, 2016, examination of Petitioner through his final examination of Petitioner on September 12, 2016, there were no complaints of or finding by Dr. Izquierdo of neck pain. Quite simply, Petitioner is found to have misrepresented the existence of neck pain before the Arbitrator for no apparent reason. If Petitioner is so inclined to make that misrepresentation, it is not inconceivable Petitioner would also misrepresent how he came to injure his right shoulder for secondary gain.

Taken as a whole, the evidence does not support a finding in favor of Petitioner. As the Arbitrator concluded, "the sheer volume of the Petitioner's varied and inconsistent histories of the January 21, 2016, incident coupled with the contradictory testimony and documents undermine his claim that he suffered accidental injuries arising out of and in the course of his employment." I agree with the Arbitrator's conclusion and, for that reason, respectfully dissent with the opinion of the majority.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CASSENS, TIMOTHY
Employee/Petitioner

Case# 16WC013153

TCH CONSTRUCTION INC
Employer/Respondent

18IWCC0408

On 12/14/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.64% 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:

0247 HANNIGAN & BOTHA LTD
KEVIN S BOTHA
505 E HAWLEY ST SUITE 240
MUNDELEIN, IL 60060

0560 WIEDNER & McAULIFFE LTD
KENDRA G GARSTKA
ONE N FRAKLIN ST SUITE 1900
CHICAGO, IL 60606

18IWCC0408

STATE OF ILLINOIS)
)SS.
COUNTY OF McHenry)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Timothy Cassens
Employee/Petitioner

v.

TCH Construction Inc.
Employer/Respondent

Case # 16 WC 13153

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Woodstock**, on **November 4, 2016.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

18IWCC0408

FINDINGS

On January 21, 2016, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $85,110.24; the average weekly wage was $1636.74.

On the date of accident, Petitioner was 51 years of age, *married* with 0 dependent children.

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

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

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

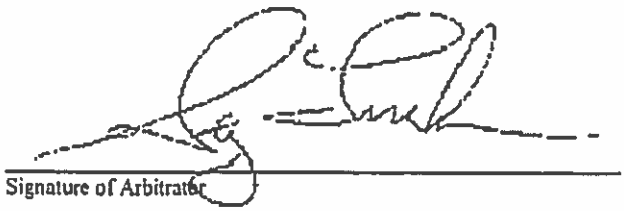
Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

BECAUSE THE ARBITRATOR FINDS THAT PETITIONER FAILED TO PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT HE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH RESPONDENT ON JANUARY 21, 2016, THE CLAIM FOR COMPENSATION IS HEREBY DENIED.

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

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



Signature of Arbitrator

December 14, 2016
Date

DEC 14 2016

Statement of Facts

Petitioner Timothy Cassens testified that he had been a carpenter for 30 years. He had worked for Respondent for 12 1/2 to 13 years. On January 21, 2016, he was working at Respondent's owner, Mark Walker's residence in Delavan, Wisconsin from 7:00 AM to 3:00 PM. He testified that at about 1:30 PM, he was going to lock the boat house where the materials were stored. He went to retrieve a tool from his truck that was parked in the driveway of Walker's residence, when he slipped and fell on ice. Petitioner testified that the temperature was very cold and there had been snow the night before and it was very icy. The ice on the driveway was hard. Petitioner testified that he pulled himself up, locked up the boat house, and went back to the house. Petitioner testified that he told his fellow employee Jose Sandoval that he could not raise his arm while working on a piece of drywall on the ceiling. He testified he told Jose that he fell on the ice.

Jose Sandoval testified that he has been employed by Respondent as a carpenter for 12 years. He was working on Mr. Walker's house in Delevan on January 21, 2016. On that day, he was working with Petitioner. There was also someone from another company there, but no other employees of Respondent. He finished work that day at 3:00 PM. He testified that Petitioner did not mention anything about a slip and fall on ice. He did not see Petitioner slip and fall. He testified that there was a boat house on the premises where they kept some materials. Petitioner was not in his vision all day. He testified that there was snow on the ground. He testified that he worked with Petitioner that afternoon. Petitioner did not mention he was having problems with his shoulder or needed assistance. Mr. Sandoval never offered to finish the drywall or assist Petitioner.

Petitioner testified he spoke with Mark Walker multiple times on the morning of January 21, 2016 to discuss the job. He testified to a telephone conversation with Mark Walker at 2:56 PM. Petitioner testified that he never mentioned anything about the slip and fall. He testified that his mind was on the HVAC issues. He testified that he was getting ready to go home and thought by icing his shoulder that night, he would be better the next morning. He testified to slip and falls and injuries on the job all the time as a carpenter. He had never filed a Worker's Compensation claim before. He testified that the reason he did not mention the injury to Mark Walker during the phone call was because it was his belief that any time you have a Workers' Compensation claim you get an "X" on your back.

Petitioner testified that after he left the job site, he drove to his wife's office in Poplar Grove. That was his daily routine during tax season, to pick up his 6 year old grandson. He also testified that because his shoulder was hurting, he wanted his wife to have a look at it. He testified that he arrived at his wife's office at approximately 4 PM. The drive from Delavan, WI to Poplar Grove, IL took 45 minutes to an hour. He testified that he called Mark Walker at 4:29 PM and told him that he slipped and fell on the ice at Walker's residence and hurt his shoulder and was going to get it checked out because of the intensity of the pain. He testified that Mr. Walker told him to keep him informed. He testified from there he went to the emergency room at Mercy Harvard Hospital.

Mark Walker testified that he is the vice-president of Respondent. Petitioner was working a job for Respondent as his personal residence in Delevan, WI on January 21, 2016. He was working with Jose Sandoval finishing up some flooring and a little bit of drywall. He testified to 4 telephone conversations with Petitioner on that morning about job related issues. He testified he spoke with Petitioner at 2:56 PM about the job. Petitioner did not mention anything about an injury. He spoke with Petitioner at 4:29 PM. Petitioner told him he slipped and fell at work and was going to get checked out. Mr. Walker testified he asked Petitioner why he did not tell him about this at 3:00 PM and why he didn't tell the guy he was working with. He testified that Petitioner did not

respond. Mr. Walker testified he reported the injury to his insurance carrier the next day, stating the accident was in question.

Jose Sandoval testified that he received a call from Mr. Walker at 4:45 PM. Mr. Walker told him that Petitioner called and told him he has fallen. Mr. Sandoval told Mr. Walker he did not know anything about it because Petitioner had not commented about anything to him.

Julie Cassens testified that Petitioner is her husband. She owns an H & R Block tax office in Poplar Grove, Illinois. During January, her daughter works with her, so her 6 year old grandson comes to the office after school. She testified that Petitioner would come over after work to see if he needed to take her grandson out or home. On January 21, 2016, Petitioner arrived at 4:00 PM. She could see he was in pain. She testified that Petitioner told her he fell on the ice walking up the hill from the boathouse. After work, they dropped off his truck and went to the emergency room. She testified that he got out of his truck and got into her car. He did not slip and fall on the ice on their driveway. She drove him to the emergency room.

Petitioner was seen in the emergency room at Mercy Harvard Hospital on January 21, 2016 (PX 1). He arrived at 4:57 PM (PX 1, p 15). His chief complaint was right shoulder pain post fall. The record notes patient reported that he slipped on ice in his driveway just prior to arrival to the emergency department (PX 1, p 17). Petitioner testified he told them he fell in the driveway. X-rays were negative for fracture or dislocation. Petitioner was released in a sling and advised to see his primary care physician for an MRI and informed that he may have a rotator cuff injury (PX 1, p 19). Petitioner left the ER at 5:32 PM (PX 1, p 15). Petitioner testified he was discharged and called Mark Walker at 5:29 PM. He testified he told Mr. Walker that he had to see his primary care doctor.

Petitioner's cell phone records (PX 7) confirm the calls with Mr. Walker on January 21, 2016. Petitioner also called his wife's office at 3:25 PM. He made a call originating from Poplar Grove at 4:16 PM. He made calls to his wife's cell phone at 4:27 PM and 4:31 PM, just before and after the 4:29 PM call to Mr. Walker, both originating in Poplar Grove.

Petitioner saw his family doctor Dr. Lesser on January 22, 2016 (PX 2, p 22-25). The history recorded is patient was in his driveway yesterday, slipped on ice and hurt his right shoulder. An MRI was ordered and Petitioner was to see Dr. Izquierdo if not 100%. The MRI performed January 26, 2016 found impingement and a complete tear of the supraspinatus and partial tear of the bursal surface of the infraspinatus (PX 2, p 21).

Petitioner testified that he called to make an appointment on January 22, 2016. The Telephone Encounter includes a history that Petitioner slipped and fell on ice in his driveway (PX 3, p 34). He saw Dr. Izquierdo on January 28, 2016 providing the same history and advancing complaints of pain in the right shoulder. After examination and review of the MRI, Dr. Izquierdo's assessment was unspecified rotator cuff tear or rupture of right shoulder, not specified as traumatic. He recommended arthroscopic surgery (PX 3, p 30-32). Petitioner testified he did not return to work for Respondent after the January 28, 2016 visit. He had a conversation with Mr. Walker on January 31, 2016. Petitioner testified that Mr. Walker said "Darn it, Tim, you fell on ice. I could understand if you fell off a ladder." Petitioner testified that Mr. Walker told him he should have told him earlier. Mr. Walker testified he did not recall a conversation on January 31, 2016. The phone records (PX 7 and RX 5) confirm calls made on that date.

Petitioner's Workers' Compensation claim was denied on February 17, 2016. Petitioner decided to proceed through his group insurance (PX 3, p 27). Petitioner presented a claim for benefits through the Carpenters Welfare Fund on February 23, 2016 (PX 10). Petitioner stated that the injury occurred when he fell on ice at job site. He stated it occurred towards the end of the workday when he went to lock up building where materials were stored. Dr. Izquierdo completed the second page of the form with the injury described as slipped and fell on ice in his driveway. In response to the question, "is the condition due to injury arising out of the patient's employment," he responded "No."

Petitioner had a pre-operative clearance appointment with Dr. Lesser on March 8, 2016 (PX 2, p 10-15). He underwent surgery on March 18, 2016. Dr. Izquierdo performed right shoulder arthroscopic repair of a large full thickness rotator cuff tear involving tears of the subscapularis, supraspinatus and infraspinatus tendons, an arthroscopic biceps tenodesis and subacromial decompression with anterior acromioplasty. The postoperative diagnosis was a right shoulder large full-thickness rotator cuff tear involving 3 tendons, right shoulder subacromial impingement and right shoulder bicipital tendinosis with partial-thickness tearing and instability (PX 3, p 38-40).

Petitioner followed up with Dr. Izquierdo post operatively on March 21, 2016. He was not to perform any lifting more than 1-2 pounds for 8 weeks to protect the integrity of the biceps tenodesis (PX 3, p 19). Petitioner began physical therapy at Poplar Grove Physical Therapy on April 8, 2016. The progress notes indicate a date of onset of 1/26/2016 and the description was that patient slipped and fell onto his right elbow at his boss's house. He stated that he was building a closet underneath the stairs at his boss's house. The materials he was using were stored in the boat house. He was walking to the boat house to lock it and keep the materials safe when he slipped on ice and fell onto his right elbow. The onset was due to an on-the-job injury (PX 4).

On April 21, 2016, Dr. Izquierdo advised Petitioner not to lift more than 1-2 pounds for the next 8 weeks (PX 3, p 15-16). He saw Dr. Izquierdo on May 19, 2016, June 16, 2016 and July 12, 2016 (PX 3). Petitioner continued in physical therapy through his discharge on August 4, 2016 (PX 4). On August 9, 2016, Dr. Izquierdo released him to full duty work. He was to gradually progress activities and work on stretching and strengthening of the right shoulder through his home exercise program (PX 3, p 2). On September 12, 2016, Petitioner complained of pain and popping in the right shoulder. His pain with activity was 3/10, there was no numbness or tingling or dislocation. Dr. Izquierdo opined that he should continue his home exercise program and use anti-inflammatories as necessary for discomfort. He placed the Petitioner at maximum medical improvement (PX 3, p 4).

Petitioner submitted bills from Poplar Grove Physical Therapy (PX 6) and Family Medicine for McHenry (PX 8). These bills indicate the patient's condition is not related to employment.

Petitioner testified that, upon his release to return to work, he did not contact the Respondent because it was his impression that once you are hurt, "you're going to get the crap jobs." Instead of causing friction and aggravation, he looked for employment elsewhere. Petitioner accepted a job as a carpenter at Maman Corporation at Union scale of $45.35 per hour around September 28, 2016. He testified that he is right-hand dominant. When he uses his right shoulder during work up high using a screw gun, he does not have the pressure like he used to. His right shoulder hurts him when he wakes up in the morning. He feels a pricking sensation in his shoulder and he has to move it around before it goes away. His right shoulder gets very sore after work from using it all day. He takes ibuprofen but no prescription medication.

Conclusions of Law

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

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. Included within that burden, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment.

Petitioner testified that at about 1:30 PM on January 21, 2016, while working for Respondent at Mark Walker's residence in Delavan, Wisconsin, he was going to lock the boat house where the materials were stored, and when he went to retrieve a tool from his truck that was parked in the driveway; he slipped and fell on ice. Petitioner testified that he told his fellow employee Jose Sandoval that he could not raise his arm while working on a piece of drywall on the ceiling. He testified he told Jose that he fell on the ice. Petitioner testified he spoke with Mark Walker at 2:56 PM. Petitioner never mentioned anything about the slip and fall. Petitioner testified that after he left the job site, he drove to his wife's office in Poplar Grove. He testified that he arrived at his wife's office at approximately 4 PM. The drive from Delavan, WI to Poplar Grove, IL took 45 minutes to an hour. He testified that he called Mark Walker at 4:29 PM and told him that he slipped and fell on the ice at Walker's residence and hurt his shoulder and was going to get it checked out because of the intensity of the pain. He testified from there he went to the emergency room at Mercy Harvard Hospital.

It is undisputed that Petitioner did not report any injury to Mr. Walker in the 2:56 PM telephone conference, and thereafter, did so at 4:29 PM. But the remainder of Petitioner's testimony, including the details of his accident, work day and activities thereafter, has many inconsistencies and is contradictory with the much of the remainder of the evidence presented.

The Mercy Harvard Hospital emergency room history, taken at about 5:00 PM on the day of the injury, states that Petitioner slipped on ice in his driveway (not the work site) just prior to arrival. The insurance information lists Blue Cross, not Workers' Compensation. The medical history of the fall in his driveway in repeated in the records of Dr. Lessor and Dr. Izquierdo. Even on the Union benefit application filed in February, 2016, Dr. Izquierdo continues to state that the fall occurred when Petitioner slipped and fell on ice in his driveway. In response to the question, "is the condition due to injury arising out of the patient's employment," he responded "No." Dr. Lessor and Poplar Grove Physical Therapy submitted billing forms listing the charges as unrelated to Petitioner employment. Petitioner's explanation of the initial emergency room mistake is unpersuasive since he was already aware of Mr. Walker's questioning his story before he went to the emergency room and he not only did not make sure the history was correct, but did not correct this in the following multiple visits with other providers. His testimony of his opinions of the negative consequences of pursuing Workers' Compensation are similarly unpersuasive given that he had already reported the injury by 4:29 PM and his insistence of claiming an on the job injury in February, 2016 on the Union welfare fund application.

Even in the evidence including the work related history, the exact details of the fall vary. Petitioner testified that he fell on the driveway before going to the boathouse to lock it up. Mrs. Cassens testified that he told her he fell on the ice walking up the hill from the boathouse. On the Union benefit form, Petitioner stated that the injury occurred when he fell on ice at job site. He stated it occurred towards the end of the workday when he went to lock up building where materials were stored. The physical therapy records state that he was walking

to the boat house to lock it when he slipped on ice and fell onto his right elbow. The only mention of a driveway is in his testimony at trial, and the medical records noting he fell in his driveway.

Petitioner's testimony and timeline are also contradicted by other evidence. Petitioner testified that the injury occurred at 1:30 PM and he was in such pain that he needed help to complete his work duties. Yet Jose Sandoval testified that he was unaware of any injury to Petitioner and did not need to assist him in completing the drywall. He also contradicts Petitioner's testimony that he was told of the accident before the end of the workday. Petitioner's explanation for not mentioning the accident at 2:56 is not persuasive if he was in fact having as much pain as he testified to.

Petitioner and his witnesses testified to a general timeline of his activities between leaving work in Delavan and ultimately arriving in the Mercy Harvard Hospital emergency room, but some inconsistencies are not explained. The telephone records do document his call to his wife's office at 3:25 from Lake Geneva, although Arbitrator notes that Lake Geneva is not on a direct route to Poplar Grove from Delavan. Petitioner did not testify to his route. He testified that he arrived at the H & R Block office at about 4:00 PM. His testimony and that of Mrs. Cassens imply that they were together until after he called Mr. Walker at 4:29 PM and they left to drop off his truck and go to the hospital. Yet the Petitioner's telephone records show that he and Mrs. Cassens exchanged cell phone calls at that time without an explanation of the need if they were both still in the office. And the 4:31 PM call indicates that Mrs. Cassens was in Woodstock.

It is the Commission's function to judge the credibility of the witnesses, determine the weight to be given their testimony, and resolve conflicting medical evidence *Tower Automotive v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 427, 435, 943 N.E.2d 153, 161, 347 Ill. Dec. 863 (2011)*. The weight given to the evidence is determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the witness and the nature of the case and its facts. While any one of the discrepancies in the evidence may have a plausible explanation, the sheer volume of the Petitioner's varied and inconsistent histories of the January 21, 2016 incident coupled with the contradictory testimony and documents undermine his claim that he suffered accidental injuries arising out of and in the course of his employment,

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on January 21, 2016.

In support of the Arbitrator's decision with respect to (F) Causal Connection, (J) Medical, (K) Temporary Compensation, (L) Nature and Extent, and (M) Penalties, the Arbitrator finds as follows:

Based upon the Arbitrator's finding with respect to Accident, the remaining issues of Causal Connection, Medical, Temporary Compensation, Nature and Extent, and Penalties are moot. Petitioner's claim for compensation is denied.