STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

Before the Illinois Workers' Compensation Commission

DENNIS R. ROUSSIN,

Petitioner,

vs.

NO: 19 WC 005252
21 IWCC 607

MADISON COMMUNITY UNIT SCHOOL DISTRICT #12,

Respondent.

ORDER

The Commission on the Motion of Respondent recalls the Decision and Opinion on Review of the Illinois Workers' Compensation Commission dated December 20, 2021, pursuant to Section 19(f) of the Act due to a clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated December 20, 2021 is hereby recalled and a Decision and Opinion on Review is hereby issued simultaneously.

January 7, 2022

SM/msb
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/s/*Stephen J. Mathis*
Stephen J. Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DENNIS R. ROUSSIN,

Petitioner,

vs. NO: 19 WC 005252

MADISON COMMUNITY UNIT
SCHOOL DISTRICT #12,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all temporary total disability (TTD), medical expenses, and prospective medical care, and being advised of the facts and applicable law, hereby reverses the Decision of the Arbitrator for the reasons stated below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total disability, prospective medical expenses, and compensation for permanent partial disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327 (1980).

The Commission finds that Petitioner sustained a work-related accident on February 21, 2017. His right shoulder condition is causally related to his work accident. Having found accident and causal connection, the Commission finds Petitioner is entitled to the 62 weeks of TTD that have already been paid commencing February 22, 2017 through October 3, 2017 and January 24, 2018 through August 21, 2018 (RX 2). Respondent is entitled to a credit of $77,817.56 for the medical expenses that have been paid. Respondent is also entitled to a credit for any reasonable, related and necessary medical expenses paid by the group medical provider, pursuant to Section 8(j) of the Act. Respondent shall hold Petitioner harmless for any claims by any providers for which Respondent receives any credit for any medical expenses paid by the

group medical provider pursuant to Section8(j) of the Act. Petitioner is entitled to prospective medical care and treatment for his right shoulder as recommended by Dr. Farley.

FINDINGS OF FACT

The Commission makes the following findings:

1) Mr. Roussin was employed with Madison Community Unit School District # 12 as a full-time custodian on February 21, 2017. On that date he was on duty cleaning the cafeteria when he slipped and fell on spilled juice and fell directly on his right shoulder.

2) Mr. Roussin admitted into evidence and testified to the following job history:

a. In 2007 Petitioner was employed as a service technician at Thermal Industries. The position required a lot of overhead lifting. T 19. He left that employment in 2014. In 2014 he was unemployed for 9 months. Petitioner then worked for a temporary service from Labor Day until the end of 2015. T 22. In 2016 Mr. Roussin was hired by Respondent as a full- time custodian.

b. Petitioner's duties for Respondent included sweeping, mopping, moving furniture, lawn maintenance, light plumbing, and overhead work. During the summer he painted a couple of classrooms by himself. He emptied trash that weighed 60-70 lbs. and required lifting the can and placing it in the dumpster. He worked alone on his shift until February 17, 2017.

3) Mr. Roussin has a history of right shoulder pain that dates back to July 17, 2007 when he sustained a work-related accident in his prior employment. He was lifting a glass trapezoid that weighed 120-140 lbs. and strained his right shoulder. PX3. An MRI performed on October 30, 2007 revealed a focal, partial articular surface tear with tendinosis, and acromioclavicular joint arthropathy with mass effect on the supraspinatus tendon. RX5.

4) In 2007 Petitioner came under the care of Dr. Kostman, an orthopedic surgeon. At that time Dr. Kostman was contracted to Concentra. He treated Petitioner conservatively with cortisone injections to the right shoulder. On December 18, 2007, Dr. Kostman discussed treatment options with Petitioner that included continued conservative therapy or arthroscopic surgery. RX6. Right shoulder surgery was not performed. Petitioner testified that he was scheduled for right shoulder surgery but that it was cancelled by Dr. Kostman. T 29. Dr. Kostman was subsequently retained by Respondent in the present case as a Section 12 expert witness.

5) Petitioner testified that he had regained full-strength in his right shoulder and continued working full-duty at Thermal Industries through 2014. T 29. He admits he has had symptoms of arthritis in his right shoulder from his 2007 work accident until the 2017 fall at work. T 49. He does not dispute that he had ongoing problems with his right shoulder in the interim for which he consulted his primary care physician Dr. Riordan. T 54.

6) Prior to the February 2017 work-injury he was able to reach his right arm above his head without assistance from his left hand. His right arm movement was unrestricted. T 32. Petitioner admitted on cross examination that he saw Dr. Riordan on December 28, 2015 and that his records note decreased range of motion on examination, and inability to resist pressure in his right arm. T 57.

7) Petitioner began work for Respondent as a substitute custodian in early 2015. He was then hired full-time by Respondent. He was able to work full-duty from December 2015 until his February 21, 2017 work accident. T 65. He pursued a hobby as a drummer from 13 years of age. He has no other hobbies. T 62.

8) On February 21, 2017 Petitioner was working at Madison School doing cafeteria duty. He slipped on spilled apricot juice and fell directly on his right shoulder. He reported the injury and was sent to Gateway Medical Center on February 22, 2017. Petitioner testified that immediately after the fall he did not feel pain because his shoulder felt the way it always did. The pain increased by the end of his shift. T 59.

9) The records from Gateway Medical Center reflect that he reported that he slipped and fell at work and that the onset of right shoulder pain was sudden and continuous. An x-ray was performed that revealed no fracture. Acromioclavicular hypertrophy was reported. Examination of the right shoulder demonstrated decreased range of motion. PX2.

10) Mr. Roussin was seen by Dr. Milne on March 6, 2017. He presented with complaints of constant pain with any use of his right shoulder. Petitioner was known to Dr. Milne as he performed a left subscapularis repair in 2014. Petitioner reported to Dr. Milne that he had an old work injury to his right shoulder in 2005 (sic). Dr. Milne diagnosed a right full thickness rotator cuff tear involving the subscapularis with right impingement syndrome and acromioclavicular arthrosis. Dr. Milne recommended arthroscopic surgery and imposed a 5 lb. lifting restriction pending surgery. PX3.

11) Dr. Milne performed right shoulder surgery on April 5, 2017. The undersurface of the rotator cuff showed a full thickness tear, the biceps tendon was found to be subluxing from the groove and the anterior superior labrum showed fraying

and tearing. Petitioner had post-operative follow up and physical therapy. Dr. Milne released him to restricted duty work with a 40 lb. lifting restriction on August 14, 2017. PX3.

12) Petitioner returned to Dr. Milne on September 12, 2017 and reported that he did not feel ready to return to full duty employment where he is expected to lift up to 70 lbs. Dr. Milne ordered a course of work hardening. On October 3, 2017 Petitioner reported to Dr. Milne that he was still having difficulty raising his right arm overhead. He was returned to full duty work. Petitioner saw Dr. Milne on October 31, 2017 and told Dr. Milne that his right shoulder was getting worse. Dr. Milne ordered an MRI arthrogram but allowed him to continue working without restrictions.

13) An MRI arthrogram was performed on November 21, 2017 which revealed evidence of a repeat full thickness tear at the insertion of the supraspinatus measuring 3.2 cm. in the AP dimension with 3.1 cm. of retraction. Dr. Milne recommended repeat surgery.

14) Dr. Milne performed a second right shoulder surgery on January 24, 2018. He underwent physical therapy and was on work restrictions of no overhead lifting or reaching. PX3.

15) On June 12, 2018 Petitioner saw Dr. Milne and reported he still had a "sticking point" in his right shoulder and required active assistance when raising his arm from 45 to 90 degrees. Dr. Milne ordered another MRI which was performed on July 10, 2018.

16) The MRI report of July 10, 2018 was read by the radiologist as demonstrating a partial thickness undersurface tear with fraying and undersurface irregularity, and suspected superior bundle subscapularis and small focal longitudinal interstitial tendon wear, but no convincing labral tear was identified. PX3.

17) Dr. Milne determined that the rotator cuff was intact and increased the frequency of physical therapy. On August 21, 2018 he returned Petitioner to full duty work. On September 18, 2018 Dr. Milne charted that Petitioner was at MMI and released him from care.

18) Petitioner returned for further orthopedic follow up on June 19, 2019. Dr. Milne had retired during the interim. Petitioner was seen by his partner Dr. Farley. Petitioner reported that he had done okay on his initial return to full duty employment but he still had some pain and weakness that became worse over the course of the spring. Dr. Farley ordered an MRI which was performed on July 1, 2019. PX7.

19) The MRI performed on July 1, 2019 reported that undersurface tears of the infraspinatus, supraspinatus and subscapularis were seen but that that no through and through components were identified. PX7.

20) Mr. Roussin returned to Dr. Farley to review the radiology results on July 3, 2019. Dr. Farley's clinical note states that he reviewed the July 1, 2019 MRI images in comparison to the July 2018 MRI and that failure of the second right shoulder cuff repair performed by Dr. Milne was evident even in the MRI images of July 10, 2018. Dr. Farley recommended further revision rotator cuff repair. His note reflects concern about the predictability of success with further surgery, but Petitioner's symptoms necessitate the recommendation. Further revision was not scheduled as Mr. Roussin had upcoming eye surgery. Dr. Farley released Petitioner without restrictions pending further rotator cuff revision.

21) Mr. Roussin underwent a Section 12 examination by Dr. Kostman at the request of Respondent on January 29, 2020.

22) Dr. Farley was deposed on March 5, 2020 and his deposition testimony was received into evidence. Dr. Farley is board certified in orthopedics. He has followed Petitioner commencing June 19, 2019 as a treating physician following the retirement of Dr. Milne. He testified consistent with his medical records and opined that the medical care and treatment rendered Mr. Roussin by Dr. Milne following his February 21, 2017 work-related injury was reasonable and necessary. (PX1)

23) Dr. Farley opined that Petitioner is not at MMI, and that if he does not undergo the recommended surgery that he will remain permanently disabled and will not regain full functionality. Dr. Farley testified that Petitioner's right shoulder simply failed to heal following the first two surgeries with Dr. Milne. (PX1).

24) Dr. Kostman was deposed on June 3, 2020 and his testimony was received into evidence. Dr. Kostman testified that he was retained by Respondent to examine Petitioner, and that he generated a report dated January 29, 2020 related to the Section 12 examination. (RX5)

25) Dr. Kostman expressed the opinion that the April 5, 2017 right shoulder surgery performed by Dr. Milne was necessary to relieve Petitioner's physiological condition, but that the need for surgery was not causally connected to the February 21, 2017 work accident. In Dr. Kostman's opinion Petitioner's history of right shoulder injury in 2007 and his activities as a drummer placed him at risk for continued rotator cuff pathology. Dr. Kostman acknowledges that

Petitioner needs the further surgery recommended by Dr. Farley but that the need for surgery is not causally connected to the February 21, 2017 fall at work. (RX5)

26) On cross-examination Dr. Kostman admitted to being associated with Concentra in 2007 and that he was the physician who evaluated Petitioner's right shoulder injury while he was employed at Thermal Industries. He admitted that there was no indication that Petitioner had been unable to work between 2007 and February 21, 2017. Dr. Kostman admitted that he had no information to dispute that Petitioner sustained a fall onto his right shoulder on February 21, 2017, nor does he have any basis to dispute that Petitioner was unable to perform his job duties after that fall.

CONCLUSIONS OF LAW

It is for the Commission to determine whether Petitioner sustained a work-related accident on February 21, 2017 and whether his current condition of ill-being is causally connected to that event. Petitioner's testimony concerning the fall he sustained while on cafeteria duty on February 21, 2017 is undisputed. Petitioner reported his injury promptly and sought medical treatment at Gateway Medical Center on February 22, 2017. The history Petitioner gave following the injury to his medical providers has been entirely consistent. The Commission agrees with the Arbitrator's finding that Petitioner sustained a work-related accident on February 21, 2017.

It is undisputed that Petitioner was working as a custodian at full-duty for Respondent at the time he fell directly onto his right shoulder on the date of the accident. Petitioner did have remote history of a right shoulder injury dating back to his prior employment in 2007. Petitioner did consult his primary care provider intermittently during the years from 2007 through 2016 for complaints related to his right shoulder. An MRI performed on November 6, 2007 revealed that Petitioner had a partial thickness right rotator cuff tear.

Petitioner testified that he was able to fully perform his work duties for Respondent prior to February 21, 2017 and that those duties included overhead activities. The records of Gateway Medical Center reflect that the onset of Petitioner's right shoulder pain was sudden and continuous following his fall at work. Petitioner further testified that by the time he arrived at Gateway Medical Center he was unable to move his shoulder properly and that he was experiencing increasing pain. He was unable to touch the small of his back with his right hand, extend his right arm, or lift his right arm over his head without assistance from his left arm. An MRI performed following the work accident showed a complete tear of the rotator cuff.

Petitioner subsequently underwent two surgeries by Dr. Milne on his right shoulder. Petitioner continued to experience problems with his right shoulder and continued to seek orthopedic care. He consulted with Dr. Farley on June 9, 2019 and had another MRI performed

on July 1, 2019. Dr. Farley has recommended further right shoulder surgery without which Petitioner will remain disabled and will not regain full functionality of his right shoulder.

Respondent's Section 12 examiner Dr. Kostman agreed that the medical treatment rendered to date has been reasonable and necessary. He acknowledged that the prospective care recommended by Dr. Farley is medically indicated. Dr. Kostman, however has opined that the February 21, 2017 work accident was not a cause of or factor in the permanent aggravation of Petitioner's right shoulder pathology. After having fully reviewed the facts and law, the Commission views the evidence differently and reverses the Arbitrator's Decision on the issue of causal connection.

In order to establish causal connection under the Act, a Petitioner must prove that some act or phase of employment was a causative factor in his ensuing injury. *Land and Lakes Co. v. Industrial Comm'n.* 359 Ill.App.3d. 582, 592, 834 N.E.2d 583, 296 Ill. Dec. 26 (2005). However, a work- related injury "need not be the sole causative factor, nor even the primary causative factor, so long as it was causative in the resulting condition of ill-being." *Sisbro v. Industrial Comm'n.* 207 Ill. 2d. 193, 205, 797 N.E. 665, 278 Ill.Dec.70 (2003). Thus, even if the employee has a pre-existing condition which makes him more vulnerable to injury, recovery will not be denied as long as it can be shown that his employment was also a causative factor. *Id.* Accordingly, an employee may recover under the Act, if he shows that he suffered a work-related accident that aggravated or accelerated a pre-existing condition. *Id.*

It is undisputed that Petitioner sustained a fall at work on February 21, 2017. Petitioner testified that prior to the fall that he was able to work full-duty as a custodian for Respondent. He was able to perform normal movement with his right shoulder on the morning of February 21, 2017 prior to the fall in the cafeteria. Subsequent to the accident he had pain and loss of range of motion that drove him to seek emergency medical care. Petitioner amply testified as to the change in his physical condition immediately following the accident. Respondent presented no evidence to contradict this testimony. Following the accident, Petitioner was subsequently diagnosed with a full-thickness tear of the rotator cuff that required two surgeries with Dr. Milne.

The Arbitrator noted that Petitioner presented no medical opinion to establish causal connection. "Medical testimony is not necessarily required, however, to establish causal connection and disability." *Westinghouse Electric Co. v. Industrial Comm'n.* 64 Ill. 2d.244, 250 (1976); *see also Union Starch & Refining Co. v. Industrial Comm'n.* 37 Ill.2d 139, 144 (1967).

Petitioner has presented evidence of a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in a disability that the Commission finds sufficient to prove a causal nexus between the accident and his right shoulder injury under *International Harvester v. Industrial Comm'n.* 93 Ill.2d. 59 irrespective of the opinion offered by Dr. Kostman concerning causal connection. For all of the forgoing reasons the Commission finds that Petitioner's current condition of ill-being is causally related to the work accident of February 21, 2017.

Dr. Farley has testified that Petitioner is not at MMI and that prospective medical care in the form of further surgical revision is required. Respondent's Section 12 examiner Dr. Kostman agrees that the prospective surgical revision is medically indicated. Without this prospective medical care Petitioner will remain permanently disabled. Dr. Kostman has not expressed any opinion disputing the necessity or reasonableness of any of Petitioner's prior medical treatment.

The Commission finds the Petitioner is entitled to the 62 weeks of TTD that has already been paid commencing February 22, 2017 through October 3, 2017 and January 24, 2018 through August 21, 2018. Respondent is entitled to a credit of $30,924.98 for TTD benefits previously paid. Petitioner is entitled to reasonable and necessary medical expenses, subject to the medical fee schedule, pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit of $77,817.56 for the medical expenses that have been paid, and Respondent shall hold Petitioner harmless for any claims by any providers of services for which Respondent is receiving this credit as provided in Section 8(j) of the Act. Petitioner is entitled to prospective medical care and treatment of his right shoulder as recommended by Dr. Farley.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 9, 2020, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $498.79 for a period of 62 weeks commencing February 22, 2017 through October 3, 2017, and January 24, 2018 through August 21, 2018, that being the period of temporary total incapacity to work under Section 8(b) of the Act.

IT IS FURTHER ODERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 77, 817.56, subject to the medical fee schedule, for the reasonable and necessary medical expenses that have been incurred pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the prospective medical treatment recommended by Dr. Farley.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit of $ 30,924.98 for 62 weeks of TTD benefits previously paid to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $77,817.56 for medical expenses that have been paid. Respondent is also entitled to a credit for reasonable, related, and necessary medical expenses paid by the group medical provider, pursuant to Section 8(j) of the Act. Respondent shall hold Petitioner harmless for any claims by any providers for which Respondent receives any credit for any medical expenses paid by the group medical provider pursuant to Section 8(j) of the Act.

No bond is required for removal of this cause to the Circuit Court. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

January 7, 2022

/s/ *Stephen J. Mathis*
Stephen J. Mathis

SJM/mb
o-10/27/2021
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/s/ *Deborah J. Baker*
Deborah J. Baker

/s/ *Deborah L. Simpson*
Deborah L. Simpson

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK TELLEZ, JR.,

Petitioner,

vs. NO: 16 WC 10913
22IWCC0009

GROSSINGER TOYOTA NORTH,

Respondent.

ORDER

This matter came before Commissioner Maria E. Portela pursuant to Respondent's "Motion to Correct a Clerical Error In Decision" filed January 6, 2022;

And the Respondent, having advised the Commission of the clerical error regarding the proper temporary partial disability total amount due and owing of $27,140.55;

The Commission is of the opinion that the Commission's Decision and Opinion on Review dated January 6, 2022 should be recalled due to a clerical error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission's Decision and Opinion on Review dated January 6, 2022, is hereby recalled and a Corrected Decision and Opinion on Review is issued simultaneously. The parties should return their original Decision to Commissioner Maria E. Portela.

January 18, 2022 /s/ *Maria E. Portela*

MEP/dmm
r: 110921
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22IWCC0009

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

FRANK TELLEZ, JR.,

Petitioner,

vs. NO: 16 WC 10913
22 IWCC 0009

GROSSINGER TOYOTA NORTH,

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 nature and extent and penalties pursuant to Sections19(k), 19(l), and fees pursuant to Section 16, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's decision as it pertains to the wage differential award. However, the Commission reverses the award of penalties pursuant to Sections 19(k) and 19(l) and attorney's fees pursuant to Section 16. The Commission further finds that all of the medical bills have been paid.

In order to qualify for wage differential benefits under Section 8(d)(1) of the Act, a Petitioner must prove: (1) a partial incapacity which prevents him from pursuing his usual and customary line of employment; and (2) an impairment of earnings. In *Smith v. Industrial Comm'n*, 308 Ill.App.3d 260, 265-66 (1999), the appellate court ruled that "[t]he object of Section 8(d)(1) is to compensate an injured claimant for his reduced earnings capacity, and if an injury does not reduce his earning capacity, he is not entitled to compensation" under that Section.

Prior to the work accident, Petitioner had an average weekly wage of $2,231.32. After the

work accident, between January 3, 2019 and July 6, 2019, Petitioner had average weekly earnings of $601.39 – a difference of $1,629.33 per week.

Petitioner has demonstrated that he has suffered a partial incapacity with prevents him from pursuing his usual and customary line of employment as an auto mechanic, AND has shown an impairment of earnings.

The Arbitrator awarded a wage differential under Section 8(d)(1) of $1,048.67 per week based on the State maximum until Petitioner turns 67 years of age or 5 years from the date this award becomes final. This award is affirmed and adopted.

Regarding the medical bills Petitioner alleges remained unpaid and therefore, subject to penalties, the Commission finds that Respondent has paid all outstanding medical bills pursuant to the fee schedule and penalties and fees are not applicable.

At the hearing, Petitioner conceded that the bills for Lincolnwood Fire Department had been paid. Additionally, the Commission finds that Rx4 corroborates that the bills of Athletic Therapeutic Institute, ATI Physical Therapy and Premier Healthcare Services have been paid. The Commission further finds that the bill for $26.72 from Presence Resurrection Medical Center is "balance billing" (as prohibited by 820 ILCS 305/8.2(e)) after the bill had already been paid. Finally, the Commission finds that all bills have been paid to RMC Cardiology as corroborated within Px25. A payment of $9.58 was received on July 12, 2016, with a contractual adjustment made by the provider in the amount of $72.42 leaving a balance of $0.00. Another payment of $9.11 was received on March 13, 2018, with a contractual adjustment made by the provider in the amount of $72.89 leaving a balance of $0.00, thereby supporting that the $160.00 alleged to be outstanding was, in fact, paid.

As all of the bills alleged to be outstanding and overdue have been paid, there is no basis pursuant to Sections 16, 19(k), or 19(l) on which to award penalties. The Commission therefore reverses the Arbitrator's award of 19(k) penalties of 50% of the unpaid medical bills, or $14,779.22, pursuant to the fee schedule, and the attorneys' fees of 20% of the unpaid medical bills pursuant to the fee schedule and the 20% of the 19(k) award on the unpaid medical bills. The Commission additionally reverses the Arbitrator's award under 19(l) of $10,000.00 for the unpaid medical bills.

Moreover, the Commission reverses the Arbitrator's award of penalties and fees pursuant to Sections 19(k), 19(l) and 16 as it pertains to the alleged non-payment of the wage differential benefits.

Section 19(l) states:

> (l) If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall

> without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

The Commission finds that Section 19(l) penalties may be imposed only with respect to nonpayment or delays in payment of benefits pursuant to Sections 8(a) and 8(b), but do not apply to nonpayment of Section 8(d)1 wage differential benefits.

The Commission also reverses the Arbitrator's award of attorney's fees pursuant to Section 16 and penalties pursuant to Section 19(k) as they pertain to the non-payment of wage differential benefits for the period from February 26, 2019 through July 23, 2019. The Petitioner alleges that the demand for payment was made and the supporting documentation for same was provided 2 months prior to trial. Respondent had paid $200,121.45 in weekly benefits as of the time of trial. Respondent paid TTD from March 24, 2016 through March 28, 2017, and September 13, 2017 through October 22, 2018 in the amount of $154,798.04; TPD from March 29, 2017 through September 12, 2017 in the amount of $27,140.55; maintenance from October 23, 2018 through January 2, 2019 in the amount of $14,178.05. Although Respondent owed wage loss differential from January 3, 2019 through July 23, 2019 in the amount of $30,264.63, Respondent actually paid benefits through February 26, 2019, so the amount outstanding was $26,259.81. The Commission finds Respondent's argument that it did not have sufficient information/documentation regarding the weekly wage Petitioner was being paid by his new employer to be persuasive. The Commission finds Respondent's failure to pay $26,259.81 in wage differential benefits did not rise to the level of vexatious, unreasonable, or intentional conduct as required pursuant to Section 19(k) of the Workers' Compensation Act.

When an employer chooses to delay payment of compensation, it has the burden of showing that it had a reasonable belief that the delay was justified. *Roodhouse Envelope Co. v. Industrial Comm'n*, 276 Ill.App.3d 576, 579 (1995). Whether an employer acts unreasonably or vexatiously in failing to pay benefits is a question of fact to be determined by the Commission, and such findings will not be disturbed by a reviewing court unless the determination is against the manifest weight of the evidence. *Roodhouse*, 276 Ill.App.3d at 579. Based on the evidence presented at trial that the documentation supporting the actual wage differential owed was not received until May 20, 2019, Respondent had a reasonable belief that the delay was justified.

As the Commission finds there is no statutory or evidentiary basis to support an award of 19(k) or 19(l) penalties as to the alleged non-payment of the wage differential benefits, the Commission also reverses the Arbitrator's award of Section 16 fees as it pertains to the wage differential.

Section 16 states in pertinent part:

> Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an

> employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

For the same reasons that Section 19(k) penalties are not warranted, the Commission reverses the Arbitrator's award of Section 16 attorneys' fees. The Commission finds that the evidence does not support that Respondent's conduct was vexatious, unreasonable or intentional.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,398.23 per week for a period of 110 5/7 weeks, from March 24, 2016 through March 28, 2017, and September 13, 2017 through October 22, 2018, 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 $1,398.23 per week for a period of 24 weeks, from March 29, 2017 through September 12, 2017, that being the period of temporary partial incapacity for work under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,398.23 per week for a period of 10 2/7 weeks, from October 23, 2018 through January 2, 2019, that being the period of maintenance for work under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner a wage differential of $1,048.67 per week, beginning January 3, 2019 and shall be paid until Petitioner reaches age 67 on October 25, 2032, or 5 years after the award becomes final, under §8(d)1 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent has paid the sum of $14,779.22 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FUTHER ORDERED BY THE COMMISSION that the awards for penalties and fees under Sections 16, 19(k) and 19(l) are reversed for the reasons set forth above.

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.

January 18, 2022

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 11/09/21
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TELLEZ JR, FRANK
Employee/Petitioner

Case# **16WC010913**

GROSSINGER TOYOTA NORTH
Employer/Respondent

On 10/3/2019, 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 1.79% 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:

0274 HORWITZ HORWITZ & ASSOC
MITCHELL W HORWITZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

5001 GAIDO & FITZEN
PETER HAVIGHORST
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Frank Tellez, Jr., **Case # 16 WC 10913**
Employee/Petitioner
v.
Grossinger Toyota North,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago** on **July 23, 2019**. 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. ☒ Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?

M. ☒ Should penalties or fees be imposed upon Respondent
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On March 24, 2016, Respondent ***was*** operating under and subject to the provisions of the Act.

On March 24, 2016, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On March 24, 2016, 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 ***$116,028.86***; the average weekly wage was ***$2,231.32.***

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

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

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

Respondent shall be given a credit of $172,980.90 for TTD, $27,140.55 for TPD, $0 for maintenance, and $0 for other benefits, for a total credit of $200,121.45.

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

ORDER

Temporary Total Disability Benefits, Temporary Partial Disability Benefits, Maintenance Benefits

Respondent to pay Petitioner TTD benefits for the period 3/24/16 through 3/28/17, and 9/13/17 through 10/22/18 representing 110-5/7 weeks x $1,398.23, for a total amount of $154,798.04.

Respondent to pay Petitioner TPD benefits for the period from 3/29/17 through 9/12/17, representing 24 weeks, for a total of amount of $27,140.55.

Respondent to pay Petitioner Maintenance benefits for the period(s): 10/23/18 through 1/2/19, representing 10-2/7 weeks x $1,398.23 for a total amount of $14,178.05.

Medical Awarded

Respondent shall pay reasonable and necessary medical services of $14,779.22, as provided in Sections 8(a) and 8.2 of the Act.

Wage differential Award Under Section 8(d)1 of the Illinois Workers' Compensation Act

Respondent shall pay Petitioner benefits, commencing January 3, 2019, of $1,048.67/week because Petitioner has suffered a wage loss of $1,629.33 per week as provided in Section 8(d)(1) of the Act. This award shall be paid until Petitioner reaches age 67 on October 25, 2032, or 5 years after the award becomes final, whichever is later.

The total accrued weekly benefits owed to Petitioner as of July 23, 2019 including, TTD, TPD, Maintenance and Wage Loss is $226,381.26. Respondent has paid a total of $200,121.45 in weekly benefits. The unpaid accrued wage loss benefit is therefore $26,259.81 as of July 23, 2019.

Penalties and Fees Award Pursuant to Section 16 and 19 of the Illinois Workers' Compensation Act

Pursuant to Section 19(l) Respondent shall pay $10,000.00 to Petitioner for non-payment of medical expenses and wage loss.

Pursuant to Section 19(k) Respondent shall pay $13,129.91 for non-payment of wage loss to Petitioner.

Pursuant to Section 19(k) Respondent shall pay to Petitioner 50% of the unpaid medical bills, **after** these medical bills are subject to any fee schedule reductions, if any, pursuant to Section 8.2.

Pursuant to Section 16 Respondent shall pay $7,877.95 in attorneys' fees for non-payment of wage loss benefits to Petitioner.

Pursuant to Section 16 Respondent shall pay attorneys' fees of 20% of the unpaid medical bills pursuant to the fee schedule, and 20% of the 19(k) award on the unpaid medical bills.

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

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

Robert M. Harris

Signature of Arbitrator Robert M. Harris

October 2, 2019
Date

OCT 3 - 2019

MEMORANDUM OF DECISION OF ARBITRATOR

STATEMENT OF FACTS

Direct Examination of Petitioner, Frank Tellez, Jr.

Petitioner, Frank Tellez, testified he was injured on March 24, 2016, while working for Respondent, Grossinger Toyota North (Transcript on Arbitration, hereinafter "T" @ 18). Respondent is an automotive dealership and Petitioner was employed by Respondent as an automotive technician (T @ 18). Petitioner's job involved working on vehicles (T @ 18). Petitioner would fix the vehicles, diagnose them, repair them, brakes, tune-ups, transmissions (T @ 18). Petitioner had been performing that job for 32 years, which were not all with Respondent (T @ 18). Petitioner began this line of work while he was in his 20's (T @ 18).

When asked about his educational background, Petitioner graduated high school and attended automotive school (T @ 19). Before entering the automotive industry, Petitioner worked at restaurants (T @ 19).

Petitioner would have to lift transmissions onto a transmission jack (T @ 19). A transmission can weight up to 700 pounds per vehicle but can weigh over 1,200 pounds if the vehicle is a truck (T @ 20). Four or five men lift the transmission (T @ 20).

Other heavy items which would have to be lifted were engine blocks, which would be lifted and placed on an engine stand. (T @ 20). A cherry picker engine lift would assist in the mounting of the engine block onto the engine stand (T @ 20).

Petitioner would squat and knee all the time, every day, pretty much 8 hours a day (T @ 20). Petitioner would also have to crawl and bend (T @ 21).

March 24, 2016 Incident

While working on a vehicle, Petitioner was called by the dispatcher and asked to see another vehicle (T @ 21). After Petitioner obtained keys he walked outside (T @ 21). After speaking to a service advisor, Petitioner walked outside toward the vehicle he needed to inspect, when he was struck by another vehicle that was moving in reverse (T @ 21).

Petitioner was struck by an SUV, a RAV4 vehicle on the left side of his body, which included his head, waist, and left knee (T @ 21). Petitioner estimated that the SUV was traveling over 10 miles per hour (T @ 22). The SUV which struck Petitioner was being driven by a co-worker, who was Respondent's head porter (T @ 22).

Medical Treatment

Petitioner was taken by ambulance to St. Francis Hospital in Evanston, Illinois (T @ 22). . Petitioner underwent a left knee x-ray and a left elbow x-ray (T @ 22). Petitioner complained of neck pain and was given crutches (T @ 22). In addition to crutches, Petitioner was given a knee brace (T @ 23).

Petitioner went to Physicians Immediate Care initially, which kept Petitioner off work (T @ 23)

Petitioner next sought treatment with his primary physician, Dr. D'Souza (T @ 23). Dr. D'Souza ordered an MRI of Petitioner's left knee and an MRI of Petitioner's lower back (T @ 23).

An MRI of Petitioner's left knee revealed a medial meniscus tear, edema in the lateral femoral condyle and tibial plateau from presumed bony contusions and narrowing and arthritis lateral compartment from minimal DJD/OA (PX 1).

In April of 2016, Dr. D'Souza referred Petitioner to seek treatment from Dr. Kevin Tu, who Petitioner visited on April 27, 2016. Dr. Tu placed Petitioner on a 10-pound lifting restriction, with no prolonged standing, walking, kneeling, squatting, stooping, or climbing (T @ 24).

Following the accident, Petitioner's left knee hurt a lot, could not bend, and was hard to walk on (T @ 24).

First Left Knee Operation

Petitioner underwent surgery on his left knee at Resurrection Medical Center on June 3, 2016 (T @ 25). Dr. Kevin Tu was the surgeon, who performed a left knee arthroscopic partial medical meniscectomy and a left knee arthroscopic extensive synovectomy (PX 1). The preoperative diagnosis was left knee medial meniscus tear, with the postoperative diagnosis being left knee complex posterior horn tear medial meniscus and left knee synovial impingement (PX 1).

Following surgery, Petitioner performed physical therapy (T @ 25). While attending physical therapy approximately 10 days after surgery, Petitioner was asked by a physical therapist to leg press 100 pounds 30 times, and while performing this activity, Petitioner had pain

in his left knee with increased swelling (T @ 25, 26).

Petitioner underwent an MRI on July 8, 2016 of his left knee (T @ 26).

Dr. Tu then changed the physical therapy provider and Petitioner was sent to Presence Saint Joseph's for physical therapy (T @ 26). Dr. Tu gave Petitioner a cortisone injection in his left knee but it did not help (T @ 26). On August 17, 2016, Dr. Tu discussed with Petitioner the possibility of a second left knee surgery (T @ 27). Dr. Tu planned a diagnostic arthroscopy with possible partial meniscectomy, possible synovectomy, possible chondroplasty (T @ 27). On December 7, 2016, Petitioner's left knee gave way, but Petitioner did not fall (T @ 27).

Dr. Cole Section 12 Exam - October 10, 2016

Dr. Brian Cole examined Petitioner at Respondent's request pursuant to Section 12 on October 10, 2016 (RX 1). Dr. Cole opined Petitioner had subjective left knee pain status post arthroscopy, meniscectomy, June 3, 2016 (RX 1). Dr. Cole opined Petitioner's treatment to date had been reasonable, necessary, and related to his injury date, but did not believe Petitioner needed to undergo a repeat arthroscopy at that time (RX 1). Instead, Dr. Cole suggested conservative measures in the interim, consisting of a cortisone injection, platelet-rich plasm injection, and oral nonsteroidal anti-inflammatories before resorting to surgery (RX 1). Dr. Cole set return to work restrictions of a sedentary-based job with limited squatting, kneeling, climbing throughout (RX 1).

Petitioner's Return to Light Duty Work for Respondent

Respondent took Petitioner back to work in a light-duty job position on or about March 29, 2017 (T @ 28). Petitioner performed the job duties of a dispatcher (T @ 29). As a dispatcher, Petitioner would receive work orders from the service writers, and then Petitioner would check to see which technician was available, and then Petitioner would physically grab the order and walk to the technician to see if he was able to work on the vehicle (T @ 29). As a dispatcher, Petitioner was on his feet all day (T @29). Being on his feet all day at work, Petitioner's left knee hurt a lot, and he would return home and ice it every night after work (T @ 30).

While on light duty, Petitioner's income was supplemented with temporary partial benefits (T @ 30). Petitioner worked as a dispatcher from March 29, 2017 through September 12, 2017 (T @ 30).

At one point, Petitioner's left knee became numb and he was examined for a possible blood clot (T @ 32). An ultrasound was performed at First Community Medical Center on April 27, 2017, and no blood clot was discovered (T@ 32).

Dr. Cole Independent Medical Examination – June 19, 2017

Petitioner again returned to see Dr. Brian Cole on June 19, 2017 at Respondent's request (T @ 32, RX 2). Dr. Cole opined that a second look left knee arthroscopy, to be performed by Dr. Kevin Tu, would be reasonable to go forward to address all pain generators (RX 2).

Petitioner's Second Left Knee Surgery

Petitioner underwent surgery on September 15, 2017 by Dr. Kevin Tu at Resurrection Medical Center (T @ 33). The operation consisted of a left knee arthroscopic partial medical meniscectomy and left knee arthroscopic extensive synovectomy (PX 1). The preoperative diagnosis was left knee pain, with the postoperative diagnosis being left knee medial meniscus fraying and left knee synovitis and medial plica with abrasion over the medial femoral condyle (PX 1).

Petitioner completed physical therapy following surgery (T @ 33).

On December 5, 2017, Petitioner completed a Functional Capacity Assessment (T @ 34).

Petitioner was sent to Dr. Brian Cole a third time by his employer, on March 5, 2018 (T @ 34, RX 3). Dr. Cole opined that Petitioner's medical treatment was related to his surgery performed on September 15, 2017, which relates to his original injury and is work related (RX 3). With regard to work restrictions, Dr. Cole wrote that he would restrict Petitioner's activity to what Petitioner put forth on the functional capacity evaluation (RX 3).

Following his visit to Dr. Cole, Petitioner performed further physical therapy (T @ 34).

Functional Capacity Evaluation

Petitioner completed a second FCE at ATI, which provided restrictions subsequent to the FCE (T @ 36, PX 13). The FCE indicated Petitioner could sit up for an hour, but with 5 to 6 hours at a time (T @ 36, PX 13). The FCE noted Petitioner could stand for up to an hour at a time for 4 to 5 hours and could walk occasional short distances (T @ 37, PX 13). Petitioner could frequently lift desk to chair 28 pounds, chair to floor 32 pounds (T @ 37, PX 13). The FCE

indicated Petitioner could bend and stoop occasionally up to one-third of a day, and could climb stairs up to a third of a day, and no crawling (T @ 37, PX 13). Petitioner was found to be able to crouch and squat occasionally, but was unable to kneel (T @ 38, PX 13).

Petitioner's last visit to Dr. Kevin Tu was on September 10, 2018 (T @ 38). Dr. Tu adopted the restrictions from the FCE as permanent restrictions for Petitioner (T @ 38).

Self-Directed and Assisted Vocational Rehabilitation

Petitioner started performing a self-directed job search from January through October 2018 (T @ 39, PX 18).

Petitioner then began searching for a job with the assistance of Kathy Mueller of Independent Rehab Services, Inc., meeting her for the first time on October 23, 2018 (T @ 39, PX 19). Mueller recommended a new resume and instructed Petitioner on how to look for jobs, apply for jobs, and how to interview (T @ 40). In Mueller's initial vocational assessment report, dated October 23, 2018, Mueller opined Petitioner was a candidate for vocational rehabilitation services (PX 19).

Petitioner obtained a job offer in December of 2018 (T @ 40). The position was a Parts Counter or Counter Person at Napa IBS, American Airlines O'Hare (T @ 41, 45). Napa IBS has a contract with American Airlines and services parts for belt loaders and Ford pickups (vehicles that haul the suitcases around) (T @ 41). Mueller recommended that Petitioner accept the job (T @ 44). Ms. Mueller's January 31, 2019 Vocational Progress Report #3 noted Petitioner was extended an offer to work for Napa Auto Parts as a Counter Sales Representative, with starting pay of $14.05 per hour, and job requirements which fell within the Medium physical demand level (PX 22). Petitioner returned back to full time gainful employment as of January 3, 2019 at his new employer, Napa Auto Parts (PX 22). Mueller wrote in her January 31, 2019 Vocational Progress Report #3 that Petitioner's wage with Napa Auto Parts was within his current earning capacity and within Petitioner's physical capabilities and restrictions as provided by Dr. Kevin Tu (PX 22).

As part of his job duties, Petitioner does a lot of walking, but not too much standing (T @ 42). Petitioner mainly sits at the counter and waits for technicians to come up and drop off a work order (T @ 42). Petitioner has to lift small parts, while any heavy parts are lifted by technicians and obtained by a forklift (T @ 43). The heaviest item Petitioner would lift would be

15 pounds, which is a water pump (T @ 45). Petitioner's current job fits within the physical limitations Dr. Tu imposed (T @ 43).

Petitioner works 7:00 a.m. to 3:30 p.m. Sunday through Thursday (T @ 45).

Petitioner's skills he previously obtained while in the automotive business are also helpful in his current job, as Petitioner knows what item a technician was looking for (T @ 43).

Petitioner's initial pay for NAPA was $14.05 an hour, but Petitioner currently earns $15.85 an hour (T @ 44). While Petitioner was working for Respondent, Petitioner was earning $2,231.32 a week, based upon a 40-hour work week (T @ 44-45). Petitioner's current job pays benefits, and he plans on staying there (T @ 46). It was the best job Petitioner could find in the period he looked for a job (T @ 46). Petitioner had attempted to get a job within his physical restrictions from Respondent, but other than the approximately six months of light duty work, Respondent has not offered Petitioner another position (T @ 46). Following Petitioner's second surgery, Respondent did not offer light duty (T @ 46). Had Petitioner remained employed by Respondent, he would be currently earning at least $2,231.32 per week or more (T @ 45).

If one calculates Petitioner's current average weekly wage and includes overtime hours at the overtime rate, which would be calculation most advantageous to Respondent, Petitioner's current average weekly wage is $601.39 (PX 14, PX 15).

Petitioner's Current Condition of Ill-Being

Currently, Petitioner complains that he cannot kneel on his left leg, and his left leg is in pain every day (T @ 47). Every day, Petitioner uses a blanket of ice to control knee swelling (T @ 48). Petitioner walks with a limp but does not use a cane (T @ 47). Petitioner can only bend his knee 90 degrees (T @ 47). Petitioner currently engages in activity within the FCE restrictions (T @ 48).

Petitioner can no longer ride his bike along the lakefront (T @ 49). Petitioner can no longer play paintball, run, or snowboard (T @ 49).

The last time Petitioner received any form of income or disability benefits from Respondent was on February 26, 2019 (T @ 51).

On May 3, 2019, Petitioner requested Respondent provide an answer as to Respondent's failure to pay wage loss benefits to Petitioner (PX 16). Petitioner included in the correspondence to Respondent, copies of his earnings with his new employer (PX 16). Respondent failed to

reply. On May 20, 2109, Petitioner sent correspondence to Respondent showing Petitioner's wage loss analysis (PX 17). On June 25, 2019 Petitioner filed a petition for penalties and attorneys' fees for non-payment of wage loss and non-payment of medical bills. (PX 24)

Cross-Examination of Petitioner

Petitioner worked for Respondent for about 5 years, from 2012 to 2016, but originally had worked with the company for about 15 years, when the company was known as Skokie Toyota (T @ 52). Petitioner had started out as a mechanic (T @ 52).

Petitioner is able to climb stairs to a second floor to obtain products (T @ 54). Otherwise, Petitioner is at a computer at the front desk (T @ 54). Petitioner would like to one day move up to a managerial position with his current employer (T @ 56). There are currently 11 to 12 employees at his present work location (T @ 56). Petitioner has had the opportunity to work overtime at his current employment, which is asked of him to do sometimes twice a month (T @ 57).

Prior to his first knee surgery with Dr. Kevin Tu, Petitioner never received surgery to his left knee (T @ 55).

Re-Direct Examination of the Petitioner, Frank Tellez, Jr.

An auto mechanic and auto technician are the same position (T @ 58).

CONCLUSIONS OF LAW

J. Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

The Arbitrator finds and concludes that Petitioner has proven by a preponderance of the credible evidence that all the medical treatment provided to him has been both reasonable and necessary. The Arbitrator further finds and concludes Respondent is responsible for all of the bills contained in Petitioner's Exhibit 25, for a total of $14,779.22 to be paid pursuant to Section 8(a) and 8.2 of the Act. The Arbitrator notes Respondent did not object to the admission of the medical bills. The Arbitrator emphasizes that Respondent's own Section 12 expert examining physician, Dr. Brian Cole, **in all three of his reports**, clearly opined that the medical care to

Petitioner had been reasonable, necessary, and related to Petitioner's March 24, 2016 work injury (RX 1, RX 2, RX 3). This was unrebutted. **No further evidence is needed to prove this issue.**

The Arbitrator therefore finds and concludes Respondent is responsible for payment of the following bills totaling $14,779.22, as listed in Petitioner's Exhibit 25, pursuant to Section 8(a) and 8.2 of the Act:

1. Athletic Therapeutic Institute for $2,295.00;
2. ATI Physical Therapy for $8,267.10;
3. Lincolnwood Fire Department for $921.40;
4. Premier Healthcare Services for $3,105.00;
5. Presence Resurrection Medical Center for $26.42;
6. RMC Cardiology for $164.00.

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

The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence he is entitled to a Wage Differential award pursuant to Section 8(d)1 commencing January 3, 2019.

The Supreme Court has expressed a preference for compensation based on earnings loss, rather than scheduled awards. *General Electric Co. v. Industrial Comm'n*, 89 Ill.2d 432, 437-38 (1982). Specifically, the Court held, "If [the injured worker] can prove an actual loss of earnings greater than the schedule presumes, there is no reason why he should not recover that loss. In theory, ***the basis of the workers' compensation system should be earnings loss***, not the schedule." *Id.* at 438 (emphasis added).

The Appellate Court continued to follow the Supreme Court's lead. Petitioner must prove two elements in order to qualify for a wage differential award under § 8(d)(1) of the Act: 1) partial incapacity which prevents him from pursuing his "usual and customary line of employment," and, 2) an impairment of earnings. *See, e.g. Gallianetti*, 315 Ill.App.3d. at 730. **The Arbitrator finds and concludes Petitioner has proven by a preponderance of the credible evidence he has satisfied both burdens of proof necessary to support an award pursuant to 8(d)1.**

In *Gallianetti*, the Court held: "It is axiomatic that words used in a statute are to be given their plain and commonly understood meaning and where the language of a statute is clear and unambiguous, the courts are obligated to enforce the law as enacted by the legislature. We

conclude that **the plain language of §8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity**." *Id.* at 728 (emphasis added). "Where a claimant proves that he is entitled to a wage-differential award, the **Commission is without discretion** to award a §8(d)(2) award in its stead." *Id.* at 729 (emphasis added). **That is the scenario this case presents.**

Section 8(d)1 of the Act provides that:

> If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident. For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later.

In this case Petitioner was struck by a motor vehicle at work. He had a long career as an automobile service technician, which was his job on the date of injury for Respondent. This accident resulted in a left knee injury, two surgeries, extensive physical therapy and the **imposition of permanent physical restrictions** by Dr. Kevin Tu (PX 1) and Dr. Brian Cole (RX 3). Due to the imposition of physical restrictions to his knee he is unable to perform the full duties of an auto service technician. Kathy Mueller, CRC opined on October 23, 2018, "It is this consultant's opinion as a Certified Rehabilitation Consultant and with a reasonable degree of Vocational Certainty that Mr. Tellez has suffered a Loss of Trade and loss access to his usual and customary line of employment as a Service Technician." Mueller identified other jobs Petitioner could perform in her report, the highest paying was at $13.16 per hour as a dispatcher in an automotive repair shop. (PX 19, @ pages 8-9).

With Mueller's assistance, Petitioner ultimately found a job starting at $14.05 per hour working in the parts department of Napa Auto Parts at O'Hare Airport. Petitioner's first day of work was January 3, 2019. Mueller concluded on January 31, 2019, "Based on the Illinois

Department Employment of Security Wage Data for the Chicago, IL area, average hourly wages for a Counter and Rental Clerk position at the Experienced level would be $13.98 per hour. Therefore, it is this consultant's opinion that Mr. Tellez's current wage of $14.05 per hour is within his current earning capacity. The position is also within his physical capabilities and restrictions as provided by Dr. Kevin Tu of G&T Orthopedics." (PX 1, 13, 22) **The Arbitrator finds and concludes the expert vocational opinions of Kathy Mueller, CRC are very credible, are supported by the record as a whole, stand unrebutted and are consistent with the medical records and Petitioner's testimony.** The Arbitrator accordingly adopts Mueller's opinions. (PX 20, 21, 22). **The Arbitrator notes with great significance that Respondent did not offer a rebuttal vocational opinion into evidence.**

The Arbitrator therefore finds and concludes Petitioner has clearly met his burden of proof by a preponderance of the credible evidence under *Galienetti*. The evidence is unrebutted and is clear. This is shown as follows:

First, Petitioner has permanent physical restrictions imposed on his left knee that partially incapacitates him from performing his usual and customary line of employment as an automobile service technician;

Second, Petitioner clearly has suffered an impairment of earnings. Petitioner is no longer able to earn $2,231.22 per week, his wage as an auto service technician. After a job search and the assistance of a vocational rehabilitation counselor he found a job starting at $14.05 per hour working for Napa Auto Parts at O'Hare Airport.

Petitioner would currently earn at least $2,231.21 per week in the full performance of his duties as an auto service technician for respondent. In reviewing Petitioner's post injury wages he earned a total of $15,888.71 from January 3, 2019 through July 6, 2019, a period of 26 3/7 weeks. Applying Section 8(d)(1) "the average amount which he is earning or is able to earn in some suitable employment" is $601.39 per week. (PX 15)

The current average earnings are calculated in a means most advantageous to Respondent, including all overtime at the overtime rate. Section 10 of the Act would exclude overtime. When taking what Petitioner would currently earn in the full performance of his duties for Respondent, $2,231.32 and subtracting $601.39 a week from it, his weekly wage loss under Section 8(d)(1) is therefore $1,629.33 per week. Taking 66-2/3 of $1,629.93, we are left with a PPD rate of $1,086.22. This PPD rate is in excess of the maximum rate for wage loss on the

date of this accident. **The maximum weekly wage differential is capped at the State Average Weekly Wage for Petitioner's date of injury, which is $1,048.67.**

The Arbitrator accordingly finds and concludes Petitioner is entitled to wage differential award benefits pursuant to Section 8(d)1 of the Act, commencing January 3, 2019. Petitioner has suffered a weekly wage loss of $1,629.33. The Arbitrator finds and concludes Respondent shall pay Petitioner wage loss benefits of $1,048.67 per week until Petitioner turns 67 years of age on October 25, 2032, or five years from the date this award become final, whichever is later.

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator finds and concludes, based on a review of the totality of the evidence in record, that Respondent is liable for penalties and fess pursuant to Sections 19(k), 19(l) and 16.

Petitioner filed a Petition for Penalties and Attorney Fees Pursuant to Section 19(k) and Section 16 on June 25, 2019 (PX 24).

Section 19(k) of the Illinois Workers' Compensation Act states:

> "In case where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay.
>
> When determining whether this subsection (k) shall apply, the Commission shall consider whether an Arbitrator has determined that the claim is not compensable or whether the employer has made payments under Section 8(j)."

Section 19(l) of the Illinois Workers' Compensation Act states:

> "If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or

refused, not to exceed $10,000. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay."

Section 16 of the Illinois Workers' Compensation Act states:

"Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier."

Penalties and Fees Based on Respondent's Failure to Pay Medical Bills

At trial, Petitioner submitted bills totaling $14,779.22 in medical charges that remain unpaid (PX 25). Respondent posed no objection to these medical bills at the hearing. Respondent has failed to present any evidence to show why these charges have remained unpaid as of the time of trial. Respondent has clearly failed to pay for Petitioner's medical care in a timely manner. Non-payment of medical bills without a reasonable basis is subject to penalties and attorney's fees. Under Section 19(k), the penalty is to be 50% of the entire type of benefit awarded that has accrued. Assessment of $10 per day penalty under §19(1) is mandatory "if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay. *McMahan v. Industrial Comm'n,* 183 111.2d 499, 702 N.E.2d 545 (1998).

At trial, Respondent entered into evidence its Exhibit 4, which is a printout of Respondent's indemnity payments (TTD and TPD) and medical payments (RX 4). The exhibit, however, clearly fails to explain why some $14,779.22 continues to remain unpaid (PX 25). One of the outstanding bills, of which the provider was Premier Healthcare Services, has an outstanding bill of $3,105.00 for a date of service as far back as July 8, 2016, which is over 1,095 days prior to the date of trial. Again, this non-payment is inexplicable.

The Arbitrator emphasizes that Respondent's own Section 12 expert examining physician, Dr. Brian J. Cole, in all three of his reports, opined that medical care to Petitioner had been reasonable, necessary, and related to Petitioner's March 24, 2016 work

injury (RX 1, RX 2, RX 3). Dr. Cole's opinions were never challenged, let alone impeached. Therefore, it is clear Respondent should have paid the remaining unpaid bills in Petitioner's Exhibit No. 25 and by failing to do so, without good reason or just cause or any valid defense, acted in an unreasonable and vexatious manner.

The Arbitrator awards penalties and attorney's fees under Sections 19(k), 19(l) and Section 16. The total bills of $14,779,22 have not been reduced to the fee schedule yet. The Arbitrator awards 50% of the unpaid medical bills at the fee schedule rate under 19(k). The Arbitrator awards attorney fees of 20% of the total bills at the fee schedule rate, and 20% of the 19(k) when calculated. Under Section 19(l), the Arbitrator awards Petitioner $10,000.00, which is $30 per day at the maximum penalty of $10,000.

Non-Payment of Wage Differential Benefits

Case law holds the non-payment of wage differential benefits can give rise to award of 19(k) penalties. See, *e.g. Peterson v. Mickinsey &Co.,* 99 IWCC 1176. Respondent has failed to pay wage loss or maintenance benefits without any valid legal or factual basis. In denying compensation, Respondent has not reasonably relied in good faith on a medical opinion and has not met the burden of demonstrating a reasonable belief that its denial of liability was justified under the circumstances, as required by *Continental Distrib. Co. v. Indus. Comm'n,* 98 I11.2d 847 (1993), *Bd. Of Educ. V. Indus. Comm'n,* 93 I11.2d 1, 442 N.E.2d 883 (1982) ("*Tully*" case).

In *Tully,* the Illinois Supreme Court held that where a delay has occurred in payment of worker's compensation benefits, the employer bears the burden of justifying the delay and the standard we hold him to is one of objective reasonableness in his belief. Thus,it is not good enough to merely assert honest believe that the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is "honest" only if the facts which a reasonable person in the employer's position would have, 42 N.E.2d at 865. The Court added in *Norwood* that the question whether an employer's conduct justifies the imposition of penalties is a factual question for the Commission. The employer's conduct is considered in terms of reasonableness. 42 N.E. 2d at 885. It was further held that a Respondent's reliance on its own physician's opinion does not establish, by itself, that its challenge to liability was made in good faith. The test is not whether there is some conflict in medical opinion. Rather, it is whether the employer's contract in relying on the medical opinion to contest liability is reasonable under all

the circumstances presented. 56 N.E.2d at 851. Moreover, the Appellate Court has noted that the burden of proof of the reasonableness of its conduct is upon the employer. *Consol. Freightways, Inc. v. Indus. Comm'n,* 136 I11.App.3d 630, 483 N.E.2d 652, 654 (1985); accord, *Ford Motor Co. v. Indus. Comm'n,* 140 I11.App.3d, 488 N.E.2d 1296 (1986).

The last time Petitioner received any form of income or disability benefits from Respondent was on February 26, 2019 (T @ 51, RX 4).

Petitioner suffered a career ending injury resulting in significant loss of income. It appears Respondent has paid all TTD, TPD and maintenance owed to Petitioner, totaling $200,1212.55. However, Respondent has, without good and just cause, failed, neglected, refused, and unreasonably delayed payment of wage loss payments due to Petitioner during his period of disability. There is no real controversy in this matter and Respondent's actions were merely frivolous and used for the purpose of delay. Respondent has further without good and just cause failed to comply with the Rules Governing Practice before the Workers' Compensation Commission, 50 Ill. Admin. Code Ch. II, Section 9110.10.

Petitioner began working for his new employer, Napa Auto Parts on January 3, 2019 (PX 22). On May 3, 2019, Petitioner requested Respondent provide an answer as to Respondent's failure to pay wage loss benefits to Petitioner (PX 16). Petitioner included in the correspondence to Respondent, copies of Petitioner's earnings with his new employer (PX 16). On May 20, 2109, Petitioner sent correspondence to Respondent showing Petitioner's wage loss analysis (PX 17). On June 25, 2019 Petitioner filed a Petition for attorneys' fees and penalties for non-payment of wage loss. The Arbitrator emphasizes Respondent has provided no explanation to this Arbitrator whatsoever for its refusal to pay the wage loss.

Petitioner began his employment with Napa Auto Parts on January 3, 2019. Between January 3, 2019 and the trial date of July 23, 2019, there are 28-6/7 (28.86) weeks in which Respondent should have paid to Petitioner a $1,048.67 weekly wage differential, totaling $30,264.62 in benefits.

The total accrued benefits to date are as follows, using the Request for Hearing form to assist, Arb. Exh. 1: TTD 3/24/16 through 3/28/17, and 9/13/17 through 10/22/18 representing 110-5/7 weeks x $1,398.23 = $154,798.04.

TPD: 3/29/17 through 9/12/17 representing 24 weeks. Total agreed owed and paid: $27,140.55 = $27,140.55.

Maintenance period(s): 10/23/18 through 1/2/19 representing 10-2/7 weeks x $1398.23 = $14,178.05.

Wage loss: 1/3/19 through 7/23/19 representing 28-6/7 weeks x $1048. 67 = $30,264.63.

Therefore, the total accrued weekly benefits owed to Petitioner as of July 23, 2019 including, TTD, TPD, Maintenance and Wage Loss is $226,381.26. Respondent has paid a total of $200,121.45 in weekly benefits. The unpaid accrued wage loss benefits is therefore $26,259.81 as of July 23, 2019.

The Arbitrator finds Respondent's failure to pay wage differential benefits to Petitioner, following Petitioner's employment with Napa Auto Parts was unreasonable and vexatious and accordingly awards penalties as follows:

Under Section 19(k), the Arbitrator awards Petitioner penalties of 50% of the $26,259.81 in unpaid wage differential benefits, or $13,129.91. Under Section 16 of the Act, the Arbitrator awards attorney's fees of $5,251.97 (20% of $26,259.81) and $2,625.98 (20% of the 19(k), $13,129.91) for a total amount of attorney's fees of $7,877.95. In total, Respondent is ordered to pay $13,129.91 under Section 19(k) and $7,877.95 in attorney's fees under Section 16 as a result of non-payment wage differential benefits under Section 8(d)1 of the Act.

The Arbitrator awards 19(l) penalties of $30 per day of withholding the wage loss, as part of the $10,000 awarded for non-payment of bills. The total 19(l) is capped at the maximum of $10,000 for non-payment of medical bills and wage loss.

CONCLUSION

The Arbitrator finds Petitioner sustained injuries which have caused him to suffer a loss of trade and resulting impairment in earnings. Therefore, the Arbitrator awards Petitioner wage differential benefits pursuant to 8(d)1 of the Illinois Workers' Compensation Act of $1,048.67 a week commencing on January 3, 2019 until the date of his 67th birthday, which is October 25, 2032, or five years from the date this award becomes final, whichever is later.

Petitioner has suffered a wage loss of $1,629.33 per week yielding a 8(d)1 weekly rate of $1,048.67. Medical bills pursuant to Section 8(a) and 8.2 are awarded totaling $14,779.22.

The Arbitrator finds and concludes Respondent's failure to pay medical bills under Section 8(a) was unreasonable and vexatious and awards Petitioner 19(l) compensation of $10,000. The remaining awards under 19(k) and Section 16 penalties for non-payment of medical bills will be calculated after the bills are reduced to the Illinois Fee Schedule pursuant to Section 8(a) and 8.2 of the Act.

Due to Respondent's failure to pay wage differential benefits following Petitioner's new employment, the Arbitrator finds that such failure was unreasonable and vexatious and awards Petitioner a total of $13,129.91 under section 19(k) and $7,877.95 under section 16 of the Act. 19(l) is also awarded for non-payment of wage loss, and as part of the non-payment of medical, totaling $10,000.

Robert M. Harris

Robert M. Harris, Arbitrator Dated: October 2, 2019