STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN G. WEIR,

Petitioner,

vs. NO: 04 WC 008139
20 IWCC 0168

CITY OF CHICAGO,

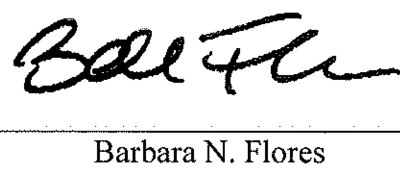
Respondent.

ORDER OF RECALL OF DECISION UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission, upon motion of the Petitioner filed March 16, 2020, finds that clerical errors exist in the Decision and Opinion on Review dated March 12, 2020, in the above captioned matter, mistakenly listing an incorrect date for the commencement of permanent total disability benefits and incorrectly awarding said benefits at the rate for partial permanent disability benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision and Opinion on Review dated March 12, 2020 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

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



DATED: APR 10 2020
o: 1/23/20
BNF/kcb
45

Barbara N. Flores

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN G. WEIR,

Petitioner,

vs. NO: 04 WC 008139
20 IWCC 0168

CITY OF CHICAGO,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary disability, permanent disability, and maintenance, 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.

I. Maintenance

The Commission initially addresses the maintenance awarded to Petitioner. Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2018)), an employer "shall *** pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." "Since maintenance is awarded incidental to vocational rehabilitation, an employer is obligated to pay maintenance only 'while a claimant is engaged in a prescribed vocational-rehabilitation program.'" *Euclid Beverage v. Illinois Workers' Compensation Comm'n*, 2019 IL App (2d) 180090WC, ¶ 29 (quoting *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39). Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising job search programs, and vocational retraining, which includes education at an accredited learning institution. *Euclid Beverage*, 2019 IL App (2d) 180090WC, ¶ 30. An employee's self-directed job search or vocational training also may constitute a vocational rehabilitation program. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004).

In this case, the Arbitrator awarded maintenance benefits in the amount of $746.52 per week for 176 and 1/7ths weeks, from August 28, 2012 through January 16, 2016. This was the period during which Petitioner was receiving vocational rehabilitation and job search services from Coventry Workers' Comp Services (Coventry). Petitioner argues that he is entitled to an award of additional maintenance benefits for the time periods prior to and after he received services from Coventry. The Commission considers each period in turn.

A. March 1, 2006 – August 27, 2012

The first time period in dispute extends from March 1, 2006 through August 27, 2012, prior to the referral to Coventry. During this initial period, Respondent had sporadic contact with Petitioner regarding vocational rehabilitation and alternate employment.

On March 6, 2007, Robert Serafin, Respondent's Director of Workers' Compensation, wrote to Petitioner. In the letter, Mr. Serafin stated that to provide Petitioner with an opportunity for vocational rehabilitation, he had arranged an interview for Petitioner with the Department of Personnel. Mr. Serafin also wrote that based on Petitioner's qualifications, he would be placed on as many eligibility lists for positions with Respondent as appropriate. Mr. Serafin added that failure to attend the interview could jeopardize Petitioner's TTD benefits. Petitioner testified that he attended the meeting, but no job offers resulted from it.

A little over one year later, in an unsigned April 15, 2008 letter, Respondent notified Petitioner it had identified a position of Watchman with the Department of Water Management within Petitioner's physical capabilities. The letter set a date and time to process Petitioner's paperwork. The letter further stated that if Petitioner believed his restrictions would prevent him from performing the duties of the job, Petitioner must bring the relevant documentation to the appointment.

On the accompanying "willingness and ability questionnaire," Petitioner indicated he was willing and able to work in all types of weather, wear the proper clothing, check in hourly, remain alert, and work in various locations around the City of Chicago. However, Petitioner also indicated he was unable and unwilling to check all exterior facility doors, check the property perimeter, check all vehicle gates, check exterior protective lighting, check the entire perimeter of construction sites, maintain a clean and safe working area, or be assigned to various shifts including 16-hour shifts. At this point in time, the treating surgeon Dr. Nelson had opined Petitioner would "clearly need to have a work place that offers him primarily a sitting job" and could "walk on an occasional basis." Petitioner testified without rebuttal that he was not offered the Watchman position due to an issue with his ability to walk. Petitioner further testified without rebuttal that he had been unsure about the scope of the question about maintaining a clean and safe working area.

In the following month, Petitioner received two letters. In a May 1, 2008 letter, Mr. Serafin wrote that to return Petitioner to the workforce, the Committee on Finance had arranged for him to attend a career development workshop which included professional resume writing and interviewing skills. The letter again noted that if Petitioner did not attend, his benefits could be suspended or terminated. Petitioner testified that he attended the workshop.

Mr. Serafin (now identified as Director of the Committee on Finance) also wrote a May 2, 2008 letter arranging an appointment for Petitioner with the Department of Human Resources to create a profile for Petitioner on Respondent's then-new online job application system. Mr. Serafin again warned that failure to attend the interview could jeopardize Petitioner's TTD benefits. Petitioner testified he attended the interview, which did not result in any job offers.

Two years later, in a March 9, 2010 letter, Ellen Bell, Respondent's Director of Workers' Compensation, wrote that to help Petitioner pursue the job search or vocational rehabilitation necessary to establish an ongoing entitlement to workers' compensation benefits, the Committee on Finance had arranged another appointment for Petitioner with the Department of Human Resources to create a profile for Petitioner for Respondent's online job application system. Ms. Bell warned that failure to attend the interview could jeopardize Petitioner's workers' compensation benefits. She also provided a telephone number for Petitioner's "return to work coordinator." Petitioner testified he attended the interview but received no job offers.

Almost two and a half years later, on August 28, 2012, Respondent referred Petitioner to Coventry for full vocational services. The regular reports from Coventry by Courtney Goodwin indicate Petitioner received job skills training, developed his resume, provided at least 7 to 10 job leads weekly (occasionally dozens per reporting period), applied in person to prospective employers (occasionally also attended by Ms. Goodwin), reported to an interview for a Watchman position with Respondent, attended job fairs, and provided weekly logs of his job searches. Petitioner's vocational goals included but were not limited to light assembler, cashier, and customer service positions. Petitioner's vocational barriers were assessed as his age, employment gap, and lack of basic computer skills. Ms. Goodwin wrote that she encouraged Petitioner to take classes to increase his computer skills; he began taking basic computer classes by July 9, 2014. Petitioner testified that, generally, he met with Ms. Goodwin weekly and attended job fairs perhaps monthly.

Petitioner contends that the letters sent by Respondent establish that Respondent was providing its own vocational rehabilitation program from 2006 to 2012. However, a "program" inherently denotes some sort of plan. The difference between the letters and the systematic services later provided by Coventry (albeit unsuccessfully) is clear. Respondent's letters address vocational rehabilitation, but they do not establish any sort of plan for returning Petitioner to work. As Respondent observes, five letters sent over the course of approximately four years is not a vocational rehabilitation program, at least not based on the contents of the letters in this case.

Nevertheless, as noted above, section 8(a) obligates employers to pay for necessary vocational rehabilitation, including maintenance. 820 ILCS 305/8(a) (West 2018). Moreover, "section 8(a) does not place any burden upon employees to request vocational rehabilitation from their employer before maintenance may be awarded." *Roper Contracting*, 349 Ill. App. 3d at 505. Thus, the issue presented here is the extent of an employer's obligation during a period where an employee complied with each of Respondent's internal instructions but there was no "prescribed vocational-rehabilitation program" yet in place.

Petitioner cites the Commission's regulation requiring employers, when appropriate, to prepare a written assessment of the vocational rehabilitation required to return the injured worker to employment, including the necessity for a plan or program that may include vocational evaluation and retraining. 50 Ill. Adm. Code 7110.10 (eff. June 22, 2006) (amended at 30 Ill. Reg. 11743 (eff. June 22, 2006) and since recodified at 50 Ill. Adm. Code 9110.10 (eff. Nov. 9, 2016)).[1] In this case, both an assessment and program were "appropriate" under the Commission's rules, as proved by Respondent's own statements and actions. Respondent's Director of Workers' Compensation wrote to Petitioner expressly to provide him with an opportunity for vocational rehabilitation on March 6, 2007. On March 9, 2010, Respondent's Director of Workers' Compensation wrote with directions to help Petitioner pursue the job search or vocational rehabilitation necessary to establish an ongoing entitlement to workers' compensation benefits. By August 28, 2012, Respondent finally referred Petitioner to Coventry for full vocational services, raising the question of why this was not done earlier, particularly given that Petitioner's employment gap was later assessed as an employment barrier by Coventry. Furthermore, during this initial period, Respondent identified another potential job for Petitioner with Respondent.

This record leaves no doubt that Respondent believed Petitioner required vocational rehabilitation but never produced the assessments required by law, let alone a program aimed at returning Petitioner to work. The Commission's rule is not a suggestion. An employer that knowingly fails to prescribe a program of vocational rehabilitation when one is appropriate cannot rely on that failure to deny maintenance benefits to an employee who is willing to participate in vocational rehabilitation. Here, Petitioner consistently complied with Respondent's directions regarding vocational rehabilitation. The Commission is aware that there are a multitude of considerations and difficulties inherent in managing a workforce as large as that of this particular Respondent. However, the same individuals and offices were involved in Petitioner's particular post-injury assessments, so it cannot be said that Respondent was unaware that it was issuing vocational guidance over a prolonged period without performing an assessment or prescribing a program such as Coventry. Accordingly, Petitioner is entitled to maintenance benefits for the period of Respondent's knowing refusal of a vocational rehabilitation program.

B. January 12, 2016 – October 19, 2018

The Arbitrator also did not award maintenance benefits from January 12, 2016 through the hearing date of October 19, 2018. This is the period after the services from Coventry ended. Regarding this period, the Arbitrator was only partially correct.

The record indicates that a January 12, 2016 report from Coventry closed Petitioner's file after he reported obtaining employment with Respondent as a Laborer. Petitioner testified he attempted to return to the Department of Transportation on his own initiative. Petitioner also testified that he informed Coventry that he thought he was going back to work. According to Petitioner, he was fingerprinted and photographed for an identification card. However, Petitioner testified he "didn't get a job."

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[1] Moreover, Respondent knew or should have known when Petitioner reached MMI, inasmuch as the records indicate Dr. Maday's and Dr. Nelson's reports were marked for distribution to MercyWorks.

In an August 26, 2016 letter, Margaret Wiencek of Respondent's Department of Transportation wrote to inform Petitioner that to continue receiving his disability benefits under the Act, he was required to actively pursue gainful employment using his current job skills and training. Ms. Wiencek directed him to submit weekly reports reflecting the pertinent data about each job sought, completing at least ten searches weekly to be documented using an attached "Injury on Duty Job Search Log." She also warned that failure to comply with job search requirements could jeopardize his weekly benefits or result in other disciplinary action.

Petitioner submitted Petitioner's Exhibit 3, which was comprised of the search logs which Petitioner submitted to Respondent weekly after receiving the August 26 letter. The first log, dated September 8, 2016, covers the week from September 1-7, 2016. The final log, dated October 16, 2018, covers the period from October 10-15, 2018.

Respondent submitted a labor market survey prepared by Coventry on April 3, 2018. The jobs listed therein, *e.g.*, cashier/receptionist or customer service representative for various automobile dealerships, AmeriCash loans, Horseshoe Hammond Casino, and Standard Parking, are essentially similar to the types of positions Coventry previously sought for Petitioner.

Petitioner further testified that he had submitted a reasonable accommodation request to Respondent. The request, dated September 4, 2018 and signed by Petitioner's treating surgeon, Dr. Nelson, raises Petitioner's restriction on lifting to 40 pounds. Petitioner testified that he has not heard from Respondent about any work since submitting the request. Petitioner later testified that he believed he could work for Respondent again with a reasonable accommodation but was not currently working with anyone to obtain a job with an accommodation.

The Arbitrator determined that a supposed *bona fide* job offer Petitioner received in January 2016 set the final date for maintenance benefits. Petitioner disputes that he received a *bona fide* job offer at that time. Respondent notes that Petitioner believed he would be returning to work and advised Coventry that he had secured the job.

The record includes Petitioner's unrebutted testimony that he did not get the job. The episode is consistent with several others in which Petitioner was photographed and fingerprinted as part of Respondent's application process but ultimately was not employed. Of note, Respondent provided no witness or evidence to controvert Petitioner's testimony establishing why he was not ultimately employed in the position. This is information that only Respondent controlled, and the lack of such evidence allows a negative inference to be drawn against Respondent on this point.

Nevertheless, Petitioner represented to Coventry that he had secured a job and as a result, Petitioner stopped receiving services from Coventry. Accordingly, after January 12, 2016, Petitioner was no longer engaged in a prescribed vocational rehabilitation program. There was also no evidence that Petitioner immediately engaged in a self-directed job search or vocational program.

After receiving Respondent's August 26, 2016 letter, Petitioner regularly submitted the required search logs documenting ten weekly job searches for the period from September 1, 2016 through October 15, 2018. The logs, apparently accepted by Respondent without objection and detailing efforts similar to those Petitioner put forth while working with Coventry, establish that Petitioner was engaged in a diligent, self-directed job search during this period.

In sum, given the record as a whole, the Commission concludes that in addition to the period from August 28, 2012 through January 16, 2016, Petitioner also shall be awarded maintenance benefits for the period from March 1, 2006 through August 27, 2012, as well the period from September 1, 2016 through the hearing date of October 19, 2018.

II. Permanent Disability

The Arbitrator awarded Petitioner permanent partial disability benefits in the amount of $550.47 per week for 200 weeks, finding the injuries sustained caused 40% of the person as a whole pursuant to § 8(d)2 of the Act. Petitioner maintains that he is permanently and totally disabled and that he fits into the "odd-lot" category. Respondent argues that there is no evidence Petitioner is medically permanently and totally disabled, or that the vocational evidence or any opinion establishes that Petitioner cannot find work in a stable labor market. Indeed, Respondent asserts that Petitioner's job search resulted in a *bona fide* job offer from Respondent.

Initially, the Commission considers the timing of the permanency determination. The Illinois Supreme Court has written that "[u]ntil the claimant has completed a prescribed rehabilitation program, the issue of the extent of permanent disability cannot be determined." *Hunter Corp. v. Industrial Comm'n*, 86 Ill. 2d 489, 501 (1981). The Arbitrator here determined that vocational rehabilitation ceased on January 12, 2016 and thus could determine permanency. However, the record establishes Petitioner did not get the Laborer job in 2016, Respondent directed Petitioner to begin his own job search in August 2016, and the job search continued until the hearing date in this matter. Thus, determining permanency as of January 12, 2016 was in error. The remaining question is whether Petitioner's job search should be considered concluded now, as that question is central to Petitioner's argument for permanent total disability benefits.

An employee is totally and permanently disabled when he is unable to make some contribution to industry sufficient to justify the payment of wages. *A.M.T.C. of Illinois v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). If a claimant's disability is of such a nature that he is not obviously unemployable, or there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove that he fits into an "odd lot" category; that being an individual who, although not altogether incapacitated, is so handicapped that he is not regularly employable in any well-known branch of the labor market. *Valley Mold & Iron Co. v. Industrial Comm'n.*, 84 Ill. 2d 538, 546-47 (1981).

Petitioner is not obviously unemployable and there is no medical evidence supporting a claim of total disability. Thus, the issue is whether Petitioner fits into the "odd lot" category.

A claimant seeking "odd lot" status must establish it by a preponderance of the evidence. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091 (2007). A claimant ordinarily satisfies his burden in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that, because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). Once a claimant establishes that he falls within an "odd lot" category, the burden shifts to the employer to prove that the claimant is employable in a stable labor market and that such a market exists. *Id.*

By these standards, Petitioner is eligible for permanent total disability benefits. Petitioner worked with Coventry for approximately three and one-half years and received no job interviews other than with Respondent. Petitioner's unrebutted testimony was that he ultimately did not get a job with Respondent in January 2016. Petitioner then followed Respondent's order and conducted a self-directed job search for over two years, again with no success.

In rebuttal, Respondent submitted a labor market survey from Coventry, but the positions listed are the same sorts of jobs for which Petitioner unsuccessfully applied for years. Petitioner was middle-aged with a job history consisting entirely of manual labor. Petitioner had some college education and a technical degree, but neither assisted him in finding employment during his multi-year efforts under the professional direction of Coventry. These factors all weigh in favor of finding permanent total disability.

Medical examinations by Drs. Cohen and Nelson both found Petitioner employable, but with significant, permanent work restrictions. Petitioner also testified that he believed he could work for Respondent again with a reasonable accommodation, but he was not ultimately employed by Respondent, which has an internal program established specifically to employ its injured workers. Respondent also was unsuccessful in otherwise placing Petitioner by using Coventry or during his self-directed job search.

Not all of the evidence supports a finding of permanent total disability, however. For example, the Arbitrator noted in her findings that there was no medical evidence submitted to support Petitioner's claim that he could not maintain a clean and safe work environment or was limited in the hours he could work for the Watchman position. The Arbitrator also noted that the surveillance video provided to Dr. Cohen contradicted Petitioner's claim at the time that he could walk no longer than 35 feet.

Yet, the Arbitrator generally found Petitioner credible regarding his medical history, mechanisms of injuries, course of medical treatment, and current subjective complaints. Accordingly, given the record in this case, the Commission concludes the weight of the evidence demonstrates that Petitioner is permanently and totally disabled.[2]

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[2] The Commission opts to award Petitioner benefits for permanent and total disability under section 8(f). Claimants otherwise have the option of seeking permanency awards under either permanent partial disability or wage differential. Our supreme court has expressed a preference for wage differential awards. *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 43. In this matter, however, Petitioner was never offered employment to establish earning capacity to differentiate from his prior earnings and calculate the wage differential. Moreover, the determination that Petitioner is permanently and totally disabled implies that he cannot obtain gainful employment, therefore his current earning potential is zero and, again, there is no basis upon which to

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $83,290.30, representing $746.52 per week for a period of 111 and 4/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner maintenance benefits of $746.52/week for 515 and 3/7ths weeks, commencing March 1, 2006 through January 16, 2016, and 111 and 1/7ths weeks, commencing September 1, 2016 through October 19, 2018, as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is awarded a credit of $204,973.06 for temporary total disability benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is awarded a credit of $370,807.15 for maintenance benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent and total disability benefits of $746.52 per week for life, commencing October 20, 2018, as provided in §8(f) of the Act, because the injury sustained caused the complete disability of the Petitioner rendering him wholly and permanently incapable of work.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for the cost of living adjustments, paid by the Rate Adjustment Fund, as provided in § 8(g) of the Act.

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 1 0 2020
d: 1/23/20
BNF/kcb
045

Barbara N. Flores

Marc Parker

Concurrence in Part and Dissent in Part

I respectfully concur in part and dissent in part from the Decision of the majority. The Arbitrator awarded Petitioner 111&4/7 weeks of TTD, 176&1/7 weeks of maintenance, and 200 weeks of PPD, representing loss of 40% of the person-as-a-whole. The majority modified the Decision of the Arbitrator to increase the award of maintenance to 515&3/7 weeks and to increase the PPD award from 40% of the person-as-a-whole to declare Petitioner permanently and totally disabled from employment for life. I concur with the majority in increasing the maintenance award. However, I dissent from the portion of the decision of the majority increasing the PPD award from 40% of the person-as-a-whole to PTD. I would have affirmed the Arbitrator's PPD award.

The Arbitrator found, and the majority conceded, that there was insufficient medical evidence to find Petitioner medically PTD. No doctor has opined that Petitioner was PTD. Rather, the majority declared Petitioner PTD based on the odd-lot theory of permanent and total disability. Petitioner did conduct a job search for several years. Respondent identified a job as security guard. However, Petitioner did not even apply or try to perform the job duties. Instead, he decided on his own that he could not do it even though it was within his restrictions. He placed restrictions on himself that no doctor imposed.

The record reveals that Petitioner advised the third-party administrator that he was offered a job, which resulted in vocational rehabilitation being terminated on January 11, 2016. However, the record also indicates that Petitioner never began the job, though there is no evidence in the record why Petitioner did not work the job, or whether he informed the third party administrator either that the job offer was withdrawn or that he declined the offer. Nor is there any evidence that Petitioner advised the administrator that his lifting limit was raised so that the jobs for which he could apply could be revised to include more job categories. Therefore, Petitioner has not established an unsuccessful job search.

In addition, regarding his suitability for employment generally, on April 3, 2018, Respondent commissioned a labor market survey finding various job categories within his weight restrictions at the time, which was 25 pounds. Those categories included customer service clerk/representative, receptionist, cashier, and greeter/information clerk. Thereafter, on September 4, 2018, Dr. Nelson increased Petitioner's weight restrictions from 25 pounds lifting to 40 pounds lifting. It seems obvious to me, that if there were various job categories suitable for Petitioner with a 25-pound limit, there would be more job categories suitable for Petitioner with a 40-pound limit. Because Petitioner was actually offered a job by Respondent and Respondent has identified various job categories for which Petitioner was qualified, Petitioner has not sustained his burden of proving he was PTD. Finally, I agree with the reasoning and analysis of the Arbitrator by which she awarded Petitioner 200 weeks of PPD representing loss of 40% of the person-as-a-whole.

For the reasons stated above, I concur with the majority in increasing the maintenance award. However, I dissent from the portion of the decision of the majority increasing the PPD award from 40% of the person-as-a-whole to PTD. I would have affirmed the Arbitrator's PPD award. Therefore, I respectfully dissent.

DLS/dw
O-1/23/20

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WEIR, MARTIN G
Employee/Petitioner

Case# **04WC008139**

02WC058348

CITY OF CHICAGO
Employer/Respondent

20IWCC0168

On 3/29/2019, 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 2.41% 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:

0147 CULLEN HASKINS NICHOLSON ET AL
PATRICK B NICHOLSON
10 S LASALLE ST SUITE 1250
CHICAGO, IL 60603

0766 HENNESSY & ROACH PC
AUKSE R GRIGALIUNAS
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Martin G. Weir
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **04** WC **08139**

Consolidated cases: **02 WC 58348**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **10/19/2018**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **9/25/2003**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,228.56**; the average weekly wage was **$1,119.78**.

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

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

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

Respondent shall be given a credit of $**204,973.06** in TTD, **$0** for TPD, **$370,807.15** for maintenance, and **$0** for other benefits, for a total credit of $**575,780.21**.

Order

Respondent shall pay temporary total disability benefits in the amount of $746.52 per week for 111 4/7 weeks from November 13, 2003 through October 3, 2004 and December 1, 2004 through February 28, 2006;

Respondent shall pay maintenance benefits in the amount of $746.52 per week for 176 1/7 weeks from August 28, 2012 through January 12, 2016;

Respondent shall pay permanent partial disability benefits in the amount of $550.47 per week for 200 weeks, because the injuries sustained caused 40% loss of use of a man as a whole pursuant to Section 8(d)(2) of the Illinois Workers' Compensation Act for a change in occupation.

See attached Findings of Fact and Conclusions of Law for detailed findings.

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.

20IWCC0168

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

03/28/19
Date

ICArbDec p. 2

MAR 2 9 2019

20 I W CC0168

PROCEDURAL HISTORY

This case has been consolidated with the following case: 02WC58348.

The matter of case # 04WC8139 was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on October 19, 2018 in Chicago, Illinois. The submitted records have been examined and the decision rendered by Arbitrator Kay. The parties stipulated that the City of Chicago (hereinafter "Respondent") and Martin G. Weir (hereinafter "Petitioner") were operating under the Workers' Compensation Act (hereinafter "Act") on September 25, 2003, that there was a relationship of employer and employee between the Respondent and Petitioner, the Petitioner did sustain an accident that arose out of and in the course of her employment with Respondent, that his current condition of ill-being is connected to his injury and that timely notice was given. In addition, the parties stipulated that the medical services provided to Petitioner were necessary and reasonable and that Respondent has paid all medical bills. The stipulated average weekly wage in accordance to the Act was $1,119.78, the Petitioner was 48 years old at the time of the accident, married with 1 dependent child. (Arb.X1)

The issues in dispute were whether Petitioner was entitled to temporary total disability for the periods of 11/13/2003 to 10/03/2004, 12/01/2004 to 3/31/2009 to 04/06/2013 to 04/19/2003, representing 274 4/7th weeks and for maintenance for the period of 04/01/2009 to 04/05/2013; 04/20/2013 to 10/19/2018 representing 496 5/7th. In addition, the nature and extent of the injury is in dispute. (Arb. X1)

SUMMARY OF FACTS AND EVIDENCE

The Petitioner testified that he was still employed by Respondent as a cement mixer at the time of his accident on September 25, 2003. (T.8) He had been working there since 1994. His job duties included digging holes for forms, unloading trucks, preparing sites for concrete. He stated that he used jackhammers, shovels, rakes and bars to dig out rocks. (T.8-9) His team mostly repaired streets, curbs, gutters, and sidewalks. (T.9) He also carried wood forms which are 2X10 and weigh approximately 20 pounds each. (T.10)

On September 25, 2003, the date of the accident, Petitioner testified that he was running the cement chute. (T.16) There was a big mound of dirt and stone and he fell because the chute was so heavy. (T.16) Petitioner testified that he fell on a mound of dirt and stone. (T.16) When he fell he fell on his right knee and he felt something twist in his knee. (T.17) Petitioner testified that his left knee was hurt also. (T.17)

On September 25, 2003, Petitioner went to MercyWorks for treatment. (P.X6) X-rays were performed of both knees, and the petitioner was diagnosed with a bilateral knee strain at that time and was released to return to work full duty. The petitioner returned to MercyWorks on October 15, 2003 and they recommended an MRI of the bilateral knees.

On October 16, 2003 an MRI was performed of the petitioner's bilateral knees. (PX 12) The MRI revealed stress fracture in proximal tibia, extensive tear of medial meniscus with some displacement of fragments, joint fluid volume which may represent meniscal tear or arthrosis identifiable as degenerative change in medial femoral tibia compartment. (PX. 11).

On October 29, 2003, Petitioner saw Dr. Maday who recommended surgeries to both knees. (T.18) Petitioner remained at work until November 12, 2003 (T.18) On December 1, 2003, Dr. Maday performed arthroscopic surgery on Petitioner's right knee. Petitioner underwent a course of PT at MercyWorks. The post

operative diagnosis was right knee medial meniscal tear with degenerative changes with lateral meniscal tear. (PX 12)

On February 5, 2004, Petitioner underwent a second surgery by Dr. Maday to his left knee. The operation that was performed was a left knee partial medial and lateral meniscectomy as well as a microfracture of the medial femoral condyle. (PX 12) Petitioner underwent a course of PT at MercyWorks following the surgeries.

On October 4, 2004, Petitioner returned to work through November 30, 2004 with the use of a cane. (T.21) The petitioner was not improving, so Dr. Maday referred him to Dr. Nelson. The petitioner saw Dr. Nelson on December 10, 2004 and he recommended additional left knee treatment in the form of a left total knee replacement.

On July 27, 2005, Petitioner underwent a left total knee replacement at the hands of Dr. Nelson (PX 12) The petitioner underwent a post-operative course of physical therapy, followed by work hardening. The petitioner was discharged from work hardening on February 27, 2006. The discharge notes indicated that the petitioner could lift 20 pounds occasionally. It stated that the petitioner needed to change positions frequently between sitting, standing and walking. (PX 8)

On February 28, 2006, Petitioner followed up with Dr. Nelson. Dr. Nelson stated that the petitioner was at maximum medical improvement and could return to work consistent with the work hardening discharge. (PX 12) Dr. Nelson further indicated that the petitioner should work primarily in a sitting job and can walk on an occasional basis, but climbing and kneeling and squatting should be limited. The Arbitrator notes that there was no evidence that the Petitioner began a job search at this time, nor that vocational rehabilitation was demanded or provided by the Respondent.

On October 12, 2012, Petitioner underwent a §12 exam, by Dr. Cohen, at the Illinois Bone and Joint Institute. (R. X1) Dr. Cohen reviewed Petitioner's medical records and also performed x-rays of the Petitioner that day. The x-rays showed total left knee replacement in satisfactory position. The right knee showed arthritic changes of the medial compartment. He also reviewed video surveillance that was performed on July 6th and July 9, 2012 which lasted for 54 minutes. The surveillance depicted the Petitioner walking around and performing various errands/tasks and descending stairs. There was no evidence of marked pain behavior or issues with walking. (RX 1) Dr. Cohen diagnosed Petitioner with stable left total knee replacement with good motion. (RX 1) He states no further treatment is needed for the left knee and that he was at MMI. The report stated that Petitioner was capable of working. Petitioner stated that he could not walk more than 35 feet, however, the video showed otherwise. Dr. Cohen indicated that reasonable restrictions would be to avoid squatting, kneeling, crawling or repetitive climbing, indicating he could work on level surfaces and a sedentary position. It indicated that the petitioner had a lifting restriction of 25 pounds, and he stated that the petitioner cannot return to his regular duties as a cement mixer. (RX 1)

On August 28, 2012, Respondent provided vocational rehabilitation services through Coventry for Petitioner. (PX 13) The Petitioner met with a vocational counselor once a week and was provided job search training. He went to job fairs about once a month and took computer classes at Oak Lawn library. The petitioner testified that Exhibits 1 and 2 constitute job search logs prepared by himself from August 24, 2012 through January of 2016. Petitioner's Exhibit 3 constitutes job search logs created by himself and turned in to the Respondent from August 8, 2016 through the present.

According to a letter sent by the Respondent, on April 15, 2008, it indicated that a job as a watchman had been identified for Petitioner within his physical capabilities. (P.X5) The letter stated that the Petitioner should appear on April 21, 2008 in order to begin the process of returning to work in this position. It stated that if Petitioner did not believe he was able to perform the job, he should bring relevant documentation. According to the "Willingness and Ability Questionnaire," which the Petitioner testified that he filled out, he stated that he is not willing or able to perform the job of a Watchman, going so far as to say that he could not even maintain a clean or safe working environment, or work up to a 16-hour shift. (T. 41-42, PX 5) The Arbitrator notes that there was no medical evidence submitted to support that Petitioner cannot maintain a clean and safe work environment, nor limited in any way in the number of hours he is allowed to work.

On August 13, 2013, Petitioner was offered a job for the City of Chicago as a Traffic Enforcement Technician at the Department of Transportation. (T. 26, PX 5) This was a sedentary job with no physical requirements where the Petitioner's primary tasks would be to view video from the City's speed cameras and verify speed enforcement incidents. (PX 5) Petitioner was asked to come in for finger prints and to fill out pre-employment paperwork. The petitioner testified that he complied and had his fingerprints and photos taken for security purposes. Petitioner testified that he did not receive the position. (T.27)

On September 4, 2018, Dr. Nelson completed a reasonable accommodation request which Petitioner submitted to Respondent. This request reiterated the foregoing restrictions but with lifting not greater than 40 pounds. (RX. 4).

The Arbitrator notes that the Petitioner introduced into evidence logs regarding job searches performed at the request of Coventry from August 24, 2012 through January 8, 2016 (PX. 1, PX. 2 and PX. 4) and from September 18, 2016 through September 25, 2018. (PX. 3) Petitioner submitted approximately 86 pages of handwritten job logs from August 24, 2012 to May 16, 2013 with five job searches on most pages. (PX. 1) Petitioner submitted approximately 212 pages of job logs for Coventry from February 9, 2013 to January 8, 2016 with five job searches on most pages (PX. 2) as well as 486 pages of computer job searches with Career Builder. (PX. 4) Petitioner also submitted approximately 186 pages of job searches as required by Respondent beginning September 18, 2016 of ten searches per week. (PX. 3)

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment/Summary of Testimony:

The Petitioner, Martin G. Weir, was the only witness to testify at trial. The Arbitrator finds the overall testimony of Petitioner to be truthful, credible and otherwise unrebutted regarding his past medical history, mechanisms of injuries, course of medical treatment and current subjective complaints.

With respect to issue (L), whether the Petitioner is entitled to TTD for the period of 11/13/2003 to 10/03/2004, 12/01/2004 to 3/31/2009 to 04/06/2013 to 04/19/2003, representing 274 4/7th weeks and for maintenance for the period of 04/01/2009 to 04/05/2013; 04/20/2013 to 10/19/2018 representing 496 5/7th weeks the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. The Arbitrator awards temporary total disability benefits in the amount of $746.52 per week for 111 4/7 weeks from November 13, 2003 through October 3, 2004 and December 1, 2004 through February 28, 2006. In support of this finding, the Arbitrator relies on the following facts:

First, the petitioner was not taken off work completely by any physician until November 13, 2003 and the petitioner testified that he did return to work full duty immediately following the injury date of September 25, 2003 for a few weeks. Second, the petitioner testified that he returned to work for the respondent for a short period of time while using a cane from October 4, 2004 through November 30, 2004. Finally, Dr. Nelson placed the petitioner at maximum medical improvement following his work hardening discharge on February 28, 2006.

Therefore, relying on the facts provided in the medical records and corroborated by the petitioner's testimony, the Arbitrator finds that the petitioner is entitled to TTD from November 13, 2003 through October 3, 2004 and December 1, 2004 through February 28, 2006.

Respondent claims that it has paid $204,973.06 in TTD benefits, the amount is not disputed by the petitioner, and shall receive a credit for same.

The Arbitrator awards maintenance benefits in the amount of $746.52 per week for 176 1/7 weeks from August 28, 2012 through January 12, 2016. In support of this finding, the Arbitrator relies on the following legal precedent and facts of the case:

For a claimant to be entitled to maintenance benefits he must prove, by a preponderance of the evidence, his injury impaired his earning capacity, AND that he is either enrolled in a vocational rehabilitation program or engaged in a diligent, self-directed job search. Roper Contracting v. Industrial Commission, 349 Ill. App. 3d 500 (2004); see also Nascote Indus. v. Indus. Comm'n, 353 Ill. App. 3d 1067, 1075 (2004); Connell v. Industrial Comm'n, 170 Ill.App.3d 49, 55 (1988). Petitioner failed to prove the second of these elements from March 1, 2006 through August 27, 2012 and following January 12, 2016.

Upon review of the complete record, there does not appear to be evidence of either a self-directed job search or formal vocational rehabilitation (nor a demand for same) for quite some time following the petitioner's MMI date of February 28, 2006. While there were a few letters forwarded to the petitioner by the City of Chicago requesting the petitioner appear at job fairs and to come in for an interview regarding the watchman position, as well as offering the position for "Traffic Enforcement Technician," (PX 5) there is no indication that the petitioner was engaged in a diligent, self-directed job search or enrolled in a vocational rehabilitation program from the period of March 1, 2006 through August 27, 2012.

The record is also devoid of evidence that vocational rehabilitation was demanded by the petitioner, or that any requests for hearing were filed by the petitioner demanding this Commission to order vocational rehabilitation benefits, if the respondent was not offering same. Eventually, it does appear as though vocational rehabilitation was provided by the respondent through Coventry, however this did not begin until August 28 of 2012. (PX 13) There was no explanation provided by either party for the delay in providing these services. There is no evidence submitted by the petitioner indicating that vocational rehabilitation was demanded, that it was refused by the respondent, or that any motions were filed before this Commission requesting that vocational rehabilitation with a counselor of his choice be ordered by the Commission. It is unknown, based on the evidence submitted in the record, why vocational rehabilitation was not initiated. The petitioner did not testify as to any problems regarding obtaining vocational rehabilitation between 2006 and 2012, nor did he testify that he demanded vocational rehabilitation between 2006 and 2012.

Second, there is no evidence that the petitioner was engaged in a self-directed job search between his MMI date of February 28, 2006 and August 28, 2012. All job search logs provided in Petitioner's exhibit 1 and 2 outline the petitioner's job search beginning in 2012, but there are no job logs which predate the petitioner's

vocational rehabilitation with Coventry. The petitioner also did not testify as to ever performing a self-directed job search, only that he underwent job placement services through Coventry beginning in 2012.

Therefore, because the petitioner was not engaged in a vocational rehabilitation program, nor was he performing a self-directed job search between February 28, 2006 and August 27, 2012, maintenance benefits would not be appropriate for that period of time.

Finally, the arbitrator relies on the bona fide job offer made by the City of Chicago for the Department of Transportation position as a laborer in January of 2016 as a proper termination date for maintenance benefits. The best evidence as to the petitioner's job offer is the vocational rehabilitation records from Coventry indicating on January 12, 2016, that the petitioner was to start his position next week, and he was already fingerprinted and taken photos for identification. (PX 5) Vocational rehabilitation was terminated on this day. The petitioner testified consistently with the Coventry report. There is no indication as to why the petitioner did not start this job. It appears as though the petitioner was about to begin working, however there is no evidence as to why the petitioner did not begin work at this position. There is no evidence that the job offer was withdrawn in any way. There is simply no evidence in the record as to why the petitioner did not actually begin working at this position. As such, the Arbitrator must conclude that this was a bona fide job offer made by the respondent to the petitioner in order to begin working on or about January 12, 2016. There is no evidence to support otherwise.

Therefore, based on the facts presented on the record, maintenance benefits are awarded in the amount of $746.52 per week for 176 1/7 weeks from August 28, 2012 through January 12, 2016.

The respondent has made payments in the amount of $370,807.15 and shall receive a credit for same.

With respect to issue of the Nature and Extent of the injury, the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. For injuries that occur before September 1, 2011, the Commission evaluates the physical impairment and the effect of the disability on the injured employee's life. Factors that may be considered include the individual's age, skill, occupation, training, inability to engage in certain kinds of activities, pain, stiffness or limitation of motion.

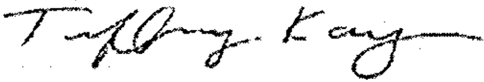
With regard to the Petitioner's age, he was 48 years of age at the time of his work-related injury on September 25, 2003. Petitioner testified that when he walks two to four blocks he has to stop and rest a bit due to the pain and throbbing in his knees. (T.36) Petitioner ices his knees at night, has issues driving long distances and as a limited amount of weight he can lift due to the pressure it places on his knees. (T.37) The Petitioner's permanent partial disability with regard to his knees will be something he has to live and work with for an extended period of time. A time frame much longer than that of an older individual in his occupation. Therefore, the Arbitrator gives some weight to this factor.

With regard to the Petitioner's skill, occupation, and training, the Arbitrator notes that the Petitioner testified that he wants to return to work in his position with reasonable accommodations related to his knee. Petitioner testified that he has made a reasonable accommodation request to the City of Chicago pursuant to the Americans with Disabilities Act. (PX 14) Petitioner testified that he was hoping to return to work in a "lighter job". (T.43) In a medical questionnaire signed by the petitioner's treating physician, Dr. Nelson, on September 4, 2018, it indicates that the Petitioner's restrictions have been relaxed, and that the petitioner can lift up to 40 pounds, however the petitioner is to avoid climbing, kneeling, squatting and no extended standing or walking. The

petitioner testified that he is ready, willing and able to work at this time. (PX 14) The Arbitrator notes that the Petitioner testified that has not been assigned anyone from the City to work with to fulfill this request/accommodation. (T.43) Therefore, the Arbitrator gives some weight to this factor.

With regard to the Petitioner's inability to engage in certain kinds of activities, pain, stiffness or limitation of motion the Petitioner testified that today he notices that he can walk better now than he used to and could go 2-4 blocks before he needs to stop and rest. He stated it is hard to bend his left knee and very difficult to bend down or kneel. He stated that he takes stairs one at a time up and down. He stated that he can drive for up to an hour before he needs to get out and stretch. He can lift 20 pounds. At this point, he is no longer treating for his knees and no longer uses a cane. Therefore, the Arbitrator gives some weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 40% man as a whole pursuant to Section 8(d)(2) of the Act.



Signature of Arbitrator

3/29/18
Date