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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mary Roberts,
Petitioner,

vs. No. 15 WC 21983

20IWCC0211

Centralia City School District #135,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection regarding Petitioner's right leg and permanent partial disability of both legs, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 9, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

20IWCC0211

Pursuant to §19(f)(2) of the Act, no appeal bond is set in this case. 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 3 - 2020

Marc Parker

mp/wj
o-02/06/20
68

Barbara N. Flores

Concurrence in Part and Dissent in Part

I respectfully concur in part and dissent in part from the Decision of the majority. The majority Affirmed and Adopted the Decision of the Arbitrator who found that Petitioner sustained her burden of proving work-related injuries to both her right and left knees and awarded her PPD representing loss of the use of 40% of the left leg and loss of 7.5% of the right leg. I would have modified the Decision of the Arbitrator to affirm his finding and award regarding the left knee/leg However, I would have found that Petitioner did not sustain her burden of proving work-related injuries to her right knee and vacated the Arbitrator's finding and award regarding the right leg. Therefore, I respectfully concur in part and dissent in part from the Decision of the Majority.

Petitioner sustained a stipulated compensable accident on March 26, 2015. She was diagnosed with a severely comminuted fracture of the left kneecap. The same day the kneecap was surgically repaired with internal fixation. The hardware was removed surgically on December 29, 2015. One of her treating doctors, Dr. Houle, noted that Petitioner did not begin to complain of right-knee pain until August 8, 2016, or more than seventeen months after the accident. Petitioner came under the care of Dr. Ungacta on April 12, 2017, complaining of right-knee pain, as well as left-knee pain. Both Petitioner and Dr. Ungacta attributed her right-knee pain to compensation due to the left-knee injury. The only treatment Dr. Ungacta recommended for Petitioner's right knee was use of an injection, a brace, and exercise.

At Respondent's request, on July 21, 2017 Dr. King performed a medical examination on Petitioner, pursuant to Section 12 of the Act. His examination of Petitioner's right knee was normal with no bruising/swelling, 5/5 strength, no pain with strength testing, negative McMurray's test, negative Lockman test, and negative anterior drawer test. X-rays showed no degeneration of the right knee, which is notable considering Petitioner was 64 years old at the time of the accident. Dr. King's diagnosis was right knee pain without signs of intraarticular pathology, or that she had subjective right-knee complaints without objective findings. I find Dr. King's opinions persuasive.

In my opinion, Petitioner has not sustained her burden of proving that she sustained any injury to her right knee. She did not complain of any discomfort for over seventeen months, she had no objective pathology in her right knee, and she had no substantive treatment for her right knee. In my opinion, Petitioner may have experienced some discomfort in her right knee from compensation for her left knee injury. However, she did not sustain her burden of proving she sustained any injury to her right knee which caused any permanent impairment or disability. Therefore, in my opinion a permanent partial disability award for the right knee is inappropriate.

For the reasons stated above, I would have modified the Decision of the Arbitrator to affirm his finding and award regarding the left leg. However, I would have found that Petitioner did not sustain her burden of proving work-related injuries to her right knee/leg and vacated his finding and award regarding the right leg. Therefore, I respectfully concur in part and dissent in part from the Decision of the Majority.

DLS/dw
O-3/5/20
46

Deborah L. Simpson
Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ROBERTS, MARY
Employee/Petitioner

Case# **15WC021983**

CENTRALIA CITY SCHOOLS DIST #135
Employer/Respondent

20IWCC0211

On 10/9/2018, 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 2.33% 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:

1282 ERIC TERLIZZI
ATTORNEY AT LAW
202 W SCHWARTZ
SALEM, IL 62881

2904 HENNESSY & ROACH PC
PAUL N BERARD
415 N 10TH ST SUITE 200
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

☐ 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

Mary Roberts
Employee/Petitioner

v.

Centralia City Schools, Dist. #135
Employer/Respondent

Case # 15 WC 21983

Consolidated cases: _____

20IWCC0211

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 William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on September 6, 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. ☐ 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 26, 2015, 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 $120,436.91; the average weekly wage was $2,316.09.

On the date of accident, Petitioner was 64 years of age, married with 0 dependent child(ren).

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 $18,286.89 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $18,286.89. The parties stipulated TTD benefits were paid in full.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $735.37 per week for 102.125 weeks because the injuries sustained caused the 40% loss of use of the left leg and seven and one-half percent (7 ½%) loss of use of the right leg, as provided in Section 8(e) of the Act.

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

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

William R. Gallagher, Arbitrator

October 5, 2018
Date

OCT 9 – 2018

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on March 26, 2015. According to the Application, Petitioner slipped on a grape on the floor and sustained an injury to her left knee (Arbitrator's Exhibit 2). There was no dispute that Petitioner sustained a work-related injury; however, Respondent disputed liability on the basis of medical causality in regard to the right knee (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a school administrator. On March 26, 2015, Petitioner sustained a slip/fall landing directly on her left knee. At trial, Petitioner testified that she had no prior injuries/symptoms in regard to either her left or right knee.

Petitioner was subsequently treated by Dr. Jean Houle, an orthopedic surgeon. Dr. Houle diagnosed Petitioner with a severely comminuted fracture of the left patella. Dr. Houle performed surgery on March 26, 2015. The procedure consisted of internal fixation using a K-wire figure of eight technique (Petitioner's Exhibit 1).

Dr. Houle performed another surgery on December 29, 2015. The procedure consisted of removal of the metal hardware and adhesions as well as a medial and lateral retinacular release (Petitioner's Exhibit 2).

Dr. Houle subsequently saw Petitioner on June 7, 2016. On examination, he noted some diminished range of motion of the left knee. He recommended Petitioner undergo a functional capacity evaluation (FCE) to determine her permanent restrictions (Petitioner's Exhibit 3).

Dr. Houle again saw Petitioner on August 8, 2016, and he initially noted that the FCE he previously recommended was not approved. At that time, Petitioner advised that she was experiencing right knee symptoms. Dr. Houle opined there was nothing more he could do from surgical standpoint and Petitioner was at MMI (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. Felix Ungacta, an orthopedic surgeon, on April 12, 2017, primarily for right knee pain. Dr. Ungacta was deposed on February 28, 2018, and his deposition testimony was received into evidence at trial. Dr. Ungacta testified that Petitioner had been experiencing right knee symptoms for approximately two years, that she had sustained an injury to her left knee cap that required surgery and she had to compensate for a stiff left knee with her right knee. Petitioner did not give Dr. Ungacta a specific date of her onset of right knee symptoms, but that the rehab, recovery and the additional weight she was putting on her right knee was causing her to experience more pain (Petitioner's Exhibit 5; pp 8-9).

Dr. Ungacta ordered x-rays of both knees. In regard to the right knee, the x-ray revealed some narrowing of the medial joint space. Dr. Ungacta opined that Petitioner's excessive use of the right knee to compensate for the stiff left knee caused or contributed to the pathology he observed in the right knee (Petitioner's Exhibit 5; pp 14-16).

On cross-examination, Dr. Ungacta acknowledged that an office note indicated the right knee pain had been present for one year. He testified that this was incorrect and the entry was made because a member of the nursing staff clicked the wrong box. He stated his recollection was that Petitioner informed him the onset of symptoms occurred two years prior to his exam, not one year (Petitioner's Exhibit 5; p 30).

At the direction of Respondent, Petitioner was examined by Dr. David King, an orthopedic surgeon, on July 21, 2017. In connection with his examination of Petitioner, Dr. King reviewed medical records provided to him by Respondent. In regard to Petitioner's left knee, Dr. King noted a decreased range of motion and tenderness to palpation. He opined Petitioner was at MMI and had an AMA rating of 13% of the left knee and 5% of the whole body (Respondent's Exhibit 1; Deposition Exhibit 2).

In regard to Petitioner's right knee, Dr. King's examination of it was benign and x-rays were negative for significant degeneration. Dr. King noted that Petitioner related her right knee complaints to compensating its use because of her left knee injury; however, he did not opine as to causality. Further, Dr. King did not opine as to an AMA impairment rating in regard to the right knee (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Ungacta again saw Petitioner on December 12, 2017. When he was deposed, he stated he reviewed Dr. King's report at that time. He disagreed with Dr. King's opinion that there was no x-ray evidence of intra-articular pathology of the right knee because the x-rays clearly revealed narrowing of the medial joint space (Petitioner's Exhibit 5; p 23).

Dr. King was deposed on April 13, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. King's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. In regard to Petitioner's right knee condition, Dr. King testified Petitioner did not sustain an injury to her right knee as result of the accident of March 26, 2015. He also stated Petitioner had no impairment of the right knee (Respondent's Exhibit 1; pp 14, 17).

On cross-examination, Dr. King stated that after an injury like the one Petitioner sustained to her left knee, it would only put substantial additional stress on the right knee for a short period of time, not substantial. He defined "short" as being 12 to 16 weeks (Respondent's Exhibit 1; p 21).

At trial, Petitioner testified she began to experience right knee symptoms of approximately one year after the accident which she attributed to overcompensating because of her left knee injury. In regard to her left knee, Petitioner still has ongoing symptoms, primarily significant pain and a decreased range of motion. Petitioner stated she usually wears a brace on the left knee, but removes it when the left knee swells. In regard to her right knee, Petitioner has ongoing symptoms of pain and swelling. Petitioner stated her activities are limited because of her knee injuries, specifically, she can only walk a short distance, has difficulties going up/down stairs and has further issues performing activities of daily living.

Petitioner's job as a school administrator was primarily a sedentary position as her job duties focused on school curriculum and funding. Petitioner had retired by the time the case was tried.

Petitioner's husband, Chad Roberts, testified at trial. He was present during Petitioner's testimony and he agreed with same. He stated that the injury had caused a deterioration of Petitioner's quality of life.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being in regard to her left and right knee condition is causally related to the accident of March 26, 2015.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner's left knee condition was related to the accident of March 26, 2015.

Petitioner testified she began to experience right knee symptoms approximately one year after the accident. The first time right knee complaints were noted in Petitioner's medical records was in Dr. Houle's record of August 8, 2016, approximately one year and five months after the accident.

Dr. Ungacta testified Petitioner's right knee complaints began two years prior to his examination of April 12, 2017, which would have been approximately three weeks following the accident.

The Arbitrator acknowledges that the date of the onset of Petitioner's right knee symptoms cannot be determined with any precision. Obviously, Dr. Ungacta's statement that the right knee symptoms began sometime in April, 2015, was not supported by the medical records.

The Arbitrator concludes the critical issue in regard to Petitioner's right knee condition is whether it is related to Petitioner's left knee injury, not the exact date of the onset of symptoms.

Petitioner credibly testified that, because of her left knee injury, she compensated with use of her right knee and experienced symptoms thereafter.

Dr. Ungacta opined that Petitioner's use of the right knee caused or contributed to the pathology he observed in the right knee.

The Arbitrator is not persuaded by Dr. King's opinion that such an injury to the left knee would only cause increased stress to the right knee for short period of time.

The Arbitrator finds the opinion of Dr. Ungacta to be more persuasive than that of Dr. King in regard to causality.

In regard to disputed issue (L) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 40% loss of use of the left leg and seven and one-half percent (7 1/2%) loss of use of the right leg.

In support of this conclusion the Arbitrator notes the following:

Dr. King opined Petitioner had an AMA impairment rating of 13% of the left knee and 5% of the whole body and no impairment of the right knee. Dr. King did not specifically state whether his opinion as to the impairment of the right knee was an AMA impairment rating. The Arbitrator gives this factor moderate weight in regard to the left knee and no weight in regard to the right knee.

At the time of the accident, Petitioner was a school administrator which was a sedentary position. Petitioner has since retired. The Arbitrator gives this factor minimal weight.

At the time of the accident, Petitioner was 64 years of age. As noted herein, Petitioner has retired but will have to live with the effects of this injury for the remainder of her natural life. The Arbitrator gives this factor moderate weight.

There was no evidence that the injury had any effect on Petitioner's future earning capacity. The Arbitrator gives this factor no weight.

The medical records clearly indicated Petitioner sustained a severe injury to her left knee which resulted in a comminuted fracture of the patella which required internal fixation with metal hardware, subsequent removal of the hardware, removal of adhesions and a medial and lateral retinacular release. Because an FCE was not authorized, it is not possible to determine with any certainty what permanent restrictions Petitioner has in regard to her left knee; however, her complaints were consistent with the injury she sustained. Because of overcompensating with the use of her right knee because of her left knee injury, Petitioner has symptoms referable to the right knee as well. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

William Wilkins,
Petitioner,

vs. No: 17 WC 036827

Shawnee Correctional Center,
Respondent.

20IWCC0212

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and prospective medical treatment, and being advised of the facts and law, reverses the §19(b) Decision of the Arbitrator. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The Arbitrator found that Petitioner failed to prove that he sustained an accident that arose out of and in the course of his employment on October 6, 2017 and denied all benefits. He concluded that Petitioner's injuries resulted from exposure to an increased personal risk incurred when he elected to cross a grassy area instead of remaining on a paved pathway on his way to the dining hall on prison grounds. After considering the entire record, and for the reasons set forth below, the Commission reverses the September 17, 2018 decision of the Arbitrator and awards Petitioner all reasonable and necessary medical expenses, prospective medical benefits, and six weeks of temporary total disability.

I. FINDINGS OF FACT

A. Background and Accident

Petitioner, Officer Wilkins, a 54-year-old correctional officer, had worked for Respondent at the Shawnee Correctional Center for eight years. Wide paved pathways connected the prison buildings. On October 6, 2017, Petitioner was walking from his assigned unit to the dining hall for his lunch break. He was given 30 minutes for his lunch break and not allowed to leave the prison grounds. Officer Wilkins testified that he chose to walk through a grassy area of the prison yard rather than using the pathway because he had limited time for his meal break and traveling by the walkway took longer. He was

required to return to his duty post at the assigned time so that he could resume his duties and allow other officers their break time. The grassy area was a shortcut he used regularly to get to the dining hall which saved him a significant amount of time. On this occasion, he stepped into a hole in the grassy area and strained/sprained his left leg and ankle and injured his lower back.

Petitioner testified that he waited four days after the accident before filing a Tri-Star Employee's Notice of Injury and Incident Report, because he believed the pain would go away. His supervisor completed a report of injury on October 11, 2017 describing the cause of the injury as "not looking at where you are walking. Also holes in ground."

B. Medical Treatment

Prior to this injury, in the 1990's, Petitioner fell while playing basketball and sustained a herniated disc at L5-S1. In 2001, his low back symptoms increased, and Officer Wilkins underwent a minimally invasive surgery to "clean up" the injured area. However, the pain and numbness and tingling in his lower extremities continued and a fusion was ultimately performed in 2002. He continued to suffer minor complaints for a couple years, but his condition improved over time, and he was symptom-free for the 13 years prior to this work accident on October 6, 2017.

After this injury, on October 9, 2017, Officer Wilkins reported to his primary care physician, Dr. Clayton Ford, that his left calf developed gnawing, cramping pain about an hour after he stepped into the hole in the grass during his work shift on October 6, 2017. He missed work on the day after his accident, due to the pain and cramping. Dr. Ford diagnosed Petitioner with a left ankle sprain and a strain of the gastrocnemius muscle in his left leg. He ordered the officer off work until October 14, 2017 and prescribed home exercise, RICE therapy (rest, ice, compression, elevation), and Aleve.

Officer Wilkins attempted to return to work on October 21, 2017 but almost immediately re-aggravated his left gastrocnemius strain. Dr. Ford ordered him off work until he had consulted with Dr. Matthew Bradley, an orthopedist at Orthopedic Sports Medicine & Spine Care Institute. Petitioner continued to treat conservatively with Dr. Ford through May 18, 2018. On November 30, 2017, Dr. Bradley diagnosed Officer Wilkins with a gastrocnemius muscle tear, prescribed physical therapy and NSAIDs and ordered work restrictions. Following a course of physical therapy, Dr. Bradley released Petitioner from care for his calf pain on January 11, 2018.

Petitioner also reported low back complaints after this injury. On December 18, 2017, during the physical therapy prescribed by Dr. Bradley for his calf pain, the therapist noted that Petitioner's leg pain appeared to be neurological and might be related to a lumbar pathology rather than his earlier strain or tear. On December 29, 2017, Officer Wilkins saw Dr. Ford for his low back pain, and the doctor ordered a lumbar MRI, moist heat, and a home exercise program. He also placed Petitioner on work restrictions and administered a trigger point injection. On January 11, 2018, Dr. Bradley noted that Petitioner was having severe spinal spasms bilaterally with pain radiating down his left leg. Dr. Bradley referred Petitioner to Dr. Raskas for evaluation and treatment.

Dr. David Raskas at Orthopedic Sports Medicine & Spine Care Institute evaluated Officer Wilkins on January 23, 2018. He noted that the January 17, 2018 MRI showed hardware from his prior fusion at L5-S1 and an annular tear at L4-5 with some foraminal encroachment. Petitioner reported

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persistent left leg and foot pain and numbness and tingling. On June 26, 2018, Dr. Raskas recommended surgery consisting of posterior stabilization and fusion at L4-5.

Pursuant to §12 of the Act, Respondent had Officer Wilkins examined by Dr. David Robson at Comprehensive Spine Care. Dr. Robson found that Petitioner's October 6, 2017 accident was an aggravating factor in the development of his lower back and left leg symptoms and that all his treatment prior to his §12 exam had been reasonable and necessary. He concluded that Officer Wilkins had not yet reached maximum medical improvement and that additional medical treatment, including the surgery recommended by Dr. Raskas, was reasonable and necessary.

C. Additional Information

The Arbitrator found that Officer Wilkins failed to prove that his accident arose in the course of his employment and denied all benefits.

II. CONCLUSIONS OF LAW

On appeal, Petitioner seeks authorization to proceed with the recommended back surgery, related post-operative rehabilitative treatment, outstanding medical expenses, and temporary total disability. Petitioner testified that Respondent terminated his temporary total disability payments after May 31, 2018, as a result of its dispute regarding accident. The officer claimed that he was entitled to a total of 30 3/7 weeks of benefits, from October 23, 2017 through December 6, 2017 and from January 23, 2018 through July 11, 2018, the hearing date. The Commission agrees and views the evidence differently than the Arbitrator and reverses the denial of the claim.

A. Accident

The primary issue on appeal is whether Petitioner failed to prove that he suffered an accident that arose out of and in the course of his employment as a correctional officer. The Arbitrator concluded that Officer Wilkins "chose to expose himself to an unnecessary personal danger solely for his own convenience and therefore his injury did not arise out of his employment." Arb. Dec., 9/17/18.

For an employee's injuries to be compensable under the Act, the injuries must arise out of and in the course of his or her employment, and both elements must be present at the time of the accident to justify compensation. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 412 N.E.2d 492, 497, 45 Ill. Dec. 141 (1980). Where the employee sustains an injury during the lunch break and is still on the employer's premises, the act of procuring lunch has been held to be reasonably incidental to the employment. *County of Cook v. Industrial Comm'n*, 165 Ill. App. 3d 1005, 520 N.E.2d 896, 117 Ill. Dec. 545 (1st Dist. 1988).

20IWCC0212

Officer Wilkins testified that he was required to remain on the employer's premises during his lunch hour and was "on call" if an emergency arose during his break time. Procuring a meal from the dining hall was incidental to Petitioner's employment, and he was in a place he might reasonably be expected to be at the time of his injury. The Commission finds that Petitioner was clearly in the course of his employment at the time of his injury.

An injury arises out of employment when a causal connection exists between the employment and the injury such that the injury has its origins in some risk incidental to the employment. *Technical Tape Corp. v. Industrial Comm'n*, 58 Ill. 2d 226, 317 N.E.2d 515 (1974); *Curtis v. Industrial Comm'n*, 158 Ill. App. 3d 344, 511 N.E.2d 866, 110 Ill. Dec. 689 (5th Dist. 1987). A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his or her duties. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 133 Ill. Dec. 454 (1989). An injury does not arise out of the employment where an employee voluntarily exposes himself or herself to an unnecessary personal **danger solely** for his own convenience. *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 577, 720 N.E.2d 275, 241 Ill. Dec. 820 (5th Dist. 1999); *Hatfill v. Industrial Comm'n*, 202 Ill. App. 3d 547, 554, 560 N.E.2d 369, 148 Ill. Dec. 67 (4th Dist. 1990) (emphasis added). However, simply because an employee chooses to take an alternative path does not mean an injury does not arise out of the employment. As the Court in *Dodson* explained:

> In ruling as we do, we do not imply that an injury does not arise out of the employment simply because it was sustained while the employee was taking an alternative path to or from the work place. To be sure, **employees are free to choose any safe route**. However, where the employee ventures from a safe sidewalk provided by the employer and instead proceeds to walk down a grassy slope covered with water and ice, we cannot say the Commission's decision finding that the employee voluntarily exposed herself to an unnecessary personal risk only for her own convenience is against the manifest weight of the evidence.

Dodson v. Industrial Comm'n, 308 Ill. App. 3d 572, 577, 720 N.E.2d 275, 241 Ill. Dec. 820 (5th Dist. 1999) (emphasis added).

The Arbitrator, relying upon *Dodson* and *Hatfill,* found that Petitioner voluntarily exposed himself to an unnecessary personal danger solely for his own benefit. He concluded that Petitioner's accident did not arise out of his employment and denied all benefits.

The Commission finds *Dodson* and *Hatfill* distinguishable from the case at bar. In *Dodson*, the claimant was leaving work, abandoned the sidewalk and cut across a grassy slope covered with ice and water to get to her vehicle. *Dodson*, 308 Ill. App. 3d at 57. She slipped and broke her ankle. *Id.* In *Hatfill*, the claimant was leaving work and jumped across a ditch filled with water onto an incline to get to his vehicle on the employer's parking lot instead of using the walkway. *Hatfill*, 202 Ill. App. 3d at 554. He injured his groin. *Id.* In each case the danger was apparent, yet the employee proceeded in an unsafe manner and voluntarily exposed herself or himself to unnecessary danger solely for his or her own convenience.

In this case, Petitioner was allowed only 30 minutes for lunch and six to eight minutes of it were consumed by his travel to and from his assigned unit to the dining hall. He testified that he was required to be back in his unit on time. This evidence is unrebutted. The reasonableness of Officer Wilkins'

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decision to take the short cut must be viewed from his perspective at the time he made the decision, not at some time after the injury had occurred. Petitioner did not decide to take a dangerous or unsafe path requiring him to walk on a wet, icy slope or jump over a ditch filled with water onto an incline. Officer Wilkins simply cut through the grass yard as he had done many other times without incident. A seemingly safe alternative route which the law permits.

Furthermore, the Commission finds that Officer Wilkins's decision to cut through the grass also benefitted his employer. Taking the shortcut allowed him to eat his lunch and return to his duties in a timely fashion as required by Respondent for the benefit of Respondent and the public that it serves. Moreover, Officer Wilkins testified that he was watching inmates walking down the path to the dining hall while he was walking through the grass, because he might have been required to assist the escorting officer if one of the inmates acted out. Not only did his decision to take the short cut benefit his employer by ensuring his prompt return after his break, but also it allowed him to monitor the inmates who were moving between buildings. Given the foregoing, there is no evidence establishing that Officer Wilkins voluntarily exposed himself to an unnecessary personal risk only for his own convenience.

Finally, we note that the accident was caused by a hazard on the employer's premises. When an injury to an employee takes place in an area that is part of the employer's premises that is attendant with a special risk or hazard, the hazard becomes part of the employment, constitutes a risk distinctly associated with the employment, and satisfies the "arising out of" requirement of the Act. *Springfield Urban League v. Illinois Workers' Comp. Comm'n*, 2013 IL App (4th) 120219WC (citing *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486, 812 N.E.2d 401, 406 (5th Dist. 2004)). Here, Officer Wilkins testified that he stepped into a hole in the grassy area and his supervisor's report of the incident attributed the officer's injuries to "holes in the ground." The evidence shows that there was no prohibition against officers walking through the grass, that Officer Wilkins regularly took this short cut on his way to the dining hall, and that other correctional officers, including witness, Acting Warden Terry Grissom, also walked through the grassy area. The Commission finds that the hole in the grassy area constituted a hazard, which became part of Officer Wilkins's employment, constituting a risk distinctly associated with that employment.

The claimant here did not choose an obviously dangerous option when a safer path was available. Unlike the claimants in *Hatfill* and *Dodson,* the officer here assumed no unreasonable risks in walking across the grass and his actions were for the benefit of his employer, as well as for his own convenience. Under these circumstances, the Commission finds that Officer Wilkins suffered an injury that arose out of and occurred in the course of his employment.

B. Causal Connection

The Commission next considers whether Officer Wilkins's current condition of ill-being is causally related to the accident. As explained herein, the medical records establish that the officer sustained a work-related accident that resulted in a left leg/foot injury and his current condition of ill-being in his lower back. Petitioner had a history of disc herniation and fusion at L5-S1. However, his medical records indicate that he was symptom-free from back pain for at least 13 years at the time of this accident. Respondent's own Section 12 examiner, Dr. Robson, concluded that the October 6, 2017 accident was the aggravating factor in the development of Officer Wilkins's lower back and left leg

symptoms and that his prior herniation and fusion did not affect his current condition. Given this record, the Commission concludes Petitioner's condition of ill-being is causally related to his work accident.

C. Medical Benefits and Prospective Medical Treatment

Dr. Robson also found that all medical treatment provided to the date of hearing was reasonable and necessary. He determined that Officer Wilkins had not reached MMI and that the surgery proposed by Dr. Raskas was appropriate and related to the work accident. The Commission concludes that Petitioner's medical treatment was reasonable, necessary and related to the accident and that the prospective medical treatment recommended by Dr. Raskas was appropriate.

Based on the foregoing, the Commission awards Petitioner the medical expenses related to his left leg, left foot and lower back injuries, as listed on Petitioner's Exhibit 1. The bills are for reasonable and necessary treatment to alleviate Officer Wilkins from the effects of his accident at work.

The Commission further finds that the surgery and post-operative care recommended by Dr. Raskas and approved by Dr. Robson is reasonable and necessary to alleviate Petitioner from the ongoing effects of his injury at work.

D. Temporary Total Disability

On the Request for Hearing, Petitioner claimed he was entitled to 30 and 3/7 weeks of temporary total disability (TTD). Respondent disputed liability for any TTD, but the parties agreed that Respondent had paid $19,497.20 or all TTD due until May 31, 2018, prior to hearing. Respondent is entitled to credit for that amount.

As Dr. Robson agreed with Dr. Raskas that Officer Wilkins had not reached maximum medical improvement at the time of his §12 exam and that he required additional medical treatment to alleviate him from the ongoing effects of his work injury, the Commission finds that Petitioner is entitled to TTD for the 30 and 3/7ths weeks claimed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the August 7, 2018 Decision of the Arbitrator denying Petitioner all benefits is reversed. The Commission finds Petitioner sustained an accident on October 6, 2017 that arose out of and in the course of his employment, and Petitioner proved by a preponderance of the evidence that his current condition of ill-being is causally related to that accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner temporary total disability for a period of 30 and 3/7ths weeks from October 23, 2017 to December 6, 2017 and from January 23, 2018 to July 11, 2018. Respondent shall receive a credit for $19,497.20 paid prior to hearing.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the reasonable and necessary medical expenses contained in Petitioner's Exhibit 1 pursuant to §8(a) and §8.2 of the Act. Respondent shall receive a credit for medical bills, if any, paid through its group medical plan for which credit may be allowed under Section 8(j) of the Act. Respondent shall hold

Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this §8(j) credit.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay for prospective medical treatment, including fusion surgery and post-operative care, as recommended by Dr. Raskas.

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 Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: APR 3 - 2020

Marc Parker

Barbara N. Flores

mp/dak
o-2/6/20
068

DISSENT

I respectfully dissent from the opinion of the Majority. The majority reversed the Decision of the Arbitrator and found Petitioner sustained his burden of proving he sustained a compensable accident. I would have Affirmed and Adopted the Decision of the Arbitrator, found that the Petitioner failed to prove that his injury arose out of his employment, and denied any benefits.

Like the Petitioner in *Dodson v. Industrial Comm'n*, 241 Ill. Dec. 820, 823 (5th District 1999) and *Hatfill v. Industrial Comm'n*, 202 Ill. App. 3d 547, 554 (4th District 1990) Petitioner testified that he decided to cut across the grassy area rather than walk on the pavement provided by the Respondent for his own convenience in order to get to the Administration Building faster so he would have more time for lunch, he did not use the grass to avoid inmates, but to save time. The path is wide enough for correctional officers to pass the inmates and according to the testimony that is what they usually do. Grass by its nature is uneven and occasionally slippery, that is why Respondent provided paved paths to and from the various buildings that comprise the Respondent's facility.

Petitioner testified that he cut through the grass in order to save time because his lunch break is only 30 minutes and he has to be back on time so the next officer can take his break. However, he did not testify or offer any evidence that the 30 minutes was inadequate for his lunch break or that he was not able to eat his lunch and get back in the 30 minutes allotted. Petitioner testified that there was a line of inmates on the path at the same time he was taking his lunch break, he admitted that he did not cut through the grass to get around them, ahead of them or to avoid them. The evidence admitted at the arbitration hearing established that the paved pathway was wide enough to accommodate the inmates and others at the same time, so it was not necessary to cut through the grass to avoid them. Petitioner did not walk through the grass out of necessity, it was a personal choice for his personal convenience.

Petitioner did not testify that his path to the Administration Building was blocked or impeded in anyway, by inmates or some other mechanism. The paths were wide enough to accommodate the inmates as well as others who were walking in the same direction or the opposite direction. Therefore, I would have found that the Petitioner's choice to take a short cut across the grass rather than use the paved surfaces (pathways) provided by the Respondent was personal in nature. The choice was designed to serve Petitioner's convenience, not the interests of his employer. This was a voluntary decision, that exposed the Petitioner to a danger separate from risks associated with his employment responsibilities. For the reasons stated above, I would have found that Petitioner failed to prove that his action and injury arose out of his employment and his claim is not compensable. Therefore, the Arbitrators decision should be affirmed and benefits denied. Accordingly, I respectfully dissent from the Decision of the Majority.

O-2/6/20
DLS/dw
46

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WILKINS, WILLIAM
Employee/Petitioner

Case# **17WC036827**

SHAWNEE CORRECTIONAL CENTER
Employer/Respondent

20IWCC0212

On 9/17/2018, 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 2.26% 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:

0969 RICH RICH & COOKSEY PC
THOMAS C RICH
6 EXECUTIVE DR SUITE 3
FAIRVIEW HTS, IL 62208

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

0558 ASSISTANT ATTORNEY GENERAL
NICOLE M WERNER
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

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

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

SEP 17 2018

BRENDA A HANSEN, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

☐ 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

William Wilkins
Employee/Petitioner

v.

Shawnee Correctional Center
Employer/Respondent

Case # 17 WC 36827

Consolidated cases: _____

20IWCC0212

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **7/11/2018**. 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. ☒ 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 **Prospective Medical Treatment**

FINDINGS

On **10/6/2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$61,178.88**; the average weekly wage was **$1,176.52**.

On the date of accident, Petitioner was **54** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on October 6, 2017, accordingly, his claim for benefits is hereby denied.

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

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

Carl Lee

Signature of Arbitrator

9/14/18

Date

SEP 17 2018

STATE OF ILLINOIS)
)SS
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

WILLIAM WILKINS,
Employee/Petitioner

v.

Case # 17 WC 36827

STATE OF ILLINOIS – SHANWEE CORRECTIONAL CENTER,
Employer/Respondent

FINDINGS OF FACT

Petitioner is employed as a correctional officer for Shawnee Correctional Center. Petitioner alleges on October 6, 2017 he injured his back when he stepped into a hole. This case was tried before Arbitrator Lee at the Mt. Vernon docket on July 11, 2018. The issues in this case are accident, causation, medical bills, TTD, and prospective medical treatment.

On October 10, 2017, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form indicating he was walking in front of Unit 1 and stepped into a hole, injuring his left leg and ankle on October 6, 2017. (RX1).

On October 9, 2017, Petitioner presented to Dr. Clayton Ford at Alexander Family Practice. (PX3). Petitioner complained of left calf pain due to a work injury. (PX3). Petitioner indicated he was walking through the grass in the yard when he stepped into a hole in the ground. (PX3). Petitioner was diagnosed with strains to the left ankle and gastrocnemius muscle of the left leg. (PX3). Petitioner was given home exercises, told to take Aleve, and told to use ice. (PX3). Left ankle x-rays were negative. (PX3). Petitioner was taken off work and told he could return without restriction on October 14, 2017. (PX3).

On October 9, 2017, Petitioner underwent x-rays of his left ankle at The CT and Open MRI Center. (PX4). The impression was negative. (PX4).

On October 16, 2017, Petitioner returned to Dr. Ford with continued complaints of leg pain that were not improving. (PX3). Petitioner was diagnosed with sprains of the left ankle, sprain of the Achilles tendon of the left ankle, strain of the gastrocnemius muscle of the left leg, and tendonitis of the left Achilles ankle. (PX3). Petitioner was to continue home exercises and ibuprofen and was given an ankle wrap. (PX3). Dr. Ford noted no further imaging was needed at this time. (PX3). Petitioner was to return to work without restriction on October 19, 2017. (PX3).

On October 23, 2017, Petitioner followed up with Dr. Ford for his left leg. (PX3). Petitioner indicated the pain was sharp and stabbing and unbearable. (PX3). Petitioner was told to wear his old ortho boot and continue ibuprofen for the pain. (PX3). Petitioner was referred to an orthopedic. (PX3).

On November 30, 2017, Petitioner presented to Dr. Matthew Bradley at Orthopedic Sports Medicine & Spine Care Institute for his left leg. (PX5). He said he stepped in a hole while at work and his heel sunk down. (PX5). Petitioner was diagnosed with a gastrocnemius muscle tear and pain in the left calf. (PX5). He was prescribed physical therapy. (PX5).

On December 19, 2017, Petitioner followed up with Dr. Ford. (PX3). Petitioner was requesting a work note for back pain. (PX3). Petitioner indicated low back pain started suddenly. (PX3). It was noted Petition had screws in his back from a previous surgery 15 years prior. (PX3). Petitioner was diagnosed with a lumbar strain, given a steroid injection, and an MRI of the lumbar spine was ordered. (PX3).

On January 2, 2018, Petitioner returned to Dr. Ford for his lower back. (PX3). Petitioner indicated his back had been hurting since October 6, 2017. (PX3). He originally thought it just hurt from favoring it due to his leg injury, but it still hurts now that his calf is healed. (PX3). Petitioner was given medication and was to follow up with a surgeon in St. Louis. (PX3).

On January 11, 2018, Petitioner followed up with Dr. Bradley for her left leg. (PX5). Petitioner indicated his calf pain had resolved and he was extremely happy with regard to his calf. (PX5). However, Petitioner indicated he was in severe pain with regard to his lower back. (PX5). He was scheduled to see Dr. Raskas, but asked if Dr. Bradley could do anything in the interval. (PX5). Dr. Bradley ordered an MRI of Petitioner's lower back. (PX5). Petitioner was released at MMI for his gastrocnemius tear. (PX5).

On January 17, 2018, Petitioner underwent an MRI of his lumbar spine at MRI Partners of Chesterfield. (PX8). The impressions were: 1) Petitioner had undergone L5/S1 posterior decompression and spinal instrumentation, alignment is acceptable; 2) there are minimal disc profile abnormalities L2/3-L4/5 with a far right lateral annular tear at L4/5 and accompanying mild to moderate facet arthropathy, there is left greater than right L3/4 and bilateral L4/5 foraminal encroachment but no evidence of central canal compromise; and 3) no enhancing mass or abnormal contrast enhancement appreciated. (PX8).

On January 23, 2018, Petitioner presented to Dr. David Raskas at Orthopedic Sports Medicine & Spine Care Institute for his low back. (PX7). Petitioner indicated he stepped into a hole while at work with his left leg, his heel sinking in. (PX7). He had immediate left leg pain. (PX7). While he did have some back pain at the time, it has gradually become worse. (PX7). Petitioner indicated he did have a previous low back surgery at L5/S1 in 2002, but fully recovered from same and had no back pain until this injury in October 2017. (PX7). Dr. Raskas reviewed Petitioner's L-spine MRI, noting an annular tear at L4/5. (PX7). Petitioner was diagnosed with low back pain, left leg weakness, and radicular pain. (PX7). A CT myelogram was ordered and potential facet blocks were discussed. (PX7).

On January 29, 2018, Petitioner underwent a myelogram of his lumbar spine at CT Partners of Chesterfield. (PX9). The impressions were: 1) successful fluoroscopy guided lumbar myelogram; 2) post-op L5/S1; and 3) small impression upon the dura at L4/5 with facet arthropathy. (PX9). Petitioner also underwent a CT lumbar spine post myelogram. (PX9). The impressions were: 1) post-op L5/S1 possibly with old fractured graft but this level appears to be solidly fused; and 2) broad-based small disc protrusion at L4/5 without central stenosis but there is advanced facet arthropathy resulting in bilateral foraminal stenosis. (PX9).

On March 1, 2018, Petitioner followed up with Dr. Ford. (PX3). Petitioner complained of continued low back pain and pain into his left leg. (PX3). Petitioner indicated he was treating in St. Louis for his back. (PX3).

On March 22, 2018, Petitioner returned to Dr. Ford. (PX3). Petitioner continued to complain of low back and left leg pain. (PX3). Petitioner was to continue off of work until he could get back in with the back surgeon. (PX3).

On April 2, 2018, Petitioner underwent a right L5/S1 facet injection, left L5/S1 facet injection, and left L5/S1 transforaminal ESI/block by Dr. Andrew Wayne. (PX10).

On April 13, 2018, Petitioner followed up with Dr. Ford for his back. (PX3). Petitioner indicated he had undergone an epidural injection which gave him about a week of relief, but the pain has returned to its previous intensity. (PX3). Petitioner was to remain off of work. (PX3).

On May 9, 2018, Petitioner underwent a Section 12 examination with Dr. David Robson at Comprehensive Spine Care, P.C. (RX4). Petitioner indicated he was walking through the yard at work when he stepped in a hole with his left leg. (RX4). Petitioner indicated he originally had left calf pain, but eventually also had increased low back pain. (RX4). Dr. Robson reviewed Petitioner's medical records and imaging studies and performed a physical examination. (RX4). Dr. Robson recommended Petitioner undergo flexion/extension x-rays of his lumbar back and if any degree of instability is found at L4/5, then surgery would be recommended. (RX4). Dr. Robson opined the October 6, 2017 injury was the aggravating factor in Petitioner's development of his low back and left leg symptoms. (RX4).

On May 14, 2018, Petitioner returned to Dr. Ford complaining of low back and left leg pain. (PX3). Petitioner indicated it was getting worse. (PX3). Petitioner was to reduce physical therapy and try pain medications. (PX3). He was to remain off of work. (PX3).

On May 15, 2018, Petitioner followed up with Dr. Raskas for his low back. (PX7). Petitioner indicated he had about a week of relief following his epidural injections. (PX7). Petitioner complained of continued pain in his low back radiating into his leg. (PX7). Dr. Raskas indicated Petitioner would likely need his fusion extended, but recommended an L4/5 facet block and transforaminal ESI at L4/5 first. (PX7). Petitioner was to remain off of work. (PX7).

On May 18, 2018, Petitioner followed up with Dr. Ford. (PX3). Petitioner indicated he saw Dr. Robson for the state who told him he had a disc injury above his previous fusion. (PX3). Petitioner indicated he was treating with Dr. Raskas who recommended another epidural

injection before proceeding with surgery. (PX3). Petitioner was to continue his medication and remain off of work. (PX3).

On June 26, 2018, Petitioner returned to Dr. Raskas for his low back. (PX7). Petitioner had not undergone the injections at this time. (PX7). X-rays of Petitioner's lumbar spine did not show any translational instability. (PX7). Dr. Raskas performed the facet block and ESI injections which gave Petitioner greater than 50% relief. (PX7). Dr. Raskas recommended Petitioner undergo surgical intervention. (PX7).

At Arbitration, Petitioner testified he is a correctional officer at Shawnee Correctional Center. He has worked there for eight years. On October 6, 2017, at approximately 5:30 p.m., he was walking to his lunch break. Petitioner testified he is not allowed to leave the premises during his lunch break. Petitioner testified he was working as the Unit 1 Core officer and had just locked up the inmates after they had eaten, so he was free to go eat. He was walking from Unit 1 to staff dining on a direct line from Unit 1, through the grass. Petitioner testified he walked this area every day as it is the shortest route to staff dining. Petitioner testified the Unit 3 inmates were on the walk on their way to chow while he was walking on the grass. Petitioner testified he was watching the inmates while he walked. The inmates are not cuffed as they walk to chow.

Petitioner testified while he was walking across the grass, he stepped in a hole, injuring his left leg and lower back. Petitioner testified the general public is not allowed in the area where he stepped into a hole. Petitioner testified he had not previously had problems with his left leg. He did have prior back issues, including surgery in 2002.

Petitioner testified he reviewed his medical records and they accurately represented his discussions with his doctors. He also attended an examination with a doctor selected by Respondent. Petitioner testified he is currently in pain; walking on concrete hurts. He wants to undergo the surgery being recommended to him. Petitioner testified he was paid workers' compensation benefits up to May 31, 2018.

On cross-examination, Petitioner testified at the time of the injury, he was going on his lunch break. He was not responding to a code or an emergency. Petitioner testified he was taking a shortcut as the most direct path from his post to staff dining was to cut through the grass. Petitioner admitted there was a paved path available to him from where he was stationed at Unit 1 to staff dining and that he could have walked the entire way there on the paved path without stepping into the grass. Petitioner testified the sidewalk between Unit 1 and the staff dining area is wide enough for a vehicle. He agreed that the paved pathway is wide enough for a line of prisoners to walk on the path and for other people to traverse the same paved pathway at the same time. Petitioner testified he is not alleging that there was any kind of defect to the paved pathway.

Petitioner testified he was paid workers' compensation benefits through May 31, 2018. He is not currently receiving any benefits. He admitted he hired Mr. Rich prior to his case being denied.

On redirect, Petitioner testified the inmates are not allowed to cut through the grass. Petitioner testified the inmates from Unit 3 were on the paved pathway on their way to chow.

Petitioner called Assistant Warden Terry Grissom was called as a witness. Assistant Warden Grissom testified he is the Acting Assistant Warden of Operations at Shawnee Correctional Center. He testified he was working at Shawnee Correctional Center at the time of Petitioner's accident, but was not a witness to the event. He testified that he did not think anything Petitioner testified to was incorrect.

On cross-examination, Assistant Warden Grissom testified he has been with IDOC for over 23 years and has been at Shawnee Correctional Center specifically for 15 years. He is very familiar with the grounds. He testified he is familiar with the area Petitioner testified to between Unit 1 and the staff dining area. Assistant Warden Grissom testified there is a paved path available from Unit 1 to staff dining and there is no reason a correctional officer would have to leave the paved path to travel from Unit 1 to staff dining. Assistant Warden Grissom testified he is not aware of any defects in the paved pathway and that the paved pathway is 20 feet wide. Assistant Warden Grissom testified that if a line of inmates is being moved, there is room for other people to walk on the same paved pathway. Assistant Warden Grissom testified Petitioner was assigned to Unit 1 core correctional officer and that position is not required to go into the grounds. Assistant Warden Grissom testified he has walked in the grass plenty of times as he is required to do so as surveying the whole grounds is part of his assignment.

Petitioner was recalled to testify. Petitioner testified that when he stepped into the hole, he was past D wing on Unit 1. Petitioner testified he was approximately 100 feet from the paved path. Petitioner admitted the accident took place 100 feet from the paved pathway. Petitioner testified the sidewalk curves around to connect the administrative building and cutting through the grass cuts off a lot of time to get to staff dining; his lunch break is 30 minutes. The Arbitrator asked Petitioner if correctional officers and inmates generally used the paved pathway at the same time. Petitioner admitted yes, they do. He further admitted that he did not cut through the grass to avoid the inmates, he did so to save time.

CONCLUSION OF LAW

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

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

Petitioner has failed to prove that he sustained an accident that arose out of his employment with Respondent on October 6, 2017. In addition, Petitioner has failed to prove that his current condition of ill-being is as a result of an alleged work related injury on October 6, 2017.

The Petitioner bears the burden of proving each and every element of his case in order to recover under the Illinois Workers' Compensation Act. *Shelton v. Indus. Com'n*, 267 Ill. App. 3d 211, 221, 641 N.E.2d 1216, 1224 (5th Dist. 1994). In order to satisfy the "arising out of" portion of the Act, the Petitioner must show that the injury was derived from some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill.App.2d 193, 203, 797 N.E.2d 665,

672 (3rd Dist. 2003). The 'in the course of' requirement speaks to the time, place, and circumstances of the injury." *Orsini v. Indus. Com'n*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005 (1987). "An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, while he is fulfilling those duties or engaged in something incidental thereto." *Scheffler Greenhouses, Inc. v. Indus. Com'n*, 66 Ill.2d 361, 367, 362 N.E.2d 325 (1977). However, "the mere fact that claimant was present at the place of injury because of his employment duties will not by itself suffice to establish that the injury arose out of the employment." *Brady v. Louis Ruffolo & Sons Const. Co.*, 143 Ill.2d 542, 551, 578 N.E.2d 921, 924 (1991).

The case at bar is similar to *Dodson v. Industrial Commission*. In *Dodson*, the petitioner was leaving work when she left the sidewalk to cut across a grassy slope to get to her vehicle quicker because it was raining. *Id.* at 277, 822. The claimant testified she walked across the grass because it was the most direct route to her car. *Id.* She also testified that she and other employees walked across the grassy slope many times in the past with the employer's acquiescence. *Id.* The grass was wet and slippery due to the rain, and the petitioner fell and broke her ankle. The Appellate Court denied petitioner benefits, holding "an injury does not arise out of the employment where an employee voluntarily exposes himself or herself to an unnecessary personal danger solely for his own convenience." *Dodson v. Industrial Commission*, 241 Ill.Dec. 820, 823, 720 N.E.2d 275, 278 (5th Dist., 1999).

Another factually similar case is *Hatfill v. Industrial Commission*. In *Hatfill*, the petitioner jumped across some water which had accumulated at the base of a five-foot incline to get to his car in his employer's parking lot, instead of using the walkway. *Id.* at 549, 370. In affirming the Commission's decision denying benefits, the Fourth District found that while the petitioner's injuries were incurred upon the employer's premises and within a reasonable time after leaving his work duties, it is apparent that the petitioner's injuries occurred while he was engaged in an activity which only benefitted himself and not his employer and therefore did not arise out of his employment. *Hatfill v. Industrial Commission*, 202 Ill.App.3e 547, 554, 560 N.E.2d. 369, 373 (4th. Dist., 1990).

In this case, Petitioner admitted he chose to cut through the grass even though there was a paved pathway available to him because it was a more convenient route and he could save time. Both Petitioner and Assistant Warden Grissom testified there is a completely paved path available to the staff dining area. Petitioner does not allege there is any defect in the paved pathway and Assistant Warden Grissom testified he was not aware of any defect. Petitioner argues that his behavior was reasonably foreseeable by Respondent and therefore should be found compensable. The Arbitrator does not find this persuasive. While Petitioner testified he cut through the grass as a shortcut often, he did not testify that anyone else did so, as well. Petitioner contends that Assistant Warden Grissom walks in the grass, however, this is not relevant as Assistant Warden Grissom testified it is a requirement of his position to inspect the grounds. There is no such requirement for Petitioner. As in both *Dodson* and *Hatfill*, where the petitioners were injured after ignoring safe routes provided by their employers and undertaking a personal risk that rendered their injuries non-compensable, so has Petitioner in the case at bar.

Petitioner next argues that his claim should be found compensable as he was injured by a hazardous condition on Respondent's premises. The Arbitrator is not persuaded by this.

Petitioner chose to cut through grass, a natural terrain, in order to take a short cut. Respondent provided a paved pathway devoid of defects for Petitioner to safely traverse from his post to staff dining. Petitioner chose to expose himself to an unnecessary personal danger solely for his own convenience and therefore his injury did not arise out of his employment.

Petitioner further argues that he took the short cut out of necessity and therefore his injury should be found compensable. However, while Petitioner testified he cut through the grass in order to save time as his lunch break is 30 minutes, he did not testify or offer any evidence that he was given an inadequate amount of time for his lunch break or that he was unable to eat his whole lunch if he did not take the short cut. Further, Petitioner also testified there was a line of inmates on the paved path at the same time he was going on break, but he admitted he did not cut through the grass to avoid them. The evidence taken at Arbitration showed the paved pathway was wide enough to be traversed by both the inmates and others, so it was not necessary for Petitioner to cut through the grass to avoid the inmates. As such, it was not "out of necessity" that Petitioner cut through the grass, but rather was done as his own personal choice for his own convenience.

The Arbitrator concludes the record as a whole does not support a finding of accidental injuries arising out of and in the course of Petitioner's employment. Instead, the Arbitrator finds Petitioner injuries resulted from exposure to an increased personal risk. Petitioner chose to take a shortcut to staff dining and walked across a grassy area. Petitioner did so instead of staying on the paved sidewalk provided by Respondent. This was a voluntary decision that unnecessarily exposed him to a danger entirely separate from his employment responsibilities. His choice was personal in nature, designed to serve his own convenience and not the interests of the employer.

Therefore, Petitioner has failed to prove he sustained accidental injuries arising out of and in the course of his employment on October 6, 2017, and his claim for benefits and compensation is hereby denied and all other issues are moot.

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 Temporary Disability	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANTHONY SCARPELLI,

Petitioner,

vs.

NO: 04 WC 43126

CITY OF CHICAGO,

Respondent.

20IWCC0213

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 causation, temporary total disability benefits, permanent disability benefits, and credit, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below and otherwise affirms and adopts the Decision of the Arbitrator which is attached hereto and made a part hereof. The Commission reaffirms its denial of Respondent's Motion to Deny Oral Argument.

The Commission makes the following corrections:

- Page 1, Paragraph 6, 3rd sentence is stricken;
- Page 3, Paragraph 4, 6th and 7th sentences are stricken;
- Page 4, Paragraph 3, 4th sentence is stricken;
- Page 6, Paragraphs 2 & 4 are stricken;
- Page 8, Paragraph 1, 3rd sentence is stricken;
- Page 13, Paragraph 4 is stricken.

The Commission affirms and adopts the remainder of the Arbitrator's findings. We write separately to clarify the reasoning behind the Commission's correction to and affirmation of the Arbitrator's decision.

Conclusions of Law

Temporary Total Disability Benefits/Maintenance Benefits

The Arbitrator awarded 470 6/7 weeks of temporary total disability benefits representing February 24, 2005 through March 4, 2014. Respondent indicates on the Request for Hearing form that Petitioner is only entitled to temporary total disability benefits until April 20, 2006. The Commission observes Petitioner underwent an MRI of his brain on April 20, 2006. PX9. However, as the Arbitrator correctly noted, there is nothing in the record which indicates a particular significance about this which would warrant the suspension of benefits.

On May 1, 2006, Petitioner participated in an FCE wherein Petitioner was placed at maximum medical improvement with limitations of no lifting more than 20 pounds and no more than five pounds with his right arm. As such, Petitioner's entitlement to temporary total disability benefits ended as of May 1, 2006. (*Matuszczak v. Illinois Workers' Compensation Commission*, 2014 IL App (2d) 130532WC, ¶14 - once an injured employee's condition stabilizes, *i.e.*, once the employee reaches MMI, he is no longer eligible for TTD benefits) and the remainder of the temporary disability benefits are properly classified as maintenance benefits, concomitant to vocational rehabilitation under Section 8(a).

An employer is obligated to pay maintenance benefits only "while a claimant is engaged in" a vocational rehabilitation program. *W.B. Olson v. Illinois Workers' Compensation Commission*, 2012 IL App (1st) 113129WC, ¶39, 981 N.E.2d 25. Petitioner was not accommodated for a return to his position once he was released with restrictions on May 1, 2006. PX9 & PX5. Over the course of several years, Respondent requested Petitioner complete a "Willingness and Able" questionnaire on three different occasions to be considered for a position as a watchman. Petitioner completed the questionnaires as requested, added caveats to his answers, and requested a copy of the questionnaire for his physician to review. Petitioner was never provided the questionnaire for his physicians to review despite his repeated requests for the same. As such, there was no opportunity for the treating doctor to evaluate the tasks outlined in the questionnaire in order to opine whether Petitioner would be medically able to carry out the same. The Commission finds Respondent did not make a good faith job offer that included specific duties, physical restrictions, and wages. Accordingly, the Willingness and Able questionnaires do not establish a *bona fide* offer of clear work duties, environment, and hours.

The Commission finds Respondent's efforts in having Petitioner complete the questionnaires for the watchman position should be construed as a form of vocational rehabilitation. Petitioner was reasonable in his responses to the questionnaires and was sufficiently cooperative in the vocational process provided by Respondent. Therefore, the Commission finds Petitioner established entitlement to Section 8(a) maintenance benefits from May 2, 2006 through August 15, 2013. Maintenance benefits terminate on August 15, 2013 as Petitioner was released from care with no physical limitation on that date. RX6.

20IWCC0213

The Commission vacates the award of temporary total disability benefits from August 16, 2013 through March 4, 2014 as Petitioner was released to full duty work without restrictions on August 15, 2013.

To summarize, we find Petitioner entitled to temporary disability benefits as follows:

- TTD from February 24, 2005 through May 1, 2006
- Maintenance from May 2, 2006 through August 15, 2013.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 17, 2018, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $768.30 per week for a period of 61 5/7 weeks, representing February 24, 2005 through May 1, 2006, 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 $768.30 per week for a period of 380 3/7 weeks, representing May 2, 2006 through August 15, 2013, that being the period of maintenance under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the benefits awarded from August 16, 2013 through March 4, 2014 are hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $567.87 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 25% loss of use of the person as a whole.

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

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury, specifically including, but not limited to, benefits paid from August 16, 2013 through March 4, 2014.

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. 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 3 – 2020

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

Stephen J. Mathis

Stephen Mathis

D. Douglas McCarthy

D. Douglas McCarthy

LEC/cak

D: 2/5/2020

43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCARPELLI JR, ANTHONY
Employee/Petitioner

Case# **04WC043126**

01WC063217

CITY OF CHICAGO
Employer/Respondent

20IWCC0213

On 5/17/2018, 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 2.03% 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:

0494 JOSEPH SPINGOLA ATTY AT LAW
1314 KENSINGTON
SUITE 3843
CHICAGO, IL 60605

2193 MICHAEL PEDICONE LAW OFFICES
340 E NORTH WATER ST
SUITE 3200
CHICAGO, IL 60611

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

Anthony Scarpelli Jr.
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **04** WC **43126**

Consolidated cases: **01 WC 63217**

20IWCC0213

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 **George Andros**, Arbitrator of the Commission, in the city of **Chicago**, on **8/13/17, 9/28/17, 10/20/17, 11/28/17, 12/14/17, 1/16/18 & 1/23/18&03/12/18**. 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. [x] 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. [x] 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 [ ] Maintenance [ ] 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 **7/22/04**, 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 $**60,320.00**; the average weekly wage was $**1,160.00**.

On the date of accident, Petitioner was **34** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**364,127.95** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**364,127.95**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $773.22/week for 470 6/7 weeks, commencing 2/24/05 through 3/4/14, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $364,127.95 for TTD paid. Respondent's claim for an overpayment of TTD be, and is hereby denied because Respondent has failed to prove its right to same.

Medical benefits

Petitioner's claim for medical expenses has been paid and is now denied.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $567.87/week for 125 weeks, because the injuries sustained caused 25% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

#001 Arb. George Andros
Signature of Arbitrator

May 11, 2018
Date

MAY 17 2018

FINDINGS OF FACT & CONCLUSIONS OF LAW 04 WC 43126

The Petitioner, a then 34 year old cement mixer in the Department of Transportation for the City of Chicago, was working in a light duty position with the City's Department of Law after having been injured in a 2001 accident. A claim for
That earlier accident (01 WC 63217) , an Award for which is pending, was consolidated with the case at bar. The medical treatment in the Findings of Fact and Conclusions of Law in that case overlap to a degree with those in this case and are incorporated herein by reference.

Petitioner testified that on 7/22/2004 while walking down stairs in the building in which he worked, while walking down stairs looking for addresses in file cabinets, he inadvertently ran into the concrete landing and knocked himself out. (Tr. 8/23/2017, pp. 39-40) Petitioner testified that his forehead hit the concrete landing and he woke up and noticed people around him. He noticed pain in his head, neck and shoulder. He also had a headache which he described as terrible. (Tr. 8/23/2017, p. 41) The accident is stipulated to between the parties. (Arb. Ex. 1)Petitioner sought medical attention from MercyWorks Ashland Avenue location complaining of his injuries. He was taken off work. He was seen at that Company clinic on 7/23/04, 7/26/04, and 8/2/04 when directed for PT and light duty.

Importantly , the Arbitrator finds the treating doctor at Mercy Works, the company clinic for city workers, immediately referred this worker to Dr. Harel Deutch , a neurosurgeon, at Rush Medical Center for more treatment; he was first seen on August 19,2004. The treating doctor at Mercy Works immediately took his patient off work.

Petitioner testified that he saw Dr. Deutsch on 8/19/2004 complaining of pain in his neck going down through his shoulder into his arm and of terrible migraine headaches. (Tr. (pp. 43-44) Perhaps like the omission above, Dr. Deutch's intake history is devoid of recordation of headache complaints as recorded history at Mercy Works and testified to assertively by the injured worker.

Dr. Deutsch ordered an MRI of Petitioner's cervical spine performed on 9/8/2004 (Pet. Ex. 6, p. 41). Petitioner followed up with Dr. Deutsch on 9/10/2004 when he noted a slight right C5-C6 disc bulge with foraminal stenosis on the right side. Dr. Deutsch's plan was to obtain an EMG to further delineate the source of Petitioner's pain. (Pet. Ex. 6, pp. 28-29)

On 10/21/2004, the EMG was performed which showed electrodiagnostic evidence right median neuropathy at the wrist. The totally inaccurate history section notes that Petitioner was injured when a cement mixer fell on his head. (Pet Ex. 6, pp. 42-43) Arbitrator notes this errata to infer how histories in medical records progress from self-limiting , patchy to totally inaccurate. On 10/22/2004, doctor found the EMG to be non-diagnostic and ordered a 6 week course of physical therapy. (Pet Ex. 6, p. 25) The MRI revealed herniated C5-6 disc although not impressive. Do PT. Consider ESI and possible a CDF at C5-6.

On 1/21/2005 physical therapy was not of any benefit. Dr. Deutsch referred Petitioner to Dr. Timothy Lubenow, the pain specialist at Rush Medical Center for a cervical epidural injection, when he was diagnosed with a cervical radiculopathy. (Pet. Ex. 7, p. 2) On 2/17/2005 the injection took place. (Pet. Ex. 7, p. 8) He also treated with Dr. Tim Lubenow for severe headaches. Dr. Lubenow referred the patient to Dr. Wang at perhaps CINN or even Rush for further treatment of severe headaches.

On 6/17/2005 Dr. Deutsch noted that his EMG had been nondiagnostic and the MRI was somewhat unimpressive except for a small right-sided disc bulge at C5-6. He discussed the possibility of surgery and his view that it would be less than 50 percent chance of improvement with probably ACDF at C5-6. The plan was for a trial of cervical traction. (Pet. Ex. 6, p. 15) At the 7/15/2005, exam, surgery was further discussed; Petitioner elected to proceed with the fusion at Rush. (Pet. Ex. 6, p. 12)

On 9/1/2005 Dr. Deutsch performed the anterior cervical discectomy and fusion. It was an anterior cervical discectomy C5-6, anterior arthrodesis at C5-C6, with anterior instrumentation at C5-6. (Pet. Ex. 6, pp. 39-40) On 9/19/2005 Dr. Deutsch described him as doing fantastic. Pain was reported as minimal. Headaches were gone; however, he did continue to have some right arm pain. (Pet. Ex. 6, p. 10) He is to remain off work.

The treatment and evaluations at Mercy Works continues through this entire set of two cases; On January 6th, 2005 Mercy released him to work with restrictions, of no lifting over 15 pounds, No overhead lifting. The Petitioner seems to assert that Mercy Works doctor , company clinic, is the final threshold determinant of whether the City will allow you back to work in any capacity.

On January 10,2005 , Dr. Michael Vender found significant findings through his right upper arm with right lateral Epicon, right Dequervains disease and parthesis right hand.

Petitioner received a trigger point injection from Dr. Lubenow on 2/9/2006 and his first stellate ganglion block from him on 2/23/2006.

Dr. Deutsch next saw Petitioner on 3/6/2006. At that time Petitioner indicated that he thought he was better after his surgery but continued to have severe neck pain, headache and right extremity pain. He recommended Petitioner follow up with Dr. Lubenow for his pain issues. He also recommended that Petitioner follow up with him in 6 months so x-rays could be taken to evaluate the fusion. (Pet. Ex. 6, p. 5)

On 3/8/2006, Dr. Lubenow administered his second ganglion block and noted that Dr. Deutsch scheduled an MRI in light of Petitioner's headaches. (Pet. Ex. 7, p. 18) Dr. Lubenow also administered an occipital nerve block on 4/7/2006. (Pet. Ex. 7, p. 21). Petitioner did not return to be seen by Dr. Lubenow after 4/7/2006.

Dr. Deutsch had one additional visit with Petitioner on 4/7/2006 where he ordered an MRI and referred him to Dr. Wang for headaches which Dr. Deutsch described as his then primary complaint at that focused exam. Petitioner did not return for any further treatment by Dr. Deutsch after 4/7/2006. (Pet. Ex. 8, p.6)

Dr. Wang examined Petitioner on 4/12/2006. Dr. Wang notes that Petitioner had a C5-6 and C6-C7 ACDF. (only at C5-6) Dr. Wang prescribed Topamax for headache prophylaxis, continue Maxalt for severe headaches, asked petitioner to keep a headache diary and wait for the MRI to rule out structural lesion. A follow up visit was to occur in 30 days with the thought that the MRI would be completed by then. (Pet. Ex. 8, pp. 2-3) On 4/20/2006, the MRI previously ordered by Dr. Deutsch with reference to Petitioner's brain/ headaches was within normal limits. It was within normal limits. (Pet. Ex. 5, p. 40) (Pet. Ex. 9, pp. 1-2) Dr Wang of CINN gave medical impression of post-concussion syndrome with migraine type of headaches mixed with mild tension headaches.

There is evidence Petitioner continued to see physicians at Mercy Works. Petitioner testified it was Mercy Works doctors that restricted him from returning to work. On May 1, 2006, Petitioner participated in a functional capacity evaluation (Pet. Ex. 9, pg. 1). The results of the FCE was reviewed on May 8, 2006, when Petitioner was placed at MMI and discharged from medical treatment with restrictions not to lift more than 20 lb. and not to lift more than 5 lb. with his right arm. (Px.5 , page 40)

There were subsequent visits by Petitioner to MercyWorks which were specifically requested by the pension board because of they contribute an additional 8 1/3 per cent of his average weekly wage in addition to the amount he was being paid while receiving TTD. (Tr. 9/29/2017 p. 129) These visits occurred on 12/28/2006, 3/20/2008, 3/2/2009, 3/1/2011, 2/28/2012, and 2/28/2013. (Pet. Ex. 5, pp. 40-42). Mercy Works records show the company doctor either kept the Patient off work or on significant restrictions. The records of the evaluations ordered by the pension board as consistent with prior opinions from Mercy Works over the years that the patient is not released to a concrete laborer job with the City of Chicago. Petitioner testified it was Mercy Works doctors that restricted him from returning to work. On May 1, 2006, Petitioner participated in a functional capacity evaluation (Pet. Ex. 9, pg. 1). The results of the FCE was reviewed on May 8, 2006, when Petitioner was placed at MMI and discharged from medical treatment with restrictions not to lift more than 20 lb. and not to lift more than 5 lb. with his right arm.

The Petitioner eventually returned to full duty as discussed infra. The section 12 doctor for the City released the petitioner as amplified below.

Approximately 6 years later, Petitioner returned to be seen by Dr. Michael Vender on 3/5/2012 with complaints of right hand pain which he indicated had been occurring over the past 2 months, at first gradual and then moderate to severe. He complained of numbness and tingling with pain throughout the arm and into the shoulder.

On 3/12/2012, the nerve conduction study showed no electrodiagnostic evidence of bilateral ulnar neuropathies across elbow or at wrist, no electrodiagnostic evidence of bilateral radial sensory neuropathies and no electrodiagnostic evidence of significant right cervical radiculopathy. (Resp. Ex. 23, pp. 9-10) Dr. Vender discussed the findings with Petitioner on 3/12/2012 and released him for work on an unrestricted basis specifically regarding the condition he treated him for at that time. Petitioner has not been seen by Dr. Vender since that date.

Respondent asserts Petitioner failed to notify the Respondent that he had been given a full duty return to work release. However, that treatment was not for the underlying condition post spine surgery ; In conclusion, the City of Chicago via its pension board was aware of his restricted work status all the way through February 28, 2013.

Marlita Thomas, an adjuster for the City of Chicago Committee on Finance Workers' Compensation section testified that she became responsible for Petitioner's case when she began handling cases arising from the City's Department of Transportation in end of 2012, early 2013. (Tr. 10/20/2017, pp. 114, 118) She disputed Petitioner's contention that getting an IME was his idea. (Tr. 10/20/2017, pp. 124) Coventry set a section 12 exam with Dr. Daniel A Troy. Per the records, Coventry nurse became a nurse case manager. Notably no certified rehabilitation counsellor or return to work liaison from City was ever tendered to Petitioner as an interloqutor.

As a result of Dr. Troy's examination, he concluded that Petitioner could return to work full duty as of that day, 4/24/2013 and required no further testing or treatment. (Resp. Ex. 5, p. 12) The Arbitrator considers the work conditioning protocol as treatment. Dr. Troy also opined that even though Petitioner was capable of returning to work full duty capacity at that time, he stated that Petitioner "could possibly benefit from four weeks of work conditioning in order to assist returning him back to work and hopefully decrease his risk of re-injury. Work conditioning is not fully required." (Resp. Ex. 5, p. 12,)

Following completion of the work conditioning, Dr. Troy issued an addendum in response to the FCE received from NovaCare Rehabilitation dated 8/15/2013. Dr. Troy concluded that Petitioner could return to work full duty as a laborer and that he was at MMI. (Resp. Ex. 6) Petitioner returned to work as a concrete laborer for the City of Chicago Department of Transportation on 3/5/2014. He continues to work there for more than 4 years to the present dates of the hearings.

Petitioner testified that he was referred by his family doctor to a Rheumatologist because the Aleve and Tylenol that he was taking were making him sick in his stomach. (Tr. 08/23/2017, pp. 92). The records of Dr. Lynn Meisle, a Rheumatologist, show that during his initial visit to her on 6/29/2017, Petitioner presented as having pain "in all of his joints." He indicated that the pain started insidiously 2 years ago. He complains of pain in his hands, elbows, ankles and knees. His PIP joints and left knee pain are the worst. Dr. Meisles diagnosed Petitioner as having polyarthritis. (Resp. Ex. 21, pp. 2-3) Dr. Meisles prescribed Meloxicam and in the follow up visit dated 8/14/2017, Petitioner reported feeling better after having taken it. (Resp. Ex. 21, p. 5)

On August 27, 2013, Coventry reports to Marlita Thomas that Petitioner has met the goals necessary for him to return to work at full duty (Pet. Ex. 11, pg. 140-141). An addendum report from Dr. Troy allowing Petitioner to return to work at full duty was not received until October 2, 2013 (Pet. Ex. 11, pg. 3). The results of that addendum are confirmed to Marlita Thomas on October 7, 2013 (Pet. Ex. 11, pg. 144-145). Ms. Thomas testified with specificity and direct answers to all questions from both attorneys. She made a positive witness for the Respondent.

Petitioner testified how it took up to four months to be allowed to return to work as it was necessary for him to be processed. He described having to be reinstated in the Respondent's budget, drug tested, and finger printed. When he was finally cleared, Petitioner returned to work on March 5, 2014.

Respondent called Ashley Pak as a witness. She identified herself as an administrative assistant in human resources in the Respondent's water department. Pak testified how the department had occasional needs for watchmen. She testified Petitioner was called for a meeting regarding available positions on three occasions. She identified various documents including a Willingness and Able form which Petitioner was asked to complete. At first, she produced one of the three Willingness and Able forms (Resp. Ex. 1) which Petitioner completed. She also identified other documents which listed the individuals who appeared at each such meeting in Resp. Ex. 12 and 13. Three names are printed in blue which Ms. Pak confirmed are three who appeared for that particular meeting who were granted the position of watchman. Its utility is questionable in terms of probative evidence.

On cross examination, Pak described how the meetings were conducted. She testified that up to 20 people are identified by the Committee on Finance for her to meet with. She testified the Willingness and Able form was prepared by the Committee on Finance (COF). Once the tendered forms were completed by those in attendance, (worker's choice) they were returned to COF where an unidentified person(s) would choose those selected for consideration to an available watchman position. Petitioner testified Ms. Pak told those at her meeting they did not have to accept the watchman position. She denied she said that. Based upon her full testimony and Rx 34, 35 the Arbitrator adopts the testimony of the worker, Mr. Scarpelli. However, the notices calling him to a meeting (Resp. Exs. 34 and 35) offer him the option of informing Ms. Pak he is not interested in the watchman position. Ms. Pak confirmed Petitioner was not selected to be a watchman at any of the three meetings at which he appeared. Ms. Pak did not refer Petitioner to the COF nor allow questions from attendees.

In a non- linear analysis, the Arbitrator concludes that Ms. Pak, after conclusion of cross examination, made a very poor witness on her own behalf. More so, after she was again called to testify as the close of proofs date(s) were approaching and despite stellar organization, preparation and concentration on the focused theory of TTD credit , no significant rehabilitation of Ms. Pak was successful. She did not establish the form completion, with or without approval by the last treating doctors who issued restrictions, actually constituted a condition precedent to a bona fide job offer; It was merely passed up an administrative chain to a finance committee-names unknown.

The Arbitrator concludes the Petitioner has the right to have the doctors' who imposed the last restrictions upon him after serious, multiple surgeries review any potential documents purported to be a list of duties proposed or even a bona fide job offer. Neither of which was a proper characterization of the forms- Willingness and Able Questionnaire. That document was only to be passed along to a City "finance committee".

Of importance, no Rule 7110 compliance or consideration occurred.

The testimony of the Petitioner is adopted that Ms. Pak absolutely refused to give the questionnaire she wanted filled out (to be sent to the Finance Committee) for some further action – to be given then and there to the worker(s) so they may take the questionnaire to their treating doctors for evaluation of the actual , specific medical opinion or work action on which the worker(s) should rely upon for purposes of this questionnaire. It is axiomatic this concrete laborer is not a medical practitioner but merely a patient -still employed by his career employer.

In this case , that surely includes the company doctor, Dr. Belier at the Mercy Works who by inference and possibly direct testimony of the Petitioner , is clearly the gatekeeper for the City of Chicago to allow or disallow employees of the City to be returned to work from the City's viewpoint.

After extensive study of all the unclear answers by Ms. Pak, many of them on cross examination akin to a quietly spoken, simply I don't know... , the Arbitrator finds this document plus her testimony to not be even close to being an offer of clear work duties, environment , hours et cetera- within the restrictions under which the worker was yoked by Doctors at Mercy Works and their referred doctors namely Dr. Fernandez plus Dr. Herel Deutch.

Causal Connection (F)

Based upon the totality of the evidence, the Arbitrator finds that Petitioner's conditions of ill being relating to his cervical disc (C5-6) and resultant surgery -are causally related to the injuries sustained in his accident on 7/22/2004. This is based upon the totality of the evidence including their records, reports , the opinion of Dr. Chmell plus the chain of events theory approved by the Appellate Court also applies to the cases at bar.

Moreover, the Arbitrator finds that there is no medical evidence introduced to demonstrate that Petitioner's polyarthritis as first diagnosed and treated by Dr. Meisles is causally related to the accident.

Dr. Chmell (Pet. Ex.10) opines with clarity and distinction that Petitioner's treatment and conditions are causally related to the accident(s)

Petitioner injured his head and cervical area on July 22, 2004. The accident is stipulated to by the parties (Arb. Ex. 2). All ensuing medical treatment was for cervical radiculopathy at C5-6 culminating an anterior cervical discectomy and fusion at C5-6 (Pet. Ex. 6). Thus , in addition to the opinion of Dr. Chmell and the analysis of the treating doctors records (including Mercy Works), the sequence of events leads to the conclusion Petitioner's injury and resultant disabilities are causally related to his accident. One of the diagnoses at Rush was post traumatic concussion. The history of severe headaches is presented soon thereafter. The doctor by inference and treatment and no inconsistent statements or differentiation of the headache diagnosis by Dr. Luebenow and diagnoses by Dr. Wang fully support that causation is established by the chain of events theory in the cases at bar. Respondent has no evidence whatsoever to rebut the above -even from Dr. Troy or Dr. Bleier of the company clinic at Mercy Works.

Medical Benefits (J)

Petitioner introduced evidence of amounts claimed to be due pursuant to the rights of subrogation by Blue Cross Blue Shield of Illinois ("BCBS") arising from to payments by it for Petitioner's medical care in connection with this accident, pursuant to Petitioner's wife's employer provided policy of group health insurance. (Pet. Ex. 14) Respondent introduced evidence of its having negotiated with BCBS, copies of the payment made, USPS tracking documentation showing delivery and BCBS correspondence with Respondent's counsel. (Resp. Ex. 37) The Arbitrator finds that the amounts claimed by Petitioner to be due based upon Pet. Ex. 13 have been compromised and paid by the Respondent. Accordingly, Petitioner's claim for medical benefits is denied.

Temporary Benefits in Dispute (K)

Respondent claims its obligation to pay TTD ended on April 20, 2006 (Arb. Ex. 2). The Arbitrator fails to finds any adopted evidence indicating that assertion, claim for credit. On April 20, 2006, Petitioner was at Mercy Hospital for MRI of his brain (Pet. Ex. 9, pg. 1). An FCE was performed on May 1, 2006, with the Petitioner being released from medical treatment at MMI with limitations not to lift more than 20 pounds and not more than 5 pounds with his right arm (Pet. Ex. 5, pg. 41). Therefore, given his significant restrictions there is no reason to terminate compensation, however categorized on April 20, 2006.

The Respondent called many witnesses from whom various inferences were elicited. The one witness upon whom Respondent most relies is Ashley Pak of City's Department of Water. It argues Petitioner would have been offered a job as a watchman if he had completed a Willingness and Able form without question. The Arbitrator notes Petitioner was called on three occasions over four years for the watchman's job. Ms. Pak testified not everyone called was offered the job of watchman. That fact is borne out by Resp. Exs. 12 & 13. She also testified Respondent's Committee on Finance determines who will be offered the position.

She did not testify who makes that decision or on what criteria that decision may be made. She testified Petitioner was not selected in his 2007, 2008, or 2010 appearance. At no point was compliance with Rule 7110 was enacted or was a certified vocational counsellor retained by the City to assist both the City and the worker to restore his gainful employment with the City.

On 10/23/2007, the City of Chicago Department of Water Management ("DWM") sent Petitioner a letter advising him that there is a vacancy for the position of Watchman and that his name has been reached on the eligibility list. He was directed to contact Ashley Pak in DWM to indicate if he was interested or not in the position. (Resp. Ex. 34).

Christopher Owen, the First Deputy Commissioner in the City of Chicago Department of Human Resources testified (Tr. 10/20/2017, p. 5) Christopher Owen is an attorney and has worked in the human resources field for 20 years. (Tr. 10/20/2017, p. 24, 39) He testified that he was familiar with a program with the City of Chicago involving returning duty-disabled employees to work in the position of watchman. (Tr. 10/20/2017, p. 10)

He identified Resp. Ex. 17 as the job specification for the title watchman. (Tr. 10/20/2017, p. 6) He testified that job specification was in effect as of January 2007 and that it was in effect through July 2011. (Tr. 10/20/2017, p. 9-10) Deputy Commissioner Owen testified that the minimum qualification for the position of watchmen is the willingness and ability to perform the job and that is determined by means of what they call a Willingness and Able Questionnaire. (Tr. 10/20/2017, p. 6, 27) Training is provided by the Department, in this case, DWM. (Tr. 10/20/2017, p. 21)

Christopher Owen testified that he did a side by side comparison of the job specification for the title watchman (Resp. Ex. 17) against the Willing and Able Questionnaires used by DWM in 2007, 2008 and 2010, and that he looked at them with a view toward the physical functions and duties. (Tr. 10/20/2017, p. 13-14) Deputy Owen testified that the Willing and Able Questionnaires were even more specific with respect to job duties than the Job Specification (Resp. Ex. 17)

Deputy Owen also testified that he did not believe that there were any physical duties on the job specification (Resp. Ex. 17) that were not included on the Willing and Able Questionnaire. (Tr. 10/20/2017, p. 91) Hence the Willing and Able Questionnaire sufficiently informs as to the job duties of the position of watchman.

Deputy Owen testified regarding the Watchman position in 2007, 2008 and 2010, if the person answered yes to all willing and Able Questions, they satisfied the requirement to forward the person to HR to be processed for the job of Watchman. (Tr. 10/20/2017, p. 100) and if they answered even one question "No" then their forms would be sent back to the Committee on Finance and they would not be processed through HR. (Tr. 10/20/2017, p. 100)

Ashley Pak from DWM testified that if the individual completes the questionnaire and answer yes to all the able and willing questions, then they are processed for the position which consists of being sent for fingerprints. (Tr. 9/29/2017, p. 166)

Mr. Owen testified forthrightly, articulately , with knowledge of the subject matter. Nevertheless, his answers avoid any key points regarding a doctor confirming or denying a worker's ability to perform a watchman's duties on a full time basis at various sites and conditions.

Deputy Commissioner Owen testified that job descriptions were available from the Department of Personnel or Human Resources at the time in 2007, 2008 or 2010 to pick up in Room 1100. Mr. Owen described the job specification for watchman (Resp. Ex. 17) as a public document. (Tr. 10/20/2017, p. 83)

Ralph Chiczewski testified that he is City of Chicago DWM Assistant Commissioner in charge of safety and security, and that the position of watchman falls under his purview. (Tr. 9/29/2017, p. 245) Assistant Commissioner Chiczewski testified that there are approximately 10-12 locations to which DWM watchman are assigned. Only 2 of those locations have chlorine. (Tr. 9/29/2017, p. 247, 248)

Willingness and Ability Questionnaire – 10/25/2007

In response to the letter that he received previously (Resp. Ex. 34), on 10/25/2007, Petitioner appeared at the DWM and was asked to complete the Willingness and Ability Questionnaire. As of the date that Petitioner completed this form he was at MMI with MercyWorks restrictions of 20 pound lifting, 5 pound lifting with the right arm and no repetitive use of the right arm. Of course, Petitioner's testimony is that from 2006 through 2013, his physical condition was sufficient to permit him to return to work as a concrete laborer. By all measures, the position of Watchman was a light duty position.

The Willingness and Ability Questionnaire which was filled out by Petitioner on 10/25/2007 was admitted in to evidence as Resp. Ex. 14. The instructions on the form requested the individual to indicate his physical ability and willingness to do the work listed by placing an "X" in the appropriate space for each statement question. There were lines on the form for Yes and No answers. Petitioner failed to check either the yes or the no choice with respect to being "able" for 7 of the 9 questions. Only 1 question was answered yes. Petitioner answered no to question number 1 which asked his ability to: "A Watchman work in all types of weather conditions and must wear proper clothing including steel toe work shoes/boots, safety vests, rain gear and hard hats." Petitioner claimed his "no" answer to this question was "per Dr. Restrictions and MercyWorks." Essentially, it appears to this Arbitrator the response was in part given. He was post cervical fusion, post upper extremities surgeries as per above. By inference and petitioner alluding by testimony, the need for a hard hat to prevent head trauma Was one of the sound basis for needing to obtain the form for further analysis by one or all of the surgeons.

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 2: "A Watchman at all DWM locations must comply with the following:

Check all exterior facility doors to make sure they are properly secured.
Check the property perimeter to make sure that the fence line is intact.
Check all vehicle gates to make sure they are properly secured.
Check to make sure all exterior protective lighting is in working order.
Check entire perimeter of construction site, take note of any materials or tools that have not been secured by DWM employees and mark it in your log.

Petitioner's answer to question number 2 was "Per Dr. " It appears the patient sincerely desired to rely upon at least one of his original treating doctors including the company gait keeper, so to speak, at Mercy Works to guide the patient (and even give the City Committee guidance in the medically complex matter. Failure to simply rely upon direction of Ms. Pak to check boxes is not at all a sign of non- cooperation in the sense of effort to return to gainful employment for which is capable of performing.

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 4: "A Watchman must maintain a clean and safe working area during their shift" without stating that "if it does not exceed restrictions by Dr."

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 5: "A Watchman must remain alert at all times and recognize that sleeping will not be tolerated and may be cause for immediate dismissal." Instead he wrote "I am currently on med that cause me to fall asleep." Petitioner further wrote "Med are Zanax, Gabipentin – Both cause drozziness (sic) and may be impossible to follow." At the time Petitioner filled out the answer to this question, he had discontinued for treatment with all doctors who had treated him for his work injuries. It had been 18 months since he was last scene. Zanax is a controlled substance and would not be refillable without being treated. The Respondent asserts the the medical records admitted into evidence do not substantiate his claim of being on those medications. The Respondent asserts any concerns that Petitioner had regarding drowsiness did not deter him from regularly driving himself and his family members to and from work each day. Petitioner testified that he'd drive his mother to work in the morning , and pick up his wife in the afternoon. (Tr. 9/29/2017, pp. 14-15)

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 6: "A Watchman will be assigned to various shifts including 16 hour shift" without stating that "has to be cleared by Dr. due to med."

Willingness and Ability Questionnaire – 5/19/2008 **20IWCC0213**

On 5/13/2008, the City of Chicago Department of Water Management ("DWM") sent Petitioner a letter advising him that it had identified a position of Watchman which is within his physical capabilities. He was informed that "the City is making this job available to you." "The paperwork confirms that you are able to perform the job duties of Watchman. If you believe your restrictions would prevent you from performing these duties, you MUST bring the relevant documentation to the appointment." He was directed to appear at the DWM location. (Resp. Ex. 35)

In response to the letter that he received previously (Resp. Ex. 35), on 5/19/2008, Petitioner appeared at the DWM and was asked to complete the Willingness and Ability Questionnaire. Petitioner was accompanied by his attorney and his father Anthony Scarpelli, Sr., who was also a duty disabled employee who had been asked to complete the same Willingness and Ability Questionnaire. A copy of that questionnaire has been admitted as Resp Ex. 15.

Petitioner changed his prior answer of 7 months previously to question 1 and indicated that he was now able to do the following: "A Watchman work in all types of weather conditions and must wear proper clothing including steel toe work shoes/boots, safety vests, rain gear and hard hats."

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 2: "A Watchman at all DWM locations must comply with the following:

> Check all exterior facility doors to make sure they are properly secured.
> Check the property perimeter to make sure that the fence line is intact.
> Check all vehicle gates to make sure they are properly secured.
> Check to make sure all exterior protective lighting is in working order.
> Check entire perimeter of construction site, take note of any materials or tools that have not been secured by DWM employees and mark it in your log.

Petitioner's answer to question number 2 was "not sure. This is not a complete job description." As Deputy Commissioner Chris Owen testified, the questionnaire is in fact more specific than the Watchman job specification. (Resp. Ex. 17) Question 2 involves principally walking and observing, neither of which have any connection to Petitioner's prior treatment.

In answering the Willingness and Ability Questionnaire, Petitioner changed his answer from 2007 to state "yes" to question number 4: "A Watchman must maintain a clean and safe working area during their shift" but added "if that is the limit of the job description."

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 5: "A Watchman must remain alert at all times and recognize that sleeping will not be tolerated and may be cause for immediate dismissal." Instead his attorney wrote "Needs doctor clearance. Need job description. Can't answer yet."

In answering the Willingness and Ability Questionnaire, Petitioner wasn't willing to answer yes to question number 6: "A Watchman will be assigned to various shifts including 16 hour shift" without stating that "has to be cleared by Dr. due to med."

In answering the Willingness and Ability Questionnaire, Petitioner changed his answer from 2007 and was answered "yes" to question number 7: "A Watchman will be assigned to various locations around the city." Petitioner failed to answer the willingness section of questions 4, 5, and 6.

As of the date that Petitioner completed this form he remained at MMI with MercyWorks restrictions of 20 pound lifting, 5 pound lifting with the right arm and no repetitive use of the right arm. He had not treated for more than 2 years. Respondent asserts Petitioner's testimony is that from 2006 through 2013, his physical condition was sufficient to permit him to return to work as a concrete laborer.

As a result of not answering "yes" to each question, he did not pass along the highly structured chain of hurdles to be considered by a committee on finance to be offered a job as a watchman, not at all clearly defined from a medical viewpoint.

Willingness and Ability Questionnaire – 7/22/2010

On 7/22/2010, Petitioner once again completed a Willingness and Ability Questionnaire. A copy of that questionnaire has been admitted as Resp Ex. 1. Even though the number of questions expanded from 7 to 9 questions, Petitioner answered all questions "yes" except for 2 of them. On question number 1, which he had answered "yes" on 5/18/2008, he then changed his answer to "no." That question was as follows: "A Watchman work in all types of weather conditions and must wear proper clothing including steel toe work shoes/boots, safety vests, rain gear and hard hats." The Respondent asserts that no restriction then in effect on its face would have prevented Petitioner from being physically able to do what was requested in number 1. The Arbitrator finds otherwise given the post surgical fusion state especially in regard to the risk posed in a hard hat area.

The second question to which Petitioner answered "no" to was question 5 which provided, "A Watchman must remain alert at all times and recognize that sleeping will not be tolerated and may be cause for immediate dismissal.

Issue of TTD (K):

In conclusion on the issue of TTD (K) the Arbitrator finds that based upon the totality of the evidence, , the Respondent at bar did not make an ascertainable, good faith offer of light duty specific in duties and physical restrictions and wage to allow the Petitioner to have the same analyzed by either MercyWorks, Dr. Deutch, Dr. Fernandez or even Dr. Vender.

The Respondent presented witnesses some of whom were more informative than others on the factual issues in the case. However, in terms of an actual development of a return to work plan, it was never established at any time by the City of Chicago claims management or agency department heads or a certified rehabilitation counselor under directive by the city to furnish services that should be deemed as a bona fide offer of employment for which a readily stable job market exists. See National Tea.

The Petitioner is not a doctor in terms of making such decisions on a form nor capable of making an informed decision in a post cervical and post upper extremity surgical state - as raised on prolonged , inciteful well prepared cross examination. Many questions were directed on how, after the fact, the worker himself should have pieced together knowledge and better try come up for a watchman consideration.

The facts show the case manager service was terminated. Under an approved Rule 7110 plan this case manager may have been the interlocutor between the various departments and contacts testified to by the Petitioner and the company clinic, clearly seen as the gatekeeper, so to speak. Said CRC, nurse or interlocutor was not employed in obtaining an evaluation for either a trial or full modified return to work effort at any given job in the massive City of Chicago job array.

Therefore based on the totality of the evidence, the Arbitrator finds that the Petitioner was temporarily totally disabled from the inclusive dates as asserted by the Petitioner in the hearing stipulations under both cases.

Nature and Extent of the Injury (L)

Petitioner returned to work full duty in the City of Chicago Department of Transportation as a concrete laborer on 3/4/2014 performing the duties specified in Respondent's Exhibit 2. He was subsequently promoted to the position of Foreman of Laborers on 12/15/2016. (Tr. 09/29/2017, p. 29). As of the date of this decision, Petitioner has worked full time in his original occupation for more than four (4) years. This occupation involves heavy lifting and forceful gripping as specified in the duties.

. Petitioner submitted the report of Dr. Samuel J. Chmell. In Dr. Chmell's report dated 7/12/2014, Dr. Chmell concluded that Petitioner has significant permanent impairment affecting his cervical spine. (Pet. Ex. 10)

Dr. Troy's examination of Petitioner in April 2013, showed that Petitioner had some slight loss of lateral rotation and flexion and extension of the cervical spine, but it is overall minimal. (this opinion minimizes the effect of a fused spine.) There were no aberrant findings and he was overall asymptomatic throughout the exam. (Resp. Ex. 5) The NovaCare Rehabilitation records from 8/15/2013 show an extremely high level of lifting and material handling – 100 pounds lifting, 215 pounds pushing bilaterally and 232 pounds pulling bilaterally. Petitioner met all goals for return to work full duty as a laborer for the City of Chicago (Resp. Ex. 36, pp. 609-611) and has been working in that job for more than 4 years. Petitioner has some complaints of pain and swelling in his hands.

Based upon the totality of the evidence, the Arbitrator finds that Petitioner sustained permanent partial disability pursuant to Section 8(d)((2) of the Act as awarded in the Decision in the case at bar.

Credit for Overpayment of TTD (N)

Based upon the Arbitrator's finding on Issue (K) - TTD, and the totality of the evidence the Arbitrator finds that the Respondent is not entitled to any credit for overpayment of temporary total disability.

Other – Admissibility of Stramaglio Arbitration Decision (O)

Respondent's counsel offered Commission decisions of cases in which Petitioner Counsel represented the respective petitioners unrelated to the cases at bar. The purpose is surmised to be the Petitioner and his counsel is imputed with knowledge relevant to the cases at bar. The Arbitrator is commanded to decide cases on evidence admitted in the case in question. The Arbitrator finds other cases in which the Petitioner attorney represented workers before the IWCC are not probative, relevant ,and, surely not admissible. This is so despite Respondent's assertion that because the Arbitrator may take judicial notice of a prior Commission decision as a hearsay exception. That hearsay exception does not make other IWCC decisions relevant. On a related aside, The Appellate Court holds that IWCC "Commission" decisions are not precedential upon appeal.

The Arbitrator further sayth naught.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Benjamin Smith,

Petitioner,

vs.

NO: 15 WC 35023

Asplundh Brush Service,

Respondent.

20IWCC0214

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 benefit rates, temporary disability and permanent disability and being advised of the facts and law, affirms the Decision of the Arbitrator with changes as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. FINDINGS OF FACT

The Commission hereby incorporates by reference the findings of fact contained in the arbitration decision, which delineate the relevant facts and analyses. However, as it pertains to permanent disability, the Commission addresses the lack of analysis in the arbitration decision although affirming the conclusion that Petitioner is entitled to a wage differential award.

A. Accident and Medical Treatment

The record establishes that Petitioner was employed by Respondent as a Foreman. Among other things, his duties included running power lines and equipment, performing contact work, and using chainsaws to cut trees. To perform his duties, Petitioner used vibratory tools/machines such as chainsaws, Barko mowers, track chippers and drove an excavator and John Deere tractor.

Appendix

On a rainy April 3, 2015 Petitioner and a coworker were changing the cylinder out of an excavator. While carrying the cylinder up a hill, Petitioner's coworker slipped on the muddy terrain and dropped his end of the cylinder. This caused Petitioner to drop his end, forcing the cylinder sideways. Petitioner's arm was twisted backwards and he felt a tear in his right elbow.

Petitioner sought medical care as referred by Respondent and was diagnosed with right medial epicondylitis. After conservative care failed, Petitioner was referred to elbow specialist Dr. Pannunzio by Respondent's claims adjuster. After diagnostic testing Petitioner was diagnosed with right medial epicondylitis and cubital tunnel syndrome. Dr. Pannunzio testified that both conditions were related to the accident in question.

On June 9, 2016, Petitioner underwent a right ulnar nerve transposition and right medial epicondylectomy with debridement of the medial conjoint tendon. In a September 20, 2016 office note, Dr. Pannunzio noted Petitioner still had difficulty with vibratory tools and mowing his own lawn. By October 24, 2016, Petitioner still reported issues using vibrating tools such as a weed eater. A note from Respondent's case management nurse confirms Respondent's knowledge that Petitioner complained of numbness from his elbow to his fingers from just 10 minutes of weed-eating activity. Dr. Pannunzio nonetheless released him to full duty to see how he responded to work, but he was to call if he had any problems. Petitioner testified that Dr. Pannunzio encouraged him to try his hand using household tools before returning to work.

Shortly thereafter Petitioner telephoned Dr. Pannunzio's office and indicated that he was still having difficulty using vibrating tools and mowing. On November 2, 2016, Dr. Pannunzio released Petitioner to restricted work with no use of vibrating tools or mowers. On November 11, 2016 Respondent offered him a position running a Barko mower. Petitioner declined the position, as it was outside of his restrictions.

As of November 15, 2016, Petitioner's symptoms persisted. Dr. Pannunzio made the restrictions he implemented on November 2, 2016 permanent. Dr. Pannunzio[1] later testified that the restrictions were related, in part, to his medial epicondylitis condition. He also testified about Petitioner's condition at the time of his release in November of 2016. Dr. Pannunzio further explained that Petitioner's diminished grip strength testing was valid.

On March 23, 2017, Petitioner underwent a section 12 examination at Respondent's request with Dr. Merrell. Dr. Merrell diagnosed chronic ulnar neuropathy at the right elbow and agreed that the instant accident caused Petitioner's current right elbow condition. However, Dr. Merrell indicated that Petitioner's elbow condition was not restricting him from returning to work in his pre-accident capacity. He recommended a functional capacity evaluation and released Petitioner to full duty, although he expressed concern with Petitioner being physically unable to operate equipment, as there would be a significant downside if he lost control of it.

B. Physicians' Testimony

Petitioner offered the deposition testimony of Dr. Pannunzio into evidence. Dr.

[1] Dr. Pannunzio treated Petitioner for both his elbow condition as relevant to the above-captioned claim as well as his hand condition addressed separately in the decision issued in Case No. 17 WC 16951.

Pannunzio testified that Petitioner first came to him on November 9, 2015 reporting that he was carrying a heavy hydraulic cylinder up a hill, slipping and falling, and straining his right medial forearm. After failing conservative treatment, he performed a medial epicondylectomy with debridement of the involved tissue and neurolysis of the ulnar nerve for cubital tunnel syndrome. Dr. Pannunzio opined that the mechanism of injury was consistent with the development of medial epicondylitis and cubital tunnel syndrome.

Regarding work restrictions, Dr. Pannunzio testified that Petitioner was on light duty restrictions through October 24, 2016 at which point he was released back to regular work for a trial period. When Petitioner returned to him on November 15, 2016, Dr. Pannunzio noted Petitioner's complaints of difficulty with his hand going to sleep and losing grip whenever he was using vibrating power tools, such as a chainsaw, mower, etc. He noted that Petitioner's grip strength was 130 on left and 80 on right (dominant hand) and testified that if it were normal, it would have been higher than his non-dominant left hand.

Dr. Pannunzio believed that Petitioner was possibly still having difficulty doing his job because of unrecovered grip strength and previously undiagnosed and untreated carpal tunnel syndrome. He testified that it was unwise for Petitioner to return to work if he could not do so without symptoms. Dr. Pannunzio added that, based on Petitioner's symptoms on November 15, 2016, Petitioner was unable to do those jobs and he was therefore given permanent restrictions. Dr. Pannunzio also attributed the permanent restrictions to both Petitioner's medial epicondylitis condition as well as his carpal tunnel syndrome.

On cross-examination, Dr. Pannunzio testified that the restrictions were based on use of vibrating tools, such as chainsaws and mowers (i.e., commercial zero turn mower, push mower). Dr. Pannunzio further stated that if Petitioner told him that he felt unsafe climbing, supporting his own weight because he could not hold on to things, or using a chainsaw because he could not hold on or he did not have sufficient grip to control it and prevent injury, that he was concerned with those activities related to grip strength.

Respondent offered the deposition testimony of Dr. Merrell into evidence. He reiterated the opinions as stated in his Section 12 examination report. Dr. Merrell diagnosed chronic ulnar neuropathy and opined that Petitioner sustained a sprain or aggravation to the elbow that caused nerve inflammation. On cross-examination, he confirmed that the injury necessitated Petitioner's elbow surgery.

With regard to Petitioner's complaints related to vibratory tools, Dr. Merrell testified that he was not aware of what tools Petitioner used "on a day-to-day basis, either at home or at work." He testified that it depended whether tools that vibrated substantially would aggravate Petitioner's elbow condition. Dr. Merrell explained that Petitioner obviously has some residual aggravation to the nerve that was moved, so if there was enough force on the arm it could be irritated and there could be some aggravation depending on the type of work. He did not feel that running a lawn mower or other smaller things would be a particularly debilitating situation. On cross-examination, Dr. Merrell also testified that Petitioner's decrease in grip strength was probably due to his original elbow injury and subsequent surgery.

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Dr. Merrell testified that Petitioner could return back to basically any kind of work, but also testified that "[t]he only caveat I put in there was I didn't -- you know, when I'm seeing somebody in the office, I'm not seeing them operate a chainsaw. If somebody wants them to operate a chainsaw, they need to decide, through their own, you know, occupational safety and health people or whoever, whether the guy is safe to do it. I can't fully make that assessment is somebody's safe to do something like that. And so I encourage them to have that evaluation, if there was a level of concern for them or him in that regard."

C. Job Duties and Equipment

In addition to Petitioner's testimony, both Petitioner and Respondent called witnesses regarding the duties of a foreman, the physical requirements of operating machinery in this position, and the difficulty or ease of operating various pieces of equipment. While the Commission incorporates by reference the findings of fact contained in the arbitration decision, the following is germane to the permanency analysis.

Petitioner called Mr. Fivecoat as a witness. He testified that there were occasions when Petitioner would be required to use a chainsaw. Mr. Fivecoat explained that if there were roadside trees that were too big for the Barko machine, they would have to be cut down and mowed with the machine. He also testified that anything by wetlands and creeks could not have the Barko equipment near it and Petitioner would be expected to "cut it down and drag it out and mow it up."

Mr. Merithew, a Regional Supervisor called by Respondent, confirmed that when he ran a Barko mower he occasionally used a chainsaw as well. Mr. Merithew testified that an operator can use a chainsaw if there is nothing else to do and explained that they try to keep equipment operators in the machine.

Respondent also called Mr. Bishop, a Foreman Operator, as a witness. He testified that no chainsaw usage was required or even contemplated for a foreman. Mr. Bishop testified that he and Petitioner were tasked with clearing trees and brush that encroach on power lines. To mow the brush, he explained that 90% of the work was done with equipment, particularly a Barko mower. Mr. Bishop testified that a Barko operator did not ever have to use a chainsaw because he could utilize trained grounds personnel to do so. On cross-examination Mr. Bishop admitted that a foreman would be expected to do everything including use a chainsaw.

Petitioner testified that when mowing, the Barko machine will vibrate significantly as it is going over heavy trees and other debris including rocks. He explained that they would have to grind all the stumps below dirt level using various machines. Anything cut with the saws had to be ground down including tree stumps.

Respondent offered a video into evidence showing a Barko mower in operation to suggest that the machine is easy to operate and does not vibrate. Mr. Bishop testified on direct that the machine barely moves "once you get your mulch pile down[.]" Then on cross-examination, he highlighted when the machine barely moves and admitted that the video only shows a mower working an already-cleared patch of land. Thus, the value of the video in

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determining how much it vibrates and how it operates when actually clearing an encroached area of land is severely limited. The remaining evidence relating to the difficulty or ease of operating a Barko mower or other equipment lies in the witnesses' testimony. Petitioner's testimony that the Barko mower is used to mulch trees of all sizes measuring up to 36 inches in diameter, tree stumps, branches, and other debris is uncontroverted.

D. Additional Information

Petitioner requested, but never received, vocational rehabilitation assistance from Respondent. Petitioner had been performing light duty work for Goodwill at Respondent's direction through November 11, 2016. After being released with permanent restrictions in November of 2016, Petitioner applied for and began receiving unemployment benefits. He was hired by Midwest Manufacturing in March of 2017. He initially earned $11.00 per hour and earned $17.00 per hour at the time of arbitration. With regard to future earnings, Petitioner testified that Midwest Manufacturing is a small company, thus he was unsure of his ability to increase his wages any more than he already had.

II. CONCLUSIONS OF LAW

The Commission affirms the Arbitrator's finding that Petitioner has established his entitlement to benefits pursuant to section 8(d)(1) of the Illinois Workers' Compensation Act ("Act"). In so concluding, the Commission addresses the factors required under Section 8.1b of the Act as well as the parties' arguments centered on the validity of Petitioner's permanent restrictions and the job duties involved in the work offered to Petitioner thereafter.

Section 8.1b of the Act addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
>
> (ii) the occupation of the injured employee;

Figure 1.

> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Id.

Regarding factor (i), the level of impairment contained within a permanent partial disability impairment report, no AMA impairment rating was offered by either party. Accordingly, the Commission gives this factor no weight.

Regarding factor (ii), the claimant's occupation, the record reflects that Petitioner was employed as a Foreman for Respondent at the time of accident. He was eventually permanently restricted from returning to his pre-accident position. Accordingly, the Commission gives great weight to this factor.

Regarding factor (iii), the record reflects that Petitioner was 37 years old at the time of accident. Thus, he has a long work life ahead of him during which he will have to manage the effects of his injury at work. Accordingly, the Commission gives great weight to this factor.

Regarding factor (iv), the claimant's future earning capacity, the record reflects that Petitioner has not returned to work for Respondent and is permanently restricted from doing so. Petitioner testified that his prospects for increasing earnings any further are limited and no vocational evidence to the contrary was admitted. Accordingly, the Commission gives greater weight to this factor.

Regarding factor (v), the evidence of disability corroborated by the treating medical records, the record reflects that Petitioner was diagnosed with right medial epicondylitis and cubital tunnel syndrome. He underwent a right ulnar nerve transposition and right medial epicondylectomy with debridement of the medial conjoint tendon. As of November 15, 2016, Petitioner was placed on permanent restrictions by Dr. Pannunzio. At that time, Petitioner complained of difficulty with his hand falling asleep and losing grip when using vibratory tools. Dr. Pannunzio opined that these restrictions were required, in part, from the effects of this injury at work. The Commission affirms the finding of the Arbitrator that the opinions of Dr. Pannunzio are more persuasive than those of Respondent's Section 12 examiner, Dr. Merrell. In so concluding, the Commission notes that while Dr. Merrell believed Petitioner could be released to full duty, he nonetheless expected difficulties in Petitioner's return to work for Respondent. Dr. Merrell was specifically concerned about Petitioner using a chainsaw, declined to opine whether this was safe, and mentioned an occupational safety expert should evaluate Petitioner. Accordingly, the Commission gives greater weight to this factor.

Based on consideration of the record as a whole, and evaluating the evidence in light of the factors required pursuant to Section 8.1b of the Act, the Commission affirms the Arbitrator's

permanency award. However, analysis of the propriety of the wage differential award requires further discussion.

Our supreme court has expressed a preference for wage differential awards. *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 43. A wage differential award under section 8(d)(1) is intended to compensate an injured claimant for his reduced earning capacity. *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC ¶ 39. Section 8(d)(1) of the Act requires that an impaired worker meet two requirements: (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "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." *Jackson Park Hospital*, 2016 IL App (1st) 142431WC ¶ 40 (citing 820 ILCS 305/8(d)(1) (West 2012)).

Respondent argues at length regarding Petitioner's job duties asserting that Dr. Pannunzio did not have an accurate understanding of Petitioner's work such that the assigned permanent restrictions do not affect his ability to work full duty. Respondent also maintains that Petitioner did not return to work when he was initially released to full duty for a trial period by Dr. Pannunzio on October 24, 2016 and that he misled Dr. Pannunzio in the imposition of permanent work restrictions thereafter. Respondent relies on Dr. Merrell's opinion that Petitioner could work full duty. While Respondent contends that Petitioner is not incapacitated from performing his work as a foreman, or that he was offered work within his restrictions, the Commission finds that the evidence establishes otherwise.

Petitioner testified that he did not feel that he could operate a mower safely and that he tried to do lawn care at home and had difficulty even with those tasks. The medical records confirm Petitioner's reported complaints to Dr. Pannunzio. Petitioner also testified that he would have to use a chainsaw at work and, contrary to Respondent's assertions, operating the Barko mower involves substantial vibration. Mr. Fivecoat echoed Petitioner's testimony in this regard.

The video offered by Respondent to establish that a Barko mower was wholly stable is of little evidentiary value. Mr. Bishop admitted that the video only shows a mower working an already-cleared patch of land. The video does not show how the machine operates when actually clearing an encroached area. Thus, the remaining evidence relating to the difficulty or ease of operating a Barko mower or other equipment lies in the witnesses' testimony. Given the admissions of Mr. Bishop and Mr. Merithew, the Commission finds that Petitioner and Mr. Fivecoat's testimony more accurately reflect the day-to-day responsibilities of a foreman as well as the physical operation of the debated machinery including a Barko mower and chainsaw.

With regard to Dr. Pannunzio's permanent restrictions and treatment, the Commission also notes that Respondent was aware of all of Petitioner's complaints during treatment. Indeed, Petitioner's entire course of treatment was performed with the knowledge, if not in the presence, of Respondent's nurse case manager and by doctors, including Dr. Pannunzio, to whom Petitioner was referred by Respondent. The foregoing is notable with regard to the period of September through November of 2016 during which Petitioner complained to Dr. Pannunzio

about his inability to use personal lawn care tools and was continuing to work at Goodwill at Respondent's direction.

Then Respondent sent Petitioner for a Section 12 examination with Dr. Merrell on March 23, 2017. At his deposition, Dr. Merrell confirmed his opinion that Petitioner could return to work full duty, but he admitted that he did so without knowledge of the equipment that Petitioner used at work. He also qualified his opinions with the proviso that he was concerned about Petitioner's use of a chainsaw and he declined to make any assessment whether Petitioner was safe to use one. While Dr. Merrell determined that Petitioner could return to full duty work, or any work for that matter, his admitted lack of knowledge of the types of equipment used by Petitioner at work undermines the persuasiveness of his full duty release opinion.

Dr. Pannunzio relied, in part, on Petitioner's representations about his physical abilities in eventually determining whether permanent restrictions were necessary. He did so after an initial release back to full duty for a trial period, which Petitioner did not attempt. Respondent focuses on this point to no productive end. The evidence establishes that Petitioner continued to work at Goodwill at Respondent's request through November 11, 2016 undermining any assertion that he was avoiding a return to work. Several days later, Petitioner returned to Dr. Pannunzio who reconsidered his complaints about difficulties operating personal lawn care equipment and he determined that the full duty work of a foreman was beyond that to which Petitioner should be physically exposed. Dr. Pannunzio imposed permanent work restrictions on November 15, 2016 and, when Respondent offered Petitioner work, Petitioner declined as it was outside of his permanent restrictions.

Ultimately, the evidence establishes that Petitioner's work as a foreman was for the purpose of commercial tree and brush-clearing involving the use of commercial machinery, particularly operation of Barko mowers and chainsaws, that involved vibration and grip strength beyond that necessary to operate personal lawn care tools such as a weed eater. The Commission cannot conclude given the totality of the evidence that Dr. Pannunzio was misled or unaware of the type of physical difficulties Petitioner encountered when he imposed permanent work restrictions at the November 15, 2016 visit. Rather, he reevaluated Petitioner's subjective complaints and considered that they were medically required and a danger to Petitioner, a sentiment echoed by Respondent's Section 12 examiner, Dr. Merrell. Thus, the Commission finds that Petitioner has established the first element required for a wage differential award.

Petitioner also established that he sustained an impairment to his earnings capacity. Wages may be indicative of earning capacity, although they are not necessarily dispositive. *Cassens Transp. Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 531 (2006). "[T]he test is the capacity to earn, not necessarily the amount earned[.]" *Id.* at 531 (quoting *Franklin County Coal Corp. v. Industrial Comm'n*, 398 Ill. 528, 533 (1947)). More recently, the appellate court has stated that "whether the claimant has sustained an impairment of earning capacity cannot be determined by simply comparing pre- and post-injury income. The analysis requires consideration of other factors, including the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market." *Jackson Park Hospital*, 2016 IL App (1st) 142431WC ¶ 45.

20IWCC0214

In this case, Petitioner has established earnings of $17.00 per hour after increases in his salary after being hired by Midwest Manufacturing in March of 2017. He testified that he is unsure of his ability to increase his earnings further. No other evidence was submitted that Petitioner could earn more. Thus, the Commission finds that Petitioner has established a diminishment in his earnings capacity and the second element required for a wage differential award, and affirms the award for wage differential benefits.

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

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner has met his burden of proof in relation to his current condition being causally connected to his work accident suffered on April 3, 2015.

IT IS ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent partial disability benefits of $107.75 per week, commencing June 29, 2018, until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in section 8(d)(1) of the Act.

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

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

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

DATED: APR 3 - 2020

o: 2/6/20
BNF/wde
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, BENJAMIN
Employee/Petitioner

Case# **15WC035023**
17WC016951

ASPLUNDH TREE SERVICE
Employer/Respondent

20IWCC0214

On 7/10/2019, 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 2.07% 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:

1727 LAW OFFICES OF MARK N LEE LTD
KEVIN J MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0000 RIPES NELSON BAGGOT KALOBRATSO
ANDREW FERNANDEZ
650 E DEVON AVE
ITASCA, IL 60143

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

- [ ] 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

Benjamin Smith
Employee/Petitioner

v.

Asplundh Tree Service
Employer/Respondent

Case # **15** WC **35023**

Consolidated cases: **17 WC 16951**

20IWCC0214

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Urbana**, on **6/29/18**. 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. [x] 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 [ ] 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 **4/3/15**, 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 $**45,532.59**; the average weekly wage was $**875.63**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **3** dependent children.

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

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

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

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

ORDER

Respondent shall pay Petitioner maintenance benefits of $583.75/week for 17 weeks, commencing 11/15/16 through 3/13/17, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $275.75/week for 12 6/7 weeks, commencing 3/14/17 through 6/11/17, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $247.75/week for 12 6/7 weeks, commencing 6/12/17 through 9/9/17, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $191.75/week for 37 5/7 weeks, commencing 9/10/17 through 5/31/18, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $107.75/week for 3 6/7 weeks, commencing 6/1/18 through 6/28/18, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 6/29/18, of $107.75/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

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

Michael K. Nowak, Arbitrator

7/8/19
Date

ICArbDec p. 2

FINDINGS OF FACT

Petitioner testified that on April 3, 2015 he was employed with Asplundh Brush Control as a foreman for about seven years. (Trans. 14) The Petitioner testified that his job required him to run jobs, run equipment, and cut trees with chain saws. The Petitioner testified he worked about 50 hours a week. (Trans. 15) The Petitioner testified that on every job site he would bring a chainsaw to cut down dangerous trees, and in areas that were inaccessible to equipment he would hand clear it using a chainsaw. He would do so on a nearly daily basis. The Petitioner testified that the chainsaws vibrate a great deal and the chainsaw he used was a Husqvarna 372 XP he estimated at 68, 69 cc's in size. (Trans. 14-17).

The Petitioner also testified he would run equipment on the job sites. He described Barko mowers, which he described as a mower with a rotary head on the front of it. This mower was used for clearing trees, including large trees up to a 36-inch diameter. The machine would then grind those trees up into wood chips. The Petitioner testified that he would first use the mower to clear an area and then the chainsaws to clean up. (Trans. 18-19) The Petitioner testified the mower ran rough due to it spinning at close to 3,000 RPM and vibrates a great deal depending on what kind of wood you are mulching. (Trans. 20) The Petitioner further described that the mower would vibrate when he hit heavy trees, rocks, grind stumps down, even fences. (Trans. 23) The Petitioner testified that he used a joystick and foot pedals to control the machine. (Trans. 20)

The Petitioner also used an excavator to lay trees down to mulch them. The Petitioner testified that the excavator machine did not vibrate. (Trans. 21-22) The Petitioner also ran a John Deere 7400 tractor with a deck on the back. He also used this to mow 6 inch diameter trees with it. The John Deere had a steering wheel. He also testified that the John Deere vibrated a great deal due to its age. (Trans. 24-25) He also used a track chipper, which was on tracks and would grab a tree and then it would chip it up. He also testified that the machine vibrates a great deal, due to sitting on top of a wood chipper. (Trans. 25-26)

On April 3, 2015 the Petitioner was working and had to change a cylinder out of an upper boom on an excavator. He was carrying the cylinder with another employee up a hill when the other worker slipped in the mud and dropped his end. The Petitioner's right arm twisted and he felt a tear. He reported his injury but did not treat right away but his injury kept getting worse. (Tran. 27)

The first date of treatment, in evidence, is July 14, 2015, to a Dr. Dwyer who reported that Petitioner had injured himself on April 3, 2015, while carrying a 500 pound cylinder. Petitioner was complaining about pain in the posterior side of the elbow that radiates down into the forearm. Petitioner was ordered to undergo therapy and to return in six weeks.

Petitioner returned on August 25, 2015, with continued right elbow complaints. Dr. Dwyer then referred him to an elbow specialist.

On November 11, 2015, Petitioner reported to Dr. Pannuzio for examination. He gave his history of going to the hospital then was referred to a Dr. Dwyer. Petitioner complained of medial elbow pain but no numbness and or tingling. The impression at that time was medial epicondylitis, but he did not think that Petitioner suffered from cubital tunnel syndrome. Dr. Pannuzio wanted to order surgery for the epicondylitis at that time.

On April 12, 2016, Petitioner developed numbness and tingling in the ring and small fingers. At this point Dr. Pannuzio wanted to proceed with surgery to correct Petitioner's epicondylitis and cubital tunnel.

On June 9, 2016, Petitioner had a right ulnar nerve transposition and right medial epicondylectomy with debridement of medial conjoint tendon.

On June 21, 2016, Petitioner followed up and was reported to be doing nicely.

On July 25, 2016, Petitioner had another follow up but was reporting pain, he was expected to return to work with no restrictions in one months' time.

August 22, 2016, Petitioner was reported as doing well and performed a grip test which was noted to be better than most patients but there was still less strength noted on the right hand compared to the left side. It was noted that he would be released in about a month and he would be released to unrestricted activities.

On September 20, 2016, Petitioner was still reporting difficulty with vibrating tools and difficulty mowing his lawn. His restrictions were again continued with plans to release to full duty.

On October 24, 2016, Petitioner was still reporting problems with vibrating tools. Provocative maneuvers for carpal tunnel were negative. Petitioner was released to full duty to see how he responded, but to report back sooner if he had problems.

Petitioner returned on November 15, 2016 for the final time. During that exam his grip strength was measured at 80 pounds on the right/130 pounds on the left. Dr. Pannuzio then diagnosed Petitioner with carpal tunnel syndrome. It was opined that vibratory tools will provoke carpal tunnel. Dr. Pannuzio documented that he is giving permanent restrictions but was unsure if the restrictions were in due, in part, to Petitioners un-treated carpal tunnel condition.

On March 23, 2017, Petitioner attended a section 12 examination with Dr. Merrell. In his report it was noted the April 2015 accident. In his report, Dr. Merrell opinioned that Petitioner had chronic ulnar neuropathy at the right elbow. He agreed with Dr. Pannuzio that the original EMG test showed evidence of mild carpal tunnel. He agreed that the April 2015 injury caused Petitioner's injury to his right elbow. He also agreed that vibratory tools are probably provoking carpal tunnel. But it was not related to his April 2015 incident. At this point he recommended a FCE. He released Petitioner back to full duty but did note there may be some safety issues with operating equipment or use of a chainsaw.

On August 29, 2017 Dr. Merrell was deposed. Dr. Merrell testified that the April injury did cause the injury to Petitioner's right elbow. (RX- 16) Dr. Merrell testified that the carpal tunnel was not related to the April 2015 incident. (RX -17) Due to Petitioner performing well on his grip strength test, Dr. Merrell did not think Petitioner needed restrictions as of November 2016. (RX -19) Dr. Merrell did state that he was concerned about the use of chainsaw, and how an occupational safety expert would need to evaluate Petitioner. (RX-22) Dr. Merrell agreed that carpal tunnel can be exacerbated by the use of vibratory tools. (RX -27) Dr. Merrell also agreed that by exacerbate that would mean make the condition worse, and that chainsaws are a vibratory

tool. (RX -28) Dr. Merrell also agreed that a carpal tunnel release would be appropriate procedure in this claim. (RX -28,29)

On March 6, 2018 Dr. Pannuzio was deposed. Dr. Pannuzio testified that Petitioner's elbow conditions of medial epicondylitis and cubital tunnel were related to Petitioner's April 3, 2015 injury. Concerning Petitioner's final date of treatment, November 15, 2016, Dr. Pannuzio testified that Petitioner had diminished grip strength that was valid. (PX7-11) Dr. Pannuzios restrictions given on November 15, 2016 were due to both Petitioners' medial epicondylitis and the carpal tunnel syndrome. He opined that the epicondylitis caused Petitioner's reduced grip strength and Petitioner's hands going to sleep using power tools was from carpal tunnel. (PX7-13). If Petitioner's carpal tunnel symptoms returned he would recommend Petitioner undergo carpal tunnel surgery. (PX7-14) Dr. Pannuzio also opined that repetitive grasping with force caused aggravation or independent causation of carpal tunnel syndrome. (PX7-14) When asked if Petitioner's occupation required use of chainsaws and heavy machinery, Dr. Pannuzio replied it would be a causative factor to the development of carpal tunnel syndrome. (PX7-14,15)

While doing work for Respondent, Petitioner testified that he did notice that his hands would go numb after using the equipment and that his symptoms would persist longer as time went on. (Trans. 39) The Petitioner testified that after his April 3, 2015 injury, his hand condition was easier to aggravate and it got worse. (Trans. 40)

The Petitioner testified as he got close to being released, he did not feel he could operate a mower safely. He testified that he had tried to do lawn care at home and had difficulty doing those activities. The Petitioner testified that he has not been able to mow his lawn since his injury. (Trans. 32) The Petitioner did attempt to return to work, but he was told he did not have anything that was not running vibratory machines. The Petitioner was concerned for his safety and other workers' safety if he was using those machines. (Trans. 34-35) He was offered a position running the mower but did not believe he could do that position. He never heard back from his employer after that point and went on unemployment. While doing a job search for unemployment he found employment with his current employer. (Trans. 35)

On cross examination, the Petitioner was shown a copy of a text message of which he was offered a job on November 11, 2016. The job offer on that text was for $18.00 an hour full time using a Barko Mower. The Petitioner testified he did get this text but he did not think it was within his restrictions. (RX-3, Trans. 45-46) On November 2, 2016, Petitioner had received permanent restrictions form Dr. Pannunzio that precluding him from mowing. The Petitioner testified that the mower referred to on the restrictions was the same Barko mower offered to him by his employer. (Trans. 58)

The Petitioner still suffers from tingling in his fingers, lack of grip strength, and he is still unable to mow his lawn. (Trans. 35)

Mr. Chance Fivecoat testified on behalf the Petitioner. Mr. Fivecoat is a 33 year old operating engineer out of Local 965. (Trans. 59-60) In 2015, Mr. Fivecoat worked as a foreman for Respondent, and had been so employed for eleven years. He worked with the Petitioner running crews. (Trans. 60-61) Mr. Fivecoat testified his job was operating equipment and cutting trees 50 hours a week. Mr. Fivecoat testified that his job required

him to use a chainsaw, daily, to clear trees that were missed by the mower. He also testified that the chainsaws vibrated a great deal. (Trans. 62) Mr. Fivecoat testified he was familiar with a 930 Barko and that operating it would involve a great deal of vibration due to hitting rocks, tree stumps, and sometimes the teeth on the machine would break and cause the machine to bounce and vibrate, he testified that the foreman would use the mower daily. (Trans. 64) Mr. Fivecoat testified that all the equipment used would vibrate but the mower, Barko, was the worst by far. (Trans. 65) Mr. Fivecoat stopped working for Respondent about three years ago and joined the Operating Engineers Union. He testified he was fired, by Respondent for organizing the union. On cross examination he also testified that they accused him of drinking on the job and damaging equipment but he denied it happened.

Mr. Fivecoat's current job uses the same equipment today as he did for Respondent but on a much larger scale. (Trans. 66) Currently he makes $45.00 an hour working in Virginia. He testified that the Petitioner could have joined him but didn't due to his injuries. When Mr. Fivecoat traveled with the Petitioner when they worked for Respondent, Petitioner never complained about traveling for Respondent. (Trans. 68) Mr. Fivecoat confirmed that if someone had problems with their grip that it would be a safety concern and he would not want a worker without a good grip. (Trans. 74)

Michael Bishop testified on behalf of Respondent. He is a current foreman operator for Respondent and has worked for them since 1996. (Trans. 76) Mr. Bishop testified his current job is an equipment operator. (Trans. 77) He estimated that 90% of his job is done with equipment, but he would hand cut big trees and clear brush. (Trans. 78) Mr. Bishop then testified that an operator would not have to use a chainsaw because there are ground persons who do that job. (Trans. 79) He then identified pictures that showed a 930 Barko Mulcher, and it would be the one used by Petitioner. On a scale from 1-10 Mr. Bishop testified that a Barko mulcher would vibrate at a 3 so long as it was in good working order. (Trans. 84, 88) Respondent then demonstrated Exhibit 6, a video of a person operating a 930 Barko mulcher.

On cross examination, Mr. Bishiop admitted that the job site pictured in RX-4 and the video are not an example of every type of work place operated upon by Respondent. Mr. Bishop also testified that if his crew came to a creek, or terrain equipment could not run he would not clear those areas but an in-house crew would then come in and do that part of the site for him. (Trans. 92) Mr. Bishop then stated that if trees needed to be cut down they would shut down the whole job site but that sometimes his ground crews could cut down trees. (Trans. 94-95) Mr. Bishop admitted that when Petitioner was working with Respondent he would be expected to do everything including using a chainsaw. (Trans. 96) Concerning the video, he admitted that clearing brush and trees was not shown in the video but the 930 Barko was only operating on already cleared ground. (Trans. 97)

Respondent also called a William Merithew a regional supervisor to testify. Mr. Merithew testified when he worked with Petitioner and he was a general foreman. He worked with Petitioner and would operate a Barko mower, and occasionally used a chainsaw. (Trans. 106-107) Mr. Merithew testified that a Barko mower only vibrated as a 1 on a scale from 1-10. He testified that the job offer of returning to work to Petitioner was one hundred percent use of a Barko Mower. (Trans. 108) He also testified that Petitioner's witness, Chance Fivecoat was terminated for misuse of machinery, not for union activities. (Trans. 108-109)

On cross examination, he admitted that crews would need to use chainsaws. (Trans. 112) Mr. Merithew testimony concerning what a crew did when they came to a creek bed was in direct conflict with the testimony of Respondent's other witness. Mr. Merithew claimed that when a crew came to a creek all parties would hand clear the area and not bring in another crew. (Trans. 112-113) He admitted that while the union vote passed his company never did unionize due to the fact that the union "just never followed through." (Trans. 115)

Petitioner was then recalled as a witness. After viewing the video in question the Petitioner testified that it was an accurate depiction of clearing brush but if it had shown them hitting a mature tree the noise would increase and the machine would vibrate as the debris hit the mower deck. (Trans. 119) The Petitioner testified that 80 percent of the time he was mowing full trees as opposed to light brush. He also testified that his equipment was not always in top operating performance and that if you broke a tooth a welder from Cat in Hannibal Missouri would have to come out to fix it. And the company didn't like paying those bills. (Trans. 120) The Petitioner stated that when it comes to clearing creeks he agreed with Mr. Merithew's testimony over that of Mr. Bishop. (Trans. 121)

A series of emails were entered into evidence and labeled Petitioner Exhibit 6. In said emails dating from November 7, 2016-November 15, 2016. In said emails Petitioner's counsel, Kevin Morrisson requested both vocational counseling and if the Respondent will accommodate Petitioner's restrictions. Respondent's counsel, Andre Fernandez, responded on November 11, 2016 and claimed that Petitioner was released to full duty work but that Petitioner did not return to work. Petitioner's counsel responded that he disagreed and the job offer presented to the client was not within Petitioner's restrictions but if a job was offered within his restrictions Petitioner would return to work. On November 15, 2016, Petitioner's counsel again requested TTD, or vocational assistance.

Petitioner testified that he has been working at Midwest Manufacturing since March 13, 2017. Petitioner currently runs a robotic laser cutter. (Trans. 10) Petitioner described his job duties as typing in programs in a computer and using a forklift to load metal onto a table. (Trans. 11) Petitioner testified he worked Monday through Thursday from 7:00 AM to 4:30 PM, and Friday he works 7:00 AM to 11:00 AM. (Trans. 12) Petitioner testified that his starting pay at this job was $11.00/hr. after 90 days he got a dollar raise to $12.00/hr. After an additional 90 days he got another raise to $14.00/hr. As of June 2018 he got an additional raise to $17.00/hr. (Trans. 13). That is the wage he was earning at the time of Arbitration. Petitioner testified his company does not provide health insurance nor does he carry it currently. (Trans. 12)

CONCLUSIONS

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

The Arbitrator notes that with respect to the injury to Petitioner's right arm Respondent only disputed Petitioner's need for permanent restrictions and not to the actual causation of the injury. Therefore, the following decision will only address that specific issue with other causation issues were stipulated at the time of trial.

The Arbitrator finds that Petitioner's restrictions were in part, due to his right elbow injury. This is based upon the objectively noted reduced grip strength, in both Dr. Pannuzzio's records and the section 12 exam of Dr.

Merrell. Petitioner was noted to have reduced strength. It was also of note that followimg-surgery Petitioner complained he had difficulty using home mowers, and light machinery on a few occasions. Further, the Arbitrator notes that even though Dr. Merrell released Petitioner to work full duty, in his report he mentions that for safety reason's Petitioner may need to be assessed by an occupational doctor for the use of equipment and chainsaws. In his deposition, Dr. Pannuzzio mentioned Petitioner's safety in his explanation of why he restricted Petitioner. The Arbitrator finds that the restrictions imposed by Dr. Pannuzzio were in part due to Petitioner's right elbow injury.

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

On November 15, 2016 Petitioner was placed at MMI for his right elbow injury and allowed to return to work with permanent restrictions of no operating mowers or power equipment. Respondent did in fact offer Petitioner the opportunity to return to work, but the Arbitrator notes that the job offer was in direct violation of the restrictions placed by Dr. Pannuzio as it required Petitioner to operate a 930 Barko mower. The Arbitrator agrees with the Petitioner that the job in question was in violation of his job restrictions. This finding is based upon the credible testimony of the Petitioner and his witness which outweighed the evidence provided by Respondent.

The Arbitrator was not convinced by the testimony of Mr. Bishop, Mr. Merithew, or the video provided by Respondent. Mr. Bishop's testimony was found to be suspect and would change from question to question. Mr. Bishop's testimony even contradicted Respondent's other witness when discussing when trees were removed. The video provided of a Barko was not found to be persuasive. The video shows nothing of what the Barko was actually doing at that time of the video but simply showed a single joystick, and it was even admitted, by Mr. Bishop, that the Barko was simply clearing an area that had already been cleared. This did not accurately display a Barko mower did when actually clearing a wooded area, which all witnesses agreed was part of Petitioner's job duties. And it seems logical if the Barko mower as described that mulching trees with up to a 36 inch diameter would cause the machine to vibrate when it was doing these activities. This is especially true as Petitioner in his medical records and at trial described difficulty even operating a personal lawn mower. That a barko machine as pictures and described would also cause him difficulty is logical.

It should also be noted that when Respondent rejected Petitioner's permanent restrictions, in November of 2016, they did so without medical justification, and it was not until the March 23, 2017 Section 12 exam that Respondent had justification to cease benefits. Up until the date of Respondent's section 12 report Petitioner's restrictions prevented him from using a mower. Per Respondent's testimony and evidence submitted at trial the job offered to Petitioner was exclusively using a mower.

Petitioner's unrefuted testimony indicated that following his restricted release on November 15, 2016 he began searching for employment. Despite requests for vocational assistance and maintenance none was provided. On March 14, 2017, 17 weeks after his release Petitioner located employment at Midwest Manufacturing. He continues to work there as of the date of hearing. He has worked 42 hours per week since his initial date of hire.

When he originally hired on March 14, 2017, He was earning $11.00 per hour. He continued to earn this hourly wage for 90 days, or until June 11, 2017 (12 6/7 weeks). Beginning June 12, 2017, he was paid $12.00 per hour. He continued to earn this hourly wage for 90 days, or until September 9, 2017 (12 6/7 weeks). On September 10, 2017 he began earning $14.00 per hour and did so through May 31 2018 (37 5/7 weeks). Beginning on June 1, 2018 Petitioner was paid $17.00 per hour which was his rate of pay up to the date of hearing on June 29, 2018. June 1, 2017 through June 28. 2018 is 3 5/7 weeks.

The parties agreed that Petitioner was earning $875.63 at the time of his injury.

While earning $11.00 per hour Petitioner was earning $413.63 less than he was at the time of injury. ($11.00 per hour x 42 hours = $462.00. $875.63 - $462 = $413.63) Two thirds of that figure is $275.25.

While earning $12.00 per hour Petitioner was earning $371.63 less than he was at the time of injury. ($12.00 per hour x 42 hours = $504.00. $875.63 - $504.00 = $371.63) Two thirds of that figure is $247.75.

While earning $14.00 per hour Petitioner was earning $287.63 less than he was at the time of injury. ($14.00 per hour x 42 hours = $588.00. $875.63 - $588.00 = $287.63) Two thirds of that figure is $191.75.

While earning $17.00 per hour Petitioner was earning $161.63 less than he was at the time of injury. ($17.00 per hour x 42 hours = $714.00. $875.63 - $714.00 = $161.63) Two thirds of that figure is $107.75.

The Arbitrator therefore awards maintenance to Petitioner as follows:

Respondent shall pay Petitioner maintenance benefits of $583.75/week for 17 weeks, commencing 11/15/16 through 3/13/17, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $275.75/week for 12 6/7 weeks, commencing 3/14/17 through 6/11/17, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $247.75/week for 12 6/7 weeks, commencing 6/12/17 through 9/9/17, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $191.75/week for 37 5/7 weeks, commencing 9/10/17 through 5/31/18, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner maintenance benefits of $107.75/week for 3 6/7 weeks, commencing 6/1/18 through 6/28/18, as provided in Section 8(a) of the Act.

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

Based upon the foregoing, the Arbitrator finds Petitioner has established his entitlement to wage differential benefits pursuant to Section 8(d)1 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing 6/29/18, of $107.75/week until Petitioner reaches age 67 or five years from the date of the final award, whichever is later, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Benjamin Smith,

Petitioner,

vs. NO: 17 WC 16951

Asplundh Tree Service,

Respondent.

20IWCC0215

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, temporary total disability, temporary partial disability, medical expenses, prospective medical treatment and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 10, 2019, is hereby affirmed and adopted.

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

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

20IWCC0215

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 3 - 2020
o020620
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, BENJAMIN
Employee/Petitioner

Case# **17WC016951**

15WC035023

ASPLUNDH TREE SERVICE
Employer/Respondent

20IWCC0215

On 7/10/2019, 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 2.07% 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:

1727 LAW OFFICES OF MARK N LEE LTD
KEVIN J MORRISSON
1101 S SECOND ST
SPRINGFIELD, IL 62704

0000 RIPES NELSON BAGGOT KALOBRATSO
ANDREW FERNANDEZ
650 E DEVONE AVE
ITASCA, IL 60143

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

- [ ] 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

Benjamin Smith
Employee/Petitioner

v.

Asplundh Tree Service
Employer/Respondent

Case # **17** WC **16951**

Consolidated cases: **15 WC 35023**

20IWCC0215

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Urbana**, on **6/29/18**. 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. [x] 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. [x] Was timely notice of the accident given to Respondent?
F. [x] 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. [x] 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?
[x] TPD [ ] Maintenance [x] 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. [x] Other **Is Petitioner entitled to prospective medical**

FINDINGS

On **11/15/16**, 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 **$45,532.59**; the average weekly wage was **$875.63**.

On the date of accident, Petitioner was **37** years of age, ***married*** with **3** dependent children.

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

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

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

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

ORDER

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Pannunzio, as provided in Sections 8(a) and 8.2 of the Act.

Because temporary benefits were already awarded in Petitioner's arm claim against Respondent, 15 WC 35023,temporary benefits in this case are denied.

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

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

Michael K. Nowak, Arbitrator

7/8/19
Date

ICArbDec p. 2

JUL 10 2019

FINDINGS OF FACT

Petitioner testified that on April 3, 2015 he was employed with Asplundh Brush Control as a foreman for about seven years. (Trans. 14) The Petitioner testified that his job required him to run jobs, run equipment, and cut trees with chain saws. The Petitioner testified he worked about 50 hours a week. (Trans. 15) The Petitioner testified that on every job site he would bring a chainsaw to cut down dangerous trees, and in areas that were inaccessible to equipment he would hand clear it using a chainsaw. He would do so on a nearly daily basis. The Petitioner testified that the chainsaws vibrate a great deal and the chainsaw he used was a Husqvarna 372 XP he estimated at 68, 69 cc's in size. (Trans. 14-17).

The Petitioner also testified he would run equipment on the job sites. He described Barko mowers, which he described as a mower with a rotary head on the front of it. This mower was used for clearing trees, including large trees up to a 36-inch diameter. The machine would then grind those trees up into wood chips. The Petitioner testified that he would first use the mower to clear an area and then the chainsaws to clean up. (Trans. 18-19) The Petitioner testified the mower ran rough due to it spinning at close to 3,000 RPM and vibrates a great deal depending on what kind of wood you are mulching. (Trans. 20) The Petitioner further described that the mower would vibrate when he hit heavy trees, rocks, grind stumps down, even fences. (Trans. 23) The Petitioner testified that he used a joystick and foot pedals to control the machine. (Trans. 20)

The Petitioner also used an excavator to lay trees down to mulch them. The Petitioner testified that the excavator machine did not vibrate. (Trans. 21-22) The Petitioner also ran a John Deere 7400 tractor with a deck on the back. He also used this to mow 6 inch diameter trees with it. The John Deere had a steering wheel. He also testified that the John Deere vibrated a great deal due to its age. (Trans. 24-25) He also used a track chipper, which was on tracks and would grab a tree and then it would chip it up. He also testified that the machine vibrates a great deal, due to sitting on top of a wood chipper. (Trans. 25-26)

On April 3, 2015 the Petitioner was working and had to change a cylinder out of an upper boom on an excavator. He was carrying the cylinder with another employee up a hill when the other worker slipped in the mud and dropped his end. The Petitioner's right arm twisted and he felt a tear. He reported his injury but did not treat right away but his injury kept getting worse. (Tran. 27)

The first date of treatment, in evidence, is July 14, 2015, to a Dr. Dwyer who reported that Petitioner had injured himself on April 3, 2015, while carrying a 500 pound cylinder. Petitioner was complaining about pain in the posterior side of the elbow that radiates down into the forearm. Petitioner was ordered to undergo therapy and to return in six weeks.

Petitioner returned on August 25, 2015, with continued right elbow complaints. Dr. Dwyer then referred him to an elbow specialist.

On November 11, 2015, Petitioner reported to Dr. Pannunzio for examination. He gave his history of going to the hospital then was referred to a Dr. Dwyer. Petitioner complained of medial elbow pain but no numbness and or tingling. The impression at that time was medial epicondylitis, but he did not think that Petitioner suffered from cubital tunnel syndrome. Dr. Pannunzio wanted to order surgery for the epicondylitis at that time.

On April 12, 2016, Petitioner developed numbness and tingling in the ring and small fingers. At this point Dr. Pannunzio wanted to proceed with surgery to correct Petitioner's epicondylitis and cubital tunnel.

On June 9, 2016, Petitioner had a right ulnar nerve transposition and right medial epicondylectomy with debridement of medial conjoint tendon.

On June 21, 2016, Petitioner followed up and was reported to be doing nicely.

On July 25, 2016, Petitioner had another follow up but was reporting pain, he was expected to return to work with no restrictions in one months' time.

August 22, 2016, Petitioner was reported as doing well and performed a grip test which was noted to be better than most patients but there was still less strength noted on the right hand compared to the left side. It was noted that he would be released in about a month and he would be released to unrestricted activities.

On September 20, 2016, Petitioner was still reporting difficulty with vibrating tools and difficulty mowing his lawn. His restrictions were again continued with plans to release to full duty.

On October 24, 2016, Petitioner was still reporting problems with vibrating tools. Provocative maneuvers for carpal tunnel were negative. Petitioner was released to full duty to see how he responded, but to report back sooner if he had problems.

Petitioner returned on November 15, 2016 for the final time. During that exam his grip strength was measured at 80 pounds on the right/130 pounds on the left. Dr. Pannunzio then diagnosed Petitioner with carpal tunnel syndrome. It was opined that vibratory tools will provoke carpal tunnel. Dr. Pannunzio documented that he is giving permanent restrictions but was unsure if the restrictions were in due, in part, to Petitioners un-treated carpal tunnel condition.

On March 23, 2017, Petitioner attended a section 12 examination with Dr. Merrell. In his report it was noted the April 2015 accident. In his report, Dr. Merrell opinioned that Petitioner had chronic ulnar neuropathy at the right elbow. He agreed with Dr. Pannunzio that the original EMG test showed evidence of mild carpal tunnel. He agreed that the April 2015 injury caused Petitioner's injury to his right elbow. He also agreed that vibratory tools are probably provoking carpal tunnel. But it was not related to his April 2015 incident. At this point he recommended an FCE. He released Petitioner back to full duty but did note there may be some safety issues with operating equipment or use of a chainsaw.

On August 29, 2017 Dr. Merrell was deposed. Dr. Merrell testified that the April injury did cause the injury to Petitioner's right elbow. (RX- 16) Dr. Merrell testified that the carpal tunnel was not related to the April 2015 incident. (RX -17) Due to Petitioner performing well on his grip strength test, Dr. Merrell did not think Petitioner needed restrictions as of November 2016. (RX -19) Dr. Merrell did state that he was concerned about the use of chainsaw, and how an occupational safety expert would need to evaluate Petitioner. (RX-22) Dr. Merrell agreed that carpal tunnel can be exacerbated by the use of vibratory tools. (RX -27) Dr. Merrell also agreed that by exacerbate that would mean make the condition worse, and that chainsaws are a vibratory

tool. (RX -28) Dr. Merrell also agreed that a carpal tunnel release would be appropriate procedure in this claim. (RX -28,29)

On March 6, 2018 Dr. Pannunzio was deposed. Dr. Pannunzio testified that Petitioner's elbow conditions of medial epicondylitis and cubital tunnel were related to Petitioner's April 3, 2015 injury. Concerning Petitioner's final date of treatment, November 15, 2016, Dr. Pannunzio testified that Petitioner had diminished grip strength that was valid. (PX7-11) Dr. Pannunzios restrictions given on November 15, 2016 were due to both Petitioners' medial epicondylitis and the carpal tunnel syndrome. He opined that the epicondylitis caused Petitioner's reduced grip strength and Petitioner's hands going to sleep using power tools was from carpal tunnel. (PX7-13). If Petitioner's carpal tunnel symptoms returned he would recommend Petitioner undergo carpal tunnel surgery. (PX7-14) Dr. Pannunzio also opined that repetitive grasping with force caused aggravation or independent causation of carpal tunnel syndrome. (PX7-14) When asked if Petitioner's occupation required use of chainsaws and heavy machinery, Dr. Pannunzio replied it would be a causative factor to the development of carpal tunnel syndrome. (PX7-14,15)

While doing work for Respondent, Petitioner testified that he did notice that his hands would go numb after using the equipment and that his symptoms would persist longer as time went on. (Trans. 39) The Petitioner testified that after his April 3, 2015 injury, his hand condition was easier to aggravate and it got worse. (Trans. 40)

The Petitioner testified as he got close to being released, he did not feel he could operate a mower safely. He testified that he had tried to do lawn care at home and had difficulty doing those activities. The Petitioner testified that he has not been able to mow his lawn since his injury. (Trans. 32) The Petitioner did attempt to return to work, but he was told he did not have anything that was not running vibratory machines. The Petitioner was concerned for his safety and other workers' safety if he was using those machines. (Trans. 34-35) He was offered a position running the mower but did not believe he could do that position. He never heard back from his employer after that point and went on unemployment. While doing a job search for unemployment he found employment with his current employer. (Trans. 35)

On cross examination, the Petitioner was shown a copy of a text message of which he was offered a job on November 11, 2016. The job offer on that text was for $18.00 an hour full time using a Barko Mower. The Petitioner testified he did get this text but he did not think it was within his restrictions. (RX-3, Trans. 45-46) On November 2, 2016, Petitioner had received permanent restrictions form Dr. Pannunzio that precluding him from mowing. The Petitioner testified that the mower referred to on the restrictions was the same Barko mower offered to him by his employer. (Trans. 58)

The Petitioner still suffers from tingling in his fingers, lack of grip strength, and he is still unable to mow his lawn. (Trans. 35)

Mr. Chance Fivecoat testified on behalf the Petitioner. Mr. Fivecoat is a 33 year old operating engineer out of Local 965. (Trans. 59-60) In 2015, Mr. Fivecoat worked as a foreman for Respondent, and had been so employed for eleven years. He worked with the Petitioner running crews. (Trans. 60-61) Mr. Fivecoat testified his job was operating equipment and cutting trees 50 hours a week. Mr. Fivecoat testified that his job required

him to use a chainsaw, daily, to clear trees that were missed by the mower. He also testified that the chainsaws vibrated a great deal. (Trans. 62) Mr. Fivecoat testified he was familiar with a 930 Barko and that operating it would involve a great deal of vibration due to hitting rocks, tree stumps, and sometimes the teeth on the machine would break and cause the machine to bounce and vibrate, he testified that the foreman would use the mower daily. (Trans. 64) Mr. Fivecoat testified that all the equipment used would vibrate but the mower, Barko, was the worst by far. (Trans. 65) Mr. Fivecoat stopped working for Respondent about three years ago and joined the Operating Engineers Union. He testified he was fired, by Respondent for organizing the union. On cross examination he also testified that they accused him of drinking on the job and damaging equipment but he denied it happened.

Mr. Fivecoat's current job uses the same equipment today as he did for Respondent but on a much larger scale. (Trans. 66) Currently he makes $45.00 an hour working in Virginia. He testified that the Petitioner could have joined him but didn't due to his injuries. When Mr. Fivecoat traveled with the Petitioner when they worked for Respondent, Petitioner never complained about traveling for Respondent. (Trans. 68) Mr. Fivecoat confirmed that if someone had problems with their grip that it would be a safety concern and he would not want a worker without a good grip. (Trans. 74)

Michael Bishop testified on behalf of Respondent. He is a current foreman operator for Respondent and has worked for them since 1996. (Trans. 76) Mr. Bishop testified his current job is an equipment operator. (Trans. 77) He estimated that 90% of his job is done with equipment, but he would hand cut big trees and clear brush. (Trans. 78) Mr. Bishop then testified that an operator would not have to use a chainsaw because there are ground persons who do that job. (Trans. 79) He then identified pictures that showed a 930 Barko Mulcher, and it would be the one used by Petitioner. On a scale from 1-10 Mr. Bishop testified that a Barko mulcher would vibrate at a 3 so long as it was in good working order. (Trans. 84, 88) Respondent then demonstrated Exhibit 6, a video of a person operating a 930 Barko mulcher.

On cross examination, Mr. Bishiop admitted that the job site pictured in RX-4 and the video are not an example of every type of work place operated upon by Respondent. Mr. Bishop also testified that if his crew came to a creek, or terrain equipment could not run he would not clear those areas but an in-house crew would then come in and do that part of the site for him. (Trans. 92) Mr. Bishop then stated that if trees needed to be cut down they would shut down the whole job site but that sometimes his ground crews could cut down trees. (Trans. 94-95) Mr. Bishop admitted that when Petitioner was working with Respondent he would be expected to do everything including using a chainsaw. (Trans. 96) Concerning the video, he admitted that clearing brush and trees was not shown in the video but the 930 Barko was only operating on already cleared ground. (Trans. 97)

Respondent also called a William Merithew a regional supervisor to testify. Mr. Merithew testified when he worked with Petitioner and he was a general foreman. He worked with Petitioner and would operate a Barko mower, and occasionally used a chainsaw. (Trans. 106-107) Mr. Merithew testified that a Barko mower only vibrated as a 1 on a scale from 1-10. He testified that the job offer of returning to work to Petitioner was one hundred percent use of a Barko Mower. (Trans. 108) He also testified that Petitioner's witness, Chance Fivecoat was terminated for misuse of machinery, not for union activities. (Trans. 108-109)

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A series of emails were entered into evidence and labeled Petitioner Exhibit 6. In said emails dating from November 7, 2016-November 15, 2016. In said emails Petitioner's counsel, Kevin Morrisson requested both vocational counseling and if the Respondent will accommodate Petitioner's restrictions. Respondent's counsel, Andre Fernandez, responded on November 11, 2016 and claimed that Petitioner was released to full duty work but that Petitioner did not return to work. Petitioner's counsel responded that he disagreed and the job offer presented to the client was not within Petitioner's restrictions but if a job was offered within his restrictions Petitioner would return to work. On November 15, 2016, Petitioner's counsel again requested TTD, or vocational assistance.

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CONCLUSIONS

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

Issue (E): Was timely notice of the accident given to Respondent?

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

The Arbitrator finds that Petitioner did suffer an accident within the course and scope of his employment, Respondent was timely notified, and that Petitioner's injury was caused by his employment with Respondent.

Petitioner's diagnosis of right hand carpal tunnel syndrome did not occur until November 15, 2016. Petitioner was diagnosed with carpal tunnel during treatment for another work related injury to his right shoulder which he suffered during the course of his employment with Respondent. It is unclear how Respondent was not put on notice of this diagnosis as it is evident that the Respondent reviewed the records, which established the diagnosis and causation on or near this diagnosis date and even had a nurse case manager assigned to the claim at the time. The respondent offered no evidence that they were prejudiced. In fact, their own IME even discussed Petitioner's carpal tunnel syndrome. Therefore, the Arbitrator rules in favor of the Petitioner in regards to notice.

With regard to the issues of accident and causation, both Petitioner's doctor and Respondent's Section 12 doctor agreed that Petitioner had right carpal tunnel syndrome and that the condition was aggravated by the use of vibratory tools like chainsaws. Both doctors' further agree carpal tunnel was present on Petitioner's May 13, 2016 EMG, but it wasn't diagnosed until November 15, 2016. At the time of trial all testifying witnesses agreed that Petitioner would use a chainsaw during his employment with Respondent. Mr. Bishop did say he doesn't currently use a chainsaw, but upon further questioning admitted that Petitioner did when he was working for Respondent. Respondent's other witness Mr. Merithrew even acknowledged that Petitioner's job required chainsaw use but disagreed to the amount of use. It is unclear based upon the evidence presented at trial what Respondent is disputing. All parties' experts agreed that carpal tunnel would be provoked or aggravated by the use of vibratory machines like chainsaws and all parties agreed that Petitioner was required to use one on a regular basis. The only dispute was to the degree Petitioner used a chainsaw and the Arbitrator finds the testimony of Petitioner and Mr. Fivecoat more credible in that regard. Therefore, with both the treating physician and section 12 examiner in agreement the Arbitrator finds that Petitioner suffered a repetitive trauma from his work with Respondent that manifested in carpal tunnel syndrome and that it was casually related to Petitioner's employment with Respondent.

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

Issue (O): Is Petitioner entitled to any prospective medical care?

All medical to date, was paid with Petitioner's 4/3/2015 injury claim, 15 WC 35023. Both Dr. Pannunzio and Dr. Merrell testified that prospective treatment, including surgery, was appropriate for Petitioner's carpal tunnel syndrome. Therefore, the Arbitrator awards prospective medical for Petitioner's carpal tunnel syndrome for further assessment up to and including possible surgical options as recommended by Dr. Pannunzio.

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

Petitioner's unrefuted testimony indicated that following his restricted release on November 15, 2016 he began searching for employment. Dr. Pannunzio opined that Petitioner's restrictioms were based, at least in part, on his carpal tunnel syndrome. Despite requests for vocational assistance and maintenance none was provided. On March 14, 2017, 17 weeks after his release Petitioner located employment at Midwest Manufacturing. He continues to work there as of the date of hearing. He has worked 42 hours per week since his initial date of hire.

When he originally hired on March 14, 2017, He was earning $11.00 per hour. He continued to earn this hourly wage for 90 days, or until June 11, 2017 (12 6/7 weeks). Beginning June 12, 2017, he was paid $12.00

per hour. He continued to earn this hourly wage for 90 days, or until September 9, 2017 (12 6/7 weeks). On September 10, 2017 he began earning $14.00 per hour and did so through May 31 2018 (37 5/7 weeks). Beginning on June 1, 2018 Petitioner was paid $17.00 per hour which was his rate of pay up to the date of hearing on June 29, 2018. June 1, 2017 through June 28. 2018 is 3 6/7 weeks.

The parties agreed that Petitioner was earning $875.63 at the time of his injury.

While earning $11.00 per hour Petitioner was earning $413.63 less than he was at the time of injury. ($11.00 per hour x 42 hours = $462.00. $875.63 - $462 = $413.63) Two thirds of that figure is $275.25.

While earning $12.00 per hour Petitioner was earning $371.63 less than he was at the time of injury. ($12.00 per hour x 42 hours = $504.00. $875.63 - $504.00 = $371.63) Two thirds of that figure is $247.75.

While earning $14.00 per hour Petitioner was earning $287.63 less than he was at the time of injury. ($14.00 per hour x 42 hours = $588.00. $875.63 - $588.00 = $287.63) Two thirds of that figure is $191.75.

While earning $17.00 per hour Petitioner was earning $161.63 less than he was at the time of injury. ($17.00 per hour x 42 hours = $714.00. $875.63 - $714.00 = $161.63) Two thirds of that figure is $107.75.

The Arbitrator finds Petitioner was entitled to TTD benefits from November 25, 2016 and TPD at varying amounts from March 14, 2017 until June 27, 2018, the day before the hearing. However, the Arbitrator awarded benefits in the same dollar amount in 15 WC 35023 and awarded Section 8(d)2 benefits thereafter. Therefore further benefits for the same period of time in this case are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Amber Beasley,

Petitioner,

vs. NO: 19 WC 4522

Nth Degree,

Respondent.

20IWCC0216

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b-1) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons stated below. The Commission finds Petitioner sustained injuries that arose out of and in the course of her employment on January 22, 2019. The Commission also finds that Petitioner's current condition of ill-being regarding her left knee, left hip, and lumbar spine is causally related to the work accident. As such, the Commission awards reasonable and related medical expenses, prospective medical treatment, and temporary total disability benefits relating to Petitioner's left knee, left hip, and lumbar spine. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Findings of Fact

On the date of accident, Petitioner worked for Respondent; however, Respondent terminated her on January 25, 2019, for reasons unrelated to the work incident. Respondent is a contractor that builds and dismantles booths for trade shows at McCormick Place in Chicago. Petitioner began working for Respondent in June 2018 as a customer service representative. Her job duties included acting as a liaison between the company's sales representatives and exhibitors. Petitioner also performed payroll and billing services. She had to travel to McCormick Place approximately 50% of the time; otherwise, she worked in Respondent's main office.

Respondent's office is located in a large industrial/business complex. While a parking lot services the entire complex, there are multiple parking spaces reserved for Respondent. Petitioner

estimated that approximately five parking spaces were reserved with signs that read "Nth Degree Reserved Parking" on the date of accident. She testified that the pictures in Petitioner's Group Exhibit 5 accurately depict both the condition of the parking lot on the date of accident and the signs reserving spaces for Respondent's use. On the date of accident, six employees, including Petitioner, regularly worked in the office. Petitioner testified that there is no walkway from the parking spaces to the building entrance. Instead, employees must walk through the parking lot. Petitioner testified that her direct supervisor, Theresa Just, as well as the city manager, Gary Wannamaker told her to park in the spaces reserved for the company.

Under cross-examination, Petitioner agreed that the business complex includes a total of six buildings that all use the parking lot. She did not know how many individual businesses are located in each of the six buildings and did not recall whether there was a large sign with a directory at the entrance to the parking lot. Petitioner testified that she was only familiar with section of the parking lot closest to Respondent's office. She did not know if there are parking spaces in front of each of the buildings. Petitioner testified that to her knowledge, none of Respondent's vendors or customers visited its office. She testified that the parking lot did not have a gate at its entrance. Furthermore, she agreed that no guard checked vehicles or permits. There is no evidence Respondent or the business complex issued parking permits to employees. Petitioner testified that she usually parked in the same space each day she worked in the office. Petitioner never saw her coworkers park in spaces other than those reserved for the company. Petitioner did not believe she would suffer any consequences if she parked in a space that was not reserved for Respondent. She also did not know of anyone receiving a reprimand or other punishment for parking in spaces other than those reserved for Respondent. Petitioner testified that while no one told her to report any unauthorized or unknown vehicles parked in the reserved spaces, she likely would have reported such a vehicle to a supervisor.

Petitioner testified that there was a snowstorm a few days before the date of accident. She testified that the weather on January 22, 2019, was cold and it was raining. She further testified that due to the weather conditions, the pavement was icy. Petitioner went to lunch with her coworker (then fiancé and now husband) at approximately noon. A half hour later, they returned to the office and parked in one of the reserved parking spaces. Petitioner was seated in the front passenger seat. Petitioner testified that she slipped and fell on ice when she exited the car. Petitioner testified,

> "When I stepped out, I stepped out with my right foot. I was on the passenger side. I stepped with my right foot. As soon as I put my left foot down it slipped, kind of fell behind me. I landed on my knee. And instead of bracing forward I braced backwards because I felt like I was going to fall and either hit my head on the car or the pavement."

(Tr. at 42-43). Petitioner testified that she limped into the office and immediately reported the incident to her supervisor. She initially denied medical treatment; however, after completing her work shift, her left knee and low back felt worse. She visited the ER later that night. Petitioner was not rushing and was not carrying anything work-related when she exited the car. There was no pending meeting that required her presence. Petitioner agreed that her left knee bore the brunt of

the impact and she then fell back while trying to regain her balance.

Petitioner testified that she did not know if Respondent was responsible for any maintenance—including snow removal—in the parking lot. She never saw any of her coworkers perform any maintenance duties in the parking area closest to Respondent's office. Petitioner did not fall when she arrived to work that morning or when it snowed a few days before her accident. Petitioner testified that she has no knowledge regarding who owns the parking lot or any terms in Respondent's lease.

Petitioner visited the ER the same day she sustained her injury. She reported slipping on ice and falling at around 12:30 p.m. In addition to complaining of left knee pain, Petitioner complained of pain on the lower left side of her back when she tried to bear weight on her left knee. A left knee x-ray was normal and the nurse practitioner prescribed a knee immobilizer. The nurse practitioner diagnosed a back strain and left knee sprain.

On January 23, 2019, Dr. Chhadia, an orthopedic surgeon, examined Petitioner. Petitioner provided a consistent mechanism of injury reporting that when stepping out of her car at work, her left leg slipped and she fell on her left knee. She reported feeling immediate pain in her left knee and low back with pain radiating down through her left hip. Petitioner denied any pre-accident issues. Petitioner complained of pain radiating around her entire left knee. She reported pain radiating up to the left hip and into her back. Petitioner also complained of low back stiffness with intermittent spasms. Dr. Chhadia diagnosed a lumbar sprain/strain, possible disc bulge, left SI joint sprain/strain, left hip sprain, and possible left knee labral or meniscus tear. He ordered an MRI of the lumbar spine and physical therapy. Petitioner was to continue wearing a left knee brace and the doctor restricted Petitioner to light duty work. Between February 7, 2019, and March 29, 2019, Petitioner attended 17 physical therapy sessions. On February 20, 2019, Petitioner returned to Dr. Chhadia and reported her left knee and hip were improving with only occasional soreness. However, she reported her low back pain had worsened and the pain radiated into her middle back. She complained of pain so intense that she could not get out of bed a few days earlier.

The March 21, 2019, MRIs of Petitioner's lumbar spine and sacrum were both normal. On May 15, 2019, Petitioner returned to Dr. Chhadia's office with complaints of continued pain in her low back, left hip, and left knee. The doctor's physician assistant examined Petitioner and referred her to Dr. Novoseletsky, a pain management doctor, for further treatment relating to Petitioner's continued lumbar spine complaints. August 6, 2019, Dr. Chhadia diagnosed a lumbar sprain/strain, bilateral SI joint sprain/strain and sacroiliitis, a left hip strain, and a left knee strain with a possible meniscus tear.

Dr. Novoseletsky first examined Petitioner on August 15, 2019. On that day, Petitioner complained of neck stiffness and low back pain. Petitioner reported a consistent mechanism of injury to the doctor. Petitioner complained of constant low back pain. She described the pain as non-radiating and "achy/throbbing." She denied neck pain but reported stiffness in her neck. Petitioner rated her pain at 8/10. The exam revealed a normal gait. Dr. Novoseletsky diagnosed bilateral lumbar facet syndrome and recommended a left L2-5 lumbar medial branch block for diagnostic purposes. An August 22, 2019, MRI of the left knee had the impression of multifocal chondromalacia most notably along the patella, and the possibility of a small vertical tear at the

20IWCC0216

junction of the posterior horn and posterior root ligament of the medial meniscus. There are no additional office visit notes in evidence.

Petitioner testified that she discussed her work restrictions with Respondent, and she returned to work for a day and a half. She testified Respondent then terminated her on or around January 25, 2019. She has not worked in any capacity since her termination. Petitioner testified that no doctor cleared her to return to work full duty since the work incident. She testified that her low back condition continued to worsen during physical therapy. She has not undergone the lumbar injections recommended by Dr. Novoseletsky. She wants to proceed with the recommended injections and continue treatment for her low back and left knee. Petitioner testified that her left knee and low back remain very painful. She wore a prescribed knee brace and back brace and testified that her pain medication was not working during the hearing. She testified that she is unable to sit or stand for prolonged periods without shifting her position periodically. Prior to the work incident, she had no complaints regarding her left knee or lumbar spine and she was able to perform all her work duties without complaint.

Conclusions of Law

Petitioner bears the burden of proving each element of her claim by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). She must show by a preponderance of the evidence that she suffered a disabling injury which arose out of and in the course of her employment. *Id.* The phrase "in the course of employment" refers to the time, place, and circumstances surrounding the injury. *Id.* To satisfy the "arising out of" prong, Petitioner must show that the injury "had its origin in some risk connected with, or incidental to, the employment." *Id.* After carefully considering the evidence and relevant law, the Commission finds Petitioner met her burden of proving her injuries arose out of and in the course of her employment.

As an initial matter, the Commission finds Petitioner testified credibly regarding her mechanism of injury. While Petitioner's testimony regarding the circumstances regarding her termination by Respondent was at best disingenuous, the Commission finds there is no evidence disputing Petitioner's testimony that her left knee, left hip, and low back injuries are the result of a slip and fall on ice in the parking lot outside Respondent's office on the date of accident.

The Commission must next determine whether Petitioner's fall occurred on Respondent's premises. "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, or within a reasonable time before and after work are generally deemed to have been received in the course of the employment." *Suter v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th) 130049WC, ¶18. Likewise, the "fact that the employer leases space and the area where the injury occurs is used by other tenants or the public does not necessarily mean it is not the employer's premises." *Suter*, 2013 IL App (4th) 130049WC at ¶34 (quoting *County of Cook v. Indus. Comm'n*, 165 Ill. App. 3d 1005, 1009 (1988)). Instead, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. *Mores-Harvey v. Indus. Comm'n*, 345 Ill. App. 3d 1034, 1040 (2004). If so, then the parking lot constitutes part of the employer's premises. *Suter*, 2013 IL App (4th) 130049WC at ¶30. There is no evidence regarding whether Respondent was responsible for maintaining any portion of the parking lot or whether Respondent's lease required the reservation

of a certain number of parking spaces for its employees' use. However, the unrefuted credible evidence proves there were approximately five parking spaces reserved specifically for the use of Respondent. Petitioner testified that generally only five people were based in the office. Likewise, Petitioner credibly testified that her supervisors told her to park in the parking spaces reserved for Respondent. Petitioner only parked in the reserved parking spaces and testified she never saw anyone other than Respondent's employees use the reserved spaces. There is no evidence there were alternative places for employees to park their vehicles such as available street parking in the vicinity of Respondent's office. Furthermore, the evidence proves Respondent's employees could only access the entrance to the office through the parking lot. In similar circumstances, the Illinois Supreme Court determined that "if the employer provides a parking lot which is customarily used by its employees, the employer is responsible for the maintenance and control of that parking lot." *De Hoyos v. Indus. Comm'n*, 26 Ill. 2d 110, 113 (1962). After analyzing the relevant facts, the Commission finds the parking lot is part of Respondent's premises. Thus, Petitioner did sustain an injury in the course of her employment.

To determine whether Petitioner's injury arose out of her employment, the Commission must consider the type of risk to which Petitioner was exposed. In Illinois, there are three categories of risk to which an employee may be exposed: 1) risks distinctly associated with one's employment, 2) risks that are personal to the employee, and, 3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed. *Dukich v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶31. However, Illinois courts have consistently reasoned that a risk analysis in unnecessary when the injury is the direct result of a hazardous condition on the employer's premises. Instead, courts have deemed injuries resulting from a hazardous condition or defect such as ice on the employer's premises to be "risks distinctly associated with the employment." *See, Dukich*, 2017 IL App (2d) 160351WC at ¶40. Based on Petitioner's credible and unrefuted testimony, the Commission finds Petitioner's injuries are the direct result of a hazardous condition on Respondent's premises and therefore arose out of her employment. For the foregoing reasons, the Commission reverses the Decision of the Arbitrator and finds Petitioner met her burden of proving she sustained a compensable injury arising out of and in the course of her employment.

The Commission must also address the question of whether Petitioner's current condition of ill-being is causally related to the work injury. After carefully reviewing the totality of the evidence, the Commission finds Petitioner sustained a lumbar sprain/strain, bilateral SI joint sprain/strain, a left hip strain, and a left knee strain with a possible meniscus tear due to the work accident. It is clear that Petitioner slipped and fell on ice. The medical evidence corroborates Petitioner's testimony that she sustained injuries to her left knee, left hip, and lumbar spine when she fell. While the MRIs of her lumbar spine and sacrum were normal, Petitioner's consistent complaints of low back pain are well-documented throughout the medical records. Additionally, Petitioner's treating physicians noted objective findings supporting Petitioner's complaints regarding her lumbar spine and left knee in particular. In the absence of any evidence suggesting Petitioner's current complaints regarding her low back, left knee, and left hip are not related to the work accident, the Commission finds Petitioner's current condition of ill-being regarding those specific body parts is causally related to the work injury.

However, the Commission finds Petitioner did not meet her burden of proving her more

Bibliography

recent complaints regarding her cervical spine are causally related to the work accident. There is no evidence of any complaints of pain or stiffness in Petitioner's neck prior to August 2019, or seven months after the work incident. Given this significant delay in any cervical complaints, Petitioner failed to prove by a preponderance of the evidence that she sustained an injury to her cervical spine due to the January 22, 2019, work accident.

As Petitioner's current condition of ill-being regarding her lumbar spine, left knee, and left hip is causally related to the work accident, the Commission must award appropriate medical expenses. The Commission finds Respondent is liable for any outstanding medical expenses for reasonable, necessary, and causally related treatment for Petitioner's lumbar sprain/strain, bilateral SI joint sprain/strain, left hip strain, and left knee strain with a possible meniscus tear through the date of hearing, November 19, 2019. The Commission denies all medical expenses for treatment relating to Petitioner's cervical spine complaints.

After carefully considering the totality of the evidence, the Commission finds Petitioner has not yet reached maximum medical improvement for her injuries relating to this work accident. Petitioner continues to suffer from significant complaints regarding her left knee and lumbar spine in particular. She testified that she would like to continue treatment for her injuries and wants to proceed with the lumbar medial branch block recommended by Dr. Novoseletsky. Therefore, the Commission finds Petitioner is entitled to the recommended left lumbar medial branch block at L2-L5.

Finally, the Commission finds Petitioner has met her burden of proving she is entitled to temporary total disability ("TTD") benefits. It is undisputed that Petitioner has not returned to work in any capacity since January 25, 2019. None of Petitioner's treating physicians have cleared her to return to work full duty since the work accident. Respondent terminated Petitioner for reasons unrelated to the work incident on January 25, 2019; consequently, it is undisputed that Respondent has not accommodated Petitioner's work restrictions since that date. Petitioner's weekly TTD rate is $515.78. The Commission finds Petitioner is entitled to TTD benefits from January 26, 2019, through November 19, 2019, totaling 42-4/7 weeks. Thus, Respondent shall pay $21,957.27 in TTD benefits to Petitioner.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 2, 2020, is reversed in its entirety.

IT IS FURTHER ORDERED that Petitioner sustained an accident that arose out of and in the course of her employment on January 22, 2019.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being relating to her lumbar spine, left knee, and left hip is causally related to the January 22, 2019, work accident. Petitioner's cervical spine complaints are not causally related to the work accident.

IT IS FURTHER ORDERED that Respondent shall pay outstanding reasonable and necessary medical charges that relate only to treatment for Petitioner's lumbar sprain/strain,

20IWCC0216

bilateral SI joint sprain/strain, left hip strain, and left knee strain with a possible meniscus tear, as provided in Sections 8(a) and 8.2 of the Act. Respondent is not liable for charges relating to Petitioner's cervical spine complaints.

IT IS FURTHER ORDERED that Respondent shall approve and pay for reasonable and necessary prospective medical treatment in the form of the lumbar medial branch block recommended by Dr. Novoseletsky.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $**515.78**/week for **42-4/7** weeks, commencing **January 26, 2019,** through **November 19, 2019**, as provided in Section 8(b) of the Act.

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

IT IS FURTHER ORDERED that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $43,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 3 - 2020

d: 3/24/20
TJT/jds
51

Thomas J. Tyrrell

Maria E. Portela

20IWCC0216

DISSENT

I disagree with the majority's opinion reversing the decision of the Arbitrator. Based on the evidence presented, I would affirm the Arbitrator's decision finding Petitioner failed to prove her accident arose out of and in the course of her employment when she slipped and fell in a parking lot, but using a different legal analysis.

To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n,* 201 Ill. 2d 187, 194 (2002). An injury arises out of one's employment if it originated from a risk connected with or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. *Orsini v. Industrial Comm'n*, 117 Ill 2d 38, 44, 509 N.E.2d 1005, 1008 (1987).

The decisive issue in parking lot cases usually is whether or not the lot is owned by the employer or controlled by the employer or is a route required by the employer. *Maxim's of Illinois, Inc. v. Industrial Comm'n.*, 35 Ill. 2d 601, 604, 221 N.E.2d 281 (1966). The employer's control or dominion over the parking lot is a significant factor in the analysis. *Joiner v. Industrial Comm'n*, 337 Ill. App. 3d 812, 816 (2003). The supreme court has also recognized that "[r]ecovery has *** been permitted for injuries sustained by an employee in a parking lot provided by *and* under the control of an employer. (emphasis added) *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 484 (1989).

In determining whether the parking lot exception to the general premises rule applies, the issue is whether the employer "provided" the parking lot in question to its employees. To determine whether a parking lot was "provided", the following factors are to be considered: (1) whether the parking lot was owned by the employer, (2) whether the employer exercised control or dominion over the parking lot, and (3) whether the parking lot was a route required by the employer. *Walker Bros. v. Ill. Workers' Comp. Comm'n,* 2019 IL App (1st) 181519WC, P23, P23, 2019 IL App (1st) 181519W, 2019 Ill. App. LEXIS 812, *14

In the present case, Petitioner sustained injuries after slipping on ice while exiting the passenger side of a vehicle after returning from lunch. (T. 32) The vehicle was parked in the parking lot in an industrial complex known as Elmhurst Metro Court Business Park where there were multiple businesses, including Respondent. (T. 55, 56) There were 6 buildings in that parking lot and there was parking surrounding each building. (T. 55, 56) A "pseudo" street passed between two large sections of the buildings. (T. 57) There were two entrances to the business park, and both were off public streets. (T. 57) During the time Petitioner worked there, from June 2018 to January 2019, she saw vendors, trucks and other cars going through the parking lot. (T. 58) There was nothing restricting the public from entering the business park. (T. 58) There was no gate and no guard checking business tags. (T. 58, 59) Petitioner was not required to have a vehicle tag to park in the lot and was not required to register her license plate in order to park in the lot. (T. 72)

20IWCC0216

Petitioner testified there were 5 to 6 parking spots reserved for employees of Respondent. (T. 59) Petitioner further testified there were only 5 signs in the parking lot reserving the parking spots. (T. 34) These 5 signs stated, "Nth Degree Reserved Parking". (PXB) These spots were reserved exclusively for employees of Nth Degree. (T. 34) Petitioner testified she was told by her supervisor to park in the spots that were for Nth Degree. (T. 38) Petitioner further explained, "...There were other people in this complex, so that's why they have those spots reserved." (T. 38)

On cross examination, Petitioner agreed she was not told to park in a specific spot. (T. 59) Most of the time she parked in the same spot every day. (T. 59) If Petitioner had parked in one of the parking spots other than the ones marked for employees of Nth Degree, there were no consequences. (T. 70) Petitioner had no knowledge of anyone being reprimanded or punished if they parked in another spot. (T. 70)

Here, Petitioner failed to prove by a preponderance of the evidence Respondent "provided" the lot. First, there is no evidence Respondent owned the parking lot. In fact, Petitioner testified she did not know who owned it.

Second, there was no evidence Respondent exercised control, dominion, maintained, or contributed to the maintenance of, the parking lot. Petitioner testified she never saw a snow removal truck or anyone in the parking lot salting or removing ice or snow. (T.88-89) Petitioner never saw anyone from the other businesses removing ice and snow in the lot. (T. 90) There was no evidence showing Respondent was responsible for maintaining the parking lot or any section thereof, i.e. no lease agreement was admitted, or witness testimony presented, proving Respondent was responsible for maintaining the lot.

Moreover, Petitioner admitted on cross examination she was not told to park in a specific spot. (T. 59) Furthermore, if she parked in one of the spots other than the ones reserved for "Nth Degree", there would not have been consequences, reprimands or punishment. (T. 70) From her testimony, Petitioner was free to park in the reserved spot or any other spot in the parking lot. The spots were not "assigned" parking spots but rather perks for the convenience of its employees.

Finally, the route Petitioner selected was not required by Respondent. The office is in a large industrial complex that houses 6 buildings that is open to the public. There is a main entrance to the building and a warehouse entrance. Petitioner would walk through the parking lot and into the main entrance. This is the same entrance used by the public. The location where Petitioner's vehicle was parked was not required by Respondent. Ergo, the path Petitioner selected was of her own choosing. Petitioner did not present evidence that she was required to use a certain route.

Petitioner failed to prove the parking lot was "provided" by Respondent. For this reason, the Arbitrator's finding should be affirmed. Thus, I respectfully dissent.

Kathryn A. Doerries

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19 (b-1) ARBITRATOR DECISION

BEASLEY, AMBER
Employee/Petitioner

Case# **19WC004522**

NTH DEGREE
Employer/Respondent

20IWCC0216

On 1/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

Unless a party does the following, this decision shall be entered as the decision of the Commission:

1) Files a Petition for Review within 30 days after receipt of this decision; and

2) Certifies that he or she has paid the court reporter $ 604.80 for the final cost of the arbitration transcript and attaches a copy of the check to the Petition; and
3) Perfects a review in accordance with the Act and Rules.

If the Commission reviews this award, interest of 1.56% 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:

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STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ 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
19(b-1)

Amber Beasley
Employee/Petitioner
v.
Nth Degree
Employer/Respondent

Case # **19** WC **4522**

Consolidated cases: _____

20IWCC0216

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **October 10, 2019**. Respondent filed a *Response* on **none**. The Honorable **Christine M. Ory**, Arbitrator of the Commission, held a pretrial conference on **October 29, 2019**, and a trial on **November 19, 2019**, and **December 6, 2019,** in the city of **Wheaton**. 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. X 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. X Was timely notice of the accident given to Respondent?
F. X 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. X 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 Is Petitioner entitled to any prospective medical care?
L. X What temporary benefits are in dispute?
☐ TPD ☐ Maintenance X TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of claimed accident, **January 22, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**24,757.64**; the average weekly wage was $**773.68**.

On the date of accident, Petitioner was **24** years of age, ***single*** with **2** dependent children.

Respondent ***does not owe*** for all reasonable and necessary medical services.

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

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

ORDER

Petitioner failed to prove she was injured in an accident on January 22, 2019, that arose out of and in the course of her employment with respondent.

Petitioner's claim is hereby denied and case is dismissed.

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter $**604.80** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) 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.

Christine M Day

Signature of Arbitrator

December 30, 2019

Date

JAN 2 - 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Amber Beasley	)	
Petitioner,	)	
vs.	)	**No. 19 WC 4522**
Nth Degree	)	
Respondent.	)	
	)	**20 IWCC0216**

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

A pre-trial conference was held on October 29, 2019; no one appeared on behalf of the respondent although proper notice was provided under the provisions of §19 b 1 of the Act. This matter proceeded to hearing under the provisions of §19 b 1 on November 19, 2019 in Wheaton. Proofs were reopened in Chicago on December 6, 2019 for purposes of conforming the exhibits to Supreme Court Rule 138.

The parties agree that on January 22, 2019, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. The parties agree petitioner's earnings in the year pre-dating the accident was $24,787.64 and her average weekly wage, calculated pursuant to §10, was $773.68.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment with respondent.
2. Whether petitioner gave timely notice of the accident.
3. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
4. Whether respondent is liable for medical bills.
5. Whether petitioner is entitled to temporary total disability.

STATEMENT OF FACTS

Petitioner testified she was last employed by respondent on January 25, 2019 when she was terminated due to her inability to travel. Respondent is an exhibitor appointed contractor; they build and dismantle booths and exhibits at McCormick Place. Petitioner was employed by respondent as a customer service representative. As such, she was liaison between sales reps and exhibitors. She was required to travel to McCormick Place which she did fifty percent of the time. She had been employed by respondent since June 20, 2018.

On January 22, 2019, petitioner was returning from lunch at approximately 12:30 P M. As she stepped out of the car she slipped and fell onto her left knee. She braced herself with her arms behind her so she would not fall on her head. The parking lot where petitioner fell was an industrial complex, with designated parking spots for respondent's employees. Petitioner identified photos of the parking lot and parking spots as PX.5 and 5a. Petitioner had been directed by her supervisor Theresa Just and the city manager, Gary Wannamaker to park in these spots identified for respondent's employees. Petitioner could only use the main entrance to enter respondent's building.

Petitioner testified it had snowed a few days before January 22, 2019. On January 22, 2019, it was cold and rainy and everything had turned to ice. She slipped on ice as she exited the vehicle on the passenger's side. She then limped inside and a co-worker, Carrie, went and got an ice pack from Walgreen's. She reported her accident to Tom Keller who told her to call the nurse triage. The nurse triage asked if petitioner needed medical assistance; which petitioner declined.

By the time petitioner left for home that day, she had pain in her left knee and lower back. That evening her fiancé took her to the emergency room at Delnor Hospital. X-rays were taken of her left knee and back. She went to Suburban Orthopaedics on January 23, 2019, where she saw Dr. Ankur Chhadia. Dr. Chhadia prescribed physical therapy and pain medications; she was also given work restrictions. She returned to work with the restrictions and worked a day and a half when she was fired. She remains under work restrictions by Dr. Chhadia.

Physical therapy was initiated on February 7, 2019. Her back got worse. She underwent a lumbar MRI on March 21, 2019. Dr. Chhadia also referred her for a MRI of her left knee and referred her to Dr. Novoseletsky. She saw Dr. Novoseletsky on August 15, 2019, who recommended lumbar spine injections. She has yet to obtain the injections as the insurance company had not approved payment. She obtained a MRI of the left knee on August 22, 2019. She wishes to receive the injections and additional treatment from Suburban Orthopaedics.

She reported she was in a lot of pain in her left knee and was wearing a prescribed brace. She reported she had pain in her low back and was also wearing a back brace.

On cross-examination, petitioner agreed she had been written up for absenteeism. She agreed she had a discussion concerning her ability to travel for work prior to the claimed work accident. She denied she was to complete paperwork regarding her termination when she returned from lunch on January 22, 2019.

Northwestern Memorial Delnor Hospital Records & Bill (PX.1)

Petitioner was seen in the emergency room on January 22, 2019 after reportedly slipping on snow or ice suffering a sprain/strain to her left knee and lower back. She was released to return to work on January 24, 2019. The bill for services rendered was $2,156.75.

Valley Emergency Care Management Bill (PX.2)

The bill for services rendered by the emergency room physician on January 22, 2019 is $1,034.00.

Radiology Subspecialist of Northern Illinois Bill (PX.3)

The radiologist bill for services rendered on January 22, 2019 is $47.00.

Suburban Orthopaedics Records & Bills (PX.4)

Petitioner was initially seen at Suburban Orthopaedics by Dr. Chhadia on January 23, 2019 after reportedly slipping while getting out of her car at work on January 22, 2019. She was diagnosed with left SI joint sprain/strain, left hip sprain/strain and possible labral tear and possible meniscus tear of the left knee. She was placed on light duty.

She was seen by Dr. Chhadia on February 20, 2019, March 27, 2019, May 15, 2019 and August 6, 2019. She was also seen by Dr. Novoseletsky on August 15, 2019, who recommended injections. The MRI was reported as normal. She also underwent physical therapy.

Medical bills total $18,267.92.

Photos of Scene (PX.5)

Petitioner identified the photos as the way the parking lot was on the day she fell on January 22, 2019.

Petitioner's 19b 1 Petition (PX.6)

The petition was filed on October 10, 2019

Return Receipt (PX.7)

The return receipt was signed by respondent on October 15, 2019

Attorney Eames November 13, 2019 Letter (PX.8)

Attorney Eames' letter to claims adjuster advising of the 19 b 1 hearing.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

C. With respect to the issue of whether an accident occurred that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

Petitioner testified that it had snowed a few days before January 22, 2019. However, on the morning of January 22, 2019 she arrived at work and had no problems navigating the parking lot. She further testified that when she returned from lunch it was cold and rainy and everything had turned to ice. By petitioner's own testimony, there is no indication that petitioner was exposed to a risk greater than that of the general public and that the accident was the result of the natural accumulation of ice, with no increase from her employment with respondent.

Therefore, the Arbitrator finds petitioner failed to prove that her injuries resulted from an accident that arose out of and in the course of her employment with respondent on January 22, 2019 and her claim is denied.

As the Arbitrator determined petitioner did not sustain accidental injuries in an accident that arose out of and in the course of her employment with respondent, the case is dismissed and all other issues are moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL KNOX,
Petitioner,

vs. NO: 17WC 12768

CITY OF CHICAGO,
Respondent.

20IWCC0217

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 being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 3, 2019, is hereby affirmed and adopted.

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

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

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 3 - 2020
d032420
TJT/jrc
051

Thomas J. Tyrrell

Kathryn Doerries

Barbara Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

KNOX, DANIEL
Employee/Petitioner

Case# **17WC012768**

CITY OF CHICAGO
Employer/Respondent

20IWCC0217

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:

0154 KROL BONGIORNO & GIVEN LTD
MIKE BRANDENBERG
20 S CLARK ST SUITE 1820
CHICAGO, IL 60603

0010 CITY OF CHICAGO DEPT OF LAW
MATTHEW LOCKE
30 N LASALLE ST SUITE 800
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DANIEL KNOX
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # **17** WC **12768**

Consolidated cases: _____

20IWCC0217

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Chicago**, on **May 14, 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. [x] 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. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [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 _____

20 IWCC0217

FINDINGS

On **April 12, 2017**, 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 $**98,905.42**; the average weekly wage was $**1,902.03**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**15,941.58** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**15,941.58**.

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

ORDER

The Arbitrator finds that the Petitioner's low back condition is causally related to the April 12, 2017 accident.

Respondent shall pay reasonable and necessary medical expenses, pursuant to the medical fee schedule, of **$2,053.10 to MercyWorks, $175.00 to Midwest Anesthesia & Pain Specialists, $2,670.00 to Windy City Medical Specialists and $2,805.65 to EQ Med**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of for any awarded medical expenses that have been paid by Respondent prior to the hearing date, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$775.18 per week**, the maximum allowable statutory rate, for **50 weeks**, because the injuries sustained caused the loss of use of **10% of the person as a whole**, as provided in Section 8(d)2 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **April 12, 2017** through **May 14, 2019**, and shall pay the remainder of the award, if any, in weekly payments.

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

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

October 1, 2019
Date

OCT 3 - 2019

STATEMENT OF FACTS

Petitioner has worked for Respondent since approximately 2000, currently as a hoisting engineer. On 4/12/17, Petitioner was lifting an approximate 100-pound loading ramp and felt immediate low back pain. He was referred to MercyWorks by Respondent and saw Dr. Anderson the same day.

At MercyWorks, Petitioner reported severe low back pain after lifting a heavy ramp at work. He denied prior back problems. On examination he was tender from L3 to S1 with limited range of motion. No neurologic abnormalities were noted. The diagnosis was acute lumbar strain and Dr. Anderson prescribed Toradol and recommended that Petitioner remain off work. At a 4/18/17 follow up, Petitioner reported right greater than left severe back pain radiating down the right leg to the knee without numbness, and Dr. Anderson prescribed physical therapy. On 4/25/17, Petitioner reported a little improvement and Dr. Anderson noted he had not yet been to therapy and was non-compliant with recommended medication. He again prescribed formal therapy and advised Petitioner to comply with medication and home therapy recommendations. On 4/28/17, Petitioner began formal physical therapy at MercyWorks. On 5/3/17, Petitioner reported persistent symptoms and Dr. Anderson prescribed a lumbar MRI and continued Petitioner off work. (Px1).

The 5/18/17 MRI revealed degenerative disc disease at L4/5 and L5/S1 with moderate to severe right foraminal narrowing at L5/S1 potentially contacting the exiting right L5 nerve root and mild degenerative disc disease at T12/L1 and L1/2. Also noted were scattered multilevel facet hypertrophy and arthropathy contributing to the noted findings. (Px1).

On 5/24/17, Dr. Anderson reviewed the MRI results, observing degenerative disc disease at L4/5 and L5/S1 with moderate to severe foraminal narrowing. He continued Petitioner off work and referred him to see an orthopedic specialist. On 5/25/17, Petitioner completed his last physical therapy session with MercyWorks. (Px1).

On 6/14/17, Petitioner was examined by orthopedic surgeon Dr. Fisher at Illinois Bone and Joint Institute. He complained of 5 out of 10 (5/10) low back pain into the right thigh to the knee. Examination reflected tenderness at the paraspinous muscles from L3 to S1 and increased pain on range of motion testing of the thoracolumbar spine, while neurologic exam was normal. Dr. Fisher noted that the MRI showed L4/5 and L5/S1 broad-based disc herniations with moderate bilateral foraminal stenosis, severe at right L5/S1. Dr. Fisher diagnosed L4/5 and L5/S1 disc herniations and foraminal stenosis, recommended work conditioning along with home exercise and strengthening at the gym, and also recommended Petitioner return to work on 7/10/17. Petitioner was advised to return as needed. (Px2). Petitioner testified he returned to his regular job as a hoisting engineer on 7/10/17.

On 8/17/17, Petitioner was reexamined by Dr. Fisher. Noting he had been working full duty, Petitioner reported no significant improvement and requested injections. X-rays showed a leg length discrepancy of 2 cm where the left hip was higher than the right hip. Dr. Fisher referred Petitioner for epidural steroid injections (ESI) at L4/5 and L5/S1. Petitioner indicated he had difficulty finding time for home exercise, and Dr. Fisher again recommend he perform such exercise. On 9/20/17, Petitioner was released to return to his regular job. (Px2).

On 10/23/17, Petitioner was examined by Dr. Saldanha at Midwest Anesthesia & Pain Specialists, who reported that Petitioner complained of back pain radiating into both legs. Petitioner had returned to work but reported increased pain with vibration from the machinery he was operating. On examination, Dr. Saldanha's findings included positive straight leg test on the right, mildly positive facet loading extension and lateral bending, and tenderness over the lumbar paraspinous muscles. The diagnosis was lumbar radiculopathy due to a 7/12/17 work-related injury. Dr. Saldanha also recommended an L5/S1 ESI, Meloxicam, NSAID cream, a lidocaine patch, and a back brace. Regular duty was continued. On 12/11/17, Petitioner was examined by Dr. Pontinen at the same facility, and he recommended the same treatment, noting the epidural had not yet been authorized. He also prescribed an "OrthoCor" device and noted the accident date was actually 4/12/17. Prescriptions were refilled on 1/29/18. Dr. Pontinen administered an L4/5 ESI on 2/9/18. (Px3).

On 4/18/18, Dr. Pontinen reexamined Petitioner and noted continued positive straight leg testing on the right and tenderness over the lumbar paraspinous muscles. Petitioner reported 75% improvement for a month with the epidural but that his pain had been gradually returning. Dr. Pontinen noted Petitioner was using his brace, the cream and patches while working due to no side effects. He recommended a repeat ESI and use of an H-wave therapy unit and TENS unit at home and prepared a letter stating that the devices met the ODG guidelines and were necessary to reduce Petitioner's pain and swelling as an alternative to pain medications. (Px3).

On 6/5/18, Dr. Rakic performed a second epidural at the L4/5 level. On 6/11/18, Petitioner returned to Dr. Pontinen and reported about 60% relief with some ongoing limitations and intermittent but improved radiation down his right leg. It was noted Petitioner was using a "game ready" cold device and the H-wave machine. Dr. Pontinen again recommended that Petitioner continue with use of the H wave and ice machine. (Px3).

Petitioner testified the machine "relieved some of the stress and tension" in his low back. At some point he became aware that the machine was not being authorized by Respondent, after which he immediately returned the machine.

On 7/30/18, Petitioner followed up at Midwest Anesthesia and reported that his pain had been a little bit worse due to working on a vibrating grinder and intermittently traveled down his right leg. He was advised to return to Dr. Fisher and to continue the H-wave and ice machine, and otherwise was released to return as needed. (Px3).

An 8/2/18 fax from Midwest Anesthesia and Pain Specialists with medical records indicates the Petitioner had been discharged. (Px3).

On 9/26/18, Petitioner returned to Dr. Fisher, reporting that he had been experiencing slightly increased lower back pain from working on asphalt grinder on a daily basis to resurfacing pavement. Neurologic exam remained normal. It was noted that Petitioner was working on reassignment to a different job description. Dr. Fisher recommended that Petitioner continue working, performing home exercise and using proper lifting mechanics. (Px2).

Petitioner testified he has not had any further medical treatment since 9/26/18 and has no currently scheduled visits. He testified he had no low back problems prior to 4/12/17. Currently, he feels limited lumbar mobility. He can only remain active in getting household chores completed, like cutting grass, for a limited period of time

before it hurts too much to continue. He has erratic sleeping patterns because he can't stay in certain positions without waking up due to pain. He gets increased pain with excessive cold and with dramatic weather changes. He remains employed as a hoisting engineer, which mainly involves operating heavy equipment to perform road construction. This includes a mini-grinder, which cuts asphalt for resurfacing, and rollers. He rides on top of the machines, noting the grinder involves a lot of vibration, which impacts his body. Going over concrete causes more impact to his low back, which tires him out and makes his back tense up. He also rides on top of the roller, and it impacts his back when he goes over uneven surfaces. He tries to offset his problems by working out, getting proper rest and preparing himself for the work to come. He will take ibuprofen when he has increased back pain/symptoms, either at lunch or at the end of the day.

On cross-examination, Petitioner testified his current salary is equal to or higher than it was on the accident date. While his back started to hurt again when he returned to work, he did not file a second workers' compensation claim. He testified he wore his prescribed back brace when he returned to work, and currently wears it occasionally. He takes ibuprofen prescribed by his primary care physician or the doctors that are treating him, but uses them sparingly as needed, maybe once a month. He testified he's had no new back injuries since he returned to unrestricted work on 7/10/17. He testified he is working with ongoing pain but agreed he has not made any new medical appointments.

Respondent obtained utilization reviews (UR) on some of the prescriptions from Midwest Anesthesia and Pain Specialists. The initial report of Coventry from 3/6/18 involved the OrthoCor, an electromagnetic pulsed therapy device. The reviewer, Dr. Duren, determined that the studies regarding this device were not of high quality and it was not recommended due to insufficient evidence supporting its efficacy. Dr. Duren attempted peer-to-peer review by contacting Midwest twice and leaving messages for a return call, with no indication a return call was ever received. (Rx2).

The second UR was directed to an 8 to 13-week RETRO Vascutherm device rental, and the review was performed by Dr. DiSanto. After peer-to-peer review with Dr. Pontinen, agreement was reached that a one-week rental was appropriate.

The parties have stipulated that the Respondent is entitled to credit totaling $15,941.58 for previously paid TTD. They also have stipulated that Petitioner was temporarily total disability from 4/13/17 through 7/19/17. The credit is only applicable to this TTD period, which is not at issue at hearing, and not against any medical expense or permanency award that may issue in this decision.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that prior to the 4/12/17 accident he was not having any problems with his back. Immediately after lifting a roughly one hundred-pound ramp that day, he testified he felt immediate sharp pain in his lower back. He provided a consistent history of the accident at MercyWorks that same day and was diagnosed with an acute lumbar strain. On 10/23/17, Dr. Saldanha diagnosed Petitioner with lumbar radiculopathy due to the work-related accident on 4/12/17. Respondent offered no medical opinion to rebut Petitioner's treating physicians, nor any evidence which would indicate the Petitioner had a preexisting low back problem or condition.

The Arbitrator has had the opportunity to review the medical evidence and the testimony of the Petitioner. The Arbitrator finds a causal connection between Petitioner's present condition of ill-being in the lower back and the work accident of 4/12/17.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner alleges that there remain outstanding balances to: Mercy Works (totaling $2,053.10), Midwest Anesthesia & Pain Specialists ($175.00), EQ Med ($2,805.65), Windy City Medical Specialists ($22,170.00) and Illinois Bone and Joint Institute ($115.00). (see Arbx1 and Px4).

Respondent argues that the bill for Windy City Medical Specialists' vascutherm home therapy involves a vascutherm device that was not medically reasonable and necessary. Respondent submitted a UR in support of this argument. (Rx1). The report itself indicates that a peer-to-peer review of this device took place with Dr. Pontinen, and it was agreed that only one week of usage of this device was reasonable. No evidence was produced by Petitioner to rebut this. The Arbitrator finds that the preponderance of the evidence supports that a one week of Windy City Medical Specialists' vascutherm home therapy was reasonable and necessary, which totaled $1,750.00, pursuant to Section 8(a) of the Act. The Arbitrator finds that the initial charges, while seemingly quite high n their face, for set-up and training (totaling $$920.00) are also awarded as the UR did not address these charges specifically. Thus, with regard to Windy City Medical Specialists, the Arbitrator awards billing totaling $2,670.00 pursuant to Sections 8(a) and 8/2 of the Act. The remainder of the billing from Windy City Medical Specialists is denied as unreasonable and unnecessary. Pursuant to Section 8.2(e), neither the Petitioner nor the Respondent is responsible for the charges which exceed $2,670.00.

The Arbitrator was unable to decipher the submitted outstanding medical expenses to determine if the OrthoCor device was included in the billing. If charges for this device remain outstanding, the Arbitrator finds that such charges are unreasonable and unnecessary based on the submitted UR report. (Rx2). As noted above, the provider that prescribed this device did not respond to the request for peer-to-peer review despite two attempts at contact from Dr. Duran. As such, the preponderance of the evidence indicates that this device was unreasonable and unnecessary pursuant to Section 8(a) of the Act.

The Arbitrator finds that the treatments provided by Mercy Works, Midwest Anesthesia & Pain Specialists, EQ Med, and Illinois Bone and Joint Institute were reasonable and necessary for the care and treatment of Petitioner pursuant to Section 8(a) of the Act. As such, the Arbitrator awards the associated medical expenses pursuant to Sections 8(a) and 8.2 of the Act.

Respondent submitted evidence which indicates that some or all of the awarded medical expenses may have been paid by Respondent prior to hearing. (see Rx3 and Rx4). The Respondent is entitled to credit against the awarded expenses for any of the expenses that were paid by Respondent prior to the hearing, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. The applicable medical providers must keep in mind that they are entitled to payment for their expenses based on the Medical Fee Schedule (Section 8.2), and that they are not entitled to any balance billing which exceeds the Fee Schedule allowances. Based upon the stipulation of the parties, Respondent shall pay any applicable outstanding balances directly to the providers, again pursuant to Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors;

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an AMA permanent partial impairment report or rating into evidence. Therefore, this factor carries no weight in the permanency determination.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner has returned to his regular job as a hoisting engineer and continues to work in that capacity as of the date of hearing. The Arbitrator does note that the job involves some degree of heavy work duties, as well as the use of large vibratory machines, and that he complains of some ongoing pain increases. His back will continue to be involved in his ongoing work duties. The Arbitrator finds that this factor carries medium weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 55 years old at the time of the accident. Neither party has submitted evidence to support how the Petitioner's age may impact any permanent partial disability that may have resulted from the 4/12/17 accident. This factor carries no weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner returned to his regular work duties and no evidence was presented which would indicate that he sustained any loss of earning capacity as a result of this accident. Petitioner testified that he makes as much or more money now than he did at the time of the accident. This factor carries some weight in the permanency determination. This factor also carries a medium level of weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that objective MRI testing showed degenerative disc disease at L4/5 and L5/S1 with moderate to severe right foraminal narrowing at L5/S1 potentially contacting the existing right L5 nerve root, as

well as mild degenerative disc disease at T12/L1 and L1/2. Dr. Anderson agreed with these findings and noted moderate to severe foraminal stenosis. Dr. Fisher reviewed the imaging and opined that the films depicted broad-based disc herniations at L4/5 and L5/S1 with moderate bilateral foraminal stenosis that was severe at right L5/S1. The Arbitrator notes that Petitioner's main complaints were of right greater than left back pain with radiation into the right leg. He underwent physical therapy and two lumbar epidurals, which did result in improvement. His testimony and the records also indicate ongoing symptomatic increase at work, particularly with operation of an asphalt grinder and other machines with significant vibration and/or uneven ride over certain surfaces. He testified he takes prescription ibuprofen as needed, though it is unclear who is currently prescribing this or what dose is being prescribed, as this medication is otherwise available over the counter. The Arbitrator gives the most significant weight in the permanency determination to this factor.

Based on the above factors, the record taken as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 10% of the person as a whole pursuant to §8(d)2 of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SANDRA DRAXLER,

Petitioner,

20IWCC0218

vs.

NO: 01 WC 23671

MEDICAL STAFFING NETWORK,

Respondent.

DECISION AND OPINION ON PETITION UNDER §8(a) OF THE ACT

This matter comes before the Commission on petitioner's petition pursuant to Section 8(a) for medical expenses incurred and alleged to be causally related to her accidental injury of January 24, 2001. A hearing occurred on February 11, 2020. Both parties were represented, and a record was made. The parties submitted depositions and other documentary evidence.

The Arbitrator Decision issued on February 27, 2003. Among the findings of fact and conclusions of law the Arbitrator found "Petitioner testified that . . . she still has no feeling in her right ring and small finger, severe weakness in her right hand, discomfort in her neck and difficulty doing fine motor tasks." Arb. Decision, p. 6. The Arbitrator also found "there is a causal connection between the Petitioner's condition of ill-being diagnosed by Fred Geisler as a disc herniation at C7-T1and pedicle fracture at C7 and her accident of January 24, 2001." Arb. Decision, p. 8.

Respondent's workers compensation insurance carrier, Lumbermens Mutual Casualty Company, was determined to be insolvent and an Order of Liquidation was entered on or about May 10, 2013. Thereafter the Illinois Insurance Guaranty Fund assumed the obligations of the insolvent carrier including this matter.

Petitioner testified via deposition on October 10, 2019. (PX1). Petitioner continues to receive her wage differential benefits which are not a part of this current dispute. (PX1: 6).

In September of 2005, Petitioner moved to Arizona and continued to seek medical care and treatment for her neck injury. (PX1:6). Petitioner consulted with various medical providers and received various prescriptions. The majority of Petitioner's claim for medical expenses pursuant to §8(a) of the Workers' Compensation Act relate to prescriptive medication involving a total claimed amount of $63,2140.89. (PX2).

Petitioner testified that the medications can be categorized into three groups. One set of medications were prescribed for her migraine headaches. (PX1: 7). A second group were prescribed for chronic pain and a third group for other issues such as anxiety. (PX1: 7).

Petitioner admitted that prior to her accidental injury she consumed Imitrix. (PX1: 7). Petitioner claimed that the migraines she suffered post-accident were different from her pre-accident condition as she claimed she has an aura and pain on the right side of her head. Since Petitioner moved to Arizona her physicians have prescribed Sumatripin, Zofran and Ondanestron for these migraine headaches.

With regard to chronic pain, the Petitioner testified her physicians have prescribed Fentanyl, Opana, Hydrocodone and Carisoprodol. (PX1: 10). With regard to her anxiety and other issues the Petitioner testified her physicians have prescribed Soma, Alprazolam, Xanax and Ambien.

In regard to the medical providers, the Petitioner claimed she saw Dr. Otto Uhrik and Arizona Neurological Institute for treatment relating to her neck injury. (PX1: 11-12). Petitioner identified Deposition Exhibit 1 as the medications filled by Injured Workers' Pharmacy for which she, in part, seeks reimbursement. (PX1: 13). Petitioner clarified that medication on the list for Nucynta is *unrelated* to her neck injury. (PX1: 15).

Petitioner also identified Deposition Exhibit 2, a list she created, which consists of Petitioner's out of pocket expenses for medications. (PX1:16). Petitioner is seeking reimbursement for these medications. (PX1: 17).

Finally, Petitioner submitted Deposition Exhibit 3 which is a document identifying medical providers to which her personal insurance carrier, Cigna Health Care, made payments. (PX1: 18). Petitioner also admitted that some of the providers listed on the exhibit are *unrelated* to her neck injury. (PX1: 19).

Petitioner identified the following providers as treatment *unrelated to her neck injury*: Dr. Dreana Janssen, Dr. Edward Dubrow, Dr. Kevin Renfree, Dr. Kara Lawless, Dr. Alan Shoham, Dr. Catherine Roberts, Dr. Joseph Haber, Dr. Lawrence Lopez. (PX1: 20-22). Petitioner could not recall whether or not the following providers were related to her neck injury: Dr. Albert Charney & VHS of Arrowhead. (PX1: 21-22).

Petitioner testified that since she last appeared before the Commission on June 8, 2005 she has suffered no other accident or injuries to her neck. (PX1: 23). Petitioner has not suffered any other accidents or injuries that required her to take narcotic medication. (PX1: 23).

On cross-examination, Petitioner testified she moved to Arizona because of the weather and

20IWCC0218

her injuries. (PX1: 25). Petitioner did not recall if Dr. Geisler or other doctors she saw in Illinois referred her to the doctors in Arizona. (PX1: 25).

On cross-examination, Petitioner further clarified that she received her headache medication from Dr. Mosely and Dr. Patel, Dr. Patel being her primary physician. (PX1: 27). Petitioner testified she did not recall how her prescriptions were paid between June 8, 2005 and September 28, 2009. (PX1: 28).

On cross-examination, Petitioner could not recall whether or not she had migraine headaches before the injury or whether she had a 20-year history of taking medication for migraines. (PX1: 29). Petitioner could not recall whether any such history was given to Dr. Patel or Dr. Mosely. (PX1: 30-31). Petitioner also admitted that treatment to her hands or elbows were unrelated to her accident. (PX1: 32). Petitioner confirmed that Injured Workers' Pharmacy had not filled any prescriptions since 2010. (PX1: 35).

On re-direct examination, Petitioner clarified that the medication Ambien and the medical provider Dr. Bisla Jabir have nothing to do with her neck injury. (PX1: 36).

On December 12, 2013, the Respondent deposed Dr. Gary Dilla. (RX1). Dr. Dilla performed a Section 12 examination of petitioner and a review of medical records. (RX1: 4). Dr. Dilla is board certified in physical medicine and rehabilitation and pain management. (RX1: 5-6). Dr. Dilla examined the petitioner on June 6, 2011. (RX1: 7).

Dr. Dilla opined that Petitioner had "chronic neck pain and tenderness, chronic paresthesias. . . . multiple-level cervical spine disc bulging. . . . (RX1: 16). Dr. Dilla also noted that the medical records he reviewed "suggested that the migraines dated back decades prior to the industrial injury." (RX1: 17). Dr. Dilla confirmed that his review of the medical records indicated that prior to the accident Petitioner took Imitrex for her migraines. (RX1: 17).

At the time of Dr. Dilla's examination, the medications of Petitioner were grouped into two categories; narcotic medication and migraine medication. (RX1: 18). Dr. Dilla opined that the migraine headache diagnosis was unrelated to her injury. (RX1: 18). With regard to the narcotic medication, Dr. Dilla opined that Petitioner's use of both Fentanyl patches and Opana was not reasonable or necessary. (RX1: 18-19). Dr. Dilla admitted that he does not prescribe either of these medications in his practice. (RX1: 19-20).

Dr. Dilla opined that Imitrex would not be related to her accident. (RX1:31). Dr. Dilla also opined that ongoing narcotic medication would not be required. (RX1: 33) and that the continued use of both Fentanyl and Opana, among others, was not reasonable or necessary RX1:38) Dr. Dilla also opined that Alprazolam and Ambien would not be related to the Petitioner's injuries. (RX1: 33). Dr. Dilla opined that his recommended treatment would involve "trigger point injection. . . electrical stimulating unit, non-narcotic topical medication, (and) cognitive behavior counseling." (RX1: 35). Dr. Dilla admitted that the Petitioner would have to be "slowly weaned off" of her narcotic medication. (RX1: 36).

On cross-examination, Dr. Dilla admitted he performs on average five independent examinations per week. (RX1: 41). Dr. Dilla charges $1,100.00 per exam or $5,500.00 per week.

20IWCC0218

(RX1: 42). Dr. Dilla confirmed he charges $800/hour for a record review and spent approximately six hours reviewing Petitioner's records. (RX1: 42).

On cross-examination, Dr. Dilla admitted that Petitioner' complaint of right- sided neck pain could be consistent with her fusion. (RX1: 48). Dr. Dilla also admitted that Petitioner's complaints of decreased sensation in the fourth and fifth fingers may be related to C8 radiculopathy. (RX1: 49).

On cross-examination, Dr. Dilla also admitted that the medical literature *does support* using opiate medication to treat chronic nonmalignant pain. (RX1: 56) (emphasis added). Dr. Dilla admitted that a detox program is "pricey" and can last a week or two after a hospital stay. (RX1: 57).

215 ILCS 5/546 often referred to as the "Other Insurance" provision of the Illinois Insurance Guaranty Act provides in part that:

> (a) An insured or claimant shall be required first to exhaust all coverage provided by any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Fund. **The Fund's obligation under Section 537.2 [215 ILCS 5/537.2] shall be reduced by the amount recovered or recoverable, whichever is greater, under such other insurance policy.**

The Commission finds that the out of pocket expenses of Petitioner identified in Deposition Exhibit 2 for medication prescribed by Dr. Uhrik Otto relating to Fentanyl in the amount of **$10,579.82** are awarded to Petitioner as related to her work-related injuries and chronic pain. The Commission finds and concludes that all other out of pocket expenses of Petitioner are denied.

The Commission finds that the prescription charges submitted by Injured Workers' Pharmacy are awarded in part, and denied in part. The Commission finds that those prescriptions in Deposition Exhibit 1 that pertain to Fentanyl were reasonable and necessary medications in an attempt to alleviate the chronic pain issues suffered by petitioner as a result of her work-related injuries and awards the total amount of **$22,436.85**.

After the Sect. 12 Exam by Dr. Dilla, the Commission finds Dr. Dilla's opinions relating to the need to eliminate the narcotic pain medications and the unreasonable nature thereof carries greater weight than the opinions of the treating physicians The Commission finds and concludes that all other medications submitted in that exhibit are denied.

The Commission finds that § 215 ILCS 5/546 required the Petitioner to submit her medical expenses through coverage provided by any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Fund. The Fund's obligation under Section 537.2 [215 ILCS 5/537.2] shall be reduced by the amount recovered or recoverable, whichever is greater, under such other insurance policy. Since

20IWCC0218

the medical bills were paid by "other insurance", the Guaranty Fund's/Respondents obligation has been met under the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the respondent pay Petitioner **$22,436.85** for prescription medication filled by Injured Workers' Pharmacy for medications pertaining to the chronic pain and sequelae of Petitioner's work-related issues.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay Petitioner **$10,579.82** for her out of pocket expenses for medication pertaining to the chronic pain and sequelae of Petitioner's work-related issues.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent has met its obligations under the Act and that it is not required to reimburse any group carrier nor hold Petitioner harmless against claims for reimbursement by "any other insurance".

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 Circuit Court.

DATED: APR 3 - 2020

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

MEP/dmm
O:021120
49

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nadia Maslat a/k/a Nadia Husein Ali Abu Seif Maslat, widow of Omar H. Maslat,

Petitioner,

vs.

No: 15 WC 23132

Super Sales Inc. and Illinois State Treasurer as Ex Officio Custodian of IWBF,

20IWCC0219

Respondents.

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 the statute of limitations, employment, accident, causal connection, and wages, and being advised of the facts and law, affirms the June 27, 2019 Decision of the Arbitrator, which is attached hereto and made a part hereof. However, because of certain speculative and unwarranted inferences made by the Arbitrator, the Commission finds it necessary to set forth its own findings of fact and conclusions of law.

I. FINDINGS OF FACT

The claim at issue indisputably involves the death of Omar H. Maslat (the decedent) who was fatally shot in Respondent Super Sales Inc.'s (Super Sales) Chicago store on April 1, 2014. Ahmad Maslat, the decedent's son and original claimant, filed an Application for Adjustment of Claim on July 28, 2015 approximately 15 months thereafter.

Ahmad Maslat alleged that an employer-employee relationship existed between the decedent and Super Sales on the day of the incident, that decedent was married, had no dependent children under 18 years of age, earned an average weekly wage of $450.00, and that he was shot in the chest and killed on April 1, 2014. The Illinois Injured Workers' Benefit Fund ("IWBF") was added as a Respondent because Super Sales was uninsured. The case eventually proceeded to an arbitration hearing on April 8, 2019. The Request for Hearing form submitted at the hearing reflects that both Respondents disputed every allegation. Also, the Application for

Adjustment of Claim was amended at the end of the hearing to substitute Nadia Maslat, the decedent's putative widow, for Ahmad Maslat as Petitioner.

The original claimant, Ahmad Maslat, was not present at the hearing. The substituted claimant, Nadia Maslat, and another son, Ala Maslat, were present and testified. Both Respondents were present through counsel at the hearing. Nadia Maslat testified that she and the decedent had been married in Jordan on August 22, 1980 and that she was his only wife. Although they lived separately, he in Chicago and she in Jordan, Nadia Maslat testified that they remained married and spoke frequently by phone. Her last trip to Chicago had been in 2008 or 2009. Nadia Maslat further testified that the decedent sent her money bi-monthly via Western Union. Together they had six children, including sons Ahmad and Ala, who lived in the United States.

Regarding employment, Nadia Maslat testified that Mr. Maslat was employed in April 2014 and had told her he worked in a grocery store. The Application for Adjustment of Claim alleges that Mr. Maslat's average weekly wage was $450.00, however the Request for Hearing form includes no representation of his claimed income or average weekly wage for the year preceding the accident.

One of decedent's sons, Ala Maslat, testified that his parents were married at the time of his father's death. He explained that his mother would stay with his father when she visited Chicago, but he did not recall where his father lived in Chicago. Ala Maslat also testified that he visited his father on a few occasions at the Super Sales store and he observed his father "doing security" at the store in the evening. He further testified that he saw his father wire money to his mother a few times. Ala Maslat identified his father's body at the morgue and described his father's position at the time as "clerk." The records from the medical examiner show that Mr. Maslat had no identification, wallet, or money on his person when he arrived at the medical examiner's office.

A "First Call Sheet" was submitted into evidence indicating that the shooting was reported by "staff" at the Food Mart as "[p]erson shot inside store." The decedent was not identified by name or occupation in the document. Omar H. Maslat was ultimately identified through a photo match on ICLEAR (Citizen and Law Enforcement Analysis and Reporting), an application developed by the Chicago Police Department to provide information about criminal offenders in Chicago and Cook County. The reporting officer indicated on the case report that Mr. Maslat was a "clerk/security guard at the food mart when he was shot." The source of the officer's information to this effect is not reflected in the report.

At the hearing, Nadia Maslat offered a transcript excerpt containing the testimony of Bahlal Abubakr from the criminal trial of the assailant who shot Mr. Maslat. *People v. Jones*, 14 CR 7806 (May 9, 2017). According to the transcript, Mr. Abubakr is the stepson of the owner of Super Sales and the clerk who was present at the time of Mr. Maslat's fatal injury. The IWBF objected to the transcript on hearsay grounds asserting that Petitioner had not shown that the witness was unavailable for the workers' compensation hearing or that the cross-examination of Mr. Abubakr at the criminal trial was substantially the same as it would have been at the workers' compensation hearing. The IWBF's primary objection was that Mr. Abubakr was not

subject to cross-examination as to the employment or accident issues, which were central to the workers' compensation claim. Super Sales joined in the objection. In response, Petitioner argued that the transcript excerpt was admissible as an admission by a party-opponent (Rule 801(d)2), because the witness was unavailable (Rule 804(b)), or as a public record (Rule 803(8)). The Arbitrator admitted Mr. Abubakr's testimony over Respondents' objections as an admission by a party's agent under Rule 801(d)2(D).

The criminal transcript reveals that Mr. Abubakr was a clerk in the Super Sales store owned by his stepfather. Mr. Abubakr stated the decedent would perform odd jobs at the store, such as stocking shelves. He further indicated that the decedent was "kind of like homeless, so you know we try to give him a job every now and then." The decedent was working on the date of the shooting and just prior to it, Mr. Abubakr had instructed the decedent to "get on security…close the gate."

Ultimately, the Arbitrator found, *inter alia*, that Petitioner's claim was barred by the statute of limitations set forth in §6(d) and that an employer-employee relationship between the decedent and Super Sales was not established. Consequently, the Arbitrator concluded that the fatality did not arise out of and in the course of Mr. Maslat's employment.

Petitioner brought this appeal on the issues of statute of limitations, employment relationship, accident, causal connection and wages. After carefully reviewing all the evidence and the applicable law, the Commission affirms the Arbitrator's denial of the claim as clarified herein.

II. CONCLUSIONS OF LAW

A. Statute of Limitations

The threshold issue in this matter is whether the claim is timely. Section 6(d) of the Act states the following in pertinent part:

> In any case, other than one where the injury was caused by exposure to radiological materials or equipment or asbestos unless the application for compensation is filed with the Commission within 3 years after the date of the accident, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred.

820 ILCS 305/6(d) (West 2008).

The original claimant, Ahmad Maslat, filed the application on July 28, 2015. The application alleged that an employer-employee relationship existed between the decedent and Super Sales on the day of the incident and that the decedent was married with no dependent children under 18 years of age when he was shot in the chest and killed on April 1, 2014. The Commission finds that this original application was timely filed within the period required under Section 6(d) of the Act (i.e., within three years after the date of the accident where no

compensation has been paid). See *Id.* However, the inquiry into the timeliness of the claim does not end here.

Approximately five years later, the matter proceeded to an arbitration hearing at which time Ahmad Maslat's attorney requested to amend the application *instanter* to reflect "Nadia Maslat aka Nadia Husein Ali Abu Seif," the decedent's putative widow, as the proper claimant. (PXF). After considering the request of Petitioner's counsel at the end of hearing to amend the application, the Arbitrator ultimately granted such leave to amend.

On review, Nadia Maslat asserts that Respondents were aware of her identity (not her mere existence) as of the time of the filing of the original application. Nadia Maslat also argues that Respondents knew that Nadia Maslat would be at the hearing because the parties had conducted a pre-trial in March to set a date certain for hearing in order to allow her time to make travel plans from Jordan. As a result, she contends that the substitution was merely to correct a misnomer.

There is no evidence to support Petitioner's proposition that the original claimant, Ahmad Maslat, the adult son of the decedent, was simply mistakenly identified as the petitioner when it should have been the decedent's putative wife and Ahmad's mother, Nadia Maslat. The concept of misnomer does not encompass naming the wrong party, but instead refers to naming the right party by the wrong name. *Cigan v. St. Regis House Hotel*, 72 Ill. App. 3d 884 (1979). This is not a case where the correct party was identified, but her filing status was incorrect, such as in *Illinois Inst. of Tech. Research Inst. v. Industrial Comm'n*, 314 Ill. App. 3d 149 (2000). The cases cited by Petitioner in support of her misnomer theory are inapposite, as they all involve incorrect names of parties, not completely different identities. The Commission agrees with the Arbitrator and finds no mere misnomer here; rather, a substitution of parties.

Alternatively, Petitioner asserts that Respondents were not prejudiced by the amendment to the application replacing Ahmad Maslat with Nadia Maslat. She also asserts that her claim should relate back to the original filing of the application. The Commission disagrees on both counts and further finds that it was error, albeit harmless, to grant Petitioner's request to amend the application on the date of the hearing and substitute her as the claimant.

Prior to the hearing, the Arbitrator asked if the parties had any matters to be addressed. Counsel for Petitioner, Ahmad Maslat, advised that he believed the Application for Adjustment of Claim was sufficient as it stood and did not need to be amended. At the conclusion of the hearing, Petitioner's counsel reconsidered and moved to amend the Application by replacing "Ahmad Omar Hassan Maslat" with "Nadia Maslat a/k/a Nadia Husein Ali Abu Seif, widow of Omar H. Maslat, deceased" as Petitioner. Respondents objected, raising the statute of limitations as a defense. The Arbitrator overruled Respondents' objection and allowed the amendment. (Tr. 95, PXF).

The Commission's Rules state that "[i]t shall be within the discretion of the Commission whether to allow any amendments to the Application after the commencement of a hearing on the merits." 50 Ill. Adm. Code 9020.20 (2016). However, in this case, while the Arbitrator granted leave to amend the application at the hearing, he was not convinced when deciding the

matters before him that the amended application was proper or timely. Among other concerns, he noted that the identity of Nadia Maslat was known to Ahmad Maslat at the time the original application was filed. Because her identity was known, there was no explanation for not naming the proper claimant at the time of filing the Application.

The Arbitrator also observed that the amended application submitted at the hearing was not accompanied by an Attorney Representation Agreement as required. Section 9020.30(b) of the Rules provides as follows:

> No attorney or law firm will be recognized in any case before the Commission unless the attorney or the attorney's firm has duly entered a written appearance, supported by a properly executed Attorney Representation Agreement and with proper notice to all parties and attorneys of record.

Petitioner's counsel offered no Appearance form or Attorney Representation Agreement into evidence when he was granted leave to amend Ahmad Maslat's application to substitute Nadia Maslat as the petitioner.

Contrary to Petitioner's assertions, there is evidence of prejudice to the Respondents. Respondents here may not have been aware that a widow existed, since the original claim was filed by an adult child. Respondents may not have been able to determine the widow's residence, particularly abroad, or the facts relevant to a determination of her marital status at the time of the fatal injury. The issues presented differed, in part, depending upon the claimant. Instead of defending against a possibly dependent adult child, Respondent was confronted by an alleged widow, and a new issue arose as to whether the parties were married at the time of Mr. Maslat's death.

Whether Petitioner's counsel alerted Respondents of the identity of Nadia Maslat within two months of the hearing does not change that such identification still occurred years after the statute of limitations had run. Nadia Maslat nonetheless asserts that her claim should relate back to the original filing of the application. However, as observed in part by the Arbitrator in his decision, Nadia Maslat's identity, status, and location was known to her son, the original claimant, Ahmad Maslat, from the date of the fatality through the statute of limitations period and beyond.

The Commission acknowledges that amendments to pleadings are and should be liberally allowed and that amended pleadings may be found to relate back to the original filings when that relation back does not prejudice the opposing party. However, the facts here do not support the amendment of this application at the end of the hearing or application of the relation-back doctrine to cure such a late amendment request to the detriment of the Respondents. Respondents were prejudiced by the last-minute substitution of Nadia Maslat for Ahmad Maslat. The substitution of the claimant in this action was made after the limitations period had expired and was an attempt to substitute an entirely different legal entity in place of the original named petitioner, Ahmad Maslat. Under these circumstances, the doctrine of relation back does not apply. *Knowles v. Mid-West Automation Systems, Inc.*, 211 Ill. App. 3d 682, 691 (1991).

"[T]he Administrative Review Law offers little guidance on who may seek review of an administrative decision. However, we have previously said that a proper plaintiff must be a 'part[y] of record whose rights, privileges, or duties are affected by the [administrative agency's] decision.'" *Bd. of Educ. of Bremen High Sch. Dist. No. 228 v. Mitchell*, 387 Ill. App. 3d 117, 123 (2008) (quoting *Board of Education of Park Forest Heights School District No. 163 v. State Teacher Certification Board*, 363 Ill. App. 3d 433, 437, 842 N.E.2d 1230, 1233-34, 299 Ill. Dec. 878 (2006)). It has been long understood that only dependents may collect awarded benefits upon the employment-related death of an injured employee. *In re Estate of Hardaway*, 26 Ill. App. 2d 493 (1960). As Ahmad Maslat was not a dependent of the decedent at the time of his death, and he was not the executor of any known estate established for the decedent, it is unclear on what basis he would be able to recover benefits as a result of the fatality. Such is not the case with Nadia Maslat who, if she could establish her dependency on the decedent as his wife at the time of his death, may have been able to recover benefits under the Act as a result of the fatality.

The Commission finds that the amendment of the Application for Adjustment of Claim did not relate back to the date of original filing of the application. Therefore, the Commission affirms the Arbitrator's finding that Nadia Maslat's claim is barred by §6(d) of the Act. The Commission further finds that granting Petitioner's request to amend the application at the hearing was in error, but such error was harmless because whether or not Respondents were prejudiced by the late amendment, Ahmad Maslat's timely claim for benefits still fails on one or more of the elements required to recover under the Act.

B. Employment Relationship

The Commission affirms the Arbitrator's finding that Petitioner failed to establish that an employer-employee relationship existed on the date of accident.

In the arbitration decision, the Arbitrator discussed the factors used in determining that no employment relationship existed between Mr. Maslat and Super Sales. In concluding that no employer-employee relationship was established, he considered: (1) whether the employer controls the manner in which the person performs his work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with needed instrumentalities; (7) whether the employer's business encompasses the person's work; (8) the label the parties place on the relationship; and (9) whether the parties' relationship is long, continuous, and exclusive. See *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000); see also *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 175 (2000).

Strikingly little evidence of employment between the decedent and Super Sales was presented at the hearing. Petitioner, whether Ahmad Maslat or Nadia Maslat, offered no documentary evidence of employment, paystubs, W-2s, or tax returns. No one testified to the nature of the decedent's alleged employment, whether he was salaried or earned an hourly wage, what functions he performed, or whether he was paid by the job. Excepting testimony from a criminal proceeding offered by Petitioner into evidence by Bahlal Abubakr, the propriety of which is addressed herein, the only testimony regarding employment was offered by Nadia

Maslat and her son, Ala Maslat. Nadia Maslat testified that the decedent told her that he worked at a grocery store. Ala Maslat testified that his father worked security at a store in the same location as Super Sales' Food Mart on the couple of evenings he visited him. The Report of Postmortem Examination and accompanying paperwork from the Cook County Medical Examiner's Office document reflecting that Mr. Maslat was shot in the chest at the Food Mart does not establish any employer-employee relationship. Indeed, there is no evidence of the events surrounding that shooting other than that identified in an excerpt from a criminal proceeding transcript involving the alleged perpetrator of the shooting, and the testimony of Mr. Abubakr during the criminal trial that did little to establish an employment relationship between the decedent and Super Sales.

Regarding the admission of the criminal proceeding testimony, the Arbitrator found it admissible as a statement by a party's agent under Ill. R. Evid. 801(d)(2)(D). That rule defines as an exception to hearsay:

> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

Illinois Rules of Evidence 801(d)(2) (Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011).

The Commission agrees that the transcript of the criminal proceedings was admissible. Mr. Abubakr was employed by his stepfather at Super Sales on the day of the incident and years later when he testified during the criminal proceedings. There was no evidence that Mr. Abubakr had been terminated by his stepfather. Thus, the Commission finds that Mr. Abubakr's statements set forth in the criminal proceedings were made as a party's agent or servant and were admissible.

However, Mr. Abubakr's testimony established only the most casual of relationships between the decedent and Super Sales. According to Mr. Abubakr, Omar Maslat was an itinerant individual whom the owners or staff at Super Sales provided with temporary odd jobs such as stocking shelves on an irregular basis. Mr. Abubakr testified that the decedent was working on the date of the shooting and he had instructed the decedent just prior to "get on security…close the gate." The foregoing is not evidence of the type of employment relationship necessary to support a workers' compensation claim. See *Ware*, 318 Ill. App. 3d at 1122; see also *Roberson*, 225 Ill. 2d at 175.

After considering the criminal transcript excerpt, the exhibits, and the testimony of Ala and Nadia Maslat at hearing, the Commission finds that the evidence presented in this matter fails to establish that an employer-employee relationship existed between the decedent and Super Sales. The Commission therefore affirms the Arbitrator's finding that Petitioner failed to prove that an employment relationship existed between the decedent and Super Sales, and further finds that all other issues are moot.

20IWCC0219

IT IS THEREFORE ORDERED BY THE COMMISSION that the June 27, 2019 Decision of the Arbitrator is affirmed.

No bond is required for the 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 Circuit Court.

DATED: APR 6 - 2020

Marc Parker

Barbara N. Flores

Deborah L. Simpson

mp/dak
o-2/20/20

068

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
FATAL

MASLET, NADIA AKA ABUSAIF ALI HUSSEIN, NADIA WIDOW OF MASLET, OMAR H
Employee/Petitioner

Case# **15WC023132**

20IWCC0219

SUPER SALES INC AND THE ILLINOIS STATE TREASURER AS EX OFFICIO CUSTODIAN OF THE ILLINOIS WORKERS' BENEFIT FUND
Employer/Respondent

On 6/27/2019, 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 2.03% 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.

1992 SYREGELAS & KASMARICK LLC
KYLE R KASMARICK
19 N GREEN ST
CHICAGO, IL 60607

0146 CRONIN PETERS & COOK PC
KENNETH D PETERS
221 N LASALLE ST SUITE 1454
CHICAGO, IL 60601

6096 ASSISTANT ATTORNEY GENERAL
JOHN CATALANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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
FATAL

Nadia Maslat,
aka Nadia Hussein Ali Abusaif,
Widow of Omar H. Maslat
Employee/Petitioner

Case # **15 WC 023132**

v.

Arb. Kurt Carlson - Chicago

Super Sales, Inc. and
The Illinois State Treasurer as
Ex Officio Custodian of the
Injured Workers' Benefit Fund
Respondent/Employer.

20IWCC0219

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 **Kur Carlson**, Arbitrator of the Commission, in the City of **Chicago**, County of **Cook**, on **April 8, 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. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☒ TTD

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

M. ☒ Should penalties or fees be imposed upon Respondent?

N. ☒ Is Respondent due any credit?

O. ☒ Other **Does Section 6(d) and/or 4(d) of the Act apply?**

FINDINGS

On **April 1, 2014**, Respondent-Employer ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did not*** exist between Petitioner and Respondent-Employer.

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned ***unknown***; the average weekly wage was ***unknown***.

On the date of accident, Petitioner was **53** years of age, single with **0** dependent child.

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

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

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

Respondent-Employer is not entitled to a credit under Section 8(j) of the Act.

Petitioner did prove notice and properly served Respondent-Employer.

ORDER

The Arbitrator finds that this claim is barred by Section 6(d) of the Act.

The Arbitrator finds that Petitioner has failed to prove that Omar Maslat had an employee/employer relationship with Super Sales, Inc.

The Arbitrator finds that Petitioner has failed to prove that Omar Maslat sustained an accident on April 1, 2014 that arose out of and in the course of his employment.

The Arbitrator finds that Petitioner has failed to prove Omar Maslat's earnings or average weekly wage.

No Penalties are awarded on this case

Injured Workers' Benefit Fund

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This finding is hereby entered as to the Fund to the extent permitted and allowed under §4(d) of the Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund, including but not limited to any full award in this matter, the amounts of any medical bills paid, temporary total disability paid or permanent partial disability paid. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, in no way limits or modifies its independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

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

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

Signature of Arbitrator

06-27-19
Date

JUN 27 2019

STATE OF ILLINOIS)
)
COUNTY OF COOK)

20IWCC0219

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nadia Maslat,
aka Nadia Hussein Ali Abusaif,
Widow of Omar H. Maslat
Employee/Petitioner

Case # **15 WC 023132**

v.

Arb. Kurt Carlson - Chicago

Super Sales, Inc. and
The Illinois State Treasurer as
Ex Officio Custodian of the
Injured Workers' Benefit Fund
Respondent/Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Findings of Fact

This action was pursued under the Illinois Workers' Compensation Act ("Act") by the Petitioner-Employee, Nadia Maslat, ("Petitioner") and sought relief from the Respondent-Employer, Super Sales, Inc., ("Super Sales") and the Illinois State Treasurer as *Ex Officio* Custodian of the Injured Workers' Benefit Fund, ("IWBF").

On April 8, 2019, a hearing was held before Arbitrator Kurt Carlson in Chicago, Illinois. Nicholas C. Syregelias & Associates represented the Petitioner. Respondent-Employer Super Sales was represented by Cronin, Peters, & Cook, P.C. The Illinois Attorney General's Office represented the IWBF.

A. Testimony

Testimony of Nadia Maslat

Petitioner, Nadia Maslat, married Omar Hasan Maslat ("Decedent") on August 22, 1980. (R. at 14) She testified she was Omar Maslat's only wife. (R. at 43) Petitioner and Omar Maslat had six children, all of whom were over the age of 18 at the time of the injury. (R. at 29)

In April 2014, Petitioner lived in Jordan and had occasional phone conversations with Omar Maslat. (R. at 32) Prior to Omar Maslat's death, that Petitioner had last visited the United States in 2008 or 2009. (R. at 44) Petitioner testified that Omar Maslat and Petitioner discussed topics including his job and money. (R. at 34) Omar Maslat would send her $500 twice a month. (R. at 34) The money was sent via Western Union; however, Petitioner left the receipts in Jordan. (R. at 41)

On April 1, 2014, Nadia Maslat was told that her husband was shot and killed. (R. at 35-48) Petitioner's son, Ahmad, filed an application for adjustment of claim with the Illinois Workers' Compensation Commission on July 28, 2015, over a year later. No estate was opened. Petitioner did not file on her own behalf until the date of trial, over five years after the date of loss and two years after the statute of limitations, pursuant to Section 6(d) of the Act.

Testimony of Ala Maslat

Ala Maslat, not Ahmad, testified that the decedent was his father. Ala Maslat's mother is Nadia Maslat. (R. at 52) Nadia and Omar Maslat were married in 1980 and they had six children. (R. at 52-53) His mother would stay with his father when she would come to Chicago and that the last time prior to 2014 that his mother came to Chicago was in 2012 or 2013. *Id.* He did not remember where his father lived. (R. at 53-54)

Until April 2014, Ala Maslat lived in Burbank, Illinois. (R. at 54) When he came to Chicago, he would stay with his in-laws and occasionally visit his father at the store where he claimed to work at on 63rd and Western. (R. at 54-55) He observed his father "doing security" at the store. *Id.* Ala Maslat also observed Omar Maslat sending $500 to his mother via Western Union. (R. at 56-57)

On April 1, 2014, Ala Maslat lived in Middleton, Ohio. (R. at 54) At approximately 8 a.m., he found out there was a shooting at the store so he drove to Chicago. (R. at 59-61)

Report of Postmortem Examination

On April 2, 2014, Dr. Helenowski performed an autopsy of Omar Maslat. (PX D) Dr. Helenowski determined that Omar Maslat died due to a gunshot wound to the chest. *Id.* According to the reporting investigator, Omar Maslat was transported to Advocate Christ Medical Center Emergency Room on April 1, 2014 from a food mart at 2439 W. 63rd Street where he had sustained a single gunshot wound. *Id.* Omar Maslat was pronounced dead by Dr. Salzman at 7:05 a.m. *Id.* Reporting Officer Kleidon determined Omar Maslat's identity through a photo match on ICLEAR and relayed that information to the reporting investigator. *Id.* In addition, reporting officer Kleidon told reporting investigator that Omar Maslat was a clerk/security guard at the food mart when he was shot. *Id.*

II. Conclusions of Law

A. Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

The Arbitrator finds that on April 1, 2014, the Respondent-Employer Super Sales was operating under and subject to the Illinois Workers' Compensation Act.

Section 3 of the Illinois Workers' Compensation Act automatically applies to a Respondent who meets any one of the seventeen listed "extra-hazardous" activities. Testimony at trial established that Super Sales falls under Section 17(a) "the operation of business or enterprise in which goods, wares, or merchandise are sold." No evidence was presented to dispute this issue, although the Arbitrator notes that Petitioner did not demonstrate that Super Sales' annual payroll was more than $1,000. Nonetheless, the Arbitrator finds that Respondent Super Sales was operating under and subject to the Illinois Workers' Compensation Act on April 1, 2014.

B. Was there an employee/employer relationship?

An employment relationship is a prerequisite for an award of benefits under the Illinois Workers' Compensation Act, 820 Ill. Comp. State. Ann. 305/1 et. seq. (2004). The question of whether a person is an employee remains one of the most vexatious in the law of compensation. Roberson v. Industrial Comm'n. 225 Ill.2d 159 (2007) Thirty-one states have a "casual employee" exception to their workers' compensation statute. Illinois is not one of them. 6 Larson's Workers' Compensation Law Section 72.01 Instead, Illinois law provides no specific litmus test for determining whether an employer-employee relationship exists. Rather, such a relationship, if one exists, must be inferred from the conduct of the parties, the right to control work being the primary factor in determining an employment relationship.

There are multiple factors to consider in assessing the nature of the relationship between the parties. Ware v. Industrial Comm'n., 318 Ill. App. 3d 1117, 1122, (1st Dist. 2000). Among these are: (1) whether the employer may control the manner in which the person performs the

work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Roberson v. Industrial Comm'n, 225 Ill. 2d 159, 175 (2000). Other relevant factors include: (8) the label the parties place on their relationship; and (9) whether the parties' relationship was "long, continuous, and exclusive." Ware, 318 Ill. App. 3d at 1122, 1126. "The single most important factor determining whether a party is an employee or an independent contractor is the right to control the manner in which one's work is done ... an independent contractor is one who undertakes to produce a given result, without being controlled as to the method by which he attains the result." Bryant v. Fox, 162 Ill. App. 3d 46 (1st Dist. 1987). "No single factor is determinative, and the significance of these factors will change depending on the work involved." The determination rests on the totality of the circumstances. Roberson, 225 Ill. 2d at 175.

The following analysis is based upon the Arbitrator's ruling that Petitioner's exhibit "C" is admissible as evidence over Respondents' hearsay objections. This is the sworn statement of the convenience store clerk, Bahalal Abubakr, who witnessed the shooting.

In applying the Ware analysis, the Arbitrator finds the following: (1) It is unclear if Super Saver controlled the manner in which Maslet performed the work; this is evidenced by the sworn statement of occurrence witness, Bahlal Abubakr, who said that Petitioner was working at the store when he was shot. (PX-C p.5) Moments before the shooting, Abubakr directed the Petitioner to "get on security" (Id. p.28) and he probably told him to close the security gate. (Id. p.30-31)

However, these statements really aren't enough to determine the nature and extent of the control Super Sales had over Petitioner. However, this statement weighs on favor of Petitioner.

There was no specific testimony about whether Super Sales (2) dictates the person's schedule. However, Abubakr stated, "we try to give him a job every now and then," which seems to indicate Maslat was employed infrequently or whenever Maslat showed up, needed money and was willing to work. In that regard, it seems safe to infer that Maslat had no set schedule or hours. In that way, he set his own schedule and worked at his own convenience. Or perhaps he was hired only for special tasks. Either scenario weighs in Respondent's favor.

There was no testimony about (3) whether the employer paid Maslat hourly. Nor was there any testimony about (4) whether Super Sales withheld income and social security taxes from the person's compensation. Again, it seems safe to infer from the record that Super Sales failed to withhold any income taxes or social security withholdings. Maybe Maslat was paid some cash or given some convenience store products to support his immediate living expenses. Perhaps he worked by the job instead of by the hour. If Maslat wired $1,000 to his wife in Jordan every month, then what did he do with the rest of the money he earned? Stated another way, what percentage of his earnings did he give his wife? There's no paper trail of any earnings whatsoever. Whatever happened to his personal property after he was killed? Who went to his abode and went through his personal affects? What did they find? The record has no answers to these questions. The lack of any paper trail weighs in Respondents' favor.

It does appear that Super Saver (5) could discharge the Mazlat at will; as he had no known employment contract. It is unclear (6) whether the employer supplied the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Roberson v. Industrial Comm'n, 225 Ill. 2d 159, 175 (2000). The Arbitrator notes that Maslat's

work of security could be construed as "loss-prevention" which is a concern of any retail establishment. However, this type of work is often contracted out to third-parties. It is difficult to imagine that a "mom and pop" convenience store would require a security presence on a Tuesday morning at 6:00 a.m. unless of course, they were involved in buying and selling contraband. Maybe the owner employed Maslat to keep on his step son? We have no way of knowing with any real certainty. And that paucity of information weighs in Respondents' favor. Other relevant factors include: (8) the label the parties place on their relationship; and (9) whether the parties' relationship was "long, continuous, and exclusive." Ware, 318 Ill. App. 3d at 1122, 1126. Here, Mazlat's relationship with Super Sales was part-time, at best, perhaps on his own terms (when he showed up) and not a long, continuous or exclusive one. Please recall that Abubakr had only known him for "a couple of months" or "on or off for a two or three years." No one knows if he performed similar work at other businesses.

"No single factor is determinative, and the significance of these factors will change depending on the work involved." The determination rests on the totality of the circumstances. Roberson, 225 Ill. 2d at 175.

In looking at the totality of the circumstances, it seems that Petitioner was not an employee of Super Sales and compensation is denied. The Arbitrator notes that many of the Ware factors are difficult to assess because age of the case, the death of Maslat, and the casual nature of the work. It is difficult for the trier of fact to imagine a "like homeless" person to be a reliable, 40-hour a week employee or even a reliable part-time employee. And if Mazlat had no work schedule, then he was the one in control, not Super Sales. By its own admission, Super Sales tried to give him a job "every now and then," could mean they were willing to help Mazlat out whenever he showed up and was willing to work. He may have been kind of a charity case. Or maybe he was an enforcer.

There simply isn't much credible evidence to establish an employment relationship. Perhaps further evidence of Petitioner's itinerant status is that Office of Medical Examiner took an inventory of the decedent's clothing and found no wallet, cell phone nor any means of identification on his person at the time of his death. His pockets were empty. (PX D) The identification of Maslat was unknown to authorities, until photo-matched using the criminal justice database known as ICLEAR. (PX D) It bears repeating that Maslat's identity was in the ICLEAR database. Mazlat's home address was also a mystery. Three different addresses were listed for him in the record. The first two are 2444 West 61st and 7221 West 87st as noted with the Office of the Medical Examiner. (PX D) The third was listed at 2444 West 63rd Street on the workers' compensation application for adjustment of claim and Death Certificate. (PX B & F). Petitioner's lifestyle appears to be somewhat nomadic, even if limited to Gage Park or Chicago Lawn neighborhoods. It is unclear if he was a citizen of the United States. (PX D vs. PX B) Witness Abubakr had only known Maslat for "a couple of months." (PX C p.22) The totality of the circumstances do not weigh in Petitioner's favor. The paucity of details regarding his employment is further indicia of a very weak employment relationship with Super Sales, Inc., if any. He was not an employee of a "mom and pop" convenience store.

Based upon a failure of proof, this Arbitrator finds that an employee/employer relationship did not exist between Respondent-Employer and Omar Maslat at the time of the alleged injury.

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

In finding that Petitioner was not an employee of Super Sales, Inc., the Arbitrator provides no analysis on this issue. However, as dicta, the Arbitrator notes that the accident in this case may

not have been "employment related" at all. The killer Joey Jones did not shoot in self-defense and there was no real robbery: no money was taken from the cash register. The primary witness, Bahlal Abubakr, had an extensive criminal record and was uncooperative with the police and court. (PX. C p.74) The victim, Omar Maslat was in the police database, ICLEAR. Note -there were fourteen surveillance cameras in the store. (PX C p.7) The Arbitrator notes there are currency exchanges, jewelers, and small banks in Chicago with fewer surveillance cameras than Super Sales. As a result, it doesn't seem like a random act of homicidal violence to the Arbitrator. Afterall, what kind of "mom and pop" convenience store employs security at 6:00 a.m. on a Tuesday morning? There is probably a back story to this event that makes one wonder about the nature of the activities going on at the store.

D. What was the date of the accident?

The Arbitrator finds that Petitioner presented sufficient, credible evidence through testimony and the Report of Postmortem Examination that the accident occurred on April 1, 2014. As such, the Arbitrator finds that the accident occurred on April 1, 2014.

E. Was the Application for Adjustment of Claim adding Nadia Maslat timely filed?

The Arbitrator finds that Petitioner failed to file her claim within three years from the date of the accident. While it is true that on July 28, 2015, an Application for Adjustment of Claim was originally filed by Ahmad Omar Hassan Maslet, son of Omar H. Maslat. (Px F) It is also true that on the date of trial, April 8, 2019, his name was removed from the application and decedent's putative wife, Nadia was added upon representation of "misnomer" by plaintiff's counsel. (ARB.

EX. 1) & (R. 95) This substitution of claimants occurred more than five years after the date of loss and occurred over two years after the statute of limitations.

A misnomer is when there is a mistake of word or combination of words constituting a person's name that distinguishes him from other individuals. Usually, it occurs when Petitioner has mistakenly named the wrong defendant. In this case, one claimant was substituted for the another. No misnomer had occurred. There was no mistake of words or combination of words and no attorney/client agreement has been filed with the Illinois Workers' Compensation Commission on behalf of Nadia Maslat, as required. The identity of Nadia Abusaif Maslat, was known to the original claimant at the time of death. (PX B & D) The original claimant,Ahmad Maslat (son), never made a bona-fide claim of dependency, nor did he ever appear in court. And why would Ahmad Maslat file a claim on his own behalf except to show dependency unless his mother was no longer married to his father? It seems highly irregular for an attorney to file on behalf of one claimant then allow another to step in his place without ostensibly obtaining consent of the original claimant nor apparently having a written attorney/client agreement with the new one. (IC Form 10) The Arbitrator notes this only to highlight the "last-minute" nature of switching claimants. Accordingly, the Arbitrator finds Petitioner's claim is barred by Section 6(d) of the Act.

No argument to apply the relation back doctrine was made on the record. Even so, the respondents' in this matter would have been reasonably confused by the omission of Nadia's name on the original filing. Especially because there doesn't appear to be a civil court filing related to this matter.

Why would there be a civil court filing? Afterall, Section 5(a) of the Act states that in most cases, workers' compensation is the exclusive remedy for injured employees in the State of Illinois.

However, the Arbitrator notes that Section 4(d) of the Act applied to this claim. Respondent had no workers' compensation insurance at the time of the occurrence. Employers who fail to obtain workers' compensation insurance are not entitled to benefits of the Act and can be held liable for a civil claim alleging wrongful death. In such an action, such an employer shall not avail themselves of the defenses of assumption of risk or negligence or that the injury was due to a co-employee. In such action, proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be on the employer to show freedom of negligence resulting in the injury. The employer shall not join any other defendant in any such civil action.

If decedent's wife was not named on the application for adjustment of claim and no civil action was filed on her behalf, then it would be fair for Respondents to assume there was no longer a marriage, or that Nadia had died or at the very least, the parties were incommunicado. There is evidence of estrangement in their relationship. The distance between Chicago, Illinois and Amman, Jordan is 6,198 miles. The issue is further complicated by the fact that Islamic marriages allow polygamy and it is legal in Jordan. Further, are divorces under Sharia law recorded by civil courts of law? If the least of these scenarios are true, and the parties were simply incommunicado, then how could the decedent, Omar Maslat, have been wiring $1,000 a month to his wife? (R. 34) How could Nadia have credibly testified that Omar was employed? Or employed at Super Sales? Where and how did he get that money? He certainly had to earn enough for his own living expenses as well. Even if Respondents were notified of her intent to appear in court at the pre-trial a month or two earlier, there was no way they could've properly investigated the veracity of the facts surrounding the marriage relationship and the money transfers. Omar Maslat's marriage status was a core issue in this death claim and not a collateral one. Respondent's were prejudiced by the late filing.

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator has already found that Petitioner has proved an employee/employer relationship did not exist between Omar Maslat and Super Sales. However, since the statute of limitations has long passed, no benefits are awarded, and the Arbitrator makes no finding in regards to causal connection of Omar Maslat's injury.

G. What were the petitioner's earnings?

The Act defines average weekly wage as "the *actual earnings* of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52." 820 ILCS 305/10 (emphasis added).

No evidence was entered regarding Omar Maslat's actual earnings. Petitioner and Ala Maslat testified that Omar Maslat sent Petitioner $500 at the beginning of the month and at the end of the month. No evidence was admitted at hearing to show that these payments were connected to Petitioner's employment at Super Sales. The Arbitrator cannot speculate where this money came from or how it relates to his actual wages. Moreover, Petitioner failed to allege an AWW or earnings on the Request for Hearing Form. (ARB. EX. 1).

If Petitioner fails to prove an average weekly wage, no award can be entered. It does not default to the minimum. "The Commission lastly finds that Petitioner failed to uphold his burden of proving by a preponderance of evidence his average weekly wage under the Act and as a result

no temporary total disability or permanent disability is being awarded." Lingenfelter, v. Cloverleaf Golf Course, Inc., 11 IL. W.C. 30578 (Ill.W.C.C. Apr. 24, 2017).

Accordingly, the Petitioner failed to meet her burden of proof regarding Omar Maslat's average weekly wage; therefore, no benefits can be awarded.

H. What was Petitioner's age at the time of the accident?

The Arbitrator finds that Petitioner presented sufficient, credible evidence that at the time of the injury Omar Maslat was 53 years old. The Death Certificate states that Omar Maslat was age of 53 at the time of the injury. (PX B)

I. What was Petitioner's marital status at the time of the accident?

The Arbitrator finds that Petitioner presented enough evidence through both the testimony of Petitioner and Ala Maslat that at the time of the injury Omar Maslat was married to Petitioner with zero dependent children at the time of hearing. However, as stated earlier, Respondents were not really allowed sufficient time to investigate this issue fairly.

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

The Arbitrator finds that Petitioner has failed to submit any medical bills for consideration. As such, the Arbitrator does not award any medical bills. Given the nature of Omar Maslat's untimely demise, the Arbitrator finds that that the autopsy he underwent was reasonable and necessary. It is unclear who paid for the funeral expenses.

K. What temporary total benefits are in dispute?

The Arbitrator has already found that Petitioner has not proved an employee/employer relationship existed between Omar Maslat and Super Sales, an average weekly wage, or that Omar Maslat's injuries arose out of his work. Thus, no TTD benefits are awarded.

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

The Arbitrator has already found that Petitioner has not proved an employee/employer relationship existed between Omar Maslat and Super Sales, an average weekly wage, and the statute of limitations has tolled. Thus, no benefits are awarded for Omar's death.

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that no claim has been made and no evidence submitted related to penalties and fees and therefore none are awarded.

N. Is Respondent due any credit?

The Arbitrator finds that Respondent-Employer and Respondent IWBF are not entitled to a credit.

O. Other

a. Injured Worker's Benefit Fund

The Illinois State Treasurer as ex-officio custodian of the Injured Workers' Benefit Fund was named as a party Respondent in this matter. Petitioner submitted sufficient credible evidence that Respondent-Employer was not insured at the time of the injury. Such evidence consists of the National Council on Compensation Insurance Certificate. (PX E) Further, Petitioner provided

enough credible evidence that notice of the proceedings were provided to the Respondent-Employer since Respondent-Employer was represented at hearing.

No benefits are awarded against Super Sales and/or against the Injured Workers' Benefit Fund.

b. Petitioner's Exhibit C, Excerpt Report of Proceedings from *People vs Jones*, is admissible

The admissibility of Petitioner's exhibit C is of vital importance to Petitioner's claim. At hearing, Petitioner offered into evidence the Excerpt Report of Proceedings from *People vs Jones*, 14 CR 07806, Petitioner's Exhibit C. This Excerpt contains the testimony of Bahlal Abubakr, the 21- year old clerk that was working at Super Sales food mart when Omar Maslat was fatally injured. Petitioner offered three evidentiary rules for its admission. (Rules 804(b), 803(8), & 801(2)) At trial, the Arbitrator rejected all three and found the document to be inadmissible. However, upon further study, the Arbitrator finds it to be admissible under 801(2) of the Illinois Rules of Evidence.

Rule 804(b) – not admissible

The Illinois Rules of Evidence provide that former testimony of a witness is only admissible if that witness is unavailable. Ill. R. Evid. 804(b). The Arbitrator finds that Bahlal Abubakr was an available witness under the Illinois Rules of Evidence. There is no evidence that Mr. Abubakr has refused to testify in this proceeding. Petitioner did not present any evidence that Mr. Abubakr has died or is suffering from a mental illness that would prevent him from testifying. There is no

evidence that Petitioner has attempted to contact Mr. Abubakar prior to the date of trial by any means. Petitioner did not subpoenaed Mr. Abubakr to testify.

In Runyon, the Commission excluded evidence based on Illinois Rule of Evidence 804. Runyon v. Pinckneyville Corr. Ctr., 10 IL.W.C. 45760 (I.W.C.C. May 19, 2015). In that case, the petitioner attempted to admit transcripts from other workers' compensation proceedings without having the witnesses testify. *Id.*

Even if Petitioner was found to be unavailable, 804(b)(1) requires the former testimony to be from a proceeding where "a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." In this case, Mr. Abubakr was crossed by the defense attorneys for Joey Jones, who was on trial for second-degree murder and attempted murder. This criminal proceeding is substantially and procedurally different from the workers' compensation claim. The transcript of Mr. Abubakr's testimony by itself cannot be cross-examined by Respondents regarding relevant workers' compensation issues.

Rule 803(8) – Public Record – not admissible

The Arbitrator also rejects Petitioner's assertation that Abubakr's criminal court transcript was admissible as a public record. Illinois Rule of Evidence 803(8) includes the reports, records, statements and data complications of public offices and agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law which there was a duty to report…" A court reporter does not seem to fit the definition of a public office or agency as defined by the rule. Further, Abubakr did not appear to be a reliable witness, since he gave his testimony from jail and was later uncooperative during his direct examination on May 9, 2017. As a result, Petitioner's Exhibit C is excluded as hearsay.

Rule 801(2) Admission by a party-opponent - admissible

However, it is an admission by a party-opponent under Rule 801(2) as when an agent or servant makes a statement concerning a matter within the scope of the agency or employment, during the existence of the relationship. Here, it appears that witness Bahlal Abubakr's statements were made during the existence of his employment relationship with Respondent. While his Grand Jury testimony was dated April 29, 2014, only four weeks after the occurrence, Mr. Abubakr had been already been arrested and convicted for his own (unrelated) crimes shortly after the shooting. On April 29, 2014, he was still in prison at the Cook County jail and there is no proof that he was still employed by Respondent. However, his employer was his step-father, who reemployed Abubakr at another store. So it, appears that Abubakr was nearly termination-proof, which is a common occurrence in some family businesses.

While Abubakr was simply a clerk in the store, not an owner or principal, it would still be within his knowledge to know whom was employed at Super Sales. Regarding Omar Maslat, witness Abubakr stated, "he was kind of like homeless, so, you know, we try to give him a job every now and then." (PX C -R. 22)

c. Petitioner's Exhibit D, Report of Postmortem Examination, is Admissible

The Arbitrator finds that Petitioner's Exhibit D is admissible under Section 16 of the Act as it a certified medical record. With regards to Respondent IWBF's *Ghere* objection, Respondents admitted they received Exhibit B, which states that Petitioner's cause of death was a gunshot wound to the chest, prior to 48-hours before the hearing. Accordingly, Respondents were put on notice and could not be surprised that Petitioner submitted medical records at hearing that

stated Omar Maslat died as a result of a gunshot wound to the chest. As such, the Arbitrator admits Petitioner's Exhibit D into evidence.

Kurt Carlson 06.27.19

Kurt Carlson Date

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARK DAUBMAN,

Petitioner,

vs. NO: 18WC 26016

PRECISION ENGINES, INC.,

Respondent.

20IWCC0220

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, medical expenses, Respondent's credit and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 22, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 6 - 2020

Barbara N. Flores

Marc Parker

Deborah Simpson

o030520
BNF/jrc
045

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

DAUBMAN, MARK
Employee/Petitioner

Case# **18WC026016**

PRECISIOIN ENGINES INC
Employer/Respondent

20IWCC0220

On 8/22/2019, 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 1.84% 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:

0487 SMITH MENDENHALL SELBY ET AL
STEVEN W SELBY
510 E 5TH ST PO BOX 518
ALTON, IL 62002

2674 BRADY CONNOLLY & MASUDA PC
NEEL MOOKERJEE
211 LANDMARK DR SUITE C2
NORMAL, IL 61761

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

☐ 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
19(b)

Mark Daubman
Employee/Petitioner

v.

Precision Engines, Inc.
Employer/Respondent

Case # **18** WC **26016**

Consolidated cases: **N/A**

20IWCC0220

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Collinsville**, on **7/31/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **8/3/18**, 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 **$30,524.00**; the average weekly wage was **$587.00**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$2,719.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$2,719.00**.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $18,091.85, as set forth in Petitioner's exhibit 3, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Vest, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $391.33/week for 49 1/7 weeks, commencing 8/22/18 through 7/31/19, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $2,719.00 for temporary total disability benefits that have been paid.

Petition for penalties and fees is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Michael K. Nowak, Arbitrator

8/21/19
Date

ICArbDec19(b)

AUG 22 2019

FINDINGS OF FACT

Petitioner testified that he is 58 years of age, single and a veteran from the U.S. Army. He left the Army in approximately 1986. For the last 7 1/2 to 8 years he has been employed with the Respondent, precision engines. He is 6 foot two approximately 170 pounds or at least used to be. He is lighter now since his accident.

He worked for the Respondent as a machinist working with engines. They do tear downs and rebuilds of automotive engines.

On August 3, 2018, Petitioner was working at the shop. He was the only employee besides the owner, Don Kulash. The Petitioner normally works with cylinder heads and when he gets caught up with that job, he does various other things in the shop including the reconditioning of rods, tearing motors apart with lots of lifting and twisting. On that particular day, the owner Mr. Kulash was having physical problems since he had just come back from hernia surgery. Petitioner identified the photos in Respondent's Exhibit 4 as being photographs of a machine known as a boring bar machine. This particular machine is used to bore the inside of engines. That machine is supposed to ride on a cushion of air and is a pretty heavy piece of equipment.

Petitioner testified that the boring bar is supposed to slide on the table but was stuck in the back left of the air table as he was facing it. Petitioner testified that Kulash brought him over to that machine to move the head of the machine because Respondent couldn't as he had just come back from surgery. Petitioner identified Exhibit 4A and an "X" was marked where he was standing while pulling the head of the machine. He had his foot propped up against the machine and twisted right reaching over and grabbing the machine, pushing and pulling and after about 10 minutes of that, he told the Kulash that it wasn't going to move.

Kulash was in front of the machine directing the Petitioner in what to do. As Petitioner was pulling and pushing on the machine, he was straining his knees and his back from pulling and pushing. Petitioner told Kulash that he was ready to quit because he didn't think it was working but Kulash insisted that he keep going on and finally after some time he shook the machine loose. When it came loose it jerked the Petitioner back and he had to catch himself and that's when he said everything got "messed up ". At that point Petitioner's back was hurting and pain shot down his leg and his knees buckled. Petitioner had to use his leg up against the machine to get leverage. As far as exertion goes Petitioner said that he had to give as much exertion as he could to try and get the machine to move.

Petitioner said the pain came on after about five minutes of catching himself. He did not finish the day. He tried to stay for about a half hour to 45 minutes and he told Kulash he can't go on anymore and had to go. That was on Friday. Respondent told the Petitioner that he hoped he felt better and Petitioner left. Petitioner returned to work the following Monday and he stated that it was rough as his pain got worse. He does not have health insurance. He has been injured at work before and has always managed to get through it without medical attention but it did not work this time. Eventually the Petitioner went to the emergency room on August 22, 2018.

Petitioner said that the emergency room looked him and over gave him some medicine and work restrictions. Petitioner stated that he took those restrictions to the Respondet the same day and also gave him an accident report. No one has paid the medical bills.

Eventually the Petitioner came under the care of Dr. Bruce Vest, Jr. and his bill has not been paid either. Petitioner testified that he's done therapy and received injections on his knees and back. As of today, some days are better than others. He has since applied for Social Security Disability and has been approved. Petitioner testified today, the date of hearing, he's walking with a cane. As to the frequency of cane use, Petitioner stated that some days are better than others and some days he can get by without it and he tries his best to do without it. He tries to walk every day to keep up his mobility. He has not had a doctor tell him that he has to walk with his cane or not walk with his cane. As to future treatment, he really doesn't want to get back surgery. If surgery can fix his knees, that's what he wants. Petitioner does have one leg that's little shorter than the other from a motorcycle accident in the 80s, just after he was getting out of the military service.

Petitioner testified that he went to two section 12 examinations. The first one was with Dr. Paletta and he was with him about 20 minutes to half-hour. The other one was with Dr. DeGrange. With the exception of a small advance, Petitioner has not received any TTD checks or had any medical bills paid by the Respondent.

On cross-examination, Petitioner again stated that he was pulling and pushing on the machine and it finally broke free and he had to catch himself from falling back. He acknowledged the photo of exhibit 4C is accurately depicting where Mr. Kulash was standing when he was injured. Kulash was standing there the entire time he was trying to operate that machine.

In reviewing the accident report, it did not say anything about jerking back and almost falling. Petitioner acknowledged Kulash was standing where he would've seen what happened. Petitioner said the machine suddenly broke loose and that's why he had to catch himself. According to the Petitioner Kulash then asked him if he was okay and the Petitioner stated he was not. Petitioner also testified that the Kulash knew why he was going home early on that particular day because he was right there when it happened. Petitioner said he told Respondent he was hurting too bad.

Petitioner stated that he would very seldomly take off work, prior to this date of accident. When he did, it would be for a sick day. Petitioner was very proud of his work record and production record as well. Petitioner did not turn in an accident report until August 22. He had worked a couple weeks between the accident and had tried to make it. He had taken off early on some of those days. This was not the first time he had been hurt and had been able to work through it before but this time it didn't happen. Petitioner agreed that the emergency room put lifting and other work restrictions on him those were given to the Respondent on August 22. The Respondent attempted to accommodate those restrictions, but the activities hurt Petitioner's back. He was asked to lift more than 10 pounds. Respondent asked him to move a grinder machine. That requires holding of the valve grinder machine continuously. Petitioner did try mopping, but it started hurting his back too bad and he had to stop. Petitioner did have the ability to take breaks including sitting. He also was asked to clean small grind valves, but you have to hold onto the machine while you're doing that. He could not pull up a stool to do so because it was too high. You can't look over the machine to see what you're granting if you're sitting on a stool. He was also asked to put cylinder heads up on the benches to do valve jobs. He did one valve job, but it hurt so bad he was not going to grind anymore. The next day Respondent asked him to spray weeds outside. He thinks that that may have taken approximately an hour and a half.

Petitioner does recall going back to the emergency room and he was completely taken off work at that point.

Subsequently, Petitioner went to go see Dr. Vest on or about August 30. He also recalled telling the doctor both his knees hurt with the right being worse than the left. As far as cane usage, Petitioner stated he probably does not use it as much as he should and today is a bad day so he's using it more than usual. Mornings are worse than the rest of the day as well. Petitioner does not leave the house very much and only maybe for an hour or two at a time. As far as his back pain goes, it is in the middle of this back and goes down his right side and periodically down into the right leg but not all the time. Doing dishes and walking upstairs cause increases symptoms.

Petitioner thinks he started using the cane a couple of weeks after the accident and he acknowledged no doctor has told him that he needs it, but it has become increasingly difficult to walk so he does use it. Dr. Vest has since told him to use the cane if he needs it. Petitioner states he always keeps the cane in his truck because sometimes his knee gives way and there's so much pain in his back.

Petitioner was shown Exhibit 12 which were a variety of surveillance videos. Petitioner acknowledged that there are times that he does not use his cane. Petitioner was also shown the video going to a gas station where he was not using his cane. On the day of his IME visits, he had one in the morning and another one in the afternoon. Petitioner acknowledged there are times when he got out of the car that day and did not use his cane and other times that he did. The video taken April 4, 2019 shows Petitioner walking in his yard without a cane. Another one taken on April 8 shows him walking with a cane. There is another video taken when he went to go eat a meal at Senior services Plus but did not take his cane with him. There's another video where Petitioner acknowledged where he went to Schnucks grocery store without his cane.

Petitioner testified the date of hearing he was having a bad day as far as pain goes and needed his cane.

On redirect, Petitioner testified that he reported the accident in writing August 22, after he met with his attorney that day for the first time. Petitioner also acknowledged there were plenty of times in the videotapes when he was using the cane and plenty of times when he was not using it, and on those occasions, he did notice a limp on his right leg. Likewise, he does not use a cane in the grocery store because he uses the cart instead for support.

Respondent called as its sole witness Donald Kulash. He is the owner of Precision Engine Service. He has owned the company for 22 years. He knows the Petitioner as an employee of 8 1/2 years. During that time, he has been his only employee. Petitioner has worked as an automotive machinist. He considers Petitioner to be a model and excellent employee that is valued. He was a great help to him. Respondent believed he had a good rapport with the Petitioner until about nine months before the accident because the Petitioner was getting in a bad mood and would throw tantrums. Petitioner earned regular raises and was making $16 per hour at the time of the accident. Petitioner kept his own time on a timesheet. There were times, prior to the accident, that Petitioner would take off early and he would generally tell him why. Respondent did not always deduct the time off when Petitioner left early. As far as the work performed, Kulash testified it was everything from machining an individual part to rebuilding a complete motor. He thought about the heaviest item you would have to lift would be 70 pounds without using a hoist or lift. He did not think that there were any activities that Petitioner performed that the he did not also perform. Kulash also denied that he had Petitioner lifting items when he was unable to do so because of recent

hernia surgery. Kulash then identified the boring machine and showed how he would place an engine block into the machine's cradle with the use of an electric crane winch.

Kulash described the boring machine as being a device that bores out 30 thousandths of an inch of metal from the inside of the cylinder wall. Prior to August 3, 2018 the Petitioner had never used that machine. Kulash also identified pictures 4A through 4D as being accurate pictures of the boring machine. That machine has not been altered and there've been no repairs done to it. Kulash also said there'd been no problems with the machine. He stated that when you glide the machine there would be approximately 20 pounds of force required. Kulash also stated he never had the machine jam on him before. He also stated his recent hernia surgery was not from work duties but rather putting a suitcase in an overhead bin on a train. He stated that he was standing next to the Petitioner about 3 to 4 foot away and that Exhibit 4C correctly shows where he was standing. Kulash stated he was instructing Petitioner the whole time on how to use the machine and at no time did he see the boring machine jam. He heard the Petitioner's description of accident and he did not recall that any of it happened. He also stated that he did not tell the Petitioner to keep pushing and pulling on the machine until it came loose. He also stated he did not see the machine break loose and jerk the Petitioner back. He has had this machine for 15 years and only once it had a wire that had to be repaired about 12 years ago. He uses the machine 3 to 4 hours a month approximately.

Kulash also testified that he did not see any indication that the Petitioner was injured. He does not remember whether Petitioner left early that day. That would not surprise him. He did not tell him he was leaving because his back hurt. He does acknowledge he could have said that his back hurt and he left but did not say that he hurt his back. Kulash testified it would not have been out of the ordinary for the Petitioner to leave because of aches and pains. Petitioner had spoken to him about his back hurting in the past. He'd also shown him his knees prior to this incident, perhaps a month or two before. At that time Petitioner showed him how he can move his leg around his knee and that it was deteriorating but he cannot remember which one.

The next regular day of work, Petitioner did not say anything to Kulash about an injury. The first time he heard about an injury was when he received the off work slip and accident report from the Petitioner on 8/22/18. On that visit Kulash testified that Petitioner said was going to the doctor and that he was tired of the Respondent abusing his body. Kulash also acknowledged receiving the work restrictions at that time. He testified that he attempted to accommodate the restrictions by having him sweep the floor but Petitioner refused to do so. He also testified that he gave him the option of sitting or standing. Respondent was uncertain of how long Petitioner stayed that next day at work. Respondent also asked him to spray for weeds outside and he did not complete that task because Petitioner stated he had to bend over to do it. He only thinks Petitioner sprayed for weeds for a few minutes and then went and sat in the office. He also asked him to clean the office floor and mop it but Petitioner would not do so. There was one particular day were the Petitioner refused to do anything and then he sent him home. Kulash thinks that he last worked for him on August 29th or 30th and there's been no interaction with him since. Respondent also testified that he would accommodate restrictions if their brought to him. Respondent also stated that if he would have received a notice of accident on August 3, he would have reported it. Respondent stated that he did turn in to the insurance company the day that he received it.

On cross-examination, Kulash acknowledged the Petitioner was an excellent employee for 8 1/2 years. He was in the room and listened to Petitioner testify. He indicated that he was standing next to a machine that Petitioner was working on and that he was giving instructions to him, and everything was great. He also agreed that his version of events was completely diverse to the Petitioner's. He also acknowledged that Petitioner may or may have not told him that he hurt his back as he was leaving on the date of accident but he can't recall.

As far as the boring machine, Kulash agreed that it rides on a cushion of air and that if the air supply is not set right, the machine could catch up so that it is capable of having the jam that was described by the Petitioner.

On redirect, Kulash testified that you could clean bathrooms with limited bending as well as mopping and that he did not instruct the Petitioner directly on how to do those activities. Kulash stated that the boring machine floats on air and it has fingers at center in the bore and has to float because you are only removing twelve thousandths of inch per side and if it doesn't float, you will ruin the block. He also stated that it's possible that little metal chips go everywhere.

On re-cross, Respondent acknowledged that the left side of the machine had quite a few items next to it so it was not accessible from the left-hand side, only from the center or the right side.

Petitioner was recalled in rebuttal. When asked whether there was any doubt that he injured himself on the day in question, Petitioner testified that it was just as he described the machine boring head was stuck and it would not move. When asked why the Respondent would say this didn't happen, Petitioner testified that he did not know why and that he really was surprised to hear him say that because he was right there and knew it was stuck.

Petitioner's Exhibit 2 contains the records of St. Anthony's Hospital emergency room. That history starts with a triage note which states "presents with complaints of low back pain starting on August 3, 2018 after working with heavy machinery also complains of right knee pain from the same ambulate with guarded gait."

The doctors note from the visit goes on to say "Petitioner stated that he was at work when he was pulling on a piece of equipment and bracing his right foot against the wall the air machine that supports that was not working and ended up feeling pain in the low back in the midline. He stated his pain is severe 8-10. Pain was intermittent with spasms and that he also felt mild pain in his right knee on the inside." (Pet 2. p 6-10) On physical exam, Petitioner had midline tenderness and paraspinal tenderness. The doctor noted difficulty with walking and sitting up and that he was limited in bending secondary to pain. Petitioner was diagnosed with lumbar strain and right knee strain. Petitioner was released with prescriptions and told to follow up with a healthcare provider. He was also given a work restriction letter allowing him to return to work on 8/24/18. The restriction states that he should limit lifting pushing and pulling 10 pounds for the next 10 days and he should also limit bending at the waist.

Petitioner returned to the emergency room on August 30, 2018. At that time, he complained of bilateral knee pain and back pain. He had not yet had his knees evaluated and did state that he had a doctor's visit coming up with Dr. Vest on September 17 but his pain has gradually worsened and is now affecting how he walks. The emergency room doctor found diffuse knee pain worse with motion. The Petitioner was diagnosed with primary osteoarthritis of both knees. He was taken off work until he could be seen by an occupational medicine doctor.

Dr. Bruce Vest, Jr. testified by deposition on July 16, 2019. Dr. Vest is a board-certified orthopedic surgeon practicing in Alton Illinois. Dr. Vest testified that he saw Petitioner on referral from his attorney on September 17, 2018. Petitioner gave an accident history occurring on August 3, 2018 while working as a machinist at precision engines. He told Dr. Vest he was working on a machine and was pushing and pulling on the machine, and had sudden pain in his low back with an extension of pain down the right leg. He said he left work early that day due to the low back pain. He said he returned to work following Monday and worked for two weeks with pain and eventually went to St. Anthony's emergency room. He was sent back for light duty work apparently went back to the ER for another visit and eventually came to Dr. Vest's office. On examination, he was diagnosed with a herniated lumbar disc, degenerative disc disease of the lumbar spine which was moderate at L4-5 and L5-S1, lumbar strain, degenerative arthritis of both knees and a torn medial or lateral meniscus of both knees. MRIs were ordered and he was taken off of work. As of his last visit with the Petitioner Dr. Vest diagnosed the Petitioner with lumbar spinal stenosis at several levels. He also has a left paracentral disc herniation at L4-5 and small central herniated disc at L3-4, along with degenerative disc disease of the lumbar spine and lumbar strain. His current knee diagnosis included severe degenerative arthritis of both knees, chronic tears of the interior crucial ligament of both knees torn medial menisci of both knees and torn lateral meniscus of the left knee.

Dr. Vest recommended epidural injections to help alleviate the lumbar pain and ordered physical therapy as well. He was also been given medications. A fusion has been discussed as a last resort, but he would prefer to do a series of epidural before final decision was made on surgery, as it is largely symptom driven. As far as the Petitioner's knees Dr. Vest testified that his knees are bad enough for knee replacements. Those have not been recommended at this point. Dr. Vest did not believe he was at maximum medical improvement at this point.

It was Dr. Vest's opinion that the accident described aggravated pre-existing problems in his low back and knees and caused him to become symptomatic and that his complaints have been consistent with Dr. Vest's findings.

On cross-examination, Dr. Vest stated he is fellowship trained in spinal surgery and sports medicine. Spines are approximately 20 to 30% of what he does. Dr. Vest acknowledged that he receives some referrals from Petitioner's attorney but could not give an exact number. He estimated it would be approximately five patients a year. He also testified that workers compensation cases account for approximately 10% of his practice and that he is charging $1800 for a deposition flat rate.

Dr. Vest acknowledged that the Petitioner had degenerative joint disease in both knees with a vargus deformity in the right knee and a valgus deformity in the left knee. Dr. Vest acknowledged that Petitioner's pain level was a 10 at his first visit. Dr. Vest also acknowledged that the MRI of the lumbar spine was consistent with chronic findings and that Petitioner became worse. As far as cane usage, Dr. Vest acknowledged he saw the cane being mentioned several times throughout treatment but he was not sure if he had prescribed the cane or if he had one of his own. Dr. Vest did acknowledge that if there is information that affects the credibility of the patient, that could affect his opinions.

On redirect, Dr. Vest stated that if the epidural pack didn't work on his lumbar spine symptoms a lumbar laminectomy could be considered but that will greatly depend on his symptoms. The surgery would be for pain control and improving his ability to walk.

Attachment 2 of the deposition of Dr. Vest are the treatment records of his office. His records indicate testing by way of x-ray and MRI of both knees and the lumbar spine that were consistent with the testimony of Dr. Vest in his deposition. Dr. Vest stated that the Petitioner was to use a cane for ambulation assistance on his visit of November 30, 2018 and subsequent visits.

Also contained in attachment are the physical therapy notes from Dr. Vest's office. Therapy was initiated on January 9,2019. The note from January 15 states that Petitioner reported his pain was 3 to 4/10 at worst 5 to 6 out of 10 since last visit and he continued to report that he is trying to walk without a cane more, however, he stated that his knees gave out at least once a day, right greater than left. This was discussed and he was advised that he should carry a cane with him and with fatigue he can use it, and if not, he has it "when needed." (PT note 1/15/19)

On his last visit on February 12, 2019 his back pain was at a 5 to 6. Dr. Vest noted an antalgic gait with limping on the right side. Dr. Vest sought epidural injections and continued him off work. His last physical therapy visit was on February 19 at which time Petitioner was having a good day at 4/5 and reported as having two good days a week and that his knees were feeling stronger and less likely to give out since the physical therapy started. At that time, the Petitioner was continuing to use the cane with the right hand.

Petitioner's Exhibit 3 is a listing of the bills from a variety of treaters totaling $18,091.85

Petitioner's Exhibit 4 is the independent medical examination report of Dr. Donald DeGrange. This report was not offered by the Respondent. Dr. DeGrange saw the Petitioner for purposes of evaluating his spine. He took a history very consistent with that given the emergency room and Dr. Vest. It was Dr. DeGrange's opinion that the Petitioner suffered a lumbar strain along with lumbar disc degeneration and stenosis at multiple levels. He believed that the mechanism of injury was a lumbar strain which had aggravated the pre-existing condition. The records that he had reviewed showed several complaints of low back pain since 2005 without any significant injury or trauma. the MRIs revealed long-standing degeneration. Dr. DeGrange agreed with Dr. vest proposing lumbar injections and that the Petitioner may eventually require a decompression surgery but did not see indications for a fusion or more extensive surgery beyond a decompression. He did not believe that the Petitioner had reached maximum medical improvement but could return to work with a 25-pound lifting restriction with the avoiding of repetitive bending and twisting at the waist as well as prolonged standing and walking. Dr. DeGrange was asked a variety of specific questions by the work comp adjuster. Dr. Grange stated that the conditions identified were not related to the August 3, 2018 incident but that they had been aggravated to their current level by that incident. He believed that the direct consequence of the August 3, 2018 work-related activities is considered a lumbar strain but that however has led to the aggravation of pre-existing degenerative condition and spinal stenosis. He also thought that the work incident aggravated but did not accelerate the condition. He also thought Dr. Vest's treatment had been reasonable and necessary and that the Petitioner was unable to return to his work full time, as relates to the

August 3 incident involving only his lumbar spine and he believed those restrictions were related to the alleged work activity.

Petitioner's #5 contains a Motion for penalties and attorney's fees based on a refusal to provide medical benefits as well as TTD.

Respondents #1 contain the responses to the 19 B as well as the petitions for penalties. The responses to the penalties state that the Respondent denies a compensable accident occurred.

Respondents Exhibit 2 is a payroll record. Those records only show one week in the year prior to the accident were the Petitioner worked less than 40 hours and that particular week was 36 hours.

Respondent's Exhibit 3 is the accident report given by the Petitioner to the Respondent on August 22, 2018. It states that the Petitioner had never used the boring machine before, it was supposed to slide freely on the air table that was not operating correctly and that his supervisor told him to push and pull to get it to move, it was still not moving so his supervisor told him to keep working it as instructed by his supervisor, he felt sudden pain in his back and his knees from the strain of trying to get it to work correctly.

Respondents Exhibit 4 is a group exhibit of four photographs. 4A is a copy of the boring machine with an X marked by the Petitioner where he was standing when he was attempting to free the machine. Photograph 4C shows the Respondent standing at or near where he was when the alleged incident occurred photograph. 4D is a picture of the bench where the Petitioner normally did his bulk of his work.

Respondent's Exhibit 5 are the subpoenaed records of St. Anthony's Hospital. Those records include a renal study dated October 5, 2013. That MRI study also had incidental findings of an annular bulge and protrusion at L3-4, a small annular tear at L4-5 and stenosis at L2-3. No herniations were noted. There are also x-rays and an MRI in 2008 ordered by Dr. Kevin Boyd of the knees, indicating calcification likely secondary to an old injury as well as an MRI of July 30, 2008 of the knee showing an oblique tear of the medial meniscus.

Respondents Exhibit 6 consists of 650 pages of records from Alton Memorial Hospital obtained by subpoena. The first entry is a visit of October 10, 2002 for cough. The next visit is February 10, 2003 for jaw pain. There is a visit for October 2, 2003 from back pain resulting from a sprained back. There's also a record of the visit in August 2004 injury to his right foot and knee and ankle resulting from a work injury but no significant pathology. There is also a visit dated September 18, 2001 for a back injury where the x-rays were minimal. There is also a ganglion cyst removal at the right wrist in 1998. There are also surgical records for April 19, 2005 for an arthroscopy on the right knee where Petitioner had a right knee medial meniscectomy.

Respondents Exhibit 7 are the treatment records of Southern Illinois Health Foundation on the Petitioner that were acquired by way of subpoena. Its 29 pages consist of treatment records from the year 2011 through 2013, and deal with the general health issues of the Petitioner. The only notable finding in any of them was a complaint of back pain on January 8, 2013.

Respondent's Exhibit 8 are additional records from Southern Illinois Healthcare Foundation showing a treatment in mid 2013 for low back pain. Of note is the MRI taken at St. Anthony's Hospital on June 17, 2013 that

is contained in the St. Anthony's records and MRI showed an annular bulge at L3-4 as well as a bulge at L4-5 with a small annular tear but no herniations.

Respondent's Exhibit 9 is the deposition of Dr. George Paletta taken on May 10, 2019. Dr. Paletta is a board-certified orthopedic spine surgeon, fellowship trained in sports medicine. He was asked to perform a section 12 examination on the Petitioner. Dr. Paletta estimated that he sees 100 patients per week and at least three of them are IMEs. He identified his report that he completed on the Petitioner. He examined the Petitioner on March 11, 2019 and took a history of injury when he twisted his upper body to the right and his right leg was pushed up against a piece of equipment and that he injured his knees and his back. Dr. Paletta reviewed medical records from St. Anthony's and Dr. Vest and performed an examination. His diagnosis was end-stage osteoarthritis of both knees with the underlying chronic ACL insufficiency. He did not believe that that condition was causally related to the accident. He did state that the alleged accident increased the subjective symptoms but there was no evidence of permanent aggravation or acceleration.

For restrictions Dr. Paletta recommended that he alternate standing and sitting and limited standing to 15 minutes per hour, no squatting, kneeling or climbing but that was not related to his work condition. He believed his treatment up to date had been reasonable.

On cross-examination, Dr. Paletta said he had no reason to doubt the veracity of the Petitioner and acknowledged that he had symptoms from this incident. Dr. Paletta also acknowledged that the mechanism of injury described by the Petitioner could result in an overload of the joint and could have overloaded his back as well. It was also his understanding that Petitioner worked at an engine shop and involved handling of equipment and heavy pieces of material and that he been doing that for some time without difficulty.

He also acknowledged that the Petitioner seemed very genuine in his complaints and symptoms. He also had no disagreement with the treatment recommendations or the treatment of Dr. Vest. He also acknowledged that an aggravation causing symptoms but nothing further, as far as materially changing the scope of the condition. He also acknowledged that the complex tear can have old history to it as well as more recent acute history to it. He also agreed that a chronic tear is more susceptible to additional tearing than a healthy piece of cartilage in a younger individual. He also could not say that the Petitioner would require a knee replacement absent this accident.

On redirect Dr. Paletta acknowledged that his opinions about symptomology were based on what Mr. Daubman told him.

On the re-cross Dr. Paletta stated that he may have misspoken in his report about prior history given by the Petitioner. He agreed that he had no reason to question the credibility of the Petitioner. Finally, Dr. Paletta acknowledged he saw no evidence of symptom magnification or secondary gain.

Respondents Exhibit 10 is a transcribed statement taken by insurance adjuster Dee Moan of the Petitioner on August 22, 2018 at 11:30 AM. Page 4 of that statement stated that Don had just gotten back from hernia surgery and could not do any lifting and wanted the Petitioner to bore a block on a machine that Petitioner had never run before. For some reason it was not operating correctly. Kulash told the Petitioner to push and pull on it

and to continue working on it until it "frees up." While he was pushing on the machine and pulling on it, he felt something in his back and his knees give and he went home.

Respondents Exhibit 11 is a DVD with three videos. The first of these videos is the boring machine being operated by Kulash. The video shows him moving the large boring head across the table which does require some exertional force and requires him to use both hands. The remainder of the video depicts him using small buttons to lower a drill into the cylinder of an engine block. The second video on the disk is Kulash picking up an engine block with a movable hydraulic crane and placing it onto the boring machine. The third video shows Kulash sliding the boring machine across the table for seven seconds using both hands.

Respondents Exhibit 12 is a surveillance report, dated January 31, 2019 prepared by Photo Fax Inc. Surveillance company. Attached to that report are videos of contacts with the Petitioner ranging from January 22, 2019 April 11, 2019. According to page 2 of the report these videos consist of approximately 14 minutes of the claimant/Petitioner walking entering his vehicle exiting his vehicle pumping gas in a vehicle carrying a trash bag to the curb driving and retrieving his mail. The report also makes certain characterizations about the Petitioner walking in a fluid manner without the use of a cane. It should be noted that this video appears to have been edited. On the first day of January 22, 2019, the video shows the front of the Petitioner's house at 10:35 and then the camera is turned off until 10:38 when the truck of the Petitioner is leaving the house. Footage of the Petitioner leaving the house and getting in the truck has been edited out or not filmed. The remainder of that day shows the Petitioner going to see his doctor and walking with his cane in and out of that facility. There are periods of time when he does not appear to be actively using his cane but does appear to be walking with a noticeable limp, sometimes more noticeable than other times. Later that day he is seen getting out of his truck and putting gas in it, returning to his home and later taking the bag of garbage out. Again, Petitioner is seen walking with a noticeable limp while not using his cane.

The next day of the video is Sunday, January 27, 2019. That video shows the Petitioner leaving his home at approximately 10 AM. Page 8 of the report claims that the Petitioner was seen arriving at the church and walking inside. However, that footage was either deleted or not filmed. According to the report, the investigator entered the church was unable to locate the Petitioner. No footage has been provided of that. Later the Petitioner leaves the church, carrying a Bible, out to his truck. There is no video footage of the Petitioner returning to his home.

The next footage claims to be taken on March 10, 2019 but contains no footage of the Petitioner. The next footage is March 11, 2019. It shows Petitioner leaving his house at nine in the morning and arriving at his IME appointment in St. Louis with Dr. Paletta. He parks his car and walked inside with a cane. Later he exits the building with a cane. Later in the day, he arrives at a second IME appointment with Dr. DeGrange. Again, when the Petitioner is not using a cane, he can be seen walking with a noticeable limp, more severe at times and others. Video footage of his arrival at home is not contained on the tape.

Footage of April 4, 2019 shows the Petitioner walking out to get his mail and returning to the house. That video is of poor quality but is appears that the Petitioner was not walking with a cane. The April 8, 2019 footage shows the Petitioner coming out of his house in the morning and retrieving a small item from the yard. Again, a noticeable limp is apparent. Later a woman arrives and brings bags of groceries to the Petitioner then leaves. The

Petitioner did not help carry in the items. The woman later returned with a few small plants and places them on the porch of the Petitioner. She also brings additional groceries in for the Petitioner. A short while later the Petitioner is seen coming out of his house and leaving in his truck. It should be noted while this was occurring, the same lady remained at the home working outside alone. A short while later the Petitioner returns home and goes inside.

The final day of footage is Thursday April 11, 2019. The Petitioner is seen leaving his house with a noticeable limp and entering another person's vehicle and traveling to the Senior Services Plus facility in Alton Illinois. They park in a handicap spot. There is no footage of the Petitioner walking in the facility. Approximately one hour later, Petitioner is seen leaving that facility and returning home. Petitioner gets his mail and walks inside. A little after 1:00pm, Petitioner is seen walking out to his truck and going to the Schnucks grocery store in Alton Illinois. There is very little footage of the Petitioner at Schnucks. He is seen entering the store and there is no footage of him in the store or leaving the store. Page 9 of the surveillance report lists no difficulty in filming at the grocery store. Shortly after, Petitioner is seen going into his home carrying what appears to be a prescription bag.

In summary, it appears over these periods of surveillance, Petitioner keeps a cane in his truck and appears to actively use it when going to three medical visits over a three-month period. There are also various times were the Petitioner appears to be limping at various levels. There are also various times in the video where the camera was either not activated or footage has been edited out that was described in the report. There are also times where groceries are being brought to him.

CONCLUSIONS

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

It appears that an incident occurred on the date in question. Petitioner is an excellent employee with a good work history. This is the characterization made by the Respondent himself. The Petitioner was not familiar with the machine he was using at the time of his accident. It is evident this machine takes significant force to operate and Respondent acknowledged it can jam up as alleged by the Petitioner if the airbed is not set correctly or if metal shavings/debris are involved. The Arbitrator finds it noteworthy that the Respondent needed the Petitioner to operate the machine but then testified that it required little force to operate. The Respondent denied that Petitioner was having to cover for him after his hernia surgery with heavy activities. The Petitioner and Respondent are the only two people in shop. It flies in the face of reason that the Petitioner would not have to do more activity while the Respondent was recuperating. The Arbitrator is also not convinced when the Respondent stated on cross that the Petitioner "may have" told him his back hurt and he had to leave. It is uncontroverted that the Petitioner had to leave early and the Respondent may recall he was told it was because he was in pain. The earnings record shows consistent work history that contravenes the Respondent's characterizations of the Petitioner's work attendance.

An injury is an accident when it is traceable to a definite time, place and cause and occurs in the course of employment, unexpectedly, and without affirmative act or design of the employee. *Matthiessen and Haegler Zinc Co. v. Industrial Commission*, 284 Ill. 378, 120 N.E.2d 249 (1918). On this issue, the Arbitrator finds the testimony of the Petitioner to be persuasive. Likewise, Petitioner's description of the nature of accident has been consistent when given to the employer and medical personnel.

Based upon the foregoing and the record taken as a whole, the Arbitrator finds that Petitioner met his burden of establishing that he sustained an accident which arose out of and in the course of his employment with Respondent.

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

Dr. Vest and Dr. DeGrange, the Section 12 examiner, both opine that the accident is causally related to the aggravation of Petitioner's preexisting degenerative condition in his spine. Dr. Paletta even acknowledges that accident caused him to become symptomatic. Dr. Paletta acknowledges that an accident as described by the Petitioner could cause an overload on the knee and the back as well. The Arbitrator finds the opinions of the treater, Dr. Vest and the IME Dr. DeGrange to be persuasive. The Arbitrator has reviewed the surveillance videos. It should be noted that both Dr. Vest and physical therapy records corroborate Petitioner's testimony about trying to minimize cane usage but to have it in his vehicle and use it when needed. There is no indication in the videos that Petitioner is engaging in activities outside of any of the doctor restrictions. None of the video footage was shown to either of the Section 12 physicians or Dr. Vest. The heaviest item he is seen carrying was a bag of kitchen garbage. The videos do show other people bringing him groceries and taking him to Senior Services for a meal. Accordingly, the Arbitrator finds Petitioner's conditions of ill-being in both knees and spine to be causally connected to his work activities.

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

None of Petitioner's bills have been paid. Both IME's opined that the treatment received to date was reasonable, necessary and proper. The Arbitrator finds the bills submitted to be reasonable, necessary and proper. The Respondent is ordered to pay the same per the fee schedule.

Issue (K): Is Petitioner entitled to any prospective medical care?

Dr. Vest opined that Petitioner is not at MMI and that opinion is shared by the Section 12 examiner. Even the other Section 12 Dr. Paletta opined that the Petitioner may need bilateral knee replacement. Dr. Vest is seeking epidural injections prior to making any surgical decisions but the Petitioner may require lumbar decompression surgery, and this is the opinion of Dr. DeGrange as well. The Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by Dr. Vest. The Arbitrator finds it reasonable for Petitioner to rely on those treatment recommendations.

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

Respondent contested the TTD based on accident and causal connection and does not dispute the duration. The Respondent is ordered to pay TTD benefits for 49 1/7 weeks for the period commencing 8/22/18 through 7/31/19. Respondent shall have a credit for TTD paid.

Issue (M) Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that Penalties and fees are not warranted based on the testimony of Mr. Kulash.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adam Fox,
Petitioner,

20IWCC0221

vs.

NO: 15 WC 36771

Russell's Seamless Gutters; Travelers Insurance and IWBF,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering all issues including insurance coverage and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 29, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

20IWCC0221

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

DATED: APR 8 - 2020
o2/20/20
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0221

FOX, ADAM
Employee/Petitioner

Case# **15WC036771**

RUSSELL'S SEAMLESS GUTTERS TRAVELERS INSURANCE & IWBF
Employer/Respondent

On 10/29/2018, 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 2.42% 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
ZBIGNIEW BEDNARZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0180 EVANS & DIXON LLC
JAMES GALLEN
211 N BROADWAY SUITE 2500
ST LOUIS, MO 63102

2389 GILDEA & COGHLAN LTD
JEREMY MAZZA
901 W BURLINGTON AVE SUITE 500
WESTERN SPRINGS, IL 60558

6097 ASSISTANT ATTORNEY GENERAL
ANA VAZQUEZ
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20 IWCC0221

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

X 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

Adam Fox Case # **15** WC **36771**
Employee/Petitioner

v.

Russell's Seamless Gutters, Travelers Insurance & IWBF
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 **Christine M. Ory**, Arbitrator of the Commission, in the city of **New Lenox**, on **November 7, 2017**. 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 X Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. X Was there an employee-employer relationship?
C. X Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. X What was the date of the accident?
E. X Was timely notice of the accident given to Respondent?
F. X Is Petitioner's current condition of ill-being causally related to the injury?
G. X What were Petitioner's earnings?
H. X What was Petitioner's age at the time of the accident?
I. X What was Petitioner's marital status at the time of the accident?
J. X 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 ☐ 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. X Other **Insurance Compliance**

FINDINGS

On **October 20, 2015,** Respondent, Russell's Seamless Gutters, ***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 an average weekly wage was $**500.00**.

On the date of accident, Petitioner was **27** years of age, ***single*** with **0** dependent children.

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

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

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

ORDER

Medical

Respondent shall pay bills totaling **$84,481.96**, subject to the fee schedule and §8 and §8.2 of the Act.

Temporary Total Disability

Respondent shall pay **TTD** from **October 30, 2015 through April 12, 2016**, which **is 23-5/7 weeks** at the rate of **$333.33** per week.

Permanent Disability

Respondent shall pay Petitioner the sum of **$300.00**/week for a period of **30.75** weeks, as provided in Section **8 (e) 9** of the Act, because the injuries sustained caused **15% loss of use of the left hand.**

The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Christine Mowy

Signature of Arbitrator

October 23, 2018

Date

OCT 29 2018

20 IWCC0221

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adam Fox	)	
Petitioner,	)	
	)	
vs.	)	**No. 15 WC 36771**
	)	
Russell's Seamless Gutters, LLC,	)	
Travelers Property & Casualty,	)	
& Illinois Injured Worker Benefit Fund	)	
Respondents.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing on November 7, 2017 in New Lenox Illinois. Petitioner claims he was hired by Travis Bollier, whom petitioner claimed was owner of Russell's Seamless Gutters to work on jobs in Illinois and Wisconsin. Petitioner also claims Russell's Seamless Gutters' workers' compensation insurance policy with Travelers Insurance should cover his workers' compensation claim for a work injury he sustained on October 20, 2015. Alternatively, petitioner claims Russell's Seamless Gutters was uninsured; accordingly, the Illinois Injured Worker Benefit Fund should be responsible to pay the claim.

At issue in this hearing was as follows:

1. Was respondent, Russell's Seamless Gutters, operating under and subject to the Illinois Workers' Compensation or Occupational Disease Act.
2. Was there an employee-employer relationship between Russell's Seamless Gutters and petitioner?
3. Did an accident occur that arose out of and in the course of petitioner's employment by respondent, Russell's Seamless Gutters?
4. What was the date of accident?
5. Was timely notice of the accident given to respondent, Russell's Seamless Gutters
6. Is petitioner's current condition of ill-being causally related to the injury?
7. What were petitioner's earnings?
8. What was petitioner's age at the time of the accident?
9. What was petitioner's marital status at the time of accident?
10. Were the medical services provided to petitioner reasonable and necessary and has respondent, Russell's Seamless Gutters, paid all appropriate charges for all reasonable and necessary medical services?
11. What temporary total disability benefits are due?
12. What is the nature and extent of the injury?
13. Whether respondent, Russell's Seamless Gutters, had a valid insurance policy with Travelers to cover petitioner's claim?
14. Whether the Injured Workers' Benefit Fund is applicable?

STATEMENT OF FACTS

Petitioner, born April 6, 1988, resided with his parents in Peotone, Illinois. He has never been married and has no dependents. The highest level of education reached was some college.

Petitioner claims he worked for a company called Russell's Seamless Gutter (hereinafter "Russell's"), which installed gutters, siding, soffit and facia. Russell's was engaged in altering and maintaining of structures. In his job with Russell's he used sharp edge cutting tools such as miter saw, a gutter machine that have sharp blades on it and tin snips. A Chevy 3500 work truck was also used in the performance of the job.

Petitioner worked as a gutter installer. He started working for Russell's in September, 2015 when he answered a Craigslist ad via email. He sent the email to Travis Bollier. The Craigslist advertised for a skilled gutter's installer. There was no indication in the Craigslist ad as to the relationship between Travis Bollier and Russell's. In the second email between Travis Bollier and petitioner, Bollier identified himself as the owner of Russell's. Petitioner provided his phone number in an email to Bollier.

Bollier called petitioner and arranged for an interview at a restaurant/bar in Coal City, Illinois. The interview took place at approximately 7:00 P.M.; sometime in September, 2015. Petitioner met with Travis and Tony Bollier, who were brothers. Petitioner was offered a job on the spot. He was to be paid $1.75 per foot of gutter on the first floor and $2.25 per foot on the second floor, which worked out to approximately $17 and $18 per hour. He accepted the job at that meeting.

The next day he met the Travis and Tony Bollier at the camp ground where they were staying in Wilmington, Illinois. The Bolliers had two pull-behind campers, a work truck and a work trailer. The work truck was a 3500 Chevy. The gutter machine was on the trailer. They cleaned out the vehicles and then loaded them up with supplies needed for the day. Tony and petitioner where in the work truck and Travis followed behind in his own vehicle. The first job was in Minooka, Illinois. They worked at this job for two days removing and replacing gutters. They started at 6 AM; worked 10 to 12 hours and then went back to the same restaurant in Coal City where they first met. Travis paid for the dinner. After dinner, they returned to the campground. Petitioner got in his vehicle and went home.

Petitioner followed this same pattern while working for Russell's; he met the Boiller brothers at the campground [in Wilmington] and then was taken to the jobsites from there. He took instructions from Boillers on how and where to perform the work. Petitioner would occasionally go for supplies. Petitioner believed if he didn't show up for a shift he would be fired. He worked 10 to 12 hours a day, six to seven days a week. 100% of the work was done with ladders. The work was performed with hand tools such as tin snips, hammers, screw drivers and scissors that were used to cut metal.

Petitioner worked for respondent Russell's in the northern part of Illinois and Wisconsin. Petitioner performed 15 to 20 jobs under the direction of Boiller; of which only three were in Wisconsin.

Petitioner was paid mainly in cash; having received payment only once by check. Petitioner received a $500 payment on October 14, 2015 by a check written by Travis [Bollier] (PX.6). Petitioner claimed it was for only three days' work and that he worked thirty hours. The other payments were by cash and made sporadically; whenever there was money. The longest he went without a paycheck was a week and a half. He never received a 1099 or W-2 and never paid

taxes on the money earned. Occasionally he was pulled off a job to do a measurement for another job for Travis.

According to petitioner, the Bollier brothers were storm chasers. They would go to where there had been hail or wind damage and give a quote to homeowners after advising the homeowners what the insurance company would cover.

On October 14, 2015, petitioner was picked up at his house by Tony in the Chevy 3500 work truck and was driving to Wisconsin when involved in an automobile accident. Petitioner was not injured in the accident. They continued on to Wisconsin; arriving at 3 PM. No work was performed that day. Travis, Tony and petitioner stayed in a hotel; Travis paid for the hotel.

They worked on the Wisconsin job on October 15, 2015 and October 16, 2015. After finishing the day in Wisconsin, they went to Niles, Illinois to do a job. They arrived late on October 16, 2015, staying in a hotel in Niles. They worked in Niles on October 17, 2015 and October 18, 2015. They went to do a small job in Sugar Grove, Illinois on October 18, 2015. They then returned to Wisconsin and stayed the night in the same hotel where they stayed the first time in Wisconsin. The job in Wisconsin consisted of three houses on one block.

On October 20, 2015, petitioner was on an eight-foot ladder trying to install a gutter. The wind was blowing. Petitioner was trying to save the gutter from being blown down and fell off the ladder onto his left hand. This occurred at about 3 or 3:30 P.M. Travis Bollier had taken the gutter machine to another job; he was not on the job site. Tony also was not on the job; petitioner believed he had gone to a gas station. Petitioner called Tony who returned and drove petitioner to Aurora Memorial Hospital in Burlington, Wisconsin. Petitioner denied having prior issues with his left wrist. X-rays of the left wrist and left shoulder revealed a left should fracture.

Petitioner's father picked up petitioner and drove him back to Illinois. On October 23, 2015, petitioner went to the emergency room of Silver Cross Hospital in order to get pain medication. He was instructed to see an orthopedic surgeon. Petitioner saw Dr. Paul Trksak at Hinsdale Orthopaedics on October 30, 2015. Petitioner was scheduled for surgery on November 6, 2015. which was cancelled when he tested positive for cocaine, THC and opiates at the pre-op testing. Petitioner denied using cocaine, THC or opiates on the day of the accident. He reportedly used cocaine and cannabis because he could not get pain killers as he had no insurance. He was using the opiates that had been prescribed by the ER.

On November 17, 2016 he returned to the ER of Silver Cross Hospital after he slipped and fell. He reportedly fell on his right side and then rolled over onto his left to get up. He was in a splint. He did not injure his left wrist further from the fall.

He returned to Dr. Trksak on December 23, 2015. As Dr. Trksak suggested he should have a different procedure than what was originally proposed, Dr. Trksak referred petitioner to Dr. Nacke. Petitioner was first seen by Dr. Nacke on January 8, 2016. A CT scan was recommended by Dr. Nacke and done on January 15, 2016. Dr. Nacke performed surgery on January 21, 2016 at St. Joseph Medical Center.

Petitioner returned to Dr. Nacke on February 22, 2016; took X-rays and recommended a splint and some occupational therapy. Therapy was done at ATI starting on February 19, 2016. Petitioner returned to Dr. Nacke on March 21, 2016; who recommended more therapy. He returned on April 12, 2016. After taking more X-rays, Dr. Nacke prescribed more therapy and a bone stimulator. Petitioner was also released to return to work with light duty restrictions. He finished therapy at ATI on May 6, 2016. He returned to Dr. Nacke on June 23, 2016. Dr. Nacke released petitioner to return to work, full-duty, on June 6, 2016. Petitioner had one final visit with Dr. Nacke on July 15, 2016.

From October 20, 2015 until he was released to return to work on June 6, 2016, petitioner did not work and had no income. Petitioner never returned to work for Russell. He understood he was fired. He claimed he received nasty text messages from Travis and Tony warning it would not be good for petitioner if he sued them.

Petitioner worked for 360 Enterprises which restored 60,000 recalled Volkswagens. He earned $14 an hour and worked full time from December, 2016 to August, 2017.

As to the problems with his left wrist, petitioner said he could no longer play golf and playing the guitar is a lot more difficult. He claimed he could not perform warehouse jobs as he could not lift 50 to 75 pounds. Driving, cold weather and just putting on his socks cases problems. He still has a bump on his wrist. He takes over the counter Tylenol for pain, up to three times a day.

On cross-examination, petitioner stated he saw Travis' business card that he gave to customers. Petitioner did not have a business card. The signage of the Boiller's vehicles were magnets that read: "Russell's Seamless Gutters". He never saw any vehicle registrations or insurance cards. Petitioner was told by Travis that he, Travis, owned the truck.

Petitioner confirmed that he only received payment by one check and the rest was in cash. It was always a round number. The amount of $36,360 claimed on the Request for Hearing was not the amount he received from Russell's. Petitioner did not keep track of the payments he received from Russell's.

Petitioner agreed that if the medical records showed he tested positive for cocaine and marijuana he agreed. He said he rarely used cocaine; he used marijuana to self-medicate. Petitioner denied he used cocaine or marijuana prior to the work accident. He admitted he used cocaine two days before the surgery was first scheduled.

Aurora Health Care Records (PX.1)

Petitioner arrived in the emergency room with a history of falling off an eight-foot ladder when the wind blew him over. He had pain and deformity of the left wrist and left shoulder pain. X-rays of the left shoulder were negative for fracture. The X-ray of the left wrist showed a comminuted fracture of the distal radius extending into the radiocarpal joint, and the ulnar styloid. Petitioner was referred to an orthopedic surgeon.

Provena St. Joseph Medical Center Records (PX.2)

On October 28, 2015, petitioner was seen in the emergency room after hitting his left elbow getting out of the shower that day and the splint moved. He was re-splinted and prescribed 20 Norco. He was to keep the wrist splinted and followed up with an orthopedic surgeon.

The November 6, 2015 lab test were positive for cocaine, THC (marijuana) and opiates.

Petitioner underwent a left distal radius osteotomy due to left distal radius malunion by Dr. Elliot Nacke on January 21, 2016.

Petitioner was evaluated for physical therapy.

ATI Physical Therapy Records (PX.4)

Petitioner received physical therapy from February 19, 2016 through May 6, 2016.

Silver Cross Hospital Records (PX.5)

Petitioner was seen in the emergency room on October 23, 2015 with a history of suffering a fractured left wrist three days earlier in Wisconsin and waiting for workman's comp to tell him where to go for surgery.

Petitioner returned to the emergency room on November 17, 2015. He had removed the splint as it caused him discomfort. He reported that night he had slipped and fell; landing mostly on his right arm, but he also struck his left forearm and wrist on the ground.

Hinsdale Orthopaedics Records (PX.6)

Petitioner was first seen by Dr. Paul Trksak on October 30, 2015. Surgery was discussed for the displaced Colles' fracture of the left wrist. Dr. Trksak felt petitioner would need an open reduction and internal fixation. Dr. Trksak opined that the injury was the result of the work accident of October 20, 2015. Dr. Trksak found petitioner was not able to work.

Petitioner returned on December 23, 2015. Dr. Trksak noted the surgery scheduled for November 6, 2015 had to be cancelled due to petitioner's positive test for cocaine. Because the surgery was cancelled and due to issue with workers' compensation coverage, petitioner had not been seen by anyone. The diagnosis was then malunion of the left intra-articular Colles' fracture. Dr. Trksak believed an osteotomy was now needed. He referred petitioner to his colleague to perform the surgery. Again, Dr. Trksak kept petitioner off work.

Petitioner was seen by Dr. Trksak's associate, Dr. Elliot Nacke, on January 8, 2016. Surgery was discussed and a CT scan was ordered. Petitioner was kept off work.

Petitioner underwent the left distal radius osteotomy by Dr. Nacke on January 21, 2016 for the malunion of the left distal radius fracture.

Petitioner was seen post-operatively on February 2, 2016. He was referred for occupational therapy and kept off work. He was seen again on March 1, 2016 and was to continue in therapy and kept off work.

On April 12, 2016, petitioner was doing well. He was to continue with therapy and released to return to work light duty with no pushing, no pulling and no lifting over 10 pounds.

On June 3, 2016 petitioner was released to return to work full duty as of June 6, 2016. On July 15, 2016 he was doing well; had no pain and had regained near full range of motion. He was released from doctor's care having reached MMI and released to return to full-duty work.

Russell's Seamless Gutters Check (PX.6)

Petitioner identified this $500 check as payment for three days which was issued by Travis Bollier.

Illinois Crash Report (PX.7)

The report indicates petitioner was in a passenger in a vehicle owned and operated by Anthony Bollier on October 14, 2015 when it was involved in an accident in Libertyville Township.

Medical Bills (PX.8)

Petitioner claims the following bills were for treatment of his injuries sustained in the accident of October 20, 2015:

$3,581.00 Joliet Anesthesia Practice

$96.00 Associated Radiologists of Joliet

$12,814.64 ATI
$496.00 Aurora Health Care
$1,674.30 Aurora Health Care Hospital
$565.64 Chicagoland Surgical Assisting
$80.00 Dr. Scott Lowry 12/24/2015
$1,229.00 EM Strategies 11/17/2015
$7,481.00 Hinsdale Orthopaedics
$38.00 Joliet Radiology 10/28/2015
$43.00 Joliet Radiology 11/3/13 pre-op chest X-ray
$256.00 Dr. Mohammed Omer M. Ansa...11/4/2015
$2,554.21 Presence St. Joseph Medical Center 10/28/15
$1,144.45 Presence St. Joseph Medical Center 11/3/15
$846.00 Presence St. Joseph Medical Center 11/6/15 drug screen
$4,461,18 Presence Saint Joseph Hospital 1/15/2016
$1,144.43 Presence St. Joseph Medical Center 01/13/2016
$47,311.95 Presence St. Joseph Hospital 01/21/2016
$1,250.70 Silver Cross Hospital 11/17/2015
$1,022.80 Silver Cross Hospital 10/23/2015
$149.36 Walgreens

National Council on Compensation Insurance Certification (PX.9)

NCCI certified Russell's Seamless Gutters did not have workers' compensation insurance in Illinois on October 20, 2015.

Travelers Insurance Policy for Russell's Seamless Gutters (PX.10)

The workers' compensation policy was written by Travelers for Russell's Seamless Gutter of 2032 Villas Drive, Warrenton, Missouri 63383 for the period of 07/03/2015-07/03/2016. The policy included the Missouri Limited Other States Endorsement, endorsement number WC 99 03 87 (00) specifically provided. This limited coverage to the state of Missouri only with only certain exceptions:

1) the work was being performed by a Missouri employee;
2) the duration of the work did not exceed 90 days; and
3) the workers' compensation law of the other state did not require the employer to secure separate coverage to begin work in that state.

CONCLUSIONS OF LAW

The Arbitrator adopts the Finding of Facts in support of the Conclusions of Law.

A. In support of the Arbitrator's decision with regard to whether Petitioner and Respondent were operating under and subject to the Illinois Workers Compensation or Occupational Diseases Act, the Arbitrator makes the following conclusions of law:

Petitioner testified, without rebuttal, that he accepted employment with Russell's Seamless Gutters at a meeting in Coal City Illinois with Travis Bollier who identified himself as the owner of Russell's Seamless Gutters. Petitioner testified, also without rebuttal, that he performed several days of work at jobs located in Illinois. Although the claimed work accident occurred in

Wisconsin, because petitioner accepted employment in Illinois and performed a majority of work in Illinois, Illinois has jurisdiction.

Pursuant to §3(1), as petitioner's job as a gutter installer required him to remodel and alter structures in behalf of Russell's; pursuant to §3(8), as petitioner's job required him to use miter saw, gutter machines that had sharp cutting edge, and tin snips; as well as pursuant to §3(15) as petitioner operated automobiles, there is automatic coverage under the Illinois Workers' Compensation Act.

Accordingly, the Arbitrator finds petitioner and Russell's were operating under and subject to the Illinois Workers' Compensation Act.

B. In support of the Arbitrator's decision as to whether there is a relationship between Russell and petitioner of employee and employer, the Arbitrator makes the following conclusions of law:

Petitioner testified, without rebuttal, that he answered a Craigslist ad by sending an email to Travis Boiller. Although in the first email, Boiller did not identify himself as being with Russell's, in the second email Travis Boiller identified himself as the owner of Russell's.

Although the work truck, in which petitioner was a passenger when involved in an accident on October 14, 2015 in northern Illinois, was owned and operated by Anthony Boiller, brother of Travis Boiller, petitioner testified, without rebuttal, that the vehicles used by Boillers in performing the gutter work, had Russell's Seamless Gutters magnet signs attached.

The name, Russell's Seamless Gutters, corresponds with the type of work petitioner was performing when injured on October 20, 2015, which was installing gutters.

Unfortunately, no party called either Boillers as witnesses. Therefore, the Arbitrator can only rely upon the evidence presented. The most supportive of petitioner's testimony that there was an employee-employer relationship between petitioner and Russell's is the $500 check issued to petitioner from the account of Russell's Seamless Gutters (PX.6). Although the signature is illegible, it was purportedly signed by Travis Boiller and was for wages. The name and address on the check was the same name and address listed on the Travelers Workers' Compensation Insurance Policy; Russell's Seamless Gutters, LLC. 2032 Villas Drive, Warrenton, MO 63383 (PX.10).

In addition, although there had been no withholding from petitioner's payment by Russell's, petitioner confirmed he was directed by Travis Boiller where to go, was driven by a Boiller to the job, what time to arrive and when the job would end for the day. Petitioner believed he had to show up for a specific job or he would be fired. He used respondent's tools. These factors suggest petitioner was an employee of Russell's and not an independent contract.

Piecing together petitioner's testimony with the evidence submitted, the Arbitrator finds petitioner proved by a preponderance of the evidence that there was an employee and employer relationship between petitioner and Russell's at the time of petitioner's accident on October 20, 2015.

C. In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent, the Arbitrator makes the following conclusions of law:

Petitioner testified, without rebuttal, he was working on a job for Russell's on October 20, 2015 in Wisconsin. On that date, at about 3 P.M., he was on an eight-foot ladder installing a gutter.

The wind caught the gutter. Petitioner fell off the ladder while trying to save the gutter from being blown down. He landed on his left hand.

The medical records from Aurora Health Care emergency room supports petitioner's testimony. The records indicate petitioner arrived at the ER at 3:10 P.M. with complaints of left wrist pain and deformity, along with left shoulder pain after a fall he had taken just prior to arrival. He stated he was standing near the top of an eight-foot ladder attempting to place gutters on a home when he lost his balance and the wind blew him over.

The history contained in the medical records of all subsequent medical providers is consistent with the work accident of October 20, 2015.

The Arbitrator finds petitioner sustained accidental injuries that arose out of and in the course of his employment with respondent, Russell's, on October 20, 2015.

D. In support of the Arbitrator's decision with regard to the date of accident, the Arbitrator makes the following conclusions of law:

The petitioner, without rebuttal, testified he fell from a ladder while working for respondent, Russell's on October 20, 2015. The records from Aurora Health Care emergency room indicate petitioner arrived in its emergency room on October 20, 2015 shortly after the fall.

The Arbitrator therefore finds petitioner's date of accident was October 20, 2015.

E. In support of the Arbitrator's decision with regard to whether Petitioner gave the Respondent notice of the accident within the time limits stated in the Act, the Arbitrator makes the following conclusions of law:

Petitioner testified, without rebuttal, that notice was given to Tony Bollier, brother of the owner of Russell's, immediately after the accident, who also drove petitioner to the hospital. In addition, the original Application for Adjustment of claim was filed and purportedly served on Russell's Seamless Gutters on November 12, 2015.

Therefore, the Arbitrator finds petitioner provided notice of the accident to Russell's within the time lime limits stated in the Act.

F. In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

The petitioner's testimony is consistent with the records from Aurora Health Care on the day of the accident, and from Silver Cross Hospital on October 23, 2015, that the fall from the ladder on October 20, 2015 resulted in the fracture to petitioner's left wrist. Orthopedic surgeon, Dr. Trksak opined that petitioner's left wrist injury, that required surgery, was the result of the accident that occurred at work on October 20, 2015.

The Arbitrator therefore finds petitioner's left wrist injury was the result of the work accident on October 20, 2015.

G. In support of the Arbitrator's decision with regard to what the Petitioner's earnings were in the year preceding the Accident and what the Petitioner's average weekly wage was calculated pursuant to Section 10 of the Act, the Arbitrator makes the following conclusions of law:

Petitioner testified, without rebuttal, he was to be paid $1.75 per foot of gutter on the first floor and $2.23 per foot on the second floor, which worked out to approximately $17 to $18 per

hour. He claimed he worked six or seven days a week, 10 to 12 hours a day, except when it rained. The only evidence of payment was a $500 check he claimed he received from Travis for three days' work. All other payment was made in cash and was sporadic; whenever respondent had money. The longest he would go without a paycheck would be a week and a half.

Petitioner did not keep track of the money he was paid and did not pay income tax on any of the payments he received from respondent. The Arbitrator finds, based upon the only credible evidence provided, that petitioner's average weekly wage was $500 per week.

H. In support of the Arbitrator's decision with regard to what the Petitioner's age, the Arbitrator makes the following conclusions of law:

Petitioner testified he was born April 6, 1988; which makes him 27 at the time of the accident.

I. In support of the Arbitrator's decision with regard to Petitioner's marital status at the time of injury, the Arbitrator makes the following conclusions of law:

Petitioner testified he was single; never been married. The Arbitrator finds petitioner's marital status was single.

J. In support of the Arbitrator findings as to whether the medical services that were provide to Petitioner were reasonable and necessary, and whether Respondent paid all appropriate charges for all reasonable and necessary treatment, the Arbitrator makes the following conclusions of law:

The medical records support the finding that petitioner received reasonable and necessary treatment and the charges were appropriate, reasonable and necessary to cure petitioner of his work injury to his left shoulder and left wrist. Accordingly, the Arbitrator awards the following medical expenses, totaling $84,481.96, in accordance with the fee schedule, §8a and §8.2 of the Act:

$3,581.00 Joliet Anesthesia Practice (01/21/2016)
$12,814.64 ATI Physical Therapy
$496.00 Aurora Health Care (10/20/2015)
$1,674.30 Aurora Health Care Hospital (10/20/2015)
$565.64 Chicagoland Surgical Assisting (01/21/2016)
$7,481.00 Hinsdale Orthopaedics
$38.00 Joliet Radiology (10/28/2015)
$43.00 Joliet Radiology (11/3/13 Pre op chest X-ray)
$2,554.21 Presence St. Joseph Medical Center (10/28/15)
$1,144.45 Presence St. Joseph Medical Center (11/3/15 pre-op testing)
$4,461,18 Presence Saint Joseph Hospital (01/21/2016)
$1,144.43 Presence St. Joseph Medical Center (01/13/2016)
$47,311.95 Presence St. Joseph Hospital (01/21/2016)
$1,022.80 Silver Cross Hospital (10/23/2015)
$149.36 Walgreens

The following bills are specifically not awarded:

$80.00 from Dr. Scott Lowry for December 24, 2015 as there are no records to support the bill.

$256.00 from Dr. Mohammed Omer M. Ansa or November 4, 2015 as there are no records to support the bill.

$846.00 Presence St. Joseph Medical Center for November 6, 2015 for drug screen due to petitioner's admitted cocaine and marijuana use.

$1,229.00 from EM Strategies; $96.00 Associated Radiologists of Joliet and $1,250.70 Silver Cross Hospital for date of service of November 17, 2015 due to a fall at home.

K. In support of the Arbitrator's decision with regard to TTD, the Arbitrator makes the following conclusions of law:

Petitioner testified he was off work as of the date of accident, October 20, 2015, until he was released to return to full duty work on June 5, 2016. The only medical evidence to support the claim for disability was from Hinsdale Orthopaedics. According to Dr. Trksak, petitioner was taken off work as of October 30, 2015. He was not released to any work until Dr. Nacke released him to return to restricted work on April 12, 2016. He was released to full-duty work until June 5, 2016. However, the petitioner admitted he did not seek work within Dr. Nacke's restrictions and did not contact Travis Boiller to see if respondent had any work within his restrictions.

Therefore, the Arbitrator finds petitioner was temporarily totally disabled from October 30, 2015 to April 12, 2016, which is 23-5/7 weeks, and awards temporary total disability benefits at the rate of $333.33 per week for this period.

L. In support of the Arbitrator's decision with regard to the nature and extent of Petitioner's injury, the Arbitrator makes the following conclusions of law:

Petitioner initially complained of injury to his left shoulder and left wrist. X-rays of the left shoulder were negative; the wrist X-rays showed a comminuted fracture of the distal radius extending into the radiocarpal joint, and the ulnar styloid. The first time petitioner was seen at Hinsdale Orthopaedics, which was on October 30, 2015, he no longer had shoulder pain. He underwent a left distal radius osteotomy, due to left distal radius malunion, on January 21, 2016. Upon discharge from Dr. Nacke's care on July 15, 2016, petitioner reported no pain, had no complaints, had returned to full activity, had almost full range of motion and was at maximum medical improvement and released to full-duty work. Petitioner is right-handed.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that there was no permanent partial disability impairment rating provided. The Arbitrator, therefore, cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a gutter installer. As such, he was required to use his both hands to install gutters. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 27 years of age. Therefore, the Arbitrator gives more weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner was released to return to work full duty with no restrictions. There is no medical evidence to support petitioner petitioner's claim he is limited in his ability to return to earning his pre-injury wages. The Arbitrator, therefore, gives no weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes that at the time he was released from Dr. Nacke's care petitioner had no pain, no complaints, had returned to full activity, had almost full range of motion and was at maximum medical improvement and released to full-duty work. There is no corroborating evidence of petitioner's wrist bump. Therefore, the Arbitrator gives little weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds petitioner sustained permanent partial disability to the extent of 15% loss of use of the left hand pursuant to § 8 (e) 9 of the Act.

O. In support of the Arbitrator's decision with regard to the question of Insurance compliance and coverage by Travelers Insurance Company the Arbitrator makes the following conclusions of law:

The evidence supports a finding that petitioner and respondent, Russell's, were operating under and subject to the Illinois Worker's Compensation Act and that Illinois has jurisdiction for this accident as the contract of hire was Illinois and petitioner reportedly performed the majority of his work for respondent in Illinois.

Although Russell's had a workers' compensation insurance policy through Travelers Insurance, the policy covers Missouri only. The policy limited coverage for another state only if the claim involved a Missouri employee and if the work outside Missouri did not extend more than ninety days. As petitioner was hired in Illinois and is an Illinois resident, Travelers is under no obligation to cover petitioner's claim under its policy. Respondent, Russell's, is not insured for petitioner's claim in Illinois by Travelers for this accident within the plain reading of the policy.

Certification by NCCI confirms Russell's Seamless Gutters do not have workers' compensation insurance for Illinois on the date of petitioner's accident, October 20, 2015.

The Arbitrator therefore finds respondent, Russell's Seamless Gutters, did not have workers' compensation insurance to cover petitioner's injury that was caused by the work accident of October 20, 2015, that arose out of and in the course of petitioner's employment with respondent, Russell's Seamless gutters.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDWARD HARRELL,

Petitioner,

vs. NO: 17 WC 3681

MACY'S INC.,

20IWCC0222

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, temporary total disability, and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 25, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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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 $66,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2020

D. Douglas McCarthy

DDM/tdm
d: 4/8/20
052

Stephen Mathis

SPECIAL CONCURRENCE/DISSENT

I concur with the majority in all aspects of its decision other than its order to compel Respondent to authorize medical treatment. This issue was previously addressed by the Court in *Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission*, 2012 IL App (2d) 110426WC, which is dispositive. The Court noted "Assuming for the sake of analysis that this provision of the Act [Section 8(a)] is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving such authorization." *Id.* at ¶ 19. Ordering Respondent to authorize medical treatment is meaningless where no enforcement mechanism exists under the Act. In accordance with Section 8(a) of the Act and the Court's holding in *Hollywood Casino*, I would order Respondent to provide and pay for the awarded medical expenses and/or treatment.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HARRELL, EDWARD
Employee/Petitioner

Case# **17WC003681**

MACY'S INC
Employer/Respondent

20IWCC0222

On 3/25/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1922 STEVEN B SALK & ASSOC LTD
DAMIAN B FLORES
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

5001 GAIDO & FINTZEN
GAIL BEMBNISTER
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Edward Harrell
Employee/Petitioner

v.

Macy's Inc.
Employer/Respondent

Case # **17** WC **03681**

Consolidated cases: _____

20IWCC0222

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 **Paul Seal**, Arbitrator of the Commission, in the city of **Chicago**, on **October 4, 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. [x] 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. [x] 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. [x] 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 [ ] Maintenance [x] 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. [x] Other **Prospective Medical**

FINDINGS

On **January 2, 2017**, 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 $**13,303.82**; the average weekly wage was $**255.84**.

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

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 $**5,462.85** for TTD, $**0** for TPD, $**0** for maintenance, and $**5,000.00** for other benefits, for a total credit of $**10,462.85**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, if not already paid, pursuant to the medical fee schedule, of $55,671.61, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $255.84/per week commencing on January 13, 2017, through September 26, 2017; and from November 15, 2017, through October 4, 2018, 82 6/7ths weeks, as provided in Section 8(b) of the Act.

Respondent shall authorize future surgery as prescribed by Dr. Salehi.

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

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

Signature of Arbitrator

March 20, 2019
Date

Findings of Facts

The parties stipulated that on January 2, 2017, Petitioner and Respondent were operating under the Act and that the relationship of employee and employer existed. The parties also stipulated that Petitioner gave timely and proper notice of the work accident to Petitioner's manager, Hassan, on January 3, 2017. The parties further stipulated that on the date of accident Petitioner was 48 years old, married, had one dependent child, and had an average weekly wage of $255.84. The issues in dispute at arbitration were causal connection, reasonableness and necessity of accrued medical, TTD and prospective surgery.

As of the date of accident, Petitioner had been employed by Respondent as a restaurant worker for approximately two and a half years. (T. at 11) Petitioner's work duties included washing dishes, food prep, busing tables and stocking shelves. (T. at 11) Petitioner's stocking duties required lifting boxes weighing up to 50 pounds approximately three times per day every Monday, Wednesday, and Friday. (T. at 12) Petitioner testified that, prior to the work accident on January 2, 2017, he was able to complete his work duties without complaints of back pain or pain traveling down his legs. (T. at 12) Petitioner testified that from his date of hire through the date of the accident in question, he had no complaints of back pain or leg pain preventing him from completing his work duties. (T. at 12 – 13)

On Monday, January 2, 2017, towards the end of his shift, the petitioner was washing pieces of a grill. To wash the grill pieces, Petitioner, who is 6'8", was required to transfer the grill off of a cart, which was 1"-2" off the ground, onto a dishwasher conveyor. (T. at 13 – 15) Petitioner bent over to pick up the 5th or 7th piece of the grill, lifted the object and immediately noted back pain, which he initially rated a 3 or 5 out of 10, with back

tightness. (T. at 14) Petitioner took a moment to stretch and then continued working the remainder of his shift. (T. at 16) Petitioner did not initially report the accident because he did not think the injury was that serious. (T. at 16) Petitioner went home that night and soaked in a tub of epsom salt water with alcohol. (T. at 17)

Petitioner woke up the next morning in a lot of pain, which prevented him from bending over to tie his shoes. (T. at 17) Petitioner reported to work on Tuesday, January 3, 2017, changed into his uniform in the locker room, and then reported the accident to his manager, Hassan. (T. at 17-18) Hassan sent Petitioner home and Petitioner remained off work through Sunday, January 8, 2017. Petitioner's pain did not subside. On Monday, January 9, 2017, upon reporting back to work, Petitioner noticed he was still in a lot of pain. (T. at 19) Later that day, Hassan sent Petitioner home again. (T at 20) Petitioner took two days off and reported back to work on Thursday, January 12, 2017. (T. at 20) At the end of his shift, Petitioner gave additional oral notice of the January 2, 2017, accident to Hassan's supervisor, Sheila. (T. at 20 – 21)

Sheila sent Petitioner to seek treatment that same day, January 12, 2017, at Physicians Immediate Care, where Petitioner reported injuring his back at work on January 2, 2017. (PX 1) During the initial exam, Petitioner reported back pain, but denied experiencing numbness, tingling or weakness down the lower extremities. (PX 1) Dr. Maniquis documented a right-sided straight leg raise, which caused sciatic pain. (T. at 1) Dr. Maniquis diagnosed a lumbar sprain and sent Petitioner back to work with restrictions. (PX 1) Light duty work was not provided by Respondent. (T. at 22)

During a follow up visit at Physicians Immediate Care on January 19, 2017, Petitioner reported waking up the previous day with increased pain radiating down his right leg. (PX 1) Petitioner advised Dr. Maniquis his leg had started to shake, so much so that

his right leg gave out twice when he went to the bathroom. (PX 1) The clinical exam notes positive right-sided straight leg raise testing, which caused sciatic pain. Dr. Maniquis diagnosed sciatica/radiculopathy and ordered a lumbar MRI. (PX 1)

Petitioner sought a second opinion with Dr. Robert Muhammad on January 26, 2017, who sent him for a lumbar MRI. (T. at 24-25) The MRI scan was read by Dr. Amar Shah to evidence L3-4 and L4-5 diffuse generalized bi-lobed posterior disc bulges; an L1-2 central posterior disc bulge measuring 2 mm, and an L5-S1 minimal right lateral recess disc bulge measuring 1 mm. (PX 6) Petitioner followed up with Dr. Muhammad on February 3, 2017, and he was diagnosed with lumbar radiculopathy and referred to orthopedic specialist, Dr. Gregory Primus, at the Chicago Center for Sports Medicine and Orthopedic Surgery. (PX 3)

During the initial exam, Dr. Primus noted that Petitioner used a cane to ambulate. Dr. Primus also recorded complaints of low back pain radiating into Petitioner's right hip and into the right leg. (PX 3) Petitioner advised Dr. Primus he felt as though his leg was going out and collapsing and he experienced spasms. (PX 3) Dr. Primus documented positive right-sided straight leg raises and reviewed MRI that showed L1-2, L3-4, and L4-5 disc disease with desiccation, bulging and spinal stenosis. (PX 3) Dr. Primus opined Petitioner's complaints were consistent with radiculopathy, and he ordered physical therapy and prescribed pain medication. (PX 3) Petitioner underwent the physical therapy at the Midwest Back Clinic with Dr. Muhammad. (PX 2)

On February 14, 2017, while on his way to physical therapy with Dr. Muhammad, Petitioner was walking across the street when his right leg began to shake, causing him to fall. (T. at 27) Petitioner sought ER treatment at the University of Chicago Medicine. (PX4) The ER notes document Petitioner was experiencing increased back pain due to a work-

related injury. (PX 4) The ER Advanced Practice Nurse, Zachary Burgess, diagnosed Petitioner with lumbar radiculopathy, prescribed pain medication, and discharged Petitioner from care. (PX 4, pg. 26)

On February 16, 2017, Petitioner followed up with Dr. Primus, who referred Petitioner for pain management with Dr. Neeraj Jain for a possible injection. (PX 3) Upon examining the Petitioner on March 16, 2017, Dr. Jain opined that Petitioner had a pre-existing degenerative condition which was asymptomatic and rendered symptomatic as a result of the work accident. Following the examination, Dr. Jain diagnosed Petitioner with L4-5 radiculopathy, which was directly related to the work injury. (PX 5) Dr. Jain recommended a right L5-S1 transforaminal epidural steroid injection. (PX 5) Petitioner testified that he was initially scared to undergo the injection. (T. at 29)

Petitioner continued physical therapy and followed up with Dr. Primus on April 13, 2017, at which time Petitioner complained of ongoing back pain, right leg pain, and right leg instability. (PX 3) In light of Petitioner's lack of interest in the injection prescribed by Dr. Jain, Dr. Primus prescribed continued therapy. (PX 3) During the follow up on May 17, 2017, Dr. Primus documented complaints which were consistent with lumbar radiculopathy, which he opined were worsening and causing significant weakness/numbness in the right lower extremity. (PX 3) Petitioner was again advised that he should seek pain management to address the worsening radicular symptoms.

Petitioner decided not to follow up with Dr. Jain because he was located too far from Petitioner's home; he instead chose to obtain a third opinion. (T. at 30) On June 5, 2017, Petitioner underwent an initial pain management evaluation with Dr. Ossama Abdellatif of Pro Clinics Pain Management. (PX 6) Dr. Abdellatif documented back pain associated with pain traveling down both lower extremities and diagnosed lumbar radiculopathy with

lumbar facet syndrome. (PX 6) Dr. Abdellatif prescribed an EMG, an epidural injection, a lumbar facet injection and physical therapy. The June 5, 2017, EMG documented radiculitis affecting L4-S1 bilaterally. (PX 6)

On June 14, 2017, Petitioner underwent an examination under section 12 of the act with Dr. Jesse Butler at Respondent's request. Dr. Butler did not review the June 5, 2017, EMG. On August 23, 2017, Dr. Butler testified that the January 26, 2017, MRI showed mild desiccation at L3-4 and L4-5. He noted that there was no herniated disc at any level or significant stenosis. Dr. Butler did identify narrowing of the left lateral recess at L3-4. (RX 1 at 12) Dr. Butler noted a negative straight leg raise with no positive Waddell's findings. (T1 at 12) Dr. Butler opined there was no subjective evidence to support Petitioner's objective complaints of pain. (RX 1 at 12) Dr. Butler diagnosed Petitioner with a lumbar sprain resulting from the January 2, 2017, work accident, opined all treatment through the date of the exam was reasonable and necessary, and ultimately opined Petitioner was at MMI as of June 14, 2017. (RX 1 at 12)

On cross examination, Dr. Butler agreed that the straight leg raise is a clinical test used to test for possible radiculopathy. (RX 1 at 17) He further acknowledged that on January 19, 2017, Dr. Maniquis diagnosed Petitioner with sciatica and radiculopathy. (RX 1at 17) He further noted that Petitioner's clinical exams on February 3, 2017, with Dr. Primus and February 16, 2017, with Dr. DeBartolo were consistent with Petitioner's presentation to Dr. Maniquis. (RX 1 at 17) Dr. Butler also acknowledged that Petitioner had degenerative disc disease with evidence of mild stenosis, i.e., the narrowing of the spinal canal, which can cause radiculopathy. (RX 1 at 21-22) He further acknowledged that stenosis can be present, asymptomatic, and subsequently rendered symptomatic as a

result of trauma such as lifting. (RX 1 at 22) Dr. Butler also testified that along with stenosis, disc herniations and disc bulges can cause radiculopathy. (RX 1 at 23)

On June 16, 2017, Dr. Abdellatif administered a trigger block injection, bilateral medial branch blocks at L3-S1, and a lumbar epidural steroid injection at L4-5. (PX 6) Ten days later, Petitioner reported 50% improvement. (PX 6) On July 14, 2017, Dr. Abdellatif proceeded with trigger point injections L3-S1, bilateral radio frequency ablations, and a second lumbar epidural steroid injection at L4-5. (PX 6) Petitioner reported 70% improvement as of July 19, 2017. Dr. Abdellatif repeated the procedures on July 18, 2017. On August 30, 2017, Petitioner reported improvement of pain and range of motion, but nonetheless reported ongoing weakness of the right lower extremity. (PX 6) Petitioner testified that the pain eventually came back. As of August 30, 2017, the pain was rated a 5/10. (T. at 33) In light of the ongoing symptoms, Dr. Abdellatif prescribed and administered a lumbar discogram on September 15, 2017, which documented concordant pain at L4-5 and L5-S1. (PX6) The post-discogram CT was read by Dr. Ernest Laney to reveal mild multilevel lumbar spondylosis with moderate spinal stenosis and foraminal stenosis at L3-4 and L4-5. (PX 6)

On September 27, 2017, Dr. Abdellatif noted Petitioner had ongoing complaints of pain and was off work; nonetheless, for financial reasons, Petitioner was asking to return to work without restrictions. (PX 6) Petitioner reached out to Respondent, but Respondent did not provide him with work. (T. at 35) Dr. Abdellatif referred Petitioner for a surgical consultation with Dr. Sean Salehi and took Petitioner off work as of October 17, 2017. (PX6)

On November 11, 2017, Petitioner underwent his initial examination with Dr. Sean Salehi at Neurological Surgery and Spine Surgery (PX 8). Dr. Salehi noted a consistent

mechanism of injury, complaints of low back pain with radiation/numbness traveling down the right lower extremity with associated spontaneously jerking and giving way of the right leg. (PX 8) Dr. Salehi reviewed the MRI and diagnosed lumbar spondylosis with right lower extremity radiculopathy which was secondary to the work accident (PX 8). However, given the poor quality of the scan, Dr. Salehi ordered a second MRI scan. Petitioner underwent the scan on December 14, 2017. Dr. Ernest Laney read the scan to evidence mild spinal canal stenosis with mild bilateral foraminal stenosis at L3-4. At the L4-5 level, he also documented mild spinal canal stenosis with moderate to severe right foraminal stenosis and mild left foraminal stenosis. (PX 8)

Dr. Salehi reviewed the scan on February 5, 2018, and he noted moderate to significant stenosis at L4-5 partly due to a bulging disc. (PX 8) Dr. Salehi concluded that Petitioner suffered from lumbar spondylosis with radiculopathy, which was secondary to the multilevel disc disease and foraminal stenosis at L4-5. Dr. Salehi further opined that Petitioner's symptoms were a result of the work accident on January 2, 2017. (PX 8) Dr. Salehi recommended surgical intervention (a right L4-5 far lateral foraminotomy) to address Petitioner's ongoing symptoms. (PX 8) Petitioner followed up with Dr. Abdellatif on February 6, 2018, and on March 6, 2018. He was advised to remain off work pending the approval of surgery. (PX 6)

On September 19, 2018, Dr. Jesse Butler authored an addendum report. Dr. Butler reviewed the September 15, 2017, discogram and post-discogram CT. (RX 5) Dr. Butler also reviewed the December 14, 2017, MRI and Dr. Salehi's notes from January and February of 2018, (RX 5) Dr. Butler concluded that the additional records did not change his original opinions and again denied the necessity of treatment after June 14, 2017.

Petitioner followed up with Dr. Salehi for a final visit on September 20, 2018. Dr. Salehi noted ongoing back pain with numbness in the right leg, calf, and shin. (PX 8) Dr. Salehi also noted that Petitioner complained of frequent shaking and jerking in the leg. As of the final visit, Dr. Salehi opined that Petitioner remained a surgical candidate to address the work-related injury. (PX 8)

Petitioner expressed his desire to undergo surgery because he wanted his leg to feel better. (T. at 37) After sitting for twenty minutes during his testimony, Petitioner testified that his right leg was completely numb. (T. at 37) Prior to the work accident, he never complained of back pain traveling down his right lower extremity. (T. at 37) Post-accident, Petitioner experiences constant low back pain which he rated a 3 to 6 1/2. (T. at 39) Petitioner further notices increased pain symptoms in the morning when the pain can reach a 9 out of 10.

Conclusions of Law

With respect to causal connection, the Arbitrator finds as follows:

The Arbitrator considers Petitioner's demeanor at arbitration. The petitioner testified for the most part credibly. The Arbitrator finds that some of the petitioner's demonstrations of his spasms and jerking in his leg seemed exaggerated and histrionic. In spite of this, the Arbitrator finds Petitioner met his burden of proving that, as a result of the undisputed work accident, he aggravated a previously asymptomatic degenerative condition and now suffers from chronic lumbar stenosis/spondylosis with right lower extremity radiculopathy. In finding causal connection, the Arbitrator takes into account the chain of events, the lack of prior complaints of pain or treatment, the immediacy of the complaints of low back pain,

and the credible opinions of Dr. Maniquis, Gregory Burgess A.P.N., Dr. Muhammad, Dr. Primus, Dr. Debartolo, Dr. Jain, Dr. Abdellatif, and Dr. Salehi.

It is well established law that proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to the injury. Navistar International Transportation Corporation, 315 Ill.App. 3d 1197, 1206 (2000). The Navistar court specifically stated that causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform duties before the date of the accident and inability to perform the same duties following that date.

In the instant case, Petitioner's testimony regarding the lack of prior low back pain and medical treatment is undisputed. Prior to the accident, Petitioner was asymptomatic and able to complete his job duties without issue. On January 2, 2017, Petitioner reported to work in his same general state of good health and noticed immediate tightness with back pain upon lifting the grill. Petitioner completed his shift, went home, and woke up with increased pain. Respondent stipulated that Petitioner reported the injury the very next morning. He was then sent home but was eventually sent for medical treatment by Respondent.

During the initial date of service at Physicians Immediate Care on January 12, 2017, Petitioner reported low back pain rated a 6 of 10. (PX 1) One week later, as of January 19, 2017, his symptoms progressed and now radiated down his right lower extremity. (PX 1) This chain of events demonstrates that Petitioner's health deteriorated from a state which allowed him to work without issue to a state of disability immediately following the work accident.

The Arbitrator is not persuaded by the causal connection opinion of Respondent's expert, Dr. Butler, who opined Petitioner only sustained a lumbar sprain and was at MMI as of June 14, 2017. Dr. Butler found Petitioner's treatment through June 5, 2017, was reasonable, necessary and casually related to the undisputed work accident. Dr. Butler opined no further treatment was necessary and the petitioner was at MMI after June 5, 2017. Other than Dr. Butler, all other medical providers agreed that the petitioner suffered from lumbar radiculopathy.

Although Dr. Butler downplayed the objective medical evidence, during cross examination, he agreed that the January 26, 2017, lumbar MRI evidenced stenosis at the L4-5 level; agreed positive straight leg raises were clinical evidence of radiculopathy, and further acknowledged that disc bulges and/or stenosis could cause radiculopathy. (RX 1 at 21-22) Subsequent to authoring his original report on June 5, 2017, and testifying on August 23, 2017, Dr. Butler authored a final report on September 19, 2018. Despite the opinions of Dr. Butler, the record as a whole supports a finding that Petitioner injured his low back on January 2, 2017. The symptoms then transitioned into lumbar radiculopathy as of January 19, 2017, and continued worsening well beyond the June 5, 2017, examination with Dr. Butler.

As it pertains to diagnosis, the Arbitrator chooses to rely upon the eight medical providers who diagnosed lumbar radiculopathy. Regarding causal connection, the Arbitrator relies upon the opinions of Dr. Salehi, Dr. Jain, and Dr. Abdellatif who opined Petitioner's lumbar radiculopathy was directly related to the work accident on January 2, 2017. (PX 5, 6, & 8) Petitioner's medical providers arrived at this opinion after thorough examination of the Petitioner himself, review of the MRI scans, consideration of the lack of prior history, and consideration of the immediacy of the Petitioner's complaints.

In light of the undisputed lack of prior history, the immediacy of Petitioner's complaints and the ongoing nature of Petitioner's complaints of low back pain radiating down the right lower extremity beyond the June 14, 2017, section 12 examination with Dr. Butler; the Arbitrator finds the January 2, 2017, work accident caused Petitioner's current condition of ill-being. For the aforementioned reasons, the Arbitrator finds Petitioner satisfied his burden of proof and established causal connection.

With respect to the reasonableness and necessity of accrued medical, the Arbitrator finds as follows:

The Arbitrator takes into account the records as a whole and finds all the treatment rendered to address Petitioner's lumbar injury was reasonable and necessary to treat Petitioner's condition of ill-being.

Having already found causal connection, the Arbitrator also finds that all treatment through the date of arbitration was reasonable and necessary to address the radicular condition emanating from the lumbar stenosis at L4-5. Accordingly, Petitioner is awarded $55,671.61 in outstanding medical treatment per the fee schedule as listed in PX 18.

With respect to TTD, the Arbitrator finds as follows:

Petitioner claims to be entitled to TTD benefits from January 13, 2017, through September 26, 2017, and again from November 15, 2017, through October 4, 2018. The Arbitrator finds Petitioner satisfied his burden of proof and established that he is entitled to TTD benefits for the 82 6/7th weeks claimed.

Accordingly, for the reasons stated above, the Arbitrator awards TTD for the 82 6/7th weeks claimed by Petitioner. Taking into account an AWW of $255.84 and a minimum TTD Rate of $255.84 for a married individual with one dependent, Petitioner is entitled to $21,198.17. The Arbitrator takes into account a credit of $5,462.85 for the TTD paid prior

to arbitration and also a credit of $5,000.00 which Respondent forwarded after the hearing dates; accordingly, Petitioner is awarded $10,735.86 in back due TTD benefits.

With respect to future medical, the Arbitrator finds as follows:

The Arbitrator finds Petitioner met his burden of proving that the surgery recommended by Dr. Salehi is reasonable, necessary, and causally related to the January 2, 2017, work accident. As it pertains to the need for surgery, the Arbitrator adopts the credible opinions of Dr. Sean Salehi who has recommended a right L4-5 far lateral foraminotomy to address Petitioner's ongoing low back pain and right lower extremity radicular symptoms.

The Arbitrator finds Dr. Salehi's recommendation for surgery to be reasonable. Petitioner had no prior history of lumbar pain or radiculopathy traveling down his right lower extremity. Petitioner sustained an undisputed work accident on January 2, 2017, and by January 19, 2017, had been diagnosed with lumbar radiculopathy. Petitioner has failed conservative treatment and continues suffering from low back pain with lumbar radiculopathy. Surgery, as recommended by Dr. Salehi, therefore, is reasonable and necessary. Accordingly, for the aforementioned reasons, the Arbitrator adopts the opinions of Dr. Salehi and awards the surgery prescribed.

STATE OF ILLINOIS)
) SS
COUNTY OF JEFFERSON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Witherspoon,

Petitioner,

vs.

NO. 06 WC 26188
06 WC 26189

White County Coal Company,

Respondent.

ORDER

This matter comes before the Illinois Workers' Compensation Commission on Petitioner's Petition for Penalties and Attorney's Fees under Sections 19(k), 19(l) and 16, heard on July 18, 2016, due notice being given, both parties being represented by counsel. Subsequent to the hearing but before an Order was issued, the term of the presiding Commissioner, Commissioner Lamborn, expired. A contemporaneous transcript of the hearing memorialized the proceeding, heard by Commissioner White, and has been relied upon for the purpose of issuing this Order. The Commission, having jurisdiction over the persons and subject matter and after being advised in the premises, finds:

- Petitioner filed separate Applications for Adjustment of Claim for injuries to his hand wrist and right thumb for date of accident 4/20/2006, filed as claim 06 WC 26188, and to his low back also sustained on 4/20/2006, filed as claim 06 WC 26189.

- The claims were consolidated and tried on March 9, 2010, and a Decision was entered April 28, 2010. The Arbitrator's Decision noted the issues in dispute were causal connection and the nature and extent of Petitioner's permanent partial disability. The Arbitrator's Decision findings noted that, "Petitioner has received all reasonable and necessary medical services" and "Respondent has paid all appropriate charges for all reasonable and necessary medical services." All temporary total disability benefits were paid. Permanent partial disability was awarded in both claims. (PX 1)

- Petitioner appealed the Arbitrator's Decision and a Workers' Compensation Commission Decision and Opinion on Review was issued February 1, 2011. The issues raised on Review were causal connection, temporary total disability, nature and extent, odd-lot award, and job search. (PX 2) The Commission affirmed and adopted the Decision of the Arbitrator. (PX 2)

- Petitioner appealed the Commission Decision to the Circuit Court of White County and the Circuit Court heard the matter June 24, 2011. In an Order entered July 29, 2011, the Circuit

Court confirmed the Decision and Opinion on Review of the Workers' Compensation Commission. (PX 3)

- Petitioner filed a Petition for Penalties and Attorney Fees (not in evidence).

- Petitioner filed an Amended Petition for Penalties and Attorney's Fees on July 18, 2016. (PX C). Petitioner claimed that per the Decision and Order, Respondent was responsible for payment of all bills for Petitioner's causally related medical services.

- Petitioner presented medical bills of Timberlake Surgery Center for dates of service January 10, 2008, January 24, 2008, August 7, 2008, & September 5, 2008, for a total amount of $22,043.84. (PX 4). Petitioner claimed that based on the fee schedule Respondent owes Timberlake Surgery Center $21,665.38.

- Petitioner requested the Commission award penalties and attorney's fees equal to 50% of the compensation owed, or $11,021.92, for unreasonable and vexatious delay of payment under Section 19(k), and/or $10,000, the maximum penalty allowed under Section 19(l), and award $4,408.76 in attorney's fees pursuant to Section 16 of the Act.

Petitioner presented the testimony of Tiffany Clarkson who testified by evidence deposition on July 6, 2016. (PX6) Ms. Clarkson was employed as the business office manager for Timberlake Surgery Center and oversaw all of the billing. (PX6, p. 3) She also provided that service for the Orthopedic Ambulatory Surgery Center in Chesterfield. She had been a billing specialist for about 6 years and had been working for Timberlake Surgery Center for about 4 years. (PX6) She was familiar with billing charges and fee schedules under the Workers' Compensation Act. She has done the fee schedule billing the entire time she has been with Timberlake. (PX6, pp. 3-4)

During her employment at Timberlake, Ms. Clarkson had followed up on bills for services rendered to Petitioner in 2008. Ms. Clarkson became involved with those bills about November 12, 2012, when she found that the bills were still outstanding. (PX6, p. 5) Ms. Clarkson testified that Petitioner received treatment and medical care at Timberlake Surgery Center and charges were incurred as result of that care. She testified there was an outstanding balance. Ms. Clarkson testified the service dates were January 10, 2008, January 24, 2008, August 7, 2008, and September 5, 2008. She testified that the charges were reasonable and customary for the same or similar services in the medical community and the geoZIP area, a percentage of Medicare rates for the area. The total charges for all dates of service was $25,933.93. (PX6, pp. 6-7)

Ms. Clarkson testified Timberlake started billing right after services were performed and they started following up right after. (PX6, p. 7) The bills were sent to Petitioner's attorney's office. (PX6, p. 7) Ms. Clarkson testified that it did not look like they ever had a Workers' Compensation carrier to bill on the file. (PX6, p. 7) She further testified they did not have information regarding private health insurance either. (PX6, p. 8)

Ms. Clarkson testified that they had received a payment of $3,890.09 from White Coal Company on July 27, 2015. (PX6, p. 8) She testified that she shows a remaining unpaid balance of $3,890.09 because of an agreement that was made to resolve all charges. (PX6, p. 8) When

asked what the unpaid amount would be under the Workers' Compensation fee schedule, Ms. Clarkson responded $21,665.38. (PX6, p. 8)

On cross-examination, Ms. Clarkson testified that she does not have any record of Timberlake sending the medical bills to the Workers' Compensation carrier and further stated they did not have the information on file. (PX6, p. 13) She stated Timberlake just sent it to the attorney's office for Petitioner. (PX6, p. 13) Timberlake used a UB form as the primary form used for billing. She agreed the document only had Petitioner's and Petitioner's attorney's names and addresses on it. (PX6, pp. 9-14)

Per Timberlake's file, there were numerous contacts made between Timberlake and Petitioner's attorney's office between April 23, 2008 and August 31, 2011, specifically, April 23, 2008, June 3, 2008, July 2, 2008, September 24, 2008, and December 30, 2008, and into 2009. Timberlake would typically make contact about every two months. (PX6, pp. 20-21) On July 20, 2011, Timberlake was notified by Petitioner's attorney the case was on appeal. (PX6, p. 32)

Ms. Clarkson stated the next time she spoke to Petitioner's attorney's office was September 5, 2013. Ms. Clarkson testified their records showed that actual bills were physically sent to Petitioner's attorney's office during those four and a half years, specifically on May 21, 2009, December 15, 2009, and October 30, 2013. (PX6, p. 37)

Ms. Clarkson testified she spoke to Respondent's counsel on October 30, 2013, and again on June 26, 2014. On June 26, 2014, Respondent's counsel presented an offer to resolve the charges. (PX6, p. 36) Ms. Clarkson testified Respondent's counsel offered to resolve the issue for 30% of the billed charges and she agreed to it. Ms. Clarkson indicated she understood it as an offer to accept or not. (PX6, p. 35) She agreed it was a percentage or proposal that would have to be reviewed by all parties. (PX6, p. 36)

On re-direct examination, Ms. Clarkson testified that she had agreed to accept 30% of the balance of the billed charges, or $7,780.18. (PX6, p. 41) Timberlake had agreed to accept 30% of the balance to get the claim paid, settled and over with. (PX6, pp. 41-42) She indicated that Timberlake received half of that amount, or $3,890.09. (PX6, p. 42)

On re-cross examination, Ms. Clarkson testified in October 2013 she called Respondent's counsel and he advised her he was unaware of any unpaid medical bills. (PX6, p. 43) Ms. Clarkson agreed that as of that date, she had not personally communicated in any way at all with Respondent's counsel, the employer or the employer's Workers' Compensation insurance company about the medical bills. (PX6, p. 44) Also, according to the account file, Timberlake Surgery Center likewise had not communicated with Respondent, its carrier or attorney. (PX6, p. 44)

Respondent offered and Commission admitted into evidence RX1, an email from Respondent's counsel to Petitioner's counsel, dated September 17, 2014, purportedly confirming a discussion and agreement at the Mount Vernon Review docket hearing site on September 16, 2014.

Respondent offered and the Commission admitted into evidence RX3, an email from Respondent's counsel to Petitioner's counsel advising him Premier Anesthesia was paid in the

amount of $382.50, the amount they agreed to pay per the exhibit, and pursuant to their agreement, Respondent's counsel advised they would issue a check to Timberlake Surgery Center for $3,890.09, or 50% of the agreed balance due, again, per the exhibit. The Commission notes this exhibit is the same as contained in PX3. The Commission further notes the letter dated August 12, 2015, from Petitioner's attorney to Respondent's attorney advising him that Timberlake Surgery Center is owed another $3,890.00, or he will proceed to hearing, corroborates Respondent's Exhibit 3. (PX5)

The following portions of the Illinois Workers' Compensation Act apply:

§16 of the Act states, in part:
Attorneys' Fees to Be Paid as Penalty

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. (Source: P.A. 94-277, eff. 7-20-05.) (820 ILCS 205/16. (2013)

§19(k): Penalty for Delay

(k) In cases 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). 820 ILCS 305/19(k). (2013)

§19(l): Penalty for Delay, in part:

(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.

Petitioner relies on the Arbitrator's decision of April 28, 2010, the Commission Decision and Opinion on Review of February 1, 2011, and the Circuit Court Order of July 29, 2011, in support of his position that Respondent is responsible for payment of all bills for Petitioner's causally related medical services and Respondent's refusal to pay all bills is unreasonable and vexatious.

After careful consideration of the totality of the evidence, the Commission denies the Petitioner's Amended Petition for Penalties and Attorney's Fees. The Commission notes that the consolidated claims were tried on March 9, 2010, and a decision was entered April 28, 2010. The Arbitrator's Decision noted the disputed issues were causal connection and nature and extent. The Arbitrator's Decision findings noted that, "Petitioner has received all reasonable and necessary medical services" and "Respondent has paid all appropriate charges for all reasonable and necessary medical services." Clearly, the parties had stipulated that all the reasonable, necessary and causally related medical expenses tendered had been paid at the time of arbitration. Medical expenses were not in dispute and consequently, were not awarded. Absent an award for medical expenses, Respondent cannot be found to have acted unreasonably or vexatiously for refusing to pay medical expenses he was never ordered to pay.

The Commission further finds that there is no evidence the medical bills at issue were tendered pre-arbitration to Respondent, Respondent's carrier or Respondent's counsel. In support of this finding, the Commission finds the testimony of Ms. Clarkson persuasive. Ms. Clarkson testified that she reviewed the account for Petitioner and there was no information in the account file regarding the name of Respondent or Respondent's carrier in the file. Ms. Clarkson testified she never sent the bills to Respondent or its insurance carrier and the account filed showed no one from Timberlake had sent the bills to Respondent, its carrier or attorney, prior to arbitration. No evidence was presented showing the medical bills from Timberlake Surgery Center were tendered to Respondent pre-arbitration.

The Commission further finds that Respondent did make a payment of the medical bills in question post-arbitration although not ordered to do so. Ms. Clarkson testified she agreed on behalf of Timberlake Surgery Center to accept 30% of the balance due, or $7,780.18, in an agreement with Respondent. The evidence shows Respondent tendered 50% of the negotiated amount or $3,890.09, pursuant to the agreement with Timberlake Surgery Center. The evidence shows this payment was accepted by Timberlake however a balance of $3,890.09 remained. Respondent maintains they had an agreement with Petitioner to pay only 50% of the negotiated balance of the $7,780.18, directly to Timberlake. Petitioner disputes whether such an agreement exists. Irrespective of whether an agreement exists, the Commission declines to award penalties for the non-payment of the unpaid balance of $3,890.09, because Respondent's conduct is not unreasonable and vexatious where Respondent was not ordered to pay the medical bills in the Decision of the Arbitrator, Decision on Review or the Order of the Circuit Court, and Respondent was never tendered the medical bills pre-arbitration.

The Commission finds that Petitioner failed to prove Respondent acted in an unreasonable and vexatious manner to warrant penalties and attorney fees under §19(l), §19(k) and §16. Petitioner's Petition for such relief is therefore denied.

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

DATED: APR 10 2020

-7/18/16
KD/jsf
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jane Jordan,

Petitioner,

vs.

NO. 14 WC 04748

RML Specialty Hospital,

Respondent.

ORDER

Petition for Enforcement of Fee Petition and the case having been filed by Petitioner's former attorney, Susan Fransen of Briskman, Briskman, & Greenberg herein and due notice given, this cause came before the Commission on January 23, 2020, in Geneva, Illinois. The Commission having jurisdiction over the persons and subject matter and after being advised in the premise finds:

- This matter was timely and properly filed for Petitioner before the Commission for an accident date of January 31, 2014 where Petitioner sustained accidental injuries. The law firm of Briskman, Briskman & Greenberg (Briskman) had represented Petitioner regarding the matter filing the Application February 7, 2014.

- The attorney representation agreement, executed by Petitioner-(client) and her attorney noted, "If client terminates this agreement before recovery, the client will pay the attorney a reasonable fee, as determined by the Workers' Compensation Commission, from the subsequent recovery…plus any unpaid expenses relating to advocating the claim up to the date that the agreement ended." As in all workers' compensation cases, this was otherwise, a standard contingent fee contract.

- In pursuit of the case, Petitioner's former attorney firm (Briskman) had expended numerous hours on the claim that had not been reimbursed, as well as the costs associated with pursuing the case. Ms. Fransen indicated she expended about five (5) hours working on the file (at $300 per hour) and support staff expended about two (2) hours on the file (at $50 per hour) and they had $45.00 expenses that were not reimbursed.

- Ms. Fransen presented a Case Note List regarding calls and contacts with Petitioner, and claims adjuster, and also various activities regarding the case, performed by an attorney

or the support staff. The list notes dates and times, but provides no details as to the amount of time spent regarding the calls and various activities.

- Petitioner left the Briskman firm and retained Dworkin & Maciariello (Dworkin) firm to pursue the matter. Stipulation to Substitute Attorneys was filed September 17, 2014.

- Thereafter, Petitioner's former attorney, Briskman firm, filed their Petition for attorney fees and expenses, and subsequently re-filed their amended Petition, Petition for Enforcement of Fee Petition entered and continued to disposition, and Notice of Motion November 13, 2019 as to their claimed fees and expenses which is the subject herein for determination. The initial fee Petition was entered and continued to disposition by Arbitrator Cronin September 21, 2015.

- The underlying case was settled by the Dworkin firm for a settlement total of $39,622.01 which represented 15% loss of Petitioner's person as a whole, 10 weeks of disputed temporary total disability benefits, and $5,455.76 towards disputed medical expenses. Fees received by the Dworkin firm totaled $7,924.40. The Lump Sum Settlement contract was approved by Arbitrator Friedman June 28, 2019. The Briskman firm fee Petition was not addressed at that time.

- The Briskman firm had monitored the case and found the matter had settled and settlement contract approved June 28, 2019. Thereafter, they contacted the Dworkin firm, as well as, Respondent counsel regarding the underlying fee petition. They re-filed their Petition for Enforcement of Fee Petition entered and continued to disposition, September 27, 2019 and November 13, 2019 and the matter was eventually set for January 23, 2020 to present and hear the motion.

- The Briskman firm indicated they contacted the Dworkin firm and Respondent counsel regarding the January 23, 2020 hearing, and neither Respondent firm nor anyone representing the Dworkin firm appeared at that time. Petitioner was not present for the hearing either.

- The matter was heard and placed on the record January 23, 2020 before Commissioner Doerries and was taken under advisement for consideration of this motion.

The Commission notes that the Briskman firm claimed fees/expenses in excess of $1,600.00 of the $7,920.00 attorney fees received by the Dworkin firm from the settlement of this matter.

The Commission finds that the only indication as to the amount of time working on the case was per the statements of Ms. Fransen. The Case Note List provides no basis to justify exactly how much time was expended on the case. At hearing she indicated that she expended about five (5) legal hours working the file and support staff expended about two (2) hours and they had $45.00 in case expenses. The Commission finds Ms. Fransen estimates of hourly rates as $300.00/hour for legal would be excessive. The Commission finds $175.00/hour for legal would more reasonable. The Commission, therefore, using Ms. Fransen statements as to hours expended, 5 legal hours at $175.00 ($875.00), plus 2 hours support staff at $50.00/hour

($100.00), plus $45.00 claimed expenses as evidenced, for a total fees and expenses awarded of $1,020.00.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Petitioner's former attorney, Briskman, Briskman & Greenberg, is entitled to §16(a) attorney fees and expenses for a total of $1,020.00 based on their time, and efforts, and expenses on behalf of Petitioner, and, herein, orders the Dworkin & Maciariello firm to remit such attorney fees/expenses in satisfaction of those efforts, from the award on the case, from which they had received their fees previously.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefore and deposited with the Office of the Secretary of the Commission.

DATED: APR 10 2020

-1/23/20
KD/jsf

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

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 1 0 2020
o: 1/23/20
BNF/kcb
45

Barbara N. Flores

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 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]

---

[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.

Deborah L. Simpson

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

20IWCC0168

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.

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

MAR 29 2019

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

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES B. BODNAR,

Petitioner,

vs. NO: 18 WC 2123

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

20IWCC0224

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary disability, and medical benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 7, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $673.08 per week for a period of 62 1/7 weeks, representing December 6, 2017 through February 13, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act. Responent shall be given a credit of $28,599.13 for temporary total disability benefits that have been paid. RX3.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for the left carpal tunnel release recommended by both Dr. Jimenez and Respondent's examiner, Dr. Rodarte.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision.

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

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

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: APR 13 2020

L. Elizabeth Coppoletti

LEC/mck

D: 3/25/20

Stephen Mathis

43

D. Douglas McCarthy

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

BODNAR, CHARLES B
Employee/Petitioner

Case# **18WC002123**

ILLINOIS DEPT OF TRANPORTATION
Employer/Respondent

20IWCC0224

On 3/7/2019, 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 2.46% 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:

1497 MORICI FIGLIOLI & ASSOCIATES
ROBERT H BUTZOW
150 N MICHIGAN AVE SUITE 100
CHICAGO, IL 60601

6153 ASSISTANT ATTORNEY GENERAL
ALYSSA SILVESTRI
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1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

MAR -7 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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
19(B)/8(A)

Charles B. Bodnar
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **18** WC **2123**

Consolidated cases: **N/A**

20IWCC0224

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **2/13/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/5/17**, 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 $**52,500.24**; the average weekly wage was $**1,009.62**.

On the date of accident, Petitioner was **67** years of age, **married** with **0** dependent children.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services through October 3, 2018.

ORDER 19IWCC0109

Respondent shall pay Petitioner temporary total disability benefits of $673.08/week for 62 1/7 weeks, commencing 12/6/17 through 2/13/19, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $28,599.13 for temporary total disability benefits that have been paid. RX 3.

Petitioner is entitled to prospective care in the form of the left carpal tunnel release recommended by both Dr. Jimenez and Respondent's examiner, Dr. Rodarte.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Molly C Mason

Signature of Arbitrator

3/7/19
Date

MAR 7 - 2019

ICArbDec19(b)

Charles Bodnar v. Illinois Department of Transportation
18 WC 2123

Summary of Disputed Issues

Petitioner claims he injured his dominant left upper extremity on December 5, 2017, while attempting to roll a heavy truck tire from one location to another. The disputed issues include accident, causal connection, temporary total disability and prospective care in the form of a left carpal tunnel release. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified he has worked seasonally as a "snow bird" for Respondent for ten years. Each fall, Respondent hires individuals to work as "snow birds" during the winter. Petitioner testified these individuals are expected to perform all the tasks that would normally be expected of full-time employees. Those tasks include operating plows and salt trucks during snowstorms and performing various maintenance and cleaning duties when it was not snowing. As a "snow bird," Petitioner regularly performed driving, lifting and carrying.

Petitioner testified that "snow birds" typically work from November until April. A person who wants to work as a "snow bird" must pass a physical examination before being hired on. Petitioner testified he passed such an examination in the fall of 2017.

Petitioner denied injuring his left hand or left arm prior to his claimed accident of December 5, 2017. Petitioner testified he had no difficulty performing his assigned duties before that accident.

Petitioner testified that, on the morning of December 5, 2017, his boss, Bob Marti, directed him and others to roll truck tires from one location to another. Petitioner testified he had seen other employees perform this task before December 5, 2017 but he had never previously done it. He received no training as to how to go about it. The tire was wide and heavy. He estimated it weighed 200 pounds. He began rolling the tire, using both hands. The tire was on his left because he is left-handed. He demonstrated to the Arbitrator that he had his left arm extended in front of him while trying to move the tire along. Petitioner testified the tire started to tip. He tried to keep it upright but the tire "won" and eventually fell. Petitioner testified he felt as if his left side, from his shoulder to his hand, was "ripped off" in the process. He reported his injury to Bob Marti [notice is not in dispute]. Marti directed him to complete paperwork and seek medical attention.

Respondent offered into evidence a Form 45/First Report of Injury completed by Jennifer Boisselle of Tristar on December 5, 2017. In this report, Boisselle indicated that Petitioner was injured at 7:15 AM on December 5, 2017 while rolling a tire into the tire room on Respondent's premises. Boiselle stated that the tire was "not balanced correct [sic]" and "began to tilt," at which point Petitioner "reached for it," pulling his upper left arm muscle and left shoulder. RX 5.

Respondent also offered into evidence an Employee's Notice of Injury signed by Petitioner on December 5, 2017 and a Supervisor's Report of Injury signed by Robert Marti on the same date. In the Employee's Notice of Injury, Petitioner indicated he was putting a tire away at 7:15 AM when he pulled his left arm and shoulder. RX 6. In the Supervisor's Report, Marti indicated that Petitioner was injured at 7:15 AM while rolling a tire from the front bay to the tire room. He described Petitioner as stating

that the "tire was falling and he [Petitioner] tried to catch it with his left arm injuring himself while doing so." Marti indicated that no unsafe conditions contributed to the accident. RX 6. Respondent also offered a Workers' Compensation Witness Report indicating there was no witness to Petitioner's claimed accident. RX 6.

Petitioner testified that, at Marti's direction, he went to a medical facility, Physicians Immediate Care, that same morning. Personnel at that facility declined to treat him and told him to go to a hospital. [No records from Physicians Immediate Care are in evidence.]

Petitioner testified he went to the Emergency Room at Presence Resurrection Hospital the same day. At the Emergency Room, he was given two rounds of pain pills and eventually an injection of morphine.

The Emergency Room records show an arrival time of 10:18 AM on December 5, 2017. The examining physician, Dr. Sallen, recorded the following history and complaints:

> "67 yo M presenting with L shoulder pain. Hx as noted below. Was at his place of work moving a large tire when the tire fell to the ground. He tried to right it w his left arm but felt an immediate pain in the left shoulder. Complains of severe pain with ROM. No meds taken for pain. Sharp pain."

PX 1, p. 5. An Emergency Room nurse, Cynthia Stachnik, R.N., noted the following history and complaints:

> "To ED from work, was moving tires and felt pull to left arm/shoulder and since c/o pain to left upper arm and with abduction of shoulder. + distal pulses. Denies crush injury."

PX 1, p. 7. Stachnik also noted "pain with movement and palpation of left upper arm and shoulder, + distal pulses/cap refill WNL, no obvious trauma." [PX 1, p. 16.] Another nurse, Colleen McNichols, R.N., noted a pain rating of 10/10 shortly after Petitioner arrived at the hospital. PX 1, p. 28.

The records reflect Petitioner was given a morphine injection and other pain medication, including a transdermal patch. PX 1, p. 9. The records also reflect that Petitioner's left arm was placed in a sling. PX 1, p. 32.

Dr. Sallen indicated that Petitioner's shoulder pain appeared muscular in nature. He saw "no indication for X-ray given mechanism." He diagnosed strains of the left shoulder and left biceps. PX 1, p. 7.

Petitioner testified that, at the time of discharge, Emergency Room personnel instructed him to return to work. Several records reflect that Petitioner was "discharged home." A "treatment and work status report" appears in PX 1, at page 20, but is not legible.

Petitioner testified that a co-worker drove him back to work from the Emergency Room. When he arrived at work, his boss asked him what he was doing there. He was not permitted to resume working because of the morphine injection.

Petitioner testified he saw his primary care physician, Dr. Nikolakakis, the following day, December 6, 2017. The doctor recorded the following history and complaints:

> "Injured his left arm yesterday while lifting a heavy tire at work and was seen in the ER with pain at the base of the left bicep extending up to the anterior shoulder and over the left trapezius. No relief with current medications and arm has been in a sling since last night."

On examination, Dr. Nikolakakis noted mild tenderness to palpation over the left biceps tendon inferiorly and moderate tenderness over the left trapezius. He diagnosed strains of the biceps and trapezius. He started Petitioner on Cyclobenzeprine and a Medrol Dosepak. He directed Petitioner to continue using the sling, stay off work and call back if his symptoms worsened. PX 2.

Petitioner next sought treatment on December 18, 2017, at which point he returned to Dr. Nikolakakis. Petitioner testified he did not work between December 6th and 18th. During this period, he felt terrible and had difficulty sleeping. He experienced shooting pain in his left arm, from his shoulder to his hand. The fingers of his left hand were numb.

Dr. Nikolakakis's note of December 18, 2017 reflects that Petitioner reported slight improvement of his left arm pain but was still experiencing "pain over the left anterior and posterior shoulder as well as the inferior biceps region." The doctor noted "no bruising or discoloration at the site." He started Petitioner on Aleve and told him to continue the other medications. He directed Petitioner to apply moist heat and rest. PX 2.

Petitioner testified that, on December 18th, Dr. Nikolakakis referred him to Dr. Jimenez, a physician affiliated with Illinois Bone and Joint. A line in Dr. Nikolakakis's note appears to mention a referral but it has been written over and is very difficult to read. PX 2.

Petitioner first saw Dr. Jimenez on December 19, 2017. A lengthy patient history form of that date appears in the doctor's chart. The first page of the form references left-sided complaints secondary to a work accident but the form is otherwise completely illegible.

In his typed note of December 19, 2017, Dr. Jimenez noted that Petitioner presented with left shoulder and left elbow pain stemming from "moving a tire with heavy lifting" at work on December 5, 2017. The doctor indicated that most of Petitioner's pain was in his elbow, "consistent with distal biceps injury."

On examination, Dr. Jimenez noted right shoulder weakness with pain on forward flexion and abduction, consistent with a rotator cuff injury, and also fairly significant weakness with elbow flexion "with attenuation of the distal biceps tendon consistent with possible partial rupture and possible full rupture." [The reference to the right shoulder appears to be an error.] The doctor obtained X-rays. He indicated the films showed no signs of fracture or dislocation. [It is not clear which body parts were X-rayed.] He prescribed MRIs of the elbow and shoulder. He directed Petitioner to remain off work "due to this work-related event." He found "clear caution [sic] regarding his elbow and shoulder.] PX 3.

Petitioner underwent the recommended MRI scans on January 16, 2018, according to Dr. Jimenez's records. The MRI reports are not in evidence. When Petitioner returned to Dr. Jimenez, on January 18, 2018, the doctor indicated the left shoulder MRI showed a small tear of the supraspinatus tendon, mild undersurface partial tearing of the infraspinatus and "glenohumeral joint erosion for non-specific arthritis." He indicated the left elbow MRI showed "tendinitis through the ligamentous tendinous structure around his shoulder but no clean evidence of acute injury, fracture or dislocation." He stated the diagnosis was "common extensor tendon signal abnormality and tendinopathy lateral epicondylitis."

On re-examination, Dr. Jimenez noted significant pain and weakness with forward flexion and abduction of the left shoulder, significant tenderness over the distal biceps tendon and pain with pronation and supination of his forearm "consistent with a biceps injury of some sort."

Dr. Jimenez again found "clear caution [sic] regarding" the work accident, noting that Petitioner's left shoulder and elbow were relatively pain free before the accident and that his post-accident symptoms were severe enough to interfere with work and activities of daily living.

Dr. Jimenez prescribed physical therapy but indicated Petitioner might require shoulder surgery. He continued to keep Petitioner off work. PX 3.

Petitioner underwent an initial occupational therapy evaluation at Illinois Bone & Joint on February 1, 2018. The evaluating therapist, Michael Lennie, OT, recorded the following history and complaints:

> "In Dec patient was rolling a tire to the tire shop at work. The tire got away from him and he reached to pull and grab the tire and felt a pain through his elbow and shoulder. Oral meds and pain patches did not improve pain at the hospital. When pain did not improve, he went and saw Dr. Jimenez on 1/19, where he received a cortisone injection which improved symptoms. He is taking Aleve every day. He did have shoulder surgery about 20 yrs ago on his R side."

Elsewhere in the same note, Lennie described Petitioner as experiencing "sharp pain about the shoulder shooting down into the elbow" and "running through his biceps into the forearm." He also noted "mild radial tunnel irritation." PX 3.

Petitioner testified the objects he was told to lift during therapy were too heavy for him. He also testified that his symptoms, particularly the numbness in his fingertips, increased as he continued attending therapy due to the therapist bending his left hand back and forth.

On February 13, 2018, Petitioner returned to Dr. Jimenez, with the doctor recording the following:

> "He is still with **continued** [emphasis added] pain in his left wrist and arm. Pain on forward flexion and abduction. He has difficulty lifting heavy and therefore we are going to keep him off work."

PX 3.

Lennie's therapy progress note of March 1, 2018 documents complaints of pain in the left shoulder, biceps, elbow and wrist. Lennie also documented a complaint of numbness in the index and long fingers. He noted that Petitioner continued to report significant pain about the entire upper extremity and was "apprehensive to use the hand with function." He indicated that the radial nerve irritation could be contributing to some of Petitioner's pain along the dorsal forearm and wrist. He recommended additional therapy and indicated Petitioner "could benefit from a prefab wrist cock up brace for the wrist to decrease pain about the wrist/forearm." PX 3.

On March 13, 2018, Dr. Jimenez noted ongoing left shoulder complaints. He recommended that Petitioner continue therapy and stay off work. He also prescribed a left upper extremity EMG to evaluate "left upper extremity numbness and tingling." PX 3.

Lennie's therapy progress note of March 27, 2018 reflects that Petitioner complained of tenderness about the supraspinatus/infraspinatus, upper trapezius and radial tunnel, pain along the dorsal hand and wrist and numbness in his fingertips. Lennie described Petitioner as making minimal progress during the preceding four weeks. He indicated that Petitioner was "now report[ing] more pain about his dorsal wrist and forearm" and "paresthesia about the median nerve distribution." PX 4.

Dr. Rechitsky conducted EMG/NCV testing of Petitioner on April 17, 2018. In his report of that date, he indicated that, on December 5, 2017, Petitioner experienced severe left shoulder pain radiating to his upper arm, elbow and forearm "with diffuse tingling paresthesia in the left upper extremity in the palm and all the fingers," when he lifted and rolled a heavy tire "which tilted and pulled [the] left arm." He indicated that, while Petitioner's left shoulder range of motion and left arm paresthesia had improved, he was still experiencing "residual numbness in the left hand only, quite clearly in the median sensory territory." He stated that, while Petitioner denied losing dexterity in his left hand, he did feel his grip strength might be slightly weaker than before. He documented a several-year-long history of prediabetes managed with dietary restrictions and Metaformin.

On examination, Dr. Rechitsky noted negative Spurling's bilaterally, positive Tinel's at the left wrist, no thenar atrophy and dense left median territory hypoesthesia.

Dr. Rechitsky interpreted the EMG/NCV as suggesting the presence of left carpal tunnel syndrome. He described the left median neuropathy at the wrist as "chronic, severe and [having] features of both demyelination and axonal loss." He saw no evidence of cervical radiculopathy on the left. He indicated it was "still possible" that Petitioner might have suffered left brachial plexus neurapraxia with gradual improvement and eventual resolution. PX 3.

On April 19, 2018, Dr. Jimenez reviewed the EMG results and indicated he agreed with Dr. Rechitsky's findings. He noted that Petitioner had been experiencing numbness and tingling in the median nerve distribution of the left upper extremity "for quite some time with clear evidence of causation from a work perspective." He indicated that the numbness and tingling had increased since December 2017 "from repetitive cyclical loading on the job." He recommended a left open carpal tunnel release, noting that Petitioner had failed splinting and therapy. He described Petitioner as now having "tremendous loss of two point discrimination." PX 3.

Lennie issued another therapy progress report on May 15, 2018, noting that Petitioner was still reporting pain in several locations with little to no relief during the preceding four weeks of therapy. He described Petitioner as "painful from the shoulder/pectoral region radiating distally down into the hand." He noted that Petitioner was now reporting nerve symptoms in the median nerve distribution and that provocative radial and ulnar nerve testing was positive. PX 3.

A therapy discharge note of June 6, 2018 reflects that, after 29 sessions, "pain about the entire upper extremity was still very evident and limiting both functionality and in therapy." PX 3.

At Respondent's request, Petitioner saw Dr. Rodarte for purposes of a Section 12 examination on August 23, 2018. The doctor recorded the following history of the accident:

> "The claimant states that he was working in the garage and was told to move the truck tires. Truck tires are both bulky and heavy. As he was rolling the tire, it began to fall and the claimant attempted to stop its fall by grasping it. As he did so, he felt that the tire pulled down on his fingertips causing pain radiating up his entire left arm. He states that the injury was witnessed but that the other employees did not want to get involved. The claimant also states at that time, he noticed paresthesia in his left hand, mild at first, but increased through time."

Referencing physician records, Dr. Rodarte opined that "the first mention of paresthesia was on April 10, 2018, 4 months after the alleged date of injury." RX 2, p. 2.

Dr. Rodarte noted that Petitioner rated his left shoulder pain at 6-8/10, his left elbow pain at 5-6/10 and his left wrist pain at 5-7/10. He also noted that Petitioner complained of "almost constant hand numbness in the left hand, motioning to the thumb, index and middle fingers." He also noted a history of prior right shoulder surgery.

Dr. Rodarte described Petitioner as "overall very pleasant and cooperative." He noted no pain behavior during the interview but "significant pain behavior throughout the evaluation." On left shoulder examination, he noted "global pain" and some inconsistencies between the range of motion measurements and those recorded by the occupational therapist and Dr. Rechitsky. He documented positive impingement signs and Neer and Hawkins testing. On left elbow examination, he noted significant tenderness and pain behavior on light palpation of both the medial and lateral epicondylar regions. On left wrist examination, he noted a full range of motion. He noted positive Tinel's signs at the left median region and left cubital tunnel.

Dr. Rodarte opined that Petitioner had pre-existing degenerative disease of the left shoulder and pre-existing left carpal tunnel syndrome. He found no causal relationship between the work accident and the left shoulder and carpal tunnel conditions. He did find causation as to the left elbow condition. He described the treatment to date as reasonable and necessary. He recommended four to six weeks of occupational therapy for the left lateral epicondylitis. He also indicated that Petitioner would require further care for his left carpal tunnel but did not link the need for this care to the accident. He imposed restrictions with respect to both arms. With respect to the left arm, he indicated that Petitioner should minimally use his left arm and hand and should not perform any work above shoulder level. RX 2.

On October 3, 2018, a claims examiner affiliated with Tristar wrote to Petitioner and his counsel indicating that Respondent was suspending the payment of temporary total disability benefits based on the Section 12 examination and Petitioner's "non-compliance" with the occupational therapy recommended by the examiner, Dr. Rodarte. PX 4.

On October 9, 2018, Dr. Jimenez again addressed causation:

> "The patient presents after a work-related injury on or about 12/5/17. The patient has had pain in his upper extremity, numbness and tingling consistent with carpal tunnel syndrome. The patient prior to his work-related event was asymptomatic and now he has become highly symptomatic through this event and therefore there is clear causation regarding his left carpal tunnel syndrome in a work-related event."

Dr. Jimenez again recommended a carpal tunnel release. He noted that the insurance carrier was denying this surgery in reliance on Dr. Rodarte. He expressed disagreement with Dr. Rodarte's recommendation of additional therapy:

> "The fact that [Petitioner] is not on therapy now is a function of the physical therapist stopping the therapy and telling the patient that it is not helping him and that the therapist also agrees the patient will benefit from surgical management."

On re-examination, Dr. Jimenez noted no evidence of thenar or hypothenar atrophy but decreased two-point discrimination of the medial nerve distribution. He described Petitioner's range of motion as "reasonable" but noted weakness in the medial nerve distribution consistent with carpal tunnel syndrome. PX 3.

On November 6, 2018, Dr. Jimenez essentially reiterated the opinions he voiced on October 9, 2018. He again recommended a left carpal tunnel release, noting that Petitioner had failed therapy. He offered Petitioner a left shoulder injection, which Petitioner declined. He recommended home exercises and directed Petitioner to remain off work while awaiting approval of the left carpal tunnel release. PX 3.

On January 3, 2019, Dr. Jimenez noted that Petitioner was now exhibiting a minor degree of thenar atrophy along with persistent numbness and tingling in the median nerve distribution. He also noted positive Tinel's and Phalen's tests. He again recommended a left carpal tunnel release. He continued to keep Petitioner off work. PX 3.

Dr. Rodarte testified by way of evidence deposition on January 22, 2019. RX 1. Dr. Rodarte testified he is board certified in preventive medicine, with a specialty in occupational and environmental medicine. Since 2016, he has been an independent contractor for Midwest Orthopedics. RX 1, pp. 7-8. Rodarte Dep Exh 1. He has testified at one trial and approximately thirty prior depositions. RX 1, p. 8.

Dr. Rodarte testified he only vaguely recalls Petitioner and would thus need to refer to his notes. He identified Rodarte Dep Exh 2 as the report he generated concerning the examination he performed

on August 23, 2017. RX 1, p. 9. He reviewed Emergency Room records, physician records and therapy notes in connection with his examination. RX 1, p. 10. He did not review a job description. RX 1, p. 10.

Dr. Rodarte testified he obtained a history from Petitioner. Petitioner told him he injured his left arm while rolling a tire. Petitioner indicated he grasped the tire to prevent it from falling and felt pain radiating up his left arm "as the tire was going down." RX 1, p. 12. With respect to his past medical history, Petitioner indicated he underwent a right shoulder surgery, hernia surgery, a colon resection and a coronary angioplasty. Petitioner also indicated he has hypertension and diabetes. RX 1, p. 13. Petitioner complained of significant left shoulder pain, left elbow pain, left wrist weakness and constant left hand numbness. RX 1, p. 14.

Dr. Rodarte opined that Petitioner had other conditions, namely carpal tunnel syndrome and a degenerative disease of the left shoulder, prior to the work accident. RX 1, p. 14.

Dr. Rodarte testified that, although Petitioner complained of significant pain throughout the examination, he was not able to identify any left shoulder abnormalities. Petitioner's left shoulder range of motion was "significantly decreased." RX 1, p. 15. Petitioner's left elbow was also significantly tender and the range of motion was decreased. Petitioner exhibited "significant pain behavior" on left elbow examination. RX 1, p. 16.

Dr. Rodarte testified he noted positive Tinel's at both the left elbow and the left wrist. He also noted positive Durkin's compression testing in the left wrist. The range of motion in Petitioner's left hand and wrist was normal and not painful. RX 1, p. 16. Strength testing revealed a deficit in the left hand compared to the right. RX 1, p. 17.

Dr. Rodarte diagnosed three conditions: left lateral epicondylitis, mild degenerative disease of the left shoulder and left carpal tunnel syndrome with an element of chronicity. With respect to the shoulder, he testified that small tears within the rotator cuff muscles are "a natural consequence of aging." In his opinion, the work accident did not cause, aggravate or contribute to the left shoulder condition or the left carpal tunnel syndrome. He could not say that the accident caused the left lateral epicondylitis but he felt that it contributed to that condition or "may have caused it." RX 1, pp. 18-20. The mechanism of injury Petitioner described, along with the objective physical findings, seemed to make it a medical probability that the epicondylitis was either caused or aggravated by the accident. As of his examination, Petitioner still had active signs and symptoms of left lateral epicondylitis. RX 1, pp. 20-21. He recommended that Petitioner undergo occupational therapy for this condition. RX 1, p. 21. He linked the need for this care to the accident. RX 1, p. 21. He did not find Petitioner capable of full duty. The restrictions he recommended were "specific to the work injury." RX 1, p. 22.

Under cross-examination, Dr. Rodarte identified Rodarte Dep Exh 3 as a letter he received from Respondent concerning the examination. He has performed similar examinations in the past. RX 1, p. 24. With respect to the treatment he is recommending, he believes Petitioner should meet with a certified hand therapist and undergo therapy for six to eight weeks to restore strength and lessen pain in his left elbow. RX 1, p. 25. He understands Petitioner previously underwent therapy. He reviewed the records concerning that care. RX 1, p. 25. He has treated individuals who have carpal tunnel syndrome but he has never performed a carpal tunnel release. He is not an orthopedic or hand surgeon. He has treated lateral epicondylitis but has not performed surgery for this condition. RX 1, p. 26. He has performed shoulder procedures but not surgical repairs. RX 1, p. 27.

Dr. Rodarte testified he does not know Dr. Jimenez. He disagrees with Dr. Jimenez's opinion that Petitioner developed carpal tunnel syndrome as a result of his accident. He disagrees because the physician who performed the EMG/NCV testing said the condition was "not the result of a traction injury." RX 1, p. 27. Petitioner did not tell him he had any problems with his shoulder, elbow, hand or wrist before the work accident. RX 1, p. 31. Nor did Petitioner tell him he had any difficulty performing his "snow bird" job duties for Respondent before the accident. RX 1, p. 31. Carpal tunnel syndrome can be caused by trauma. The mechanism of injury that Petitioner described can cause carpal tunnel syndrome. RX 1, p. 32. He has no opinion as to whether Petitioner was credible. The tests he performed correlated with the diagnoses of carpal tunnel and epicondylitis. RX 1, pp. 32-33. The left shoulder MRI findings were consistent with Petitioner's age. "There was no finding on the MRI which strongly implied acuity." He attributed the shoulder MRI findings solely to degeneration. RX 1, p. 33. He did note significant limitations in range of motion of Petitioner's left shoulder on examination. The MRI revealed small tears in two of the muscles of the rotator cuff. The type of degenerative shoulder condition that Petitioner has can be asymptomatic. RX 1, p. 34. He has no data to support the conclusion that Petitioner's left shoulder became symptomatic after the work accident. He has no records showing that Petitioner had left shoulder problems before the accident. RX 1, p. 35. Petitioner exhibited significant pain behavior. RX 1, p. 36.

Dr. Rodarte testified that lateral epicondylitis can be treated conservatively, via rest, anti-inflammatories and sometimes injections and devices. Surgery is required in some cases. RX 1, p. 37. Occupational therapy, consisting of stretches and strengthening, is sometimes helpful. He has never heard of occupational therapy aggravating underlying carpal tunnel syndrome. Carpal tunnel is an impingement of the median nerve. This nerve does not traverse near the lateral epicondylar. RX 1, p. 38. He reviewed Petitioner's occupational therapy records but no longer has access to those records and thus cannot describe the exact kind of therapy Petitioner underwent. He cannot recall the credentials of the therapist Petitioner saw. He typically recommends that occupational therapy be conducted by a certified hand therapist. RX 1, p. 40. He is aware that Dr. Jimenez has recommended a carpal tunnel release. He agrees with this recommendation. RX 1, pp. 41-42. When he examined Petitioner, Petitioner told him he had been off work. Since Petitioner's job is hand intensive, he felt that duty restrictions were necessary. RX 1, p. 42. Therapy can improve a carpal tunnel condition. He would recommend carpal tunnel surgery if conservative measures did not result in improvement. RX 1, p. 43. The brachial plexus is a nerve complex that travels from the neck down to the arm. "The chronicity of [Petitioner's] carpal tunnel syndrome is based on the [EMG/NCV] findings of demyelination of the nerve and axonal degeneration of the nerve." These findings only develop after a significant period and would rarely be associated with an acute, recent event. RX 1, pp. 44-45. He has no information indicating that Petitioner had carpal tunnel symptoms before the work accident but that does not necessarily mean the symptoms did not exist. He does not recall asking Petitioner if he had such symptoms. RX 1, pp. 45-46.

On redirect, Dr. Rodarte testified that none of the topics discussed during cross-examination prompted him to change the opinions set forth in his report. He determines the existence of pre-existing conditions via the patient's history and the records he reviews. At times, a physical examination will also provide some temporal clues. RX 1, pp. 46-47.

Under re-cross, Dr. Rodarte reiterated he has no documents reflecting that Petitioner had shoulder, elbow, hand or wrist problems before the December 5, 2017 accident. RX 1, p. 47.

Petitioner returned to Dr. Jimenez on February 5, 2019, about a week before the hearing. The doctor described Petitioner as having undergone a right carpal tunnel release by Dr. Visotsky in 1997.

He reiterated his causation opinions and again recommended a left carpal tunnel release. He indicated that "the problem with waiting is that [Petitioner] is going to have some permanent damage of the nerve." He continued to keep Petitioner off work. PX 3.

Under cross-examination, Petitioner testified that, before he started rolling the tire, the tire was leaning against a wall. He used both hands to roll the tire. The tire was to his left. The tire began to wobble. In retrospect, he "should have let it fall" but he kept trying to keep it upright. As far as he knows, tires are manually rolled and not moved via machinery. He had never tried to roll a tire before the accident. He rolled the tire at the direction of his boss. He and the other seasonal employees were supposed to do everything a full-time employee would do. They were expected to do what the bosses told them to do.

Petitioner testified the home exercises prescribed by the therapist consisted of lying on his back while moving his arm up and to the side, pressing against a door frame and using bands. He was "black and blue" when he walked out of therapy sessions. His pain increased with therapy. The numbness and tingling started when the therapist moved his wrist back and forth. This occurred possibly in March. He experienced very little numbness and tingling at the beginning. He is not currently undergoing active care. Dr. Jimenez continues to examine him and prescribe pain medication but is otherwise waiting for the recommended surgery to be approved.

Petitioner denied any pre-accident left arm injuries. He also denied undergoing a right carpal tunnel release in 1997. He has not filed any other workers' compensation claims.

Petitioner testified that, before the accident, he worked for the Chicago Park District between April and November. His job consisted of driving a tractor and cleaning beaches. He last worked for the Chicago Park District in October 2017. He does not pursue any hobbies. His non-work activities including visiting family members, shopping with his wife, watching television and taking his dog for 30-minute walks. His dog weighs about 40 pounds. He has a yard and tries to mow his lawn.

On redirect, Petitioner testified that no physician, including Respondent's examiner, has released him to full duty since the accident. After the accident, his pain went from his shoulder to his fingers and was "pretty much constant." His symptoms worsened during therapy. Dr. Jimenez is currently recommending surgery, not home therapy.

Arbitrator's Credibility Assessment

The fact that Respondent hired Petitioner on a seasonal basis for ten years running weighs in Petitioner's favor, credibility-wise.

The Arbitrator finds credible Petitioner's testimony that he had some degree of left hand numbness and tingling after the accident and that these symptoms increased as he participated in occupational therapy sessions. Dr. Jimenez's note of February 13, 2018, written about two weeks after the initial therapy session, describes Petitioner as having "continued" symptoms in his left wrist.

During cross-examination, Respondent attempted to impeach Petitioner on the issue of whether he underwent a right-sided carpal tunnel release in 1997. Petitioner denied undergoing this procedure. Dr. Jimenez's note of February 5, 2019 mentions a right-sided release but it appears this is a

transcription error. Other records, including Dr. Rodarte's report, reflect Petitioner underwent a right shoulder surgery, not a carpal tunnel release, in 1997.

The Arbitrator did not find Dr. Rodarte particularly persuasive. This case involves upper extremity and hand conditions. Dr. Rodarte acknowledged he is neither an orthopedic surgeon nor a hand surgeon. He has never performed a carpal tunnel release. On direct examination, he did not explain why the torqueing mechanism involved in the accident could be a competent cause of Petitioner's lateral epicondylitis yet have no bearing on the left shoulder or carpal tunnel conditions. Under cross-examination, he acknowledged the left shoulder MRI showed distinct tears but attributed that pathology solely to the aging process. He also agreed that carpal tunnel syndrome can be traumatic in origin and that the specific type of trauma described by Petitioner could cause carpal tunnel. He asserted that numbness and tingling were first documented on April 10, 2018 but Petitioner's occupational therapist noted a complaint of numbness in the left index and middle fingers on March 1, 2018.

Arbitrator's Conclusions of Law

Did Petitioner sustain an accident on December 5, 2017 arising out of and in the course of his employment?

The Arbitrator finds in Petitioner's favor on the issue of accident. As for the "in the course of" element, which refers to the time, place and circumstances of the accident, Respondent's own exhibits establish that the accident occurred on Respondent's premises during Petitioner's scheduled workday. Those exhibits also establish that the accident arose out of Petitioner's employment. Petitioner was performing an assigned task, i.e., rolling a truck tire from the bay to the tire room, when the accident occurred. No one contradicted Petitioner's credible testimony that the tire was wide, very heavy and difficult to control. Nor did anyone testify that Petitioner violated any work rule in rolling the tire. Robert Marti, the supervisor who completed one of the reports in RX 6, acknowledged that no unsafe act contributed to the accident.

Did Petitioner establish a causal connection between the December 5, 2017 accident and any claimed current condition of ill-being? Did Petitioner establish causation as to the need for the left carpal tunnel release recommended by both Dr. Jimenez and Respondent's examiner?

The Arbitrator finds that Petitioner established a causal connection between the accident of December 5, 2017 and his claimed current conditions of ill-being, including his left carpal tunnel condition. In so finding, the Arbitrator relies on the following: 1) the fact that Petitioner, who is left-handed, was able to successfully perform the physical duties of a "snow bird" for ten winters prior to the accident; 2) Petitioner's credible testimony concerning the mechanism of injury; 3) the post-accident sling immobilization, which could have prevented Petitioner from noticing left hand and wrist symptoms; 4) Petitioner's credible testimony that participation in occupational therapy caused his left wrist symptoms to increase over time; 5) the initial therapy note of February 1, 2018, which documents left forearm complaints and symptoms consistent with radial tunnel irritation; 6) Dr. Jimenez's February 13, 2018 note, which refers to "continued" left wrist symptoms; 7) the therapy notes of March 1 and 27, 2018, which corroborate Petitioner's testimony that his left wrist complaints increased in March as he continued to participate in therapy; 8) the symptoms and history recorded by Dr. Rechitsky on April 17, 2018 (PX 3); and 9) Dr. Rodarte's concession that carpal tunnel syndrome can be caused by the torqueing mechanism Petitioner described.

The Arbitrator recognizes that the earliest medical records do not mention left wrist complaints. The Arbitrator also recognizes that Dr. Jimenez's records contain some inconsistencies. In this particular case, the most careful and thorough histories appear to have been recorded by a non-physician, namely Petitioner's occupational therapist. Unlike Dr. Jimenez, who saw Petitioner monthly, the therapist saw Petitioner on almost thirty occasions between February 1 and May 15, 2018. The Arbitrator gives weight to those histories.

Illinois case law also supports a finding of causation. In Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003), the Supreme Court held that an injured worker need only prove that an accident was a cause of his condition. He need not establish that the accident was the sole, or even a significant, cause. Nor is he obligated to eliminate all other possible contributing causes. Moreover, there is no requirement that he establish a condition of absolute good health prior to the accident. Schroeder v. IWCC, 2017 Ill. App. LEXIS 350 (4th Dist. 2017).

The Arbitrator further finds that Petitioner established causation as to the need for the left carpal tunnel release recommended by both Dr. Jimenez and Dr. Rodarte. There is no evidence indicating Petitioner underwent treatment for left carpal tunnel syndrome prior to the accident. Dr. Jimenez reasonably prescribed a release in response to the EMG and the therapist's notation that conservative measures were not alleviating Petitioner's numbness and tingling.

Was Petitioner temporarily totally disabled from December 6, 2017 through the hearing of February 13, 2019?

Petitioner claims he was temporarily totally disabled from December 6, 2017 (the day after the accident) through the hearing of February 13, 2019. Respondent disputes this claim based on its accident and causation defenses. Arb Exh 1. Respondent submitted into evidence a print-out showing it paid temporary total disability benefits from December 11, 2017 through October 3, 2018. RX 3. Respondent discontinued the payment of benefits on October 3, 2018 based on its claim that Petitioner was non-compliant with treatment, namely additional therapy, recommended by its examiner, Dr. Rodarte. PX 4.

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. The Arbitrator views Petitioner's causally related left carpal tunnel syndrome condition as unstable. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). Dr. Jimenez first recommended a left carpal tunnel release on April 19, 2018, following the positive EMG/NCV study. He documented worsening symptoms thereafter. He was still recommending the release as of Petitioner's last visit, on February 5, 2019. On that date, he expressed concern that the delay could result in permanent nerve damage. Respondent's examiner, Dr. Rodarte, agrees that Petitioner has left carpal tunnel syndrome, although he does not link this condition to the work accident. He also agrees with Dr. Jimenez's recommendation of a carpal tunnel release. RX 1, pp. 41-42. He recommended work restrictions. RX 1, p. 42. There is no evidence indicating Respondent offered Petitioner work within those restrictions.

The Arbitrator finds that Petitioner was temporarily totally disabled from December 6, 2017 (the day Dr. Nikolakakis took him off work) through the hearing of February 13, 2019, a period of 62 1/7 weeks. Respondent shall receive credit for the $28,559.13 in benefits it paid from December 11, 2017 through October 3, 2018. RX 3.

Is Petitioner entitled to prospective care?

The Arbitrator has previously found in Petitioner's favor on the issues of accident and causation. Respondent's examiner, Dr. Rodarte, agrees that Petitioner needs a left carpal tunnel release, although he does not causally link this surgery to the accident. As noted previously, the Arbitrator does not find Dr. Rodarte particularly persuasive on the issue of causation vis-à-vis the carpal tunnel. The Arbitrator Dr. Jimenez recommended that the release be performed in advance of any additional elbow or shoulder care. To the Arbitrator, it makes no sense for Petitioner to pursue additional elbow therapy, as Dr. Rodarte has suggested, while deferring a surgery both doctors endorse, particularly in light of Dr. Jimenez's recent comment that additional delay will likely result in permanent nerve damage. PX 3. Petitioner derived virtually no benefit from the 29 sessions of therapy he attended between February and May 2018. PX 3. The carpal tunnel release, if successful, will allow Dr. Jimenez to determine the origin of any remaining upper extremity symptoms. The Arbitrator awards prospective care in the form of a left carpal tunnel release.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patrick Whalen,

Petitioner,

vs.

NO: 08 WC 40699
11 WC 20482

Illinois Department of Transportation,

Respondent.

20IWCC0223

DECISION AND OPINION PURSUANT TO SECTION 19(h)

Petitions having been filed by both Respondent and Petitioner pursuant to Section 19(h), following a hearing and notice given to all parties, the Commission, after considering all issues and being advised of the facts of law, hereby denies both petitions for the reasons set forth below.

I. FINDINGS OF FACT

A. Law of the Case

This consolidated matter was tried before Arbitrator Friedman on February 4, 2015. Petitioner alleged that he injured[1] his left shoulder and cervical spine on February 21, 2008 while looking over his shoulder as he was steering an end loader and backing out of a yard. Petitioner also sprained his previously surgically-repaired left shoulder and aggravated his pre-existing cervical spondylosis and radiculopathy. On February 2, 2011, Petitioner suffered a second accident in which he injured[2] his cervical spine, lumbar spine and right knee when the front end loader he was driving struck an overpass, jackknifed and caused him to strike his head and both knees. Petitioner also aggravated his pre-existing degenerative cervical condition.

[1] Case No. 08 WC 40699
[2] Case No. 11 WC 20482

"The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606 (2003) (citing *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 125 Ill. App. 3d 1083, 1086-87 (1984) (quotations omitted)). The law of the case doctrine is applicable to issues litigated before the Illinois Workers' Compensation Commission. *Ming AutoBody/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 252 (2008)). In addition, the original award cannot be relitigated in a Section 19(h) proceeding. See *Motor Wheel Corp. v. Industrial Comm'n*, 75 Ill. 2d 230, 236 (1979). Thus, the findings of fact and conclusions of law from the arbitration decision in the above-captioned cases are binding, and herein adopted and incorporated by reference. The Commission notes the following pertinent findings as they relate to the parties' Section 19(h) petitions.

With regard to the February 21, 2008 accident, the Arbitrator found that Petitioner sustained a left shoulder sprain and a temporary aggravation of his pre-existing cervical spine condition. With regard to the February 2, 2011 accident, the Arbitrator found that Petitioner's cervical spine condition was aggravated by the work accident as opined by Dr. Bernstein, Petitioner's treating physician and surgeon, and as agreed by both of Respondent's Section 12 examiners, Drs. Phillips and Lami.

Regarding the 2011 claim, the Arbitrator further found the opinions of Dr. Phillips to be more persuasive than those of Petitioner's treating physician, Dr. Montella, relating to Petitioner's lumbar spine condition. Specifically, the Arbitrator noted that "Dr. Phillips diagnosed Petitioner with a lumbar sprain/strain. He did not find any significant neural compression or evidence of any acute structural injury. ... He opined that the lumbar spine would not result in any permanent restrictions or limitations. After review of the record as a whole including the medical records and depositions and Petitioner's testimony, the [A]rbitrator finds the opinion of Dr. Phillips more persuasive that [sic] that of Dr. Montella. The Arbitrator finds that as a result of the accidental injuries sustained on February 2, 2011, the Petitioner sustained a sprain/strain injury to the lumbar spine." Arb. Dec. at 11.

As a result of the February 2, 2011 accident, the Arbitrator awarded temporary total disability benefits from January 23, 2012 through June 23, 2014. In so doing, the Arbitrator stated that the "opinions of Dr. Bernstein, as the treating surgeon, [are] most persuasive. Dr. Bernstein found Petitioner at maximum medical improvement and capable of return to restricted duty as of June 23, 2014. As discussed in the Arbitrator's decision with respect to causal connection, the Arbitrator finds the opinions of Dr. Montella unpersuasive and based upon a lack of documentation as to the basis of his opinions beyond his sketchy understanding of the subjective complaints of the Petitioner and his need for medication. Dr. Phillips[']' opinion as to the lumbar condition is more persuasive. As of his examination, he did not expect any permanent impairment for the low back. As also noted, despite MRI findings of a meniscal tear, Dr. Montella's recent records do not even include complaints to the right knee, and there is no evidence that the right knee condition was disabling at any date after Dr. Bernstein's MMI finding with respect to the cervical spine." Arb. Dec. at 15. Respondent was awarded a credit

20IWCC0223

for TTD and any maintenance benefits paid credited against the temporary benefits award with the remainder to be credited against the permanent disability award. Arb. Dec. at 15.

Ultimately, the Arbitrator made a permanency award as a result of Petitioner's claims. He declined to award any permanent partial disability (PPD) related to Petitioner's left shoulder or cervical spine injuries on February 21, 2008. Arb. Dec. at 15-16. However, the Arbitrator did award permanent partial disability benefits with regard to the latter claim.

The Arbitrator's main conclusion in support of the wage differential award related to Petitioner's cervical condition. To that end, the facts detail Dr. Bernstein's concern about the solidity of Petitioner's fusion. A May 9, 2014 CT scan found an absence of solid bone fusion at C3-4 and Dr. Bernstein noted haloing around the screws, which suggested loosening and an incomplete fusion at that level. Arb. Dec. at 7. The Arbitrator noted the pseudoarthrosis problem and highlighted Dr. Lami's acknowledgement that "the pseudoarthrosis is a competent cause of pain and [of] Petitioner"s subjective complaints and further that if there is a non union of the fusion at C3-4, heavy work would not be advisable." Arb. Dec at 16.

The Arbitrator concluded that Petitioner suffered injuries including an aggravation of his pre-existing degenerative cervical condition resulting in a three-level fusion as well as a lumbar sprain/strain and a tear of the posterior horn of the medial meniscus of the right knee. He placed Petitioner at MMI based on the release of Dr. Bernstein on June 23, 2014 to restricted employment, which he noted in PX17 at 18. The Arbitrator then noted "[g]iven the extensive surgery performed and Petitioner's testimony concerning his ongoing symptoms, the Arbitrator finds that the opinion of Dr. Bernstein that Petitioner cannot return to his previous employment is most persuasive. Dr. Phillips opined that he did not believe Petitioner could return to his regular job, supporting Dr. Bernstein's opinion. While Dr. Lami opines that the surgery along should not preclude Petitioner from returning to his job, he acknowledges that the psuedoarthrosis is a competent cause of pain and Petitioner's subjective complaints and further that if there is a non union of the fusion at C3-4, heavy work would not be advisable. The Arbitrator also takes note that Respondent has not offered Petitioner a return to work following the examination by Dr. Lami or release by Dr. Bernstein." Arb. Dec. at 16.

Ultimately, the Arbitrator found Dr. Bernstein's opinion that Petitioner could not return to his prior employment persuasive. Arb. Dec. at 17. In so concluding, he noted the extensive surgery performed, and Petitioner's testimony regarding issues with his neck, balance, inability to stand or drive for long periods, inability to squat or kneel without assistance rising up and diminished strength. The Arbitrator found that "[b]ased upon the preponderance of the credible medical opinions including Dr. Bernstein and Dr. Phillips, the Petitioner has proved that he is unable to pursue his actual and customary line of employment. ... While the Arbitrator finds that Petitioner has failed to conduct a diligent job search, the Petitioner can establish what he is able to earn in some suitable employment by expert testimony. With respect to the second requirement, reduced earning capacity, the Petitioner's vocational rehabilitation expert, Susan Entenberg, opined that there was a readily available and stable labor market in which the claimant could obtain positions earning between $9 and $12 per hour. Given Petitioner's lack of any reasonable effort to seek employment, the Arbitrator finds that Petitioner is capable of

reduced earnings of $12.00 per hour or $480.00 per week as a result of the injuries sustained." Arb. Dec. at 17-18.

On March 26, 2015, Petitioner was awarded medical expenses, temporary total disability benefits and a wage differential award of $542.03 per week pursuant to section 8(d)(1) of the Act, commencing on June 24, 2014 for the duration of the disability. Arb. Dec. at 18.

B. Petitions Pursuant to Section 19(h) and Post-Arbitration Evidence

Respondent filed the instant Section 19(h) petition on January 8, 2019. Petitioner filed his own 19(h) petition on February 11, 2019. A hearing was held on July 9, 2019 and August 6, 2019.

1. Petitioner's Testimony, Post-Arbitration Employment, and Post-Arbitration Medical Treatment

Respondent called Petitioner as its first witness. Petitioner testified that he was a heavy equipment operator for IDOT. In that position, his duties included working in the summertime on breakouts, loading salt into the dome during the summertime, and loading trucks in the wintertime. Petitioner used an end loader to shovel as well as a Bobcat and jackhammer. After his accidents at work, Petitioner agreed that he underwent a functional capacity evaluation (FCE) in 2014. He was thereafter permanently restricted from lifting over 20 pounds and from overhead lifting.

Petitioner agreed that his claims went to an arbitration hearing in 2015 and he was questioned about his testimony at that time. He also agreed that he testified that he had low back pain every day. Petitioner further agreed that he testified that his low back hurt if he bent over, that if he knelt or squatted he needed something to pull himself up, and that he had neck pain. Petitioner did not recall testifying that he could not look down at that time. Petitioner also testified that he could not stand or walk for more than an hour due to low back pain, drive for long periods of time, or safely drive a truck.

Regarding his current condition, Petitioner testified that he still has aches and pains in his neck, low back and right leg. At the Section 19(h) hearing, Petitioner testified that he continued to treat with various providers for his conditions. Additionally, since the arbitration hearing Petitioner has been taking various medications prescribed by Dr. Montella. He testified to difficulty lifting above his head, soreness, and inability to bend or kneel without assistance. Petitioner also testified that he has pain and limited range of motion in his neck, as well as balance issues.

When asked if his condition had changed since the arbitration hearing, Petitioner testified that his condition has changed a little bit. Respondent's counsel asked how, and pressed the inquiry. Petitioner testified that he did not know how so, but that in time things get better. After additional inquiry, and Petitioner asking whether he had to get into percentages, Petitioner testified 50%. When then asked whether he was 50% better than he was at the time of the hearing, Petitioner replied, "No. No. Probably right around there, I would say. I'm not going to

lie. Sure. Why not?"

Respondent elected not to have Petitioner evaluated by a Section 12 examiner. However, both parties submitted various records related to Petitioner's post-arbitration medical treatment and other documents related to Petitioner's post-arbitration employment. The medical records submitted into evidence reflect that Petitioner requested and received full duty releases from various treating physicians.

On April 1, 2015, Petitioner presented to his primary care physician, Dr. Gindorf, who noted "[a]lso discussed partial disability asking if I knew whet[h]er he could still work while on partial disability states he feels ok And wants to go back to work if not able to." RX6 at 4.

Petitioner returned on April 24, 2015 for a "ck up to return to work[.]" RX6 at 6. Petitioner informed Dr. Gindorf that he "needs note to RTW Feels like he will be able to handle responsibilities Had not done a lot of heavy lifting previously younger guys usually do most of it States will not be using jack hammer[.]" RX6 at 6. Dr. Gindorf obliged with a full duty release effective immediately. RX2 at 1.

Petitioner acknowledged that after he received the arbitration award, he sought to return to work with Respondent. He completed an application, which was dated by Petitioner and received by Respondent on April 24, 2015. RX1. Petitioner applied for two positions: Woodstock Operations Supervisor and Grayslake Operations Supervisor. *Id.*

Petitioner testified that when he filled out the application, he told them that he still had physical impairments and later testified that he did not tell them; rather, the "disability act people from the State of Illinois" called him. Petitioner testified that "[t]hey already knew it. The disability people told me to go apply for the jobs." With regard to his application, Petitioner denied checking the box that said "no Impairment[.]" RX1. He explained that every time he applied, he always put "other."

With regard to submitting the application to Respondent, Petitioner testified that he received a phone call from the "disability act people" of the State of Illinois. When asked why he decided to submit applications to Respondent in April or May of 2015, Petitioner testified that he was offered a light-duty desk job. Petitioner also testified that he spoke with Carmen Cortez, an employee of IDOT. He testified that he was told to submit the application, which would be followed by an interview process. On questioning by his attorney, the following exchange took place:

> Q. These applications you submitted in April or May of 2015, did you speak with someone from IDOT regarding these applications?
> A. Yes, I did.
> Q. Who is that person?
> A. Carmen Cortez.
> Q. Who is Carmen Cortez?
> A. Well, you go to him when you got problems with insurance and medical and stuff like that, but he usually takes all the applications for – If there's a posting for

a job, you fill it out, and you give it to him, and I guess he stamps it or puts it in the computer or whatever he does.
Q. And did he tell you, Pat, what steps you had to take as part of your application for the supervisory job?
[Respondent's counsel interposed a hearsay objection, which was withdrawn.]
A. Yes.
...
Q. This Mr. Cortez from IDOT, Pat, did he tell you anything about doctor releases you had to obtain as part of the application process?
A. No.
Q. Did you as part of your application in April or May of 2015 obtain releases from your doctors?
A. Yes, I did.
Q. Why did you get those releases?
A. Because the packet that I was sent from Springfield gave me a list of things to fill out with this paperwork. I had three days to get it done, and part of that list was to get full releases to be able to get a desk job at IDOT.

Petitioner testified that the position that he applied for was as a storekeeper or supervisor. He explained that a storekeeper essentially orders and provides auto parts to mechanics as they are needed and maintains records on those items. Petitioner was not hired, but testified that if Respondent were to offer him that position he would accept it although it would mean that he would no longer receive a wage differential award.

The medical records reflect that on May 18, 2015, Petitioner presented to Dr. Montella for his lumbar pain who noted significant improvements since his last visit. Petitioner stated "everything is well, he has little pain once in a while." RX2. The note goes on to state "Patrick is here to get released back to work with full duty and no restrictions." *Id.* Petitioner denied that he had significant improvement in his condition in April and May of 2015, although he acknowledged the foregoing report to Dr. Montella.

Dr. Montella provided Petitioner with a full duty release dated May 18, 2015 on an Illinois Department of Transportation form addressed to "Workers' Compensation" at a Schaumburg, Illinois address. RX2. Dr. Bernstein also provided his full duty release on May 18, 2015 and Dr. Gindorf did so as well on May 26, 2015 on the same type of IDOT form. *Id.*

On June 1, 2015, Petitioner presented to Dr. Sawlani. RX2. It was noted that Petitioner needed a letter stating he can go back to work full duty with no restrictions. *Id.*

On July 8, 2015, a "Reasonable Accommodation Certificate" was completed for Petitioner who "is unable to return to his/her former position of Heavy Const. Equip. Operator[.]" PX44. Ms. Syas signed on Respondent's behalf indicating that a reasonable accommodation had been attempted, but could not be made. *Id.* Petitioner testified that he was not re-hired by Respondent.

20IWCC0223

On October 26, 2015, Petitioner filed a Charge of Discrimination against Respondent. The letter states, in pertinent part, "[d]uring my employment, I sustained a work related injury. Subsequently, I have been denied reinstatement. I complained to no avail." RX12.

On November 30, 2016, Petitioner followed up with Dr. Montella for his lumbar pain. Petitioner had recently moved to another home. PX30. During the move, he aggravated his back pain and symptoms. *Id.* He had pain radiating to his right leg, but denied numbness or tingling. *Id.*

Between April 24, 2017 and January 16, 2019, Petitioner followed up with Dr. Montella complaining of chronic low back pain radiating down the back of his right leg. PX30. He was diagnosed with "intervertebral disc disorders with radiculopathy, lumbosacral region, other intervertebral disc displacement, lumbar region." *Id.* He was prescribed medication and performed home exercises. *Id.*

While Petitioner underwent post-arbitration treatment, he applied for and obtained several full-time, although temporary or seasonal, positions. Petitioner applied for a position with Sunset Cartage on August 8, 2015. RX9. He worked as a Semi-Truck Driver for a few months. Petitioner explained that he drove a semi-truck delivering gravel and estimated that he drove 30-40 miles total over 8-9 hours doing short runs. Petitioner underwent and passed a medical exam before being hired.

Petitioner then applied to work for Cook County as a Motor Vehicle Driver on November 4, 2015. RX3. Petitioner worked in the position through March 9, 2016. *Id.* Petitioner testified that he drove around in a pickup truck most of the time as a passenger. Petitioner did not know how long he drove around each day and described the work to be driving around to do Cook County or highway stuff. Petitioner denied performing repairs on the roadway, performing tree and brush removal by operating chainsaws and chippers, or manually loading and unloading vehicles with a variety of equipment and barricades as identified in the job description. He acknowledged that he did some "paper picking" and trash removal.

Petitioner then worked at Fox Waterway as a Seasonal Truck Driver driving a small dump truck carrying sludge from the Fox River and the surrounding lakes, which he then drove about a mile down to dump it in a cornfield. He drove about four or five loads back and forth in a day. Petitioner explained that he never got out of the truck, and that the loading and unloading was all automatic.

Petitioner testified that he also worked at the McHenry golf course for a couple of months cutting grass on a riding mower. Petitioner testified that he could not have cut the grass if he had to use a push mower although he guessed he could operate one.

Finally, Petitioner testified about his employment with Algonquin Township as a Drainage Adviser earning $15.00 per hour. Petitioner testified that he was hired on February 2, 2019 and remains working there. He explained that the township has subdivisions without public sewers, so everything runs along the curb. Petitioner's job is to explain the job on paper and give it to his boss who has other people go out and perform the work; sometimes Petitioner

20IWCC0223

was present to watch the work. He drives pickup trucks once or twice a week, and usually rides with the crews within a 15-mile area.

Petitioner also testified that he applied for various heavy equipment jobs. He explained that he did so "just to see if they would call...." He went on to state that had he received an interview, he would go in and explain his condition to see if they would be ok with it. There is no evidence in the record that Petitioner was hired for any heavy labor positions.

2. Georgina Syas

Respondent called Georgina Syas as a witness. Ms. Syas is the Personnel Manager for District 1 for Respondent. She noted that on April 24, 2015, Petitioner submitted job applications to Respondent for the Operation Supervisor position in two locations. The job duties for this position include supervising a maintenance yard, ordering supplies, possibly cleaning trucks and driving to work sites to make sure things are operating properly. She described this job as heavy work due to some of the work functions in the yard as well as having to occasionally go on-site and assist with pothole patching, sewers, etc. Petitioner submitted work release letters from physicians indicating that he had no restrictions.

Ms. Syas also testified that in Spring 2015 Petitioner attempted to return to his pre-accident position as Heavy Construction Equipment Operator. Ms. Syas testified that she spoke with Petitioner during that time period and he told her that he was a "walking miracle" and he "had completely recovered from his surgery and his injuries and that he was ready to return without restriction." Ms. Syas testified that she had been copied on emails wherein Petitioner sought to be re-hired at his pre-accident position.

Ms. Syas confirmed that Carmen Cortez is her Transactions Manager at IDOT and he works with negotiated rate employees when they begin work on issues such as getting physicals, setting them up for training, and health insurance. Ms. Syas denied that Mr. Cortez would offer positions or hire employees.

On cross-examination, Ms. Syas testified that Petitioner went to her Schaumburg, Illinois office requesting to return to his position as a heavy construction equipment operator. She believed that she had emails documenting that request in writing, and that she may have been copied on the emails. No such emails were submitted into evidence.

Ms. Syas testified that she told Petitioner "in the spring of 2015 that it was our understanding that he was permanently and totally disabled, he had been given an award for that reason, and that he would not be able to return to his position as a heavy construction equipment operator."

Ms. Syas also testified on cross-examination that she did speak with someone else at IDOT about Petitioner's request to return as a heavy construction equipment operator, her workers' comp manager at the time, Wendy West, who informed her that he called and was trying to return to his position as a heavy construction equipment operator. Ms. Syas also testified that she spoke with her workers' comp examiner, Gail Corone, who "told me the same

20IWCC0223

thing that he had left a message saying that he wanted to return as a heavy construction equipment operator."

3. Robert Bowman

Respondent called Robert Bowman as a witness. Mr. Bowman is the Superintendent for Field Operations for Fox Waterway Agency. He has worked there since 1996. Petitioner worked there in July and August of 2018 as a Truck Driver. The duties included driving a Class B dump truck for construction aggregate soil, light maintenance of the truck, pre-trip instructions, etc. Driving was from 6:00 a.m. to 3:00 p.m. The driver may potentially need to climb to get inside the truck bed, and may also be required to lift 50 pounds with occasional bending and shoveling. Petitioner indicated to him that he was able to perform these duties. Petitioner was terminated after Fox Waterway learned that their insurance would not cover him due to his driving record.

On cross-examination, Mr. Bowman acknowledged that had not personally observed Petitioner lifting anything over 50 pounds.

4. Rick Prescott

Respondent called Rick Prescott as a witness. Mr. Prescott testified that he works for Sunset Cartage and has done so since May of 2017 as the DOT Compliance and Safety Manager. In this position, Mr. Prescott testified that part of his duties require him to create, maintain, and sustain documents and ensure DOT compliance for all auditing purposes. See RX9. Mr. Prescott testified that has never met Petitioner.

5. Surveillance Video

Respondent offered surveillance video and accompanying report into evidence. RX4-RX5. The video footage reflects Petitioner walking a dog and mowing his lawn for an extended period on October 13, 2018. He is also observed bending over and pulling the starter as well as bending over to pick up and throw branches. Although there were no obvious signs of pain, difficulty walking or discomfort, there are no instances of Petitioner lifting over 20 pounds of engaged in overhead lifting.

II. CONCLUSIONS OF LAW

The Illinois Supreme Court has explained that "[t]he purpose of a proceeding under section 19(h) is to determine if a Petitioner's disability has "recurred, increased, diminished or ended" since the time of the original decision of the Industrial Commission. *Gay v. Industrial Commission*, 178 Ill. App. 3d 129, 132 (1989) (citations omitted). To warrant a change in benefits, the change in a claimant's disability must be material. *Id.*; see also *Murff v. Illinois Workers' Comp. Comm'n*, 2017 IL App (1st) 160005WC, ¶ 22. Medical evidence normally provides the best means of determining whether such a change in disability has occurred. *International Harvester v. Industrial Comm'n*, 169 Ill. App. 3d 809, 817 (1988). The inquiry is not whether the claimant's employability has changed although it "can be used as

additional evidence to reveal the change in and extent of claimant's physical capabilities." *Id.* (citing *United States Steel Corp. v. Industrial Comm'n*, 35 Ill. 2d 506, 510-11 (1966)). Ultimately, in determining whether an increase or decrease in disability has occurred, the entire record must be examined. See *Board of Trustees of the University of Illinois v. Industrial Comm'n*, 71 Ill. 2d 287, 295 (1978).

In the instant case, Petitioner was permanently restricted from lifting over 20 pounds and from overhead lifting as of the time of the arbitration award. Respondent filed its Section 19(h) petition five years later. Respondent did not have Petitioner examined by its own physician after the wage differential award was entered. Respondent avers that Petitioner's medical condition had substantially and materially changed. In support of its contention, Respondent relies primarily upon full duty work releases procured by Petitioner in asserting that his disability has diminished.

At first glance, the releases provided within such a short period after the entry of the wage differential award appear to be indicative of diminished disability. However, an examination of the entire record reveals several key facts suggesting that the releases were obtained for reasons of employability, not due to a material decrease in his disability.

The Commission first observes the timing of events. The arbitration award was issued on March 26, 2015. In his decision, the Arbitrator noted that Respondent had not offered Petitioner a return to work following the examination by Dr. Lami or release by Dr. Bernstein. Arb. Dec. at 16. Petitioner testified that he had financial need for himself and his family and was looking for work. He acknowledged that he sought to return to work with Respondent after arbitration and completed an application on April 24, 2015. Petitioner testified that he received a phone call from the "disability act people" of the State of Illinois and they "told [him] to go apply for the jobs." More specifically, Petitioner testified that he spoke with Mr. Cortez, who usually handles insurance and medical problems. He added that if there was a job posting, "you fill it out, and you give it to him, and I guess he stamps it or puts it in the computer or whatever he does." Petitioner further testified that the packet that he was sent from Springfield gave him a list of things to fill out, including full releases, to be able to get a desk job at IDOT, and that he had days to complete the packet.

Respondent's witness, Ms. Syas, confirmed the type of work performed by Mr. Cortez, but maintained that he did not have authority to hire employees. Whether Mr. Cortez could hire anyone does not change the fact that he was involved in the process of onboarding employees or fielding related issues in her office. While Ms. Syas denied as much, it is wholly plausible that Petitioner, a negotiated rate employee, would rely on information provided by Mr. Cortez, who reports to the Personnel Manager, Ms. Syas, or in materials provided by Respondent in attempting to return to its employment.

Notwithstanding, Respondent maintains that the full duty work releases were unilaterally obtained by Petitioner without any inducement by its employees. To that end, Respondent offered the testimony of Ms. Syas who stated that she had been copied on emails wherein Petitioner sought to be re-hired at his pre-accident position. No such emails were submitted into evidence. Ms. Syas also testified that she spoke with her workers' compensation manager at the

20IWCC0223

time (Ms. West), and her workers' compensation examiner (Ms. Corone), both of whom informed her that Petitioner called and was trying to return to his pre-accident position. Neither Ms. West nor Ms. Corone testified at the hearing.

Moreover, the reliability of Ms. Syas's understanding about how Petitioner came to apply for the supervisor positions is brought into question by the Reasonable Accommodation Certificate that she signed on July 8, 2015.[3] Therein, and shortly after receipt of the work releases, Ms. Syas noted that Petitioner was "unable to return to his/her former position of Heavy Const. Equip. Operator." She also indicated that a reasonable accommodation had been attempted but could not be made. The existence of this document controverts Ms. Syas's testimony that Petitioner unilaterally obtained full duty releases, as well as the notion that Petitioner was attempting to return to his pre-accident position on a full duty basis.

Rather, Petitioner's accommodation request and his ire at not being rehired by Respondent suggests that Petitioner was seeking to gain accommodated employment with Respondent within his restrictions.[4] The request also suggests that the full duty releases were obtained as recommended by Mr. Cortez and not because he reportedly became miraculously able-bodied as Ms. Syas posited. The Commission finds no plausible reason for Petitioner to submit a reasonable accommodation request after applying for the supervisor positions unless he could not actually perform the job without accommodation or restriction. The Commission finds Petitioner's accommodation request – and Respondent's rejection thereof – more probative of what both parties believed regarding Petitioner's level of disability than the work notes Petitioner was apparently instructed to obtain by Respondent and had produced within the prior weeks.

Aside from the work notes, Respondent also offers evidence of Petitioner's representations and vocational behavior in an attempt to establish that there was a change in Petitioner's disability. At the 19(h) hearing, Petitioner testified that his condition was now fifty percent better. Petitioner's April 24, 2015 job application with Respondent indicates "no impairment" though Petitioner denied checking that box. On the job application for Sunset Cartage, Petitioner indicated there was no reason he could not perform the job functions. He also passed a road test and medical exam and was able to drive a dump truck.

However, given the unrebutted evidence of Petitioner's need, desire and motivation to work in some capacity, the evidence of what Petitioner has said must be weighed against the evidence of what he can or cannot do. None of Petitioner's activities are outside of his prior 20-pound lifting restriction or overhead lifting restriction. The Commission also observes that the outside employment applications do not establish that Petitioner was actually engaged in work outside of his restrictions at any time after the arbitration hearing. Indeed, neither Mr. Bowman nor Mr. Prescott observed Petitioner engaged in such activities and the video surveillance does not show Petitioner working outside of his prior restrictions. Petitioner's current job as a

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[3] The Commission observes that Ms. Syas was misinformed and under the impression that Petitioner was permanently and totally disabled, not permanently restricted from performing certain pre-accident activities.

[4] Petitioner ultimately filed a Charge of Discrimination against Respondent for failing to reinstate him in a position as a result of his work-related injury on October 26, 2015. While the charge was later dismissed, it lends credence to Petitioner's testimony that he obtained work releases from his physicians as indicated by Mr. Cortez or the packet which he testified that he received.

Drainage Adviser is also within his restrictions. Respondent's evidence is more relevant to Petitioner's employability than his disability; it does not support Respondent's proposition that Petitioner's physical capabilities have changed materially. *International Harvester*, 169 Ill. App. 3d at 817; see *United States Steel Corp.*, 35 Ill. 2d at 510-11.

Ultimately, viewing the record in its entirety, the evidence submitted in this case relating to Petitioner's medical condition and whether his physical abilities had materially changed – as opposed to whether he was attempting to procure work – was very limited. Although Petitioner obtained work notes as suggested representing that his condition had improved, Respondent also offered documentation shortly thereafter which necessarily implied that he could not work in his prior job without restriction or accommodation. Moreover, Petitioner's activities do not demonstrate a material increase in his abilities. Therefore, the Commission finds that Respondent has failed to establish that Petitioner's physical capabilities have increased such that a substantial or material change in his disability has occurred. Accordingly, the Commission denies Respondent's section 19(h) petition.

With regard to Petitioner's 19(h) petition, Petitioner argues that, not only has his disability not diminished, but that his wage differential has increased since arbitration due to increases through 2019 in the average weekly wage of a Heavy Equipment Operator for Respondent. However, Petitioner's petition is not proper under the umbrella of section 19(h). In *Petrie v. Industrial Comm'n*, the Court found that "[f]rom our review of the Act we conclude that when the legislature used the term "disability" in section 19(h) it was referring to physical and mental disability and not economic disability." *Petrie v. Industrial Comm'n*, 160 Ill. App. 3d 165, 171 (1987). *Petrie* continues, "...when the legislature intended to refer to something other than physical and mental disability, it used different or additional language: sections 6(c)(1) and 8(h-1) refer to 'legal disability'; and section 8(d)(2) refers to 'impairment of earning capacity." (Ill. Rev. Stat. 1983, ch. 48, pars. 138.6(c)(1), 138.8(h-1), 138.8(d)(2).) We conclude, therefore, that a change in physical or mental condition is a prerequisite for a section 19(h) petition." *Id.* at 171-72. The Commission finds that the basis for Petitioner's petition does not meet this prerequisite, thus his petition is hereby denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's petition under section 19(h) of the Act is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's petition under section 19(h) of the Act is hereby denied.

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.

20IWCC0223

Pursuant to section 19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 10 2020
o: 2/20/20
BNF/wde
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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 Majority denied both Petitioner's and Respondent's Petitions pursuant to §19(h) to modify the prior award based on a change in Petitioner's disability. I concur in the Decision of the Majority denying Petitioner's Petitioner. However, I dissent from the Decision of the Majority regarding Respondent's petition. I would have found that Respondent sustained its burden of proving that there had been a substantial change in Petitioner's condition and that Respondent was entitled to relief under §19(h) of the Act.

Petitioner injured his shoulders and neck on February 2, 2011. On March 26, 2015, the Arbitrator found that Petitioner could not lift more than 20 pounds, could not lift overhead, could not drive for long distances, and could not drive a truck. Therefore, he concluded that Petitioner could not return to work at his prior job as Heavy Equipment Operator and that he could earn only $12.00 an hour or $480.00 a week. Based on those findings, he awarded Petitioner a wage differential of $542.03 a week.

On April 1, 2015, less than a week after the award and three weeks before the first wage differential payment was made, Petitioner presented to one of his treating doctors, Dr. Gindorf, and reported that he felt OK, asked the doctor whether he could work while on partial disability, and noted that if he could not, he wanted to return to work. Three weeks later, on April 24, 2015, Dr. Gindorf noted that Petitioner told him that younger guys would do most of the heavy lifting, that he would not be using a jackhammer, and that he believed he could handle the responsibilities of his job. Dr. Gindorf then released him to work without restrictions. Thereafter, on May 18, 2015, Petitioner was released to work without restrictions by three different medical providers. He was also released to work without restrictions by various other treaters on May 19, May 21, May 26, May 28, and June 18, 2015. He had a total of eight releases to work without restrictions after the arbitration hearing.

At the §19(h) hearing, Petitioner acknowledged that he applied to return to work for Respondent. He testified that he did so because he was offered a light-duty office position. However, that assertion was rebutted by Respondent's Regional Personnel Director, Mr. Syas, who testified that on April 24, 2015, Petitioner applied for a job as either Operational Supervisor,

a heavy-duty position, or at his pre-injury job of Heavy Equipment Operator. Mr. Syas related a conversation he had with Petitioner at that time in which Petitioner stated: "he was a walking miracle and he had completely recovered from his injuries and his surgeries and he was ready to return to work without restrictions." Respondent refused to reinstate him because the prior award indicated that he could not safely return to such a job.

From November 16, 2015 to March 9, 2016, Petitioner worked full-time as a seasonal road repairmen for Cook County earning $35.03 per hour for 40 hours a week. That position required lifting, pushing, pulling, and moving objects of moderate to heavy weight. In addition, in July and August of 2018, Petitioner worked full time as a dump truck operator which required lifting up to 50 pounds. Finally, video surveillance from October 13, 2018 showed Petitioner doing yard work, mowing his lawn, and frequently bending to pick up debris. Despite seeking heavy-duty jobs with Respondent and his ability to perform relatively heavy work, Petitioner testified that he was 50% better since the arbitration hearing and that in the post-arbitration jobs described, he simply "sat in the truck." He also testified that he could neither bend nor kneel.

In my opinion, Petitioner has no credibility. Not only did he misrepresent the nature of his post-arbitration work activities at the §19(h) hearing, he almost certainly misrepresented his condition and his alleged degree of disability at the arbitration hearing, as evidenced by his statement to Mr. Syas and his attempt to be re-hired in a heavy physical demand level job. It is also important to note that the same treating doctors who had opined that Petitioner was significantly disabled and unable to return to his prior job pre-arbitration, resulting in his substantial wage differential award, all released him to work full-duty at his prior heavy-duty job without restrictions post-arbitration within a couple of months of the arbitration award.

Finally, I disagree with the Majority in its reliance on Respondent's failure to have Petitioner re-examined pursuant to §12. First, there is no requirement in the statute, rules, or case law requiring that an employer obtain a §12 examination in order to prove a change of condition under §19(h). Second, I believe it is a bit hypocritical of the majority to stress the lack of an IME examination in its decision. Previously, the Commission found that Petitioner's treating doctors were more persuasive than Respondent's §12 medical examiners. However, now the Majority is discounting the opinions of Petitioner's treating doctors (the same doctors that said he was not able to work) about Petitioner's ability to work and basically demanding a §12 medical examination as a perquisite to granting Respondent's petition.

For the reasons stated above, I concur in the Decision of the Majority denying Petitioner's Petition. However, I dissent from the Decision of the Majority regarding Respondent's petition. I would have found that Respondent sustained its burden of proving that there had been a substantial change in Petitioner's condition and that Respondent was entitled to relief under §19(h) of the Act. Therefore, I respectfully dissent from the Decision of the Majority.

DLS/dw
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46

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WHALEN, PATRICK
Employee/Petitioner

Case# **08WC040699**

11WC020482

ILLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

20IWCC0223

On 3/26/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% 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:

1

1414 BAAL & O'CONNER
BRYAN O'CONNOR
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CHICAGO, IL 60601

5204 ASSISTANT ATTORNEY GENERAL
CHRISTOPHER FLETCHER
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1430 CENTAL MGMGT SERVICES
WORKERS' COMP MANAGER
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SPRINGFIELD, IL 62794-9208

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

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

MAR 26 2015

[illegible], Acting Secretary
Illinois Workers' Compensation Commission

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

Patrick Whalen
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **08** WC **40699**

Consolidated cases: **11 WC 20482**

20IWCC0223

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen Friedman**, Arbitrator of the Commission, in the city of **Chicago**, on **February 4, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

20IWCC0223

FINDINGS

On **February 21, 2008 and February 2. 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On these dates, Petitioner ***did*** sustain accidents that arose out of and in the course of employment.

Timely notice of these accidents **was** given to Respondent.

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

In the year preceding each injury, Petitioner earned $**67,238.08**; the average weekly wage was $**1,293.04**.

On the February 21, 2008, Petitioner was **55** years of age, ***single*** with **0** dependent children.
On the February 2, 2011, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**126,553.03** for TTD, $**0.00** for TPD, $**38,919.91** for maintenance, and $**615.73** for other benefits, for a total credit of $**166,088.67**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $862.03/week for 152 3/7 weeks, commencing February 24, 2008 through August 28, 2008 and January 23, 2012 through June 23, 2014, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $127,168.76 for temporary total disability and salary paid for the periods awarded.

Respondent shall pay reasonable and necessary medical services as detailed in the findings attached hereto, pursuant to the medical fee schedule, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall also hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving credit as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits, commencing June 24, 2014, of $542.03/week for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act. Respondent shall receive credit for benefits paid of $38,919.91 for disputed temporary compensation and maintenance paid. Respondent shall also receive credit for any additional benefit paid from the date of the hearing forward.

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

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

Signature of Arbitrator

March 26, 2015
Date

MAR 26 2015

Statement of Facts

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Petitioner has filed two Applications for Adjustment of Claim alleging accidental injuries on February 21, 2008 (08 WC 40699) and February 2, 2011 (11 WC 20482). These claims were consolidated by the parties for a single hearing and decision.

Petitioner's Employment and Job Duties and Prior Medical Condition

Petitioner Patrick Whalen had been employed with Respondent Illinois Department of Transportation since 2001. Petitioner was initially designated as a highway maintainer, Petitioner testified that he performed the duties which are set forth in Petitioner's Exhibit 29, which describes the various functions required to maintain and repair roads and bridges. Beginning in 2005, Petitioner was working for Respondent as a heavy equipment operator. He operated a variety of heavy equipment, including bobcats, front end loaders, grading machines and large trucks. He also regularly handled free standing jack hammers, which he described as "old" weighing between 75 to 100 lbs. Petitioner also operated a bobcat with jackhammer attachment, which when in use would bounce the cab in which he was sitting. He would regularly shovel salt, asphalt and other material by hand. In order to access some of the equipment he was operating, he would have to climb up steps. As an operator, Petitioner was also required to maintain his equipment, which necessitated squatting, kneeling and lying down next to and under the machines. Although designated as a heavy equipment operator, he often performed work of a highway maintainer, and would routinely lift material on the job weighing between 50 and 100 lbs. Petitioner was working as a heavy equipment operator for Respondent on both dates of injury, 2-21-08 and 2-2-11.

Petitioner testified he had no prior neck or low back injuries nor did he have any prior neck or low back problems before February 21, 2008. Petitioner testified that he had no prior right knee injuries, and never had any problems with his knee giving way before February, 2011. Petitioner did injure both shoulders in a work accident with Respondent in 2006. He sustained bilateral rotator cuff tears requiring surgery on both shoulders, performed by Dr Cummins of Lake Cook Orthopedics. Petitioner returned to full duty with Respondent about six months before February, 2008, and worked full duty during that period.

February 21, 2008 Accident and Treatment

Petitioner testified that he was scooping up salt on February 21, 2008 with an end loader to put into a salt dome. Petitioner was working in the Northbrook yard. Petitioner testified there was a ball on the steering wheel of the end loader and he had to look over his shoulder when backing out. Petitioner testified he felt a snap on his left side. Petitioner reported to his supervisor and was advised to go to the emergency room. The records of Glenbrook Hospital were admitted as Petitioner's Exhibit 23. The record reports the history of

accident with complaints into the left shoulder. Petitioner advised of the prior shoulder surgeries and stated he had been back to work since September. Petitioner was diagnosed with a left shoulder sprain.

Petitioner was off work for the five days following the injury, and received full pay for that period under a union benefit. Petitioner saw Dr Cummins on 2-26-08. The records of Lake Cook Orthopedics were admitted as Petitioner's Exhibit 24. Petitioner complained of left shoulder pain on 7/10 scale. Dr Cummins noted a positive impingement sign and tenderness on physical exam. An examination of the cervical spine was normal. His impression was probable left shoulder strain with possible pop of scar tissue and/or suture material in shoulder. He prescribed a Medrol Dosepak and recommended light duty with a 10 lb. weight lifting restriction and no overhead work. (Px 24 p 2-5). Petitioner returned on March 31, 2008 with persistent left shoulder pain and complaints of numbness in the right fourth and fifth fingers at night. Petitioner thought this might be related to altered sleep mechanics. Cervical spine exam was again unremarkable and the diagnosis was left shoulder impingement and right cubital tunnel. Petitioner had continued complaints on April 28, 2008. Dr. Cummins prescribed an MRI of the left shoulder to rule out a recurrent rotator cuff tear. Petitioner stated that he can reproduce his hand symptoms with hyperextension of his neck and Dr. Cummins ordered a cervical MRI and an EMG. He notes that he was not treating these symptoms as a Worker's Compensation injury (Px 24, p 11).

Petitioner underwent an MRI of his shoulder and neck on May 15, 2008 and an EMG nerve test on June 25, 2008. The MRI of the shoulder noted degenerative arthritis in an otherwise normal study (Px 24 p13). The cervical MRI notes degenerative arthritis with a bulging of the C5-6 disk margin (Px 24, p 40). Dr. Schneider noted the MRI was of very poor quality (Px 24, p 25). The EMG was normal (Px 24, p 21-22).

Petitioner returned to Dr. Cummins on July 7, 2008. Dr. Cummins notes that the left shoulder has essentially resolved. His limiting symptoms are due to cervical radiculopathy. He notes Petitioner attributes this to frequent rotation of his head at work. Petitioner also questioned if the condition was related to a pre operative nerve block he received. Petitioner saw Dr. Schneider on July 28, 2008 with complaints of pain down the right arm and neck pain of 9/10. Dr. Cummins provided permanent restrictions of 25 pounds with either arm and limited overhead use of the arms with respect to the shoulders on August 18, 2008. He was at maximum medical improvement with respect to his shoulders at that time.

Petitioner was seen by Dr. Brebach on August 25, 2008. Dr. Brebach notes treatment with physical therapy and a Medrol Dosepak with the symptoms of numbness and tingling having resolved. On examination, Petitioner had mild decrease in range of motion with normal neurological testing. Dr. Brebach released

Petitioner to full duty and discharged him from care (Px 24, p 30). Petitioner returned on September 22, 2008 with continued complaints. Dr. Brebach suggested epidural steroid injections at C5-6 and C6-7 (Px 23, p 34).

Petitioner testified that while he was back to work without any restrictions, he was seeing his own doctor, Dr. Gindorf for continuing complaints in his hands, arms and neck. Dr. Brebach wrote an updated note to Dr. Gindorf on June 1, 2009 suggesting a two level cervical fusion (Px 24, p 41). Petitioner testified during this time he had pain in his right arms and numbness in both hands and in his smaller fingers. Petitioner testified that his coworkers would assist in helping him out on the job.

Respondent sent Petitioner for an evaluation with Dr Michael Panuska in Bourbonnais on 8-27-09. Dr. Panuska's impression was herniated cervical discs with radiculopathy – resolved, and he cleared Petitioner for full duty. (PX26).

February 2, 2011 Accident and Treatment

Petitioner testified that his shift began at 3:00 AM on February 2, 2011. He worked out of the Northbrook yard. A major snowstorm had hit the area. Petitioner was operating a front end loader with a bucket and skid plate under the bucket. Around 5:00 PM that day, the skid plate of the loader struck a bridge deck on an overpass, and the vehicle jackknifed. Petitioner testified that he struck his head in the impact, and was knocked unconscious for a period of time. When he came to, he inspected the loader, which had sustained damage. He reported the accident to his supervisor. Petitioner was taken to Glenbrook Hospital on February 3, 2011. The Glenbrook Hospital emergency room record was admitted at Petitioner's Exhibit 2. The records reflect that he was seen just before 8:00 AM. Petitioner reported that he had struck both shoulders in the accident and both knees, but denied hitting his head or losing consciousness. Petitioner testified that he did advise the medical staff that he had lost consciousness. According to the records, Petitioner complained of pain in the shoulders, arms and knees. X rays of the shoulder showed mild to moderate degenerative changes (Px 2). Per the hospital records, Petitioner was diagnosed with bilateral shoulder contusions. Petitioner was released to return to work.

Petitioner testified that, following discharge from the Glenbrook Hospital emergency room, he was taken back to the yard where he signed out and went home. He slept for approximately 18 hours and awoke in pain. Petitioner had significant bruising of the arms and shoulders as depicted in photos admitted into evidence. (Px 20A-20D). Petitioner testified that he returned to Glenbrook Hospital on 2-5-11. Per the hospital records, Petitioner complained of headache and neck pain. CT scans of the head and neck were taken. The head CT showed left frontal scalp hemorrhage. The neck CT showed a non-displaced fracture of C2, with moderate stenosis at C4-5 and C5-6 (Px 3). Petitioner testified that he was not apprised of the cervical fracture. The

hospital records confirmed that Petitioner had ecchymosis of both shoulders (Px 23). Petitioner was again released back to work and he did return. Petitioner saw Dr. Gindorf, his family doctor on February 11, 2011 complaining of bilateral shoulder pain. He was prescribed pain medication by Dr. Gindorf (Px 6). Petitioner testified he requested authorization to see an orthopedic doctor, which was denied.

Petitioner testified that he was experiencing headaches, neck, shoulder, knee and low back pain. Petitioner testified that he needed authorization to see an orthopedist, but this was denied. Petitioner testified he went to Dr. Montella on recommendation of his son. He first saw Dr. Montella on April 4, 2011. Dr. Montella's records were admitted as Petitioner's Exhibit 6. The April 4, 2011 office note records the history of accident and complaints of bilateral neck pain, low back pain and right knee pain. Petitioner rated his pain 8 of 10 with numbness, tingling, weakness and fatigue (Px 4 p 26). Dr Montella performed a physical exam which revealed decreased range of motion of the cervical and lumbar spines, mild lumbar muscle spasm, positive straight leg raising test, tenderness and mild swelling of the right knee, with positive McMurray's test and an antalgic gait secondary to knee pain (Px 4 p 26-30). Dr Montella ordered MRIs of the cervical and lumbar spine, and right knee, as well as physical therapy (Px 4 p 37-40). He diagnosed cervical and lumbar disc herniations and a right knee medial meniscus tear (Px 4 p 29).

Petitioner testified that he continued to work with assistance from fellow workers. Petitioner did commence physical therapy at Northwest Suburban Physical Therapy on September 11, 2011 (Px 5). The right knee MRI was approved first and was performed on September 14, 2011. The MRI showed a tear of the posterior horn of the medial meniscus, and some edema in the proximal tibia adjacent to the tear likely representing bone contusion (Px 4 p 80). On September 19, 2011, Petitioner reported that his symptoms were worsening (Px 4 p 81). Physical examination notes reduced motion in the lumbar and cervical spine, positive straight leg raising. The neurological examination including sensation, reflexes and sensation was normal in both the lumbar and cervical spine (Px 4, p 82). Dr Montella continued to request cervical and lumbar MRI studies. Dr. Montella provided Petitioner an off work slip on January 9, 2012 for one month without any record of a visit on that date (Px 4, p 136). On January 23, 2012, Petitioner saw Dr Montella and reported that his symptoms had worsened further. His neck pain was worse, and now his left side felt numb. He reported numbness and tingling to the left arm, hand and fingers. Examination of systems notes no change from the last visit. Dr Montella recommended a neurosurgical consult for the persistent neck pain. (Px 4 p142-146), and continued to request MRIs of the cervical and lumbar spine.

The MRI studies were performed at Alexian Brothers Medical Center on February 21, 2012. The cervical MRI was read by the radiologist as showing degenerative changes and stenosis at multiple levels (Px 7). The

lumbar MRI was read by the radiologist as showing mild bulging at L4-5 and L5-S1 but no disc herniations nor neuroforaminal narrowing (Px 8).

Petitioner testified that he chose to seek treatment from Dr. Avi Bernstein. Dr. Bernstein's records were admitted as Petitioner's Exhibits 13-15. His deposition transcript was admitted as Petitioner's Exhibit 17. Dr. Bernstein saw Petitioner on June 25, 2012. After review of the history, physical examination and review of the MRI studies, Dr. Bernstein diagnosed cervical myelopathy and recommended a three level decompression and fusion. He opined that the Petitioner had a pre existing degenerative condition of the cervical spine that appears to have been aggravated as a result of the work related incident on February 2, 2011 (Px 13, 17).

Petitioner was evaluated at Respondent's request by Dr. Frank Phillips on November 29, 2012. Dr. Phillips agreed with Dr. Bernstein diagnosis and treatment of the cervical spine as well as the opinion that the condition was aggravated by the 2011 injury. While he opined that Petitioner also suffered an aggravation of the cervical spine in 2008, he opined that the current need for treatment was not related to that incident but rather the 2011 accident. Dr. Phillips diagnosed Petitioner with a lumbar sprain/strain. He did not find any significant neural compression or evidence of any acute structural injury. He recommended a course of physical therapy and anti-inflammatory medications. He opined that the lumbar spine would not result in any permanent restrictions or limitations.

Dr. Bernstein performed surgery on February 5, 2013 (Px 15). The surgery consisted of a cervical spine decompression and fusion from C3-C6. Petitioner was released to return to work with a 20 pound lifting restriction by Dr. Bernstein on June 10, 2013. Petitioner was released from care with these as permanent restrictions on August 12, 2013. Dr. Bernstein at that time notes residual symptoms and a potential pseudoarthrosis. Petitioner returned to Dr. Bernstein on April 7, 2014 with complaints of decreased range of motion on the left side. A CT scan performed on May 9, 2014, found an absence of solid bone fusion on C3-4 (Px 7 p 26). Dr. Bernstein reported haloing around the screws which suggested loosening and an incomplete fusion at that level (Px 14 p 27). Petitioner underwent an EMG study on May 27, 2014 which was positive for left ulnar neuropathy and bilateral carpal tunnel syndrome, but did not have definitive evidence of cervical radiculopathy. Dr. Bernstein released Petitioner at maximum medical improvement on June 23, 2014 (Px 14, p 35). Dr. Bernstein opined that Petitioner could not return to his prior work at Respondent (Px 17, p18).

Petitioner was examined by Dr. Babik Lami at Respondent's request on February 27, 2014 (Rx 1). He testified at deposition on September 15, 2014 (Rx 2). Dr. Lami agreed that the February 2, 2011 injury contributed to the pre existing degenerative cervical spine. He found no objective findings other that subjective complaints

and limited motion of the neck, which he felt was based upon Petitioner's cooperation. He found Petitioner at maximum medical improvement. He opined that based upon Petitioner's subjective complaints, restrictions of no overhead lifting and lifting of 30 pounds on a routine basis and 50 pounds occasionally would be appropriate (Rx 1). Dr. Lami does not agree with the need of ongoing narcotic medication (Rx 2, p16). Dr. Lami testified than a non union of the fusion could be a competent cause for pain. If there is a non union he would recommend Petitioner shy away from heavy work (Rx 2 p 28).

Petitioner testified that he remains under Dr. Montella's care and last saw him in January of 2015. Dr. Montella has prescribed Norco, Cymbalta and Neurontin which Petitioner takes on a regular basis. Dr. Montella's records since the discharge by Dr. Bernstein in June, 2014 reflect treatment for neck and back pain. Dr. Montella testified by deposition on June 4, 2014 (Px 12). Dr Montella opined that if Petitioner requires ongoing narcotic pain medication for his pain symptoms, then Petitioner is permanently and totally disabled. If Petitioner can reach a point where he can manage his symptoms without narcotic pain medications, then he is permanently partially disabled (Px 12 p14, 22-23). Dr Montella testified that during his exams of March and April 2014, Petitioner still had significant pain requiring narcotic medication. Petitioner cannot return to a job involving heavy lifting. His injuries have limited his ability to perform activities of daily living in a common sense way (Px 12 p18-19). Dr Montella opined that Petitioner will require future medical care for his injuries, including medication, therapy and perhaps injections from time to time for flare-ups. (Px 12 p17).

On cross-examination, when Dr. Montella was asked what activities of daily living are limited for Petitioner, he was unable to provide a specific response. Dr. Montella agreed that just because one has a multilevel fusion does not mean one can never go back to work. When questioned as to his opinion that Petitioner is permanently and totally disabled, Dr. Montella testified, "I would say his neck is sufficient for that, but if he were take all three, certainly yes. I am not sure if I would declare him permanently totally disabled because of his knee alone though, but certainly his neck alone." He opined that the permanent total disability is as a result of the narcotic usage. He was unable to testify if Petitioner's narcotic usage had increased. Dr. Montella testified Petitioner will be treating with him indefinitely.

Petitioner's Current Condition and Vocational Evidence

Petitioner testified that he has neck pain, with diminished motion. He has difficulty rotating his neck to one side or the other. He cannot stand for long periods. He can drive, but not for long periods of time. His strength is diminished. He cannot climb ladders due to balance problems. He performs activities of daily living, although some cause pain. He cannot squat or kneel without some assistance in rising up. Petitioner testified that his right knee is much better now. His low back pain has also improved. Petitioner is not doing any home exercise program now. Petitioner testified he tries to walk when at home and tries to stay active walking his Husky dog.

Petitioner testified that he never graduated high school, but did receive a GED. His past employment included over 18 years with the Chicago Fire Department as a firefighter. Petitioner testified that he started working with Respondent following his career as a firefighter. He still has a CDL license and renewed it in 2014. He can drive a semi-truck with that CDL license. Petitioner does not believe he can safely drive a truck, and cannot maintain a truck. Petitioner testified that in 2006, he passed his EMT certification the very first time at St. Joseph. Petitioner further testified on cross-examination that while at the Fire Academy he trained in agility and also took classroom classes. Petitioner also admitted his EMT license is able to be recertified. Petitioner admitted the Pingree Grove Fire Department hired him right away.

Petitioner testified he does have Internet access at home and has his daughter help him with his computer. Petitioner testified he is able to use Facebook, Yahoo Mail, and "can google". Petitioner testified he has a resume somewhere, but not an updated resume. Petitioner admitted he has been around trucks most of his life. Petitioner understands how to maintain an endloader and bobcat, knows how to check fluids in these vehicles, change tires, and keep maintenance up. Petitioner also understands how to work a grader, which moves gravel around. Petitioner testified that he does not think he could sell truck parts. Petitioner does not have a forklift license and does not believe a person needs a forklift license to drive a forklift. Petitioner admitted he is able to drive by himself and did drive to go see Ms. Entenberg, the vocational rehabilitation counselor. Petitioner admitted he previously volunteered for his political party and had a part in opening polling headquarters.

Petitioner offered a list of jobs for which he has applied since October, 2014 (Px 28). Petitioner testified that his job log spanned only 4 months. Petitioner did not make any notations of any kind of specific details, such as who he spoke to about the job. Petitioner admitted of the 11 jobs on the job log, he pulled not a single one from an actual job posting. Petitioner testified all the jobs shown in the job log are within a 5 mile radius of Petitioner's home. Petitioner admitted when he went in to the employers, he did not know if they were hiring. Petitioner admitted when he walked into these businesses he did not have a resume. Petitioner has not searched for any supervisory or administrative firefighter jobs and said he was "past the age." Prior to the employers listed on Petitioner's Exhibit 28, he did not do a job search.

Petitioner was evaluated by Susan Entenberg at Petitioner's request. Ms Entenberg opined that Petitioner has limited employment capabilities and he cannot perform his past duties. Based upon Petitioner's medical restrictions, Ms Entenberg opined that Petitioner is precluded from performing all of his past forms of work, and that he has sustained a reduction in earning power and loss of job security. She opined that his past work does not provide transferrable skills in view of his medical restrictions, but that Petitioner was a good

candidate for vocational rehabilitation of some type. She identified a series of possible suitable employment opportunities for which Petitioner would be qualified, with starting salaries ranged from $9.14 to $11.56 per hour. Ms. Entenberg opined that Petitioner was capable of employment and could earn from $9.00 to $12.00 per hours in the suitable occupations she set forth (Px 9).

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

February 21, 2008 Accident:

Petitioner sustained an undisputed accident on February 21, 2008 when he felt a pop in his left shoulder. Petitioner's description of the accident and his initial complaints at Glenbrook Hospital describe a sharp pain in the left shoulder only. Petitioner had prior surgery on both shoulders and had returned to work within the previous six months of this injury. He was diagnosed with a shoulder strain. MRI of the shoulder was unremarkable. Dr. Cummins notes that the shoulder condition had essentially resolved as of July 7, 2008 and determined Petitioner was MMI as to the left shoulder as of August 18, 2008.

During the course of his care, Petitioner began advancing complaints numbness in the 4th and 5th fingers of the right hand. Initially, this was diagnosed cubital tunnel syndrome thought to be from altered sleep position. Thereafter, the diagnosis was altered to cervical radiculopathy based upon reproduction of symptoms with hyperextension of Petitioner's neck. The cervical MRI noted degenerative arthritis with a bulging of the C5-6 disk margin. The EMG was normal. Dr. Cummins stated that he was not treating these symptoms as a Worker's Compensation injury. Petitioner was treated for a cervical radiculopathy by Dr. Schneider and Dr. Brebach. He was not released to return to full duty by Dr. Brebach until the August 25, 2008 office visit.

None of the Lake Cook Orthopedic treating physicians provides a clear causal connection opinion of the cervical condition to the February 21, 2008 work injury. However Dr. Phillips in his November 29, 2012 report opines that the accident did cause an aggravation of the cervical spondylosis and radiculopathy and that the treatment rendered was reasonable and related in part to the 2008 injury. The Arbitrator finds the opinions of Dr. Phillips persuasive.

Based upon the record as a whole including the Petitioner's testimony and the medical evidence submitted, the Arbitrator finds that, as a result of the accidental injuries sustained on February 21, 2008, the Petitioner has sustained a sprain injury to the left shoulder and that he suffered a temporary aggravation of his pre existing condition to the cervical spine as a result of the accidental injuries sustained on February 21, 2008.

February 2, 2011 Accident

As a result of the accidental injuries sustained on February 2, 2011, Petitioner suffered additional complaints of headaches, shoulder, low back, right knee and neck pain. Although the initial medical treatment at Glenbrook Hospital and Dr. Gindorf record complaints related to the shoulders only. The subsequent treatment includes complaints in the neck, back and right knee.

With respect to the condition of the cervical spine, Dr. Bernstein, Dr. Phillips and Dr. Lami all agree that the pre existing degenerative cervical spine condition was aggravated by the work accident and that the subsequent treatment including the surgery performed by Dr. Bernstein was reasonable, necessary and causally connected.

With respect to the lumbar spine, Dr. Montella's April 4, 2011 physical exam revealed decreased range of motion of the cervical and lumbar spines, mild lumbar muscle spasm, positive straight leg raising test. On the September 19, 2011 office visit the neurological examination including sensation, reflexes and sensation was normal in both the lumbar and cervical spine. The MRI was read by the radiologist as showing mild bulging at L4-5 and L5-S1 but no disc herniations nor neuroforaminal narrowing. Although Dr. Montella carried a diagnosis of lumbar disc herniation, Dr. Phillips diagnosed Petitioner with a lumbar sprain/strain. He did not find any significant neural compression or evidence of any acute structural injury. He recommended a course of physical therapy and anti-inflammatory medications. He opined that the lumbar spine would not result in any permanent restrictions or limitations. After review of the record as a whole including the medical records and depositions and Petitioner's testimony, the arbitrator finds the opinion of Dr. Phillips more persuasive that that of Dr. Montella. The Arbitrator finds that as a result of the accidental injuries sustained on February 2, 2011, the Petitioner sustained a sprain/strain injury to the lumbar spine.

With respect to the right knee, Petitioner has been diagnosed with a tear of the medial meniscus by Dr. Montella. The MRI performed on September 14, 2011, showed a tear of the posterior horn of the medial meniscus, and some edema in the proximal tibia adjacent to the tear likely representing bone contusion. No surgery was performed for the right knee. Petitioner testified that his knee symptoms have improved. Dr Montella's records reflect only complaints of back and neck pain since January, 2014. Dr. Montella's deposition testimony is unpersuasive as to the need for any continued treatment or disability for the right knee. Based upon the record as a whole including the Petitioner's testimony, the medical records and depositions, the Arbitrator finds that, as a result of the accidental injuries sustained on February 2, 2011, Petitioner suffered an injury to the right knee including the MRI findings of a tear of the medial meniscus.

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

February 21, 2008 Accident

Petitioner has submitted a group on allegedly unpaid bills with respect to the February 21, 2008 accident as Petitioner's Exhibit 10A (pages A-F) and listed on Petitioner's Exhibit 11A. After review of the medical records the Arbitrator does not find documentation for the charges claimed by Dr. Sawlani (Px 10A-B), Advocate Good Shepard Hospital (Px 10A-C), and Elk Grove Radiology (Px 10A-E). The Arbitrator finds that with respect to these bills, the Petitioner has failed to prove that the treatment was reasonable, necessary or causally connected to the accident on February 21, 2008. Petitioner's claim for these bills is denied.

The Arbitrator finds that the following charges are substantiated by the medical records, specifically Petitioner's Exhibits 23 and 24, and that the charges are reasonable, necessary and causally connected to the accidental injuries sustained on February 21, 2008:

Px 10A	Lake Cook Orthopedic Associates (3/31/08; 4/28/08)	$190.00
Px 10A-D	ENH Radiology (2/21/08)	$29.00
Px 10A-F	ENH Medical Group (2/21/08)	$199.00

Respondent shall pay Petitioner **$418.00** for reasonable, necessary medical services causally connected to the accidental injuries sustained on February 21, 2008. Respondent shall receive credit for any payment made on these charges. Respondent shall hold Petitioner harmless for any payment made pursuant to Section 8(j) of the Act.

February 2, 2011 Accident

Petitioner has submitted a group on allegedly unpaid bills with respect to the February 21, 2008 accident as Petitioner's Exhibit 10B (pages A-N) and listed on Petitioner's Exhibit 11B. Respondent's Exhibit 4 purporting to be a payment log was admitted. The parties have stipulated that Respondent has paid $165,065.26 in medical benefits and that Respondent shall received credit for any group benefits paid pursuant to Section 8(j).

DENIED BILLS: The Arbitrator finds that after review of the record as a whole, that Petitioner has failed to prove by a preponderance of the evidence that the following bills are reasonable, necessary and causally connected to the accidental injuries sustained on February 2, 2011:

10B-A Consolidated Path Consultants (9/19/13) After review of the exhibits, the Arbitrator cannot find any medical documentation for the charges listed.

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10B-H Active Health Ltd. (9/5/13-9/10/13) The records of Active Health admitted as Petitioner's Exhibit 18 contain treatment through a discharge date of June 18, 2013. No documentation of further treatment was submitted.

10B-K Advanced Radiological Consultants This exhibit is a past due notice that does not contain a date of service to identify the treatment provided.

10B-L ACL Laboratories (1/29/13) After review of the exhibits, the Arbitrator cannot find any medical documentation for the charges listed.

AWARDED BILLS: The Arbitrator finds that after review of the record as a whole, that Petitioner has proved by a preponderance of the evidence that the following bills are reasonable, necessary and causally connected to the accidental injuries sustained on February 2, 2011:

10B-B Northshore University Healthsystems (2/3/11)	$1,428.00
10B-C Northshore University Healthsystems (2/5/11)	$4,643.00
10B-D Northshore University Healthsystems Faculty Practice (2/3/11)	$907.00
10B-E Alexian Brothers (9/14/11, 2/21/12)	$4,253.40 (after adjustments)
10B-G Northwest Suburban Physical Therapy	$15,027.00
10B-J Lutheran General Hospital (2/5/13, 2/7/13, 5/13/14)	$36,143.89
10B-N Yale Diagnostics (5/23/14)	$330.00

PARTIALLY AWARDED BILLS: The Arbitrator finds that after review of the record as a whole, that Petitioner has proved by a preponderance of the evidence that the following portions of the bills admitted are reasonable, necessary and causally connected to the accidental injuries sustained on February 2, 2011:

10B-F Midwest Sports/Dr. Montella The billing submitted included multiple paid visits and care, with a remaining balance of $6750.10. The balance reflects alleged multiple unpaid office visits and drug screens. The Arbitrator, as described in the decisions with respect to causal connection finds the opinions of Dr. Phillips and Dr. Bernstein more persuasive than that of Dr. Montella. The Arbitrator finds that the opinion of Dr. Phillips that as of the date of his examination on November 29, 2012 that ongoing narcotic medication is not indicated for Petitioner is more persuasive that Dr. Montella's continued prescription of these drugs. Since the Arbitrator finds that the medication is not reasonable and necessary, the testing for the drug levels is similarly not reasonable or necessary. The unpaid drug screens charges before November 29, 2012 on November 28, 2011 ($1200.00) and May 30, 2012 ($300.00) are awarded, all subsequent charges for drug screens are denied. Based upon Dr. Bernstein's finding petitioner at maximum medical improvement for the cervical spine on June 23, 2014 and Dr. Phillips opinion that Petitioner's lumbar spine condition was a sprain/strain, the Arbitrator finds that any treatment rendered after Dr. Bernstein's finding of MMI on June 23, 2014 is not reasonable, necessary or causally connected to the accidental injuries. The Arbitrator finds that Petitioner's Exhibit 10B-F includes 11 allegedly unpaid office visits before June 23, 2014 on 9/19/11, 10/17/11, 3/4/13, 6/24/13, 7/24/13, 8/28/13, 9/27/13, 10/25/13, 12/6/13, 4/30/14, 6/2/14 at a charge of $125.00 per visit. The Arbitrator finds that the reasonable, necessary and causally connected treatment bills total **$2875.00** before fee schedule reductions if any.

10B-I Upendrah Shah (1/28/13-8/8/13) After review of the exhibits, the Arbitrator cannot find documentation of the treatment claimed except for the date of service on February 5 and 6, 2013 at Lutheran General Hospital. The Arbitrator finds that these charges of **$420.00** are reasonable, necessary and causally connected to the accidental injuries sustained on February 2, 2011. The remainder of the bill is denied.

10B-M Assured Toxicology The bill submitted is for drug testing as a result of Dr. Montella's ongoing prescription of narcotic medications. Based upon the Arbitrator's ruling with respect to the reasonableness and necessity of Dr. Montella's treatment, including the ongoing narcotic prescriptions, the Arbitrator finds that all charges after the date of Dr. Phillips examination on November 29, 2012 are not reasonable or necessary and are therefore denied. The charge for testing on October 25, 2012 for **$937.12** is reasonable and necessary. All other charges are denied.

CREDIT: The parties have stipulated that Respondent has paid $165,065.26 in medical benefits and that Respondent is entitled to credit for any further payments made through a group plan pursuant to Section 8(j). Respondent's Exhibit 4 purports to be a spreadsheet of payments made. But the Arbitrator notes than many charges listed show a "Method" of "Paper Tran" with a 0 Payment. The payments do not match the billing submitted or total the amount stipulated to. The exhibit does indicate payment was likely made against the charges on Petitioner's Exhibit 10B pages C, D, E, G, I, J, N, but the Arbitrator cannot determine if the payment has resolved the bill in its entirety. Therefore, pursuant to the evidence submitted and the stipulation of the parties, the Arbitrator awards the above listed bills pursuant to Section 8(a) and 8.2 of the Act less credit for any adjustments and payments made by Respondent. Respondent also to hold Petitioner harmless for any claim for payments made pursuant to Section 8(j) of the Act.

In support of the Arbitrator's decision with respect to (K) Temporary Compensation, the Arbitrator finds as follows:

February 21, 2008 Accident

Based upon the Arbitrator's findings with respect to causal connection, Petitioner testified that he was off work for the first five days after his injury and was paid full wages. Petitioner was then under active treatment by Dr. Cummins and Dr. Brebach for work related conditions to the left shoulder and cervical spine. Dr. Brebach did not release Petitioner to return to work until the August 25, 2008 visit. The Arbitrator therefore finds that, as a result of the accidental injuries sustained on February 21, 2009, Petitioner is entitled to temporary compensation from February 24, 2008 through August 25, 2008, a period of 26 2/7 weeks.

The parties have stipulated that Petitioner received 5 days of full salary for the period February 24 through February 28 for which Respondent is entitled to credit under Section 8(j) of $615.73 and a further credit for temporary compensation paid of $17,814.11 for a total credit of $18,429.84.

February 2, 2011 Accident

Petitioner testified that he continued to work following the February 2, 2011 accident until he was taken off of work by Dr. Montella on January 5, 2012. The records reflect that Dr. Montella provided an off work slip on January 9, 2012, but provided no basis for the opinion. There is no office visit documented a visit on that date. Dr. Montella provides a further off work slip in conjunction with the office visit on January 23, 2012 which records worsening symptoms. While the Arbitrator notes the inconsistency in Dr. Montella's opinions on work status as illustrated by his deposition cross examination, the Arbitrator finds the off work opinion rendered on January 23, 2013 uncontroverted and supported by the subsequent MRI studies and opinions of Dr. Phillips and Dr. Bernstein. The Arbitrator finds the Petitioner was entitled to temporary total disability beginning January 23, 2012.

With respect to the Petitioner's cervical spine condition, the Arbitrator finds the opinions of Dr. Bernstein, as the treating surgeon, most persuasive. Dr. Bernstein found Petitioner at maximum medical improvement and capable of return to restricted duty as of June 23, 2014. As discussed in the Arbitrator's decision with respect to causal connection, the Arbitrator finds the opinions of Dr. Montella unpersuasive and based upon a lack of documentation as to the basis of his opinions beyond his sketchy understanding of the subjective complaints of the Petitioner and his need for medication. Dr. Phillips opinion as to the lumbar condition is more persuasive. As of his examination, he did not expect any permanent impairment for the low back. As also noted, despite MRI findings of a meniscal tear, Dr. Montella's recent records do not even include complaints to the right knee, and there is no evidence that the right knee condition was disabling at any date after Dr. Bernstein's MMI finding with respect to the cervical spine.

Based upon the Petitioner's testimony and the medical evidence submitted, the Arbitrator finds that, as a result of the accidental injuries sustained on February 2, 2011, Petitioner is entitled to temporary total disability benefits from January 23, 2012 through June 23, 2014, a period of 126 1/7 weeks. Respondent is entitled to credit for temporary total disability benefits paid for this period of $108,738.92. The remainder of the compensation paid by Respondent as temporary compensation or maintenance shall be credited against the permanent disability awarded.

In support of the Arbitrator's decision with respect to (L) and (O) Nature and Extent including Claims for Wage Differential and Permanent Total Disability, the Arbitrator finds as follows:

February 21, 2008 Accident

Based upon the Arbitrator's decision with respect to causal connection, the Petitioner sustained a sprain injury to the left shoulder which had previously be injured and surgically repaired, and an aggravation of a pre existing cervical spondylosis and radiculopathy as a result of the February 21, 2008 accident. Dr. Cummins notes reflect that the left shoulder sprain was essentially resolved as of July 7, 2008. Petitioner was released

to full duty work by Dr. Brebach with respect to the cervical condition and worked full duty until the accident on February 2, 2011. The Arbitrator finds the opinion of Dr. Phillips that the subsequent treatment recommended for the cervical spine was not related to the 2008 accident persuasive. The Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence that he sustained any permanent disability as a result of the February 21, 2008 accident. Permanent disability will be addresses with respect the accidental injuries sustained on February 2, 2011.

February 2, 2011 Accident

Petitioner sustained injuries to his neck, back and right knee as a result of the February 2, 2011 accident. The Petitioner has presented this matter on theories of permanent total disability, wage differential or permanent partial disability to the man as a whole. After review of the evidence, the Arbitrator finds that this matter is properly compensated as a wage differential pursuant to Section 8(d)1 of the Act.

As detailed in the Arbitrator's decision with respect to causal connection, as a result of the accident sustained on February 2, 2011, Petitioner suffered injuries including aggravation of his pre existing degenerative cervical condition resulting in a three level cervical fusion, a lumbar sprain/strain and a tear of the posterior horn of the medial meniscus of the right knee. As detailed in the Arbitrator's decision with respect to temporary compensation, the Arbitrator has found that Petitioner reached maximum medical improvement as of his release by Dr. Bernstein on June 23, 2014 to restricted employment. Given the extensive surgery performed and Petitioner's testimony concerning his ongoing symptoms, the Arbitrator finds that the opinion of Dr. Bernstein that Petitioner cannot return to his previous employment is most persuasive. Dr. Phillips opined that he did not believe Petitioner could return to his regular job, supporting Dr. Bernstein's opinion. While Dr. Lami opines that the surgery alone should not preclude Petitioner from returning to his job, he acknowledges that the pseudoarthrosis is a competent cause of pain and Petitioner's subjective complaints and further that if there is a non union of the fusion at C3-4, heavy work would not be advisable. The Arbitrator also takes note that Respondent has not offered Petitioner a return to work following the examination by Dr. Lami or release by Dr. Bernstein.

An employee need not be reduced to complete physical incapacity to be entitled to Permanent Total Disability benefits. A Permanent Total Disability award is proper when the employee can make no contribution to industry sufficient to earn a wage. The focus of the analysis must be upon the degree to which the claimant's medical disability impairs his employability. A person is not entitled to Permanent Total Disability benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life. The claimant ordinarily satisfies his burden of proving that he falls into the odd lot category 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.

Petitioner has been released with restrictions as to lifting and overhead work by Dr. Bernstein, Dr. Phillips and Dr. Lami. The Arbitrator finds the opinion of Dr. Montella that Petitioner may be permanently totally disabled unpersuasive in light of Dr. Montella's tenuous grasp on Petitioner's current condition, medication level and the contrary opinions of Dr. Bernstein, the primary surgeon with respect to the cervical spine. While Petitioner cannot return to his prior employment, the Petitioner is released to work within restrictions which will not jeopardize his health. The Arbitrator finds that Petitioner's job search is far from diligent. The limited effort spans only a few months and the 11 listings lack detail. Petitioner admits that he was unaware if any of the contacts were even hiring and it appears that some of his efforts were ancillary to other errands he was performing. Ms. Entenberg has identified several job classifications within which he is capable of working. Petitioner also continues to have a current CDL license and has extensive background with respect to vehicle maintenance and fire fighting. The Arbitrator finds that based upon the evidence submitted that Petitioner has failed to prove by a preponderance of the evidence that he is permanently totally disabled.

In order to qualify for a wage-differential award under section 8(d)(1) of the Act, a claimant must prove (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment" and (2) an impairment in earnings. A claimant must prove his actual earnings for a substantial period before his accident and after he returns to work, or in the event that he is unable to return to work, he must prove what he is able to earn in some suitable employment.

When the record establishes that an employee has suffered an impairment of earning capacity, section 8(d)(2) comes into play only when "the employee elects to waive his right to recover under Section 8(d)1, which is not the case herein.

Based upon the preponderance of the credible medical opinions including Dr. Bernstein and Dr. Phillips, the Petitioner has proved that he is unable to pursue his usual and customary line of employment. His earning for a substantial period before his accident was the stipulated average weekly wage in this matter of $1,293.04. While the Arbitrator finds that Petitioner has failed to conduct a diligent job search, the Petitioner can establish what he is able to earn in some suitable employment by expert testimony. With respect to the second requirement, reduced earning capacity, the Petitioner's vocational rehabilitation expert, Susan Entenberg, opined that there was a readily available and stable labor market in which the claimant could obtain positions earning between $9 and $12 per hour. Given Petitioner's lack of any reasonable effort to seek employment,

the Arbitrator finds that Petitioner is capable of reduced earnings of $12.00 per hour or $480.00 per week as a result of the injuries sustained.

Petitioner has therefore sustained a loss of earning capacity of $813.04 ($1,293.04-$480.00) per week. Petitioner is entitled to an award of $542.03 per week pursuant to Section 8(d)1 of the Act. Based upon the Arbitrator's decision with respect to Temporary Compensation, Petitioner is entitled to wage differential benefits beginning as of the date of maximum medical improvement on June, 23, 2014. As of the hearing date on February 4, 2015, 32 2/7 weeks of benefits had accrued. Benefits shall continue for the duration of the disability. Respondent shall receive credit for benefits paid during this period of $38,919.91 for disputed temporary compensation and maintenance paid. Respondent shall also receive credit for any additional benefits paid from the date of the hearing forward.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aracell Godinez,

Petitioner,

vs. No. 15 WC 24667

McDonalds,

20 IWCC0225

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, benefit rates, temporary disability and permanent partial disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Petitioner testified that on June 22, 2015, she had been employed at McDonalds for ten years as a sandwich assembler. She worked 40 hours per week, from 8:30 am to 1:30 pm. She prepared breakfast sandwiches, Big Macs, chicken sandwiches and fish fillet sandwiches. For many of the sandwiches she made, Petitioner used a heavy sauce pistol gun which, when the trigger was pulled, distributed sauce on the sandwiches. Some sandwiches required two squeezes of the trigger. On busy days, Petitioner estimated she would make up to 830 sandwiches. Petitioner also used both of her thumbs to press levers on containers to dispense ketchup and mustard onto burgers. She estimated she would dispense ketchup and mustard onto about 500 hamburgers a day. Most of the time, she prepared sandwiches by herself. Her hands got sore from performing those activities.

In January 2015, Petitioner noticed her hands were painful between her thumbs and index fingers. Her right hand was more painful than her left. In March 2015, Petitioner asked her bosses, Ben and Ron, for help on the assembly line, but they did not provide her with any.

Petitioner stopped working on June 22, 2015 because of pain in her hands. The first treatment she received was on June 26, 2015 from Dr. Rajesh, who diagnosed her with hand joint pain and rheumatoid arthritis. Dr. Rajesh authorized Petitioner off work.

On June 29, 2015 Petitioner began treating with Grandview Health Partners. Doctors there diagnosed her with right carpal tunnel syndrome and wrist pain. They provided treatment consisting of myofascial releases, electrical stimulation, exercises, manipulation, a TENS unit and a carpal tunnel brace.

Petitioner saw Dr. Saldanha on July 8, 2015. At that time, Petitioner complained of right arm pain and pain in the right side of her neck, which radiated into her shoulder and down to her wrist and thenar eminence of her right hand. She reported difficulty grasping objects, and that repetitive activity made her pain worse. Dr. Saldanha kept Petitioner off work, and diagnosed her with likely carpal tunnel syndrome and cervicalgia from work-related overuse syndrome. On September 16, 2015, Dr. Saldanha reported Petitioner also had right lateral epicondylitis, and one week later he gave her an injection into her right wrist. By October 14, 2015, Dr. Saldanha reported that Petitioner's right lateral epicondylitis had resolved.

Petitioner testified that she returned to work on September 22, 2015 with restrictions that her employer was able to accommodate. On September 23, 2015, she underwent an EMG/NCV, which was suggestive of right carpal tunnel syndrome. Between September 22, 2015 and December 21, 2015, Petitioner was given reduced work schedule of 26 to 28 hours per week.

On October 30, 2015, Petitioner came under the care of orthopedic surgeon Dr. Gregory Primus. Petitioner reported a 4-month history of bilateral hand pain, right greater than left. Dr. Primus reported the precipitating event was Petitioner's repetitive work, and that the actual mechanism of her injury was wrist flexion and extension. He diagnosed Petitioner with right carpal tunnel syndrome and bilateral wrist sprains. Dr. Primus provided a steroid injection to Petitioner's right carpal tunnel on November 16, 2016, but it failed to provide lasting relief. Dr. Primus ultimately performed a right carpal tunnel release on December 21, 2015. Petitioner testified that when she returned to work with restrictions on January 14, 2016, her hours were reduced to between 12 to 16 hours per week. On April 12, 2016, Petitioner was released to work without restrictions.

Robert Freeman testified on behalf of Respondent that he owns a franchise from McDonalds, and that he hired Petitioner as a crew person in 2005. He testified that the store where Petitioner worked for the last month before her injury was not particularly busy, though it was busier during breakfast and lunch times. Mr. Freeman testified that Petitioner performed a variety of other tasks in addition to sandwich making, including setting up product, turning on grills, fryers and toasters, restocking food, cleaning, sweeping and mopping. He testified that three people worked on the grill making sandwiches in that store, and that no employee ever made 830 sandwiches a day. He testified that when Petitioner had restrictions, he tried to accommodate them. On cross examination, Mr. Freeman admitted Petitioner had worked at his

Homer Glen store, which was actually much busier, for 10 years until one month prior to her injury.

Dr. Michael Vender testified via deposition that at Respondent's request, he performed a Section 12 examination of Petitioner on January 25, 2016. Then, Petitioner complained of right hand and thumb numbness since her surgery, though she reported that her left hand numbness was gone. Dr. Vender diagnosed Petitioner with right carpal tunnel syndrome and probable hand and wrist tendonitis. He did not believe her work activities were related to those diagnoses, noting that she had other risk factors for developing carpal tunnel syndrome including her age, gender and increased BMI. Dr. Vender found Petitioner's carpal tunnel surgery had been reasonable and appropriate, but not her chiropractic care, post-operative occupational therapy, TENS unit, or the prescribed compound creams. Dr. Vender did not believe Petitioner had any clinically significant left carpal tunnel syndrome at his exam.

On cross examination, Dr. Vender admitted that certain job activities could contribute to carpal tunnel syndrome if they were forceful, exertional and performed on a regular and persistent basis. He admitted that he made assumptions without actually knowing some of the specific tasks Petitioner performed. He admitted he did not know the force which was needed to squeeze the sauce gun. Dr. Vender acknowledged that using one's thumb constantly or repetitively could cause trigger thumb, which he diagnosed Petitioner as having, along with right flexor carpi radialis tendonitis. He agreed that Petitioner's constant forceful pressing of levers on ketchup and mustard containers could have contributed to her trigger thumb.

The Arbitrator found that Petitioner failed to prove an accident because her initial treater, Dr. Rajesh, diagnosed her hand pain as rheumatoid arthritis. The Arbitrator, in finding Petitioner did not prove causation, believed Dr. Vender's opinions were more persuasive, credible and supported by the evidence than those of Petitioner's treating physicians. The Arbitrator found that Petitioner's work activities were not very forceful and did not occur on a regular and persistent basis; also, that she did not prepare as many sandwiches as she claimed.

The Commission views the evidence differently than the Arbitrator. The Commission finds Petitioner's testimony regarding her symptoms, and the timeline of when they developed, to be credible. She testified that her hands, thumbs and fingers became painful in January 2015. In March 2015, Petitioner asked her employer for help on the assembly line. Instead, Respondent reassigned Petitioner to work in one of its less busy stores. Petitioner testified that her hand pain continued and became so bad that she had to stop coming to work on June 22, 2015. The Commission finds that Petitioner proved she sustained a repetitive injury which arose out of and in the course of her employment with Respondent on June 22, 2015.

Petitioner testified she had to squeeze a "sauce gun" hundreds of times throughout her workday, primarily with her right hand. She used her thumbs hundreds of times a day to dispense ketchup and mustard out of containers. Although witness Robert Freeman testified that Petitioner made fewer sandwiches than what she claimed, he offered no records or statistics to

support his testimony – despite his exclusive access to that information as the business owner. The failure of a party to produce testimony or physical evidence within his control creates a presumption that the evidence, if produced, would have been adverse to him. *Tonarelli v Gibbons,* 121 Ill.App. 3d 1042, 460 N.E.2d 464 (1st Dist., 1984). Regardless of the exact number of sandwiches Petitioner made each day, she used the sauce gun and condiment dispensers hundreds of times during a substantial part of her shift. The Commission finds Petitioner's testimony credible in establishing that she performed repetitive and forceful motions with her hands, thumbs and wrists, hundreds of times a day, for a period of over ten years prior to her accident.

The records of Petitioner's treating physicians also support a finding of causal connection between Petitioner's work activities and her right carpal tunnel syndrome and right trigger thumb. On June 29, 2015 Dr. Bodem reported that Petitioner felt that her hands had been weakening progressively over the past several weeks while she was at work. On September 16, 2015, Dr. Saldanha reported that Petitioner had, "likely carpal tunnel syndrome and cervicalgia from work related overuse syndrome." And on October 30, 2015, Dr. Primus wrote that the precipitating event causing Petitioner's hand pain was her repetitive work.

The Commission finds Dr. Vender's opinions less credible than those of Petitioner's treaters', for a number of reasons. First, Dr. Vender admitted he based his opinions on assumptions he made, many of which were incorrect, regarding Petitioner's duties. He assumed Petitioner cooked hamburgers and French fries, but Petitioner performed neither of those tasks. He assumed that the force needed to squeeze the trigger of the sauce gun was, "limited," without actually knowing the force that was required. He admitted he did not know the weight of the sauce gun, or whether using it on a forceful repetitive basis could cause carpal tunnel syndrome. He acknowledged that repetitive, forceful pushing of ketchup and mustard dispensers, hundreds of times per day, could contribute to trigger thumb.

The Commission finds that Petitioner proved the treatment she received was reasonable, necessary and causally related to her repetitive injuries. However, while so finding, the Commission declines to award Petitioner the transportation charges billed by her treaters, as those charges were not reasonable or necessary to treat Petitioner's conditions. The Commission also declines to award Petitioner prospective medical care. Dr. Primus found Petitioner to be at MMI on June 6, 2016, and he did not recommend Petitioner receive any treatment after that date.

The parties, in their Request for Hearing, stipulated to an average weekly wage of $406.25. That comes to $10.16 per hour for Petitioner's 40 hour week. Petitioner also stipulated that she was claiming temporary total disability benefits for the two following periods: June 29, 2015 through September 21, 2015, and December 21, 2015 through January 13, 2016. The Commission finds Petitioner proved entitlement to TTD for those two periods, based upon her testimony and her treating physicians' records. On June 6, 2016, Petitioner saw Dr. Primus. He noted that she had been doing well and was back working full duty. He released her from care at

MMI. The Commission adopts Dr. Primus' conclusion that Petitioner was at MMI for her work related injuries as of June 6, 2016.

The Commission finds that while Respondent tried to accommodate Petitioner during the two periods she had work restrictions, it provided Petitioner with fewer hours than her usual 40 hour work week. Between September 22, 2015 and December 20, 2015, Petitioner worked at most only 28 hours per week; and between January 14, 2016 and April 12, 2016, she worked at most, only 16 hours per week. The Commission finds Petitioner is entitled to: TPD at the rate of $81.18/week[1] for the 12-6/7 week period between September 22, 2016 and December 20, 2016; and TPD at the rate of $162.46/week[2] for the 12-5/7 week period between January 14, 2016 and April 11, 2016.

On September 16, 2015 Dr. Saldanha reported a causal connection between Petitioner's work and her carpal tunnel syndrome and cervicalgia. However, neither he nor any other physician provided an opinion that Petitioner's right elbow lateral epicondylitis was causally related to her work. That condition was not diagnosed until more than 2½ months after Petitioner last worked for Respondent, and was successfully treated with only one injection. A few weeks after that, Petitioner's right lateral epicondylitis had resolved. The Commission finds Petitioner's right lateral epicondylitis was not proven to be causally related to her work accident.

In assessing the nature and extent of Petitioner's work-related injuries, the Commission has considered the five factors enumerated in §8.1b(b), and assigns the following weights to them:

(i) **Disability impairment rating:** *no weight,* because neither party offered into evidence an impairment rating from a qualified physician.

(ii) **Employee's occupation:** *minimal weight,* because Petitioner was released to full duty work without restrictions, and has found comparable work at another employer.

(iii) **Employee's age:** *moderate weight,* because at her age of 40, she is expected to work for over two more decades.

(iv) **Future earning capacity:** *no weight,* because Petitioner presented no evidence to show a diminution of her future earning capacity.

(v) **Evidence of disability corroborated by the treating records:** *significant weight,* because after months of unsuccessful conservative medical treatment for her conditions, Petitioner had to undergo a right carpal tunnel release on December 21, 2015. She testified that she still experiences pain and weakness in her right upper extremity and lesser pain in her left hand. Her right thumb still hurts, and she doesn't have the same strength as before her accident. Although Petitioner underwent an FCE on October 16, 2015 which found her able to work at a Light-Medium physical

[1] 28 hrs. worked x $10.16/hr. = $284.48 earnings/week. $406.25 - $248.48 = $121.77. Two-thirds of that is $81.18.
[2] 16 hrs. worked x $10.16/hr. = $162.56 earnings/week. $406.25 - $162.46 = $243.69. Two-thirds of that is $162.46.

demand level, that test was performed prior to her carpal tunnel release surgery and is not relevant. Since undergoing that FCE, Petitioner was released to full duty work with no restrictions on April 12, 2016, and she has not seen any doctors for her related conditions since June 6, 2016.

Based upon the above, and all of the evidence of record, the Commission finds that Petitioner sustained no permanent partial disability to her neck and left upper extremity, but did sustain permanent partial disability to the extent of 15% loss of her (dominant) right hand, and 5% loss of use of her right thumb, pursuant §8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 16, 2018, is hereby vacated. The Commission finds Petitioner proved an accident arising out of and in the course of her employment with Respondent on June 22, 2015, and that she proved her bilateral hand and wrist conditions were causally related to that accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical expenses related to Petitioner's cervical and upper extremity conditions, except for her right lateral epicondylitis, pursuant to the medical fee schedule, as provided in §8(a) and §8.2 of the Act. The Commission does not require Respondent to pay any charges billed for transporting Petitioner to any medical providers for treatment. Respondent shall provide Petitioner with a hold harmless for all bills which have already been paid by others.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner for temporary total disability, the sum of $270.83 per week for a total period of 15-4/7 weeks, commencing June 29, 2015 through September 21, 2015, and then from December 21, 2015 through January 13, 2016, as provided in §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner for temporary partial disability, the sum of $81.18 per week for a period of 12-6/7 weeks, commencing September 22, 2016 through December 20, 2016, as provided in §8(a) of the Act. Respondent shall also pay to Petitioner for temporary partial disability, the sum of $162.46 per week for a period of 12-5/7 weeks, commencing January 14, 2016 through April 11, 2016 as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $243.75 per week for a period of 34.55 weeks, as provided in §8(e) of the Act, for the reason that the injury caused the 15% percent loss of use of the right hand (30.75 weeks), and the 5% loss of use of the right thumb (3.8 weeks).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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 removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $64,200.00. 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.

APR 17 2020

DATED:
o-02/20/2020
MP/mcp
68

Marc Parker

Barbara N. Flores

DISSENT

I respectfully dissent from the Decision of the Majority. The Majority reversed the Decision of the Arbitrator who found Petitioner neither sustained her burden of proving she sustained a repetitive trauma accident nor that her conditions of ill-being of right carpal tunnel syndrome, elbow tendonitis, and right trigger thumb were causally related to her work activities and denied compensation. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

Petitioner testified that she worked for Respondent for 10 years as a sandwich assembler and that she had no other responsibilities. However, on cross she admitted that her job involved other responsibilities such as cleaning/mopping, grilling, stocking, toasting buns, and wrapping the sandwiches. She testified that during the lunch rush between 10:30 to 1:30 she made 830 sandwiches and 50 salads. She used a "sauce gun" for Big Macs, chicken sandwiches, and fish sandwiches and her right hand got sore with the use of the sauce gun. The Arbitrator examined the sauce gun and noted that it was like a caulk gun though larger. Petitioner testified that for quarter pounders, hamburgers, and cheeseburgers, she did not use the sauce gun but would use a thumb operated dispenser to dispense condiments.

The owner of the franchise at which Petitioner worked at the time of the alleged manifestation of her conditions of ill-being testified. He stated that he never had any employee make 830 sandwiches per shift and did not know how a line cook could make that many. He also testified that for an entire day, the restaurant would sell a total of 40-45 Big Macs, 120

chicken sandwiches, 225 cheeseburgers, and 125 hamburgers and that all sandwiches were prepared by the team of line cooks.

When Petitioner first sought treatment for right-hand pain, she was diagnosed with Rheumatoid Arthritis based on a previously ordered blood test and was referred to rheumatology. Respondent sent Petitioner for a Section 12 medical examination with Dr. Vender. He took a history of her work activities, reviewed a description of her job duties, and viewed photographs of the devices she used. He opined that Petitioner's conditions of ill-being were not casually related to her work activities. He noted that her work activities did not include any forceful use of her hands or arms and that she had various responsibilities which meant that she did not perform constant repetitive activities.

I agree with the Arbitrator's assessment of the relative persuasiveness of the causation opinion of Dr. Vender and her treating doctors. The Arbitrator described the treaters' causation opinions as "underwhelming." They appeared simply to ascribe causation based on Petitioner's pronouncements and that her symptoms were aggravated by work activities. Dr. Vender explained that the elicitation of symptoms by an activity does not mean that the activity accelerates a condition of ill-being. I also agree that simple repetitive motions without forceful gripping/grasping or vibration is not causative of neuropathic conditions such as carpal tunnel syndrome.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator who found Petitioner neither sustained her burden of proving she sustained a repetitive trauma accident nor that her conditions of ill-being of right carpal tunnel syndrome, elbow tendonitis, and right trigger thumb were causally related to her work activities and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GODINEZ, ARACELL
Employee/Petitioner

Case# **15WC024667**

McDONALDS
Employer/Respondent

20IWCC0225

On 4/16/2018, 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 1.88% 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:

4872 ELIZABETH BOWER KENT LTD
53 W JACKSON BLVD
SUITE 601
CHICAGO, IL 60604

0766 HENNESSY & ROACH PC
JOHN D WHEELER
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)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Araceli Godinez
Employee/Petitioner
v.
McDonalds
Employer/Respondent

Case # **15 WC 024667**

20IWCC0225

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable , **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **November 15, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **June 22, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,125.00**; the average weekly wage was **$406.25**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

Claim for Compensation denied. Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on June 22, 2015 and failed to prove a causal connection exists between her current condition of ill-being regarding her neck, bilateral hands, right elbow and right thumb and her work activities for Respondent.

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

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

Signature of Arbitrator

April 16, 2018

Date

ICArbDec p. 2

APR 16 2018

STATEMENT OF FACTS

Petitioner testified via Spanish/English interpreter.

On June 22, 2015, Petitioner was employed by Respondent as a line cook. Petitioner was 40 years old on that date. She is right handed. Petitioner began working for Respondent in November of 2005. She worked at Respondent's Homer Glen store for most of her career and later worked at the Orland Park store. Her job was to prepare sandwiches in the kitchen. She would assemble the sandwiches and wrap them. She worked 5 days a week, 40 hours. Her shift was 5:30am to 1:30pm.

Petitioner testified that she assembled a number of sandwiches including: Big Macs, hamburgers, cheeseburgers, breakfast sandwiches, chicken sandwiches, fish filets, Quarter Pounders and salads. When Petitioner started in the morning, she would set up her station for breakfast products while a fellow employee cooked meat on the grill. As it got close to lunchtime, she would set up her station for lunch sandwiches. Another employee would cook the burgers.

Petitioner testified that the process of assembling a sandwich involved numerous steps, including handling the bread, using a sauce gun, adding vegetables, and adding the meat. Sandwich orders appeared on a screen above and to the right of Petitioner's head. After assembling a sandwich, Petitioner would place it in the appropriate wrapper or container. Petitioner used a "sauce gun" to apply sauce onto some of the sandwiches.

Petitioner described the sauce gun and a sauce gun was examined by the Arbitrator. (PX 15, PX 26) The sauce gun was used for Big Macs, fish sandwiches and chicken sandwiches. Petitioner testified that she was

required to exert an amount of force to operate the sauce gun. Petitioner displayed how she operated the sauce gun, primarily with her right hand. Petitioner said that she was required to squeeze the sauce gun twice per Big Mac sandwich (once for the top of the sandwich, and once for the bottom of the sandwich), one time for the fish sandwich and one time to apply mayonnaise on chicken sandwiches.

Petitioner testified that she made many sandwiches throughout the day. She made approximately 100 Big Macs, 200 chicken sandwiches, 500 cheeseburgers and hamburgers, and approximately 30 Fish Filets. On cross-examination, it was noted the Petitioner allegedly made approximately 830 sandwiches per day from around 10:30 A.M. or 11:00 A.M. until 1:30 P.M. Breakfast sandwiches did not require the use of the sauce gun.

Petitioner identified PX 12 as a photo of a canister of the Big Mac sauce. The photo depicts a large canister labeled 740 milliliters, which is equal to 25 fluid ounces. Petitioner identified PX 13 as photo of the sauce gun used to apply the Big Mac sauce. Petitioner identified PX 26 as the sauce gun that she used to apply the sauces. Petitioner demonstrated how she would insert the canister of Big Mac sauce into the sauce gun, and then squeeze the trigger to apply the sauce. Petitioner testified that act of squeezing the trigger of the sauce gun required force and pressure even without the canister inserted. Petitioner testified there is more pressure and force needed when the canister was inserted into the sauce gun. Petitioner identified PX 27 as a large can of ice tea similar in size to the canister of Big Mac sauce, but the Big Mac sauce canister was heavier. The can of ice tea is 10 inches in height, 3 inches in circumference and contains 23 fluid ounces. Petitioner identified PX 14 as a photo of a canister of Big Mac sauce loaded into the sauce gun. Petitioner identified PX 15 as a photo of an employee applying Big Mac sauce with the sauce gun. PX 15 shows an employee squeezing the trigger of the sauce gun with his right hand while steadying the sauce gun with his left hand. Petitioner testified that for each Big Mac sandwich she had to squeeze the trigger of the sauce gun twice. Petitioner testified that chicken sandwiches required mayonnaise which was packaged in an identical type canister to the Big Mac sauce canister and

distributed identically from the same size sauce gun. For each chicken sandwich, Petitioner had to squeeze the trigger of the sauce gun one time. Petitioner testified that the fish sandwich required tartar sauce, which was packaged in the same type of canister, and applied from the same type sauce gun. Petitioner identified PX 16 as a photo of a canister of tartar sauce and the sauce gun she used to apply the sauce. If Petitioner made 100 Big Macs a day, 200 chicken sandwiches a day and 30 fish sandwiches a day, she would theoretically pull the trigger on the sauce gun 430 times. Petitioner testified that she used her right hand to squeeze the trigger and that her right hand started getting tired from its use. The Arbitrator examined PX 26 and observed that the sauce gun is similar to a caulking gun except that the sauce gun is heavier and wider. The Arbitrator reported that the pistol grip is a bigger than a standard caulk gun and that it encompasses his whole hand, which he described as a standard male hand. The Arbitrator reported that the sauce gun requires force from two fingers at least to operate or ratchet down the gun. The Arbitrator reported that if there was product in the sauce gun, he would presume that there would be more resistance in pulling the trigger.

Petitioner testified that when she assembled hamburgers, Quarter Pounders, and cheeseburgers, she would place ketchup and mustard on the burgers with a thumb operated device for each condiment. Petitioner identified PX 17, 18, and 19 as photos of the containers used to dispense ketchup and mustard. PX 17 shows two large plastic containers, one filled with ketchup and one with mustard, with red and yellow thumb levers, respectively. PX 18 shows an employee gripping the ketchup dispenser handle in his right hand with his right thumb on the lever, and gripping the mustard dispenser in his left hand with his left thumb on the lever, depressing the levers to dispense the ketchup and mustard at the same time. Petitioner testified that she would apply ketchup and mustard in the same manner as the employee depicted in PX 18. PX 19 shows a close-up of the condiments on a cheeseburger. Petitioner testified that it took force to press the levers of the dispensers. Petitioner stated that ketchup required more force because the ketchup container was heavier. Petitioner testified that, to the best of her knowledge, she would make a combination of about 500 hamburgers, cheeseburgers and Quarter Pounders a day.

This would require her to press the lever with her thumb to distribute the ketchup and mustard 500 times for each hand. Petitioner testified that she made approximately 50 to 60 salads a day.

During cross-examination, Petitioner agreed that her position of line cook also required her to be responsible for a variety of kitchen duties. She was responsible for maintaining the grill, occasional washing of dishes, maintaining a clean working area and obtaining stock items, such as vegetables and containers, amongst other things. Petitioner confirmed that her work duties were not solely limited to making sandwiches.

Petitioner noted that she began experiencing upper extremity pain in January of 2015. Both hands hurt, her right hand more than her left. She was using her left hand more, so it began to hurt. She also had pain in her right forearm, neck on the right side and numbness in her right and left hands. Petitioner requested that management get her more help on the line. Petitioner did not get help. She began to experience a loss of strength in her right hand. Petitioner testified that she stopped working as of June 22, 2015, as her doctor said to get therapy and she had pain in her hands.

Petitioner initially sought medical treatment at Aunt Martha's Health Center. The records from this facility begin on June 26, 2015 and show that Petitioner presented to Aunt Martha's for hand pain and positive RA factor. Mild swelling of the IP and MCP joints was noted, along with tenderness of the joints. The remainder of the hand exam was benign. There was no comment regarding the right thumb, right elbow or neck. Prednisone, NSAIDs and a referral to Rheumatology were recommended. The blood test showing the positive RA factor was done on June 24, 2015. Petitioner was given an off work slip dated June 26, 2015 and stating that Petitioner could return to work on 6/29/2015. There is nothing relating Petitioner's complaints or condition to her work. (PX 1)

Petitioner did not return to work on June 29, 2015, instead presenting to Grandview Health Partners. She was initially seen by Charles Bodem, DC with complaints of right and left wrist pain, right and left hand pain which was associated with numbness, tingling, weakness and burning sensation in the bilateral hands and wrists. The date of onset was said to be 6/22/2015. It was noted that the patient worked for 9 years and 6 months as a cook at McDonalds. She is constantly using her hands to cut and prepare food. "For several weeks leading up to the date of injury, she noticed progressively worsening weakness in her hands and a pulsating feeling in her hands and wrists associated with work activities." The pain became so bad that she had to stop working. There was no comment on the positive RA finding and edema was noted about the dorsal, volar and lateral right wrist. The diagnosis was carpal tunnel syndrome, hand sprain/strain, pain in hand and pain in wrist. Petitioner began a course of treatment with this facility including manipulation, manual therapy, E stim, ultrasound, therapeutic exercises, Kinesio therapy, work hardening and hot/cold packs through November of 2015. She underwent an EMG/NCV study on September 23, 2015. The study was at Rehab Dynamix and was positive for right carpal tunnel syndrome, with no ulnar nerve pathology and no radial nerve pathology. While the study was said to be limited, the bill was for $4,922.02 and included a $250.00 charge for "transportation." When Petitioner was seen on November 15, 2015, improvement was noted. She was referred to an orthopedist by Dr. Brandon Korfel, DC with a diagnosis of CTS, right, DeQuervain's, right, other tenosynovitis, left hand and pain in the left hand. The bill for treatment at Grandview was $21,269.79. (PX 2)

Petitioner began treatment with Chicago Pain & Orthopedic Institute on July 8, 2015, on a referral from Dr. Bodem. She was diagnosed with cervicalgia and carpal tunnel syndrome due to work related overuse syndrome by Dr. Saldanha. She received injections at this facility (including the right epicondyle on September 22, 2015) and received treatment through June 6, 2016. At the June 6, 2016 visit, Dr. Primus noted that she was 6 months post right carpal tunnel release, working full duty without any complications with some occasional swelling with activity, but otherwise continuing to improve with no significant numbness, tingling or nerve issues.

The physical exam was largely benign and she was declared to be at MMI. A pain compound was to be considered for incisional pain and the patient was to return, PRN. Chicago Pain & Orthopedic Institute also billed for Accredited Ambulatory Care and Metromilwaukee Anesthesia. The bills are $2,508.00 from Metromilwaukee, $11,686.15 from Accredited and $8,954.91 from Chicago Pain. Accredited and Chicago Pain billed for transportation at rates of $299.00 or $350.00 on 9 occasions. There does not appear to be a medical basis for these charges. (PX 3)

Petitioner began treatment with Dr. Gregory Primus for bilateral hand pain on October 30, 2015. The precipitating event was said to be repetitive work with wrist flexion and extension. The diagnosis was right carpal tunnel syndrome and sprain of the radiocarpal joint of the left wrist. Dr. Primus documented that the conditions were work related. Work restrictions, injection, therapy and an eventual right carpal tunnel release were endorsed by Dr. Primus. The CTR procedure took place on December 21, 2015. Dr. DeBartolo saw Petitioner in follow-up on 2 occasions and noted left carpal tunnel syndrome on February 10, 2016. Petitioner had follow-up care with Dr. Primus through June 6, 2016. (PX 4)

Petitioner received care at Spine & Pain Center in Joliet, beginning March 17, 2016, for post-operative care regarding her right wrist. This treatment was with Dr. Daniel P. Cantarello and continued through May 10, 2016. (PX 5) The bill from this facility was submitted as PX 6 and amounts to $7,560.00.

Petitioner underwent an FCE on October 16, 2015 at Elite Physical Therapy. The study showed she was capable of light/medium work and an inability to perform grasping activities on a constant basis. This pre-surgery study is of no help in determining the nature and extent of the injuries and is of questionable help regarding work activities, as Petitioner had returned to restricted duty work in September of 2015. The bill for this study appears to be $993.92. (PX 7)

Petitioner submitted a bill from IWPharmacy as PX 8. The bill amounts to $3,804.87. Petitioner also submitted a bill from RX Development Pharmaceutical Management as PX 9. This bill was in the amount of $5,149.72.

Petitioner testified that she is currently working at a factory in a full duty capacity. Her new job duties primarily include packing. Petitioner noted that she still has some pain in her right hand, elbow and wrist. She has some difficulty with day to day activities such as lifting heavy items like grocery bags. Petitioner testified that she has not sought further treatment for her right hand.

Petitioner was placed off work by her physicians beginning June 26, 2015. She returned to work at modified duty beginning September 22, 2015 and ending on the day before surgery, December 20, 2015. She worked less hours during this time and made less money than she would have if she worked her standard 40 hours per week. She was taken completely off work again from December 21, 2015 through January 13, 2016. From January 14, 2016 to April 11, 2016 Petitioner again worked modified duty, working less than her usual 40 hours per week. Petitioner was released to full duty, effective April 12, 2016.

Mr. Robert Freeman testified on behalf of the Respondent. Mr. Freeman is the owner of the McDonalds franchises that Petitioner worked at. Freeman owns a number of McDonalds franchises and has been affiliated with the McDonalds brand since a young age. Freeman provided testimony regarding the workplace environment at the McDonalds locations that Petitioner worked at, based upon his many years of experience. Mr. Freeman testified that the Petitioner had been an employee of Respondent for a number of years. Petitioner usually worked the opening shift of approximately 5:30 A.M. until around 1:30 P.M. During that time period, Petitioner would take a break approximately halfway through her daily shift.

Regarding the Petitioner's job duties, Mr. Freeman provided an overview of the Petitioner's duties for an average work day. As part of her job duties as a line cook, Petitioner would remove the various products the line cooks would use throughout the day from the freezer. Petitioner was responsible for stocking everything in the line area of the kitchen, essentially all of the items necessary to prepare sandwiches. This included the bread products, the vegetables, the meat and the condiments. Petitioner would be required to occasionally keep the lobby area clean. Freeman stated that employees are usually cross-trained to perform a number of different jobs within the franchise location. Petitioner would be required to complete a variety of job activities throughout the day.

Mr. Freeman testified that there are usually three employees working as line cooks making sandwiches on a daily basis. Freeman provided specific testimony as to how many sandwiches are made on an average day by the team of line cooks. On average, between 40 and 45 Big Macs are sold. On average, around120 chicken sandwiches are sold. Mr. Freeman noted that on average a store would sell around 225 cheeseburgers per day, 55 Quarter Pounders and 125 hamburgers. Freeman specifically noted that the total number of sandwiches sold would be prepared as a group by the line cooks. The responsibility of making the sandwiches would be divided up amongst the various members of the line cook team. Freeman did not think that a line cook would make 830 sandwiches per shift at his locations. On cross-examination, Freeman conceded that his testimony about the number of sandwiches sold was at the slower Orland Park store and not at the busier Homer Glen store where Petitioner worked for 10 years.

Robert Freeman's son, Benjamin, who oversaw Petitioner's work activities more than Robert, did not appear for trial. Given the proofs in this case and the absence of an offer of proof by Petitioner, the Arbitrator declines to make any presumptions as to the potential negative impact of Benjamin's testimony.

Respondent sent Petitioner for a §12 exam by Dr. Michael Vender on January 25, 2016 (after the date of surgery). (PX 10, RX 1) Dr. Vender testified via an evidence deposition on November 11, 2016. Dr. Vander is a hand surgeon. He is a board certified orthopedic surgeon, fellowship trained in hand and upper extremity surgery, with additional qualifications as a hand surgeon. His diagnosis regarding Petitioner was status post right carpal tunnel syndrome release, with probable tendonitis in the hand and wrist. He did not endorse causation as to Petitioner's condition of ill-being and her work activities. Petitioner's risk factors for carpal tunnel syndrome were; her age; gender; and increased body mass. The surgical release was reasonable. OT. TENS unit, multiple medications and compounds were not reasonable. Dr. Vender thought that Petitioner's job duties did not expose her to forceful activities on a regular and persistent basis. Therefore, her work activities were not contributory to carpal tunnel syndrome. Petitioner's work activities were varied, there was not a persistence of repetitiveness of any type of activity, such that he would endorse causation. Petitioner only had intermittent exposure to exertional/forceful activities. Petitioner told Dr. Vender about her work activities. He also viewed photos of the sauce gun, etc. and reviewed Petitioner's job description. Constantly using the ketchup/mustard dispensers could be a contributing factor in causing a trigger thumb condition. Elicitation of symptoms has nothing to do with causing or progressing the disease. Dr. Vender initially appeared to not have a complete understanding of Petitioner's job activities, but he was subjected to a strong cross-examination and he maintained and supported his opinions.

Petitioner relies on the causation opinions set forth in the records of the treating physicians.

Neither the treating physicians beginning with Grandview, nor Dr. Vender, commented on the positive RA finding noted by the physician at Aunt Martha's.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between her employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

WITH RESPECT TO ISSUES (C) DID PETITIONER SUSTAIN ACCIDENTAL INJURIES WHICH AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMNET BY RESPONDENT ON JUNE 22, 2015? and (F), IS PETITIONER'S CONDITION OF ILL-BEING CASUALLY RELATED TO THE INJURY? , THE ARBITRATOR FINDS:

Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on June 22, 2015. Petitioner testified that June 22, 2015 was the last day that she worked because of hand pain and her doctors wanted her to receive therapy. The first medical treatment shown in the evidence adduced is on June 26, 2015 at Aunt Martha's, where Petitioner is seen for hand pain and a positive RA blood test result. Obviously, the blood test was ordered before the 6/26 visit and it would be helpful to have

seen the chart note associated with the order for the test. That information failed to be submitted into evidence. Additionally, instead of following up with Rheumatology, Petitioner begins treatment with Grandview Health Partners for hand and wrist pain, along with later diagnoses of cervicalgia, right DeQuervain's right trigger thumb and right epicondylitis. The Arbitrator finds the opinions of the treating physicians to be underwhelming and not persuasive on the issue of causation. If Petitioner's medical opinions do not support a finding of causation, they cannot support a finding of accident in a repetitive trauma case. There has been a failure of proof on the issue of accident.

The Arbitrator finds the causation opinions of Dr. Vender to be persuasive, credible and supported by the evidence. Petitioner's work activities were not very forceful and did not occur on a regular and persistent basis such that causation can be found. Petitioner's sandwich making was not as frequent as Petitioner testified to and the activities were varied with each type of sandwich that she made. She was not constantly squeezing the sauce gun or the mustard and ketchup dispensers. She was also engaged in wrapping sandwiches and other activities, which eliminates any regular and persistent nature of her work activities. Additionally, it is obvious that the placing of bread on a table, meat on the bread, cheese or other condiments on the meat and placing the bread on top of a sandwich is not forceful.

Given the evidence adduced, the Arbitrator declines to find in favor of Petitioner on the issue of causation.

The claim for compensation is, therefore, denied.

WITH RESPECT TO ISSUE (J), MEDICAL EXPENSES, ISSUE (K), TEMPORARY BENEFITS AND ISSUE (L), NATURE AND EXTENT, THE ARBITRATOR FINDS:

As the Arbitrator has found that Petitioner failed to prove that hse sustained accidental injuries which arose out of and in the course of her employment by Respondent on June 22, 2015 and failed to prove a causal connection exists between her work activities for Respondent and her current condition of ill-being, the Arbitrator needs not decide these issues.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maximino Salas

Petitioner,

20IWCC0226

vs. NO. 09WC 021991

Jose Luis Gonzalez and the Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of jurisdiction, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 31, 2018 is hereby affirmed and adopted.

No bond is required for the 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 Circuit Court.

APR 17 2020

DATED:
SJM/sj
d-4/8/20
44

Stephen J. Mathis

Douglas D. McCarthy

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SALAS, MAXIMINO
Employee/Petitioner

Case# **09WC021991**

GONZALEZ, JOSE LUIS AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKER BENEFIT FUND
Employer/Respondent

20IWCC0226

On 12/31/2018, 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 2.48% 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.

3149 LAW OFFICE OF NICHOLIS J STEIN
6 LYNN DR
HAWTHORN WOODS, IL 60047

0000 JOSE LUIS GONZALEZ
1600 S BERTA RD
COAL CITY, IL 60416

6149 ASSISTANT ATTORNEY GENERAL
DANIELLE CURTISS
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☒ 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

Maximino Salas
Employee/Petitioner

Case # **09** WC **21991**

v.

Jose Luis Gonzalez and the Illinos State Treasurer as Ex-Officio Custodian of the Injured Worker Benefit Fund
Employer/Respondent

20IWCC0226

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 **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **December 7, 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. ☒ 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 **September 29, 2008**, Respondent ***was not*** 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 $**28,400.00**; the average weekly wage was $**550.00**

On the date of accident, Petitioner was **19** years of age, ***single*** with **0** dependent children

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

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

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

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

ORDER

The Petitioner failed to meet the threshold burden of establishing Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act. Therefore, Petitioner's claim for benefits is denied.

No benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

December 26, 2018
Date

JAN 3 - 2019

FACTS:

Petitioner testified he was employed by Jose Luis Gonzalez, who owned a ranch in Coal City, Illinois. He was hired by Mr. Gonzalez in March 2008 to take care of the12 to 13 horses that lived on the ranch. Care of the horses involved feeding, walking and grooming the horses, as well as cleaning the horse stables. Petitioner worked Monday through Sunday from 7:00 a.m. to 7:00 p.m. He did not live on the ranch, but he stayed there approximately four days per week. The other days he would go home to his house in Chicago after work was done for the day.

Petitioner testified that he directly reported to another worker on the ranch who others referred to as "el toro." Mr. Gonzalez gave Petitioner a list of duties that needed to be completed on the ranch, and Petitioner was to stay at work until they were complete. Petitioner was permitted to have alternative employment while working on the ranch, but he never did. He believed that he could be terminated at any time, and never signed an employment contract. He was paid $550 cash every Sunday or Monday, which he received from Mr. Gonzalez directly.

Petitioner testified that on September 29, 2008, he was working at the ranch walking one of the horses when he fell off the horse. The horse hit a nearby post, and Petitioner fell off the horse, was hit in the head by the post, then fell to the ground. A co-worker transported Petitioner to Cook County Stroger Hospital.

At Cook County Stroger Hospital, Petitioner complained of diffuse abdominal pain, left flank pain, left elbow and forearm pain, left hip pain, left femur pain, and left foot pain. (Petitioner Exhibit "PX" 3). He reported, via a Spanish interpreter, that he fell from a horse and struck his abdomen on a pipe. *Id.* X-rays and CT scans revealed a non-displaced fracture of transverse process of S1. *Id.* All other imaging was negative. *Id.* Petitioner was discharged with ibuprofen and instructed to follow up in trauma clinic within one week. *Id.* This Arbitrator notes that there were no other treatment records submitted into evidence.

Petitioner testified that he returned to work full duty in December 2008. He went back to work for Mr. Gonzalez for one month, then sought alternative employment. He is currently employed at a restaurant. He testified that he has a scar from the accident on his stomach approximately one inch in size. This Arbitrator notes that the scar was not viewed at the hearing. Petitioner continues to suffer from stomach pain in the area where he struck the pole during the accident.

Petitioner testified that he was not paid by Mr. Gonzalez for the time he was off work. He does not remember whether Mr. Gonzalez paid his medical bills from Stroger.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (A.), Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act, the Arbitrator finds and concludes as follows:

The Illinois Workers' Compensation Act does not automatically apply to all employers. The Act specifically exempts agricultural enterprises from 820 Ill. Comp. Stat. Ann. 305/3(19) (2015). It states:

> Nothing contained in this act shall be construed to apply to any agricultural enterprise, including aquaculture, employing less than 400 working days of agricultural or aquacultural labor per quarter during the preceding calendar year, exclusive of working hours of the employer's spouse and other members of his or her immediate family residing with him or her. *Id.*

The Commission addressed this exception in *Thorin Hart*, where the petitioner was injured while caring for hogs. *Thorin Hart, Petitioner*, 13 IL. W.C. 25432 (Ill. Indus. Com'n Feb. 26, 2018). While addressing whether petitioner's injury on equipment used to assist with hog feeding, the Commission stated that "the activity performed by petitioner at the time of his injury was fundamental to the agricultural enterprise of hog finishing. The Petitioner's employment was therefore covered under the exemption of the act provided in Section 3(19)."

In the case at bar, Petitioner testified he was employed by Jose Luis Gonzalez, who owned a ranch in Coal City, Illinois. He was hired to take care of the 12 to 13 horses that lived on the ranch. Care of the horses involved feeding, walking and grooming the horses, as well as cleaning the horse stables. Petitioner's employment with Mr. Gonzalez is clearly agricultural in nature as his entire job was to take care of horses.

The Arbitrator notes that the record is silent regarding any evidence of the precise number of employees employed by Mr. Gonzalez at the ranch. As the burden rests on Petitioner to prove by a preponderance of the evidence that this exemption does not apply, Petitioner has failed to meet that burden. Based on the finding that Petitioner was engaged in an agricultural enterprise, this Arbitrator finds that Petitioner's employment was covered by the exemption to the Act provided in Section 3(19). This Arbitrator finds that Petitioner has presented no evidence that Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act and Petitioner is not entitled to compensation for her injuries.

Additionally, even if the Arbitrator found that Section 3(19) did not apply, the Arbitrator also finds that Section 3 of the Act does not apply. Section 3 states:

> The provisions of this Act hereinafter following shall apply automatically and without election to the State, county, city, town, township, incorporated village or school district, body politic or municipal corporation, and to all employers and all their employees, engaged in any department of the following enterprises or businesses which are declared to be extra hazardous. . . .820 Ill. Comp. Stat. Ann. 305/3.

Section 3 enumerates eighteen types of businesses and industries of which are declared to be "extra hazardous." Petitioner has not met the burden of proving that any one of these eighteen "extra hazardous" conditions applies to Mr. Gonzalez's alleged business. Petitioner testified he took care of 12 to 13 horses, which involved feeding, grooming, and walking the horses, and cleaning the stables. He did not testify as to any specific equipment used to complete this job. He testified that the equipment he used was owned by Mr. Gonzalez. However, he never specified as to what type of equipment he specifically used. The Arbitrator therefore finds that Petitioner has presented no evidence that Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act and Petitioner is not entitled to compensation for her injuries.

As the Arbitrator has found that the Petitioner failed to prove that the Respondent-Employer was operating under and subject to the Illinois Workers' Compensation Act, determination of the remaining disputed issues is moot.

Petitioner's claim for compensation is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ara Gardner,
Petitioner,

vs.

NO: 09 WC 46581

University of Illinois at Chicago,
Respondent.

20IWCC0227

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018 is hereby affirmed and adopted.

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

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

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

DATED: APR 17 2020
d-4/7/20
KAD/jsf
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARDNER, ARA
Employee/Petitioner

Case# **09WC046581**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

20IWCC0227

On 7/24/2018, 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 2.14% 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:

0598 LUSAK & COBB
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0904 STATE UNIVERSITY RETIREMT SYS
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CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUL 24 2018

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

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

AVA GARDNER
Employee/Petitioner

Case # 09 WC 46581

v.

Consolidated cases:

UNIVERSITY OF ILLINOIS AT CHICAGO,
Employer/Respondent

20IWCC0227

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 **KURT CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **April 16, 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. ☐ 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 20IWCC0227

On **09/27/2007**, 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 part, and not causally related in part.

In the year preceding the injury, Petitioner earned **$37,865.36**; the average weekly wage was **$728.18**.

On the date of accident, Petitioner was ***41*** years of age, ***single*** with **zero** 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 **$1,040.23** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,040.23**.

ORDER

The Arbitrator finds that Petitioner proved a causal connection between the 09-27-07 occurrence and her lumbar spine, but no causal connection between the 09-27-07 occurrence and her present condition of ill-being regarding the cervical spine as alleged.

The Arbitrator has considered Petitioner's claim for lumbar injuries and has incorporated this claim in his Decision in case 10 WC 21738, as it was a intervening, superseding occurrence.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$485.45**/week for **2-1/7** weeks, commencing **9/28/2007** through **10/12/2007**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$1,040.23** for temporary total disability benefits that have been paid.

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

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

Signature of Arbitrator

July 20, 2018
Date

JUL 24 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARA GARDNER, Petitioner, vs. UNIVERSITY OF ILLINOIS AT CHICAGO, Respondent.	)	No. 09 WC 46581

20IWCC0227

MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF FACTS

Petitioner was employed at the University of Illinois Health and Science System on September 17, 2007. As of that date, she had been working for the University of Illinois for 16 years. (9). On that date, Petitioner was reassigned off her unit. She was attempting to lift an obese patient with the help of a nurse when while doing so, she felt a pop in her low back. This caused her to lay over the patient, unable to move. (10). The nurse called for assistance; Petitioner was taken to the ER on a gurney. She was admitted through the emergency room on that date and remained an impatient for three days. (11).

Petitioner came under the care of the physicians at the University of Illinois Medical Center Health Service on September 27, 2007 when she presented with complaints of severe back pain; she was emotional, crying due pain. (RX 1, 88-89). Lumbar X-rays were negative. The report from Dr. Gehm from that date indicates that Petitioner had been receiving little relief with Toradol and Valium – she was taking the latter medication routinely at home for posterior shoulder problems and was taking up to four Vicodin at a time for pain at home. (RX 1, 85). She received an injection of Ketorolac and was given Diazepam and Benadryl. Examination was generally benign except for positive straight leg raising bilaterally with paraspinal tenderness. Dr. Nelson made a differential

diagnosis of back pain, muscle strain versus disc herniation versus nerve impingement versus vertebral compression fracture. (RX 1, 85).

An MRI was ordered and Petitioner prescribed Dilaudid, Norco, and Valium. (RX 1, 81-82). The MRI was performed September 27, 2007 and was significant for degenerative disc disease at L4-5 with mild mass effect upon the anterior portion of the thecal sac; there was no evidence of nerve root compromise. (RX 1, 80).

Petitioner followed up at Health Service for physical therapy evaluations per the September 28, 2007 report of Dr. Nelson. Petitioner was prescribed multiple pain medications, including Hydromorphone and Vicodin as well as Chlorzoxazone, a muscle relaxant, and medication for insomnia. Upon discharge from the hospital on that date, she was prescribed Hydromorphone for breakthrough pain, Morphine, and Flexeril. (RX 1, 76-77). In the preliminary report upon discharge, the pharmacist indicated that Petitioner was discharged home on "new" medications for a new onset of low back pain. The pharmacist noted that Petitioner had taken Valium and Vicodin in the past due to a previous injury. (RX 1, 71).

Petitioner came under the care of Dr. Shapiro following release from the hospital. The doctor performed diagnostic studies and prescribed therapy and injections. According to Petitioner, the doctor said she would require surgery but she did not undertake surgery. (11-12). Ultimately, she was released to return to work. Immediately after returning, she noticed that a quick move would "reactivate" her symptoms but after a while she started to feel better. (13).

Petitioner saw Dr. Shapiro on October 4, 2007 for initial consultation following the September 28, 2007 occurrence. She reported extreme discomfort despite use of narcotics, anti-inflammatories, and muscle relaxants. She reported back pain radiating into both legs; the majority of her problem was in the back itself. On exam, the Petitioner was extremely uncomfortable with any change of position. Motor strength and sensation were intact as were reflexes in both lower

extremities. There was full painless range of motion of both hips. The doctor noted severe back pain with attempt at straight leg raise. He considered her x-rays unremarkable. An MRI showed degenerative disc disease at L4-5 with loss of disc hydration and a small disc bulge consistent within acute annular tear. He diagnosed acute back pain from an annular tear and recommended a Medrol Dosepak. (PX 4, 53-54; RX 3, 83-84).

Petitioner remained off work and participated in physical therapy through October 12, 2007. Petitioner reported that her low back pain was almost gone and that she would be returning to work. She was taking no pain medication at that time. (RX 2, 16). Assessment on October 12, 2007, was a recovering lumbar strain. Health Service records reflect that Petitioner was released to return to work on October 13, 2007, with instructions to return to the emergency room is her condition worsened. Exam on that date found Petitioner to have full flexion of the lumbar spine as well as full rotation. Straight leg raising was negative. (PX 2, 55-60; RX 1, 62).

Petitioner returned to work on October 13, 2007. She could not recall if she did not see Dr. Shapiro again until January 13, 2009. She could not recall the dates; she just knew she saw him a lot. She did not agree that after October 2007 she did not see Dr. Shapiro until January 13, 2009. (33-34).

Petitioner was seen in Health Service on multiple occasions throughout 2008 and, specifically, on December 15, 2008 when she complained of pain at end range of motion of both the neck and back. She reported that this was due to a work-related injury. Examination revealed no findings supporting restricted duty. She was released to full duty at that time. She reported that she had been injured on September 27, 2007. (PX 2, 50-52).

The Petitioner saw Dr. Shapiro again on December 29, 2008, (PX 4, 52), with a present complaint of low back and neck pain which she characterized as very severe and constant. This radiated down the right leg to the calf. In the interim, she claimed injuries in October 2008 while

trying to lift a patient. She reported having slipped while performing this task, striking her head, neck and low back against a food cart. This caused neck pain and exacerbated her low back symptoms. She reported also having slipped in late November or early December 2008 and now complained of neck pain radiating to the upper back and low back pain similar to when she originally injured herself. The doctor noted limited range of cervical motion but normal neurological testing. Regarding the lumbar spine, there was mild positive straight leg raising on the right at 45 degrees and pain radiating into the right calf. The doctor recommended cervical and lumbar MRI studies. (PX 4, 41).

Dr. Shapiro obtained a cervical spine MRI on January 28, 2009, which revealed disc degeneration, most prominent at C5-6 with mild central stenosis and probable minimal hydromyelia at C6-7. (PX 4, 36). A lumbar MRI performed January 28, 2009 revealed mild disc degenerative changes at L4-5 with a broad-based small central protrusion. (PX 4, 35).

Petitioner saw Dr. Shapiro on February 12, 2009, when he advised her that the cervical MRI showed moderate degeneration at C5-6 with no herniation which he believed was the cause of her symptoms. The lumbar spine study confirmed a broad-based herniation with degeneration at L4-5. He recommended physical therapy for the cervical spine and a discography for the lumbar spine. Therapy records from March 4, 2009, reflect that Petitioner presented with pain and stiffness in her cervical spine which apparently resulted from a lifting incident at work on an unspecified date. Examination on that date concentrated on the cervical spine and upper extremities. (RX 2, 9-11). On March 12, 2009, Dr. Shapiro stated that no further testing was necessary: Petitioner's low back symptoms came from the L4-5 disc. (PX 4, 32-33).

Petitioner appeared at Health Service on November 30, 2009 with a history of a work-related incident involving her scalp/hair, left shoulder, lower back, facial and hand abrasions/superficial lacerations. She was found unable to return to work at full duty and was placed on modified duty

work restrictions and provided Ibuprofen. Examination of the left shoulder at that time revealed no obvious deformity; range of motion was limited in abduction and rotation, internal and external. (PX 2, 26-28). She followed up at Health Service on December 3, 2009, when she was released for full duty effective December 4, 2009. Exam at that time revealed no obvious deformity of the left shoulder but range of motion remained limited. Dr. Marder commented that she was back to pre-injury baseline per her report. His exam showed persistent, mild tenderness on palpation of the supraspinatus area. (PX 2, 24-25).

Petitioner presented Health Service on January 26, 2010, with a history of having been assaulted by an adolescent patient on November 26, 2009, when the patient grabbed her by the hair. She reported low back and left shoulder pain resulting from the incident. She offered no complaints of low back pain on January 26, but did report persistent left shoulder pain and range of motion limitation. The rotator cuff was tender and rotation limited. There was near full range of motion on abduction/adduction, with abduction slightly limited at 150 degrees. Dr. Marder commented that there were equivocal signs of impingement but noted some symptom magnification. She was kept at full duty and referred to physical therapy. (PX 2, 19-20)

On February 24, 2010, Petitioner reported a history of a neck injury in 2007 and another cervical strain in November, 2009. She reported having been assaulted by a patient again on February 24, 2010 when she was pulled forward by the keychain she wore around her neck. On exam, cervical range of motion was limited; the Tinel's was positive for median neuropathy. An MRI was ordered and Petitioner released to work with restrictions of no lifting, pushing, or pulling over 20 pounds. (PX 2, 16-17).

Restrictions were continued on March 3, 2010, when the doctor commented on the results of the MRI which showed degenerative disc disease and mild to moderate central and foraminal stenosis at C5-6. Petitioner was placed off work. (PX 2, 14). She was referred to physical therapy

and remained in an off work status. (PX 2, 11-12). Her status was unchanged on March 15, 2010, and she remained off work as of April 1, 2010. She had been seeing Dr. Shapiro for low back pain and had an appointment for left shoulder issues. She was taking Flexeril but was advised to wean off this medication. Cervical spine motion was limited as of April 1, 2010. There was near full range of motion in the left shoulder with a painful arc of motion and signs of impingement. The rotator cuff was tender on palpation. Assessment as of April 1, 2010 was multiple cervical, lower back, and left shoulder injuries with a recent work related reinjury. (PX 2, 5-6).

Petitioner returned to Dr. Shapiro on March 25, 2010, when he stated he had not seen her for a year. He had recommended an L4-5 fusion at that time. She had participated in physical therapy which provided improvement but she was then reinjured in November of 2009 when a patient beat her, which caused a worsening of neck and back symptoms and pain radiating down both arms. She also mentioned an episode at work when a patient pulled the cord around her neck, causing a worsening of neck pain. The doctor also mentioned a chronic condition of neck pain. Petitioner had been working. He examined Petitioner's cervical spine at that time and noted limitations in flexion and extension. Neurological testing was normal. The lumbar spine was tender to palpation and flexion to 80 degrees, at which point Petitioner complained of pain. The doctor noted a cervical MRI which he stated confirmed moderate degeneration at C5-6; an EMG/NCV of the upper extremities was normal. The doctor diagnosed a soft tissue injury of the cervical spine and recommended an updated MRI which was discussed at the April 27th visit. He placed Petitioner off work at that time. (PX 4, 18-19; RX 3, 38-39).

The lumbar MRI was performed April 9, 2010 and was significant for degenerative disc disease with facet changes at L4-5 and no evidence of frank disc herniation or significant central spinal canal or intervertebral foraminal stenosis. When Dr. Shapiro saw the Petitioner following the test, the doctor noted that the report confirmed degeneration at L4-5 with no evidence of

compression, in effect the same result as the test from the year prior. On exam, he noted moderate tenderness to palpation and forward flexion limited to 70 degrees. He reviewed an IME report authored by Dr. Matz who opined that the Petitioner was at maximum medical improvement and could return to work without restriction. In discussing her case, he advised the Petitioner that if she could tolerate her pain that she should return to work without restriction; otherwise, she should undertake an FCE and a discogram for diagnostic purposes. He took her off Norco and placed her on Celebrex. He released the Petitioner to return to work without restriction effective April 28, 2010. (RX 4, 15-16).

Petitioner returned to Dr. Shapiro on April 27, 2010. He felt the current MRI confirmed L4-5 degeneration but there was no evidence of compression of any neural structure – this showed no interval change from an earlier MRI. The doctor noted moderate tenderness about the lumbar spine on that date which limited forward flexion of the lumbar spine. Straight leg raising was negative. The doctor discussed an FCE and a discography to confirm her symptoms and to determine if she was a surgical candidate. He took her off Norco and prescribed Celebrex. He released her to return to work without restriction on April 28, 2010. (RX 3, 26-27).

The Petitioner was referred for a functional capacity evaluation at ATI Physical Therapy on April 29, 2010. According to Crystal Bell, the specialist who conducted the test, the FCE was invalid. Ms. Bell stated that there were inconsistencies during certain portions of the test, selectivity of pain reports, and pain behaviors demonstrated during the test. She considered the results to represent a manipulated effort by the Petitioner which caused the functional abilities the Petitioner demonstrated to be less than their true-safe capability level. (RX 4, 7).

Dr. Shapiro reviewed the FCE results on May 6, 2010, when he stated that the Petitioner should be returned to full duty without restriction. He also stated that there was no reason to proceed with a discography of the lumbar spine. (PX 4, 5). He then saw the Petitioner on May 12, 2010, to

discuss the test results. He advised her at that time that the evaluator felt she was manipulating the test and not performing to her full capabilities; therefore, the doctor determined that no discography should be performed and that she should return to work without restriction. The Petitioner strongly defended her effort during the test which apparently caused the doctor to recommend a second FCE witnessed by a neutral party. (PX 4, 4).

Petitioner was examined on two occasions by Dr. Ghanayem. At the first exam on August 18, 2010, Petitioner presented with a history of two low back injuries and an injury to the cervical spine which occurred at the time of the second back injury. She reported that she had stopped work in February, 2010 and was released back to regular work activities two months before the exam in August but had not yet returned to work. She complained of pain at the base of the lumbar spine, numbness in her feet and hand, and pain at the base of the cervical spine with pain referred to the posterior right shoulder. On exam, the doctor noted tenderness at the base of the lumbar spine with no spasm and normal lumbar motion; the neurological exam was normal. Dr. Ghanayem reviewed diagnostic studies from 2007 which revealed disc degeneration at L4-L5, longstanding in nature. The doctor assessed subjective complaints and examination findings consistent with soft tissue neck and back pain. He did not recommend a lumbar fusion despite the thought that she may have needed one in 2007. He considered her able to work regular duty. (RX 4)

Petitioner returned to Dr. Ghanayem on March 3, 2014, with no interval history of injury. She complained of ongoing neck and low back pain with fluctuating arm symptoms. There was no leg pain but some referred pain to the right upper thigh and buttock. She reported extensive therapy and multiple injections since the last evaluation. She produced a report from Dr. Sampat of Parkview Orthopedics who recommended against surgical intervention for the cervical spine. (RX 5).

Dr. Ghanayem's exam was generally normal except for some limitation of extension and flexion of the lumbar spine. The doctor reviewed an October, 2011, MRI which revealed

degenerative changes in the lumbar spine; a recent cervical MRI that revealed mild cervical spondylosis with no neurological compression at any level. This produced a negative EMG study of both upper and lower extremities which the doctor felt was an expected finding based on the MRI scans. He considered Petitioner able to return to regular work without restriction and stated that she was not in need of any further treatment. (RX 5).

Petitioner received medical treatment at the Rehabilitation Institute of Chicago in April, 2014. An outpatient assessment performed April 21, 2014, noted that the results of MRI studies of the cervical and lumbar spines and resulted in a clinical diagnosis of neck and thoracic myofascial pain. In addition, the impression included myofascial low back pain, scoliosis/spondylosis, a dysphoric mood, and chronic pain syndrome.

The cervical spine MRI performed January 8, 2014 revealed multilevel disc bulges and protrusions with foraminal stenosis and spinal stenosis at C5-6 on the right with no spinal cord effacement. In addition, there was spondylosis and levoscoliosis noted. The lumbar MRI performed March 28, 2014 revealed mild degenerative changes throughout the lumbar spine without significant spinal canal stenosis. Also, there was "at most" mild right L3-4 and bilateral L4-5 foraminal stenosis.

Rehabilitation Institute of Chicago developed a treatment plan which included a referral for an interdisciplinary chronic pain management program, continuing medication use (opioids as needed), and a recommendation for psychology biofeedback.

On April 28, 2014, Petitioner was evaluated by Dr. Margolis who diagnosed neck and low back pain. (RX 3, 11). Petitioner attributed her symptoms to a series of incidents at work commencing in 2007 when while lifting a patient she felt a pop in her neck with pain radiating down the arms and repeat injuries between 2008 and 2010. She was complaining of constant neck pain at the time of the April, 2014 exam. (RX 3, 34-37).

Exhibits:

Petitioner introduced the following exhibits into evidence:

Petitioner's Exhibit 1 – Report of Injury

Petitioner's Exhibit 2 – Employee Health Services records

Petitioner's Exhibit 3 – RIC Center for Pain Management records

Petitioner's Exhibit 4 – Dr. Shapiro records

Petitioner's Exhibit 5 – Illinois Bone & Joint/Dr. Westin records

The Respondent placed the following exhibits into evidence:

Case 09 WC 45681:

Respondent's Exhibit 1 – University of Illinois Medical Center records

Respondent's Exhibit 2 – University of Illinois Medical Center physical therapy records

Respondent's Exhibit 3 – Dr. Shapiro/Illinois Bone & Joint Institute records

Respondent's Exhibit 4 – Dr. Ghanayem August 18, 2010, report

Respondent's Exhibit 5 – Dr. Ghanayem March 2, 2014, report

Case 09 WC 45682:

Respondent's Exhibit 1 – Report of Injury, November 23, 2008

Respondent's Exhibit 2 – Dr. Shapiro, Dr. Westin/Illinois Bone & Joint

Case 10 WC 21739:

Respondent's Exhibit 1 – University of Illinois Medical Center records

Case 10 WC 21738:

Respondent's Exhibit 1 – Dr. Player April 20, 2010, report

Respondent's Exhibit 2 – Dr. Player July 8, 2010, addendum report

Respondent's Exhibit 3 – Workers' Compensation Commission printout, Case 91 WC 14466

Respondent's Exhibit 4 – Workers' Compensation Commission printout, Case 95 WC 21860

Respondent's Exhibit 5 – Workers' Compensation Commission printout, Case 01 WC 46594

]**Case 10 WC 21737:**

Respondent's Exhibit 1 – Report of Injury dated February 23, 2010

Respondent's Exhibit 2 – Dr. Matz April 19, 2010, report

Respondent's Exhibit 3 – ATI Physical Therapy April 29, 2010 FCE report

Respondent's Exhibit 4 – Claim Summary Payment Sheet (TTD payments)

DISPUTED ISSUES

With regard to issue F.: Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator makes the following findings.

1. Cervical Spine:

With regard to the claim for injuries of or to the cervical spine, the Arbitrator finds that Petitioner failed to prove a causal connection between the September 27, 2007 occurrence at work and the current condition of her cervical spine. Although Respondent stipulated to an accident on the above date, Petitioner introduced no evidence suggesting that the cervical spine was involved in this incident. Rather, the medical records of the Respondent's Health Service and the records of Dr. Shapiro/Illinois Bone & Joint refer only to a history of injury to the lumbar spine and subjective complaints of ill-being regarding the low back. Further, the Petitioner did not testify to having injured her cervical spine at the time of the September, 2007 incident. Therefore, the Arbitrator finds that Petitioner failed to prove a causal connection between the accident at work in September, 2007 and a condition of ill-being with regard to her cervical spine.

2. Lumbar Spine:

Respondent appears to have stipulated, by implication, that the Petitioner did injure her lumbar spine at the time of the September 27, 2007 occurrence. Paragraph four of Arbitrator's Exhibit #1 indicates that Respondent disputed causal connection "in context of cervical pathology." From this, the Arbitrator infers that the Respondent did not dispute a potential causal connection with regard to the lumbar spine.

The Arbitrator does note that the Respondent also stipulated to what appears to have been multiple injuries, including the cervical spine, which resulted from a subsequent accident at work on November 26, 2009 which is the subject of the Arbitrator's decision in case 10 WC 21738. The Arbitrator will discuss the implications of the latter accident in his decision in that case. However,

the Arbitrator notes here that there was a subsequent accident involving the lumbar spine which the Arbitrator has determined is causally connected to the Petitioner's current condition of ill-being as regards the lumbar spine and that the subsequent accident, being an intervening accident, will be the source of any and all findings with regard to permanent partial disability as regards the lumbar spine.

With regard to issue L: What is the nature and extent of the injury, the Arbitrator makes the following findings.

The Arbitrator takes note of Petitioner's claim for subsequent injuries on November 26, 2009, which is the subject of the Arbitrator's decision in case 10 WC 21738 and has determined that the Petitioner's current condition of ill-being as alleged is causally connected to the November, 2009 occurrence. The Arbitrator finds that the subsequent occurrence was an intervening accident which eliminates liability for permanent partial disability connected to the September, 2007 accident. The Arbitrator has taken into consideration the facts and circumstances of the incident at work on September 27, 2007 and the medical treatment Petitioner received subsequent to that incident for said injuries and has incorporated the above facts as they pertain to the medical treatment Petitioner received after the September, 2007 occurrence into his decision in case 10 WC 21738.

DATED AND ENTERED July 20, 2018

Arbitrator Kurt Carlson

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ara Gardner,
Petitioner,

vs.

NO: 09 WC 46582

University of Illinois at Chicago,
Respondent.

20IWCC0228

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018 is hereby affirmed and adopted.

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

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

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

DATED: APR 17 2020
d-4/7/20
KAD/jsf
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARDNER, ARA
Employee/Petitioner

Case# **09WC046582**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

20IWCC0228

On 7/24/2018, 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 2.14% 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:

0598 LUSAK & COBB
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CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

JUL 24 2018

Brett A. Rowe
Brett A. Rowe, Acting Secretary
Illinois Workers' Compensation Commission

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

ARA GARDNER,
Employee/Petitioner

Case # **09 WC 46582**

v.

Consolidated cases:

UNIVERSITY OF ILLINOIS AT CHICAGO,
Employer/Respondent

20 IWCC0228

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 **KURT CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **April 16, 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. ☐ 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 **10/29/2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did not*** 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$39,108.68**; the average weekly wage was **$752.09**.

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

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

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

ORDER

Petitioner failed to prove she sustained accidental injuries as alleged. In addition, Petitioner failed to prove a causal connection between the alleged incident on 10-29-08 and her alleged condition of ill-being. Therefore, the claim for benefits is denied.

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

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

Signature of Arbitrator

July 20, 2018

JUL 24 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARA GARDNER, Petitioner, vs. UNIVERSITY OF ILLINOIS AT CHICAGO, Respondent.	)	No. 09 WC 46582 20IWCC0228

MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF FACTS

A Health Service note from October 17, 2007, indicates that Petitioner was attacked by a patient in the psych unit, after which she complained of pain. The therapist assessed an acute muscle strain. On October 25, 2007, Petitioner reported worsening pain – she was working at that time. The therapist noted neurological symptoms in the left lower extremity which comported with her complaints of shooting pain along the lateral side of the left leg. (RX 2, 13).

Petitioner alleged an accident at work on October 26, 2008, when while lifting a male patient who wore a cervical collar, she felt pain and a pop in her neck which traveled down her arms. After notifying her charge nurse, she was sent to health services. (13-14). Maria Galagos was her charge nurse. (14-15).

A University of Illinois Employee's Interview Report/Employee Section was signed by Petitioner on November 23, 2008, and received by the Workers' Compensation Department on December 2, 2008. This report indicates that Petitioner was involved in an accident on October 29, 2008 which, per her report, was reported on that date. The description of the accident states that

while assisting a patient in his bed, Petitioner felt something pop on the back of her neck, after which she felt a burning 'pin like' feeling. (RX 1).

Petitioner was shown the Report of Injury. (36-39; 09 WC 46582, RX1). The date on the report next to Petitioner's signature is November 23, 2008. Petitioner indicated that sometimes she signs the wrong date. Petitioner could not recall the date when she first saw Dr. Shapiro after the alleged accident on October 29, 2008. She saw Gerry at Health Services. Petitioner did not agree that she did not see Dr. Shapiro until January 13, 2009 when Dr. Shapiro examined her neck. She stated that "you guys are going by reports, and there is other injuries in between that you don't have the report for." (39-40).

With regard to the Report of Injury, that report had one page. The report is dated November 23, 2010. There was a second page to the report which bears the date of November 23, 2008. The reason the dates are different is that she did not do the incident report correctly and it was sent back to her at a later date. The workers' comp department at UIC informed her that she did not do it correctly so they sent it back for her N1 to fill in his part and for her to do her part. At the top of the report she put the date of the accident and the body part injured. Robert Hughes signed the second page of the report. (56-57).

The University of Illinois Employee's Interview Report/Employee Section was signed by Petitioner on November 23, 2008, and received by the Workers' Compensation Department on December 2, 2008. Per this report, Petitioner was involved in an accident on October 29, 2008 which, per her report, was reported on that date. The description of the accident indicates that while assisting a patient in his bed, Petitioner felt something pop on the back of her neck, after which she felt a burning 'pin like' feeling. (RX 1).

Per her testimony, Petitioner was referred back to Dr. Shapiro who recommended physical

therapy and injections. She could not remember how long she was off work but knew that she was "off for a while." (15-16). Petitioner identified the incident report (PX 1). She could not recall if Robert Hughes, her N1, or Maria Galagos gave her the incident report form. But she prepared it and gave it to Mr. Hughes. (16-17).

Dr. Shapiro at Illinois Bone & Joint obtained a cervical MRI on January 28, 2009. This test revealed disc degeneration with mild central stenosis at C5-6. There was degenerative disc disease at C2-3, C3-4, and C5-6. (RX 2, 17-18). On follow up on February 12, 2009, Dr. Shapiro stated that the MRI confirmed moderate degeneration at C5-6 which he felt was the cause of Petitioner's symptoms. He recommended that she commence physical therapy for neck conditioning; he recommended a discogram of the lumbar spine. (RX 2, 15).

Petitioner was seen in Health Service on multiple occasions throughout 2008 and, specifically, on December 15, 2008 when she complained of pain at end range of motion of both the neck and back. She reported that this was due to a work-related injury. Examination revealed no findings supporting restricted duty. She was released to full duty at that time. She reported that she had been injured on September 27, 2007. (PX 2, 50-52).

The Petitioner saw Dr. Shapiro again on December 29, 2008, (PX 4, 52), with a present complaint of low back and neck pain which she characterized as very severe and constant. This radiated down the right leg to the calf. In the interim, she claimed injuries in October 2008 while trying to lift a patient. She reported having slipped while performing this task, striking her head, neck and low back against a food cart. This caused neck pain and exacerbated her low back symptoms. She reported also having slipped in late November or early December 2008 and now complained of neck pain radiating to the upper back and low back pain similar to when she originally injured herself. The doctor noted limited range of cervical motion but normal neurological testing.

Regarding the lumbar spine, there was mild positive straight leg raising on the right at 45 degrees and pain radiating into the right calf. The doctor recommended cervical and lumbar MRI studies. (PX 4, 41).

Dr. Shapiro obtained a cervical spine MRI on January 28, 2009, which revealed disc degeneration, most prominent at C5-6 with mild central stenosis and probable minimal hydromyelia at C6-7. (PX 4, 36). A lumbar MRI performed January 28, 2009 revealed mild disc degenerative changes at L4-5 with a broad-based small central protrusion. (PX 4, 35).

Petitioner saw Dr. Shapiro on February 12, 2009, when he advised her that the cervical MRI showed moderate degeneration at C5-6 with no herniation which he believed was the cause of her symptoms. The lumbar spine study confirmed a broad-based herniation with degeneration at L4-5. He recommended physical therapy for the cervical spine and a discography for the lumbar spine. Therapy records from March 4, 2009, reflect that Petitioner presented with pain and stiffness in her cervical spine which apparently resulted from a lifting incident at work on an unspecified date. Examination on that date concentrated on the cervical spine and upper extremities. (RX 2, 9-11). On March 12, 2009, Dr. Shapiro stated that no further testing was necessary: Petitioner's low back symptoms came from the L4-5 disc. (PX 4, 32-33).

Exhibits:

Petitioner introduced the following exhibits into evidence:

Petitioner's Exhibit 1 – Report of Injury

Petitioner's Exhibit 2 – Employee Health Services records

Petitioner's Exhibit 3 – RIC Center for Pain Management records

Petitioner's Exhibit 4 – Dr. Shapiro records

Petitioner's Exhibit 5 – Illinois Bone & Joint/Dr. Westin record

The Respondent placed the following exhibits into evidence:

Respondent's Exhibit 1 – Report of Injury, November 23, 2008

Respondent's Exhibit 2 – Dr. Shapiro, Dr. Westin/Illinois Bone & Joint

DISPUTED ISSUES

With regard to issue C.: Did an accident occur that arose out of and in the course of Petitioner's employment with Respondent, the Arbitrator makes the following findings:

Petitioner alleged an injury while working on October 29, 2008, which she described as an attack by a patient in the psyche unit. She sought care from Health Services following the alleged incident. A therapist noted symptoms in the left lower extremity consistent with her complaints. Petitioner then alleged another accident at work involving the low back as well as other parts of the body. Apparently, no Application for Adjustment of Claim was filed for this incident; however, the Arbitrator notes that the parties stipulated to a November 26, 2009, occurrence which is the subject of Case No. 10 WC 21738. In any event, the Petitioner did not sign the injury report until November 23, 2008; said accident report was not received by the Respondent's workers' compensation department until December 2, 2008.

The description of the accident set forth in the accident report is the same as that to which Petitioner testified occurred on November 26, 2008: while lifting a male patient who wore a cervical collar, Petitioner felt pain and a pop in her neck which traveled down her arms. Per her testimony, Petitioner stated that the reason the report bore a date several weeks after the alleged accident is that

she did not fill out the incident report correctly and thus it was returned to her to complete properly. Because of this, the report bears the November 23, 2008 date.

Meanwhile, Petitioner had complained of being attacked by a patient on October 17, 2007, another date for which Petitioner did not file an Application for Adjustment of Claim. She did see a therapist on October 25, 2007, complaining of worsening pain, a date prior to the alleged occurrence. When she saw Health Services on December 15, 2008 – the first day of service after the alleged October 29, 2008 accident date claimed – she reported that her symptoms related to the September 27, 2007 occurrence. She later saw Dr. Shapiro and underwent both cervical and lumbar MRI studies. These were performed on January 28, 2009. Although Dr. Shapiro attributed Petitioner's symptoms in the lumbar spine to an L4-5 disc noted on the MRI, the history in Health Services records reflects a lifting incident at work on an unspecified date. She did mention to Dr. Shapiro that she had injured her low back and neck in October, 2008, however. But, further, she reported another accident in late November or early December, 2008 as well.

Dr. Shapiro interpreted the MRI studies as showing disc degeneration in the cervical and lumbar spines.

From the history one can glean from the medical records, and the somewhat contradictory and confusing history provided by Petitioner in her testimony, it is difficult to conclude that Petitioner sustained accidental injuries arising out of and in the course of her employment in October, 2008 as alleged. Petitioner has the burden of proving all elements of her claim and the Arbitrator believes she has fallen short in this case. Therefore, the Arbitrator denies the claim for compensation in relation to the October 29, 2008 occurrence.

With regard to issue F.: Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator make the following findings:

Even if Petitioner could be said to have proved she sustained accidental injuries arising out of and in the course of her employment on October 29, 2008, the Arbitrator would nonetheless deny the instant claim because the Petitioner failed to prove a causal connection between the occurrence on that date and her present condition of ill-being as it relates to her cervical and/or lumbar spines. The basic reason for this determination is that no physician has related Petitioner's condition or conditions to said incident. Further, Petitioner described at least two other accidents at work in October and November, 2008 and, further, did not prepare an accident report until almost one month after the alleged occurrence. Given that the diagnostic studies were performed some three months after the alleged occurrence and that the diagnostic studies revealed what obviously were longstanding pre-existing degenerative conditions in the cervical and lumbar spines, the Arbitrator cannot find a causal connection between the alleged accident in October, 2008 and Petitioner's current condition of ill-being.

Also, the Arbitrator notes that the parties stipulated to a later accident on November 26, 2009, wherein it appears Petitioner may have injured multiple body parts, including the cervical and lumbar spines. The Arbitrator has addressed the issue of permanent partial disability which includes the cervical and lumbar spines, in that matter, Case No. 10 WC 21738.

With regard to issue L.: What is the nature and extent of the injury, the Arbitrator makes the following findings:

Based on the Arbitrator's findings regarding accident and causal connection the Arbitrator awards no disability in relation to the October 29, 2008, occurrence. Having failed to prove accidental injuries arising out of and in the course of her employment and, separately, failed to prove a causal connection between her current condition of ill-being and the October 29, 2008, occurrence, the Arbitrator must deny the claim for compensation in this case.

DATED AND ENTERED 7.20, 2018

Arbitrator Kurt Carlson

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)
X Correct scriveners error	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ara Gardner,
Petitioner,

vs.

NO: 10 WC 21737

University of Illinois at Chicago,
Respondent.

20IWCC0229

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 causal connection, benefit rates, permanent partial disability, and credit for temporary total disability benefits paid, and being advised of the facts and law, herein, corrects an apparent scrivener's error in the Memorandum of Arbitrator's Decision, specifically on page 1, paragraph 1, to reflect the proper date of accident of February 23, 2010, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018 is hereby affirmed and adopted, herein, correcting only to reflect the proper date of accident to February 23, 2010.

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

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

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

DATED: APR 17 2020
d-4/7/20
KAD/jsf
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARDNER, ARA
Employee/Petitioner

Case# **10WC021737**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

20 IWCC0229

On 7/24/2018, 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 2.14% 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:

0598 LUSAK & COBB
JOHN E LUSAK
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

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

2461 NYHAN BAMBRICK KINZIE & LOWRY
WILLIAM A LOWRY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

0902 UNIVERSITY OF ILLINOIS CHICAGO
CLAIMS MANAGEMENT
1737 W POLK M/C 940 SUITE B9
CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

JUL 24 2018

Brandi A. Peris
BRANDI A. PERIS, Acting Secretary
Illinois Workers' Compensation Commission

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

ARA GARDNER,
Employee/Petitioner

Case # **10 WC 21737**

v.

Consolidated cases:

UNIVERSITY OF ILLINOIS AT CHICAGO,
Employer/Respondent

20 IWCC0229

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 **KURT CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **April 16, 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. ☒ 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 **2/23/2010**, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$49,041.20**; the average weekly wage was **$943.10**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

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

ORDER

Temporary Total Disability

As stipulated by the parties, Respondent shall pay Petitioner temporary total disability benefits of **$628.73**/week for **43-6/7** weeks, commencing from 02-24-10 through 12-23-10, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$32,654.98** for temporary total disability benefits that have been paid.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner no permanent partial disability for this claim. Petitioner has related the permanency of this injury to her November 2009 accident – 10 WC 21738.

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

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

Signature of Arbitrator

July 20, 2018
Date

JUL 24 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARA GARDNER, Petitioner, vs. UNIVERSITY OF ILLINOIS AT CHICAGO, Respondent.	)	No. 10 WC 21737

20IWCC0229

MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF FACTS

Petitioner claimed further injuries on February 10, 2010, when after staff broke up a fight and separated the patients, Petitioner was injured while bending over to lock a patient in his room. At the time she was performing this action, the patient ran, snatched the knob from the inside, and pulled her into the door, causing injury to her neck and her left shoulder. As she described it, the door was open at the time and she was preparing to close it. The patient was inside the room and grabbed the door and pulled it. This caused the door to strike her neck and shoulder. (25-26).

Petitioner signed a University of Illinois Employee's Injury Report on February 23, 2010. The employee section of the injury report stated that while trying to close the door to a patient's room, the patient grabbed Petitioner's keychain which was around her neck and pulled her toward the patient, causing her neck to jerk forward. The report of injury referred to a neck injury only. (RX 1). Petitioner did not agree that there was no mention of an injury to the left shoulder in the Report of Injury for the February 23, 2010 incident. (51). She could not recall that saw Dr. Matz for

an independent medical examination on April 19, 2010. (51). She went for an FCE at ATI Physical Therapy on April 29, 2010. She recalled that the results of the exam favored UIC. (51-52).

Petitioner was referred to Health Services after the incident and was referred to Illinois Bone & Joint where she saw Dr. Westin who treated her shoulder and Dr. Fisher who treated her back. Dr. Westin performed shoulder surgery at Weiss Memorial Hospital. She remained off work until December 23, 2010. (27-28). Petitioner claimed not to have received all temporary total disability payments she claimed were due her. (29). Petitioner claimed 43-6/7 weeks temporary total disability. (Arbitrator's Exhibit 1, 10 WC 21737).

The Petitioner saw Dr. Rozental, a neurologist at Northwestern Medical Center, on March 2, 2010 when she reported a reinjury at work on February 23, 2010. This was caused by an aggressive patient who "pulled the door" causing an injury to her neck which had persisted despite use of Norco and Flexeril prescribed by the emergency room. She characterized the pain as pressure and burning down her back. The doctor had apparently seen her on February 16, 2010 when she also had neck pain which now had worsened. He reviewed an MRI and EMG studies performed on March 1, 2010 which he considered normal. (PX 4, 25). The radiologist noted a small posterior disc osteophyte complex and facet joint degenerative changes at C5-6; however, the previously visualized disc extrusion at C5-6 was no longer present. (PX 4, 29). The neurological exam was normal except for tenderness in the trapezius muscles and cervical paraspinals. Dr. Rozental's assessment was minimal degenerative disc disease of the cervical spine and recommended physical therapy and nonsteroidal analgesics. He also recommended Flexeril and Nortriptyline. (PX 4, 26-27).

Petitioner was examined by Dr. Matz on April 19, 2010 when she presented with a consistent history; she also reported to Dr. Matz that she did not go the emergency room, rather going to health

service the following day. She described two previous work-related injuries to her neck dating back to 2007 or 2008. One involved pulling a paraplegic up in bed when she felt a pop in her neck and bilateral upper extremity pain. She described the medical treatment she had received for the injury which included physical therapy and recommendations for injections which she declined.

At the time of the Dr. Matz exam on April 19, 2010, Petitioner was participating in physical therapy three times weekly for the neck and shoulder. The doctor also reviewed a report from other injuries, including one in November, 2009 when she was attacked by a patient. She also described an accident involving the cervical spine, as well as the low back in 2007 or 2008. Independently, she claimed a foot injury which occurred in June, 2009. (RX 2).

Petitioner complained to Dr. Matz of daily neck pain which she had had previously but that was interspersed by 'good days'. She noted discoloration in her hands which she stated turned pale or blue. She described having had eight procedures done on her left shoulder since 1989. Both upper extremities were weak; her low back hurt and it worsened since November, 2009; the outside of her legs tingled from her hips down to her feet, more so on the right; her legs were tired and her fourth and fifth toes bilaterally were numb. She was using Norco two or three times per day and an occasional Flexeril for the past year.

Dr. Matz reviewed an April 9, 2010 MRI of the lumbar spine which he considered excellent diagnostic quality and which showed no acute abnormalities, no evidence of disc herniation, nerve root impingement or spinal stenosis. Petitioner recalled in 2000 or 2008 that Dr. Shapiro recommended surgery but she declined. Physical therapy produced improvement. She was working every day. Nonetheless, she complained of constant neck and low back pain and tingling in both hands and feet. An EMG was reported to her as being normal. (RX 2, 2-3).

On exam, Dr. Matz considered Petitioner to be extremely pain focused – she moaned and sighed during the exam and voluntarily restricted cervical spine motion. Otherwise, the exam was normal: bending of the lumbar spine was to 90 degrees, but Petitioner exhibited pain behavior during this maneuver, moaning and hyperventilating. Dr. Matz reviewed multiple medical documents which indicated treatment for a multitude of complaints with no objective abnormalities being found. The doctor referenced an entry in the medical records which stated that she was taking four Vicodin for pain when at home. University of Illinois Health Service records following the February 23, 2010 incident noted a lack of objective confirmatory findings. (RX 2, 3-4).

Dr. Matz expressed the opinion that the magnitude of her symptoms was not substantiated by any objective physical findings. He noted preexisting neck complaints and that the cervical MRI and EMG results were normal. The lumbar MRI obtained April 9, 2010 revealed very minor degenerative changes with no evidence or herniation or impingement. (RX 2, 3-4). Dr. Matz opined that Petitioner had a wide range of inexplicable complaints accompanied by pain behavior and other signs of symptom magnification. Imaging studies and clinical examinations provided no evidence to support a clinical diagnosis of physical impairment. Dr. Matz considered Petitioner to be at maximum medical improvement and that her complaints followed a pattern of symptom magnification and non-organic complaints. He placed no restriction on her daily activities. (RX 2, 4).

Petitioner was evaluated by Dr. Player on April 20, 2010 when she presented with a history of injuries to the neck, back, and left shoulder on November 26, 2009. She reported having sustained no left shoulder injury on February 23 or February 24, 2010. She was seen in the emergency room on the date of accident when she received treatment for her back; later, she was evaluated for her

neck at health service. She reported to Dr. Player that she told the ER doctor that she hurt her shoulder and that her low back and left shoulder were evaluated by health service who recommended she take Ibuprofen and use ice on the shoulder. She reported being unable to lift the left shoulder from November until the "next incident" in February, 2010, after which she received therapy which helped the shoulder.

With regard to an incident on February 23, 2010, she was bending forward at the waist while unlocking a door when the person behind it flung open the door, causing her neck to jerk forward. She told Dr. Player that she injured her neck at that time, not the shoulder. (RX 1, 7). Petitioner reported to Dr. Player that the left shoulder was better, albeit she had pain every day. Symptoms were located over the anterior, superior left shoulder area and were described as throbbing, aching, burning, and tiring.

On exam Dr. Player noted movement in the abduction plane increased symptoms; resting and using ice improved symptoms. He observed surgical scars on both shoulders: a scar on the anterior left shoulder represented at least two surgeries; there was another surgical scar on the left lateral shoulder. He found restriction of left shoulder motion and generalized tenderness over the anterior left shoulder. (RX 1, 8-9). He considered Petitioner's subjective complaints consistent with objective examination findings with no symptom magnification. Diagnosis was left shoulder pain, status/post-multiple left shoulder surgeries for subluxation. (RX 1, 10-11). The doctor recommended an MRI and evaluation by a shoulder specialist.

Based on the history reported, Dr. Player found no causal relationship between an injury on February 23 or 24, 2010 to the left shoulder. Therefore, there could be no causal relationship between those injury dates and any abnormalities documented by a shoulder MRI. The doctor stated

that Petitioner reported an injury on Thanksgiving Day, November 26, 2009, with a mechanism of injury involving a patient grabbing her by the hair, pulling her across a desk and out into a hallway. Dr. Player was of the opinion that if this mechanism of injury was accurate, it was possible that Petitioner sustained a left shoulder injury as a result of that incident. Dr. Player did note what he considered a "rich" prior history of injury and surgeries to the left shoulder joint. (RX 1, 13).

With regard to a return to work, Dr. Player was of the opinion that Petitioner was capable of returning to full and regular duty as a mental health counselor. This was despite positive objective left shoulder findings – the doctor considered her work activities as a counselor very limited. He answered a specific question regarding the February 24, 2010 incident, stating that whether Petitioner was at maximum medical improvement as a result of this incident was not germane due to Petitioner's statement that she did not injure her left shoulder on that date. (RX 1, 13).

Dr. Player issued a record review report dated July 8, 2010 which summarized certain surveillance performed on April 20, 2010. The doctor noted Petitioner using the left upper extremity in fluid, flowing, and reciprocal motions in variance with the rigid holding of her left upper extremity against her upper torso at the time of the April 20, 2010 examination. This was documented on surveillance both before and after the exam. According to Dr. Player, this variance caused no change in the opinions he rendered at the time of the April 20, 2010 exam because she manifested additional positive objective left shoulder physical findings on the examination. (RX 2, 4-5).

Petitioner underwent a functional capacity evaluation at ATI Physical Therapy on April 29, 2010. This test was considered invalid based on inconsistencies during testing. The assessment specialist, Crystal Bell, noted inconsistencies in selectivity of pain reports and pain behaviors which she opined represented a manipulated effort. Therefore, the levels of function identified represented

less than their "true safe" capability level. (RX 3, 5, Crystal Bell report).

An April 26, 2010, report from Dr. Westin at Illinois Bone & Joint indicates Petitioner consulted with Dr. Westin with regard to a November 26, 2009 occurrence when she was attacked by a patient who pulled her hair and left arm. Per her report, this caused a painful left shoulder along with a neck and back injury. Physical therapy produced significant results and she returned to work. However, on February 23, 2010 she was opening the door when a person behind the door reached out and grabbed and pulled her neck which caused the resumption of cervical symptoms. She noted a painful left shoulder which worsened with overhead motion. (RX 2, 13-14).

On exam, Dr. Westin noted a previous surgical incision and mild tenderness at the AC joint. Forward elevation of the left upper extremity was limited; the right shoulder was normal albeit some impingement was noted on the abduction and internal rotation with deltoid area pain on supraspinatus testing. The neck was stiff. Dr. Westin diagnosed persistent weakness and pain of the left shoulder suggestive of a rotator cuff injury and recommended an MRI, requested review of the operative report from her last surgery in order to determine the exact nature of that procedure. (RX 2, 13-14).

Dr. Shapiro released Petitioner to unrestricted work effective May 12, 2010. (RX 2, 3). She was referred for scapular and cuff strengthening effective May 14, 2010, with a diagnosis of left biceps tendonitis. Dr. Westin also recommended a cortisone injection. (RX 2, 1-2).

Upon returning to work, Petitioner was feeling "pretty good. I stayed off long enough to heal, so I was feeling okay." (17).

Presently, Petitioner said she experiences spasm in her shoulder and her neck if she holds her arm up from two to three minutes. She cannot do her hair with her left shoulder and arm. When she

returned back to the unit in 2012, she was working in an office. She testified that she started receiving treatment for her neck and low back. But after she was placed back on the unit, she sustained more injuries – these injuries were not part of her case. (30).

Respondent introduced into evidence a Claim Summary Payment Sheet which reflects TTD payments made to Petitioner during the period from March 6, 2010 through March 14, 2011 in the amount of $33,912.32. (RX 4).

Exhibits:

Petitioner introduced the following exhibits into evidence:

Petitioner's Exhibit 1 – Report of Injury

Petitioner's Exhibit 2 – Employee Health Services records

Petitioner's Exhibit 3 – RIC Center for Pain Management records

Petitioner's Exhibit 4 – Dr. Shapiro records

Petitioner's Exhibit 5 – Illinois Bone & Joint/Dr. Westin records

The Respondent placed the following exhibits into evidence:

Case 10 WC 21737:

Respondent's Exhibit 1 – Report of Injury dated February 23, 2010

Respondent's Exhibit 2 – Dr. Matz April 19, 2010, report

Respondent's Exhibit 3 – ATI Physical Therapy April 29, 2010 FCE report

Respondent's Exhibit 4 – Claim Summary Payment Sheet (TTD payments)

Case 09 WC 45681:

Respondent's Exhibit 1 – University of Illinois Medical Center records

Respondent's Exhibit 2 – University of Illinois Medical Center physical therapy records

Respondent's Exhibit 3 – Dr. Shapiro/Illinois Bone & Joint Institute records

Respondent's Exhibit 4 – Dr. Ghanayem August 18, 2010, report

Respondent's Exhibit 5 – Dr. Ghanayem March 2, 2014, report

Case 10 WC 21738:

Respondent's Exhibit 1 – Dr. Player April 20, 2010, report

Respondent's Exhibit 2 – Dr. Player July 8, 2010, addendum report

Respondent's Exhibit 3 – Workers' Compensation Commission printout, Case 91 WC 14466

Respondent's Exhibit 4 – Workers' Compensation Commission printout, Case 95 WC 21860

Respondent's Exhibit 5 – Workers' Compensation Commission printout, Case 01 WC 46594

DISPUTED ISSUES

With regard to Issue F.: Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator makes the following findings.

The parties stipulated that Petitioner sustained accidental injuries arising out of and in the course of her employment on February 23, 2010, when she reported an incident wherein a patient pulled the keychain around her neck, causing a resumption of cervical symptoms that she had been

experiencing since November, 2009 when she sustained another accident at work (see 10 WC 21738). The Respondent disputed causal connection "in the context of the left shoulder," which causes the Arbitrator to infer that with respect to any claim for injury other than the left shoulder that there is such a connection between Petitioner's complaints of ill-being and the February, 2010 accident.

As regards the left shoulder condition, the Arbitrator finds that Petitioner failed to prove a causal connection between an injury to this body part and the accident at work on February 23, 2010. The primary basis for this is the statement made by Petitioner to Dr. Player who performed a Section 12 examination following the February 23, 2010 occurrence. At that time, she told Dr. Player specifically that she did not injure the left shoulder at the time of that occurrence. Rather, she attributed her shoulder condition to the accident at work in November, 2009. The Arbitrator has found that Petitioner sustained accidental injuries to the left shoulder arising out of and in the course of her employment on November 26, 2009 as alleged and that the condition of her left shoulder is causally connected to that accident. Therefore, the issue of causal connection with respect to the left shoulder has been decided favorably for Petitioner in another case.

As regards complaints of ill-being to other body parts in relation to the February 23, 2010 occurrence, the Arbitrator finds that Petitioner failed to prove a causal connection between this accident and any injuries to the cervical or lumbar spines. When Petitioner first presented for treatment at Health Services and, later, when she followed up with Dr. Shapiro at Illinois Bone & Joint, she attributed her condition to the November, 2009 accident. That there may have been an aggravation of the cervical condition at the time of the February occurrence is possible; however, this incident does not appear to have been a major one. Also, Petitioner on other occasions attributed her

various conditions to the November, 2009 accident almost to the exclusion of any other accident. There are references to injuries to her lumbar spine going back to the September, 2007 occurrence (09 WC 46581), but the November, 2009 occurrence superseded these. It does not appear that Petitioner injured her low back at the time of the February, 2010 occurrence based on her description of the accident.

The Arbitrator notes that Petitioner had multiple diagnostic studies of both the cervical and lumbar spines performed before and after the February, 2010 occurrence. All these studies revealed degenerative disc disease in both cervical and lumbar spines. Dr. Ghanayem noted that these were of longstanding nature. And Dr. Shapiro, Petitioner's principal treating physician throughout the time period in question, did not state a causal connection between Petitioner's condition of ill-being with regard to the cervical and lumbar spines and the February, 2010 accident.

The evidence failing to show Petitioner injured her left shoulder or low back as a result of the February, 2010 occurrence, the Arbitrator cannot find a causal connection between complaints of ill-being with regard to these body parts and the February, 2010 occurrence. As regards the cervical spine, the Arbitrator regards whatever injury Petitioner received to her cervical spine on February 23, 2010, to have been a temporary aggravation only. The totality of the evidence in the several cases for which Petitioner claims injuries to her cervical and lumbar spines reflects that the November 26, 2009 occurrence was more likely than not the principal cause of Petitioner's low back, cervical, and left shoulder injuries and that the February, 2010 occurrence contributed little to what by February 2010 was a long-standing condition. This finding is based in large part on Petitioner's statements to her medical providers, including Dr. Shapiro, as well as the physicians who examined Petitioner for her various claims: Dr. Ghanayem, Dr. Player, and Dr. Matz. The examinations of Dr. Matz and Dr.

Ghanayem were fundamentally normal but the Arbitrator infers that Petitioner more likely than not did suffer an aggravation of a pre-existing condition as a result of the November, 2009 occurrence. However, the Arbitrator cannot place a causal connection between Petitioner's current condition of ill-being and the February, 2010 occurrence.

With regard to Issue K.: What temporary benefits are in dispute, the Arbitrator makes the following findings.

The parties stipulated that Petitioner was off work for 43-6/7ths weeks following the February 23, 2010 occurrence. The TTD period was, in the Arbitrator's opinion, related to the November, 2009 accident. Specifically, Petitioner lost time from work resulting from the left shoulder injury. Any lost time for treatment for the cervical and lumbar conditions would have been attributed to the November, 2009 accident. In the various histories collected over the period in question, Petitioner was attributing her condition to the November, 2009 occurrence as well as making reference to the accident from September, 2007.

The Arbitrator has already determined that there is a causal connection between Petitioner's condition of ill-being as alleged and the November, 2009 occurrence and thus the period of lost time, notwithstanding its being related to an earlier accident, is a legitimate lost time period which the parties acknowledged. However, it appears also that Petitioner paid benefits for a period longer than the 43-6/7ths week period in question.

With regard to Issue L.: What is the nature and extent of the injury, the Arbitrator makes the following findings.

Based on the Arbitrator's decision in Case No. 10 WC 21738, the Arbitrator awards no disability in relation to the February 23, 2010, occurrence. The Petitioner's condition of ill-being as

alleged is causally connected to the November, 2009 accident and not the February 23, 2010 accident. The Arbitrator has taken into consideration the foregoing facts in making an award for disability in Case No. 10 WC 21738.

In relation to issues N.: Is Respondent due any credit, and Issue O.: Other, the Arbitrator makes the following findings.

The parties stipulated that Petitioner was off work and entitled to TTD during the period February 24, 2010 through December 23, 2010, a period of 43-6/7ths weeks. The parties also stipulated that the sum of $32,654.98 was paid to Petitioner as and for temporary total disability. As stated above, the Arbitrator is of the opinion that the lost time period relates not to the February 23, 2010 occurrence but rather to the November 26, 2009 accident at work. Notwithstanding this, Petitioner was entitled to temporary total disability benefits during the period in question per the parties' stipulation. However, the Respondent having paid a sum in excess of what Petitioner otherwise would have been due in temporary total disability benefits for the period in question, the Arbitrator grants a credit to the Respondent in the amount of $5,080.53 which represents an overpayment of TTD.

DATED AND ENTERED July 20, 2018

Arbitrator Kutt Carlson

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ara Gardner,
Petitioner,

vs.

NO: 10 WC 21738

University of Illinois at Chicago,
Respondent.

20IWCC0230

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 causal connection, benefit rates, permanent partial disability, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018 is hereby affirmed and adopted.

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

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

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

DATED: APR 17 2020
d-4/7/20
KAD/jsf
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARDNER, ARA
Employee/Petitioner

Case# **10WC021738**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

20IWCC0230

On 7/24/2018, 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 2.14% 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:

0598 LUSAK & COBB
JOHN E LUSAK
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

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

2461 NYHAN BAMBRICK KINZIE & LOWRY
WILLIAM A LOWRY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

0902 UNIVERSITY OF ILLINOIS CHICAGO
CLAIMS MANAGEMENT
1737 W POLK M/C 940 SUITE B9
CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

JUL 24 2018

PHILIP A. RABOIA, Acting Secretary
Illinois Workers' Compensation Commission

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

ARA GARDNER,
Employee/Petitioner

Case # **10 WC 21738**

v.

Consolidated cases:

UNIVERSITY OF ILLINOIS OF CHICAGO HOSPITAL,
Employer/Respondent

20IWCC0230

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 **KURT CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **April 16, 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. ☐ 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 **11/26/2009**, 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 **$33,630.48**; the average weekly wage was **$646.74**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$431.16**/week for **0** weeks, as the accident alleged caused no time lost from work.

Permanent Partial Disability: Person as a whole

Respondent shall pay Petitioner permanent partial disability benefits of $ **388.04** /week for **125** weeks, because the injuries sustained caused the **25** % loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

07-20-18
Date

JUL 24 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARA GARDNER, Petitioner, vs. UNIVERSITY OF ILLINOIS AT CHICAGO, Respondent.	)	No. 10 WC 21738

20IWCC0230

MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF FACTS

Petitioner sustained an injury on November 26, 2009, when a patient pulled her hair. This occurred in the day room where psychiatric patients come to eat and visit with family members. (20-21). Per her testimony, Petitioner was monitoring the day room and speaking with a patient. An irate patient came her way and jumped on top of her desk and grabbed her braids and started pounding on her. The patient pulled the braids out from her scalp. She apparently struck Petitioner about the face and jaw and hurt her shoulder and back. (21-23).

Petitioner appeared at Health Service on November 30, 2009 with a history of a work-related incident involving her scalp/hair, left shoulder, lower back, facial and hand abrasions/superficial lacerations. She was found unable to return to work at full duty and was placed on modified duty work restrictions and provided Ibuprofen. Examination of the left shoulder at that time revealed no obvious deformity; range of motion was limited in abduction and rotation, internal and external. (PX 2, 26-28). She followed up at Health Service on December 3, 2009, when she was released for full duty effective December 4, 2009. Exam at that time revealed no obvious deformity of the left

shoulder but range of motion remained limited. Dr. Marder commented that she was back to pre-injury baseline per her report. His exam showed persistent, mild tenderness on palpation of the supraspinatus area. (PX 2, 24-25).

She returned to Health Service on December 18, 2009. On exam, there was a ¼ inch abrasion to the left wrist. Petitioner reported having cleaned her wrist with peroxide. The wound was healing. She was diagnosed with a wrist abrasion and released to full duty. (PX 2, 21-22).

Per her testimony, she now wears artificial hair – some of her hair is natural but there is a "whole lot" missing. (23-24). She saw a dermatologist at UIC who made up a special concoction for use on her scalp. She also saw a doctor at Illinois Bone & Joint for her back and shoulder. Petitioner did not agree that she returned to work on November 30, 2009. But she was not sure – she stated "I am not sure about all of these different dates." (43-44).

With regard to the November 26, 2009, incident, Petitioner claimed an injury to her left shoulder, following which she sought treatment with Dr. Westin. Petitioner testified that she had never noticed any discomfort with her left shoulder before the injury. However, she stated some confusion with regard to who she did or did not see because "each injury they would send me to different doctors… [s] got filed here and some of it didn't." (46-48).

Petitioner presented Health Service on January 26, 2010, with a history of having been assaulted by an adolescent patient on November 26, 2009, when the patient grabbed her by the hair. She reported low back and left shoulder pain resulting from the incident. She offered no complaints of low back pain on January 26, but did report persistent left shoulder pain and range of motion limitation. The rotator cuff was tender and rotation limited. There was near full range of motion on abduction/adduction, with abduction slightly limited at 150 degrees. Dr. Marder commented that

there were equivocal signs of impingement but noted some symptom magnification. She was kept at full duty and referred to physical therapy. (PX 2, 19-20)

On February 24, 2010, Petitioner reported a history of a neck injury in 2007 and another cervical strain in November, 2009. She reported having been assaulted by a patient again on February 24, 2010 when she was pulled forward by the keychain she wore around her neck. On exam, cervical range of motion was limited; the Tinel's was positive for median neuropathy. An MRI was ordered and Petitioner released to work with restrictions of no lifting, pushing, or pulling over 20 pounds. (PX 2, 16-17).

Restrictions were continued on March 3, 2010, when the doctor commented on the results of the MRI which showed degenerative disc disease and mild to moderate central and foraminal stenosis at C5-6. Petitioner was placed off work. (PX 2, 14). She was referred to physical therapy and remained in an off work status. (PX 2, 11-12). Her status was unchanged on March 15, 2010, and she remained off work as of April 1, 2010. She had been seeing Dr. Shapiro for low back pain and had an appointment for left shoulder issues. She was taking Flexeril but was advised to wean off this medication. Cervical spine motion was limited as of April 1, 2010. There was near full range of motion in the left shoulder with a painful arc of motion and signs of impingement. The rotator cuff was tender on palpation. Assessment as of April 1, 2010 was multiple cervical, lower back, and left shoulder injuries with a recent work related reinjury. (PX 2, 5-6).

Petitioner returned to Dr. Shapiro on March 25, 2010, when he stated he had not seen her for a year. He had recommended an L4-5 fusion at that time. She had participated in physical therapy which provided improvement but she was then reinjured in November of 2009 when a patient beat her, which caused a worsening of neck and back symptoms and pain radiating down both arms. She

also mentioned an episode at work when a patient pulled the cord around her neck, causing a worsening of neck pain. The doctor also mentioned a chronic condition of neck pain. Petitioner had been working. He examined Petitioner's cervical spine at that time and noted limitations in flexion and extension. Neurological testing was normal. The lumbar spine was tender to palpation and flexion to 80 degrees, at which point Petitioner complained of pain. The doctor noted a cervical MRI which he stated confirmed moderate degeneration at C5-6; an EMG/NCV of the upper extremities was normal. The doctor diagnosed a soft tissue injury of the cervical spine and recommended an updated MRI which was discussed at the April 27th visit. He placed Petitioner off work at that time. (PX 4, 18-19; RX 3, 38-39).

Petitioner was evaluated by Dr. Player on April 20, 2010 when she presented with a history of injuries to the neck, back, and left shoulder on November 26, 2009. She reported having sustained no left shoulder injury on February 23 or February 24, 2010. She was seen in the emergency room on the date of accident when she received treatment for her back; later, she was evaluated for her neck at health service. She reported to Dr. Player that she told the ER doctor that she hurt her shoulder and that her low back and left shoulder were evaluated by health service who recommended she take Ibuprofen and use ice on the shoulder. She reported being unable to lift the left shoulder from November until the "next incident" in February, 2010, after which she received therapy which helped the shoulder.

With regard to an incident on February 23, 2010, she was bending forward at the waist while unlocking a door when the person behind it flung open the door, causing her neck to jerk forward. She told Dr. Player that she injured her neck at that time, not the shoulder. (RX 1, 7). Petitioner reported to Dr. Player that the left shoulder was better, albeit she had pain every day. Symptoms

were located over the anterior, superior left shoulder area and were described as throbbing, aching, burning, and tiring.

On exam Dr. Player noted movement in the abduction plane increased symptoms; resting and using ice improved symptoms. He observed surgical scars on both shoulders: a scar on the anterior left shoulder represented at least two surgeries; there was another surgical scar on the left lateral shoulder. He found restriction of left shoulder motion and generalized tenderness over the anterior left shoulder. (RX 1, 8-9). He considered Petitioner's subjective complaints consistent with objective examination findings with no symptom magnification. Diagnosis was left shoulder pain, status/post-multiple left shoulder surgeries for subluxation. (RX 1, 10-11). The doctor recommended an MRI and evaluation by a shoulder specialist.

Based on the history reported, Dr. Player found no causal relationship between an injury on February 23 or 24, 2010 to the left shoulder. Therefore, there could be no causal relationship between those injury dates and any abnormalities documented by a shoulder MRI. The doctor stated that Petitioner reported an injury on Thanksgiving Day, November 26, 2009, with a mechanism of injury involving a patient grabbing her by the hair, pulling her across a desk and out into a hallway. Dr. Player was of the opinion that if this mechanism of injury was accurate, it was possible that Petitioner sustained a left shoulder injury as a result of that incident. Dr. Player did note what he considered a "rich" prior history of injury and surgeries to the left shoulder joint. (RX 1, 13).

With regard to a return to work, Dr. Player was of the opinion that Petitioner was capable of returning to full and regular duty as a mental health counselor. This was despite positive objective left shoulder findings – the doctor considered her work activities as a counselor very limited. He answered a specific question regarding the February 24, 2010 incident, stating that whether Petitioner

was at maximum medical improvement as a result of this incident was not germane due to Petitioner's statement that she did not injure her left shoulder on that date. (RX 1, 13).

Dr. Player issued a record review report dated July 8, 2010 which summarized certain surveillance performed on April 20, 2010. The doctor noted Petitioner using the left upper extremity in fluid, flowing, and reciprocal motions in variance with the rigid holding of her left upper extremity against her upper torso at the time of the April 20, 2010 examination. This was documented on surveillance both before and after the exam. According to Dr. Player, this variance caused no change in the opinions he rendered at the time of the April 20, 2010 exam because she manifested additional positive objective left shoulder physical findings on the examination. (RX 2, 4-5).

On April 27, 2010, Dr. Shapiro stated that the current MRI confirmed L4-5 degeneration but there was no evidence of compression of any neural structure – this showed no interval change from an earlier MRI. The doctor noted moderate tenderness about the lumbar spine on that date which limited forward flexion of the lumbar spine. Straight leg raising was negative. The doctor discussed an FCE and a discography to confirm her symptoms and to determine if she was a surgical candidate. He took her off Norco and prescribed Celebrex. He released her to return to work without restriction on April 28, 2010. (RX 3, 26-27).

The Petitioner was referred for a functional capacity evaluation at ATI Physical Therapy on April 29, 2010. According to Crystal Bell, the specialist who conducted the test, the FCE was invalid. Ms. Bell stated that there were inconsistencies during certain portions of the test, selectivity of pain reports, and pain behaviors demonstrated during the test. She considered the results to represent a manipulated effort by the Petitioner which caused the functional abilities the Petitioner demonstrated to be less than their true-safe capability level. (RX 4, 7).

Dr. Shapiro reviewed the FCE results on May 6, 2010, when he stated that the Petitioner should be returned to full duty without restriction. He also stated that there was no reason to proceed with a discography of the lumbar spine. (PX 4, 5). He then saw the Petitioner on May 12, 2010, to discuss the test results. He advised her at that time that the evaluator felt she was manipulating the test and not performing to her full capabilities; therefore, the doctor determined that no discography should be performed and that she should return to work without restriction. The Petitioner strongly defended her effort during the test which apparently caused the doctor to recommend a second FCE witnessed by a neutral party. (PX 4, 4).

An April 26, 2010, report from Dr. Westin at Illinois Bone & Joint indicates Petitioner consulted with Dr. Westin with regard to a November 26, 2009 occurrence when she was attacked by a patient who pulled her hair and left arm. Per her report, this caused a painful left shoulder along with a neck and back injury. Physical therapy produced significant results and she returned to work. However, on February 23, 2010 she was opening the door when a person behind the door reached out and grabbed and pulled her neck which caused the resumption of cervical symptoms. She noted a painful left shoulder which worsened with overhead motion. (RX 2, 13-14).

On exam, Dr. Westin noted a previous surgical incision and mild tenderness at the AC joint. Forward elevation of the left upper extremity was limited; the right shoulder was normal albeit some impingement was noted on the abduction and internal rotation with deltoid area pain on supraspinatus testing. The neck was stiff. Dr. Westin diagnosed persistent weakness and pain of the left shoulder suggestive of a rotator cuff injury and recommended an MRI, requested review of the operative report from her last surgery in order to determine the exact nature of that procedure. (RX 2, 13-14).

When Petitioner saw Dr. Westin on April 26, 2010, she reported the above history of injury on November 26, 2009. She reported having improved after a few months of therapy and returned to work and a significant prior history to both shoulders, with civilization surgeries for both shoulders, the left shoulder most recently in 1988. After that surgery, she stated that her shoulder only bothered her a little bit with bad weather. Following the November 2009 incident, she felt well enough and required no additional treatment until February 23, 2010, when she sustained another injury when a patient grabbed and pulled a keychain which she had around her neck. She underwent therapy for the neck and shoulder for two months at the University of Illinois but the shoulder remained painful. (PX 5, 55).

On exam, Dr. Westin noted a deltopectoral incision of 7mm on the anterior left shoulder and a vertical incision anteriorly as well. There was mild tenderness anteriorly and laterally over the subacromial space without limitation on elevation and abduction and internal rotation of the left shoulder. The doctor also noted impingement on abduction, internal rotation and deltoid pain on the supraspinatus test. The doctor diagnosed a persistent left shoulder weakness and pain suggesting injury to the rotator cuff. He recommended an MRI to rule out a rotator cuff tear. (PX 5, 55-56).

The MRI was performed on April 30, 2010, and was significant for degeneration of the glenoid labrum with involvement of the superior labrum at the biceps labral anchor with minimal residual labral tissue identifiable. In addition, there was mild glenohumeral AC joint arthritis, evidence of the prior surgery, and moderate thinning and irregularity of the intra-articular biceps tendon which otherwise was intact. However, there was no full-thickness rotator cuff tear despite articular surface fraying of the supraspinatus and infraspinatus tendons. (PX 5, 43-44).

When the Petitioner saw Dr. Westin on May 14, 2010, he described capsular abnormalities related to the prior surgery but informed her that the rotator cuff was intact. He reviewed the operative note from her last surgery in 2000 when she underwent an acromioplasty. The rotator cuff was intact during this procedure. On exam, the Petitioner was very tender at the biceps groove anteriorly; she also complained of lumbar pain. He diagnosed left shoulder biceps tendonitis and injected the shoulder and subacromial space. He then referred her to physical therapy at Accelerated Rehabilitation where she was evaluated on May 19, 2010. (PX 5, 39-40).

Petitioner followed up with Dr. Westin on June 14, 2010 when she reported soreness along the bicipital tendon. Range of motion was full. The doctor reviewed a therapy note from Accelerated from June 10, 2010 which reflected full range of motion on that date as well and which stated that the Petitioner demonstrated increasing strength. No additional therapy was recommended. The Petitioner expressed a desire to return to work; the doctor indicated it would be helpful if she could be reassigned to a floor with a low risk of altercation. He released her with a prescription for independent exercise. (PX 5, 33).

When Petitioner saw Dr. Westin on December 6, 2010, she complained of persistent anterior shoulder pain. Apparently, she was not accepted for modified duty work. She was using only Ibuprofen. On exam, there was painful elevation anteriorly and tenderness over the biceps tendon extending into the muscle with a noted deformity. Supraspinatus testing was painful. X-rays revealed a Type I acromion, a postoperative finding; there was some calcification in the subacromial space. The most recent shoulder MRI revealed rotator cuff thinning with irregularity of the intra-articular biceps. The doctor diagnosed persistent biceps tendinosis, unrelieved by injection. He recommended an arthroscopy and biceps tenodesis. (PX 5, 26-27). The surgery was performed on December 15,

2010, a procedure described as a subpectoral biceps tenodesis with debridement of a degenerative labral tear and partial thickness tear of a previously repaired rotator cuff. Post-operative diagnoses were: chronic biceps tendonitis secondary to multiple procedures and recurrent trauma, degenerative glenoid labral tear, and partial articular surface tear of previously repaired rotator cuff with no cuff defect. (PX 5, 17-18). At the first post-operative visit on December 23, 2010, the Petitioner reported that her preoperative bicep tenderness was gone. The doctor referred the Petitioner to physical therapy. (PX 5, 16).

The Petitioner returned to Dr. Westin on January 5, 2011, reporting a new onset of pain radiating into the left thumb which occurred during therapy. She reported doing well with regard to the shoulder. The doctor noted minimal tenderness over the biceps and a positive Spurling test on neck range of motion. Pain increased with extension and rotation of the cervical spine to the left. The doctor added therapy for the cervical spine to her therapy protocol. (RX 5, 14). On February 11, 2011, rotator cuff strength was good and there was full range of motion. The Petitioner complained of some pain down the forearm. She was progressing in therapy. The doctor recommended further therapy with Advanced Physicians (Marc O'Neal). She had been taking Norco and Celebrex; the doctor advised continuing use of the Celebrex. (RX 5, 9-10). On March 11, 2011, the Petitioner was advised to transition to a home/independent therapy program. (RX 5, 4).

The doctor referred the Petitioner for a follow-up MRI of the cervical spine which was conducted on March 21, 2011. This revealed multiple degenerative changes at 5-6, including a mild anterior osteophyte and a broad-based spondylotic ridge effacing the ventral subarachnoid space and mild spinal stenosis. There was no gross cord compression or cord edema seen. In addition, there

was hypertrophy at C5-6 leading to foraminal stenosis; the hydromyelia seen on previous studies could not be confirmed. (RX 5, 1-2).

Petitioner was examined on two occasions by Dr. Ghanayem. At the first exam on August 18, 2010, Petitioner presented with a history of two low back injuries and an injury to the cervical spine which occurred at the time of the second back injury. She reported that she had stopped work in February, 2010 and was released back to regular work activities two months before the exam in August but had not yet returned to work. She complained of pain at the base of the lumbar spine, numbness in her feet and hand, and pain at the base of the cervical spine with pain referred to the posterior right shoulder. On exam, the doctor noted tenderness at the base of the lumbar spine with no spasm and normal lumbar motion; the neurological exam was normal. Dr. Ghanayem reviewed diagnostic studies from 2007 which revealed disc degeneration at L4-L5, longstanding in nature. The doctor assessed subjective complaints and examination findings consistent with soft tissue neck and back pain. He did not recommend a lumbar fusion despite the thought that she may have needed one in 2007. He considered her able to work regular duty. (RX 4)

Petitioner returned to Dr. Ghanayem on March 3, 2014, with no interval history of injury. She complained of ongoing neck and low back pain with fluctuating arm symptoms. There was no leg pain but some referred pain to the right upper thigh and buttock. She reported extensive therapy and multiple injections since the last evaluation. She produced a report from Dr. Sampat of Parkview Orthopedics who recommended against surgical intervention for the cervical spine. (RX 5). Dr. Ghanayem's exam was generally normal except for some limitation of extension and flexion of the lumbar spine. The doctor reviewed an October, 2011, MRI which revealed degenerative changes in the lumbar spine; a recent cervical MRI that revealed mild cervical spondylosis with no

neurological compression at any level. This produced a negative EMG study of both upper and lower extremities which the doctor felt was an expected finding based on the MRI scans. He considered Petitioner able to return to regular work without restriction and stated that she was not in need of any further treatment. (RX 5).

Petitioner settled three prior cases involving the left shoulder/arm: 91 WC 14466, date of accident October 15, 1990, settled for 55% loss of use of the left arm. (RX 3); 95 WC 21860, date of accident June 26, 1994, settled for 8.8% loss of use of the left arm (RX 4); 01 WC 46594, date of accident July 5, 2001, settled for 20% loss of use of the left arm, a settlement which included consideration for other body parts. Petitioner agreed that she received these settlements (48-49; RX 5). There were 11 other cases connected to and which were made part of the settlement to case 01 WC 46594: 01 WC 46595 and 01 WC 56301 through 01 WC 56310 inclusive, 11 additional cases. (RX 5).

Exhibits:

Petitioner introduced the following exhibits into evidence:

Petitioner's Exhibit 1 – Report of Injury

Petitioner's Exhibit 2 – Employee Health Services records

Petitioner's Exhibit 3 – RIC Center for Pain Management records

Petitioner's Exhibit 4 – Dr. Shapiro records

Petitioner's Exhibit 5 – Illinois Bone & Joint/Dr. Westin records

Respondent submitted into evidence the following exhibits.

Case 10 WC 21738:

Respondent's Exhibit 1 – Dr. Player April 20, 2010, report

Respondent's Exhibit 2 – Dr. Player July 8, 2010, addendum report

Respondent's Exhibit 3 – Workers' Compensation Commission printout, Case 91 WC 14466

Respondent's Exhibit 4 – Workers' Compensation Commission printout, Case 95 WC 21860

Respondent's Exhibit 5 – Workers' Compensation Commission printout, Case 01 WC 46594

Case 09 WC 45681:

Respondent's Exhibit 1 – University of Illinois Medical Center records

Respondent's Exhibit 2 – University of Illinois Medical Center physical therapy records

Respondent's Exhibit 3 – Dr. Shapiro/Illinois Bone & Joint Institute records

Respondent's Exhibit 4 – Dr. Ghanayem August 18, 2010, report

Respondent's Exhibit 5 – Dr. Ghanayem March 2, 2014, report

Case 10 WC 21737:

Respondent's Exhibit 1 – Report of Injury dated February 23, 2010

Respondent's Exhibit 2 – Dr. Matz April 19, 2010, report

Respondent's Exhibit 3 – ATI Physical Therapy April 29, 2010 FCE report

Respondent's Exhibit 4 – Claim Summary Payment Sheet (TTD payments)

DISPUTED ISSUES

With regard to Issue L.: What is the nature and extent of the injury, the Arbitrator makes the following findings.

The parties stipulated that Petitioner sustained accidental injuries arising out of and the in course of her employment on November 26, 2009, and that the Petitioner's current condition of ill-being is causally connected to said incident. Therefore, the sole issue in dispute is the nature and extent of Petitioner's injuries arising from said incident.

Petitioner testified that she sustained injuries on the above date when an irate patient jumped on top of her desk, grabbed her braids and "started pounding on her." The patient pulled Petitioner's braids out from her scalp and apparently struck Petitioner about the face and jaw. This caused injuries to her shoulder, cervical spine, and lower back. She gave this report to Health Services on November 30, 2009. She was placed on restricted and released for full duty effective December 4, 2009. Dr. Marter commented that she was back to pre-injury baseline; however, symptoms persisted.

The Petitioner testified that she now wears artificial hair as there is a "whole lot" missing, but this was not demonstrated at trial. About her other injuries, she reported having injured the left shoulder and low back as a result of the incident. As of January, 2010, she reported persistent left shoulder pain; Dr. Marter noted signs of impingement, albeit equivocal. She was kept at full duty but referred to physical therapy.

Petitioner reported a subsequent injury on February 24, 2010, (see case no. 10 WC 21737). When she reported this later injury, she made reference to having injured her neck as a result of the November, 2009 occurrence.

Petitioner was working under restrictions and referred for additional MRI studies. The results

of these were similar to those taken the year previous: degenerative disc disease in the cervical and lumbar spines. She was referred to therapy and placed off work in March 2010. It appears she participated in therapy for both cervical and lumbar spines as well as the left shoulder. Dr. Shapiro was recommending a lumbar fusion.

When Dr. Shapiro recommended the fusion, the history he recorded was that Petitioner suffered a worsening of neck and back symptoms with pain radiating down both arms as a result of the November 2009 occurrence. She also mentioned the recent occurrence of February 2010; however, it is clear that Petitioner attributed her multiple symptoms to the November, 2009 occurrence.

The Arbitrator notes that although virtually all the intensive conservative care Petitioner received was after the February 2010 occurrence, the Petitioner nonetheless had been attributing, and continued to attribute, her multiple problems to the November, 2009 occurrence. This applies as well to the multiple evaluations Petitioner underwent in 2010 and later. For example, when Petitioner saw Dr. Player on October 20, 2010, she reported injuries to the back, neck, and left shoulder in November, 2009. She specifically denied having sustained a left shoulder injury in February, 2010. Dr. Player was of the opinion that Petitioner's left shoulder condition was causally related to the November, 2009 occurrence and that despite the Petitioner's "rich" prior history of left shoulder injuries and surgeries, that Petitioner required treatment for the left shoulder in relation to the November, 2009 occurrence. Dr. Player specifically found no causal connection between the February, 2010 occurrence and the left shoulder condition. The Dr. Player record review report from July, 2010 confirmed his diagnosis and causal connection opinion.

The Petitioner had been referred for an FCE on April 29, 2010. The Arbitrator notes that once

Dr. Shapiro received the FCE results that Petitioner was placed back at full duty without restriction as the test revealed manipulation. The doctor also canceled a previous recommendation for a discography in anticipation of surgery. However, Petitioner continued to treat for the left shoulder – she saw Dr. Westin on April 26, 2010, on referral from Dr. Shapiro. She reported the left arm injury she sustained on November 26, 2009, which also caused a neck and back injury. Cervical symptoms resumed after the February, 2010 occurrence. The doctor diagnosed a potential rotator cuff injury and ordered updated diagnostic studies.

The April 30, 2009 MRI was significant for a degenerated glenoid labrum, glenohumeral AC joint arthritis, and an irregularity of the intra-articular biceps tendon. Dr. Westin also described capsular abnormalities related to the prior surgeries. Dr. Westin prescribed physical therapy at that time. Petitioner did not follow up until December, 2010 when she was still apparently under restriction. Neither therapy nor injections had caused a reduction in symptoms. Therefore, he performed surgery on December 15, 2010, a biceps tenodesis with debridement of a degenerative labral tear and partial thickness tear of the previously repaired rotator cuff. Post-operative diagnoses were chronic biceps tendonitis secondary to multiple procedures and recurrent trauma.

On follow up with Dr. Westin, Petitioner's shoulder symptoms subsided but she continued to complain of cervical spine pain. A follow up MRI performed on March 21, 2011, again revealed multiple degenerative changes, most prominent at C5-6.

Dr. Ghanayem examined Petitioner on two occasions in 2010 and 2014. On August 18, 2010, Dr. Ghanayem reviewed diagnostic studies from 2007 which revealed disc degeneration at L4-5, longstanding in nature. He considered Petitioner's subjective complaints and examination findings consistent with soft tissue neck and back pain. Dr. Ghanayem indicated that if Petitioner may have

needed a lumbar fusion in 2007 that she did not need one in 2010, and considered her able to work regular duty. On March 3, 2014, Dr. Ghanayem's exam was within normal limits except for some limitation on extension and flexion of the lumbar spine. An MRI performed in October, 2011 revealed degenerative changes in the lumbar spine; a more recent cervical MRI revealed mild cervical spondylosis with no neurological compression at any level. An EMG study of both upper and lower extremities was negative. The doctor again considered Petitioner able to work regular duty.

Considering the forgoing, the Arbitrator finds that Petitioner sustained permanent partial disability as a result of the November 26, 2009, accident at work. With regard to the left shoulder, it is evident from Petitioner's testimony that she did not re-injure this part of the body in February, 2010, this based on the Dr. Player report. As regards the cervical and lumbar spines, Petitioner has had multiple MRI studies both before and after November 2009, which reveal degenerative disc disease most prominently at C5-6 and L4-5. It is apparent Petitioner is not in need of surgical intervention. Further, these findings are of longstanding nature per Dr. Ghanayem. It does not appear that the cervical or lumbar MRI studies have shown any interval changes over the several years when Petitioner was tested and re-tested.

There is no medical opinion which states within any degree of medical certainty that the findings on the cervical and lumbar MRI studies related in whole or in part to any of the accidents at work, including the November 26, 2009, accident. The Arbitrator finds that the pathology revealed by these studies pre-existed that date, especially the findings on lumbar MRI as there had been an MRI performed after the September, 2007 accident. Nonetheless, the Arbitrator notes the degree of treatment Petitioner received in 2010 and later at the Rehabilitation Institute in 2014 for the cervical

and lumbar spines and infers that the pre-existing conditions of Petitioner's cervical and lumbar spines was aggravated by the November 26, 2009 accident. Also, Dr. Ghanayem noted some loss of lumbar motion at the time of the 2014 IME. Therefore, the Arbitrator awards Petitioner 15% man as a whole for what the Arbitrator determines was an aggravation of the pre-existing conditions of the cervical and lumbar spines, and for the hair loss resulting from the November 26, 2009 incident.

As regards the left shoulder, the Arbitrator finds a direct causal connection between the surgery performed by Dr. Westin in December, 2010, and the accident of November, 2009. Petitioner has had numerous left shoulder injuries and surgeries, including two major left shoulder surgeries. She has received multiple settlements and awards for injuries to the left shoulder which total 83.8% loss of use of the left arm – all prior settlements were obtained prior to the decision in *Will County Forest Preserve vs. Compensation Commission.* Acknowledging that there is no specific credit for the prior specific loss settlements against any disability the Arbitrator will award for the left shoulder injury in this case, the Arbitrator nonetheless notes that Petitioner has been compensated in the past for injuries to this body part. The distinction between specific loss under Section 8(e) and disability to the person under Section 8(d)2 as regards credit is immaterial given the previous condition of Petitioner's left shoulder. Therefore, the Arbitrator awards Petitioner 10% man as a whole as and for permanent partial disability in relation to the left shoulder injury Petitioner sustained on November 26, 2009 and the shoulder surgery Dr. Westin performed in December 2016.

July 20, 2018

Arbitrator Kurt Carlson

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ara Gardner,
Petitioner,
vs.

NO: 10 WC 21739

University of Illinois at Chicago,
Respondent.

20IWCC0231

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 benefit rates, causal connection, permanent partial disability, and temporary total disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 24, 2018 is hereby affirmed and adopted.

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

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

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

DATED: APR 17 2020
d-4/7/20
KAD/jsf
042

Kathryn A. Doerries

Maria E. Portela

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

GARDNER, ARA
Employee/Petitioner

Case# **10WC021739**

UNIVERSITY OF ILLINOIS AT CHICAGO
Employer/Respondent

20IWCC0231

On 7/24/2018, 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 2.14% 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:

0598 LUSAK & COBB
JOHN E LUSAK
221 N LASALLE ST SUITE 1700
CHICAGO, IL 60601

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

2461 NYHAN BAMBRICK KINZIE & LOWRY
WILLIAM A LOWRY
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

0902 UNIVERSITY OF ILLINOIS CHICAGO
CLAIMS MANAGEMENT
1737 W POLK M/C 940 SUITE B9
CHICAGO, IL 60612

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CchampaIGN, IL 61825

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

JUL 24 2018

Brandi A. Morris, Acting Secretary
Illinois Workers' Compensation Commission

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

ARA GARDNER,
Employee/Petitioner

v.

UNIVERSITY OF ILLINOIS OF CHICAGO HOSPITAL,
Employer/Respondent

Case # **10 WC 21739**

Consolidated cases:

20IWCC0231

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 **KURT CARLSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **April 16, 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. ☐ 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 **12/17/2009**, 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 **$33,798.44**; the average weekly wage was **$649.97**.

On the date of accident, Petitioner was **43** years of age, ***single*** with **0** dependent children.

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

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

ORDER

Temporary Total Disability

Petitioner failed to prove she sustained permanent disability or disfigurement as a result of the 12-17-09 accident. Therefore, the claim for benefits is denied.

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

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

Signature of Arbitrator

July 20, 2018
Date

JUL 24 2018

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARA GARDNER, Petitioner, vs. UNIVERSITY OF ILLINOIS AT CHICAGO, Respondent.	)	No. 10 WC 21739

20IWCC0231

MEMORANDUM OF ARBITRATOR'S DECISION

STATEMENT OF FACTS

Petitioner sustained a bite injury on December 17, 2009, while restraining a patient. Per her testimony, the patient bit her while she was performing the restraint procedure. She stated that the incident was witnessed and that she reported it and was sent to Health Services. (18). She returned to Health Service on December 18, 2009. On exam, there was a ¼ inch abrasion to the left wrist. Petitioner reported having cleaned her wrist with peroxide. The wound was healing. She was diagnosed with a wrist abrasion and released to full duty. (PX 2, 21-22). Petitioner returned to work without restrictions the following day.

Because the patient was HIV positive, she had to take a series of medications and was tested for HIV every three months. Currently, all tests had been negative for the HIV virus. Currently, she was being tested every six months. In addition, she had a course of antibiotics and received a Tetanus shot which produced an allergic reaction. (19-20).

With regard to issue L: What is the nature and extent of the injury, the Arbitrator makes the following findings.

Petitioner suffered an injury at work on December 17, 2009 when she was bit by a patient. Upon receiving medical treatment, she was found to have an abrasion on the left wrist. Otherwise, she received no further medical treatment for this occurrence. There is no medical evidence showing, or medical opinion stating, that Petitioner sustained permanent disability or serious and permanent disfigurement as a result of this incident.

In addition, Petitioner did not testify to any residual complaints of ill-being with regard to the December, 2009 occurrence nor did Petitioner display any serious and permanent disfiguring injuries resulting from said injury. Therefore, the Arbitrator denies the claim for additional compensation in relation to the December 17, 2009 occurrence.

Exhibits:

Petitioner introduced the following exhibits into evidence:

Petitioner's Exhibit 1 – Report of Injury

Petitioner's Exhibit 2 – Employee Health Services records

The Respondent placed the following exhibits into evidence:

Respondent's Exhibit 1 – University of Illinois Medical Center records

DATED AND ENTERED July 20, 2018

Arbitrator Kurt Carlson

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roxanne Thompson,

Petitioner,

vs. No. 17 WC18342

State of Illinois/Dept. of Public Health,

20IWCC0232

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

Petitioner testified that on February 24, 2017, she worked for the State of Illinois in the cancer registry, where she entered data on a keyboard all day, every day. She had worked for the State since 1988, and all of her prior positions were clerical in nature, also. Petitioner first noticed she had pain in her hands when she was typing. At the end of her workday, her hands would be sore; although on weekends, her hands usually felt better. Petitioner admitted she had experienced symptoms in her hands going back to 2010.

Petitioner had seen doctors for various pains in her hands prior to February 2017. In June 2014, she saw Dr. Larry Sapetti with complaints of bilateral thumb pain. He diagnosed her with arthritis and tendinitis of the thumbs. At that time, Dr. Sapetti prescribed Tylenol and thumb splints. In 2016, Petitioner prepared a First Report of Injury for injuries to her thumbs from typing and computer work on October 15, 2016. She also completed another Injury Report for November 29, 2016; that time, she reported she experienced pain to her right thumb, right wrist,

Bibliography

and multiple upper extremities, again from repetitive motions and typing. Throughout this time, however, Petitioner continued working.

On January 9, 2017, Petitioner saw Dr. Western for her hand symptoms. He diagnosed her with osteoarthritis of her thumbs and prescribed physical therapy. Petitioner testified that around February 17, 2017, her hand pain began to interfere with the performance of her job duties. Her constant typing and use of the space bar and mouse required her to flex her thumb, which caused pain. X-rays of her hands taken that day indicated she had osteoarthritis at the STT joints and the first CMC joints of both wrists.

On February 24, 2017, Petitioner first saw Dr. Ma for her hand pain, and informed him of her job duties. He reported her injuries were from, "Overuse and repetition with hands." When Dr. Ma saw Petitioner a few days later on February 27, 2017, he noted Petitioner's complaints of constant, sharp, throbbing pain which caused her difficulty when sleeping. At that time Petitioner wearing a splint for typing, but it did not help when she performed other activities. Petitioner testified that she reported her injuries to her employer.

On May 25, 2017, Dr. Ma operated on Petitioner. He performed a right thumb ligament reconstruction and tendon interpositional arthroplasty and a first extensor compartment release in the right wrist. He also provided a steroid injection to Petitioner's left thumb CMC joint. Petitioner reported that those procedures went well and alleviated her pain. However, her left thumb pain persisted and then worsened. On August 17, 2017, Dr. Ma operated on Petitioner's left thumb, performing a trapeziectomy, ligamentous reconstruction, and tendon arthroplasty with graft.

Petitioner returned to her prior job on November 1, 2017, and worked there until she voluntarily retired on March 1, 2018 – for reasons admittedly unrelated to her accident. She has since found another part-time job. Although Petitioner's thumbs are better now, they are still very weak.

Treating orthopedic surgeon, Dr. Jianjun Ma, testified via deposition that he first saw Petitioner on February 24, 2017 for pain in her ulnar wrist and thumbs. Petitioner told him her thumb symptoms were aggravated by typing and activities at work. After examination, Dr. Ma diagnosed Petitioner with significant bilateral thumb CMC joint arthritis and left wrist extensor tendon tenosynovitis. Petitioner's x-rays confirmed she had CMC joint arthritis. Dr. Ma recommended right wrist and thumb injections; he also recommended left thumb surgery because Dr. Western's non-surgical treatment did not help. Dr. Ma acknowledged that Petitioner's job activities were not abnormally strenuous and that she just did "normal typing." However, he opined that Petitioner's pain progressively worsened over the years as a result of her repetitive typing. He also opined that although her work activities did not cause her bilateral thumb joint arthritis, they would have aggravated her pain and symptoms to the point that surgery became reasonable and necessary. Finally, Dr. Ma opined that as a result of typing or overuse of her

hand, Petitioner's DeQuervain's tenosynovitis most likely worsened to the point that surgery was necessary.

Dr. Anthony Sudekum testified via deposition that on November 28, 2017, he conducted a Section 12 examination of Petitioner at Respondent's request. At the time of his exam, Petitioner had already undergone the two surgeries with Dr. Ma.

Dr. Sudekum acknowledged that Petitioner's complaints seemed valid, and that her arthritis condition likely did worsen over the 25 plus years she had worked for Respondent. However, he disagreed there was a causal connection between her work activities and her condition, because her work tasks were not repetitively forceful enough, over a long enough time, to have caused injury to her joints. He opined that Petitioner had other risk factors for developing arthritis: her age and gender.

The Arbitrator found Petitioner failed to prove by a preponderance of evidence that she had sustained an accident while working for Respondent on February 24, 2017. The Arbitrator found Dr. Sudekum's opinions more persuasive than Dr. Ma's, and did not believe Petitioner proved her injuries were the result of anything other than the normal degenerative aging process. The Arbitrator found persuasive Dr. Sudekum's opinion – that even if Petitioner did no typing, her conditions would have progressed at the same rate and required the same treatment.

The Commission views the evidence differently than the Arbitrator. It is unrebutted that Petitioner worked for over 25 years in positions which required her to type on a keyboard for most of her workday. It is also unrebutted that her symptoms worsened over time. Petitioner testified that by February 17, 2017, her symptoms had worsened to the point that they interfered with her ability to perform her job. Records in evidence corroborate Petitioner's testimony that her typing at work aggravated and worsened her pain and other symptoms.

The Commission finds Petitioner proved her bilateral thumb and right wrist conditions manifested on February 24, 2017, the date she was first seen by orthopedic surgeon, Dr. Ma. Although Petitioner had reported hand pain on dates prior to February 24, 2017, that was the date on which Dr. Ma documented Petitioner's conditions were the result of overuse and repetition with her hands.

Dr. Sudekum admitted that, given the presence of Petitioner's arthritis, her work activity of typing would cause pain. While Dr. Ma acknowledged that Petitioner's work activities did not *cause* her arthritis, he opined that her typing *aggravated* her pain and symptoms – to the point that treatment and surgery were required. Even though Petitioner may have had other risk factors for developing arthritis, those did not negate the fact that her work activities aggravated her condition. To be entitled to compensation for an injury, Petitioner need not prove that her injury was the sole causative factor in her subsequent treatment and disability, but only that it was *a* causative factor. If a pre-existing condition is aggravated, exacerbated or accelerated by

20IWCC0232

an accidental injury, the employee is entitled to benefits. *Rock Road Construction v. Industrial Commission*, 37 Ill.2d 12, 227 N.E.2d 65 (1967).

In assessing the nature and extent of Petitioner's work-related injuries, the Commission has considered the five factors enumerated in §8.1b(b) of the Act, and assigns the following weights to them:

(i) **Disability impairment rating:** *no weight,* because neither party offered into evidence an impairment rating from a qualified physician.

(ii) **Employee's occupation:** *moderate weight,* because Petitioner was released to full duty work without restrictions, and returned to her prior position at Respondent, until she retired months later. She admitted her work injury was not the reason why she retired. After her retirement, Petitioner began a part-time job with another employer.

(iii) **Employee's age of 56:** *minimal weight,* because Petitioner voluntarily took an early retirement after she was released to full duty.

(iv) **Future earning capacity:** *no weight,* because Petitioner presented no evidence to show a diminution of her future earning capacity as a result of her accident.

(i) **Evidence of disability corroborated by the treating records:** *significant weight,* because Petitioner ultimately had to undergo two surgeries after conservative care and treatment proved unsuccessful. Petitioner testified that she still experiences weakness in her thumbs, and she has difficulty gripping objects and opening jars. At Petitioner's last visit with Dr. Ma on January 26, 2018, Petitioner reported her left thumb constantly ached, and she rated her pain at 8/10.

Based upon the above, and all of the evidence of record, the Commission finds that Petitioner sustained permanent partial disability to the extent of 10% loss of use of each thumb, and 12.5% loss of use of her right hand, pursuant §8(e) of the Act.

At arbitration, the parties stipulated that medical expenses and temporary total disability were not issues in dispute (Transcript, pp. 4-5). Accordingly, the Commission makes no findings or awards relating to those issues.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 13, 2018, is hereby vacated. The Commission finds Petitioner proved an accident arising out of and in the course of her employment which manifested on February 24, 2017, and proved her bilateral thumb and right wrist conditions were causally related to that accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $768.01 per week for a total period of 40.825 weeks, as provided in §8(e) of the Act, for the reason that the injury caused the 10% percent loss of use of the right thumb (7.6 weeks), the 10% percent loss of use of the left thumb (7.6 weeks), and the 12.5% loss of use of the right hand (25.625 weeks).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

APR 17 2020

DATED:
o-03/05/2020
MP/mcp
68

Marc Parker

Barbara N. Flores

DISSENT

I respectfully dissent from the Decision of the Majority. The Majority reversed the Decision of the Arbitrator who found Petitioner neither sustained her burden of proving she sustained a repetitive trauma accident nor that her conditions of ill-being of bilateral thumb arthritis and right wrist tenosynovitis were causally related to her work activities and denied compensation. I would have affirmed adopted the well-reasoned Decision of the Arbitrator.

Petitioner testified that she worked for Respondent from 1998 to 2018 in clerical positions. Her last position was in the cancer registry in which she keyboarded "all day, every day." She testified that the continuous typing made her thumbs hurt. She was diagnosed with bilateral CMC arthritis and had surgery on both thumbs.

Medical records beginning in 2005 were submitted into evidence. In 2005 she presented to Dr. McKay complaining of a flare up of symptoms in her neck and upper back that stemmed

from a prior motor vehicle accident. She also noted she keyboarded and had pain in her hands at night. She also noted that she did not have symptoms at work and that she believed her workstation was appropriately set up.

In 2011, she prepared a patient questionnaire and pain diagram. She described pain in her hands and thumbs bilaterally. On January 13, 2015, Petitioner presented to Dr. Horvath and reported pain in her thumbs radiating into her wrists when "doing hair." Petitioner did hair styling part-time during her employment with Respondent. Dr. Horvath ruled out a prior diagnosis of rheumatoid arthritis and diagnosed bilateral CMC arthritis and DeQuervain's tenosynovitis. Petitioner had injections but declined physical therapy due to financial considerations.

Petitioner was referred to Dr. Ma for bilateral thumb arthritis. In the intake form, Petitioner indicated that she did not suffer an injury. Nevertheless, Dr. Ma noted that Petitioner was beginning a workers' compensation claim and Dr. Ma completed the appropriate paperwork. Dr. Ma performed surgery on Petitioner's right thumb on May 25, 2017 and on the left thumb on August 17, 2017.

Dr. Ma testified by deposition that the triggering mechanism of thumb arthritis is not really known, but it is very common with women. He opined that while typing did not cause Petitioner's arthritis, he believed that the constant typing could aggravate her long-standing chronic condition. He also acknowledged that her condition was progressive and worsened over time and that any activity with her hands at home or work would could cause pain. He also testified that Petitioner might have needed surgery in her thumbs even if she did not perform typing.

Dr. Sudekum also testified by deposition. Dr. Sudekum concluded that Petitioner's conditions of ill-being were not causally related to her work activities. He noted that in her position, Petitioner had duties besides keyboarding including using phones, copying, faxing, and other general clerical work, none of which would aggravate arthritis. He noted that none of these activities were forceful or caused any significant impact, which would be necessary to aggravate Petitioner's underlying thumb arthritis.

Dr. Sudekum also stressed that Petitioner had generalized arthritis in various areas including her knees, ankles, neck, feet, and shoulders, as well as her hands. He explained that Petitioner had the same type of arthritis that most people get with age but to varying degrees. He also noted that the condition is "primarily genetically determined." He also stressed that symptomology is not synonymous with causation and that Petitioner would have symptoms with various activities with her hands whether work-related or not.

In finding that Petitioner did not sustain her burden of proving accident or causation to her current conditions of ill-being, the Arbitrator found the opinion testimony of Dr. Sudekum more persuasive than those of Dr. Ma. She stressed that both doctors agreed on most things,

including the extent of Petitioner's underlying arthritis and that any activities with her hands could elicit pain. The Arbitrator also stressed that Dr. Ma acknowledged that Petitioner could have needed the surgeries even absent her keyboarding, and Dr. Sudekum's observation that the elicitation of symptoms did not connote permanent aggravation of a chronic degenerative condition of ill-being. I agree with the analysis of the Arbitrator in finding the opinions of Dr. Sudekum more persuasive than Dr. Ma. Therefore, I would have affirmed and adopted her decision.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator who found Petitioner neither sustained her burden of proving she sustained a repetitive trauma accident nor that her conditions of ill-being bilateral thumb arthritis and right wrist tenosynovitis were causally related to her work activities and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

Deborah L. Simpson

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMPSON, ROXANNE
Employee/Petitioner

Case# **17WC018342**

STATE OF ILLINOIS/DEPT OF PUBLIC HEALTH
Employer/Respondent

20IWCC0232

On 12/13/2018, 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 2.48% 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:

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2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

DEC 13 2018

Brandon J. Rios
Acting Co-Chairman & Director
Illinois Workers' Compensation Commission

CERTIFIED as a true and correct copy
pursuant to 28U.S.C. 1746

OCT 1 2019

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

- [ ] 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

ROXANNE THOMPSON
Employee/Petitioner

v.

STATE OF ILLINOIS/DEPARTMENT OF PUBLIC HEALTH
Employer/Respondent

Case # **17** WC **18342**

Consolidated cases: _____

20IWCC0232

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 **Christina Hemenway**, Arbitrator of the Commission, in the city of **Springfield**, on **September 27, 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. [x] 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. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [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 **February 24, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned $**66,561.17**; the average weekly wage was $**1,280.02**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

ORDER

As explained in the Arbitration Decision, Petitioner failed to prove by a preponderance of the evidence that she sustained an accident which arose out of and in the course of her employment on February 24, 2017. All benefits are denied.

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

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

Signature of Arbitrator

December 12, 2018
Date

DEC 13 2018

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

20IWCC0232

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ROXANNE THOMPSON
Employee/Petitioner

v. Case #: 17 WC 18342

STATE OF ILLINOIS/DEPARTMENT OF PUBLIC HEALTH
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner filed an Application for Adjustment of Claim on June 22, 2017, alleging repetitive trauma injury to her right wrist, right thumb, and both hands arising out of and in the course of her employment with Respondent. The Application alleged an accident date of October 15, 2016. At the time of trial, Petitioner moved to amend the Application to reflect an accident date of February 24, 2017. Respondent had no objection, and the Application was so amended *instanter*. Respondent disputed that the injury arose out of and in the course of Petitioner's employment, that proper notice had been given, and that her condition was causally related to her employment, and further disputed liability for permanent partial disability. There was no issue as to medical bills, temporary total disability, or average weekly wage.

Petitioner's Testimony

On February 24, 2017, Petitioner was 56 years old, single, and had no dependent children. She testified she worked for the State of Illinois from 1998 until retirement on March 1, 2018, during which time she held three or four different positions, all of which were clerical. She currently works for Kalola Cleaning Company a couple of hours each day, 20 hours a week. Her duties include cleaning, vacuuming, and refilling toilet paper, but she does not do any scrubbing. On the date of the alleged accident, she worked in the cancer registry, a position she had held since 1999. She testified that the job required her to work on abstracts, entering data all day, every day. She worked a four-day work week, 9 ½ hours Monday through Wednesday, and 9 hours on Thursday. She had two 20-minute breaks and a half hour lunch break every day. She explained that she worked off of two different computer monitors and accessed three to four different databases to add data, treatments, surgeries, and any updates or changes from treatment notes, and that she had to merge data. She used a keyboard to enter the information, going from one screen to the other to access data and make changes. She testified that the information she entered was

not simply data but was also verbiage which required her to use both hands in typing on the keyboard.

Petitioner reviewed Petitioner's Exhibit 2, which she identified as three photographs of her at her workstation. Picture A shows her with both monitors, the keyboard, and the mouse. Picture B shows her sitting, which she testified is how she positioned herself on a normal day. Picture C is another picture of her with her monitors, keyboard, and mouse, taken from a different angle. The Arbitrator notes that all of the equipment is on top of a modular desktop. PX2.

Petitioner reviewed Petitioner's Exhibit 3, which she identified as a three-page document she prepared which details her job duties. She testified that performing "change/deletes" was when she added most of the verbiage to the abstracts. She explained that people in the cancer registry can have up to six or seven abstracts (a/k/a/ primaries or cases) and that she had to get into each abstract to add documentation from the change/delete submissions from the hospitals, physicians, etc. When there were multiple abstracts, she had to open and verify any changes on each of the 34 screens for each abstract, then add all of the verbiage in each abstract.

Petitioner testified that around February 24, 2017, she saw her primary care physician and talked to him about her hands. She explained that it had gotten to the point where it was hard to do her job, she couldn't sleep, and her hands hurt all the time. She noted she had been taking Ibuprofen for about two years at that point and she had been treating with her primary physician, Dr. Sapetti. She testified that she talked with him about her work but did not report an injury to her employer. He eventually referred her to Dr. Western on November 29, 2016, who did an injection in one hand. She declined an injection in the other hand, due to the pain. She followed up with Dr. Western on January 9 and February 17, 2017. She completed a notice of injury for her employer around that time and testified she did so because she could not work due to the pain. She was then referred to Dr. Ma, a hand surgeon. She testified she talked with him about her job and the job requirements. He recommended surgery for the carpometacarpal (CMC) joint arthritis in her thumbs.

Petitioner testified that the continuous typing of her job made her thumbs hurt. Specifically, she stated that using the space bar, using the mouse to go from screen to screen, and typing verbiage required her to flex her thumbs which caused pain. She noticed that many times her symptoms were better on the weekends and increased throughout the work week.

Petitioner testified that she underwent an EMG, which was negative. She eventually underwent surgery on May 25, 2017, for right-sided CMC arthritis and DeQuervain's disease, which alleviated all the pain. She was taken off work and used her sick time and vacation while she was off. She had a second surgery on August 17, 2017 on the left side. She testified that both surgeries alleviated her pain but did leave her with weakness. She returned to work around November 1, 2017, and worked until she retired on March 1, 2018.

Petitioner testified that currently her thumbs are doing better but are very weak. She has difficulty with everyday activities such as taking the plastic off cottage cheese, opening jars, gripping items, and the like. She is able to perform all the duties of her current job.

On cross-examination, Petitioner admitted that she had issues with her hands going back 14 years, to January 2005, when she complained of numbness and throbbing in her right hand. She admitted she had been diagnosed with arthritis in several areas of her body. She acknowledged she had complained to her doctor about pain in her hands, including when she was cutting hair, on January 29, 2007, and January 21, 2009. She admitted she had undergone an EMG on September 13, 2010, due to issues with her hands. From Respondent's Exhibit 10, Petitioner reviewed a patient intake form that she completed and signed on February 20, 2011. She admitted that she marked on the form that she had pain in both hands, among other body parts. She acknowledged that on January 13, 2014, she complained of bilateral thumb pain to Dr. Sapetti, who diagnosed arthritis and tendonitis and prescribed splints. She admitted that on November 29, 2016, she again complained to Dr. Sapetti of bilateral thumb pain and advised him that the pain had been going on for a couple of years. She admitted that she saw Dr. Western on January 9, 2017, that he had diagnosed osteoarthritis of the thumbs and prescribed physical therapy, and that she did not undergo therapy because of the overall cost and her co-pays. She admitted that she saw Dr. Ma on February 24, 2017, the amended date of accident alleged, and completed a patient intake form at that time. On the intake form she was asked if she had an injury and she answered "no"; she further indicated she had had symptoms since 2014, which had come on gradually.

Continuing on cross-examination, Petitioner acknowledged she had reviewed Respondent's Exhibit 14, the position description for Cancer Registrar 2, which was her position. She agreed that the description fairly and accurately portrayed her duties. She testified that when entering information, she used the mouse to click with her index finger and also typed in verbiage, such as where the patient was diagnosed and treated and what kind of treatment was rendered. She explained that any changes that were made had to be entered throughout the record. She testified that she typed most of the time she was at her work station.

Petitioner acknowledged that on April 25, 2017, she called the 800 number to report a claim with an accident date of November 29, 2016, and noted she reported the accident to supervisor Lori Koch, as evidenced by the Form 45 Report of Injury (RX13) and the Employee's Notice of Injury (RX12, PX1). She further acknowledged that the original Application for Adjustment of Claim (RX5) listed the date of accident as October 15, 2016. She also acknowledged that she completed another Employee's Notice of Injury on February 28, 2017, and listed the date of accident as "January 2015" and further noted that she reported the accident to Lori Koch. Petitioner testified that she is right-handed.

On re-direct examination, Petitioner testified that, with regard to cutting hair, she "did a couple of haircuts now and then", probably one or two a month, and also gave her mother a perm. She denied that this was done on a regular basis or that it was a regular business for her. Petitioner reviewed the intake form she completed for Dr. Ma (RX10, pg.87) and confirmed that she indicated that her hands were weak and sore and that the symptoms were made worse by typing all day. With regard to the various dates of accident used in documents, Petitioner testified that she did not know exactly when her injuries started and that she "had to make up a date...because workman's comp wanted a date". She explained that her hands had been hurting for a long time and they finally got bad enough to seek treatment.

Medical Records and Other Exhibits

Medical records from Springfield Clinic were submitted by both parties, dating back to 2005. The Arbitrator breaks them down by year and summarizes pertinent records as follows.

2005. On January 25, Petitioner saw Dr. McKay, who noted a motor vehicle accident in July 2003 with injuries to her neck and upper back. Petitioner complained of a flare-up after moving furniture in her basement following a flood. She also reported she did keyboarding on a daily basis and had a lot of numbness in her hand intermittently in the middle of the night. She had throbbing in her right hand and was worried she had a pinched nerve. It was noted, *"None of the numbness or throbbing occurs when she's at work. Thinks she has her work station set up appropriately."* Assessment was acute cervical strain with possible right side radiculopathy, right trapezius strain, and intermittent ulnar neuritis. RX10.

On November 10, Petitioner complained of right-side pain in her back and neck, as well as occasional chest pain. On December 9, she reported neck and back pain. On December 20, she reported episodic chest pain, back and neck pain, and numbness of the fingers. RX10.

2006. On January 27, Petitioner reported chronic low back pain. On January 31, Physician's Assistant Marissa Cowell authored a letter which stated that Petitioner had mild arthritis in her back that caused some chronic pain in the lumbar area. She asked that Petitioner be allowed to use a heater at her desk because cold temperatures tended to cause her more discomfort. On August 4, Dr. McKay authored a letter to Petitioner regarding her rudeness to the nursing and reception staff on multiple occasions. She was advised that Dr. McKay may have to discontinue his services if she was not nicer when interacting with the staff. RX10.

2007. On January 29, Petitioner complained of neck and back pain, into her right shoulder. She also reported that she wakes up with pain into her hands. She advised she had been told in the past she may have rheumatoid arthritis but she was not sure. She was referred to physical therapy and to Rheumatology. It was suspected she may have fibromyalgia. RX10.

2008. On November 14, Dr. McKay made a chart entry that Petitioner had been discharged from his practice "because of rude behavior and a personality conflict" with him. He authored a letter to her reflecting same and advising her to continue care with another physician. RX10.

2009. On December 21, Petitioner presented to Dr. Larry Sapetti with complaints of pain around her right elbow for two weeks. It was noted, "She said it really bothered her when she was mopping her father's floor. When she cuts hair, rolling perms it bothers her. Those are all the stuff she did after her data entry job at the state all day." Assessment was lateral epicondylitis. She underwent an injection and was instructed to use a tennis elbow band. RX10.

2010. On September 8, Petitioner complained of chronic headaches as well as pain in her right elbow/forearm with some tingling and numbness. An EMG was ordered. On September 13, Petitioner underwent an EMG/NCS on bilateral upper extremities. She reported numbness in the fingers of both hands which "started about a year ago", as well as pain in her elbows. The study

was essentially normal, with no evidence of median or ulnar neuropathy, cervical radiculopathy, or peripherical neuropathy or myopathy. RX10.

2011. On February 20, Petitioner completed a patient history form for Dr. Benjamin Stevens in Orthopedics & Podiatry. She noted she was being seen for left foot pain present for three months. She completed a pain diagram and marked that she had pain in both hands and thumbs, as well as in various other body parts. RX10.

2013. On January 10, Petitioner underwent an EMG requested by a Dr. Becker. It appears it was done on the right lower extremity; however, the report appears to be incomplete. RX10.

2014. On January 13, Petitioner presented to Dr. Sapetti with bilateral thumb pain. She reported it hurt most at the carpometacarpal joint and somewhat at the metacarpophalangeal joint. She noted that she typed a lot and used her hands all the time. There was tenderness at both joints and she had signs of DeQuervain's tendonitis as well. Assessment was arthritis and tendonitis of the thumbs. She was instructed to wear thumb spica splints at night and take Tylenol as needed. On November 14, she was seen for colitis and nerves. Assessment was ulcerative colitis and pancolitis. Adjustments were made to her medications. RX6, RX10.

2015. On January 13, Petitioner presented to Dr. Jeffrey Horvath for evaluation of rheumatoid arthritis previously diagnosed by Dr. Fleischli. She reported pain in the CMC joints, right worse than left, with some radiating pain into the wrists, as well as occasional numbness in the fourth and fifth fingers. She noted the symptoms bothered her if she wrapped her thumbs underneath her fingers and "when she does hair". She also noted she did a lot of repetitive work as well. Following examination, Dr. Horvath opined that Petitioner did not have rheumatoid arthritis, but did have osteoarthritis of the CMC joints and DeQuervain's. He recommended splinting and Tylenol and potentially injections of the basilar thumb joints. RX4, RX9, PX4. On June 12, Petitioner presented to Dr. Sapetti for pain on the right side of her neck. RX10.

2016. On January 28 Petitioner was seen for stress/nerves and pain in her right lower quadrant. She reported she had a lot of stress from work and may be getting reprimanded or possibly even fired. Assessment was anxiety disorder and depression. On March 25, she followed up for anxiety and stress and reported she had been suspended from work for 30 days due to using the government internet for personal use. She was referred to counseling and her medication was adjusted. On April 8, she followed up for situational anxiety and ulcerative colitis. FMLA papers were completed on her behalf, based on the ulcerative colitis. She returned on April 13 for abdominal bloating. She reported severe stress at work due to being suspended and having problems with her management. Petitioner followed up for the same issues on September 8. On October 19, she reported being in an auto accident the day before and complained of pain in her head, neck, and ribs. RX10.

On November 29, Petitioner presented to Dr. Gary Western for bilateral thumb pain and right third toe pain. She completed an intake form and noted that her problems started with typing. She denied having seen any other physician for this problem. She did not provide an answer to the question of whether the issue was work related. She indicated a history of rheumatoid arthritis. Dr. Western noted she had bilateral moderate CMC arthritis, right worse than left, with current

symptoms actually worse on the left. She reported occasional swelling and difficulty gripping. She had tenderness, positive Finkelstein's, painful motion, and reduced grip. There was evidence of arthritis in both hands. Assessment was bilateral CMC arthritis and bilateral DeQuervain's tenosynovitis. She was given a splint for her left wrist and referred to therapy. RX10.

2017. On January 9, Petitioner returned to Dr. Western with continued complaints of bilateral thumb pain. She advised she chose not to go to therapy, due to the co-pay, but noted that the splint had been beneficial. She reported pain at the base of her thumb that radiated up into her forearm, especially with gripping and ulnar deviation of the wrist. She had tenderness to palpation in the CMC joint of both thumbs, pain with motion, and positive Finkelstein's. Assessment was DeQuervain's tenosynovitis and primary osteoarthritis of both first carpometacarpal joints. She underwent cortisone injections in both wrists/first dorsal compartment. RX10, PX4.

On February 17, Petitioner returned to Dr. Western and reported that the injection helped some on the right but not on the left. She continued to complain of pain in the base of the thumbs, especially with gripping, lifting, and twisting, and weakness in her grip. She noted that even manipulating the doorknob was painful. Bilateral hand x-rays were taken and compared to those of January 13, 2015. They showed osteoarthritis and other degenerative changes. It was noted that the changes at the first CMC joints had progressed since the previous x-rays. Assessment was basal joint arthritis of both thumbs, right greater than left, and pain in the thumb and wrist, with the left more painful than the right. Repeat injection was done on the left but declined on the right. RX10, PX4, RX7.

On February 24, 2017, Petitioner presented to Dr. Jianjun Ma, upon referral by Dr. Western. She completed an intake form and indicated she was being seen for arthritis and tendonitis in both thumb joints, which had been present since 2014. To the question of whether she had an injury, she wrote "no", and stated that the problem came on gradually. She indicated that she was bothered performing normal activities of daily living, that she typed all day, and that her hands were weak, sore, and inflamed. She noted a history of rheumatoid arthritis and stomach ulcers. Dr. Western noted she was being seen for evaluation of bilateral basilar joint osteoarthritis. Examination of the left upper extremity showed significant tenderness with palpation to the first extensor compartment and CMC joint area, positive grind test, limited range of motion, and positive Tinel's to the cubital tunnel. Examination on the right showed significant tenderness to the CMC joint and positive grind test. Assessment was numbness and tingling in left hand, primary osteoarthritis of bilateral first carpometacarpal joints, and DeQuervain's tenosynovitis on the left. After discussing options and previous unsuccessful treatment, surgery was recommended. An EMG/NCS was ordered to evaluate possible bilateral ulnar nerve compression. It was noted that Petitioner was "in the process of applying for worker's compensation". Dr. Ma completed an Initial Workers' Compensation Medical Report that day. He diagnosed left wrist DeQuervain's tenosynovitis and bilateral CMC osteoarthritis and noted, "This would be aggravated by repetitive motion." RX10, PX4.

Petitioner underwent an EMG/NCS by Dr. Narla on March 24, 2017. He noted a six to seven month history of tingling and numbness in the fingers up to the elbows and a significant amount of arthritic changes in the CMC joints with tenderness. The testing showed no evidence

of ulnar entrapment neuropathy, carpal tunnel compression of the median nerve, peripheral neuropathy, or radial sensory neuropathy. RX10, PX4.

On March 31, she returned to Dr. Ma, who reviewed the negative findings of the EMG/NCS. She reported continued numbness and tingling of both hands and pain in both thumbs, and noted that the symptoms were aggravated at work. Examination was unchanged and surgery was again recommended. RX10, PX4.

On April 12, Petitioner presented to Dr. Sapetti for follow up on her arthritis. He noted she had arthritis which had created tenosynovitis. He opined, "The tenosynovitis I believe is definitely overuse." Dr. Sapetti agreed she had degenerative osteoarthritis in both hands and metacarpal phalangeal joints as well as tenosynovitis. He further agreed surgery was warranted. RX10, PX4.

On April 25, Petitioner returned to Dr. Ma and reported continued bilateral hand pain which "was aggravated with repeated motion at work such as typing". She rated the pain at 10/10 and stated she could not live with it on a daily basis. Examination was unchanged, as was Dr. Ma's recommendation for surgery. RX10, PX4.

On May 25, 2017, Petitioner underwent surgery by Dr. Ma, which consisted of (1) right thumb ligament reconstruction and tendon interpositional arthroplasty; (2) harvest of right flexor carpal radialis tendon; (3) right wrist first extensor compartment release; and (4) steroid injection of the left thumb CMC joint. Post-operative diagnoses were bilateral thumb carpometacarpal arthritis and right wrist DeQuervain's disease. She followed up with Dr. Ma on June 9 and reported continued pain in her left thumb, with limited relief from the injection, as well as pain in the right thumb. She returned on June 19 and reported increased pain over the right thumb and base of the cast. The cast was removed and replaced, which provided relief. RX10, PX4.

On July 11, she returned to Dr. Ma and reported she had gotten her cast wet when she was using a tile saw. She complained of aching pain in the right hand. She was instructed to continue home exercises and avoid heavy lifting, pushing, or grasping. Dr. Ma indicated she was not ready for heaving typing and should remain off work. Petitioner also complained of worsening pain in the *left* thumb CMC joint area. She declined an injection and was prescribed Voltaren gel. She followed up on August 1 and reported improved strength, range of motion, and pain in her right thumb but continued pain in her left thumb. Dr. Ma noted that conservative measures, including injection, on the left thumb had not helped and he recommended surgery. PX4.

On August 17, 2017, Petitioner underwent surgery on the left thumb by Dr. Ma, which consisted of (1) trapeziectomy; (2) ligamentous reconstruction; (3) tendon interpositional arthroplasty; and (4) flexor carpal radialis (FCR) tendon graft. Post-operative diagnosis was CMC joint arthritis. She followed up on September 1 and reported improved pain. She returned again on September 29 and reported improved pain but some numbness and tingling to the tip of the left thumb. She noted she recently injured her right hand when she slid down four steps at home and tried to stop herself with her hand and complained of stiffness and pain which was constant and achy. X-rays were negative for fracture or dislocation. PX4.

On November 3, Petitioner presented to Dr. Sapetti with complaints of neck pain for about two and a half months. She explained she had just returned to work after an extended leave. Assessment was cervicalgia. She declined physical therapy, was prescribed a short course of prednisone, and was instructed to use heat, ice, and topicals. On November 17, she underwent a cervical MRI, which was compared to a CT scan of July 2, 2014. It showed multilevel arthritis, most pronounced at C6-7, and a disc bulge with stenosis at C6-7. She returned to Dr. Sapetti on November 29, who reviewed the MRI with her. He recommended physical therapy and prescribed Flexeril and Ultram as necessary. PX4.

On December 15, Petitioner returned to Dr. Ma and reported she was doing well with improvement in pain. She complained of numbness and tingling in the bilateral ring and small fingers which woke her at night. She was advised to continue home exercises and scar modalities. A repeat EMG/NCS was ordered to address the numbness and tingling. PX4.

2018. On January 5, Petitioner underwent an EMG/NCS, which was compared with the study done in March 2017. It revealed (1) no evidence of carpal tunnel compression on the right; (2) borderline carpal tunnel compression on the left, which was noted to not be producing her symptoms; (3) no evidence of cubital tunnel compression bilaterally; (4) no evidence of peripheral neuropathy. PX4.

Petitioner returned to Dr. Ma on January 26, 2018, and reported improved strength in her right hand, significant pain in the left thumb, and difficulty performing some activities. Dr. Ma noted the EMG/NCS results and borderline carpal tunnel syndrome. He recommended continued exercises and follow up in three months. PX4. The Arbitrator notes this is the final treatment record from Dr. Ma or any other physician.

Dr. Ma testified by way of deposition on February 6, 2018. He is a Board Certified Orthopedic Surgeon. He testified consistent with his treating records. Dr. Ma testified that he initially diagnosed Petitioner with significant arthritis in both thumb CMC joints and with extensor tendon tenosynovitis. He explained that tenosynovitis is inflammation of the tendon and that when the tendon is swollen it is too tight to glide, which causes pain. He noted there are many reasons for the inflammation, but that it was very common with repeated motion with the thumb. Further, Petitioner reported that the pain in her thumbs was aggravated by typing at work. He opined that prolonged typing could affect her symptoms. PX5.

Dr. Ma summarized his treatment of Petitioner, including the two surgeries. He noted he last saw her on January 26, 2018, at which time she was doing great except for some occasional pain and weakness. He opined that she would reach maximum medical improvement one year after the second surgery, which was August 17, 2017. PX5.

Dr. Ma was presented with a lengthy hypothetical by Petitioner's counsel regarding her job duties during her employment with Respondent, including that all of the jobs were full time and "required continuous computer use"; that her symptoms began around 2014 but she did not seriously start treating until she saw Dr. Western; that she noticed pain at the end of the workday; and that the pain lessened over the weekend. Based on the hypothetical, Dr. Ma opined that Petitioner's typing with her thumb aggravated her symptoms of pain from arthritis in the CMC

joint in both thumbs, to the point that surgery became reasonable and necessary. Dr. Ma testified that by the time he first saw Petitioner, her symptoms had been going on for years and was a chronic situation. He agreed that the pain got progressively worse through the years due to the repetitive typing. He explained that the same was true of the DeQuervain's in her wrist. He opined that any motion of the thumb, such as typing, required the tendon to slide through a tunnel, which aggravated the symptoms to the point that surgery became reasonable and necessary. PX5.

On cross-examination, Dr. Ma explained that in the joints in the body there is cartilage and under the cartilage is bone, and with osteoarthritis the cartilage itself will inflame and with repeated motion the cartilage will die and expose the bone. He noted that osteoarthritis is triggered in the beginning by many things, such as age, activities, or genetic reasons. He agreed that the condition is more common in women and more common the older a person gets. He could not state to a reasonable degree of medical certainty that Petitioner did not develop the condition as a result of one of those triggers. PX5.

Dr. Ma conceded that once Petitioner developed osteoarthritis, any activity with her hands could cause pain, whether it be typing at work or handling a gallon of milk at home. Dr. Ma defined "aggravation" as any activity that made symptoms worse. He testified that Petitioner's work activities did not cause her osteoarthritis, but rather aggravated it. He again opined that any activity that caused pain was an aggravation of the condition. He conceded, however, that progression of the condition could not clearly be traced to a specific activity. He explained that over time the cartilage got thinner and thinner, until the bone was completely exposed. He conceded that as the condition progressed, even if Petitioner did not type at all, she might still have needed the surgeries. PX5.

Dr. Ma agreed with the Arthritis Foundation that half of women will experience osteoarthritis by the time they are 85 years old and that it usually occurs with no specific cause. He agreed that certain factors contributed to causing the condition, including age and gender. PX5.

Dr. Ma testified that even if the hypothetical regarding Petitioner's job duties was not accurate, his opinions would not change, as he relied upon Petitioner's history to him that her work activities caused pain. It did not matter to him how many hours a day she worked or typed. He agreed that Petitioner's job activities were not abnormally strenuous, and believed it was "just normal typing". PX5.

Dr. Ma could not state with a reasonable degree of medical certainty when Petitioner's arthritis in her thumbs and hands developed, but agreed it was present as early as 2015, based on x-rays. As to the DeQuervain's tenosynovitis, he testified that the condition was diagnosed as early as 2015 by Dr. Horvath. Dr. Ma agreed that when Petitioner saw Dr. Western in February 2017 she complained of pain in the base of her thumbs with gripping, lifting, and twisting, and that even manipulating the doorknob was painful. He conceded that she made no reference to her work and there was nothing in Dr. Western's note about her work. He further conceded that Petitioner stated on the intake form for his office that her symptoms had started in 2014 and that they had come on gradually. PX5.

Dr. Ma agreed that during Petitioner's first visit with him on February 24, 2017, x-rays were taken which showed significant arthritis of the CMC joints of the thumbs, and that his assessment was degenerative osteoarthritis in both hands and metacarpophalangeal joints. He explained that degenerative means it gets worse over time and is not acute. PX5.

Dr. Ma testified that it would take up to a year for Petitioner to recover from her surgeries. He could not state whether she would have a full recovery and may still have some pain and/or weakness. He noted that a functional capacity evaluation may be necessary, depending on her symptoms, to determine if she needs any permanent work restrictions. However, she would not need the FCE if she is retiring, which is what she indicated to Dr. Ma. PX5.

On re-direct examination, Dr. Ma confirmed that Petitioner was currently released to full duty work. PX5.

On November 28, 2017, Petitioner was evaluated by Dr. Anthony Sudekum of Missouri Hand Center, Respondent's Section 12 examiner. She reported to Dr. Sudekum that for several years prior to her surgeries in 2017 she had gradually worsening pain and intermittent swelling in her bilateral thumbs and wrists. She stated that since her surgeries, her hands were significantly better but she still experienced pain in her left thumb and hand, though not in her right hand. She still had intermittent numbness and tingling in both ring and small fingers at night. She complained of decreased grip strength bilaterally and difficulty opening jars, squeezing a toothpaste tube, and the like. She noted she was still using a wrist brace/wrap on both wrists while at work, but had been working full duty since November 1, 2017. RX1, Dep.RX2.

Petitioner reported to Dr. Sudekum that she worked four days a week, 7:00 a.m. to 5:00 p.m. and worked at her computer workstation for most of her workday, entering information into an electronic database. She estimated she worked on approximately 200 cancer cases per day but was unable to say how many pages of typing she performs each day. RX1, Dep.RX2.

Dr. Sudekum obtained a medical and work history from Petitioner, performed an examination, and reviewed treating records. His assessment was status post bilateral thumb basal joint arthroplasties, with a reasonably good result from the procedures. He noted Petitioner still had soreness in the area of the surgeries, as well as persistent untreated arthrosis in the hand and wrist, including degenerative arthritis at the scaphoid-trapezoid articulation directly adjacent to the thumb basilar joints, and arthritic changes elsewhere in the carpus. He opined that the arthrosis continued to be a cause of pain, stiffness, swelling, and weakness in her bilateral hands and wrists. He further opined that Petitioner currently had some symptoms and findings on exam which may be indicative of cubital tunnel syndrome, including nocturnal numbness and tingling in the bilateral ring and little fingers. RX1, Dep.RX2.

Dr. Sudekum opined that Petitioner's job tasks and duties as a Cancer Registrar 2 involved light manual, clerical activity. He noted she did not give any history of a specific traumatic accident or incident that may have caused or aggravated the pathologic processes and anatomic changes associated with basilar joint arthritis. The exception was her fall at home in August 2017, which may have resulted in injury to her right thumb, wrist, or hand. Dr. Sudekum opined that there was no indication in the records or by Petitioner's own description of her job activities that

she performed abnormally strenuous activities that would have caused or aggravated the pathology associated with the thumb basilar joint arthritis or cubital tunnel syndrome. He further noted several non-work-related risk factors which could contribute to the development of these two conditions, including her gender, her age, and her generalized osteoarthritis affecting multiple joints of bilateral hands, wrists, elbows, knees, feet, and cervical spine. RX1, Dep.RX2.

Dr. Sudekum explained that basilar joint arthritis and cubital tunnel syndrome were chronic degenerative conditions that occur randomly and sporadically in the adult population, may be genetic and/or idiopathic in origin, and may be associated with individual anatomy and other comorbid factors and conditions. He opined that the cause of Petitioner's generalized arthritis was a genetic predisposition. He further opined that when the majority of employees who perform the same job tasks do not develop a chronic degenerative condition, but some do, this suggested that it is the inherent variability in the individuals that leads to the development of the condition. He noted that it was possible and likely that Petitioner would have experienced some symptoms associated with basilar joint arthritis while performing her normal job duties. However, "this should not be misunderstood to implicate that activity as a cause or progression of the underlying arthritic pathology". He opined that Petitoner's job duties did not cause or aggravate the pathology or development of basilar joint arthritis and/or cubital tunnel syndrome, and further that she would have developed the conditions regardless of her job activities. RX1, Dep.RX2.

Dr. Sudekum believed that the medical treatment rendered to Petitioner to date had been reasonable and necessary. He did not believe she required any specific treatment for the osteoarthritis at that time, but opined that it was likely she may have gradually progressive arthritic symptoms in the future that would require treatment, including medications, injections, occupational therapy, and/or surgery. He suggested that she be evaluated and treated for her generalized osteoarthritis by a rheumatologist. He opined that Petitioner could resume full duty at work and all her normal activities of daily living, and that she would reach maximum medical improvement one year post-surgery. RX1, Dep.RX2.

Dr. Sudekum testified by way of deposition on April 3, 2018. He is a Board Certified Plastic and Reconstructive Surgeon and has a subspecialty certification in surgery of the upper extremity. He treats about 20 to 30 patients per week and does about one IME per week. He testified consistent with his report of November 28, 2017. RX1.

Dr. Sudekum testified that he had a detailed discussion with Petitioner about her job duties and concluded that the job did not result in any progression or aggravation of her pathologic condition of basilar joint arthritis. He explained that her clerical tasks did not involve forceful impact and were not likely to cause injury to the joints. He described the tasks and duties as benign in terms of any potential causation. He testified that he relied upon the job information that Petitioner gave him directly in forming his opinion. RX1.

Dr. Sudekum testified that Petitioner's underlying osteoarthritis is a thinning of the articular cartilage at the joints. As the cartilage becomes thinner, bony osteophytes or outgrowth of bones can grow next to the joints. As that occurs, the joint space can be lost, which causes pain due to the lack of cartilage. This happens all over the body, such as in Petitioner's case when the condition was present in her knees, ankles, feet, neck, hands, and shoulders. The condition is

primarily genetically determined, is progressive, and in some cases can become very severe. He testified that, because osteoarthritis is a progressive condition, it will get worse regardless of what a patient does. Dr. Sudekum noted that Petitioner had non-work-related risk factors for the development and/or progression of osteoarthritis. Specifically, especially for basilar joint arthritis, approximately 70 percent of those cases are seen in women. It typically starts in the mid to late middle ages, age 50 and on, and progresses. RX1.

Dr. Sudekum testified that he read Dr. Ma's deposition and disagreed with his opinion that Petitioner's symptoms were aggravated by work. He noted that it was certainly possible that she experienced *symptoms* when she was doing her job, just as she would when brushing her hair or making dinner or buttoning her blouse. He noted that any of those activities could cause her to feel symptoms with basilar joint arthritis. He opined, however, that performing her job duties did not affect the pathology of the condition, did not make the condition worse, and did not aggravate the underlying condition. He noted that almost anything Petitioner did would cause symptomatology and that, regardless of her employment activities, she would have required the same treatment on the same timetable. RX1.

Dr. Sudekum testified that Petitioner had also been diagnosed with DeQuervain's stenosing tenosynovitis. He explained that that tendon was right next to the inflamed arthritic joint and that it was very common for patients with arthritis to also have tenosynovitis, and that it would be secondary to the underlying arthritic inflammatory and degenerative condition. RX1.

Dr. Sudekum testified that Petitioner stated her hands were significantly better than prior to her surgeries, but that she still had some pain in her thumb and up into her wrist. He opined that she reached maximum medical improvement in May 2018 for the right hand and in August 2018 for her left hand. RX1.

On cross-examination, Dr. Sudekum testified that it was possible Petitioner would require additional surgeries of the upper extremities, due to the significant arthritis of the scaphoid trapezoid trapezium, which is directly adjacent to the basilar joint. He noted there was still significant arthritis between the scaphoid and the trapezoid and that the joint may need to be fused in the future if the becomes more severely arthritic. RX1.

Dr. Sudekum acknowledged that Petitioner experienced symptoms while performing her regular job duties, but pointed out that she noticed symptoms *all the time*, which was documented in the treating notes. He specifically pointed to the intake form she completed for Dr. Ma, wherein she stated that she had symptoms whenever she used her hands. He reiterated his opinion that Petitioner's work duties did not make her condition worse; rather, she simply experienced symptoms while at work. He explained that over the years Petitioner worked for the State, her condition likely did worsen. However, that was due to the progression of the condition itself and not due to her work duties. He noted that a significant direct trauma or fracture to a joint could cause post-traumatic arthritis, but there was no evidence that Petitioner had sustained either. RX1.

The parties submitted several reports of injury completed on various dates in 2017 and listing various dates of accident.

1. On February 21, Respondent completed a Form 45/Employer's First Report of Injury with a date of accident October 15, 2016. It reflected that Petitioner reported she had sustained bilateral thumb injuries/basal joint arthritis which were caused by repetitive motion of typing and computer work from 7 am to 5 pm. RX3.
2. On February 24, Dr. Ma completed an Initial Workers' Compensation Medical Report with a date of accident October 15, 2016. It reflected Petitioner had left wrist DeQuervain's tenosynovitis and bilateral CMC osteoarthritis "aggravated by repetitive motion". PX1.
3. On February 28, Petitioner completed an Employee's Notice of Injury with a date of accident "January 2015". She reported injury to her left and right thumb basal joints from repeated use of thumbs typing ten hours a day for 29 years. She included additional details on page two and stated that although she was a licensed cosmetologist she had not done hair since 1985. She stated that she kept her license so should could buy products, but that she did not do hair at all. RX2.
4. On April 25, Petitioner completed an Employee's Notice of Injury with a date of accident November 29, 2016. She reported injury to right and left hands, wrists, and thumbs due to repetition of using her hands typing all day. She noted she reported the accident to her supervisor Lori Koch on April 18. PX1, RX12.
5. On April 25, Respondent completed a Form 45/Employer's First Report of Injury with a date of accident November 29, 2016. It reflected that Petitioner reported she had sustained injury to multiple upper extremities from repetitive movement/typing ten hours a day, four days a week. RX13.
6. On May 31, Petitioner signed the original Application for Adjustment of Claim with a date of accident October 15, 2016. She reported injury to her right wrist, right thumb, and bilateral hands. RX5.

CONCLUSIONS OF LAW

The Arbitrator hereby incorporates by reference the above Findings of Fact, and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After review of the evidence and due deliberations, the Arbitrator finds on the issues presented at trial as follows.

In support of the Arbitrator's decision relating to issue (C), whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds the following:

To obtain compensation under the Illinois workers' Compensation Act, a claimant must show by a preponderance of the evidence that he suffered a disabling injury arising out of and in the course of his employment. 805 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1013 (1st Dist. 2011); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57 (1989).

The Arbitrator notes that Petitioner put forth a theory of repetitive trauma in support of her claim that she sustained an accident that arose out of and in the course of employment. Illinois recognizes that a claimant's condition may not always arise out of a single incident of trauma and, thus, benefits may be awarded for repetitive trauma. However, even when repetitive trauma is

asserted as a theory of accident, the employee must still show that the job duties were, in fact, repetitive. *Williams v. Industrial Comm'n*, 115 Ill.2d 524, 529-530 (1987).

An employee who alleges injury based on repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury. There must be a showing that the injury is work related and not the result of a normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill.2d 524, 529-530 (1987).

The Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that she sustained an accident which arose out of and in the course of her employment. In so concluding, the Arbitrator finds significant Petitioner's underlying chronic medical condition, the history contained within the medical records, and the well-reasoned opinions of Dr. Sudekum.

It is undisputed that Petitioner suffers from generalized osteoarthritis in multiple joints, including bilateral hands, wrists, elbows, knees, feet, and cervical spine, as well as basilar joint arthritis in her thumbs. This is documented in the medical records as early as 2006. Both Dr. Ma and Dr. Sudekum testified that there are several triggers for osteoarthritis, including age, gender, and genetics. Dr. Ma agreed that the condition was more common in women and more common the older a person gets. Dr. Sudekum opined that the cause of Petitioner's arthritis was genetics.

It is also undisputed that as early as 2005 Petitioner was complaining (to Dr. McKay) about numbness and throbbing in her hands at night and that she mentioned she did keyboarding on a daily basis. She reported to Dr. McKay, however, that the symptoms did *not* occur when she was at work and that she believed her work station was set up appropriately. This was 12 years prior to the alleged date of accident, and her symptoms began while she was *home, at night*. She again complained in 2007 of waking up with pain in her hands and was told she likely had arthritis. In 2009 she complained of pain in her right elbow, which was worse when mopping her father's floor and when cutting hair and rolling hair perms. While the complaint at that time was to her elbow, the Arbitrator takes note of the activities described by Petitioner which caused symptoms.

In 2010, Petitioner again complained of right elbow/forearm pain, tingling, and numbness. She also reported numbness in the fingers of both hands which started a year prior. In 2011, She saw Dr. Stevens for pain in her left foot but also completed an intake pain diagram, on which she marked that she had pain in both hands and thumbs, as well as in various other body parts.

In 2014, Petitioner complained to Dr. Sapetti of bilateral thumb pain, mostly at the carpometacarpal joint and somewhat at the metacarpophalangeal joint. She was diagnosed at that time with arthritis and tendonitis. She had the same complaints to Dr. Horvath in 2015. She reported pain if she wrapped her thumbs underneath her fingers and when she "does hair". She stated she did repetitive work; however, the Arbitrator notes she did not indicate that she had pain while performing her work. The diagnosis was again osteoarthritis, as well as DeQuervain's.

On November 29, 2016, Petitioner saw Dr. Western for the first time and complained of bilateral thumb pain, which she indicated started with typing. As the above summary shows, however, this is not supported by her medical history. When completing the intake form, she left blank the question of whether the issue was work related. She was once again diagnosed with

bilateral CMC arthritis and bilateral DeQuervain's tenosynovitis. Dr. Western made no indication of an opinion that these conditions were related to Petitioner's work activities, either at the first visit or at subsequent visits.

When Petitioner first saw Dr. Ma on February 24, 2017, she completed an intake form and indicated she was being seen for arthritis and tendonitis in both thumbs. To the question of whether she had an injury, she wrote "no". She indicated that the problem bothered her during normal activities of daily living and whenever she was using her hands, which is consistent with the medical records going back to 2005, and that she typed all day. She advised Dr. Ma that she was in the process of applying for worker's compensation. Dr. Ma completed a medical reported and noted that her DeQuervain's tenosynovitis and bilateral CMC osteoarthritis would be "aggravated by repetitive motion". The Arbitrator finds significant, however, that in his deposition Dr. Ma testified that his definition of aggravation was *any* activity that made her symptoms worse, whether it was handling a gallon of milk at home or typing at work. Petitioner again reported to Dr. Ma on March 31, 2017, that her symptoms were aggravated at work. However, it is clear from the record that her symptoms were, in fact, aggravated with *any* activity.

Dr. Ma and Dr. Sudekum are actually in agreement on most things. They agree that osteoarthritis is a progressive condition which, as it progresses, causes worsening pain, swelling, and other symptoms. They agree that Petitioner was at risk of developing arthritis due to her gender, age, and genetics. They further agree that Petitioner's work activities did not cause her generalized osteoarthritis or her bilateral basilar thumb arthritis. While Dr. Ma testified that her work activities aggravated her condition, he again reiterated that any activity which caused pain was considered by him to be an aggravation of the condition. He conceded that progression of her condition could not be clearly traced to a specific activity. He further conceded that as the condition progressed, even if Petitioner did not type at all, she might still have needed the surgeries she had undergone. He conceded that prior to Petitioner seeing him, the record clearly showed that she complained of pain in the base of her thumbs with any gripping, lifting, or twisting, and that it was painful to even turn a doorknob.

Dr. Sudekum gave a thorough explanation of osteoarthritis as a thinning of the articular cartilage at the joints, which leads to osteophytes next to the joints and the loss of joint space, which causes pain in the joints. He noted that the condition is progressive and gets worse regardless of what a patient does. He agreed that it was, indeed, possible that Petitioner would have experienced *symptoms* while performing her job, just as she would have experienced symptoms when brushing her hair or making dinner or buttoning her blouse. He opined that performing her job duties did not affect the pathology of her condition, did not make the condition worse, and did not aggravate the underlying condition. He pointed out and emphasized, on direct and on cross-examination, that the treating records clearly documented that Petitioner had symptoms *all the time*, whether at work or when performing activities of daily living. Her work duties did not aggravate or make her arthritis condition worse; rather, she simply experienced *symptoms* while at work. Further, regardless of her employment activities, she would have required the same treatment on the same timetable.

With regard to the DeQuervain's tenosynovitis, Dr. Sudekum explained that the tendon involved was right next to the inflamed arthritic joint and that it was very common for those

patients with osteoarthritis/basilar thumb arthritis to also have tenosynovitis. The tenosynovitis would be secondary to the underlying arthritic inflammatory condition and degenerative condition, rather than Petitioner's work activities.

The Arbitrator notes the nearly identical opinions held by Dr. Ma and Dr. Sudekum with regard to Petitioner's underlying arthritic condition, the progression of the condition, and her symptoms while performing nearly any activity. While at first glance, Dr. Ma appears to say that Petitioner's work activities aggravated her condition, he goes on to say that *any* activity that caused symptoms so aggravated the condition. As Dr. Sudekum pointed out, however, experiencing *symptoms* with an activity is not the same as that activity actually *aggravating* the condition.

The Arbitrator finds Dr. Sudekum's opinions and explanations to be well-reasoned and persuasive, and the Arbitrator relies upon them in rendering this Decision.

Based on the foregoing and the record in its entirety, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that she sustained a repetitive trauma accident to her bilateral hands and thumbs on February 24, 2017, that arose out of and in the course of her employment with Respondent. All other issues are rendered moot and the Arbitrator makes no findings regarding same. All benefits are denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SALVADOR ALARCON-HERRERA,
Petitioner,

vs. NO: 15WC 18505

MULTI - TEMPS,
Respondent.

20IWCC0233

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, permanent disability, temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 28, 2019, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2020

D. Douglas McCarthy

d41520
DDM/jrc
052

L. Elizabeth Coppoletti

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALARCON-HERRERA, SALAVADOR
Employee/Petitioner

Case# **15WC018505**

MULTI-TEMPS
Employer/Respondent

20IWCC0233

On 2/28/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4340 EFTEKHARI LAW OFFICES LLC
EHSAN EFTEKHARI
701 MAIN ST SUITE 203
EVANSTON, IL 60202

5001 GAIDO & FINTZEN
GAIL M BEMBNISTER
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Salavador Alarcon-Herrera
Employee/Petitioner

v.

Multi-Temps
Employer/Respondent

Case # 15 WC 018505

20IWCC0233

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **November 13, 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. [x] 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. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] TTD
L. [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 _____

20IWCC0233

FINDINGS

On **November 12, 2014**, 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, in part,*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,449.48**; the average weekly wage was **$412.49**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**. The Parties agreed that no lost time benefits were owed.

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

ORDER

Respondent shall pay reasonable and necessary medical services of $11,197.84, as provided in Sections 8(a) and 8.2 of the Act and as is set forth below.

Respondent shall pay Petitioner permanent partial disability benefits of $247.49 per week for 12.65 weeks, because the injuries sustained caused the 5% loss of the Petitioner's right arm, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner all awarded compensation benefits that have accrued from 11/12/2014 through 11/13/2018 in a lump sum and shall pay the remainder of the award, if any, in a lump sum.

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

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

Signature of Arbitrator

February 28, 2019
Date

FEB 28 2019

FINDINGS OF FACT

Petitioner testified via a Spanish/English interpreter.

Petitioner was employed by Respondent as a laborer. Petitioner is right handed. He was 49 years old on the date of accident. He has a past medical history of psoriasis, hypertension, diabetes and gout. (PX P)

The Parties stipulated that Petitioner sustained accidental injuries which arose out of and in the course of his employment by Respondent on November 12, 2014. Petitioner was engaged in putting parts and a 900 lbs. metal roll into a box. The roll was being lifted by a forklift. The roll came down on Petitioner's right arm and pushed his arm into the box. Petitioner's arm was stuck in the box. He was freed when his fellow employees raised the roll. Petitioner reported the accident and was sent by Respondent to Midwest Orthopaedics at Rush Occupational Clinic. He had treatment at Midwest from November 12, 2014 to June 10, 2015.

Petitioner reported to Midwest Orthopaedics at Rush on November 12, 2014, complaining of pain of the right arm and numbness of the fourth and fifth fingers. Paresthesia was noted in the right third and fourth fingers (ring and little). Dorsal right wrist pain was noted at the limits of flexion and extension. No dorsal wrist pain was noted to firm palpation. The right shoulder and upper arm exams were benign. Pain was noted in the right elbow, along with full range of motion and normal strength. X-rays of the right wrist and right elbow were normal. Petitioner was diagnosed with contusion of the right arm and given work restrictions. Work restrictions were accommodated throughout Petitioner's treatment. Bracing and icing were recommended. On November 14, 2014, Petitioner denied numbness to the fingers. On November 21, 2014, Petitioner was returned to regular duty and tingling to the 4th and 5th fingers was noted. On December 8, 2014, Petitioner was referred to a hand specialist. (PX B)

Petitioner then began treatment with Dr. Wysocki at Midwest Orthopaedics at Rush on December 24, 2014. It was noted that Petitioner had numbness and tingling in the ring and small fingers. Petitioner had negative median nerve compression, Tinel, and Phalen tests at the carpal tunnel. The diagnosis was of right forearm contusion with possible secondary ulnar neuropathy at the elbow. A splint and occupational therapy were recommended. Work restrictions were provided, which were accommodated. (PX B)

On January 28, 2015, Dr. Wysocki provided an injection to the right wrist. There were no signs or symptoms of carpal tunnel, but there were positive findings for cubital tunnel syndrome, and an EMG was recommended. Petitioner had not yet undergone occupational therapy and this was recommended. (PX B)

Petitioner underwent *15* sessions of occupational therapy at ATI. (PX F) Dr. Wysocki reviewed the EMG from March 1, 2015, and noted that there was no evidence of cubital tunnel syndrome, but some mild right carpal tunnel syndrome was demonstrated. On April 1, 2015, Petitioner's diagnosis was right forearm

contusion with possible secondary ulnar neuropathy at the elbow, EMG negative to the right wrist pain. On examination, Petitioner had a negative carpal tunnel compression test. Petitioner noted that with the splint use, the neurologic symptoms were mostly resolved. (PX B)

On April 22, 2015, physical therapy was discontinued and Petitioner was able to return to full duty work. On June 10, 2015, Dr. Wysocki stated that in cases where people have some symptoms of ongoing neuropathy, if they are neurologically stable and able to function, a six month evaluation is recommended and a repeat EMG to determine there is any development of neuropathy. Petitioner reported his symptoms were manageable enough that he felt comfortable observing it over the next several months. Petitioner was to return in three months and continue to use his flexion block splint. (PX B)

On June 10, 2015, Petitioner began treatment with Dr. Neema Bayran at The Pain center of Illinois. Petitioner was diagnosed with right elbow pain secondary to right lateral epicondylitis, right wrist pain secondary to right wrist sprain, and right hand pain secondary to hand contusion. Petitioner was referred for an MRI of the right hand and wrist. (PX J)

Petitioner underwent an MRI of the right wrist on June 16, 2015. The impression was partial tear of common extensor tendons seen at the internal epicondyle, hyperintense signal noted within the lateral epicondyle suggesting contusional injury, mild humeroradial join effusion. (PX J)

On June 24, 2015, the diagnosis of right carpal tunnel syndrome was added. This occurred following Dr. Bayran reviewing the EMG. Dr. Bayran recommended four weeks of physical therapy and referred Petitioner to an orthopedic surgeon. No causation opinion was provided regarding the carpal tunnel syndrome condition. On July 17, 2015, it was recommended Petitioner follow-up with Dr. Ramsey Ellis.(PX J)

On July 17, 2015, Petitioner was seen by Dr. Ellis at Midwest Hand Surgery, who requested the EMG, but was otherwise in agreement with Dr. Wysocki's opinion of watching and waiting. (PX P)

On September 4, 2015, Petitioner returned to Dr. Ellis, who reviewed the EMG. This visit is the first where complaints of numbness in the median nerve distribution is documented. Petitioner was diagnosed with right carpal tunnel syndrome. A carpal tunnel release was recommended. (PX P)

On September 9, 2015, Dr. Bayran recommended Petitioner continue to follow-up with Dr. Ellis and to consider an injection if there was no improvement. This was again noted on October 15, 2015. (PX J)

On November 3, 2015, Dr. Ellis released Petitioner from care, noting Petitioner can work full duty and only return if necessary. No further treatment was recommended. (PX P)

Petitioner testified he has not received any treatment since November 3, 2015. This is because any pain that he experiences is tolerable and it is not constant. Petitioner testified he has pain with some movements to his right arm and has difficulty shaving. He takes great care on some work activities. The pain sometimes

disturbs his sleep. The pain is either strong or light. The pain is not constant. It does not last a long time. Petitioner further testified that he is now employed directly at the location where he was hurt and no longer works for Respondent. He has the same position as when he was injured. He does lift items at work. Petitioner works 8 hours a day, five days a week, with occasional overtime of two additional hours a day. Petitioner now earns $18.00 an hour.

Petitioner testified to undergoing 37 sessions of physical therapy at Forrest Hill Therapy. Records from June 30, July 24, August 20, and September 12, 2015 were submitted. (PX N)

Dr. Ajay Balaram, of Hand and Shoulder Associates, testified on behalf of the Respondent. Dr. Balaram specializes in orthopedic surgery with a subspecialization in hand and upper extremity surgery. Dr. Balaram is board certified in orthopedic surgery, and holds a certificate of added qualification in hand surgery (RX 1)

Dr. Balaram testified he examined Petitioner on November 25, 2015, for an independent medical evaluation. A Spanish-English interpreter was present. Dr. Balaram testified he reviewed medical records up until the patient's release from care with Dr. Wysocki, including the EMG. The last medical records reviewed were dated June 10, 2015. Dr. Balaram performed a hands-on evaluation of the Petitioner. (RX 1)

Dr. Balaram diagnosed Petitioner with a right forearm crush injury with contusion and secondary ulnar neuritis, as well as right carpal tunnel syndrome. Dr. Balaram testified the ulnar neuropathy was related to the work injury on November 12, 2014, but the carpal tunnel syndrome was not. This was because Petitioner did not have complaints of median nerve symptoms nor any numbness or tingling that would be consistent with carpal tunnel syndrome in the initial evaluation or in the months following the injury. This would be the thumb, index finger and portions of the middle finger. If the crush injury had affected the median nerve, which is the nerve that causes carpal tunnel syndrome, he would expect symptoms immediately after the injury. Dr. Balaram opined Petitioner was at maximum medical injury as it related to the work injury and he could work without restrictions. The treatment until June 10, 2015 was reasonable and necessary. He was unaware of subsequent treatment, so he had no further opinions on this issue. Dr. Balaram additionally testified that on his examination, there was no evidence of any shoulder or neck injury and that Petitioner denied any neck or right shoulder pain. (RX 1)

Respondent submitted into evidence a Utilization Review Report from Dr. Trotter dated February 8, 2018. This report addressed the 37 physical therapy sessions from June 30, 2015 to October 13, 2015. The initial 10 physical therapy sessions were certified as medically necessary and appropriate. The remaining were not. In support of this, the report noted there was limited evidence of clinical issues unable to be addressed by a (likely already related to the claimant) prescribed and self-directed protocol. (RX 2) There was no evidence

presented of an appeal of the Utilization Review Report. Petitioner did testify that during the physical therapy sessions the treatment was consistent and he did learn the therapeutic movements from this.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d).

To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between his employment and his injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

Decisions of an arbitrator shall be based exclusively on evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

WITH RESPECT TO ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS:

Petitioner's current condition of ill-being is, in part, causally related to the injury. The Arbitrator finds that Petitioner suffered a right forearm crush injury, with contusion and secondary ulnar neuritis as a result of the accident of November 12, 2014. This finding is based upon the persuasive opinions of Dr. Balaram and the medical records.

Petitioner's neck, right shoulder and right hand carpal tunnel syndrome conditions are not related to the accident for the reasons stated by Dr. Balaram, and because no complaints or findings regarding these areas of the body were noted in the medical records for months after the accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS:

The following medical bills were submitted into evidence:

ATI Physical Therapy dates of service February 26, 2015 – April 20, 2015 totaling $7,080.34 Given the evidence adduced, the Arbitrator orders Respondent to pay directly to Petitioner, upon receipt of HCFA forms, for the said ATI Physical Therapy medical bills.

- **Marianjoy date of service March 19, 2015, totaling $621.50.** This is for the EMG. Given the evidence at trial, the Arbitrator orders Respondent to pay directly to Petitioner, upon receipt of HCFA forms, for the said Marianjoy bill.

- **Forrest Hill Physical Therapy dates of service from June 30, 2015 – October 13, 2015, totaling $19,213.00** There are serious concerns regarding these bills. First, Petitioner testified to participating in 37 sessions, but the only records provided are on June 30, July 24, August 20, and September 12, 2015. The bills do run from 6/30 to 10/13/2015. Additionally, Dr. Ellis never recommends physical therapy. In the initial visit, Dr. Ellis agreed with Dr. Wysocki's assessment to watch and wait to see if Petitioner progresses. Then carpal tunnel release is recommended. Dr. Bayran recommends "at least four weeks" on June 24, 2015, only after he diagnosis Petitioner with right carpal tunnel syndrome (which has been found to be unrelated to the accident). There is no further recommendation for physical therapy. Respondent submitted Utilization Review evidence, which certifies only 10 sessions as medically necessary and appropriate. There was no evidence that the UR was appealed or disputed. Essentially, the UR report states Petitioner could have begun a home exercise program following 10 sessions. Petitioner himself testified the therapies rendered were consistent and he did learn and was familiar with them. Given it is Petitioner's burden to prove the claimed medical treatment is reasonable, necessary, and related to the work injury, the Arbitrator finds Petitioner is not liable for any of the Forrest Hill Physical Therapy bills. First, Petitioner failed to provide full treatment records to support his claim. Given this, the Arbitrator is unable to determine whether the therapy is related to the work injury. Furthermore, even if the physical therapy is related to the ulnar neuritis condition, Dr. Bayran recommended "at least four weeks" on June 24, 2015, but no further physical therapy was shown to be prescribed in Dr. Bayran's records. The Arbitrator finds none

of these sessions of physical therapy is necessary nor appropriate, as both Dr. Wysocki and Dr. Ellis never recommended further physical therapy past what was provided from ATI. Additionally, as the Utilization Review report opines, after 10 sessions, Petitioner could have begun a home exercise program. This would have actually been 25 sessions of physical therapy, including the ATI Physical Therapy, and Petitioner did not provide any evidence to dispute this. These bills are not awarded.

- **Pain Center of Illinois dates of service June 10, 2015 to November 11, 2015 totaling $1,193.00.** The Arbitrator finds the June 10 and June 24, 2015 dates of service **($593.00)** are related to the work injury. The treatment thereafter is deemed related to the right carpal tunnels syndrome condition and not related to the work injury. Therefore, the Arbitrator orders Respondent to pay directly to Petitioner for the dates of service June 10 and 24, 2015 only, upon receipt of HCFA forms.
- **Premium HealthCare Solutions date of service June 16, 2015 totaling $2,325.00.** These bills are for the right wrist and right elbow MRIs. Given the diagnostic purpose, the Arbitrator orders Respondent to pay directly to Petitioner, upon receipt of HCFA forms, for the claimed Premium HealthCare Solutions medical services.
- **Midwest Hand Surgery dates of service July 17, 2015 to November 3, 2015 totaling $884.00** Petitioner was referred to Midwest Hand Surgery from Pain Center of Illinois. On July 17, 2015, Dr. Ellis expressed agreement with Dr. Wysocki's recommendation to monitor Petitioner's progress. On September 4, 2015, Dr. Ellis reviewed the EMG and diagnosed Petitioner with right carpal tunnel syndrome, which the Arbitrator has found is not related to the work injury. Therefore, the Arbitrator orders Respondent to pay directly to Petitioner, upon receipt of HCFA forms, for the July 17 and September 24, 2015 dates of service **($578.00)**. Any treatment thereafter is deemed related to the right carpal tunnel syndrome condition and, therefore, not awarded as being not related to the work injury.

The total amount of medical bills awarded is: $11,197.84. This award is made in accordance with §§ 8(a) and 8.2 of the Act and Respondent is entitled to a credit for all bills paid.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires the Commission's consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;
3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by a physician must be explained in a written order." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. The reported level of impairment

   An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability. This factor is given no weight in determining PPD.

2. Petitioner's Occupation

   On the date of the accident, Petitioner was employed as a laborer for Respondent. He was able to return to work to his usual and customary position, without restrictions. This factor is given great weight in determining PPD.

3. Petitioner's age at the time of injury

   Petitioner was 49 years old at the time of injury, and he is 53 years old at the time of the hearing. Accordingly, Petitioner is expected to work for 10 plus years. This is relevant and receives some weight in determining PPD.

4. Petitioner's future earning capacity

   Petitioner has no loss of earnings. Nothing in the Record, including his testimony, suggests that his future earning capacity has been affected by the injury sustained. Petitioner testified that he is currently working in the same position, indeed making more money in a permanent position. Great weight is placed on this factor in determining PPD.

5. Petitioner's evidence of disability corroborated by medical records

As a result of the work injury, Petitioner underwent a course of therapy and conservative care. The medical records support a finding that Petitioner is entitled to an award of permanency. Dr. Wysocki noted some residual findings at the last visit. Petitioner testified to some residual complaints at trial, which would be consistent with the records.

After considering the above, and the Record as a whole, the Arbitrator finds that the injuries sustained caused Petitioner to suffer the 5% loss of use of his right arm, in accordance with § 8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALAN PRICE,

Petitioner,

vs. NO: 15 WC 30111

AMERICAN COAL COMPANY,

20IWCC0234

Respondent.

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 exposure under the Occupational Disease Act, accident, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

As Petitioner's accident occurred after September 1, 2011, §8.1b applies. Section 8.1b(b) requires permanent partial disability be determined following consideration of five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. *820 ILCS 305/8.1b(b).*

Section 8.1b(b)(i) – §8.1b(a) impairment report

The Commission gives some weight to this factor noting that Respondent offered an impairment rating from Dr. James Castle finding Petitioner had a 0 impairment.

Section 8.1b(b)(ii) – occupation of the injured employee

The Petitioner worked as a laborer in the coal mines. He began working in the coal mines

in 1978 and continued working in the mines until he was laid off on May 23, 2015. Dr. Glennon Paul testified that Petitioner was precluded from working as a coal miner due to his coal workers' pneumoconiosis (CWP) and chronic bronchitis. However, Petitioner retired following his lay off and has not looked for work. The Commission, therefore, gives some weight to this factor.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

The Petitioner was 59 years old as of the date of his last exposure. He was capable of performing his regular duties at the time of his lay off. The Commission give little weight to this factor.

Section 8.1b(b)(iv) – future earning capacity

The Commission gives little weight to this factor. While Dr. Paul testified that Petitioner is precluded from working as a coal miner, Petitioner retired and did not look for work. No evidence was offered suggesting that Petitioner's condition had an impact on his future earning capacity.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

The Commission gives moderate weight to this factor. The medical records reveal that Petitioner complained of wheezing, coughing, and shortness of breath. Dr. Alexander, the primary care physician, recorded said symptoms on numerous office visits between December 2009 and August 2016. While there are conflicting opinions as to whether Petitioner has CWP and chronic bronchitis, the Commission finds the opinions of Dr. Paul and Dr. Henry Smith credible. Dr. Paul diagnosed Petitioner with CWP and chronic bronchitis due to his exposure to coal dust. His opinion was premised upon the pulmonary function tests, the chest x-rays, and his physical examination. Dr. Smith performed a b-read of the April 13, 2016 chest x-ray and found a profusion of 1/0. He diagnosed Petitioner with simple CWP.

Based on the above, the Commission finds Petitioner sustained permanent partial disability to the extent of 8% loss of use of the person-as-a-whole pursuant to Section 8(d)2.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 27, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $647.67 per week for a period of 40 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused 8% loss of use of the person-as-a-whole.

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

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

Resources

20IWCC0234

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $26,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2020

D. Douglas McCarthy

DDM/tdm
O: 3/3/20
052

Stephen Mathis

DISSENT

I view the medical evidence in a different light than the majority as I would afford greater weight to the opinions of Dr. Meyer and Dr. Castle over those of Dr. Paul and Dr. Smith. As such, I respectfully dissent.

Dr. Meyer and Dr. Castle are both certified B-Readers whereas Dr. Paul is not. Both Dr. Meyer and Dr. Castle agree Petitioner's chest x-rays fail to evidence CWP. Dr. Meyer reviewed three chest x-rays, January 25, 2011; March 1, 2012; and April 13, 2016 and opined none of the films exhibited CWP. RX1, p. 43. Dr. Castle reviewed the chest x-ray dated April 13, 2016 and concurred with Dr. Meyer's opinion that the same failed to evidence CWP. RX2, p. 52.

As for the diagnosis of chronic bronchitis, Dr. Castle opined Petitioner did not suffer from reactive airway disease nor was a diagnosis of chronic bronchitis present. RX2, p. 46. Dr. Castle explained the basis of his opinion relying on Petitioner's prior treatment records as well as the normal pulmonary function studies performed by Dr. Paul, Petitioner's expert. *Id.* Dr. Castle explained Petitioner suffered from chronic sinusitis which he associated to a fractured nose causing nasal obstruction. RX2, p. 47. Dr. Castle reiterated all testing performed by Dr. Paul was normal. RX2, p. 50-1.

Dr. Paul conceded all pulmonary testing which he performed was normal and failed to reveal either obstructive or reactive airway disease. PX1, p. 39-40. Dr. Paul also conceded he failed to review any of Petitioner's prior treatment records. PX1, p. 38. Nonetheless, Dr. Paul opined Petitioner suffered from chronic bronchitis which was caused by coal dust. PX1, p. 13. Dr. Paul provided no basis for his opinion other than to state chronic bronchitis can exist even with normal pulmonary function testing. PX1, p. 31. An expert's opinion is only as valid as the facts upon which it is based. *Gross v. Illinois Workers' Compensation Commission*, 2011 IL App (4th) 100615WC.

I would find Petitioner failed to prove he suffered an occupational exposure leading to the development of pneumoconiosis or chronic bronchitis, and, therefore, I would deny the matter in its entirety. Accordingly, I dissent.

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

PRICE, ALAN
Employee/Petitioner

Case# **15WC030111**

THE AMERICAN COAL COMPANY
Employer/Respondent

20IWCC0234

On 5/27/2019, 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 2.34% 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:

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

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

☐ 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
CORRECTED ARBITRATION DECISION

ALAN PRICE
Employee/Petitioner

v.

THE AMERICAN COAL COMPANY
Employer/Respondent

Case # **15** WC **30111**

Consolidated cases: _____

20IWCC0234

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **November 15,2018**. 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. ☐ 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 **Disease/exposure, causation, Sections 1(d)-(f), 19(d).**

FINDINGS

On **05/23/15**, 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 **$56,131.40**; the average weekly wage was $.1,079.45

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**N/A** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

- The Respondent shall pay the Petitioner the sum of $647.67/week for a further period of 40 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a permanent and partial disablement to the extent of 8% MAW.

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

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

Signature of Arbitrator

5/25/19
Date

MAY 27 2019

STATEMENT OF FACTS

Petitioner, Alan Price of Mulkeytown, Illinois was sixty-two years of age on the date of Arbitration with a date of birth of December 14, 1955. He is married to Rebecca Price. He graduated high school from Christopher High School. He worked thirty-seven years in the coal mining industry, all of which were underground. During the course of his mining career in addition to coal dust he was regularly exposed to silica dust, roof bolting glue fumes, diesel fumes, trowel-on, and smoke from coal fires. He last worked in the coal mines on May 23, 2015. On that day he worked for American Coal at their Galatia mine. He was fifty-nine years of age at the time and had a job classification of laborer. This was his last day in the coal mine as the mine laid him off. This ended his coal mining career and he has had no significant employment since.

Petitioner started his coal mining career in 1978 for Old Ben Coal in Benton, Illinois. He was hired in as a laborer. The duties of a laborer included running the boring machine, roof bolting, and running the buggy car. Petitioner described each of these jobs, running the boring machine is the machine that actually cuts the coal from the face of the mine. This can also be called a continuous miner. A buggy car takes the coal from the continuous miner to the belts so that it can be removed from the mine. Another duty that Petitioner had was that of a roof bolter. This is where holes are drilled into the ceiling of the mine with bolts put in to support the ceiling. Petitioner described using roof bolting glue pins in the roof bolting process. When those pins would break they would give off an odor that Petitioner described as rather strong that would take your breath away. Throughout the course of Petitioner's mining career he worked almost exclusively at the face of the mine where the coal was cut. Petitioner described in detail the amount of coal dust and rock dust exposure that was involved with these jobs.

Throughout his career Petitioner worked for several mines including Inland 2 in McLeansboro and then back to Old Ben 24 in 1987 when Inland closed. In addition to the previous jobs described, Petitioner also shoveled the belt. That is where coal falls off the belt and has to be shoveled back by hand with a shovel so that it can be removed from the mine. Petitioner testified that this generated quite a bit of dust. In 1990 Petitioner left Old Ben and started working for Kerr-McGee, which eventually turned into American Coal. This is where he finished his mining career. When Petitioner worked at Kerr-McGee in addition to the jobs already described he also ran a long wall. A long wall replaces the continuous miner machine and cuts the coal with a shear across the face of the mine. Petitioner described this long wall as generating quite a bit of dust while you were working. If you went from the return back to the intake of the long wall the dust was pretty much in your face continually. Somewhere around 1986 or 1987 diesel machines were starting to be used in the mines. Petitioner describes the air being filled with diesel fumes as these machines were being run.

Petitioner first started noticing breathing problems about five years before he left the mine. He began noticing that it took him longer and he had to take more breaks when he would be walking out of the mine. When he first started noticing breathing problems until the time he left the mine, his breathing became worse. Since he left the mine, up until the date of trial his breathing has progressively gotten worse. His breathing difficulties affect his activities of daily living. Trimming his lawn after mowing has become difficult. Petitioner used to hunt a lot but the walking that is involved in deer hunting has limited his activities. Petitioner can walk for fifteen to twenty minutes on level ground at a normal pace before becoming short of breath. This is less than what he used to be able to do. He can climb one flight of stairs before having to stop to rest. Petitioner's treating doctor is Dr. Alexander. He did speak to his doctor about his breathing difficulties. Petitioner is currently not on any breathing medications. He has never smoked cigarettes. In addition to breathing difficulties Petitioner describes having a heart condition called Cartia, which is heart spasms. Petitioner takes Synthroid for his thyroid condition.

Dr. Glennon Paul

At Petitioner's attorney's request, Petitioner was examined by Dr. Glennon Paul on April 25, 2016. Dr. Paul is the medical director of St. John's Respiratory Therapy and clinical assistant professor of medicine at SIU Medical School. (PX 1, p 6) He is also the senior physician at the Central Illinois Allergy and Respiratory Clinic. (PX 1, p 7) Petitioner gave a history of being a 37year coal miner with wheezing and coughing and shortness of breath with upper respiratory infection. (PX 1, p 11) Dr. Paul gave an opinion to a reasonable degree of medical certainty that Petitioner suffered from Coal Worker's Pneumoconiosis which was caused by coal dust. He further testified that Petitioner suffered from chronic bronchitis, which was also caused by the coal dust environment. (PX 1, p 12 & 13) Dr. Paul went on to testify that based on pulmonary function tests, chest x-rays and physical examination, Petitioner had physiologically significant, radiographically significant, and clinically significant pulmonary impairment, all of which was caused by coal dust. (PX 1, p 13 & 14) Based on this diagnosis, Dr. Paul testified to a reasonable degree of medical certainty that Petitioner is totally precluded from working in the coal mine. That restriction would be permanent. (PX 1, p 14) Even when coal miners quit the coal mine their exposure to coal dust never ends. (PX 1, p 15) Dr. Paul testified that in order to have pneumoconiosis a miner must have, in addition to coal dust deposited in his lungs, a tissue reaction to it. That tissue reaction can be called scarring or fibrosis. The scarring of coal worker's pneumoconiosis cannot perform the function of normal healthy lung tissue. (PX 1, p 17) By definition, if you have CWP it is true that you have some impairment of the function of the lung at the site of the scarring whether it can be measured by spirometry or not. (PX 1, p 17 & 18) A person can have shortness of breath despite having normal pulmonary function tests. It is also possible to have injury or disease to the lung despite normal pulmonary function testing. (PX 1, p 18) Dr. Paul went on to testify that a person can have CWP that is radiographically significant and not have shortness of breath. They may also have normal pulmonary function testing, normal blood gases, and normal physical

examination of the chest. (PX 1, p 21) Dr. Paul testified that there is no cure for CWP and the exposure does not end when the coal miner leaves the mine. Once the disease starts progressing there is no way to stop it. (PX 1, p 22) Dr. Paul testified to a list of exposures in the environment of the coal mine that can cause injury to lungs in addition to coal dust. These included silica, diesel fumes, fumes from other petroleum products, smoke and fumes from high sulfur coal fires, smoke and fumes from electrical cable fires, fumes from the glue used in the roof bolting process and welding fumes. (PX 1, p 23 & 24) Dr. Paul testified that the development of CWP varies on the individual and can be anywhere from forty years to two years. (PX 1, p 27 & 28) Dr. Paul testified that a person with chronic bronchitis can have normal pulmonary function testing, normal blood gas testing, and normal physical exam. (PX 1, p 31) Dr. Paul stated that while he is not a b-reader he reads as many as one hundred x-rays a week and has been doing such for thirty-five years. (PX 1, p 33) Dr. Paul went on to say that of all the x-rays that have been sent to him by Culley & Wissore or brought in by clients of Culley & Wissore that have been examined over the last few years, a majority of those x-rays he failed to find pneumoconiosis. (PX 1, p 33) Dr. Paul stated that a person can have CWP and have a normal chest x-ray but they can be found on both pathology and autopsy and not show up on an x-ray. The lesions that show up on pathology or autopsy are the same that show up on x-ray but more diffused and smaller. These smaller lesions will have the same ability to progress as larger lesions. That also means that at that location there is an impairment in the function of the lung in the infected tissue. So a negative x-ray can never rule out the existence of CWP. (PX 1, p 34 & 35)

Dr. Henry K. Smith

At Petitioner's request, b-reader, Dr. Henry K. Smith reviewed a grade 1 chest x-ray dated April 13, 2016. Dr. Smith found interstitial fibrosis of classification p/p, all lung zones involved bilaterally, of a profusion 1/0. There are no chest wall plaques, calcifications or large opacities. There are thickened interlobar fissures. There are calcified nodes in the right hilus related to old healed granulomatous process. Heart size is normal. There is calcified thoracic aorta. There is increased mid to lower dorsal dextroscoliosis and spondylosis. There are post-op changes in the epigastric region. Dr. Smith's impression was simple coal worker's pneumoconiosis with small opacities, primary p, secondary p, all lung zones involved bilaterally, of a profusion 1/0.

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Dr. Castle Charges

At Respondent's request, Dr. Castle performed a forensic review of medical films and gave a deposition regarding his findings. Dr. Castle charged $3,700.00 to review the medical films and $1,900.00 for his deposition for a total of $5,600.00 in charges.

Mr. Cristopher Meyer

At Respondent's request, x-rays were read by b-reader, Dr. Cristopher A. Meyer. Dr. Meyer reviewed a PA chest radiograph dated January 25, 2011 from Harrisburg Medical Center, a PA lateral chest radiograph dated March 1, 2012 from Dr. James Alexander, and a PA lateral chest radiograph dated April 13, 2016 from Central Illinois Allergy and Respiratory. (RX 1, p 40) Dr. Meyer testified that the lowest quality film was actually the 2011 film. It was digitized hard copy, which is not compliant with the current 20 C.F.R. regulations, but it was interpretable as a quality 3. It has some artifact and poor contrast. The other two had minor imperfections as Dr. Alexander's film was a quality 2. In 2012, it was over-exposed and the Central Illinois Allergy and Respiratory radiograph was a PA and lateral chest quality 2, improper position, which is usually a scapula overlap or a little rotation and some mottle. (RX 1, p 40 & 41) Dr. Meyer's interpretation of the 2011 film was lungs were clear there were calcified subcarinal lymph nodes indicating prior granulomatous infection, and there were some surgical clips overlying the upper abdomen, but there was no findings of CWP. On the 2012 examination, there were no small or large opacities, and these densely calcified subcarinal lymph nodes are not going to go away. The lungs were clear and no findings of CWP. The 2016 examination was the same: no findings of CWP in the densely calcified subcarinal lymph nodes. (RX 1, p 43) On cross-examination Dr. Meyer testified that CWP is a permanent abnormality. (RX 1, p 60) Dr. Meyer also testified that CWP can be considered to be a chronic progressive disease in some coal miners. (RX 1, p 61 & 62) Dr. Meyer also stated that it would be true that CWP was present at some level when the coal worker left the mine. (RX 1, p 62) Dr. Meyer would generally expect CWP to appear first radiographically or pathologically and then later, as it became more significant, it would begin to manifest itself in pulmonary function abnormalities or clinical abnormalities. (RX 1, p 64) Dr. Meyer testified that it is true that as CWP progresses the progression would vary from miner to miner rather than exactly the same in all miners. The exact shape, size, and location of the macule would also vary from miner to miner. (RX 1, p 65) Dr. Meyer stated that it is true that a miner that has 1/0 CWP probably won't even know that he has it and probably won't complain to his doctor until he gets a b-reading that tells him he has it. (RX 1, p 69) Dr. Meyer went on to testify that pneumoconiosis could develop at any time during his mining career including in the last month or so; in fact, even show up radiographically a month or so after he left the coal mine. (RX 1, p 73 & 74) Therefore, it is possible that a miner could work thirty or forty years in a coal mine, develop radiographically significant CWP but not have it manifest itself on the x-ray until the last year or even the first year after leaving the mines. (RX 1, p 79)

Dr. James Castle

At Respondent's request, Dr. James Castle did a records review on November 10, 2016. Dr. Castle testified to a reasonable degree of medical certainty that from a ventilatory standpoint Petitioner was capable of heavy manual labor. (RX 2, p 51) Dr. Castle also testified that after viewing all the medical records and testing he felt

to a reasonable degree of medical certainty that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. He did feel that Petitioner worked in or around the underground mining industry to have possibly developed CWP if he were a susceptible host. (RX 2, p 60) On cross-examination, Dr. Castle testified that CWP is basically trapped coal dust in a part of the lung that ends up wrapped in scar tissue and can be accompanied by emphysema around it. It is called focal emphysema. (RX 2, p 97) Dr. Castle further testified that by definition if a person has CWP, they could have an impairment in the function of the lungs at the site of the scarring and emphysema. (RX 2, p 98) He went on to affirm that a person can have radiographically significant CWP yet have normal spirometry, normal pulmonary function in all areas, normal blood gases, normal physical exam of the chest, and maybe even no complaints. If they would have complaints it would most likely be shortness of breath. (RX 2, p 100) Dr. Castle also stated that CWP can be accurately described as a chronic slowly progressive disease. (RX 2, p 100) He went on to say that it is true that the rate of progression of CWP will vary from miner to miner. (RX 2, p 103) As CWP progresses and goes from category 1 to category 2 to category 3, as you go to each more extensive pneumoconiosis the likelihood of further progression is also greater. (RX 1, p 104) There also can be mixed dust CWP from coal mining, which would also include silica. The silica is toxic to the surrounding lung tissue. It is more fibrogenic than coal dust. (RX 1, p 104) Pneumoconiosis from just coal dust or mixed dust that dust is trapped in the lungs and will never be removed. Therefore, the lung tissue will be exposed to that trapped dust that will be there for the rest of the miner's life. The only treatment for CWP is to remove the miner from any further exposure. (RX 2, p 105) Having pulmonary function testing within the range of normal does not mean that your lungs are free of any lung damage or disease. (RX 2, p 115) Dr. Castle testified that chronic bronchitis is not just cough but requires the presence of sputum production over a finite period of time for two years. (RX 2, p 118) Dr. Castle affirmatively answered, that the increased mucous produced by chronic bronchitis is also something that is not able to be objectively tested and measured and for which there are tables of impairment. (RX 2, p 121)

NIOSH Records

Respondent produced NIOSH records showing chest x-rays of various readings throughout Petitioner's mining career. All of these readings were negative for coal worker's pneumoconiosis.

Dr. James Alexander

Under an office visit of June 17, 2016 on history of present illness: Alan Price is a 60 year old male. Patient presents today for evaluation of possible UTI and sinusitis. He has had sinus pain and pressure for the last 2 weeks. He got better initially, and then the symptoms came back. He has had headaches and sinus pressure. (RX 4, p 17) On the same office visit under assessment: acute sinusitis, allergic rhinitis due to pollen. Under plan: Acute sinusitis – The levaquin should cover this well. His most pressing

issue with this is the underlying nasal allergies. Acute rhinitis – Patient is on maximal medical therapy with Flonase and Singulair. (RX 4, p 20) On an office visit of January 11, 2016 under active problems: allergic rhinitis – pollen. Chief complaint: recheck on labs – also having sinus issues. (RX 4, p 22) Under assessment: sinusitis and allergic rhinitis due to pollen. (RX 4, p 25) On an office visit of August 28, 2015 under chief complaint, the chief complaint is: routine check-up-sinus h/a, drainage; refills. (RX 4, p 45) Under assessment: sinusitis and allergic rhinitis. (RX 4, p 48) On an office note dated May 14, 2014, under notes: patient's wife called and state that "Alan has had intermittent sob lasting 15-20 minutes at a time with discomfort in his neck". (RX 4, p 94) On a PA lateral chest x-ray dated March 1, 2012 under indication: cough. Findings: PA and lateral views of the chest show a cardiac silhouette of normal size. The pulmonary vessels are normally distributed. There is presence of calcified mediastinal residua. The lungs are well aerated. (RX 4, p 118) On an office visit of March 1, 2012 under chief complaint, chief complaint is: chest congestion. Under history of present illness: Alan Price is a 56 year old male. • Feeling terrible • Feeling poorly (malaise) • no fever • no chills • sinus pain •no headache •no neck stiffness •no swollen glands in the neck •no red eyes •nasal discharge •sore throat •no ear ache •no sneezing •dyspnea •cough •coughing up sputum •wheezing •no myalgias. (RX 4, p 122) On the same office visit under lungs: pulmonary auscultation revealed abnormalities, wheezing was heard, wheezing was heard bilaterally, diffuse wheezing was heard, rhonchi were heard, rhonchi were heard on the left at the base, rales/crackles were heard bilaterally, no rales/crackles were heard. Assessment: acute sinusitis and asthmatic bronchitis. (RX 4, p 124) On an office visit of February 10, 2012 under nose: general/bilateral: discharge: nasal discharge seen. Sinus tenderness: tenderness of sinuses. Assessment: cough, sinusitis, allergic rhinitis. (RX 4, p 127 & 128) On an office visit of October 10, 2011, encounter: sinus infection. Under chief complaint, chief complaint is: sinus pressure, HA, cough. Under history of present illness: Patient complains of headache, nasal congestion, sore throat, ear stuffiness since Monday. Patient reports chills and sweating. States nasal discharge is green, denies body aches. Denies itchy watery eyes. Patient reports non-productive cough, denies SOB. Takes Singulair 10mg daily and Zyrtec. (RX 4, p 129) On an office visit of December 16, 2009 under S: Complaints of cough and congestion, sinus pressure. O: heart is regular. Lungs are clear. Sinuses tender. A/P: 1. Sinusitis. Z-Pak as directed. (RX 4, p 201) On an office visit of April 8, 2009 under S: Patient complains of sinus congestion and also states that has episodes at night where he has to sit up on the side of the bed to catch his breath and wakes up diaphoretic. O: Heart is regular. Lungs are clear. Ears are clear. Throat is clear. Sinuses tender. A: Daytime sleepiness, possible sleep apnea. Sinusitis. (RX 4, p 213) On a CT of the sinuses dated December 10, 2008, under history: recurrent sinusitis. Findings: The paranasal sinuses are well aerated. Mild mucosal thickening is present in the ethmoid sinuses. A small mucous retention cyst is present in the medial right maxillary sinus. A small meniscus is present in the ostia draining the maxillary sinuses. On impression: 1. Mild mucosal thickening, mainly in the ethmoid sinuses. Post functional endoscopic surgery. 2. Old nasal bone, nasal spine and nasal septum fractures. (RX 4, p 218)

Heartland Regional Medical Center

On a CT of the abdomen and pelvis dated April 11, 2011 under impressions: 3. noncalcified 3.2mm nodule in the left lung base. Report was called to Jennifer in Dr. Alexander's office at the time of the dictation on April 11, 2011. (RX 5, p 50)

Harrisburg Medical Center

On a chest x-ray dated December 3, 2001, the lungs are clear on infiltrate. Heart size and pulmonary vessels are normal. There is no pleural fluid. No pneumothorax. Calcified right hilar and mediastinal lymph nodes from old healed granulomatous disease. There are post surgical changes noted in the left upper quadrant of the abdomen. Impression: no active disease. (RX 6, p 66)

River to River Heart Group

On an office visit of June 23, 201 under problems: reviewed problems: respiratory system. (RX 7, p 16)

HMC Clinic dated 11/5/2018

On a chest x-ray dated July 3, 2018 under findings: No active infiltrate. Small calcified mediastinal and right hilar lymph nodes due to benign old healed granulomatous disease. (RX 8, p 15) On an office note dated February 9, 2018 under active problems: allergic rhinitis - pollen. Under chief complaint, The chief complaint is: sinus congestion x 5 days. History of present illness: The patient presents today for evaluation of sinus pain and pressure. The symptoms started 5 days ago. He is taking Singulair and Flonase and is not getting better. He denies fever, chills or sweats. He is sneezing and burning itchy eyes. He has green snot. He has a slight cough. (RX 8, p 20) On the same office note, under plan, Acute sinusitis - Treat with azithromycin as ordered below. (RX 8, p 23)

CONCLUSIONS OF LAW

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the issue of occupational disease and causation in Petitioner's favor. The Arbitrator concludes that Petitioner suffers from coal worker's pneumoconiosis (CWP), and chronic bronchitis, each of which was caused by his exposures as a coal miner. He worked as a coal miner for 37 years, all of it being underground. He is a lifelong never smoker. The Arbitrator found Petitioner to be a candid and credible witness.

Dr. Paul examined Petitioner on 4-13-16 at Petitioner's request. Dr. Paul is Board Certified in Internal Medicine, Allergy and Immunology, and he has authored a book on asthma. He served as the Medical Director of Respiratory Therapy at St. John's Hospital in Springfield for 40 years and concurrently as Medical Director of Respiratory Therapy at Memorial Hospital in Springfield for the first 10 of those years. Dr. Paul has performed black lung examinations for 40 years as often at the request of Respondents as Petitioners. He finds the majority of x-rays sent to him by Petitioner's counsel to be negative for CWP. He added that as to the medical evaluations he does currently, "I'm always asked by the employer. Defense."

Dr. Paul diagnosed CWP based on Petitioner's chest x-rays. His physical examination of the chest showed wheezing and coughing with forced expiration, and his pulmonary function testing (PFTs) were normal. Dr. Paul testified that in terms of diagnosing lung disease, the gold standard is pathologic review, but that a diagnosis of CWP can be made on a positive chest x-ray and a sufficient history of coal mine exposure. He said a negative x-ray can never rule out the existence of CWP; and that there have been studies to show that over 50% of long-term coal miners who have autopsies will have CWP diagnosed pathologically at autopsy when they did not have CWP appreciated by radiograph during their life.

Dr. Smith, b-reader/radiologist reviewed chest films of 4-13-16 at the request of Petitioner, and in addition to finding interstitial fibrosis, p/p in all lung zones at a profusion of 1/0, he also found thickened interlobar fissures and calcified nodules related to old healed granulomatous disease.

Dr. Paul testified that Petitioner has chronic bronchitis. He testified that a coal miner's exposure never ends. After the coal miner leaves the coalmine, a lot of the coal mine dust they've inhaled remains in his lungs for the rest of his life. He said that as much as 50% of the weight of a long-term miner's lungs can be composed of coal mine dust that's trapped in his lungs. He testified that a miner can have chronic bronchitis despite having normal PFTs, AGBs, and physical examination of the chest, and he testified that reactive airways disease (RAD) is characterized by asthma attacks or responses to environmental triggers. He said that RAD can be aggravated by dust, smoke, and fumes in a coal mine.

Regarding CWP, Dr. Paul further testified that a miner can have CWP and have a normal chest x-ray. He was criticized by Dr. Castle for not following the procedures for reading an x-ray under the b-reading system. However, he testified that when he read the x-ray, he knew the date, but he didn't remember it at the time of the deposition. Regarding opacity types, he said "I don't know if that makes any difference. If you have Black Lung, any type of opacity is compatible with it, so I don't remember exactly what his opacities were." As to the categorization of profusion, he didn't list it, and he said, "That's probably not germane in the fact that if you have a 1/2, or a 1/0, it's positive, that means he's positive for CWP. I didn't list it down as any other."

Regarding Petitioner's prescriptions for Singulair and Flonase, Dr. Paul said, "Apparently his doctor thought his symptoms were related to asthma when they probably were related to bronchitis."

The Arbitrator notes that while Respondent was allowed a full examination, it determined to only obtain a review of the medical records. Dr. Castle, who performed the records review, has been retired for a number of years, and has not seen patients in his office for a decade nor in the hospital for 14 years. His practice consists of records reviews and depositions such as he did here. He did not examine, speak to, nor see Petitioner. The Arbitrator notes that Dr. Castle is located in Hilton Head, South Carolina, not a coal mining area.

Dr. Castle performed a b-reading of the 4-13-16 x-ray as did radiologist/b-reader Dr. Christopher Meyer. Dr. Meyer also reviewed x-rays from 1-25-11 and 3-1-12. He found all x-rays to show no findings of CWP. He rated the x-ray from 1-12-11 to be quality 3 due to artifact and poor contrast, and he wrote that the x-ray was a digitized copy of an analog "film" x-ray and was of barely acceptable quality for the determination of the presence or absence of pneumoconiosis. He also testified that since the film was digitized hardcopy, it is actually not compliant with the current 20 C.F.R. regs. He rated the film of 3-1-12 as quality 2 due to over exposure, and testified that overexposure of a film would make it more difficult to appreciate the abnormalities of CWP. And he read the x-ray of 4-13-16 as being quality 2 due to improper position and mottle. He testified that mottle makes the exam look grainy or like there are tiny little dots or grains of sand on the film. "It is related to noise on the image and it can simulate type 'p' opacities." The Arbitrator notes that Dr. Meyer's readings of the x-rays of 1-25-11 and 3-1-12 could not rule out radiographic CWP in Petitioner on his date of last exposure on 5-23-15 or 2 years after that, such being the period defined in Section 1(f). Petitioner continued to work as a coal miner for four years and four months after the 2011 film and for three years and two months after the 2012 film. Dr. Meyer testified that two qualified and competent b-readers can reasonably disagree when a film might be 1/0 or 0/0.

The Arbitrator notes that the issue at stake is "CWP," not "radiographic CWP," not "clinically significant" CWP, and not "physiologically significant" CWP. Our Appellate Court has noted that CWP is a slowly progressive disease which is composed of abnormalities consisting of coal mine dust wrapped in scar tissue and surrounded by emphysema. There is no cure for it; it results in an impairment in the function of the lung at the site of the scarring, whether such can be measured by testing or not; and the sufferer cannot return to the environment of a coal mine without endangering his health.

The Arbitrator turns to the deposition of Respondent's b-reader/radiologist, Dr. Meyer, to describe the significance of the disease of CWP in this case. Having no medical evidence at all, it would still be more likely than not that Petitioner could have CWP. Dr. Meyer cited studies showing that at autopsy, 50% or more of long-term coal miners have CWP that can be diagnosed pathologically that was not

diagnosed radiographically during life. And he said that there are older studies that show a much higher incidence than that. The Arbitrator notes that Petitioner worked as an underground coal miner for 37 years. This qualifies him as a long-term coal miner. He further testified specifically that it is possible for a miner to have CWP determined by pathology that was not appreciated on a radiographic study.

Dr. Meyer defined the difference between a positive x-ray and a negative x-ray when looking for CWP. If you have read an x-ray to be positive and the miner has a sufficient history of exposure to cause CWP, that would warrant a diagnosis of CWP; however, if you find the x-ray to be negative, that doesn't necessarily rule out that the miner may have CWP pathologically. Specifically, with regard to his negative b-reading in this case, he testified that such would not rule out the possibility that at autopsy or pathology, there may be found CWP. "It's possible to find coal macules with a negative x-ray." Regarding the nature of pathologic CWP, he testified that the abnormalities found pathologically which were not found radiographically would still have the same constitution as the macules or nodules that would show up on x-ray, just perhaps smaller, but they would still be subject to potential progression as any other CWP abnormality might be. He added that not all miners have the same reaction to the coal mine dust. It is possible for a miner to work 30 to 40 years in a mine, develop radiographically-significant CWP, but not have it manifest itself until the last year or even the first year after he leaves the mine. Further, when a miner has CWP that progresses, the rate of that progression would vary from miner to miner, as would the exact shape, size, and location of the macule. These things would also vary within an individual miner. In terms of the miner's awareness of his CWP, Dr. Meyer said that a miner with 1/0 CWP probably won't know he has it, and he won't complain to his doctor. He said it is similar to prostate cancer or colon cancer in that most people won't have any idea that they have it until they take the appropriate test and get the diagnosis. As to the specific nature of the exposure of a coal miner, he testified that the body's ability to clear the dust is important, but that the amount of dust in the lung can be as much as one-half the total weight of the lung itself. He added that with mixed dust exposure, including silica, there is much more toxicity. The Arbitrator notes that Petitioner's unrebutted testimony is that he was exposed to silica in his mining work. Dr. Meyer said that if he reads the x-ray positive, entries in treatment records of clear lungs wouldn't change his diagnosis. Pulmonary function tests, be they good or bad, wouldn't have a bearing. And complaints of shortness of breath or a failure to find shortness of breath would have no effect on the reading of the x-ray. Again, he said that reading an x-ray as negative does not rule out the possibility that CWP exists. Dr. Castle, Respondent's other expert, did not disagree with Dr. Meyer.

In weighing the evidence, the Arbitrator finds the preponderance of the evidence in Petitioner's favor. Respondent's experts were more than equivocal, admitting that their negative readings did not rule out CWP, while Petitioner's experts were not equivocal. To support that, Dr. Meyer testified that a positive reading coupled with a sufficient history of exposure was enough basis to diagnose CWP; therefore, Dr.

Smith and Dr. Paul had an adequate medical basis for their opinions. In addition, the studies brought forth by Dr. Meyer indicate that it is more likely than not that Petitioner would have CWP diagnosed pathologically were an autopsy to be taken at his death. The Arbitrator is not speculating nor engaging in conjecture that Petitioner has pathologically significant CWP; however, the Arbitrator does take note of these studies in finding that Petitioner has met his burden. The Arbitrator recognizes that Respondent's experts are both b-readers, while Dr. Smith is the only b-reader for Petitioner. The Arbitrator also recognizes that the only two radiologists in the record are Dr. Smith and Dr. Meyer. This decision is made with all these facts being weighed and considered.

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

As noted above, the Appellate Court has settled the issue. When a miner has proven the existence of CWP, he has also proven disablement by both an impairment in the function of the lungs and by a medical contraindication of further coal mine exposure. The universal testimony in this record agrees with the Court.

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

The Arbitrator notes that as of the time of Dr. Paul's testing, Petitioner's pulmonary function testing was within the range of normal, and his physical examination of the chest showed wheezing and coughing with forced exhalation. At Arbitration, Petitioner gave credible testimony as to his pulmonary condition since leaving the mines. The Arbitrator notes that Petitioner's treatment records are sufficient for further diagnoses of sinusitis and allergic rhinitis. He has been treated for these diseases, and has been prescribed medication for them. The Arbitrator finds that these airways diseases could be aggravated and made worse by further exposure to the coal mine environment, and further finds that they were aggravated by the coal mine environment, making them compensable.

The Arbitrator finds Petitioner to be disabled to the extent of 8% person as a whole.

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Inez Qtaish,

Petitioner,

vs. No. 12 WC 19559

Bronzeville Park Nursing and Skill Facility,

Respondent.

ORDER

This matter comes before the Commission on: 1) Petitioner's petition to proceed as a poor person under section 20 of the Workers' Compensation Act (the Act); 2) Respondent's motion to dismiss Petitioner's petition for review; and 3) Dworkin & Maciariello's motion to enforce its attorney fee petition. All parties appeared for hearing on February 6, 2020. The Commission finds and orders as follows:

On or about June 6, 2012, Petitioner retained the firm of Dworkin & Maciariello to represent her with respect to a work accident that occurred on May 13, 2012. Petitioner signed a standard attorney representation agreement. In August of 2017, Petitioner terminated Dworkin & Maciariello as her attorney. Dworkin & Maciariello promptly filed a petition for attorney fees, which was continued to disposition.

Petitioner represented herself (*pro se*) at an arbitration hearing on November 19, 2018. Respondent was represented by the firm of McCabe and Kirshner. On May 7, 2019, an arbitrator filed a decision awarding temporary total disability, medical benefits and permanent partial disability benefits.

On May 8, 2019, Petitioner *pro se* filed a petition for review of the arbitrator's decision. The proof of service on the back of the petition does not list any parties to whom notice was given.

On May 14, 2019, Petitioner filed a petition to proceed as a poor person under section 20. The petition, which states Petitioner intended to appear before Commissioner Coppoletti on June 27, 2019, was not properly noticed, in that it did not list any parties to whom notice was given.

In November of 2019, the firm of Nyhan, Bambrick, Kinzie & Lowry entered its appearance on behalf of Respondent.

On December 4, 2019, Dworkin & Maciariello filed a motion to enforce its attorney fee petition.

In December of 2019, the Commission on its own motion set the matter for disposition.

On January 8, 2020, Respondent filed a motion to dismiss Petitioner's petition for review for failure to timely file an authenticated transcript or arbitration.

On February 6, 2020, Commissioner Stephen Mathis held a hearing in the matter. All parties appeared, made statements and presented evidence. A transcript of the hearing was made. Petitioner wished to obtain as a poor person a transcript of arbitration, so that she could proceed with her review. Petitioner was under the impression the transcript should have arrived in the mail per Commissioner Coppoletti. However, there did not seem to be a signed order to that effect. Respondent's new counsel stated that Petitioner's section 20 petition did not show on the Commission's docket and there was no order entered on June 27, 2019.[1] Also, there was nothing in the records of the prior attorney for Respondent, who has died. Respondent did acknowledge receiving Petitioner's petition for review.

The Commission finds, based on the record and off the record discussions, that Petitioner is a poor person within the meaning of section 20.

Turning to Respondent's motion to dismiss Petitioner's petition for review, the Commission, after a thorough consideration of all records, notes that the Review Department failed to set a return date on review (the date authenticated transcript is due) and failed to set a briefing schedule. Under the circumstances, the Commission denies Respondent's motion to dismiss.

Lastly, the Commission finds that Dworkin & Maciariello's motion to enforce its attorney fee petition should be entered and continued to final disposition of Petitioner's case on review and further appeal, if any.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's petition to proceed as a poor person under section 20 of the Act is granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's motion to dismiss Petitioner's petition for review is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Dworkin & Maciariello's motion to enforce its attorney fee petition is entered and continued to final disposition of Petitioner's case on review and further appeal, if any.

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[1] The Commission has searched its records and found no ruling on the petition to proceed as a poor person.

IT IS FURTHER ORDERED BY THE COMMISSION that the Review Department is directed to set a return date on review and a briefing schedule, so that a review of the arbitrator's decision can proceed in due course.

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 Circuit Court.

DATED: APR 2 0 2020
SM/sk
44

Stephen J. Mathis

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rickey Chavarria,
Petitioner,

vs.

Anthony Marano Co,
Respondent.

20IWCC0235

NO: 17 WC 21311

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, medical, permanent disability and temporary disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 14, 2019, is hereby affirmed and adopted.

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

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

There is no bond for the removal of this cause to the Circuit Court by Respondent. 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 20 2020
o3/19/20
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0235

CHAUARRIA, RICKEY Case# **17WC021311**

Employee/Petitioner

ANTHONY MARANO COMPANY INC

Employer/Respondent

On 2/14/2019, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1427 BERG & BERG
JOEL COAKLEY
2100 W 35TH ST
CHICAGO, IL 60609

0532 HOLECEK & ASSOCIATES
BARNALDI ROY-MOHANTY
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

20IWCC0235

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

- [ ] 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

Rickey Chavarria
Employee/Petitioner

v.

Anthony Marano Company, Inc.
Employer/Respondent

Case # **17** WC **21311**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **January 11, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [x] 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. [x] 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 [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0235

FINDINGS

On **June 23, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

In the year preceding the injury, Petitioner earned **$38,480.00**; the average weekly wage was **$740.00**.

On the date of accident, Petitioner was **50** years of age, ***single*** with **0** dependent children.

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

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

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

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

ORDER

BECAUSE THE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH RESPONDENT ON JUNE 23, 2017, PETITIONER'S CLAIM FOR COMPENSATION IS HEREBY DENIED.

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

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

Signature of Arbitrator

February 13, 2019
Date

ICArbDec p. 2

FEB 14 2019

Statement of Facts

Petitioner Rickey Chavarria testified that he is employed by Respondent Anthony Marano Company as a truck driver. He has worked for them for close to 4 years. His job is to deliver produce. He testified that he would make deliveries based upon the assignment given to him on a daily basis. He would check in with the customer and have them sign a bill of lading. He would turn in the bills of lading at the end of the shift. Petitioner testified that he worked 7 days per week, averaging 70 hours per week. He earned $18.50 per hour. He would begin at 7:00 to 7:30 AM and work until he finished his route. He testified that he had no option to work less than 7 days per week. Petitioner testified that PX 1 was his bank deposits and identified the direct deposits made by Respondent for the year preceding June 23, 2017. These checks included regular pay, overtime, vacation, and bonuses. Respondent's payroll department would have the actual checks.

Petitioner testified he was in a car accident in December 2007 and had treatment for his neck for three months. He had an MRI of his neck. He testified he had no treatment thereafter until after June 23, 2017. Petitioner also had prior Workers' Compensation Claims. The Application for Adjustment of Claim notes 5 prior filings. The Arbitrator notes that the 3 claims filed in 1990 and 1992 990 WC 17764, 90 WC 17765, 92 WC 7427) were settled together for 1% MAW. 09 WC 3914 was settled for 2.46% MAW. 11 WC 113 was dismissed.

Petitioner testified that on June 23, 2017, he was delivering to El Guero Supermarket on Root Street in Aurora. He testified that he had delivered to that location many times. He estimated he was there once per month. In 2016, it was 2 to 3 times per week. He checked in with the manager. At the end of the delivery, he pulled the rope to close the door and it came down too fast. He ducked but the door hit him on the back of the neck. He felt pain. He testified that the accident was witnessed by Porfilio Castallino, an employee of El Guero. He testified that he finished his work day. He was thinking he would finish his day, go home and hope the pain would go away.

Petitioner testified that he continued to work until he reported the injury to either Maria or Elizabeth Lara. Both are managers, maybe in HR. He testified he filled out an accident report and was sent to Concentra. Petitioner testified he was not certain what date he filled out the report, but it was the same date that he first was seen at Concentra. He testified that when he filled out the accident report, he could not remember the date of accident. Petitioner testified that he is aware of Respondent's accident reporting policy. He was supposed to report to Jason Nitti immediately. He reported an accident to him in 2016. Petitioner testified Mr. Nitti was physically present at the warehouse. Petitioner would speak to him about 2 times per month. He could text or phone him. He testified he did not report the accident to him immediately because he was not in his right mind.

Jason Nitti testified that he has been employed by Respondent for over 6 years. He is currently the Director of Logistics and Fleet. In June 2017, he was Director of Logistics. His job duties are to monitor the local drivers and inbound and outbound logistics, buying and selling of all the equipment. He is Petitioner's supervisor. He would monitor Petitioner. He would have interaction if there were any issues, otherwise, his day to day interaction would be if he would see Petitioner in the building. Petitioner was a CDL Class A driver. He testified that drivers have different start times and work 8 to 11 hours per day. They are required to work 5 days per week, at least 8 hours per day. If the route is not finished, the driver must complete the route. Drivers work 5 to 6 days per week, sometimes 7. All overtime beyond the required 5 days is voluntary. Respondent offered RX 7 and RX 8 which are spreadsheet calculations of Petitioner's average weekly wage prepared by counsel.

Mr. Nitti testified that he would interact with the drivers on a daily basis if needed. The Petitioner's job duties at a delivery were to check in with the supervisor, review his bill of lading and deliver to the dock, not into the store. His phone would show when he arrived. The customer would check and sign the bill of lading and return it to the driver. He would turn these in when he returned. Mr. Nitti testified that Respondent's accident policy was that any injury, damage to the vehicle or customer complaint should be reported to him immediately. Petitioner was advised of the policy at the time of his hire. Petitioner had notified him of other incidents. If there was an injury reported, Mr. Nitti would take it to Beth in HR or Elizabeth Lara. He testified that Petitioner did not report an accident to him occurring any date in June 2017. He recalls just in passing Petitioner mentioned that his neck was struck at El Guero. Mr. Nitti identified RX 3, RX 4, and RX 5 as the listing of Petitioner's routes for May, June and July 2017. There is no delivery to El Guero at all in June 2017.

Petitioner was seen at Concentra Occupational Health on July 5, 2017 (PX 2). He presented with a neck injury and complaints of chest pain. The Injury Date is listed as 6/5/2017 (PX 2). Petitioner testified he told them he did not know the date of accident and guessed June 1. The Occupational History states the average work day is 8 hours and Petitioner worked no recent overtime. The history is that an overhead door hit him on the back of the neck. He did not fall down and did not seek medical attention. He retracted his complaint of chest pain. Examination was negative except for painful extension and flexion. X-rays were negative except for degenerative changes. Petitioner was diagnosed with a neck contusion and released to full duty work and advised to see his personal doctor for the issues discussed (PX 2).

Petitioner saw his family doctor, Dr. Wright, from July 7, 2017 through July 17, 2017 (PX 5). His handwritten notes of treatment are illegible. His Surgeon's Report dated July 7, 2017 contains a history that on June 23, 2017 about 3:00 PM while completing a delivery at El Guero Supermarket in Aurora, patient closed the north dock door with a pull rope. The door malfunctioned and closed rapidly, striking the patient's posterior cervical region. The injury was witnessed by Porfilio. Treatment was electrical stimulation, diathermy and anti-inflammatory medication. Dr. Wright assessed cervical strain with right and left arm radiculopathy. Dr. Wright also prepared Employee Work Status Reports for each visit. These list the date of injury as June 7, 2017 or June 1, 2017. They placed Petitioner on restrictions through July 17, 2017 when Dr. Wright took Petitioner off work (PX 5). Petitioner testified that he worked until July 12, 2017. He brought his restrictions to Respondent and he was told by Respondent that there was no work available within his restrictions. Petitioner had an MRI of the cervical spine ordered by Dr. Wright performed July 28, 2017 (PX 8).

Dr. Wright's records note that he was advised that this matter was denied on July 20, 2017 (PX 5). Petitioner filed a pro se Application for Adjustment of Claim with the Commission on July 21, 2017 (RX 1). The date of accident is listed as June 1-20/21. Notice is listed as given both orally and in writing (RX 1). An amended Application was filed on August 9, 2017 by Berg & Berg (RX 2). The date of accident is listed as 6/23/2017 (RX 2). Petitioner testified that he figured out the date of accident from his credit card statement. He testified the injury occurred the same day he went to the Secretary of State after work to transfer the city sticker on his new car., and that charge was on the statement.

Petitioner testified Dr. Wright referred him to Dr. Salehi. He first saw Dr. Salehi on August 10, 2017 (PX 3). The history states that on June 23. 2017, he was pulling on an overhead door (the motor was broken) when it started coming down quickly and hit him on the back of the neck. Petitioner reported immediate pain in his neck. He continued to work but the pain worsened over the next week and he reported it to his employer. He complained of constant pain in the neck radiating to the shoulders with tingling down both arms. Petitioner admits to a prior MVA three years ago when he had a herniated disc in his neck. He states that he underwent

physical therapy and that his symptoms resolved completely. Physical examination noted tenderness and diminished but equal upper extremity reflexes. Strength and sensation were normal. Dr. Salehi reviewed a 1/5/08 cervical MRI report as showing a bulging disc at C5-6. He read the July 28, 2017 MRI as showing herniated discs at C3-4, C4-5 and C5-6. He began Petitioner on physical therapy (PX 3).

Petitioner attended physical therapy at Athletico on August 15, 2017 through October 16, 2017 (PX 4, PX 7). Dr. Salehi notes some improvement at his September 12, 2017 visit. He continued Petitioner in physical therapy and on work restrictions (PX 3). Petitioner was discharged from physical therapy to full time work without restrictions on October 16, 2017 (PX 7). On October 17, 2017, Petitioner reported improving pain with therapy but still complained of limited range of motion with pain radiating into the upper arms and his hand falling asleep occasionally. The physical examination noted continued tenderness. There is a positive Spurling Maneuver, even with non-physiologic pressure. Dr. Salehi notes that he continues with neck pain although improved. Petitioner can work without restrictions (PX 8). On November 14, 2017, Dr. Salehi notes Petitioner has returned to work full duty and is working 7 days per week. He reports he is achy and tired at the end of the day. Dr. Salehi states Petitioner can continue to work full duty and does not need to return for re-evaluation (PX 8).

Petitioner testified he returned to his regular job on October 17, 2017. His job is the same now as it was before the accident. He has had no further treatment since last seeing Dr. Salehi. Petitioner testified he still has pain of 7/10. If he moves wrong, the pain will be 10/10. He testified he takes muscle relaxers and an occasional Norco. He stretches and takes hot baths. He does the exercises from therapy. He bought a neck brace. This was not prescribed by any doctor. If a doctor told him in the future he needed surgery, he would consider it.

Conclusions of Law

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

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980).* To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of the claimant's employment. An injury occurs "in the course of' employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties or engages in some incidental employment duties. An injury "arises out of" one's employment if it originates from a risk connected with, or incidental to, the employment and involves a causal connection between the employment and the accidental injury.

Petitioner's testimony of the accident, if found credible, would satisfy the "in the course" and "arising out of" requirements. But the Arbitrator finds Petitioner's story not credible and contradicted by the remainder of the evidence.

Petitioner failed to report the accident promptly to Jason Nitti despite the Respondent's policy to do so immediately. This failure is particularly troubling since Petitioner acknowledged his understanding of the policy, had previously properly reported an incident to Mr. Nitti. The failure to report the incident promptly to Mr. Nitti is extremely significant to the Arbitrator because the policy was to report not only injuries but any damage to the

truck. Petitioner reported to two different medical providers that the door came down because it was broken. The failure to report the defective door and failure to affect a repair would create a future hazard to anyone using that truck including Petitioner. The route logs then document that, after the alleged date of accident, Petitioner worked a regular route on 10 consecutive days before he claims to have reported the injury to Ms. Lara, not Mr. Nitti, despite having reported prior incidents to him.

The Petitioner's inability to consistently report the date of accident also undermines Petitioner's credibility. His varied and inconsistent histories of the incident undermine his claim that he suffered accidental injuries arising out of and in the course of his employment, particularly given his multiple prior claims filings. While he may not know the exact date, the failure to be able to determine if the accident was over a month ago or just a week or two ago is significant. Petitioner testified that when he reported the injury to Ms. Lara on July 5, 2017, he did not know the date of injury. Petitioner first reports to Concentra that the accident occurred a month before the July 5, 2017 visit and the record state the accident date is June 5. While Dr. Wright's Surgeon Report includes the June 23, 2017 date and details of the accident, this document is contradicted by and is inconsistent with Dr. Wright's daily notes and bills which all list the accident date as either June 1 or June 7. Given that Petitioner's hand-written Application for Adjustment of Claim filed on July 21, 2017, was prepared after Petitioner had already completed his care with Dr. Wright, and claims accident dates of June 1-20/21, the Arbitrator infers that the typed Surgeon's Report was prepared after the dates of treatment listed rather than on July 7, 2017. It is not until the Amended Application is filed and Petitioner is seen by Dr. Salehi that a June 23, 2017 accident is documented.

Once Petitioner's accident date is fixed on June 23, 2017, the location at El Guero and the existence of the witness Porfilio are also included. But RX 4 is credible evidence that Petitioner did not make any delivery to El Guero the entire month of June 2017. He made no deliveries at all in Aurora. The Arbitrator notes that, despite identifying the witness in the medical records within weeks of the alleged accident, Petitioner did not call him to testify, did not subpoena his attendance, and offered no explanation for failing to produce this critical witness.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on June 23, 2017.

In support of the Arbitrator's decision with respect to (G) Average Weekly Wage, the Arbitrator finds as follows:

Although the Arbitrator's finding with respect to Accident renders further issues moot, the Arbitrator makes the following finding with respect to Average Weekly Wage in the event the Accident finding is reversed.

Section 10 of the Act states "the compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her

employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc. v. Illinois Workers' Compensation, 372 Ill. App. 3d 549; 865 N.E. 2d 979; 2007 Ill. App. LEXIS 244; 310 Ill. Dec 259.*

Petitioner testified that he was paid $18.50 per hour. Both Petitioner and Mr. Nitti agreed that he was regularly scheduled for at least 8 hours per day for 5 days a week or 40 hours per week. Petitioner testified that working over 8 hours per day and additional hours on Saturday and Sunday were mandatory overtime. Mr. Nitti testified that the additional days were voluntary but that drivers were required to complete their deliveries even if the shift exceeded 8 hours. He testified the regular work day was 8 to 11 hours.

Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. Having heard the testimony and reviewed the exhibits, the Arbitrator finds that Petitioner has failed to prove any overtime hours should be included in the calculation of his average weekly wage. The Arbitrator finds Mr. Nitti's testimony persuasive that work beyond 5 days per week was voluntary. This is consistent with the notation in the Concentra records that Petitioner's regular work week was 5 days. While, based upon the testimony of Petitioner and Mr. Nitti, Petitioner may have worked mandatory overtime hours in excess of 8 hours per day in completing his routes on his regularly scheduled days, no evidence to allow the calculation of these overtime wages was offered. PX 1 is a compilation of the net amounts paid to Petitioner. These deposits would include net pay for all overtime hours including the overtime premium as well as vacation, sick time and bonuses. The amount paid is net after deductions and is of no use to the Arbitrator in the calculation wages. No wage statement or wage records from Respondent were offered into evidence. Petitioner did not subpoena these records. RX 7 and RX 8 are attorney prepared calculations but do not include any underlying evidence to support the attorney's calculations. They include no explanation of whether other hours were ignored or eliminated or the reasons for any days not worked. The Arbitrator finds them of no evidentiary value.

The only credible evidence admitted is Petitioner testimony that he earned $18.50 per hour and Mr. Nitti's testimony that the required workweek was 40 hours per week. Based upon this evidence, Petitioner's Average Weekly Wage would be 40 hours x $18.50 per hour or $740.00.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that his average weekly wage pursuant to Section 10 of the Act was $740.00.

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

Based upon the Arbitrator's finding with respect to Accident, the remaining issues of Notice, Causal Connection, Medical, Temporary Compensation, and Nature & Extent are moot.

Petitioner's claim for compensation is denied.

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

Based upon the Arbitrator's finding with respect to Accident, Petitioner's claim for penalties is denied.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Debra Busbey,
Petitioner,

vs.

Continental Tire North America Inc,
Respondent.

20IWCC0236

NO: 19 WC 9446

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 issue of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 26, 2019, is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $15,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 20 2020
o4/2/20
DLS/rm
046

Deborah L. Simpson

Barbara N. Flores

Marc Parker

20IWCC0236

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

20IWCC0236

BUSBEY, DEBRA
Employee/Petitioner

Case# **19WC009446**

CONTINENTAL TIRE NORTH AMERICA INC
Employer/Respondent

On 9/26/2019, 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 1.86% 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:

1167 WOMICK LAW FIRM CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

0299 KEEFE & DePAULI PC
ANDREW J KEEFE
2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

20IWCC0236

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

- [ ] 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
NATURE AND EXTENT ONLY

Debra Busbey
Employee/Petitioner

v.

Continental Tire North America, Inc.
Employer/Respondent

Case # 19 WC 09446

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lee**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **07/12/2019**. By stipulation, the parties agree:

On the date of accident, **06/22/2018**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**72,888.65**, and the average weekly wage was $**1,410.45**.

At the time of injury, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**268.66** for TTD, $**0** for TPD, $**0** for maintenance, and $**16,603.44** for advanced PPD benefits, for a total credit of $**16,872.10**.

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

ORDER

Respondent shall pay Petitioner the sum of $**790.64**/week for a period of **39.9** weeks, less advanced PPD benefits (5.5% loss of use of the right hand and 5.5% loss of use of the left hand as of the trial date, with additional advancements scheduled) for which Respondent is entitled to a credit, as provided in Section **8(e)(9)** of the Act, because the injuries sustained caused **10.5% loss of use of the right hand and 10.5% loss of the left hand**.

Respondent shall pay Petitioner compensation that has accrued from **12/31/19** through **07/12/19**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

9/23/19
Date

SEP 26 2019

The Arbitrator finds the following facts:

Petitioner, 55 years of age, sustained repetitive trauma injuries to her bilateral hands/wrists as a result of her work activities manifesting on June 22, 2018. She has worked for Respondent 17 years and is employed as a tire inspector. She reportedly works 55-60 hours per week. She developed symptoms in her right and left hands. Bracing and therapy did not alleviate her symptoms.

Petitioner underwent an EMG/NCS study on August 14, 2018 that was interpreted to reveal moderate bilateral carpal tunnel syndrome, right worse than left. She came under the care of Dr. Steven Young on September 11, 2018. Dr. Young diagnosed bilateral carpal tunnel syndrome and recommended surgery. No work restrictions were imposed.

On October 26, 2018, Petitioner underwent a right carpal tunnel release without complication. On November 14, 2018, Petitioner underwent a left carpal tunnel release without complication. Work restrictions were imposed following each surgery. Physical therapy was ordered.

Dr. Young last evaluated Petitioner on December 31, 2018. Petitioner reported doing well. She denied having numbness, tingling, or pain. She also denied any limitations in her activities of daily living. Physical examination revealed the incision sites were well healed without erythema or drainage. Petitioner had full range of motion in both hands. No decreased strength was noted. Petitioner was released from care without restrictions and instructed to return on an as needed basis.

Respondent paid 2/7 weeks of TTD benefits. Respondent has advanced 21 weeks of PPD benefits as of the date of trial. The parties agree Respondent is entitled to a credit for those payments and a credit for scheduled PPD advancements.

At trial, Petitioner testified that her recovery has been uneventful. She has resumed working her regular job activities. She works overtime and is subject to annual raises. She testified that she has no problems or complaints with either hand since her release from care on December 31, 2018.

Therefore, the Arbitrator concludes:

(1) Petitioner sustained disability to the extent of **10.5% loss of use of the right hand and 10.5% loss of use of the left hand** or **39.9 weeks** disability under Section **8(e)(11)** of the Act as a result of the June 22, 2018 work accident manifesting June 22, 2018. Petitioner underwent bilateral carpal tunnel releases without complication and has made a full recovery.

In determining the level of permanent partial disability, the Arbitrator considers the following factors:
(i) Petitioner did not submit an AMA impairment rating report and this factor is given no weight.
(ii) Petitioner resumed working her regular job as 100% inspector on December 31, 2018, and continues working her regular job duties without restriction. She has not been reprimanded for her performance and is capable of continuing his job despite the injury. She continues working overtime. This factor is given some weight.
(iii) Petitioner was 55 years at the time of her injury and will not have to live and work with her purported symptoms as long as a younger individual. This factor is given some weight.

(iv) Petitioner's future earning capacity was not diminished by the injury and she is subject to annual cost of living raises. This factor is given some weight.
(v) Petitioner credibly testified that she had no complaints or residual symptoms following her release from care. This factor is given significant weight.

(2) Respondent is entitled to a credit for advanced PPD benefit payments, which at the time of trial, totaled 5.5% loss of use of the right hand and 5.5% loss of use of the left hand. Respondent is also entitled to a credit for any other advanced PPD payments.

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ 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
☒ Grant	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELIEZER GONZALEZ,

Petitioner,

vs. NO: 10 WC 4125

JEWEL FOOD STORES, INC.,

Respondent.

20IWCC0237

DECISION AND OPINION ON REVIEW PURSUANT TO SECTION 8(a)

This matter comes before the Commission on Respondent's §8(a) Petition, as amended, requesting a determination that Respondent is no longer obligated to authorize Petitioner's prescriptions for certain narcotics and to find other medical care and treatment options that are reasonable.

The underlying claim arises out of a May 20, 2009 accident in which Petitioner injured his lower back while moving pallets, resulting in disc herniation and interbody fusion surgery at the L5-S1 level, along with subsequent hardware removal surgery. Thereafter, Petitioner and Respondent entered into a settlement agreement, which was approved by the Arbitrator in a Settlement Contract Lump Sum Petition and Order dated April 16, 2013. Pursuant to the contract, Petitioner received a settlement of $220,000, representing a permanent diminution of work capacity and a compromised wage differential. The parties agreed that medical rights under §8(a) remained open for Petitioner's low back. Under the agreement, Petitioner bears the burden of proving continuing causation. The settlement's open medical provision excludes vocational rehabilitation and maintenance benefits. Moreover, the agreement provides that Respondent retains all rights concerning its liability for medical care as set forth in §8(a) as amended and other provisions of the Act, including but not limited to §§8.2, 8.7, and 12.

On July 17, 2017, Respondent filed a petition pursuant to §8(a) of the Act, requesting the Commission conduct a hearing to determine whether Petitioner's medical care remains

reasonable. The petition alleges that Petitioner has been prescribed narcotic medication for years and the recent levels of opioid usage caused concern. The petition also alleges that, consistent with the terms of the settlement contract, Respondent obtained a medical examination of Petitioner with Dr. Howard Konowitz, who opined that opioids are not recommended for chronic non-malignant pain and not reasonable or clinically appropriate. Dr. Konowitz offered a medical suggestion for in-patient or out-patient Suboxone treatment to address the opioid prescription.

On May 16, 2018, Respondent filed an amended petition, additionally alleging that Petitioner has refused a detoxification and weaning program. Respondent further alleged that Respondent's counsel worked with both Petitioner's counsel and his treating physician, Dr. Christopher Morgan, for over two years to determine whether there could be any modification to Petitioner's prescription medication regimen. Ultimately, the amended petition requested the Commission find Respondent is no longer obligated to authorize Petitioner's prescriptions for certain narcotics, and also a determination that other treatment options, including but not limited to a detoxification and weaning program, are reasonable.

On May 24, 2018, Petitioner filed a response to the amended petition. Petitioner argued that Dr. Konowitz's opinion that opioids are not recommended for chronic non-malignant pain is incorrect. Petitioner also argued Respondent is legally obligated to pay for the medication in accordance with the settlement agreement. Petitioner further contended that the proposed detoxification program does nothing to address his chronic pain.

A hearing was held before Commissioner Flores on March 19, 2019. Both parties were represented by counsel. A record was taken, which discloses the following facts.

I. FINDINGS OF FACT

Petitioner testified that he suffered a back injury while working for Respondent in 2009 that has caused unbearable chronic pain. He stated he reached a settlement agreement with Respondent which provided for open medical and that Respondent is now seeking to open the case again. It was Petitioner's understanding that Respondent initially sought to monitor his medication, but later sought to send him to a detoxification program and does not want to pay for his medications. Petitioner later added that Respondent also did not want to pay for Evzio, a drug which would be administered in the case of a suspected opioid overdose. Petitioner stated he had not been prescribed Evzio but it was now being required in the event of an emergency.

Petitioner further testified his prescribed medications have really helped his life and he would be unable to function without them. Petitioner confirmed that in 2013, he was prescribed Cymbalta, Norco, and Exalgo. Petitioner stated that the Exalgo was later switched to Morphine and these were the medications he was currently prescribed.

On cross-examination, Petitioner acknowledged Respondent has paid for his medications. Petitioner also acknowledged he did not want to participate in the detoxification or weaning program for which Respondent had offered to pay. Petitioner stated he just followed the recommendations of his treating physician.

Petitioner also testified that he was aware of the dangers of opioid medications publicized in the news media. He testified that he discussed the risks of opioid use with his physician, signed an opioid contract, and undergoes urine drug screening tests. He stated that he was unaware that if he were injured today, he would not be prescribed his current medications. According to Petitioner, no one had spoken to him about the CDC guidelines issued in 2016. Petitioner testified that the people depicted on television were using opioids for the "high," whereas he was hurt and would not take these medications if it were not required.

Petitioner testified he was 41 years old. When asked whether he would continue with his prescribed medications for the next 40 years, Petitioner again answered that he was not a doctor and would follow his doctor's recommendations.

Petitioner introduced various certified medical records into evidence. The oldest record is dated August 15, 2012, but the remainder cover the period from April 17, 2017 through May 14, 2018. The more recent records generally indicate Petitioner reported pain at a level of 3/10 and the musculoskeletal "[e]xamination is essentially unchanged." Petitioner was diagnosed with: (1) lumbar postlaminectomy syndrome; (2) lumbar discogenic pain; (3) lumbosacral radiculopathy; (4) lumbar facet syndrome; and (5) opioid dependence.

The March 5, 2018 treatment note identifies Petitioner's pain score and essentially unchanged condition with recommendations for that visit stated as follows:

> "His urine and drug screen done at his last visit was consistent. The plan is to have a trial of gradually decreasing his use of opioid medications and the plan is for him to have a trial of eliminating the MSER 50 mg tablet that he has been using in the morning. He is to continue using MSER 60 mg tablet every eight hours, Cymbalta 60 mg daily, and Norco 10/325 at a maximum of four per day.
>
> I did review Dr. Konowitz and report dated January 22, 2018. I disagree with Dr. Konowitz's opinion regarding my treatment of Eliezer Gonzalez. Mr. Gonzalez has reported increase in his level of function and increase in his quality of life with the use of opioid medications in the past. When we have tried decreasing his use of opioid medications, he has had increase in his level of pain and decrease in his level of function. However, he has overall been decreasing his use of opioid medications and it is wrong of Dr. Konowitz to state in his IME report that the patient has not decreased his use of opioid medications in terms of morphine equivalent. The patient has decreased his use of opioid medications namely morphine equivalent."

The treatment note for April 2, 2018 indicated this medication regime was to be continued. The May 14, 2018 treatment note recommended a trial of decreasing Petitioner's dose of Norco 10/325 to three times daily instead of four, while continuing his doses of MSER and Cymbalta. A urine drug screen was to be obtained for adherence monitoring on that date.

Petitioner also submitted records from Dr. Peter Brown, a pain psychologist who prepared risk stratification/medication management evaluations of Petitioner for medication clearance. On October 30, 2012, Dr. Brown concluded that Petitioner was an acceptable candidate for Norco 10/325 and recommended a low risk protocol. On March 20, 2014, Dr. Brown recommended a low-moderate risk protocol. On August 5, 2015, Dr. Brown assessed Petitioner's global risk level was low to moderate, an assessment repeated on October 4, 2017.

Petitioner submitted a statement from the American Academy of Pain Medicine on the use of opioids to treat chronic pain, as approved in February 2013. The 2013 statement indicated in part that prescription of opioids for chronic, intractable pain is appropriate when more conservative methods are ineffective and the treatment plan is reasonably designed to avoid diversion, addiction, and other adverse effects.

Dr. Konowitz testified by a deposition taken on May 10, 2018.[1] Dr. Konowitz is board-certified in anesthesia, pain management, and internal medicine. At the time of his testimony, his practice focused on anesthesia and pain management.

Dr. Konowitz testified that he performed two independent medical examinations of Petitioner on October 27, 2016 and January 17, 2018. The doctor stated that he issued an addendum without an examination on March 19, 2018.[2]

According to Dr. Konowitz, at the time of the first examination, the diagnosis related to Petitioner's opioid management for his chronic mechanical back pain. The doctor indicated that Petitioner had average pain scores of 2 or 3/10, with a maximum of 6 to 7/10. Petitioner's pain medication prescriptions included: Morphine Sulfate (60 mg), three times daily; Morphine Sulfate Extended Release (MSER) (30 mg), three times daily; and Hydrocodone 10.325, four times daily.

Dr. Konowitz calculated that the Morphine equivalent dosage of Petitioner's prescriptions was 310 milligrams daily. Dr. Konowitz stated that 0-50 milligrams would be a range where acute pain is treated. However, the doctor also stated that if a patient had transitioned from acute to chronic pain, the range might extend to 90 milligrams, with some literature indicating as many as 110 milligrams. Dr. Konowitz testified that those higher ranges would be for someone on opioids.

Dr. Konowitz further testified that the vast majority of patients should not transition into these higher dosages, in order to decrease the risk of side effects and long-term consequences. Dr. Konowitz stated that as the dosage increases, the incidence of death and duration of treatment increases. He opined there "[a]bsolutely" was a risk of death in Petitioner's case. Dr. Konowitz gave as examples the cases where a patient also takes an over-the-counter medication for an upper respiratory infection or takes any medication with a sedative potential.

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[1] Objections made in the May 10, 2018 deposition were ruled upon by the then-assigned Commissioner.
[2] Dr. Konowitz's IME reports and the addendum were introduced into evidence as exhibits to his deposition.

Dr. Konowitz added that there are systemic effects of chronic, long-term opioid usage. He stated that such usage can affect "the gut" as well as the cognitive and endocrine systems. He opined that "[t]here's really nowhere on the body that's not ultimately affected by chronic long-term opioids."

Dr. Konowitz testified that Petitioner was at a dosage level that would render a typical person unconscious. According to the doctor, Petitioner had developed a tolerance and a change in the brain chemistry has occurred. Dr. Konowitz stated that with chronic opioid usage, patients lose their reference point regarding their personal pain scores. He also stated that patients properly weaned from these medications usually wind up at their original pain scores. Dr. Konowitz explained that in the subgroup of high-dosage patients, the medication can be so rapidly absorbed that it triggers hyperalgesia, a condition where the pain is worse with the medication than without it.

Dr. Konowitz recommended that Petitioner be weaned off his current medication with a Butorphenol-type product such as Suboxone, although he mentioned similar medications including Butrans and Belbuca. Dr. Konowitz explained that these products are also opioids but work on a different receptor than Morphine receptors in the body. According to the doctor, simply stopping an opioid at Petitioner's dosage level would result in significant withdrawal and pain flares, with side effects including diaphoresis, confusion, and seizures. Dr. Konowitz stated that Suboxone is an oral agent, but other products are available as a patch that will last for a week. He added that some of his patients are police officers who use a patch and it works fine.

Depending on the case, Dr. Konowitz handles detoxification through his office or refers patients to addictionologists. In October 2016, Dr. Konowitz recommended Suboxone and possibly in-patient or out-patient treatment with a program such as Alexian Brothers,[3] although he could name ten others.

Dr. Konowitz opined that a patient should not continue on opioids merely because they have been prescribed and the patient has had some pain relief. He stated that opioids should be used for the right reasons, and those reasons have become more limited as the medical community gets better research.

According to Dr. Konowitz, a pharmaceutical company named Purdue released a medication called OxyContin and promoted literature and opioid use that was incorrect. The doctor opined that the literature from the period of 2000-2010 should have been and has been thrown out because it was not valid. He stated that Purdue convinced the world that the literature for cancer applied to other chronic pain patients. Dr. Konowitz observed that death is common in cancer cases, so the long-term effect of chronic opioid usage was not observed among that group of patients. He noted there are differences between chronic cancer patients and end-of-life cases, and a difference between acute and chronic pain.

[3] An Alexian Brothers pamphlet describing weaning and detoxification programs was admitted without objection during the deposition.

Dr. Konowitz testified that there are now valid CDC guidelines for treatment. He stated that patients can now be treated for pain with adjuvants and non-opioids that work extremely well. The doctor also referred to studies on rats suggesting that Morphine treatment can make nerve injuries worse.

Dr. Konowitz described Petitioner as a "legacy patient." He opined that if the current medical guidelines were followed after Petitioner's injury, opioids would not have been prescribed. According to Dr. Konowitz, opioids would not have been continued as long during the post-operative treatment and the dosage would not have escalated over time. Dr. Konowitz opined that the treating physicians would have changed the adjuvants and used other methods of treatment. He stated that at the first sign of opioid tolerance, Petitioner would have been transitioned to a Butrans patch.

Dr. Konowitz testified he saw Petitioner again on January 17, 2018. He stated he also reviewed Petitioner's medical records from Drs. Morgan and Brown from October 2016 through October 2017. Dr. Konowitz's diagnosis remained that Petitioner had mechanical back pain and a failure of opioids as a treatment.

Dr. Konowitz did not agree with the treatment plan from Drs. Morgan and Brown, which was to continue the opioid prescriptions. Dr. Konowitz opined that the opioids were neither reasonable nor medically necessary. According to the doctor, Petitioner was at a Morphine equivalent dosage of 235 milligrams, which is still an extremely high dose. Dr. Konowitz believed Petitioner's dosage would eventually cause a major event.

Dr. Konowitz also was concerned with the treating physicians' documentation and charting. He testified that the visits appeared to be brief and "rubber-stamped," with entries that were almost copied-and-pasted "Exam unchanged." Dr. Konowitz stated he was not certain that a full assessment was occurring with each visit, based on the charting. At that time, Dr. Konowitz continued to recommend a Suboxone treatment program such as offered through Alexian Brothers. The doctor additionally recommended Nortriptyline or amitryoline for Petitioner's sleep disorder; both also help in downregulating pain.

Dr. Konowitz further testified that on March 19, 2018, he prepared an addendum addressing the side effects of Petitioner's continued opioid usage at its current level. He continued to believe the Morphine and Hydrocodone were not medically necessary. However, he believed the prescribed random urine screenings were appropriate, as well as Duloxetine to treat the mechanical low back pain.

Dr. Konowitz continued to recommend Suboxone or an equivalent, and treatment from an addictionologist through a program like Alexian Brothers, though there are other choices such as Smooth Landings. Dr. Konowitz stated he has had high-dosage patients get down to a zero dosage over time. In his opinion, the problem was that it takes only five minutes to write a prescription, but an hour to get someone into a treatment program and the government incentivizes doctors to conduct five-minute visits.

On cross-examination, Dr. Konowitz was asked whether a doctor's deposition at a judicial proceeding can be reliable if he ignores the motive or circumstances of the litigation. Respondent lodged a standing objection to the line of questioning, which was sustained. Dr. Konowitz was also asked about the terms of the settlement agreement, a standing objection to which was also sustained.

Dr. Konowitz was questioned about a statement in his initial IME report that "[o]pioids are not recommended for chronic non-malignant pain." Dr. Konowitz explained that statement appears as a preface to a question he was asked to answer in his report. Petitioner's counsel also questioned Dr. Konowitz about a note from Dr. Morgan stating it was not true that doctors do not prescribe opioid medication for chronic non-malignant pain, but Respondent's objections to the exhibit and associated questions were sustained on the grounds the document was hearsay, unauthenticated, and produced in anticipation of litigation.

Dr. Konowitz agreed that Petitioner was prescribed Cymbalta, Norco, and Exalgo in 2013 and was still alive. The doctor noted that Petitioner has been prescribed Hyrocodone throughout the period. He added that Petitioner should be on Cymbalta, which is Duloxetine. According to Dr. Konowitz, Exalgo was removed from the market because of its addictive qualities and the danger of its use. He further noted the Exalgo prescription was switched to Morphine. Dr. Konowitz opined that other than the Cymbalta, the opioids were all flavors of the same story.

Dr. Konowitz was also shown what Petitioner's counsel described as the "American Academy of Pain Medication Guidelines, Opioid Guidelines." Respondent's objections to the document were sustained, but questions regarding the contents of the document were permitted. Dr. Konowitz testified that the document was from 2013 and some of it remained valid, but some of it was superseded by the current CDC guidelines. Dr. Konowitz also cited the 2016 CDC guidelines in support of his opinion that opioid usage carried a risk of death.

II. CONCLUSIONS OF LAW

A. Evidentiary Rulings

Initially, the Commission addresses the admissibility of Petitioner's Exhibits 6A and 8, upon which rulings were reserved at the March 19, 2019 hearing. Exhibit 6A contains uncertified medical records from Dr. Morgan reflecting eight visits occurring between January 29, 2014 and August 2, 2018, which apparently did not fall within Petitioner's subpoenaed medical records due to a change in facilities. Exhibit 8 is an uncertified medication management note from June 30, 2017.

The rules of evidence apply to all proceedings before the Commission or an arbitrator, except to the extent they conflict with the Act, the Workers' Occupational Diseases Act, or the Rules Governing Practice Before the Workers' Compensation Commission. 50 Ill. Admin. Code § 9030.70(a) (2016); see *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 479 (1989). Even when a document falls within a recognized exception to the hearsay rule, such as the reports of a treating physician prepared in the course of treatment, an adequate foundation must still be laid before it is admitted into evidence. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002,

1011 (2005) (citing *National Wrecking Co. v. Industrial Comm'n*, 352 Ill. App. 3d 561, 568 (2004)).

In this case, Petitioner failed to demonstrate the authenticity of Exhibits 6A and 8 and lay a proper foundation for their admission into evidence. Nor did Petitioner take advantage of the certification procedure set forth in section 16 of the Act (820 ILCS 305/16 (West 2018)). Accordingly, the Commission concludes these exhibits are not admissible in these proceedings.

B. The Merits

After considering the entire record, the Commission grants Respondent's "reverse" Section 8(a) petition to the extent that the Commission finds that Petitioner's opioid regimen is no longer indicated and that he is now an appropriate candidate for a detoxification program, for which program Respondent has offered to pay.

The issue is whether Petitioner's prescriptions for opioids such as MSER and Norco remain reasonably necessary to alleviate Petitioner's chronic back pain. The Commission is persuaded by Dr. Konowitz's testimony on this issue.

Dr. Konowitz persuasively opined that the prescribed opioids were neither reasonable nor medically necessary taking into account Petitioner's ongoing condition, his response to the medications, relevant, current medical literature, and an "absolute" risk of death for Petitioner if he continues taking opioids at current dosages. According Dr. Konowitz, Petitioner was at a Morphine equivalent dosage of 235 milligrams daily, which is an extremely high dose, one far above even the 110 milligrams which might be considered for someone already taking opioids. Dr. Konowitz opined that as the dosage increases, the incidence of death and duration of treatment increases. He opined there "[a]bsolutely" was a risk of death in Petitioner's case, primarily if he also were to take any medication with a sedative potential. Dr. Konowitz later testified that Petitioner's dosage would eventually cause a major event. Petitioner claims Respondent was being misleading in alleging Petitioner's opioid medications were endangering his life, but the allegation finds support in Dr. Konowitz's testimony.

Nor were death or some other major event the only potentially bad outcomes attributed to long-term, high dosage opioid use. Dr. Konowitz testified that in the subgroup of high-dosage patients, the medication can be so rapidly absorbed that it triggers hyperalgesia. Dr. Konowitz also referred to studies on rats suggesting that Morphine treatment can make nerve injuries worse. The doctor additionally testified regarding the systemic effects of chronic, long-term opioid usage, including upon "the gut," the cognitive system and the endocrine system.

Dr. Konowitz further testified regarding alternative treatment for Petitioner's condition indicating that he should be weaned off his current medication with a Butorphenol-type product such as Suboxone or similar medications. He explained that patients can now be treated for pain with adjuvants and non-opioids that work extremely well. Petitioner observes that his chronic back pain cannot be detoxified, but the medically supported opinions of Dr. Konowitz establish that it can be effectively treated without long-term opioid usage in the quantities prescribed here for Petitioner's particular condition.

20IWCC0237

Petitioner argues the Commission should rule that a §8(a) petition is not proven simply by Dr. Konowitz's opinion. Petitioner asserts that he was not required to present the testimony of his treating physicians to establish the reasonableness and necessity of his treatment. See *RG Construction Services v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 132137WC, ¶¶ 53-55. It is the function of the Commission to resolve conflicts in medical evidence; greater weight may be attached to the opinion of treating physicians. See *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232 (1992) (citing *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill. 2d 1, 4 (1979)). However, the Commission is not required to give more weight to a treating physician's opinion than to the opinion of an examining physician. *Prairie Farms Dairy v. Industrial Comm'n*, 279 Ill. App. 3d 546, 550 (1996).

Although the Commission is persuaded by Dr. Konowitz's testimony, our decision today was informed by the entirety of the evidence. The foregoing includes consideration of the 2013 statement from the American Academy of Pain Medicine on the use of opioids to treat chronic pain. However, Dr. Konowitz noted the invalidity of that earlier research and literature as well as the CDC guidelines established in 2016 reflecting the proper, current medical approach.

The Commission has also considered the medical records from Petitioner's treating physicians.[4] At the outset, the Commission observes that Dr. Brown's risk assessments indicate Petitioner was at low or moderate risk for opioid abuse, with no evidence Petitioner had deviated from the protocol. Yet Dr. Morgan's treatment notes consistently diagnose Petitioner with opioid dependence with steadfast opioid treatment regimens. Dr. Morgan's diagnosis is broadly consistent with Dr. Konowitz's testimony that Petitioner has developed a tolerance for a high dosage of opioids without medical necessity or reasonableness given his condition.

Indeed, Dr. Morgan's March 5, 2018 treatment note, which responds to Dr. Konowitz's January 2018 IME report, specifically mentions Dr. Morgan's ongoing efforts to reduce Petitioner's Morphine equivalent dosage. The records indicate these efforts were continuing as recently as May 2018. Dr. Morgan's notes tend to confirm Dr. Konowitz's concerns regarding Petitioner's Morphine equivalent dosage, reducing the persuasiveness of Dr. Morgan's opinion that the prescriptions remained appropriate.

The Commission accepts Dr. Morgan's observation that Petitioner reported an increase in his level of function and quality of life with the use of opioid medications in the past. However, Dr. Konowitz opined that a patient should not continue on prescribed opioids merely because the patient has had some pain relief. He explained that the reasons for prescribing opioids have become more limited as the medical community gets better research. Dr. Morgan's response to Dr. Konowitz did not address this point or many of the other points Dr. Konowitz raised in support of his opinion that the opioids prescribed in this case were neither reasonable nor medically necessary.

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[4] The Commission observes that Dr. Konowitz's IME reports also appear to summarize Dr. Morgan's recommendations from his treatment notes.

Petitioner maintains that he demonstrated during these proceedings that Respondent was not concerned with his health and simply did not want to pay for the opioid medications at issue. However, Respondent's standing objection to Petitioner's line of questioning of Dr. Konowitz in this regard was later sustained. We note Dr. Konowitz answered that motive was not the issue in rendering his opinions; rather, he testified the issue was whether Petitioner's treatment plan remained medically indicated in 2018. Furthermore, Respondent has offered to pay for alternative treatment, such as a Suboxone program or Butrans, which Dr. Konowitz testified are extremely expensive and he did not take cost into account in making his recommendations.

Petitioner further argues the Commission should find there was a settlement agreement between Petitioner and Respondent in which the MSER, Norco, and Cymbalta medications were included as part of the settlement. Petitioner further argues that a settlement agreement closes a case forever.

The Commission notes that Petitioner's Cymbalta prescription is not in dispute in these proceedings; Dr. Konowitz agrees with that prescription. The Commission has reviewed Petitioner's settlement agreement, which makes no specific reference to medications, let alone the specific opioid medications at issue in these proceedings. The settlement agreement states that medical rights under §8(a) of the Act remained open for Petitioner's low back. Section 8(a) limits the employer's liability "to that which is reasonably required to cure or relieve from the effects of the accidental injury." 820 ILCS 305/8(a) (West 2018). The agreement also provides that Respondent also retains all rights concerning its liability for medical care as set forth in §8(a) as amended and other provisions of the Act, including but not limited to §§8.2, 8.7, and 12.

Neither §8(a) nor the settlement agreement in this case preclude Respondent from seeking a determination that the previously prescribed opioid medications are no longer reasonably required to relieve from the effects of Petitioner's injury. Conversely, Petitioner is similarly entitled to petition for additional or alternative treatment where reasonably required. Given that the Cymbalta prescription is not in dispute, and that Respondent does not dispute that Petitioner suffers from chronic back pain[5], the Commission finds that the ongoing prescription for Cymbalta remains appropriate.

In sum, after reviewing the entire record, the Commission concludes that Petitioner's degree of opioid tolerance has rendered him an appropriate candidate for alternative pain management (a detoxification program), should he so choose, whereby an attempt can be made to wean him off Norco and Morphine and his condition might improve without such imminent risks to his overall health. The Commission understands Petitioner will have concerns about this course of treatment. However, should the detoxification program prove ineffective, nothing in this Opinion and Order precludes Petitioner from filing his own Section 8(a) petition for other or additional treatment.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's motion to terminate the §8(a) benefits for the opioid medications Norco and Morphine (including MSER) is

[5] In the settlement agreement, Respondent denies Petitioner's current condition is related to his accidental injury, but causation is not at issue in these proceedings.

20IWCC0237

granted only to the extent that, while Petitioner's narcotics regimen for pain is no longer indicated, he is now an appropriate candidate for a detoxification program, for which program Respondent has offered to, and shall, pay. Should any detoxification program accepted by Petitioner prove ineffective, nothing in this Opinion and Order precludes Petitioner from filing a new §8(a) petition for other or additional treatment.

Bond for removal of this cause to the Circuit Court by Petitioner is hereby fixed at the sum of $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 24 2020
d: 4/16/20
BNF/kcb
45

Barbara N. Flores

Deborah L. Simpson

Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rondae Thompson,

Petitioner,

vs. NO: 13 WC 41738

City of Chicago,

Respondent.

20IWCC0238

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 wages, benefit rate, permanent partial disability rate, and permanent disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 22, 2018 is hereby affirmed and adopted.

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

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

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

20IWCC0238

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 24 2020
d: 3/19/20
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

THOMPSON, RONDAE
Employee/Petitioner

Case# **13WC041738**
15WC016334

CITY OF CHICAGO
Employer/Respondent

20IWCC0238
20IWCC0238

On 5/22/2018, 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 2.08% 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:

0314 KUMLIN & FROMM
MARK L FROMM
205 W RANDOLPH ST SUITE 1030
CHICAGO, IL 60606

0010 CITY OF CHICAGO DEPT OF LAW
KEVIN REID
30 N LASALLE ST SUITE 800
CHICAGO, IL 60602

20IWCC0238

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

Rondae Thompson
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **13** WC **41738**

Consolidated cases: **15 WC 16334**

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 Luedke**, Arbitrator of the Commission, in the city of **Chicago**, on **February 20, 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. ☐ 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 **November 21, 2013**, 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.

A specific and limited portion of Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$69,402.84**; the average weekly wage was **$1,334.67**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **2** 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 **$38,389.38** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$38,389.38**.

ORDER

Respondent shall pay the petitioner permanent partial disability benefits of $721.66/week for 0.88 weeks, because the injuries sustained caused 4% loss of the right little finger, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $721.66/week for 5 weeks, because the injuries sustained caused 1% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

The Arbitrator refers to his Decision in Case 15 WC 16334 for permanent partial disability benefits to be awarded for petitioner's left wrist condition.

Respondent shall be given a credit of **$38,389.38** for TTD paid.

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

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

Signature of Arbitrator

5-18-2018
Date

MAY 22 2018

The parties tried these cases before Arbitrator Robert Luedke February 20, 2018, and subsequently stipulated to another Arbitrator of the Commission issuing Decision of Arbitrator based on Transcript of Proceedings on Arbitration and exhibits.

Findings of Facts

The petitioner testified that he was employed by the respondent, City of Chicago Department of Streets and Sanitation, for roughly 12 years as a laborer. He was 41 years old at the time of accident. (TA 10-11) His duties were varied and included dumping garbage cans, lifting items, sweeping alleys, and lifting tree trunks. (TA 11-12) On November 21, 2013, the petitioner was working with a partner and a driver and he was loading a garbage can onto the truck using the arm connected to the garbage truck when the can popped off. (TA 13-14) His hand was still on the can – so, the can fell off heavy and knocked him down, and caused him to twist his left wrist. The petitioner testified that he had a little pain in his neck which didn't last very long. He also testified that he hurt his little finger on his right hand.

The petitioner notified his supervisor and presented to MercyWorks that morning with an injury to the back of the neck, lower back, left wrist, and right small finger. (TA 16-17). He was diagnosed with a cervical and lumbosacral strain, left wrist strain, and right fifth finger contusion. He was prescribed some medications, fitted for a splint for his left wrist, and taken off work. (TA 18)

The petitioner returned to MercyWorks November 27, 2013, was referred for physical therapy for the low back, MRI was ordered for his left wrist, and he continued off work. (TA 19) He returned December 5, 2013, and was assessed with a lumbar strain, left wrist contusion/sprain, and right little finger contusion. There was no mention of the neck or cervical spine. He was awaiting the left wrist MRI and engaged in physical therapy for his back and left wrist.

On December 12, 2013, Dr. Anderson noted that the MRI report showed a strain to the scapholunate ligament and a small TFCC tear. He referred the petitioner to Dr. Heller for the left wrist and right little finger. (TA 19-20) The petitioner remained off work. He saw Dr. Heller at Midland Orthopedics December 16, 2013, for his left wrist and right little finger. (TA 21) Dr. Heller noted that he had previously treated the petitioner in 2010 for a left wrist sprain. Dr. Heller compared the recent MRI with one from 2010 and noted that there had been progression of the TFCC tear. In 2010, the petitioner had slight partial thickness tearing of the TFCC without full thickness perforation compared to the complete tear shown on the recent MRI. Dr. Heller also noted that cystic degeneration within the distal ulnar, partial scapholunate ligament tear, and degenerative changes were all unchanged. The right little finger had some slight swelling and Dr. Heller opined that it would heal eventually. He recommended conservative treatment in the form of an injection for the wrist followed by surgery for the wrist if necessary.

The petitioner returned to Dr. Anderson for his low back December 19, 2013. Dr. Anderson noted that the petitioner's physical therapist commented on his lack of effort in therapy. The petitioner remained off work.

The petitioner saw Dr. Heller December 20, 2013, for the left wrist, underwent an intra-articular injection, and was referred for occupational therapy.

On January 2, 2014, the petitioner complained of transient pains into his legs with no numbness. He continued to complain of pain and stiffness and a lumbar MRI was recommended. (TA 26-27) As of January 21, 2014, the petitioner completed 11 physical therapy visits and was discharged for lack of progress.

The petitioner saw Dr. Heller again January 20, 2014. The petitioner stated that his right little finger had not improved and was still painful and swollen and that his left wrist had worsened. Dr. Heller noted that the TFCC tear had worsened after the recent incident. With regard to the little finger, examination showed full range of motion and a small discrete swelling over the radial aspect of the PIP joint which was the source of pain. Dr. Heller injected the PIP joint and opined that the injection should relieve any symptoms remaining from the contusion. The petitioner testified that his finger improved following the injection. With regard to the wrist the petitioner stayed in therapy for one more month prior to seriously considering surgery.

The MRI from January 28, 2014, showed a minimal disc bulge at L5-S1, a minimal 1-2mm central protrusion with no stenosis, as well as minimal disc bulge at L4-5. The petitioner was continued off duty.

On February 21, 2014, Dr. Heller noted that the right small finger injection had made a significant improvement. The petitioner had no swelling and normal range of motion and Dr. Heller noted the injection provided excellent relief. With the petitioner's wrist symptoms persisting, Dr. Heller recommended surgery for the left wrist which petitioner agreed to after a few days consideration.

On February 26, 2014, the petitioner presented to Dr. Fisher of Illinois Bone and Joint for his low back complaints. The petitioner denied any lower extremity radicular symptoms and noted that the TENS unit he had been prescribed was helping. Dr. Fisher noted small disc bulges at L4-5 and L5-S1 per MRI. Dr. Fisher sent the petitioner back to physical therapy and recommended NSAIDs, muscle relaxers, and continued use of the TENS unit. The petitioner was prescribed light duty which was not available for the petitioner's particular position with the respondent.

As of April 9, 2014, the petitioner was prescribed the TENS unit, home exercise, and NSAIDs for the lumbar spine. With regard to restrictions, Dr. Fisher did not list any for the low back but rather checked the "other" box and referred the reader to any restriction imposed by Dr. Heller for the left wrist.

On June 11, 2014, the petitioner underwent a left wrist arthroscopy with debridement including debridement of the triangular fibrocartilage complex tear. (TA 29) Two weeks post-op on June 24, 2014, the petitioner was referred for physical therapy. (TA 30) It was noted that there was no evidence of any extensor tendon injury and that the ulnar nerve was completely intact as was digital motion and digital sensation. The petitioner was continued off work. On August 5, 2014, the petitioner was seven weeks post-op and although improving still had some pain and weakness. (TA 31) Physical therapy continued and the petitioner was prescribed light duty with no use of his left arm. On September 19, 2014, the petitioner told Dr. Heller that he felt great and was ready to go back to work. (TA 34) Dr. Heller provided the full duty release noting an excellent outcome post left wrist arthroscopy.

The petitioner returned to work as a laborer for 5 days per week 8 hours per day. (TA 37) He noticed that initially his strength was not fully returned. He worked using different muscles and using a different rhythm so that he would not reinjure his wrist. He testified that his right little finger was also weaker and that his back was weaker. He noted that he couldn't drive as much as he used to due to discomfort from rotation of the wrist and his back tightening up. He also had his partner helping him more with lifting. (TA 35)

On January 14, 2015, the petitioner was loading furniture into the back of the truck. He had a dresser leaning against the truck. (TA 38) He testified that when he went to lift it he felt and heard his wrist pop, he smashed his right ring finger, and hurt his back. He testified that he again notified his supervisor and was taken for treatment to MercyWorks. (TA 39)

The petitioner again was referred to Dr. Heller on January 26, 2015, for his new injury. (TA 40) He told Dr. Heller that his left wrist and ring finger were injured when loading garbage into the garbage truck. The petitioner's signed hand-written intake form did not mention his low back. Dr. Heller's office note does not mention any injury to his back. The petitioner did not notice any symptoms between his release from his prior left wrist surgery and the accident of January 14, 2015. The petitioner was diagnosed with a contusion to the right ring finger and a sprained left wrist. It was noted that petitioner's TFCC was tender again. He was referred for physical therapy and given a splint for his left wrist. (TA 41)

On March 2, 2015, the petitioner was engaged in ongoing therapy for his left wrist and right ring finger. Dr. Heller noted that a new left wrist MRI will obviously show the prior tear and would not be helpful with diagnosis. He further noted that if the petitioner had persistent pain, non-responsive to therapy, he may require a revision arthroscopy.

On March 16, 2015, the petitioner had been in therapy but still complained of weakness in the left wrist and right ring finger. The plan was for additional therapy and hope to avoid surgery on the wrist. On April 17, 2015, the right ring finger was quite painful at the PIP joint and Dr. Heller performed a corticosteroid injection into the PIP joint. On May 18, 2015, Dr. Heller noted that petitioner's right ring finger was somewhat improved after the previous injection. The finger had no swelling, complete intact active motion, no instability, no evidence of triggering or locking, no clicking or popping, and full intact function of the flexor and

extensor tendons. Regarding the wrist, Dr. Heller ordered a new MRI to look for other findings that were new and different from the previous injury pattern.

On June 12, 2015, the petitioner underwent MRI of his left wrist. It showed a new punctuate central tear of the TFCC as compared to the 2010 MRI. It showed a cyst of the distal ulna, mild edema around the scapholunate joint with possible small cystic change in the lunate.

On July 6, 2015, Dr. Heller noted that the MRI showed the prior TFCC tear that was debrided. He noted that it was larger and more pronounced than prior to the surgery as expected given the arthroscopic debridement. The cyst noted had been present since the 2010 MRI but had gotten slightly larger. There appeared to be a small new degenerative cyst within the lunate bone. Dr. Heller explained to the petitioner that he had some evidence of some early degenerative changes at the ulnocarpal joint and that he may benefit from an ulnar shortening osteotomy. On August 10, 2015, the petitioner told Dr. Heller that he would like to proceed with an osteotomy but would first like to schedule a second opinion. (TA 43-44)

The respondent authorized the petitioner to see Dr. John Fernandez of Midwest Orthopaedics at Rush October 20, 2015. (TA 44-45) Dr. Fernandez stated the petitioner's history, relating the TFCC surgery to the more recent injury while lifting a dresser, rather than the earlier injury from the falling garbage can. Dr. Fernandez noted that over the last two months the petitioner experienced some triggering and locking symptoms in the base of his right thumb. Dr. Fernandez wanted to see a new MRI to determine whether the petitioner sustained a re-injury after surgery in 2014. He discussed the possibility of repeating the arthroscopic surgery with or without an ulnar shortening osteotomy, which the petitioner indicated that he would like to avoid.

The petitioner returned to Dr. Fernandez January 12, 2016, to discuss the MRI and treatment options. Dr. Fernandez noted that the MRI did show a cyst in the distal ulna and was positive for TFCC pathology. Surgery was discussed. (TA 46)

On June 1, 2016, Dr. Fernandez performed a left wrist arthroscopy with debridement of the central triangular fibrocartilage and chondromalacia of the lunate and triquetrum. He also removed a loose body from the wrist. Dr. Fernandez did not proceed with ulnar shortening as he did not observe sufficient findings to warrant an ulnar shortening osteotomy.

On June 16, 2016, the petitioner was two weeks post-op, prescribed a munster splint and prescribed physical therapy.

On July 19, 2016, the petitioner was in therapy which was to continue. On August 30, 2016, the petitioner was about three months post-op, engaged in physical therapy, and doing better. Therapy was continued. The petitioner testified that as of September 2016, he was doing better and was only a couple of steps away from 100%. (TA 51)

On October 6, 2016, the petitioner was continuing physical therapy, working on strengthening, and was happy with his progress so far. Therapy was to continue for four more weeks before transitioning to work conditioning. A return to work was anticipated for December.

On November 8, 2016, the petitioner relayed to Dr. Fernandez that "I am better." He still had a little bit of pain and weakness but was overall better. It was recommended that he continue therapy for strengthening exercises for the next three weeks and that he would be at MMI with a full duty return to work on December 5, 2016. (TA 52-53)

The petitioner testified that when at work he is more cautious of his left wrist and has slowed his performance a bit. He testified that he is not quite as strong as he used to be. He noted that he still has a little bit of pain and that when he is in discomfort he uses a heat machine for his wrist, over the counter medications, and hot towels.

Conclusions of Law

RE: DATE OF ACCIDENT NOVEMBER 21, 2013

The Arbitrator finds that the petitioner met his burden of proving that he provided notice of an accident within the 45-day period required by the Act. The petitioner testified that he notified his supervisor, filled out the appropriate paperwork, and presented to MercyWorks following his injury. The presentation to MercyWorks is within the 45-day statutory time period.

With Regard to Whether the Current Condition of Ill-being Is Causally Connected to the Alleged Accident, the Arbitrator Finds as Follows:

The Arbitrator finds that the petitioner's current condition of ill-being as related to his right little finger and low back is related to the injury of November 21, 2013. The petitioner's current left wrist condition is related to his injury of November 21, 2013.

With regard to the right little finger, the petitioner suffered a contusion which resolved completely after administration of a steroid injection. As of February 21, 2014, the petitioner's right little finger injury had resolved, and the petitioner had excellent relief from the injection.

With regard to the petitioner's low back, the petitioner sustained a lumbar strain. He was treated with conservative measures. As of April 9, 2014, the petitioner was no longer restricted pertaining to his low back.

With regard to the petitioner's left wrist, the petitioner's current condition of ill-being is related to both the injury from November 21, 2013, and the injury from January 14, 2015. The petitioner underwent surgery for the left wrist on June 11, 2014, and he was able to return to work. However, on January 14, 2015, the petitioner suffered another incident which caused his left wrist to become symptomatic, his pain recurred necessitating revision surgery. As such, petitioner's current condition of ill being is related to both accidents.

With Regard to the Nature and Extent of Petitioner's Injury, the Arbitrator Finds as Follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that the petitioner was employed as a laborer at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. Because of petitioner's ability to perform all of his duties, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was 37 years old at the time of the accident. Because of his young age and his ability to work his full duties, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), the petitioner's future earnings capacity, the Arbitrator notes that the petitioner's earning capacity has not been lessened because of his right ring finger, low back, or left wrist injuries. Because of the petitioner's ability to earn at his pre-injury levels, the Arbitrator therefore gives great weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the petitioner's right little finger injury resolved fully. The petitioner was treated conservatively and successfully for his low back resulting in no permanent restrictions. The petitioner's first TFCC surgery was successful in that he returned to full duty laborer work. Because of the petitioner's excellent recoveries and his ability to resume laborer work, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 4% loss of use of use of the right little finger pursuant to §8(e) of the Act. The Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 1% loss of person as a whole for his low back injury pursuant to §8(d)2 of the Act.

The Arbitrator finds that while the petitioner suffered permanent partial disability to his left wrist as a result of the November 21, 2013, that this disability is more properly assessed in conjunction with his second left wrist accident of January 14, 2015, the results of which are closer in time to the petitioner's testimony at trial and are at the conclusion of all treatment for his left wrist. Therefore, the Arbitrator does not award any permanency in case number 13 WC 41738 for the left wrist but does so under case 15 WC 16334.

RE: DATE OF ACCIDENT JANURY 14, 2015

With Regard to Whether the Petitioner Gave Notice of an Accident Within the Time Limits Stated in the Act, the Arbitrator Finds as Follows:

The parties stipulated to notice in both cases in their Request for Hearing (AX1) as well as on the record. (TA 5; 7)

With Regard to Whether the Petitioner's Current Condition of Ill-being is Causally Connected to the Alleged Accident, the Arbitrator Finds as Follows:

The Arbitrator finds that the petitioner's condition of ill being as it relates to the January 14, 2015, work accident is that of a repeat arthroscopy for his left wrist TFCC and a right ring finger contusion. While petitioner testified at trial that he re-injured his back on January 14, 2015, he gave no testimony as to how it happened. The application filed does not include any reference to the low back. The histories given to the doctors do not mention the low back. The petitioner's own handwritten, signed intake form about the incident does not mention the low back.

With regard to the petitioner's right ring finger, he sustained a contusion which resolved fully after the administration of a cortisone injection. As of May 18, 2015, after the injection, the petitioner had no further problems with his right ring finger.

With regard to the petitioner's left wrist, the petitioner sustained a trauma which caused his left TFCC to become tender and symptomatic. This was addressed surgically and successfully, and the petitioner was able to return to work. As in the earlier case, the Arbitrator specifically finds that the cyst in petitioner's ulnar nerve, the small cyst in the lunate bone, and the early degenerative changes at the ulnocarpal joint are not related to either injury and

represent pre-existing and ongoing degenerative changes. As such, any future consideration for an ulnar shortening osteotomy would not be related to this of the earlier injury.

With Regard to the Nature and Extent of the Petitioner's Injury, the Arbitrator Finds as Follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that the petitioner was employed as a laborer at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. Because of the petitioner's ability to perform all of his duties, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was 38 years old at the time of the accident. Because of his young age and his ability to work his full duties, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the petitioner's earning capacity has not been diminished because of his injuries. Because of the petitioner's ability to earn at his pre-injury levels, the Arbitrator therefore gives great weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the petitioner had a successful result following his repeat TFCC surgery as well as a resolved right ring finger contusion which allowed him to resume laborer duties. Because of Dr. Fernandez's opinions following surgery and the

petitioner's ability to resume heavy duty work, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 4% loss of use of use of the right ring finger pursuant to §8(e) of the Act. The Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 25% loss of the left hand pursuant to §8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rondae Thompson,

Petitioner,

vs. NO: 15 WC 16334

City of Chicago,

20IWCC0239

Respondent.

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 wages, benefit rate, permanent partial disability rate, and permanent disability, and being advised of the facts and law, affirms and adopts the Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed June 12, 2018 is hereby affirmed and adopted.

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

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

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

20IWCC0239

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 24 2020
d: 3/19/20
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

THOMPSON, RONDAE
Employee/Petitioner

Case# **15WC016334**
13WC041738

CITY OF CHICAGO
Employer/Respondent

20IWCC0239

On 6/12/2018, 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 2.07% 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:

0314 KUMLIN & FROMM
MARK L FROMM
205 W RANDOLPH ST SUITE 1030
CHICAGO, IL 60606

0113 CITY OF CHICAGO LAW DEPT
STEPHANIE LIPMAN
30 N LASALLE ST SUITE 800
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
CORRECTED ARBITRATION DECISION

Rondae Thompson
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 15 WC 16334

Consolidated cases: 13 WC 41738

20IWCC0239

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 Luedke**, Arbitrator of the Commission, in the city of **Chicago**, on **February 20, 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. ☒ Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **January 14, 2015**, 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 an accident to the left wrist and right ring finger ***was*** given to Respondent.

A specific and limited portion of Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$69,596.80**; the average weekly wage was **$1,334.67**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** 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 **$89,638.88** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$89,638.88**.

ORDER

Respondent shall pay the petitioner permanent partial disability benefits of $735.37/week for 1.08 weeks, because the injuries sustained caused 4% loss of the right ring finger, as provided in Section 8(e) of the Act.

Respondent shall pay the petitioner permanent partial disability benefits of $735.37/week for 51.25 weeks, because the injuries sustained caused 25% loss of the left hand, as provided in Section 8(e) of the Act.

Respondent shall be given a credit of **$89,638.88** for TTD paid.

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

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

Signature of Arbitrator

June 8th, 2018.
Date

JUN 12 2018

The parties tried these cases before Arbitrator Robert Luedke February 20, 2018, and subsequently stipulated to another Arbitrator of the Commission issuing Decision of Arbitrator based on Transcript of Proceedings on Arbitration and exhibits.

Findings of Facts

The petitioner testified that he was employed by the respondent, City of Chicago Department of Streets and Sanitation, for roughly 12 years as a laborer. He was 41 years old at the time of accident. (TA 10-11) His duties were varied and included dumping garbage cans, lifting items, sweeping alleys, and lifting tree trunks. (TA 11-12) On November 21, 2013, the petitioner was working with a partner and a driver and he was loading a garbage can onto the truck using the arm connected to the garbage truck when the can popped off. (TA 13-14) His hand was still on the can – so, the can fell off heavy and knocked him down, and caused him to twist his left wrist. The petitioner testified that he had a little pain in his neck which didn't last very long. He also testified that he hurt his little finger on his right hand.

The petitioner notified his supervisor and presented to MercyWorks that morning with an injury to the back of the neck, lower back, left wrist, and right small finger. (TA 16-17). He was diagnosed with a cervical and lumbosacral strain, left wrist strain, and right fifth finger contusion. He was prescribed some medications, fitted for a splint for his left wrist, and taken off work. (TA 18)

The petitioner returned to MercyWorks November 27, 2013, was referred for physical therapy for the low back, MRI was ordered for his left wrist, and he continued off work. (TA 19) He returned December 5, 2013, and was assessed with a lumbar strain, left wrist contusion/sprain, and right little finger contusion. There was no mention of the neck or cervical spine. He was awaiting the left wrist MRI and engaged in physical therapy for his back and left wrist.

On December 12, 2013, Dr. Anderson noted that the MRI report showed a strain to the scapholunate ligament and a small TFCC tear. He referred the petitioner to Dr. Heller for the left wrist and right little finger. (TA 19-20) The petitioner remained off work. He saw Dr. Heller at Midland Orthopedics December 16, 2013, for his left wrist and right little finger. (TA 21) Dr. Heller noted that he had previously treated the petitioner in 2010 for a left wrist sprain. Dr. Heller compared the recent MRI with one from 2010 and noted that there had been progression of the TFCC tear. In 2010, the petitioner had slight partial thickness tearing of the TFCC without full thickness perforation compared to the complete tear shown on the recent MRI. Dr. Heller also noted that cystic degeneration within the distal ulnar, partial scapholunate ligament tear, and degenerative changes were all unchanged. The right little finger had some slight swelling and Dr. Heller opined that it would heal eventually. He recommended conservative treatment in the form of an injection for the wrist followed by surgery for the wrist if necessary.

The petitioner returned to Dr. Anderson for his low back December 19, 2013. Dr. Anderson noted that the petitioner's physical therapist commented on his lack of effort in therapy. The petitioner remained off work.

The petitioner saw Dr. Heller December 20, 2013, for the left wrist, underwent an intra-articular injection, and was referred for occupational therapy.

On January 2, 2014, the petitioner complained of transient pains into his legs with no numbness. He continued to complain of pain and stiffness and a lumbar MRI was recommended. (TA 26-27) As of January 21, 2014, the petitioner completed 11 physical therapy visits and was discharged for lack of progress.

The petitioner saw Dr. Heller again January 20, 2014. The petitioner stated that his right little finger had not improved and was still painful and swollen and that his left wrist had worsened. Dr. Heller noted that the TFCC tear had worsened after the recent incident. With regard to the little finger, examination showed full range of motion and a small discrete swelling over the radial aspect of the PIP joint which was the source of pain. Dr. Heller injected the PIP joint and opined that the injection should relieve any symptoms remaining from the contusion. The petitioner testified that his finger improved following the injection. With regard to the wrist the petitioner stayed in therapy for one more month prior to seriously considering surgery.

The MRI from January 28, 2014, showed a minimal disc bulge at L5-S1, a minimal 1-2mm central protrusion with no stenosis, as well as minimal disc bulge at L4-5. The petitioner was continued off duty.

On February 21, 2014, Dr. Heller noted that the right small finger injection had made a significant improvement. The petitioner had no swelling and normal range of motion and Dr. Heller noted the injection provided excellent relief. With the petitioner's wrist symptoms persisting, Dr. Heller recommended surgery for the left wrist which petitioner agreed to after a few days consideration.

On February 26, 2014, the petitioner presented to Dr. Fisher of Illinois Bone and Joint for his low back complaints. The petitioner denied any lower extremity radicular symptoms and noted that the TENS unit he had been prescribed was helping. Dr. Fisher noted small disc bulges at L4-5 and L5-S1 per MRI. Dr. Fisher sent the petitioner back to physical therapy and recommended NSAIDs, muscle relaxers, and continued use of the TENS unit. The petitioner was prescribed light duty which was not available for the petitioner's particular position with the respondent.

As of April 9, 2014, the petitioner was prescribed the TENS unit, home exercise, and NSAIDs for the lumbar spine. With regard to restrictions, Dr. Fisher did not list any for the low back but rather checked the "other" box and referred the reader to any restriction imposed by Dr. Heller for the left wrist.

On June 11, 2014, the petitioner underwent a left wrist arthroscopy with debridement including debridement of the triangular fibrocartilage complex tear. (TA 29) Two weeks post-op on June 24, 2014, the petitioner was referred for physical therapy. (TA 30) It was noted that there was no evidence of any extensor tendon injury and that the ulnar nerve was completely intact as was digital motion and digital sensation. The petitioner was continued off work. On August 5, 2014, the petitioner was seven weeks post-op and although improving still had some pain and weakness. (TA 31) Physical therapy continued and the petitioner was prescribed light duty with no use of his left arm. On September 19, 2014, the petitioner told Dr. Heller that he felt great and was ready to go back to work. (TA 34) Dr. Heller provided the full duty release noting an excellent outcome post left wrist arthroscopy.

The petitioner returned to work as a laborer for 5 days per week 8 hours per day. (TA 37) He noticed that initially his strength was not fully returned. He worked using different muscles and using a different rhythm so that he would not reinjure his wrist. He testified that his right little finger was also weaker and that his back was weaker. He noted that he couldn't drive as much as he used to due to discomfort from rotation of the wrist and his back tightening up. He also had his partner helping him more with lifting. (TA 35)

On January 14, 2015, the petitioner was loading furniture into the back of the truck. He had a dresser leaning against the truck. (TA 38) He testified that when he went to lift it he felt and heard his wrist pop, he smashed his right ring finger, and hurt his back. He testified that he again notified his supervisor and was taken for treatment to MercyWorks. (TA 39)

The petitioner again was referred to Dr. Heller on January 26, 2015, for his new injury. (TA 40) He told Dr. Heller that his left wrist and ring finger were injured when loading garbage into the garbage truck. The petitioner's signed hand-written intake form did not mention his low back. Dr. Heller's office note does not mention any injury to his back. The petitioner did not notice any symptoms between his release from his prior left wrist surgery and the accident of January 14, 2015. The petitioner was diagnosed with a contusion to the right ring finger and a sprained left wrist. It was noted that petitioner's TFCC was tender again. He was referred for physical therapy and given a splint for his left wrist. (TA 41)

On March 2, 2015, the petitioner was engaged in ongoing therapy for his left wrist and right ring finger. Dr. Heller noted that a new left wrist MRI will obviously show the prior tear and would not be helpful with diagnosis. He further noted that if the petitioner had persistent pain, non-responsive to therapy, he may require a revision arthroscopy.

On March 16, 2015, the petitioner had been in therapy but still complained of weakness in the left wrist and right ring finger. The plan was for additional therapy and hope to avoid surgery on the wrist. On April 17, 2015, the right ring finger was quite painful at the PIP joint and Dr. Heller performed a corticosteroid injection into the PIP joint. On May 18, 2015, Dr. Heller noted that petitioner's right ring finger was somewhat improved after the previous injection. The finger had no swelling, complete intact active motion, no instability, no evidence of triggering or locking, no clicking or popping, and full intact function of the flexor and

extensor tendons. Regarding the wrist, Dr. Heller ordered a new MRI to look for other findings that were new and different from the previous injury pattern.

On June 12, 2015, the petitioner underwent MRI of his left wrist. It showed a new punctuate central tear of the TFCC as compared to the 2010 MRI. It showed a cyst of the distal ulna, mild edema around the scapholunate joint with possible small cystic change in the lunate.

On July 6, 2015, Dr. Heller noted that the MRI showed the prior TFCC tear that was debrided. He noted that it was larger and more pronounced than prior to the surgery as expected given the arthroscopic debridement. The cyst noted had been present since the 2010 MRI but had gotten slightly larger. There appeared to be a small new degenerative cyst within the lunate bone. Dr. Heller explained to the petitioner that he had some evidence of some early degenerative changes at the ulnocarpal joint and that he may benefit from an ulnar shortening osteotomy. On August 10, 2015, the petitioner told Dr. Heller that he would like to proceed with an osteotomy but would first like to schedule a second opinion. (TA 43-44)

The respondent authorized the petitioner to see Dr. John Fernandez of Midwest Orthopaedics at Rush October 20, 2015. (TA 44-45) Dr. Fernandez stated the petitioner's history, relating the TFCC surgery to the more recent injury while lifting a dresser, rather than the earlier injury from the falling garbage can. Dr. Fernandez noted that over the last two months the petitioner experienced some triggering and locking symptoms in the base of his right thumb. Dr. Fernandez wanted to see a new MRI to determine whether the petitioner sustained a re-injury after surgery in 2014. He discussed the possibility of repeating the arthroscopic surgery with or without an ulnar shortening osteotomy, which the petitioner indicated that he would like to avoid.

The petitioner returned to Dr. Fernandez January 12, 2016, to discuss the MRI and treatment options. Dr. Fernandez noted that the MRI did show a cyst in the distal ulna and was positive for TFCC pathology. Surgery was discussed. (TA 46)

On June 1, 2016, Dr. Fernandez performed a left wrist arthroscopy with debridement of the central triangular fibrocartilage and chondromalacia of the lunate and triquetrum. He also removed a loose body from the wrist. Dr. Fernandez did not proceed with ulnar shortening as he did not observe sufficient findings to warrant an ulnar shortening osteotomy.

On June 16, 2016, the petitioner was two weeks post-op, prescribed a munster splint and prescribed physical therapy.

On July 19, 2016, the petitioner was in therapy which was to continue. On August 30, 2016, the petitioner was about three months post-op, engaged in physical therapy, and doing better. Therapy was continued. The petitioner testified that as of September 2016, he was doing better and was only a couple of steps away from 100%. (TA 51)

On October 6, 2016, the petitioner was continuing physical therapy, working on strengthening, and was happy with his progress so far. Therapy was to continue for four more weeks before transitioning to work conditioning. A return to work was anticipated for December.

On November 8, 2016, the petitioner relayed to Dr. Fernandez that "I am better." He still had a little bit of pain and weakness but was overall better. It was recommended that he continue therapy for strengthening exercises for the next three weeks and that he would be at MMI with a full duty return to work on December 5, 2016. (TA 52-53)

The petitioner testified that when at work he is more cautious of his left wrist and has slowed his performance a bit. He testified that he is not quite as strong as he used to be. He noted that he still has a little bit of pain and that when he is in discomfort he uses a heat machine for his wrist, over the counter medications, and hot towels.

Conclusions of Law

RE: DATE OF ACCIDENT NOVEMBER 21, 2013

The Arbitrator finds that the petitioner met his burden of proving that he provided notice of an accident within the 45-day period required by the Act. The petitioner testified that he notified his supervisor, filled out the appropriate paperwork, and presented to MercyWorks following his injury. The presentation to MercyWorks is within the 45-day statutory time period.

With Regard to Whether the Current Condition of Ill-being Is Causally Connected to the Alleged Accident, the Arbitrator Finds as Follows:

The Arbitrator finds that the petitioner's current condition of ill-being as related to his right little finger and low back is related to the injury of November 21, 2013. The petitioner's current left wrist condition is related to his injury of November 21, 2013.

With regard to the right little finger, the petitioner suffered a contusion which resolved completely after administration of a steroid injection. As of February 21, 2014, the petitioner's right little finger injury had resolved, and the petitioner had excellent relief from the injection.

With regard to the petitioner's low back, the petitioner sustained a lumbar strain. He was treated with conservative measures. As of April 9, 2014, the petitioner was no longer restricted pertaining to his low back.

With regard to the petitioner's left wrist, the petitioner's current condition of ill-being is related to both the injury from November 21, 2013, and the injury from January 14, 2015. The petitioner underwent surgery for the left wrist on June 11, 2014, and he was able to return to work. However, on January 14, 2015, the petitioner suffered another incident which caused his left wrist to become symptomatic, his pain recurred necessitating revision surgery. As such, petitioner's current condition of ill being is related to both accidents.

With Regard to the Nature and Extent of Petitioner's Injury, the Arbitrator Finds as Follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that the petitioner was employed as a laborer at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. Because of petitioner's ability to perform all of his duties, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was 37 years old at the time of the accident. Because of his young age and his ability to work his full duties, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), the petitioner's future earnings capacity, the Arbitrator notes that the petitioner's earning capacity has not been lessened because of his right ring finger, low back, or left wrist injuries. Because of the petitioner's ability to earn at his pre-injury levels, the Arbitrator therefore gives great weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the petitioner's right little finger injury resolved fully. The petitioner was treated conservatively and successfully for his low back resulting in no permanent restrictions. The petitioner's first TFCC surgery was successful in that he returned to full duty laborer work. Because of the petitioner's excellent recoveries and his ability to resume laborer work, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 4% loss of use of use of the right little finger pursuant to §8(e) of the Act. The Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 1% loss of person as a whole for his low back injury pursuant to §8(d)2 of the Act.

The Arbitrator finds that while the petitioner suffered permanent partial disability to his left wrist as a result of the November 21, 2013, that this disability is more properly assessed in conjunction with his second left wrist accident of January 14, 2015, the results of which are closer in time to the petitioner's testimony at trial and are at the conclusion of all treatment for his left wrist. Therefore, the Arbitrator does not award any permanency in case number 13 WC 41738 for the left wrist but does so under case 15 WC 16334.

RE: DATE OF ACCIDENT JANURY 14, 2015

With Regard to Whether the Petitioner Gave Notice of an Accident Within the Time Limits Stated in the Act, the Arbitrator Finds as Follows:

The parties stipulated to notice in both cases in their Request for Hearing (AX1) as well as on the record. (TA 5; 7)

With Regard to Whether the Petitioner's Current Condition of Ill-being is Causally Connected to the Alleged Accident, the Arbitrator Finds as Follows:

The Arbitrator finds that the petitioner's condition of ill being as it relates to the January 14, 2015, work accident is that of a repeat arthroscopy for his left wrist TFCC and a right ring finger contusion. While petitioner testified at trial that he re-injured his back on January 14, 2015, he gave no testimony as to how it happened. The application filed does not include any reference to the low back. The histories given to the doctors do not mention the low back. The petitioner's own handwritten, signed intake form about the incident does not mention the low back.

With regard to the petitioner's right ring finger, he sustained a contusion which resolved fully after the administration of a cortisone injection. As of May 18, 2015, after the injection, the petitioner had no further problems with his right ring finger.

With regard to the petitioner's left wrist, the petitioner sustained a trauma which caused his left TFCC to become tender and symptomatic. This was addressed surgically and successfully, and the petitioner was able to return to work. As in the earlier case, the Arbitrator specifically finds that the cyst in petitioner's ulnar nerve, the small cyst in the lunate bone, and the early degenerative changes at the ulnocarpal joint are not related to either injury and

represent pre-existing and ongoing degenerative changes. As such, any future consideration for an ulnar shortening osteotomy would not be related to this of the earlier injury.

With Regard to the Nature and Extent of the Petitioner's Injury, the Arbitrator Finds as Follows:

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that the petitioner was employed as a laborer at the time of the accident and that he was able to return to work in his prior capacity as a result of said injury. Because of the petitioner's ability to perform all of his duties, the Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that the petitioner was 38 years old at the time of the accident. Because of his young age and his ability to work his full duties, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the petitioner's earning capacity has not been diminished because of his injuries. Because of the petitioner's ability to earn at his pre-injury levels, the Arbitrator therefore gives great weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that the petitioner had a successful result following his repeat TFCC surgery as well as a resolved right ring finger contusion which allowed him to resume laborer duties. Because of Dr. Fernandez's opinions following surgery and the

petitioner's ability to resume heavy duty work, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 4% loss of use of use of the right ring finger pursuant to §8(e) of the Act. The Arbitrator finds that the petitioner sustained permanent partial disability to the extent of 25% loss of the left hand pursuant to §8(e) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Korando,

Petitioner,

vs. NO: 15 WC 39251

Knight Hawk Coal, LLC,

20IWCC0240

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of disease and permanent disability and being advised of the facts and law, changes 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.

A. FINDINGS OF FACT

The Commission hereby incorporates by reference the findings of fact contained in the arbitration decision, which delineate the relevant facts and analyses. However, as it pertains to permanent disability, the Commission modifies the Arbitrator's decision, insofar as it falls short of discussing the statutorily mandated factors enumerated in section 8.1b of the Act.

The record reflects that, beginning in 1971, Petitioner worked in a coal mine for approximately 40 years. The first 20 years he worked at a strip mine, followed by eight years working underground. When that mine was shut down Petitioner worked as a truck driver for approximately five years before being hired by Respondent in 2005 as a Heavy Equipment Operator.

Petitioner testified that he was regularly exposed to coal dust, silica dust, roof bolting glue fumes and diesel fumes. He last worked at Red Hawk mine in December of 2014 at the age of 63. He performed whatever work was required of him. On his final day of work, he was exposed to coal and silica dust. Due to his overall health issues, which largely included back issues, Petitioner decided to retire that day.

Petitioner testified that three to four years prior to retirement he began noticing shortness of breath with exertion more quickly than usual. This got progressively worse leading up to his retirement.

Since retiring Petitioner has drawn funds from his pension and social security benefits. He has not held steady employment, but did occasionally drive a bulldozer for Heine Brothers Farms where he leveled dirt. Ninety percent of this work was done in an enclosed cab with air conditioning, and Petitioner testified that he was not exposed to much dust. His most recent W-2 indicated that he earned $18.00 per hour and earned $600.00 for the year.

On July 12, 2016 Dr. Paul performed a black lung evaluation on Petitioner, who presented with a history of shortness of breath, and coughing and wheezing with exertion. A pulmonary function study showed a 14 percent fall with inhalation of methacholine, suggestive of some bronchitis. A chest x-ray revealed maculopapular lesions in both lower lobe areas. Dr. Paul diagnosed coal dust inhalation related simple coal workers pneumoconiosis ("CWP") and chronic bronchitis. At his deposition, Dr. Paul opined that Petitioner would probably have bronchitis for the remainder of his life. He also testified that Petitioner could no longer be exposed to a coal mining environment without endangering himself.

On July 20, 2016 Dr. Henry K. Smith, a b-reader, reviewed the chest x-ray from July 12, 2016. He found the x-ray to be "Quality 1" and found interstitial fibrosis of classification p/p/, bilateral upper, mid and lower zones involved, of a profusion 1/0. Dr. Smith noted mild thickened interlobar fissures, a calcified thoracic aorta, moderate mid to lower dorsal degenerative vertebral spurring and spinal dextrocurvature. Dr. Smith diagnosed simple CWP with small opacities at primary p and secondary p in all lung zones involved bilaterally, of a profusion 1/0.

Dr. Meyer, a b-reader, read the July 12, 2016 chest x-ray and felt the diagnostic quality was "2", overexposed with mottle. He interpreted that the film suggested clear lungs. He testified that once a coal miner leaves the coal mine, much of the coal mine dust inhaled remains in their lungs for the rest of their life. He also cited studies showing that at autopsy, 50 percent or more of long-term coal miners have CWP that can be diagnosed pathologically that was not diagnosed radiographically during life. He stated there are older studies that show a much higher incidence. The Commission notes the length of Petitioner's coal mining career.

Dr. Castle, a b-reader, performed a medical records review on Respondent's behalf on December 1, 2016. Dr. Castle has been retired for a number of years and has not seen patients in

his office for a decade. He did not see, speak to or examine Petitioner. Nevertheless, he opined that Petitioner did not suffer from any pulmonary disease or impairment as a result of his exposure to coal dust. He did admit that Petitioner certainly worked in an environment where he could have developed CWP if he were a susceptible host. He also admitted that if a person was exposed to trapped dust it will be there for the rest of their life, and that the only treatment for CWP is to remove the miner from further exposure.

Petitioner testified that he began using an albuterol inhaler a couple of years prior to arbitration, and now uses it 4-5 days per week.

II. CONCLUSIONS OF LAW

The Arbitrator awarded Petitioner eight percent loss of use of his person as a whole, pursuant to section 8(d)(2) of the Illinois Workers' Compensation Act ("Act"), due to Petitioner's CWP and chronic bronchitis. The Commission affirms the Arbitrator's finding that Petitioner has established his entitlement to benefits pursuant to the Act. In so concluding, the Commission addresses the factors required under Section 8.1b of the Act, which were omitted from the Arbitrator's decision.

Section 8.1b of the Act addresses the factors that must be considered in determining the extent of permanent partial disability for accidents occurring on or after September 1, 2011. 820 ILCS 305/8.1b (LEXIS 2011). Specifically, Section 8.1b states:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records. No

> single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Id.

Regarding factor (i), the level of impairment contained within a permanent partial disability impairment report, an AMA impairment rating of zero was offered by Dr. Castle. As found by the Arbitrator, the Commission does not find Dr. Castle's opinions persuasive in relation to the instant matter, noting that Dr. Castle never met nor spoke with Petitioner, nor did he take a patient history. The Commission accordingly applies little weight to Dr. Castle's impairment rating. With no other impairment rating offered, the Commission gives little weight to this factor.

Regarding factor (ii), the claimant's occupation, the record reflects that Petitioner was employed as a Coal Miner for Respondent at the time of his last exposure and could no longer be so employed. The Commission notes Dr. Paul's opinion that Petitioner would probably have bronchitis for the remainder of his life. Petitioner retired from coal mining, but indicated it was mostly due to his back issues. However, Dr. Paul testified that Petitioner could no longer be exposed to a coal mining environment without endangering himself, a sentiment echoed by Respondent's physicians, Drs. Castle and Meyer. The Commission also notes that Petitioner worked approximately 33 hours in 2018 for Heine Brothers Farms leveling dirt, and that 90 percent of his work was done in an enclosed cab with air conditioning. Accordingly, the Commission gives great weight to this factor.

Regarding factor (iii), the record reflects that Petitioner was 63 years old at the time of accident. Thus, he has a short work life ahead of him during which he will have to manage the effects of his injury at work. Accordingly, the Commission gives moderate weight to this factor.

Regarding factor (iv), the claimant's future earning capacity, the record reflects that Petitioner voluntarily retired from coal mining due largely to issues unrelated to his CWP and chronic bronchitis. There is no evidence that he was seeking new employment as a coal miner, thus his future earning capacity was minimally affected by his injury. Accordingly, the Commission gives great weight to this factor.

Regarding factor (v), the evidence of disability corroborated by the treating medical records, the record reflects that Petitioner was diagnosed with CWP and chronic bronchitis. No evidence was submitted regarding ongoing respiratory treatment, however there was unrebutted testimony that several years prior to arbitration Petitioner was prescribed an albuterol inhaler, which he uses 4-5 days per week. Accordingly, the Commission gives greater weight to this factor.

Based on consideration of the record as a whole, and evaluating the evidence in light of the factors required pursuant to Section 8.1b of the Act, the Commission affirms the Arbitrator's permanency award.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $735.37 per week for a period of 40 weeks, for the reason that Petitioner sustained injuries causing an 8% loss of use of his person as a whole, pursuant to section 8(d)(2) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $29,500.00. 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.

APR 24 2020

DATED:
o:3/5/19
BNF/wde
045

Barbara N. Flores

Marc Parker

Dissent

I respectfully dissent from the Decision of the Majority. The Majority affirmed the Decision of the Arbitrator who found Petitioner sustained his burden of proving he suffered an occupational disease. I would have found that Petitioner did not sustain his burden of proving he suffered an occupational disease, reversed the Decision of the Arbitrator, and denied compensation.

Petitioner began working in coal mines in 1971. He worked for Cutler mines and after that business ceased operations, he filed a claim under the Illinois Occupational Diseases Act alleging he suffered from coal workers' pneumoconiosis ("CWP") due to coal mine exposure. He was hired by Respondent in June of 2005 to work in a mine as a heavy equipment operator.

Petitioner then dismissed his claim for CWP because he was advised by his lawyer that he could not maintain the claim if he returned to work in a coal mine.

Petitioner testified that he decided to retire in 2014 due to back issues which made it more difficult to get into the cabin of his equipment. He also testified that three or four years prior to his retirement he noticed increased shortness of breath with exertion, which progressively worsened. In a treatment note dated December 16, 2014, it was noted that Petitioner planned on retiring on December 19th. It was also noted that his lungs were clear. At a later doctor appointment on March 31, 2016, it was again noted that his lungs were clear. Petitioner was then evaluated by Dr. Paul, a pulmonologist. He diagnosed simple CWP and chronic bronchitis, and referred him to Dr. Smith, a B-reader. Dr. Smith interpreted Petitioner's x-rays, which described the x-rays as "Quality 1." He opined that the x-rays showed 1/0 small opacities in all lung zones. He agreed with Dr. Paul's diagnoses of simple CWP.

Petitioner's x-rays were read by Dr. Meyer, another B-reader. He described the x-rays as "Quality 2" due to mild overexposure. He disagreed with Dr. Smith's characterization of the x-rays as being of Quality 1, and with Dr. Smith's interpretation that Petitioner's the x-rays showed CWP. Dr. Meyer noted that it was relatively common to find opacities in the upper zones, it is very rare to find them in the lower zones, as Dr. Smith had found.

Petitioner's x-rays were then read by Dr. Castle, another B-reader. He agreed with Dr. Meyer in classifying the x-rays as of Quality 2 due to overexposure. Dr. Castle also agreed with Dr. Meyer's interpretation that the x-rays did not show opacities indicative of CWP. Dr. Castle also asserted that the spirometry results, upon which Dr. Paul diagnosed chronic bronchitis, was what he would expect for a person of Petitioner's age (64 at the time of last exposure) and demographics. Dr. Castle opined that Petitioner had no clinical criteria to diagnose chronic bronchitis and that Petitioner did not have any impairment due to respiratory disease.

The Arbitrator found the opinions of Dr. Paul and Dr. Smith more persuasive than those of Dr. Meyer and Dr. Castle. He relied on his conclusion that the x-rays that were interpreted by Dr. Paul and Dr. Smith were of greater quality (Quality 1), than those read by Dr. Meyer and Dr. Castle, which they both characterized as Quality 2. However, the record indicates that all these doctors interpreted the same x-rays. I find the x-ray interpretations of Dr. Meyer and Dr. Castle more persuasive than that of Dr. Smith. Generally, the interpretations of two B-readers is more persuasive than the interpretation of one B-reader.

In addition, the Arbitrator relied largely on acknowledgement by Dr. Meyer and Dr. Castle that it was possible for a coal miner to have CWP even though x-rays may not show corresponding pathology. In my opinion, such reliance by the Arbitrator was inappropriate. Such reliance contravenes the tenets of diagnosis of CWP established by NIOSH, which bases such diagnosis on x-ray interpretation, primarily by B-readers. In addition, such reliance by the Arbitrator suggests that any coal miner can be found to have CWP without any objective evidence of pathology, which, in my opinion, wanders into the realm of speculation.

20IWCC0240

Finally, I find significant Petitioner's filing a claim for CWP against his prior defunct coal mine almost a decade prior to the instant claim and then dropping the claim when given an opportunity to resume working in a coal mine. Furthermore, Petitioner testified that he began experiencing shortness of breath three to four years prior to his retirement in December of 2014 and that he eventually decided to retire due to his back problems. These sequences indicate that Petitioner likely did not have symptoms when he filed his first claim and that his retirement in 2014 was not associated with any alleged respiratory issues. The record suggests that Petitioner was intent on filing a claim whenever his coal-mining career was over, irrespective of symptoms or impairment he may experience. This seriously undermines Petitioner's overall credibility.

For the reasons stated above, I would have found that Petitioner did not sustain his burden of proving he suffered an occupational disease, reversed the Decision of the Arbitrator, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

O-3/5/20
DLS/dw
46

Deborah L. Simpson

Deborah L. Simpson

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

KORANDO, DANIEL
Employee/Petitioner

Case# **15WC039251**

KNIGHT HAWK COAL LLC
Employer/Respondent

20IWCC0240

On 4/22/2019, 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 2.39% 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:

0755 CULLEY & WISSORE
KIRK CAPONI
300 SMALL ST SUITE 3
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

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

☐ 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

DANIEL KORANDO
Employee/Petitioner

v.

KNIGHT HAWK COAL, LLC.
Employer/Respondent

Case # **15** WC **39251**

Consolidated cases: _____

20IWCC0240

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 **Edward Lee**, Arbitrator of the Commission, in the city of **Herrin**, on **February 15,2019**. 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. ☐ Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Disease/exposure, causation, Sections 1(d)-(f), 19(d).**

FINDINGS

On **12/26/14**, 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 **$67,550.60**; the average weekly wage was **$1,299.05.**

On the date of accident, Petitioner was **63** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$N/A** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

- The Respondent shall pay the Petitioner the sum of $735.37/week for a further period of 40 weeks, as provided in Section 8(d)(2) of the Act, because the injuries sustained caused a permanent and partial disablement to the extent of 8% MAW.

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

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

Signature of Arbitrator

4/17/19
Date

APR 22 2019

STATEMENT OF FACTS

Petitioner, Daniel Korando of Ava, Illinois was sixty-seven years of age on the date of Arbitration with a date of birth of March 5, 1951. He is married to Eula Korando. He graduated from Gorham High School and had one year of college at Southern Illinois University Edwardsville. He worked thirty-nine years in the mining industry, eight of which were underground. In addition to coal dust, he was regularly exposed to and breathed silica dust, roof bolting glue fumes, and diesel fumes.

He last worked in the mines in December of 2014. At that time, he was working for Knight Hawk Coal at their Red Hawk Mine in Vergennes, Illinois. He was sixty-three years of age with a job classification of heavy equipment operator. On that last day of work he was exposed to silica and rock dust. He decided to retire because he was having health issues and trouble getting up and down on the bulldozer.

Petitioner began his mining career in 1971 working for Ayrshire Coal Company. This was an above ground mine which is known as a strip mine. He was hired in as an oiler on a drag line. His primary job was to keep the drag line oiled and lubricated. He was also responsible for handling the power cable. He had this job for approximately two years. He then moved on to a smaller drag line where he was the only man on it. Petitioner took care of the machine completely on his own. This included oiling and also any type of repair/mechanic work that would need to be done. He did this for approximately twelve and a half to thirteen years. After leaving the drag line he began to run a bulldozer. The bulldozer was used in multiple roles. It assisted in pit work but its major role would have been reclamation work. He would knock the top of the spoils down and re-level it to an acceptable point and then the dirt would be brought back over and the dozer would level it out after the dirt was dumped. He had this job for approximately five years. Petitioner described quite a bit of rock exposure whenever the rock was dumped from the drag line especially when the wind was not against you. Petitioner described the cabs as not being very tight which would allow the dust and rock to accumulate quite a bit inside the operator's quarters. While operating the bulldozer he was exposed to more coal dust whenever he was working in the pit. At times the bulldozer would literally be sitting on coal and when the dozer would spin around, it would gouge into the coal and create a cloud of dust around the bulldozer. After leaving that mine, he went to the Cutler mine in Percy, Illinois. This was an underground mine. Petitioner testified he did quite a bit of roof bolting at this mine. Roof bolting is where you take a large drill bit, drill a hole in the ceiling and place a steel pin in the ceiling. It has an expander on it and a miner would spin it with his drill pod. As he spins the pin it expands and the expander would pull down and expand out. Then there was a plate on the bottom of this bolt. This supported the roof after the coal was taken out. Petitioner described, in certain situations, using roof bolting glue pins. These were placed in the hole before the bolt was inserted. Petitioner described the roof bolting glue pins when they would break they would have an odor that would take your breath away. Petitioner estimated that he spent approximately 60% of the eight years he was underground, roof bolting. He also ran a scoop, which would be like an underground bulldozer. One of the major jobs of the

scoop was to clean an entry after the continuous miner had come out. This process created quite a bit of coal dust. In addition, Petitioner would have rock dust that he carried on the piece of equipment with him. He would take the bag of rock dust and would throw the dust up in the air on the ribs of the mine. This was to help suppress the combustible dust. Petitioner described actually operating the machine that would blow the rock dust up onto the ribs on the mine for better coverage. During his time at the Cutler mine he put in quite a bit of extended belt lines and power cable. During this job there would be a lot of rock dusting that would need to be done on the ribs of mine. After eight years, Petitioner left the Cutler mine because it shut down. Petitioner then drove a truck for Southern Illinois Motor Express for approximately four or five years. Around 2005, Petitioner went back to work for Knight Hawk at a strip mine. He continued to work at this mine until his retirement. Petitioner describes his job as being similar to the job he had at the strip mine when he started his mining career. He spent quite a bit of his time on the stockpile with an end loader. Trucks dump the coal and then he would go back by and pick it up. This was done in order to get more coal in the stockpile. He describes quite a bit of exposure to coal dust with this job.

Petitioner first started noticing breathing problems three or four years before he retired. He noticed becoming short of breath when he was pulling pump hose and hooking up the pump. From the first time he started noticing breathing problems until he left the mine, he felt his breathing progressively worsened. Since he has left the mine up until the date of trial, it has continued to worsen.

Petitioner described how his breathing difficulties affect his activities of daily living. He describes how he enjoys playing saxophone and played in several bands. He notices that he doesn't have as much wind to play the saxophone as he used to. Petitioner has also been an avid gardener but the shortness of breath has effected the amount of gardening he can do. He can work in the garden for fifteen to twenty minutes then he has to sit down and let his body recharge. Petitioner deer hunts but he does not hunt as much anymore. He describes hunting on rather hilly ground and he would have difficulty dragging a deer out if he would happen to kill it. He now uses a four-wheeler to aid in his hunting.

Petitioner's family doctor is Dr. Davidson in Pickneyville. Petitioner has not smoked a cigarette since 1975. He testified that he started smoking cigarettes around the age of sixteen and quit when he was approximately twenty-four/twenty-five. While he was smoking he smoked approximately a pack and a half a day. Aside from breathing problems, Petitioner has had a back surgery in December of 2017 where several disks were fused. He also tore a rotator cuff that he had surgery for in February of 2018. He takes medications for hypertension and also arthritis.

After leaving the mines, Petitioner testified that he ran a dozer for approximately forty hours last year at eighteen dollars an hour. This was done at Heine Brothers Farms. This was the only type of employment he has had since leaving the coal mine. Petitioner testified that 90% of the bulldozing that he did for those forty hours was in

an enclosed air-conditioned cab. Petitioner testified that there was very little dust exposure.

Dr. Glennon Paul

At Petitioner's attorney's request, Petitioner was examined by Dr. Glennon Paul. Dr. Paul is the medical director of St. John's respiratory therapy and clinical assistant professor of medicine at SIU Medical School. (px 1, p 6) He is also the senior physician at the Central Illinois Allergy and Respiratory Clinic. (px 1, p 7) Dr. Paul testified that Petitioner gave a history of working in the coal mines for forty years, thirty-two above ground and eight below. He complained of shortness of breath with two flights or walking a mile and that he coughs and wheezes with exertion. (px 1, p 11 & 12) Dr. Paul gave a diagnosis of chronic bronchitis. He did pulmonary function studies and methacholine stimulation tests, Petitioner fell 14% after the methacholine which is in the bronchitic range. He felt it was almost in the asthmatic range. He reversed towards normal after Albuterol. Dr. Paul testified that the spirometry, forced vital capacity, FEV1 and ratio, total lung capacity, and diffusion capacity were all normal but when Petitioner inhaled the methacholine it became abnormal. (px 1, p 15) Dr. Paul gave the opinion to a reasonable degree of medical certainty that Petitioner has coal worker's pneumoconiosis. That pneumoconiosis was caused by the inhalation of coal dust. Again, Dr. Paul testified that to a reasonable degree of medical certainty, Petitioner has chronic bronchitis, which was caused by his inhalation of coal dust. It is very unlikely that Petitioner's smoking history, that he gave of smoking as a juvenile until the age of twenty-four, affected his chronic bronchitis. (px 1, p 16) Dr. Paul testified that Petitioner has clinically significant and radiographically significant pulmonary impairment. Both were caused by his exposure to the environment of the coal mine. (px 1, p 17) Given his diagnosis, Petitioner is permanently precluded from working in the coal mines. (px 1, p 19) When asked about CWP, Dr. Paul testified that the tissue reaction that causes pneumoconiosis is called scarring and fibrosis. That scarring of pneumoconiosis cannot perform the function of normal healthy lung tissue. (px 1, p 20) Dr. Paul stated that it is possible to have injury or disease to your lungs despite having normal pulmonary function testing. A person can have shortness of breath despite having pulmonary function tests within the normal range. (px 1, p 21) A person can have CWP that is radiographically significant but not have shortness of breath. That same person can have radiographically significant CWP and have normal pulmonary function testing, normal blood gases, and normal physical examination of the chest. (px 1, p 24) CWP is considered a progressive disease, with further exposure it can progress to progressive massive fibrosis or complicated pneumoconiosis. (px 1, p 24) This can be life threatening. (px 1, p 25) There is no cure for CWP and leaving the exposure of the coal mine does not stop its progression. Dr. Paul listed several exposures in the coal mine that can injure the lung in addition to coal dust. These include silica, diesel fumes, fumes from other petroleum products, smoke and fumes from high sulfur coal fires, smoke and fumes from electrical cable fires, fumes from the glues used in the roof bolting process, and welding fumes. (px 1, p 26 & 27) Dr. Paul characterized chronic bronchitis as one of the chronic obstructive pulmonary diseases. He testified that one can have chronic bronchitis and have

normal pulmonary function testing, normal blood gases, and normal physical exam of the chest. (px 1, p 34) Any further exposure to the coal mine dust, for a person who has chronic bronchitis, can make this a progressive disease. (px 1, p 34)

Dr. Henry K. Smith

At Petitioner's attorney's request, b-reader, Dr. Henry K. Smith reviewed a grade 1 chest x-ray dated July 12, 2016. Dr. Smith found interstitial fibrosis of classification p/p, bilateral upper, mid and lower zones involved, of a profusion 1/0. There are no chest wall plaques or calcifications. There are mild thickened interlobar fissures. Heart size is normal. There is calcified thoracic aorta. There is moderate mid to lower dorsal degenerative vertebral spurring and spinal dextrocurvature. Dr. Smith's impression was simple coal worker's pneumoconiosis with small opacities, primary p, secondary p, all lung zones involved bilaterally, of a profusion 1/0.

Dr. Castle Charges

At respondent's attorney's request, Dr. Castle performed a forensic review of medical films and gave a deposition. Dr. Castle charged $2,200.00 for the review of medical films and $1,900.00 for his deposition, for a total of $4,100.00 in charges.

Dr. James Castle

At respondent's request, Dr. James Castle did a records review on December 1, 2016. Dr. Castle gave an opinion to a reasonable degree of medical certainty that Petitioner does not suffer from any pulmonary disease or impairment occurring as a result of his occupational exposure to coal mine dust. Dr. Castle went on to say that Petitioner certainly worked in or around the underground mining industry to have possibly developed CWP if he were a susceptible host. (rx 1, p 43) Dr. Castle gave the opinion that Petitioner's obesity was a risk factor in developing pulmonary symptoms. (rx 1, p 44) On cross-examination, Dr. Castle agreed that a normal diffusing capacity would not rule out the existence of early emphysema or chronic bronchitis. A normal diffusion capacity would also not rule out the existence of category 1 CWP. (rx 1, p 48) Dr. Castle agreed that a negative x-ray could still not rule out CWP. The Petitioner could have pathologic evidence. (rx 1, p 52) Dr. Castle agreed that a person can have pulmonary disease without functional abnormalities. (rx 1, p 54) Dr. Castle also agreed that if he had everything he had right now and actually examined the Petitioner he would have a better database. (rx 1, p 72) Its possible that a highly sensitive individual that would work in the coal mine, that they could have a sensitizer-induced occupational asthma that would not be apparent at the initial exposures to the causative agent but sometime later the accumulative affect may result in a reaction that they notice. Dr. Castle also agreed that if a person who is asthmatic had normal spirometry on one day, that does not necessarily mean that if it was taken at a different time, could show impairment. (rx 1, p 74) When asked about CWP, Dr. Castle agreed that if a person has CWP, he would have an impairment in the function of the lungs at the site of the scarring and emphysema. (rx 1, p 77) CWP could

be accurately described as a chronic slowly progressive disease. (rx 1, p 80) Dr. Castle agreed that silica is toxic to the surrounding lung tissue. If a person has trapped silica in their lungs that will have a possible toxic affect that is emitted to the surrounding tissue for the rest of his life. (rx 1, p 84) If a person is exposed to the trapped dust, that will be there for the rest of his life. (rx 1, p 85) The only treatment for CWP is to remove to miner from any further exposure. (rx 1, p 85) Dr. Castle also agreed that having PFTs within a normal range does not mean that a person's lungs are free from any lung damage. Simple chronic bronchitis, if it progresses, can lead to obstructive lung disease. (rx 1, p 98)

Dr. Cristopher Meyer

At respondent's request, Dr. Cristopher Meyer b-reader, read a PA lateral chest x-ray from Central Illinois Allergy and Respiratory dated July 12, 2016. Dr. Meyer felt the diagnostic quality was 2, overexposed with mottle. (rx 2, p 41) His interpretation of the film was that the lungs were clear. There was some atherosclerotic calcifications of the thoracic aorta and some degenerative changes of the spine, and his impression was no radiographic findings of CWP with clear lungs. (rx 2, p 41 & 42) On cross-examination, Dr. Meyer agreed that even with a negative x-ray, this man could still have pneumoconiosis pathologically. (rx 2, p 43) Dr. Meyer felt it was fair to say that when you have mixed dust exposure resulting in macules of pure coal dust, there can be more toxicity in the lung tissue, for instance if there was more silica involved. (rx 2, p 56 & 57) The macule of CWP is a permanent abnormality. (rx 2, p 57) To his knowledge, Dr. Meyer testified that once there is CWP progressing there is no medicine or anything modern medical science can do to stop or reverse that progression. He went on to say that removing the coal worker from the exposure is the best response. (rx 2, p 58) The progression of the CWP can even progress after the miner leaves the exposure. (rx 2, p 59) Dr. Meyer also said that he would imagine that CWP would appear first radiographically or pathologically and then later as it becomes more significant it would begin to manifest itself in pulmonary function abnormalities or clinical abnormalities. (rx 2, p 61) It was Dr. Meyer's understanding that certain occupations in the mine such as roof bolting, drilling or shooting where you disturb the coal, where there may be more rock involvement, those were occupations in the coal mine that would tend to have greater silica exposure. (rx 2, p 64 & 65) Under cross, Dr. Meyer also admitted that it would be fair to say that a miner who has a 1/0 pneumoconiosis probably wouldn't even know that he has it, probably wouldn't complain to his doctor until he gets a b-reading that tells him he's got it. (rx 2, p 66 & 67) Dr. Meyer went on to say that it is probably true that pneumoconiosis could develop at any time during his career, including in the last month or so; even show up radiographically a month or so after he left the coal mine. Therefore, it is possible that a miner could work thirty or forty years in a coal mine, develop radiographically significant CWP but not have it manifest itself on the x-ray until the last year or even the first year after they leave the coal mine. (rx 2, p 76)

Medical Records of Dr. Davidson

On an office note dated 10/18/02 chest congestion, productive cough, yellow sputum. (rx 3, p 5)

Medical Records of Medical Arts

On an office note dated 7/31/08 trouble breathing, cough, sinus headache. (rx 4, p 12)

Medical Records of St. Joseph's Memorial Hospital

On a chest x-ray dated June 30, 2005, impression: borderline cardiac size with atherosclerotic aorta. Otherwise normal chest. (rx 5, p 32)

CONCLUSIONS OF LAW

Issue (C) and (O): Did Petitioner suffer disease which arose out of and in the course of his employment by Respondent?

The Arbitrator resolves the issue of occupational disease and causation in Petitioner's favor. The Arbitrator concludes that Petitioner suffers from coal worker's pneumoconiosis (CWP), and chronic bronchitis, each of which was caused by his exposures as a coal miner. He worked as a coal miner for 39 years. He smoked cigarettes for a short period of time as a young man until the age of 24. The Arbitrator found Petitioner to be a candid and credible witness.

Dr. Paul examined Petitioner on 7-12-16 at Petitioner's request. Dr. Paul is Board Certified in Internal Medicine, Allergy and Immunology, and he has authored a book on asthma. He served as the Medical Director of Respiratory Therapy at St. John's Hospital in Springfield for 40 years and concurrently as Medical Director of Respiratory Therapy at Memorial Hospital in Springfield for the first 10 of those years. Dr. Paul has performed black lung examinations for 40 years as often at the request of Respondents as Petitioners. He finds the majority of x-rays sent to him by Petitioner's counsel to be negative for CWP. He added that as to the medical evaluations he does currently, "I'm always asked by the employer. Defense."

Dr. Paul diagnosed CWP based on Petitioner's chest x-rays. His physical examination of the chest was normal, and his pulmonary function testing (PFTs), other than his methacholine testing, were within the range of normal. Dr. Paul testified that in terms of diagnosing lung disease, the gold standard is pathologic review, but that a diagnosis of CWP can be made on a positive chest x-ray and a sufficient history of coal mine exposure. He said a negative x-ray can never rule out the existence of CWP; and that there have been studies to show that over 50% of

long-term coal miners who have autopsies will have CWP diagnosed pathologically at autopsy when they did not have CWP appreciated by radiograph during their life.

Dr. Paul further testified that a miner can have CWP and have a normal chest x-ray. He was criticized by Dr. Castle for not following the procedures for reading an x-ray under the b-reading system. However, the Arbitrator recognizes and takes into consideration the fact that Dr. Paul is not a b-reader, but has a very significant history of reading chest x-rays, particularly for CWP. The Arbitrator also considers it significant that Dr. Paul finds more chest x-rays sent to him by Petitioner's counsel to be negative for CWP more often than positive. Finally, while holding the b-reader certification is significant, the only question before the Commission is whether Petitioner has CWP, not what the profusion of the CWP is; therefore, the only box on the b-reading form that is significant in this case is the one that denotes that the x-ray is at least at a level of 1/0. It is positive. This is a binomial consideration no different than the one a non-b-reader would make as being either "positive" or "negative."

Dr. Smith, b-reader/radiologist, reviewed chest films of 7-12-16 at the request of Petitioner, and he found CWP with small opacities, p/p, in all lung zones, bilaterally. He also found thickened interlobar fissures.

Dr. Paul testified that Petitioner also has chronic bronchitis, based on his history of cough as well as his methacholine response, and he opined that the chronic bronchitis was related to Petitioner's coal mining exposures. He testified that a miner can have chronic bronchitis despite having normal PFTs, AGBs, and physical examination of the chest. He further described the nature of chronic bronchitis and how it can be related to the degree of response to the administration of methacholine. He testified that Petitioner's response of 14% to methacholine was consistent with his diagnosis of chronic bronchitis.

Petitioner's unrebutted testimony is that he regularly takes Albuterol, which was prescribed by the surgeon who performed surgery on his neck.

Dr. Meyer, Respondent's b-reader/radiologist, testified that a coal miner's exposure never ends. After the coal miner leaves the coal mine, much of the coal mine dust he has inhaled remains in his lungs for the rest of his life. He said that as much as 50% of the weight of a long-term miner's lungs can be composed of coal mine dust that's trapped in his lungs.

The Arbitrator notes that while Respondent was allowed a full examination, it determined to only obtain a review of the medical records. Dr. Castle, who performed the records review, has been retired for a number of years, and has not seen patients in his office for a decade nor in the hospital for 14 years. His practice consists of records reviews and depositions such as he did in this case. He did not examine, speak to, nor see Petitioner.

The Arbitrator further notes that Dr. Castle testified that chronic bronchitis is determined by a patient history of sufficient cough. However, while Dr. Paul examined Petitioner and took his own patient history, Dr. Castle never met nor talked to Petitioner. Between Dr. Paul and Dr. Castle, Dr. Paul was the only expert to take a patient history; therefore, the Arbitrator gives Dr. Paul's opinions on chronic bronchitis greater weight than those of Dr. Castle. The Arbitrator further notes that at the time Respondent engaged Dr. Castle to perform only a records review, and not an examination, it was aware that Petitioner was alleging chronic bronchitis. Dr. Castle took no patient history because of the specific decision of Respondent.

Dr. Meyer found the x-ray he reviewed to be quality 2 due to overexposure and mottle. Overexposure can make reading an x-ray for CWP more difficult, because it makes the x-ray darker. Dr. Meyer testified that mottle gives the x-ray a grainy appearance. The Arbitrator takes the quality of the x-ray read by Dr. Meyer into account in giving greater weight to the readings of Dr. Smith and Dr. Paul. Petitioner has met his burden of proving CWP. In addition, both Dr. Meyer and Dr. Castle admitted that Petitioner could have CWP notwithstanding their negative x-ray readings.

The Arbitrator also notes that the totality of the testimony in this case establishes the medical difference between a positive x-ray reading and a negative x-ray reading for CWP. A positive reading, combined with a sufficient history of exposure is an adequate basis for a diagnosis of CWP; however, a negative x-ray reading can never rule CWP out.

The Arbitrator notes that the issue at stake is "CWP," not "radiographic CWP," not "clinically significant" CWP, and not "physiologically significant" CWP. Our Appellate Court has noted that CWP is a slowly progressive disease which is composed of abnormalities consisting of coal mine dust wrapped in scar tissue and surrounded by emphysema. There is no cure for it; it results in an impairment in the function of the lung at the site of the scarring, whether such can be measured by testing or not; and the sufferer cannot return to the environment of a coal mine without endangering his health.

The Arbitrator turns to the deposition of Respondent's b-reader/radiologist, Dr. Meyer, to describe the significance of the disease of CWP in this case. Having no medical evidence at all, it would still be more likely than not that Petitioner could have CWP. Dr. Meyer cited studies showing that at autopsy, 50% or more of long-term coal miners have CWP that can be diagnosed pathologically that was not diagnosed radiographically during life. And he said that there are older studies that show a much higher incidence than that. Petitioner worked as a coal miner for 39 years.

Dr. Meyer testified regarding the nature of pathologic CWP, saying that the abnormalities found pathologically which were not found radiographically would have the same constitution as the macules or nodules that would show up on x-ray,

just perhaps smaller. They would still be subject to potential progression as any other CWP abnormality might be. In terms of the miner's awareness of his CWP, Dr. Meyer said that a miner with 1/0 CWP probably won't know he has it, and he won't complain to his doctor. He said CWP is similar to prostate cancer or colon cancer in that most people won't have any idea that they have it until they take the appropriate test and get the diagnosis. As to the specific nature of the exposure of a coal miner, he testified that the body's ability to clear the dust is important, but that the amount of dust in the lung can be as much as one-half the total weight of the lung itself. He added that with mixed dust exposure, including silica, there is much more toxicity. The Arbitrator notes that Petitioner's unrebutted testimony is that he was exposed to silica in his mining work.

Regarding records reviews and determining the existence of CWP, Dr. Meyer said that if he reads the x-ray positive, entries in treatment records of clear lungs wouldn't change his diagnosis. Pulmonary function tests, be they good or bad, wouldn't have a bearing. And complaints of shortness of breath or a failure to find shortness of breath would have no effect on the reading of the x-ray. Again, he said that reading an x-ray as negative does not rule out the possibility that CWP exists. Dr. Castle, Respondent's other expert, did not disagree with Dr. Meyer.

In weighing the evidence, the Arbitrator finds the preponderance of the evidence in Petitioner's favor. In addition, the studies brought forth by Dr. Meyer establish that it is more likely than not that Petitioner would have CWP diagnosed pathologically were an autopsy to be taken at his death. The Arbitrator is not speculating nor engaging in conjecture that Petitioner has pathologically significant CWP; however, the Arbitrator does take note of these studies in finding that Petitioner has met his burden.

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

As noted above, the Appellate Court has settled the issue. When a miner has proven the existence of CWP, he has also proven disablement by both an impairment in the function of the lungs and by a medical contraindication of further coal mine exposure. The universal testimony in this record agrees with the Court. Regarding chronic bronchitis, the Arbitrator finds that a chronic cough is not a natural state and represents a pulmonary impairment.

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

The Arbitrator notes that as of the time of Dr. Paul's testing, Petitioner's pulmonary function testing was within the range of normal. At Arbitration, Petitioner gave credible testimony as to his pulmonary condition since leaving the mines. The Arbitrator finds it significant that Dr. Paul based his diagnosis of chronic bronchitis on Petitioner's abnormal response to methacholine as well as to his history of cough. Further, Petitioner has been prescribed Albuterol for his pulmonary

problems. Dr. Paul found Petitioner's CWP and chronic bronchitis to be related to his coal mine exposures.

The Arbitrator specifically notes that Petitioner sought work after leaving coal mining, and did operate a John Deere bulldozer for a minimal amount of time for Heine Brothers Farms. However, in this work, Petitioner's only exposure was to dirt, not to coal mine dust which would include coal and silica. This fact was uncontested by Respondent. There is no testimony tying Petitioner's chronic bronchitis and CWP to any exposures other than those he encountered in his work as a coal miner; therefore, Knight Hawk Coal is properly identified as the Respondent in this matter.

The Arbitrator finds Petitioner to be disabled to the extent of 8% person as a whole.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AUDREY NAIL,

Petitioner,

vs. NO: 18 WC 22327

GLOBAL BRASS & COPPER,

Respondent.

20IWCC0241

DECISION AND OPINION ON REVIEW

Timely Petition for Review under section 19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and the nature and extent of the injury, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

20IWCC0241

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $11,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 24 2020
d: 4/2/20
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

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

NAIL, AUDREY
Employee/Petitioner

Case# **18WC022327**

GLOBAL BRASS & COPPER
Employer/Respondent

20IWCC0241

On 9/10/2019, 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 1.82% 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:

0438 BROWN & CROUPPEN PC
JACLYN J HARRES
211 N BROADWAY SUITE 1600
ST LOUIS, MO 63102

0299 KEEFE & DePAULI PC
MICHAEL KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

- [ ] 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
19(b)

Audrey Nail
Employee/Petitioner

v.

Global Brass & Copper
Employer/Respondent

Case # **18** WC **22327**

Consolidated cases: **N/A**

20IWCC0241

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **8/8/19**. 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. [x] 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. [x] 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. [x] 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] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

20IWCC0241

FINDINGS

On the date of accident, **4/4/18**, 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 $**54,724.34**; the average weekly wage was $**1,244.41**.

On the date of accident, Petitioner was **55** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $2,710.40, as set forth in Petitioner's exhibit 5, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for prospective medical care as recommended by Dr. Schlafly and/or Dr. McKee, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Michael K. Nowak, Arbitrator

9/3/19
Date

ICArbDec19(b)

SEP 10 2019

FINDINGS OF FACT

Petitioner is 58 years old and married. She has high blood pressure and asthma which are both controlled with daily medications. She does not have diabetes or thyroid issues. She quit smoking over 20 years ago. She has no hobbies and is right hand dominant.

Petitioner has worked for Respondent since 2001 as a fulltime employee and occasionally works overtime depending on Respondent's needs. Petitioner testified that just prior to beginning her employment with Respondent in 2001, she underwent a physical administered by agents for Respondent. She testified that a "nerve test" was performed on her hands and wrists. When asked if the test revealed any issues with her wrists, the Petitioner indicated that she must not have had any issues in 2001 because she "got the job."

Petitioner worked in "utility" from the time her employment began until approximately 10 years ago. She likened her duties working utility to those of a "hand packing."

Her duties in utility/hand packing included making boxes by folding the bottoms up and taping them. Petitioner would also pack prepared boxes with a variety of parts. She stated that she would have to take the parts off a machine belt and place them in stacks, then slide them over to be placed in the boxes. She would also have to take parts from her side, place them in boxes on her other side then push the boxes up onto a belt. Petitioner stated that she would pack 60 or more boxes per day. She stated that each box would contain anywhere from 8 to 20 parts.

Petitioner would also inspect the parts being produced. She stated that this entailed picking up individual parts out of a packed box, container, or tub by hand. She would then twirl them around to visually inspect them. Petitioner would then stack the various produced parts in the prepared boxes. The type and amount of parts handled depended on the order being filled. Petitioner testified that Respondent produces a variety of parts including lead frames, flat lead frames, and cups. Petitioner would also have to roll parts with plastic padding and stuff padding into the boxes and around the parts.

Petitioner has worked in Respondent's department 490 as an "adjuster" for the last 10 years. She stated that her duties as an adjuster include setting up a job to get it running to make products. Setting up a job includes unbolting a die set inside a machine press, pulling it out, cleaning it, and then putting in a new die set, and bolting it in place. Petitioner uses an Allen wrench or torque wrench to loosen and tighten the bolts. There are 4-6 bolts per machine and Petitioner does this at least twice per day. Petitioner also runs the machines by engaging the press and helping to pack the parts being produced as described in her job duties in utility/hand packing.

As an adjuster, Petitioner also uses a vibratory tool called a "nibbler" to cut metal coils and straighten them. She stated that a nibbler is a hand tool that is used to cut through metal. Petitioner states that she uses the nibbler for approximately an hour per day.

Although she moved to a job as an adjuster, Petitioner was required to perform utility/hand packing duties when Respondent became short staffed. Petitioner stated that she had to return to utility/hand packing duties months before April 04, 2018.

Some months prior to April 04, 2018, she began having sharp pains in her wrists and fingers as she was performing her utility/hand packing duties at Respondent's facility. She indicated that the pain was located on the underside of her wrists and would shoot up into her hands.

Petitioner stated that when she first felt her symptoms, she informed her supervisor, "Hayes." She stated that she was sent to an in-house nurse practitioner and given Ace bandages and wrist bands. No examination was performed nor were any tests conducted. Petitioner stated that she returned to the in-house nurse practitioner twice before being directed to visit with her primary care physician.

Petitioner first saw her primary care physicians, Dr. Jain, on April 4, 2018 for her symptoms. She complained of bilateral hand pain and numbness in her thumbs and index fingers. She told Dr. Jain that she had been suffering from these symptoms for months. Dr. Jain also noted arthralgias, crepitus, stiffness, swelling, and warmth and stated that her symptoms were possibly due to occupation-related repetitive wrist motions. A blood test run by Dr. Jain was negative for arthritis, diabetes, and thyroid issues. He recommended that Petitioner try wrist splints and Aleve to alleviate her symptoms. He also advised her to consider surgical carpal tunnel releases.

Petitioner testified that she did use the wrist splints. However, the wrist splints did not help her symptoms and made her hands numb.

She returned to Dr. Jain on May 01, 2018 for her wrist, hand, and finger symptoms. He noted pain with range of motion in both hands and hypoesthesia in Petitioner's bilateral median nerve distribution. He referred her to a neurologist for to perform an EMG/NCV of her bilateral upper extremities.

On June 12, 2018, Petitioner underwent an EMG/NCV with Dr. Naseer at Anderson Hospital. Following the tests, Dr. Naseer diagnosed Petitioner with mild evolving bilateral carpal tunnel syndrome without ulnar neuropathy. Petitioner was then referred to Dr. McKee, a plastic surgeon.

She saw Dr. McKee on July 06, 2018. She reported right greater than left pain in the dorsal ulnar fingers extending up the volar forearm. Dr. McKee noted that Petitioner's symptoms woke her at night. She was also dropping things and reported diminished grip strength, swelling in both hands, cramping in her thumbs and difficulty with fine motor tasks.

Upon examination of Petitioner and review of her EMG/NCV results and records from Dr. Jain, Dr. McKee diagnosed Petitioner with right carpal tunnel syndrome, right cubital tunnel syndrome, and right trigger thumb. However, Petitioner indicated that the diagnosis was for her left side as well, but that Dr. McKee was going to perform surgery on the right side first. Petitioner testified that she did not undergo any surgery for her carpal tunnel syndrome symptoms

Dr. Rotman examined Petitioner on November 19, 2018 on behalf of Respondent. In addition to taking a history from Petitioner, examining her, and reviewing her medical records, Dr. Rotman viewed videos provided to him by Respondent. The video referenced in the November 19, 2018 report only show duties involve in using the machine press.

Dr. Rotman stated that Petitioner described the hand packing job to be most problematic for her but noted that he did not have a video of those duties. Dr. Rotman was then provided with a video showing the hand packing duties as described by Petitioner and drafted his January 28, 2019 addendum report.

Dr. Rotman ultimately diagnosed Petitioner with mild carpal tunnel on both sides. He did not believe that Petitioner had any triggering but did note an irritability over the cubital tunnels. He recommended that Petitioner undergo carpal tunnel releases.

Dr. Rotman stated that carpal tunnel syndrome is an idiopathic disease; the cause of which is unknown. He stated that carpal tunnel syndrome occurs when a thickening of the ligament tightens around the nerve. He stated that it occurs equally in workers and non-workers.

He goes on to state that an aggravation of carpal tunnel syndrome would just be a job that would bring out the symptoms so much that treatment would be warranted. Dr. Rotman stated that such a job would require repetitive, forceful motion. He goes on to state that if you use your hands heavily and have carpal tunnel, those heavy activities are going to be bothersome.

Dr. Rotman stated that although they were repetitive, the activities shown in the videos did not require high force to warrant an opinion that Petitioner's work activities were the cause of her symptoms. However, Dr. Rotman claims that he has previously found that the aggravation of Respondent's other employee's carpal tunnel syndrome was related to their employment.

Dr. Rotman did admit that a smaller person would have to use more force when gripping than would a larger person. He also admitted that Petitioner is only 5'2" and 141 pounds and that the videos he reviewed showed men performing most of the job duties Petitioner performs. Dr. Rotman attributed Petitioner's symptoms purely to her age and gender.

Petitioner also underwent an Independent Medical Evaluation with Dr. Bruce Schlafly on December 17, 2018 at the request of her attorney. At that time, she reported pain and numbness in both hands, catching or popping in her middle fingers, and tenderness and swelling in the right thumb.

Upon examination, Dr. Schlafly found that Petitioner had a positive Tinel sign in the median nerve of the right wrist and positive Phalen's tests at each wrist. He also found pinwheel sensations in the left index finger and catching of the flexor tendons of both middle fingers. He also found an isolated area of tenderness and swelling of the flexor tendon sheath of the right thumb. He opined that the combination of factors that Petitioner exhibited established a diagnosis of carpal tunnel syndrome.

Petitioner described her job duties to Dr. Schlafly stating that she worked as a machine operator and packer. She stated that several years prior, she was moved from a packer to a machine operator. However, she noted that her employer had been short staffed, and she had been performing packing duties again. She reported that her job required a lot of use of her hands. She told Dr. Schlafly that she changes machines dies which are secured by bolts, uses wrenches, screwdrivers, torque wrenches, Allen wrenches, and pry bars. She also described some packing duties, telling Dr. Schlafly that she packs brass and copper parts into boxes by unrolling plastic padding to surround the parts. She told Dr. Schlafly that she does not engage in any hand-intensive activities outside of work.

Dr. Schlafly found Petitioner's occupational history to be very significant regarding her hand complaints. He also noted that she did not have any significant disease or conditions that would contribute to the hand issues she was and is experiencing. Following his review of Petitioner's records and examining her, Dr. Schlafly diagnosed Petitioner with bilateral carpal tunnel syndrome, bilateral middle trigger fingers, and right trigger thumb. Dr. Schlafly attributes this diagnosis to Petitioner's repetitive work with her hands as a machine operator and packer for Respondent for over 15 years. He recommended that Petitioner undergo carpal tunnel release surgeries on both hands and then receive injections for her trigger fingers.

Petitioner stated that she currently has constant throbbing in her hands and pain in her fingers. Her hands are swollen and difficult to move when she wakes up the morning. Her hands throb during work. She stated that her symptoms are in both hands. Her fingers will lock up and she will have pain in her fingers and wrists. She also described tingling in her fingers that is at its worst when she is driving. Petitioner also stated that packing boxes at work aggravates these symptoms more than any other activity. Currently, Petitioner stated that even though she is now an adjuster, she still performs packing duties depending on how many people are available.

Petitioner is still working full time. She testified that she takes a lot of aspirin to help her symptoms. She also does stretches and takes breaks to get through the workday. She would like to proceed with the recommended surgeries.

CONCLUSIONS

The condition of bilateral carpal tunnel syndrome and bilateral middle finger triggering and right thumb triggering is not disputed. The need for surgery is likewise not disputed.

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

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

An injury is accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Industrial Commission*, 128 N.E.2d 718, 720 (Ill. 1955); *General Electric Co. v. Industrial Commission*, 433 N.E.2d 671, 672 (Ill. 1982). In a repetitive trauma case, issues of accident and causation are intertwined. *Elizabeth Boettcher v. Spectrum Property Group and First Merit Venture,* 99 I.I.C. 0961 (1999). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 797 N.E.2d 665, 672-73 (Ill. 2003) (emphasis added). As in establishing accident, to show causal connection Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury. *Fierke v. Industrial Commission*, 723 N.E.2d 846 (3rd Dist. 2000).

In *Edward Hines Precision Components v. Indus. Comm'n,* 825 N.E.2d 773, (2nd Dist. 2005). the Court expressly stated, "There is no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma." *Id.* at N.E.2d 780. Similarly, the Commission noted in *Dorhesca Randell v. St. Alexius Medical Center*, 13 I.W.C.C. 0135 (2013), a repetitive trauma claim, a claimant must show that work activities are a cause of his or her condition; the claimant does not have to establish that the work activities are the sole or primary cause, and there is no requirement that a claimant must spend a

certain amount of time each day on a specific task before a finding of repetitive trauma can be made. *Randell* citing *All Steel, Inc. v. Indus. Comm'n*, 582 N.E.2d 240 (2nd Dist. 1991) and *Edward Hines supra.*

The Appellate Court in *City of Springfield v. Illinois Workers' Comp. Comm'n*, 901 N.E.2d 1066 (4th Dist., 2009) issued a favorable decision in a repetitive trauma case to a claimant whose work was "varied" but also "repetitive" or "intensive" in that he used his hands, albeit for different task, for at least five (5) hours out of an eight (8) hour work day. *Id.* "While [claimant's] duties may not have been 'repetitive' in a sense that the same thing was done over and over again as on an assembly line, the Commission finds that his duties required an intensive use of his hands and arms and his injuries were certainly cumulative." *Id.*

In this case, the evidence shows that Petitioner gave thorough and credible testimony regarding her job duties and the onset of her symptoms. Petitioner has worked for Respondent since 2001, performing hand intensive duties and a variety of different, repetitive tasks. She was examined prior to the beginning of her employment and did not exhibit any signs of carpal tunnel syndrome. She worked in utility/hand packing for many years before moving to a job as an adjuster. During her time as an adjuster, she had no documented issues with carpal tunnel symptoms. Petitioner testified that sometime in early 2018, when she was required by her employer to resume some utility/hand packing duties, she began to experience sharp pains which spread from her wrists into her hands and fingers. These pains quickly developed into numbness, tingling, swelling and throbbing.

Respondent relies on the opinion of Dr. Rotman who ignores Petitioner's 17+ years of employment and simply points to her age and gender as the culprit in her current condition. However, Dr. Rotman states that carpal tunnel syndrome is idiopathic, but its symptoms are only exacerbated when forceful repetitive work is done. By that line of thought, the symptoms Petitioner is experiencing must have been caused by some repetitive work that is forceful for Petitioner. Petitioner has no hand intensive hobbies to speak of and has worked for Respondent for many years performing the same tasks over and over. Additionally, she has no diseases generally considered to be causative factors in carpal tunnel syndrome symptoms, such as diabetes or thyroid issues. Petitioner is not a smoker and is not obese. Therefore, no factors, other than Petitioner's work duties, are indicated as a cause of her current symptoms. As pointed out by Dr. Schlafly, Petitioner's 17+ years of repetitive work for Respondent have caused to her carpal tunnel syndrome symptoms and need for treatment.

In this case the Arbitrator finds the testimony and opinions of Dr. Schlafly more persuasive that those of Dr. Rotman. Based upon the foregoing and the record taken as a whole, the Arbitrator finds Petitioner has met her burden of establishing that she sustained accidental injuries which arose out of and in the course of her employment with Respondent and that her current condition of ill-being is causally related to the accident.

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

Issue (K): Is Petitioner entitled to any prospective medical care?

As indicated above the condition of bilateral carpal tunnel syndrome and bilateral middle finger triggering and right thumb triggering is not disputed. Nor is the reasonableness and necessity of the treatment provided thus far. The need for surgery is likewise not disputed.

20IWCC0241

Petitioner submitted medical bills totaling $2,710.40 (PX 5) Based upon the Arbitrator's findings with respect to C & F above, Petitioner is entitled to payment of past medical expenses as submitted and is further entitled to prospective medical treatment as recommended by Dr Schlafly and or Dr. McKee.

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Tim James,

Petitioner,

vs. NO: 18 WC 25024

McLaughlin Body Co.,

20IWCC0242

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary disability, medical expenses, prospective medical care, and permanent disability and being advised of the facts and law, reverses in part the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327 (1980).

I. FINDINGS OF FACT

A. Background

Petitioner was employed by Respondent as an Inspector in April of 2018 and he sustained an undisputed accident on July 6, 2018 involving his low back. Respondent makes cabs for various manufacturing companies.

Petitioner's job was to inspect Caterpillar cabs and the two doors that go with the cabs. Petitioner explained that everything is on a conveyor system. He worked alone and would lift doors weighing approximately 50 pounds off the rack and carry them 15-20 feet over to a table

where he would lay them down and use a flashlight to inspect them.

Petitioner inspected about eight cabs, close to 16 doors, when he first started in April. Then through July, Petitioner testified that the number of cabs that he inspected increased to 20-25 cabs per day (up to 50 doors per day). Petitioner testified that it became more strenuous because they had to put more tables out on the floor to increase the value, so his movement with these doors was exponentially increased. He explained that a round trip from picking them up prior to inspection to an inspection table and back to the rack was probably 40 feet if the door passed inspection and an additional 50 feet if the door failed because he took the door to another rack and then push it about 50 feet over to a repair station.

B. Prior Medical Treatment

Petitioner had medical treatment to his low back and for other unrelated conditions prior to his accident at work. On June 15, 2008, Petitioner presented to the Genesis Medical Center ("Genesis") Emergency Room complaining of right sided back pain while cleaning his garage. He rated his pain 9/10. Over a year later, on November 30, 2009, Petitioner complained of back pain radiating to his hip. A lumbar MRI was performed and compared to one dated March 15, 2007. It was noted that the November 30, 2009 MRI revealed mild to moderate diffuse degenerative changes, with no focal disc protrusion or extrusion. Significant central spinal or foraminal stenosis was present at multiple levels, most severe on the right from L3-L5 and on the left at L4-5.

From June 19, 2012 through August 28, 2012, Petitioner presented on several occasions to Genesis and ORA Orthopedics ("ORA"). On October 11, 2012, Petitioner underwent a lumbar MRI that revealed diffuse degenerative changes, most severe at L4-5. An addendum noted an apparent focal disc protrusion on the left affecting the left neural foramen. On October 31, 2012, Petitioner returned to ORA with complaints of back pain radiating down his left leg. The recent MRI was reviewed and found to reveal a left lateral L4-5 disc herniation. On November 28, 2012, Petitioner informed ORA that his back pain had started to move to his right side. He was referred to Dr. Panozzo for selective nerve root blocks. By January 10, 2013, Petitioner reported that his left lower leg pain had resolved. Over the next three years, Petitioner periodically treated for his back pain and was consistently prescribed pain medication.

On May 23, 2016, Petitioner presented to Dr. Josie at Unity Point Health. He complained of daily chronic back pain ongoing for four years and gradually worsening. He was diagnosed with chronic back pain and lumbar radiculopathy. He was prescribed Norco and referred to a pain clinic. On September 26, 2016, Petitioner complained of chronic back pain 6/10 without sciatica. He also complained of occasional numbness and tingling down his legs, but denied radiating pain, weakness and loss of sensation in his legs. He was diagnosed with chronic bilateral low back pain without sciatica.

Petitioner then underwent a lumbar MRI on October 6, 2016 that revealed broad based

bulges at T12-L1 and L1 through L5. Degenerative facet disease and moderate left foraminal stenosis was found at L4-5. At L5-S1 there was a broad based bulge, a small superimposed focal disc protrusion in the right foraminal position and mild right foraminal narrowing with no canal stenosis. The radiologist noted that Petitioner's symptomatology was likely related to the L4-5 stenosis.

On December 22, 2017, Petitioner presented to Genesis with neck and back pain after being rear-ended in a motor vehicle accident. Lumbar x-rays revealed degenerative changes. He was diagnosed with chronic back pain and prescribed Norco.

On April 9, 2018, Petitioner underwent a pre-employment screening with Respondent indicating that he was capable of performing the duties of the job.

C. Accident and Medical Treatment

Petitioner sustained his accident toward the end of his shift on Friday, July 6, 2018. Petitioner explained that he did not feel that he needed immediate medical attention. Petitioner testified that the workload that week had been hot and heavy, and towards the end of the shift, he just attributed his condition to it being a hot day and a long week. His muscles were just stiff and he was looking forward to the weekend to rest. Petitioner did not think anything was seriously wrong requiring medical attention other than just a strained muscle.

The Sunday night leading up to Monday morning, Petitioner did not sleep comfortably and went from the bed to the couch to the recliner. He generally gets up at 4:00 a.m. for his shift and at 2:00 a.m., he had severe pain where he could not move. He testified "I mean, it was just like somebody stuck a lightning bolt in my back and it just rang all the way to my right foot, just down my leg. I mean it was just terrible."

Petitioner did not go to work and then presented to the company clinic, Concentra, on July 13, 2018. He indicated that he injured his back lifting heavy cab doors and that the soreness worsened over the weekend. He complained of sharp back pain and stabbing pain in his right leg as well as paresthesia. Petitioner indicated that two weeks prior he had experienced some numbness radiating down his right leg, but he was able to shake it off. He attributed these symptoms to a loss of blood flow while crawling underneath a cabinet to inspect the underside of some items. Petitioner was diagnosed with a low back injury, lumbar strain and lumbar radiculopathy. Dr. Chelli released him to modified duty with physical therapy. However, Petitioner did not return to work, although light duty work was made available to him. He testified that he knows his body and that his pain was too severe and unlike any other pain he has experienced.

D. Work Restrictions and Termination from Employment

Petitioner was terminated from Respondent's employment on July 27, 2018. Respondent

called Abby Fobert as a witness. Ms. Fobert testified that she is the Human Resources Manager for Respondent and that Petitioner was employed by Respondent from April through July of 2018. According to Ms. Fobert, Petitioner was terminated by Respondent because he did not report his absences to the attendance line for three consecutive days in violation of Respondent's written attendance policy. Ms. Fobert also testified that Petitioner was offered light duty work within his restrictions after being released in a light-duty capacity, however Petitioner responded that he would not come to work due to his pain level. Petitioner has not worked since the accident.

Petitioner testified that he was terminated for failing to call off work on only one occasion. Petitioner testified that Ms. Fobert asked him to call the sick line every day to let them know he would not be coming in, which he did for a certain period of time. Then, the one time that he did not do that, he was terminated.

E. Continued Medical Treatment

Petitioner continued to undergo treatment and a lumbar MRI taken August 6, 2018 revealed L5-S1 findings of a mild diffuse disc bulge, bilateral facet joint and ligamentous hypertrophy, and no significant central canal stenosis. There was severe right neural foraminal stenosis with a possible right lateral disc herniation extending into the neural foramen. The radiologist's impression was a right lateral disc herniation causing severe right lateral neural foraminal stenosis at L5-S1. Degenerative changes had worsened since the October 6, 2016 lumbar MRI. Shortly thereafter Dr. Chelli agreed with the radiologist's findings, and diagnosed a low back injury, lumbar radiculopathy and neural foraminal stenosis. Petitioner was again released to light duty, prescribed medication and referred to an orthopedic spine physician.

On August 30, 2018, orthopedic surgeon Dr. Berry examined Petitioner and discussed the most recent MRI results. Dr. Berry diagnosed severe right-sided foraminal stenosis which was "superimposed on a large foraminal disc herniation causing severe compression of the exiting L5 root." Dr. Berry opined that Petitioner required surgical intervention and placed him on work restrictions of seated duty with no lifting over five pounds.

On October 8, 2018, Petitioner underwent a Section 12 examination at Respondent's request with Dr. Zelby. Upon examination, Dr. Zelby noted inconsistent behavioral responses, including diminished pain responses upon distraction and nonanatomic sensory changes. He opined that Petitioner did not sustain a traumatic or repetitive work injury. Dr. Zelby authored an addendum report on November 23, 2018 after reviewing additional medical records from June 2008 through December 2012. His opinions were unaltered.

F. Deposition Testimony – Dr. Zelby

Dr. Zelby is a board-certified neurosurgeon. He performed a Section 12 examination of Petitioner at Respondent's request on October 8, 2018. Petitioner reported constant right-sided

low back pain with intermittent, but daily, radicular pain to his foot. Dr. Zelby reviewed lumbar MRI images from October 11, 2012 and August 6, 2018, as well as a lumbar MRI report from October 6, 2016. He also reviewed records from Drs. Collins, Panozzo and Berry, as well as Concentra's medical records.

Dr. Zelby diagnosed lumbar spondylosis with radiculopathy, but found that this condition was not causally related to Petitioner's work duties. Dr. Zelby opined that the post-accident MRI showed the same L5-S1 abnormalities as did the pre-accident October 2012 counterpart, as well as the same foraminal disc protrusion described in the pre-accident October 2016 version. Dr. Zelby opined that the only difference in the post-accident MRI was a degenerative progression, which would not arise from repetitive activities. Dr. Zelby recommended a microdiscectomy with a modest medial facetectomy at L5-S1.

On cross-examination, Dr. Zelby admitted that it was possible to have an asymptomatic herniated disc, and that there was minimal evidence of right leg pain in Petitioner's medical records prior to the accident date. He also admitted that repetitive heavy lifting could accelerate a person's back condition.

G. Deposition Testimony – Dr. Berry

Dr. Berry is a board-certified orthopedic spine surgeon who treated Petitioner on August 30, 2018. Upon examination, Dr. Berry noted Petitioner's discomfort and distress. Petitioner walked with a limp and had right leg weakness. Dr. Berry also noted decreased sensation to touch, especially in the L5 distribution, and a positive straight leg test on the right. In contrast, Dr. Berry noted full strength and sensation in Petitioner's left leg.

Dr. Berry testified that Petitioner's subjective complaints were consistent with objective findings. Specifically, Petitioner's complaints of pain and radiation on the right side were consistent with an L5 pain distribution. Dr. Berry was aware of Petitioner's back problems stemming back to 2008, but testified that the August 2018 MRI revealed a clear compression of the L5 nerve root from a disc herniation, which was not present on previous MRI's. He testified that Petitioner had a symptomatic L5-S1 foraminal disc herniation on the right with L5 radiculopathy and was a candidate for a transforaminal lumbar interbody fusion from the right at L5-S1. Dr. Berry testified that Petitioner's symptoms were either caused or exacerbated by the instant accident, and he predicted persistent pain and dysfunction for Petitioner without surgery.

Additionally, Dr. Berry disagreed with Dr. Zelby's recommendation of a microdiscectomy with a modest medial facetectomy. Dr. Berry testified that in the past nine years of spine surgery, patients with Petitioner's studies have not responded to decompression-only procedures.

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H. Additional Information

Petitioner testified that he continues to experience severe discomfort in his lower back radiating all the way down the right side of his leg. He explained that it feels like a huge knot being shocked by electricity and, while his symptoms vary, sometimes it is unbearable. Petitioner testified that he did not feel this type of pain and radiating symptoms before working for Respondent. Petitioner testified that workers' compensation has not approved the surgery recommended by Dr. Berry. He testified that he wishes to undergo the surgery.

II. CONCLUSIONS OF LAW

A. Causal Connection

In order to obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "It is axiomatic that employers take their employees as they find them." *Id.* at 205. "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* It is also well settled that causation in a workers' compensation case may be established by a chain of events showing prior good health, an accident, and a subsequent injury. *Schroeder v. Illinois Workers' Comp. Comm'n*, 2017 IL App (4th) 160192WC, ¶ 25 (citing *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982).

In the case at bar, Petitioner's description of the mechanism of injury and his job duties is uncontroverted. Indeed, the accident is undisputed. Petitioner was able to perform heavy industrial work for months for Respondent prior to the accident. Immediately after the accident he called off work and complained of severe pain. Petitioner's subjective complaints were corroborated by the physician at the company clinic, Dr. Chelli, who placed him on modified duty, ordered an MRI and referred Petitioner to an orthopedic spine physician immediately upon reviewing the MRI results.

The objective diagnostic evidence revealed in Petitioner's pre- and post-accident MRIs establish a clear and significant change in Petitioner's lumbar spine. Petitioner's treating orthopedist, Dr. Berry, opined that Petitioner's condition was causally related to the accident at work. In so doing, he noted that the pre-accident 2012 and 2016 MRI findings were similar, both revealing the most significant findings at L4-5. The interpreting radiologists determined that the findings of the 2016 MRI (similar to the 2012 MRI) indicated the L4-5 level was the cause of Petitioner's symptoms. With regard to the L5-S1 level, Petitioner's 2016 MRI revealed mild right foraminal narrowing with no canal stenosis. The radiologist's impression of the post-

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accident MRI was of a right lateral disc herniation causing severe right lateral neural foraminal stenosis at L5-S1. Dr. Berry agreed and opined that the objective indicators in Petitioner's post-accident MRI were consistent with his new and subjective pain complaints finding that the L5-S1 level was the cause of Petitioner's symptoms.

In contrast, Dr. Zelby opined that Petitioner's condition was not causally related to the accident at work, but admitted that it was possible to have an asymptomatic herniated disc and that there was minimal evidence of right leg pain in Petitioner's medical records prior to the accident date. Dr. Zelby further admitted that repetitive heavy lifting could accelerate a person's back condition. Dr. Zelby's acknowledgment of the limited right leg complaints in Petitioner's prior medical history and Petitioner's uncontroverted testimony that he lifted and carried dozens of cab doors in a day belie Dr. Zelby's ultimate conclusions. In light of the record as a whole, the Commission does not find Dr. Zelby's opinions to be persuasive.

In short, Petitioner's pre-existing lumbar spine condition has been aggravated by his undisputed accident at work as corroborated by objective medical evidence on which Dr. Berry relied in rendering his opinions. The Commission finds the opinions of Dr. Berry to be persuasive given the record as a whole. Accordingly, the Commission reverses the Arbitrator and finds that Petitioner has established a causal connection between his accident and current condition of ill-being.

B. Medical Expenses

The Arbitrator denied Petitioner's claim for medical expenses on the basis of his denial of causal connection. Petitioner submitted unpaid medical bills into evidence in the amount of $3,085.74. Respondent did not assert that any of Petitioner's treatment was unreasonable or unnecessary. In fact, Respondent's own Section 12 examiner, Dr. Zelby, recommended prospective surgical treatment, albeit somewhat different and, in his opinion, unrelated to the accident.

Having found that Petitioner has established a causal connection in reliance on the opinions of Dr. Berry, the Commission also finds that the submitted charges are reasonable, necessary, and related to Petitioner's accident. Thus, the Commission awards all unpaid portions of Petitioner's medical bills pursuant to the provisions in Sections 8(a) and 8.2 of the Act.

C. Prospective Medical Treatment

In reliance on the opinions of Dr. Berry, the Commission further awards the prospective medical care pursuant to Section 8(a) of the Act in the form of the recommended L5-S1 fusion and decompression prescribed by Dr. Berry as it is reasonable and necessary to alleviate Petitioner from the effects of his injury at work.

All else is affirmed and adopted.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner has met his burden of proof regarding causal connection to his current condition of ill-being.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner has failed to establish his entitled to temporary total disability benefits as claimed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner all unpaid medical expenses related to the instant matter, pursuant to sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the prospective medical treatment recommended by Dr. Berry, in addition to all related treatment that shall follow.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's claim for temporary disability benefits is denied and that Respondent is entitled to a credit in the amount of $9,138.80 for previously paid temporary total disability benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $25,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 24 2020
o: 3/5/20
BNF/wde
045

Barbara N. Flores

Marc Parker

Concurrence in part, Dissent in part

I respectfully concur, in part, and dissent, in part, from the Decision of the Majority. The Majority reversed the Decision of the Arbitrator who found Petitioner did not sustain his burden of proving that a stipulated work-related accident caused a current condition of ill-being of his lumbar spine, denied compensation, and awarded Respondent credit of $9,138.80 for prior payment of TTD. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator.

In his decision, the Arbitrator found Petitioner to be not credible. In my opinion, when the credibility of a claimant is an ultimate issue in a claim, as it is here, I believe the Commission should generally defer to the assessment of credibility by the Arbitrator, who actually observed the claimant's testimony, rather than substitute our assessment of credibility on review.

The Arbitrator noted that Petitioner testified openly and without hesitation on direct examination but testified evasively and vaguely on cross. In addition, Petitioner clearly misrepresented the pre-accident treatment to his lumbar spine and specifically denied any treatment for his back prior to a previous Workers' Compensation claim in 2012. In fact, he had treatment for his back since at least 2007, at which time he reported 9/10 low back pain and for which he had an MRI in 2008.

In addition, although Respondent stipulated to accident, Petitioner's history was inconsistent. Specifically, he reported to a treating doctor, Dr. Berry, that he had a traumatic event in which he bent to pick up a door. However, he reported to Respondent's Section 12 medical examiner, Dr. Zelby, that he did not have any specific traumatic event, but rather attributed his back condition to cumulative heavy labor. In addition, on his examination, Dr. Zelby found several nonorganic pain responses, which further put Petitioner's credibility into question.

Both Dr. Berry and Dr. Zelby testified by deposition. Dr. Berry opined that the work accident at least aggravated Petitioner's pre-existing lumbar condition. On the other hand, Dr. Zelby opined that Petitioner's current condition was simply the natural progression of his long-standing lumbar condition. I agree with the Arbitrator that Dr. Zelby was more persuasive than Dr. Berry. As correctly pointed out by the Arbitrator, Dr. Zelby was provided all of Petitioner's records back to 2007 while the only pre-accident records Dr. Berry was provided was an MRI taken in 2012, after Petitioner's prior Workers' Compensation accident. Therefore, Dr. Zelby had a better understanding of the extent of Petitioner's pre-existing condition than did Dr. Berry. In addition, Dr. Zelby testified persuasively that the post-accident MRI showed no structural change from the pre-accident 2012 MRI.

Sabotage

The Arbitrator denied compensation and awarded Respondent credit of $9,138.80 for prior payment of TTD. He noted that on several occasions Petitioner's treating doctors had released him to work with certain restrictions. Respondent then offered Petitioner work within the prescribed restrictions. However, Petitioner declined all such offers and refused to even attempt to work at these light-duty positions. Based on such refusals, I concur with the Arbitrator that Petitioner was not entitled to TTD and Respondent was entitled to the credit awarded.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator in which he found that Petitioner did not sustain his burden of proving a work-related accident caused the current condition of ill-being of his lumbar spine. Therefore, I respectfully dissent from the Decision of the Majority.

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DLS/dw
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Deborah L. Simpson

Spoonful

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

JAMES, TIM
Employee/Petitioner

Case# **18WC025024**

McLAUGHLIN BODY CO
Employer/Respondent

20IWCC0242

On 8/23/2019, 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 1.84% 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:

0307 ELFENBAUM EVERS & AMARILIO
KAROLINA M ZIELINSKA
900 W JACKSON BLVD SUITE 3E
CHICAGO, IL 60607

0507 RUSIN & MACIOROWSKI LTD
DANIEL W ARKIN
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

STATE OF ILLINOIS)
) SS.
COUNTY OF ROCK ISLAND)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Tim James
Employee/Petitioner

Case # 18 WC 25024

v.
McLaughlin Body Co.
Employer/Respondent

20IWCC0242

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 Arbitrator Paul-Eric Seal, Arbitrator of the Commission, in the city of Rock Island on June 6, 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. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, July 6, 2018, 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 not causally related to the accident.

In the year preceding the injury, Petitioner earned $45,361.68, the average weekly wage was $872.34.

On the date of accident, Petitioner was 54 years of age, married, with no dependent children.

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

Respondent shall be given a credit of $9,138.80 for TTD, $ -0- for TPD, $ -0- for maintenance, and $ -0- for other benefits, for a total credit of $9,138.80.

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

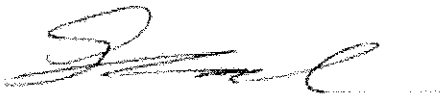
ORDER

Based upon the Arbitrator's findings and conclusions as discussed on the Attachments to this Arbitration Decision, the Arbitrator finds that the Petitioner has failed to meet his burden of proving that the requisite causal relationship exists between his present condition of ill-being and the accident of July 6, 2018. Accordingly, the Arbitrator finds that the Petitioner is not entitled to prospective medical treatment, payment of bills or payment of TTD. The Arbitrator further finds that Petitioner failed to return to work to a light duty position that was available and offered, within the Petitioner's medical restrictions. Therefore, Petitioner failed to prove that Respondent owed the previous payments of TTD to the petitioner. Respondent is entitled to a credit in the amount of their payments of $9,138.80.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 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

August 17, 2019
Date

AUG 23 2019

In support of the Arbitrator's Decision relating to "F" – whether petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds the following facts:

It is undisputed that the petitioner was hired by the respondent to work as an inspector in April of 2018. Petitioner's job consisted of inspecting doors, which required lifting and carrying them from a rack to a table. Petitioner testified that he initially inspected 16 doors per day when he was hired in April of 2018. This required lifting and carrying of the doors from a rack to a table, which was a distance of 15 to 20 feet. The doors weighed approximately 50 pounds each. The petitioner testified that his job increased to inspecting 20 to 25 doors per day by July of 2018 and further that the distance he needed to carry them increased to 40 feet.

The petitioner also testified that he was working on July 6, 2018, and, towards the end of his shift he felt like he strained a muscle in his back. He also testified that he did not feel a strain while he was working. Noting that July 6th was a Friday, the petitioner was off work on July 7th and 8th and called in to work on Monday, July 9th, advising that he had pain in his back and leg. He testified that he had pain while he was sleeping over the weekend and that his pain got worse over the weekend.

The petitioner's initial medical treatment was with Dr. Chelli at Occupational Health Centers of Illinois (Concentra) on July 13, 2018. He presented with a complaint of low back pain with radiation down his right leg, which he stated began on July 6th after lifting heavy cab doors at work. Dr. Chelli listed his diagnoses as a low back injury, lumbar strain and lumbar radiculopathy. His treatment recommendations consisted of medication, a referral to physical therapy and a release to modified duty work. Both the petitioner and Abby Fobert, respondent's Human Resources Manager, testified that light duty work was available and offered to the petitioner and that he refused to return to work because he was in pain.

Follow up visits with Dr. Chelli were on July 16th and August 13th, 2018. The petitioner again was given releases for light duty work and again refused to return to work due to his claimed pain level.

Dr. Chelli also ordered an MRI, which was performed at ORA on August 6, 2018. According to the radiologist, the MRI revealed a herniated disc with severe right lateral neuroforaminal stenosis at L5-S1, along with degenerative changes and bulging discs at every level from T12 through S1. The radiologist also referred to a prior MRI that had been performed on October 6, 2016.

Dr. Chelli referred the petitioner to Dr. Berry at ORA on August 13. The petitioner was examined by Dr. Berry on August 30, 2018. Following his review of the MRI and his examination of the petitioner, Dr. Berry stated that the petitioner has severe right-sided foraminal stenosis superimposed on a large foraminal disc herniation which is causing severe compression of the exiting L5 root. Dr. Berry recommended an L5-S1 minimally invasive transforaminal lumbar interbody fusion. He agreed with Dr. Chelli relative to the petitioner's ability to work in a light duty capacity.

The petitioner has not seen any other doctors subsequent to his accident of July 6, 2018.

It is also undisputed that the petitioner was terminated from McLaughlin Body Company on July 27, 2018. Although the petitioner testified that this was because he failed to call in one morning, he was questioned on cross examination as to whether this was actually for failing to call in for three days. The petitioner's response to this question was, "I don't recall."

Abby Fobert testified that the petitioner's employment was terminated because he failed to report his absences on the attendance line for three consecutive days. This action constitutes a voluntary resignation and job abandonment and results in termination based on the attendance policy.

Ms. Fobert also testified that McLaughlin Body Company was able to accommodate the petitioner's restrictions after July 6, 2018, that he was offered light duty work within his restrictions multiple times, and that he refused to return to work.

The Arbitrator notes that the main issue in dispute in this case is whether petitioner's present condition of ill-being is causally related to the accident of July 6, 2018. The Arbitrator has carefully weighed the credibility and motivation of the witnesses and reviewed and analyzed the medical records that were admitted into evidence, including the medical reports and deposition testimony of Dr. Berry and Respondent's examiner under section 12 of the Act, Dr. Andrew Zelby.

From a credibility perspective, the Arbitrator specifically notes that the petitioner testified openly and without hesitation or any confusion when asked questions on direct examination by his attorney. However, on cross examination, and with regard to his prior accidents, injuries, medical treatment and employers, the petitioner testified vaguely and evasively, and he responded, "I don't recall" to many of the questions – most especially those concerning his medical records and histories and prior treatment, etc.

In short, much of the petitioner's testimony on direct examination was rebutted and contradicted on cross-examination, as well as by his own medical records. The Arbitrator finds that the petitioner was less than truthful in his testimony at hearing.

To fully evaluate the causal connection and credibility issues, the Arbitrator notes and considers the chronology of what occurred prior to the accident date of July 6, 2018.

Although the petitioner testified on direct examination that he had prior low back injuries and one of them occurred in 2012, his testimony relative to that accident was that he fell off a ladder while working for Superior Gutter and sustained a right calcaneal fracture, along with a broken wrist and twisting his back. The petitioner denied having any other prior back injuries.

The petitioner testified that he did not recall if he was asked about his past medical history and treatment when he underwent a preemployment physical for the respondent. He testified that he would have provided information about his history if he had been asked, but that he did not recall whether he volunteered this information, if he had been asked.

The petitioner also testified that he did not have any other back injuries, other than the accident which occurred in 2012, when he fell off the ladder while working for Superior Gutter.

The petitioner testified that the treatment he received for his low back, following the 2012 accident, was with Dr. Panozzo and Dr. Sundar for about one year. He also testified that he underwent two MRIs following this accident.

The petitioner then testified that both Dr. Panozzo and Dr. Sundar stopped treating him after a year and a half since he no longer had pain.

The petitioner denied having filed any other workers' compensation claims and testified further that he did not know or could not recall the filing of 01 WC 44786.

The petitioner further testified that he had only worked for Superior Gutter one day when he was injured in 2012 and that his next employer was The Crown Group. He testified that he worked for this employer from December of 2016 until December of 2017 and that he was unemployed after December of 2017 until he was hired by the respondent in April of 2018.

The petitioner testified that he did not receive any medical treatment while he was working for The Crown Group. He also testified that he did not receive any medical treatment for his back after he was released from care by Dr. Panozzo and Dr. Sundar, which is again noted to be either one year or one and a half years following the 2012 accident with Superior Gutter.

After petitioner testified that he was not involved in any other non-work-related accidents involving his back, he was impeached on cross examination relative to a motor vehicle accident that he was involved in on December 22, 2017. The petitioner then admitted that he was a passenger in this vehicle but did not recall whether he injured his low back or complained of low back soreness. While admitting that he went to the Illini Emergency Room in Silvis, he did not know if he underwent an MRI or any x-rays. He also testified that he did not recall whether he complained of low back problems or injuries as a result of this accident. He did admit, however, that the records of Genesis Medical Center would be correct if they documented a low back injury as a result of the December 22, 2017 accident.

The petitioner next testified that he could not recall any back injuries or back problems prior to his 2012 accident at Superior Gutter. He did, however, again admit that records of Genesis Medical Center would be correct if they documented prior injuries and treatment.

The Arbitrator notes that the Genesis Medical Center records have been admitted into evidence as Respondent Exhibit 1. These records document complaints of low back pain and an emergency room visit on November 28, 2009, an MRI that was obtained on November 30, 2009 and a reference to a prior lumbar spine MRI on March 15, 2007. The November 30, 2009 MRI documents complaints of back pain with radiation to the hip and leg and further that disc bulging was noted from L1 through S1 without any focal disc protrusions or extrusions.

Chronologically, the Genesis records next discuss the petitioner's September 5, 2012 emergency room visit which occurred after he fell off a ladder, broke his right foot and right wrist and injured his left knee and low back on June 19, 2012.

Notes of November 7, 2012 document pain running down the left thigh, past the knee, and a notation that an MRI revealed multiple levels of disc herniations with central canal stenosis and foraminal stenosis from L1 to S1.

A physical therapy discharge summary on February 12, 2013, documents low back pain as 9/10.

The petitioner returned to Genesis Medical Center on March 31, 2014 with a complaint of back pain and foot pain which began three days earlier. He stated that he had been raking leaves three days earlier and now has worse back pain.

Petitioner again testified that he did not work for anybody after Superior Gutter before he worked for The Crown Group. However, and after being questioned about emergency room records of December 9, 2015, which document complaints of chronic back pain, treatment at a pain clinic due to stocking shelves at Dollar Tree, the petitioner admitted that these records are also correct. Additionally, these records indicate that the petitioner was taking Vicodin every day, that his pain was 8/10 and that he has seen multiple doctors for his chronic back pain.

The petitioner next admitted that the emergency room records from Genesis Medical Center of April 13, 2016 are also correct. These records indicate that the petitioner has been getting treatment for his back but that his doctor dropped him and he "just wants pain medication until he has a new appointment on May 2, 2016." The petitioner's pain at this time is noted to be sharp and constant, and rated as 9/10.

After being given a prescription for Norco and advised to follow up with his primary care physician, petitioner returned to the emergency room on April 17, 2016, stated he "tweaked his back" and obtained another prescription for Norco.

The petitioner was next questioned about treatment with Dr. Brett Josie, of UnityPoint Internal Medicine. The Arbitrator notes that these records have been admitted into evidence as Respondent Exhibit 2.

Although the petitioner testified that he had seen Dr. Josie, as his primary care physician, he could not recall the specific periods of time he treated with him. He did admit that Dr. Josie's records would be correct if they reflected that he was seen and complained of chronic back pain on May 23, 2016.

Contrary to his previous testimony that he stopped treating with Dr. Sundar after one year or one and a half years following his accident in 2012, the petitioner advised Dr. Josie that Dr. Sundar had given him injections but then discharged him from the pain clinic because he cancelled or failed to appear for two of his appointments.

When seen by Dr. Josie on May 23, 2016, the petitioner asked for a referral to a new pain specialist to get more injections. The petitioner testified that he could not recall why he would have requested more injections since his earlier testimony was that his pain went away after the injections he received from Dr. Panozzo and Dr. Sundar. He also could not recall when or why he developed additional pain. Petitioner then admitted that Dr. Josie's records would be correct if they reflect that he complained of chronic back problems that began four years prior and progressively worsened.

When seen on June 17, 2016, the petitioner advised Dr. Josie that he has pain daily, which has been gradually worsening, stated that the pain does not radiate and that it is aggravated by bending. He further denied leg pain, numbness, tingling or weakness but stated that he has stiffness in the morning.

Dr. Josie's records of September 26, 2016 document the petitioner's inability to get into a pain clinic until "February 20, 2016." Dr. Josie's diagnoses on September 26, 2016 are listed as lumbar radiculopathy and chronic low back pain without sciatica.

Although Dr. Josie ordered another lumbar MRI, they also state that the petitioner, who has chronic low back pain with some radiculopathy, requested more Norco. The petitioner testified that he asked Dr. Josie for Norco and that the doctor declined, and instead recommended gabapentin. Although Dr. Josie's records state

that "I am very reluctant to give him more pain medication since it does show that he has some drug seeking behavior in his chart," the petitioner denied that Dr. Josie refused to give him medication for this reason.

Other notes on September 26, 2016 discuss the petitioner's long history of back pain, treatment with a specialist and state that the petitioner "even went to Dr. Panozzo who discharged him because he has drug seeking behavior on opiates."

The petitioner next advised Dr. Josie that his chronic back pain is 6/10, that he works in construction, stands for long periods of time and admits that he has had several MRIs and wants to see a spinal specialist.

The petitioner advised Dr. Josie that he has a herniated disc and that he wants to see a spinal specialist "because he does have some numbness and tingling that were down his legs at times."

As for his treatment with Dr. Panozzo, the petitioner testified that his records would be correct if they indicate that he complained of bilateral back pain which radiated down both legs. He admitted that he told Dr. Panozzo that his right leg pain and back pain was worse than ever on February 11, 2013.

However, petitioner also testified that he did not recall whether he had pain radiating down his right leg prior to the accident of July 6, 2018, and he could only remember pain in his left leg prior to that date. Petitioner then admitted that he had pain going down both sides of his back prior to working for the respondent.

Petitioner was next questioned as to the past medical history and prior records that he had provided to Dr. Berry. Petitioner testified that he started to tell Dr. Berry about his past medical history but that Dr. Berry stopped him from talking and told him that he already had access to the petitioner's records. He then testified that he did not provide Dr. Berry with copies of his records but that he told him about all of his prior medical treatment and prior accidents, as discussed above.

The Arbitrator has also reviewed the transcript of Dr. Berry's evidence deposition which was obtained on March 5, 2019 and is in evidence as Petitioner Exhibit 4. Dr. Berry testified that he only examined the petitioner once, which was on August 30 2018. He testified as to the x-rays he had obtained on that day, the petitioner's MRI from August 6, 2018, and his examination of the petitioner. He also testified that the petitioner presented with a history of feeling pain in his lumbar spine due to bending over and twisting to lift heavy doors on June 6, 2018. Following his examination of the petitioner, Dr. Berry recommended a fusion surgery at L5-S1.

Dr. Berry also testified that he reviewed the petitioner's October 11, 2012, MRI and that he believed the petitioner's L5 nerve root pain was caused, aggravated or accelerated by his work accident of July 6, 2018. He also testified that the petitioner denied any previous episode of right leg radiculopathy. Based upon the history that was provided to him by the petitioner, Dr. Berry opined that the petitioner's job duties aggravated or accelerated his foraminal stenosis.

On cross examination, Dr. Berry testified that he did not review any of the petitioner's medical records for treatment before the July 6, 2018, accident other than the October 11, 2012, MRI report. He also testified that he did not review the prior MRIs of the petitioner's lumbar spine from 2009 and 2016 and admitted that he did not have complete knowledge of the petitioner's prior lumbar spine treatment.

The petitioner underwent examination at the request of the respondent pursuant to section 12 of the Act with Dr. Andrew Zelby on October 8, 2018. Dr. Zelby's reports of October 8, 2018, and November 23, 2018, were admitted into evidence as Respondent Exhibits 3 and 4. Dr. Zelby's evidence deposition was obtained on April 29, 2018, and it is in evidence as Respondent Exhibit 5.

Unlike Dr. Berry, Dr. Zelby had been provided with all of the petitioner's medical records and reports. Following his examination of the petitioner and his review of the various medical records, Dr. Zelby opined that the petitioner did not sustain a discrete work injury and that his lumbar condition is not related to repetitive trauma. He also noted that the petitioner's right leg symptoms began prior to his claimed work injury and that the petitioner's various symptoms, and the medical treatment he received after July 6, 2018, are due solely to manifestations of a pre-existing and already symptomatic degenerative condition. Dr. Zelby clearly stated that there is no medical evidence to support an allegation or claim that the petitioner's pre-existing and already symptomatic degenerative condition was exacerbated, aggravated, accelerated or altered as a result of any work injury or work activity in July of 2018.

While the Arbitrator notes that different doctors (Berry and Zelby) could have different opinions on this disputed causal connection issue, the Arbitrator notes that only Dr. Zelby had been provided with a complete, thorough and accurate history of the petitioner's prior medical problems and treatment, along with all of the corresponding medical records. Dr. Berry agreed that he did not have complete knowledge of the petitioner's prior lumbar spine treatment or history, unlike Dr. Zelby.

The Arbitrator finds this to be a very important and critical factor when determining the credibility and weight to be given to these competing opinions. Based upon the above, the Arbitrator finds that the opinions of Dr. Zelby are to be given more weight and credibility than those of Dr. Berry.

In addition to the Arbitrator's findings relative to the causation opinions of Dr. Berry and Dr. Zelby, the Arbitrator has further considered the testimony, motivation and credibility of the petitioner. The Arbitrator finds that the petitioner was evasive, untruthful and selective in his testimony at trial, as well as with the information, including history and records, that he provided to Dr. Berry. This further supports the Arbitrator's Decision and conclusions relative to causal relationship.

After carefully considering and weighing all of the above, the entirety of the evidence, the petitioner's testimony, and the documentary evidence, the Arbitrator finds that the petitioner failed to meet his burden of proving a causal relationship between his past and present condition of ill-being and the accident of July 6, 2018. Accordingly, and based on this conclusion, the petitioner's claims and requests for medical treatment, payment of medical bills, and payment of TTD are denied.

In support of the Arbitrator's Decision relating to "K" – prospective medical care, the Arbitrator finds the following facts:

Dr. Zelby and Dr. Berry are of the opinion that the petitioner is in need of additional medical treatment. The Arbitrator again notes his findings and conclusions relative to causal connection as discussed above. Based upon this causal connection conclusion, the Arbitrator finds that the respondent is not responsible for any medical treatment the petitioner may need. Accordingly, petitioner's request for an order for prospective medical treatment is denied.

In support of the Arbitrator's Decision relating to "L" – temporary total disability, the Arbitrator finds the following facts:

The Arbitrator initially notes that the petitioner was released to return to light duty work, on multiple occasions, by Dr. Chelli and Dr. Berry. The Arbitrator further notes that it is undisputed that respondent offered light duty work for the petitioner, within his restrictions, and that petitioner refused to return to work, citing complaints of pain. The Arbitrator notes that the petitioner did not return to either Dr. Chelli or Dr. Berry and obtain an off work note or any further restrictions. Instead, petitioner simply did not return to work and did not call the respondent, resulting in his voluntary termination of employment.

The petitioner was released to return to light duty work. The respondent testified credibly, and the parties agree, that modified duties were available within the petitioner's restrictions. The petitioner admitted that he did not return to work or attempt the restricted duties. His only reason for refusing was that he just did not think that he could do it. In no way does this support any award of temporary total disability compensation.

Additionally, the Arbitrator again notes his findings and conclusions relative to causal relationship, as discussed above. Accordingly, all claims for additional TTD are denied.

In support of the Arbitrator's Decision relating to "N" – credit due respondent, the Arbitrator finds the following facts:

Although it has been stipulated that the respondent paid $9,138.80 for TTD, consisting of 15 5/7^{ths} weeks for the period of July 26th through November 12, 2018, the Arbitrator finds that the petitioner was not entitled to payment of any TTD benefits. The petitioner had been released to return to light duty work, beginning on July 13, 2018, by Dr. Chelli. Dr. Chelli's light duty restrictions continued at his subsequent appointments. Petitioner was next examined by Dr. Berry on August 30, 2018, and he was again released to return to work with light duty restrictions.

It is undisputed that the respondent had work available for the petitioner within his restrictions, that this work had been offered to the petitioner, and that he refused to accept the same and return to work. Petitioner's actions of not returning to work and not calling or reporting his absences for three days resulted in the termination of petitioner's employment. Considering these circumstances, and further considering the causal relationship conclusions discussed above, the Arbitrator finds that the petitioner was not entitled to any TTD benefits and awards a credit to the respondent in the amount of $9,138.80 for the payments previously issued as discussed above.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth McGann,

Petitioner,

vs. NO: 05 WC 44564

City of Chicago,

Respondent.

20IWCC0243

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, maintenance, credit, medical expenses, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. FINDINGS OF FACTS

A. Background and Prior Section 19(b) Hearing

Petitioner was a 33-year-old employee of Respondent. She worked for Respondent's Department of Revenue as an investigator and surveilled parties that emptied parking meters. On February 7, 2005, she slipped and fell down a flight of wet stairs, approximately 10 stairs. She injured her neck, back, right arm, and right ankle.

In a prior decision filed under §19(b) at an arbitration hearing held on June 25, 2007, the Arbitrator found Petitioner was entitled to temporary total disability (TTD) benefits for 121 and 4/7ths weeks and that Respondent was liable for medical expenses in the amount of $4,377.00. Respondent was to receive a credit for all amounts paid on account of said accidental injuries. The Arbitrator further found that Drs. Petrone and Monk were Petitioner's first and second choices of

physician, respectively, and Dr. Sinai was found to and be Petitioner's third choice of physicians and Dr. Herman falls within that chain of referral. Thus, medical bills for said providers were denied. Finally, Petitioner's Petition for Penalties and Attorney's Fees was denied. Neither party filed a Petition for Review.

"The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *Irizarry v. Industrial Comm'n*, 337 Ill. App. 3d 598, 606 (2nd Dist. 2003) (citing *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 125 Ill. App. 3d 1083, 1086-87 (1984) (quotations omitted)). The law of the case doctrine is applicable to issues litigated before the Illinois Workers' Compensation Commission. *Ming AutoBody/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 252, 899 N.E.2d 365, 326 Ill. Dec. 148 (2008)). Thus, the findings of fact and conclusions of law from the first arbitration hearing in this case are binding, and herein adopted and incorporated by reference.

B. Final Hearing Evidence

The parties returned for a hearing before the Arbitrator, which is the subject of the parties' cross-petitions for review. All remaining issues were addressed in the final hearing held over several dates on August 22, 2016, September 19, 2016, November 16, 2016, December 13, 2016 and December 14, 2016. The Arbitrator issued his decision on March 8, 2017.

Petitioner filed her petition for review relating to temporary disability benefits and the nature and extent of her injury. The Commission notes that a rider to the parties' request for hearing form reflects Petitioner's claim that she is entitled to TTD benefits from June 26, 2007 through June 15, 2012 and from September 16, 2012 through date of hearing. She further claimed entitlement to TPD benefits from June 16, 2012 through September 15, 2012. Respondent also filed a petition for review relating to causal connection, temporary disability benefits, maintenance benefits, medical bills, the nature and extent of Petitioner's injury, and its credit for payments made.

Evidence adduced at the final hearing included additional medical treatment beginning with a visit by Petitioner with Dr. Martin at the Center for Brain and Spine Surgery on June 25, 2007, the day of the original §19(b) hearing. Dr. Martin indicated that two or three physical therapy sessions were required. The treatment options discussed included injections, physical therapy, possibly fusion surgery, and medications.

Petitioner attended physical therapy at Rehabilitation, Inc., beginning on June 28, 2007, upon a referral from Dr. Herman. Petitioner was discharged from physical therapy on September 11, 2007. Between September 2007 and October 2008, Petitioner treated with Dr. Petrone, a chiropractor. Dr. Petrone performed manipulation and stimulation on her back and provided chiropractic physical therapy. Petitioner indicated the treatment she received from Dr. Petrone provided one or two days of relief. Petitioner also testified that there were times she did not see Dr. Petrone because her bills were not being paid and were piling up. She acknowledged that Dr. Petrone never refused to see her.

Thereafter, Petitioner had a child on July 14, 2010. Between July 14, 2010 and August 31, 2011, Petitioner continued to treat with Dr. Petrone. At that time, Petitioner was experiencing sharp pains and spasms in her legs, and by the end of the day, her pain was at its worst. Petitioner would take pain medication when she went to bed. She had prescriptions for Vicodin/Hydrocodone and she also rotated between Advil and Tylenol.

Petitioner testified that she experienced muscle spasms at nighttime, and her pain was always worse on her left side. Her entire back was now painful with pain in her left leg greater than in her right leg. She experienced tingling and numbing to this day. Dr. Petrone referred Petitioner to Chicago Northside MRI in August 2011, where an MRI was performed.

At Respondent's request, Petitioner underwent a Section 12 examination, with Dr. Jay Levin on August 17, 2011. He referred Petitioner for an updated MRI scan. Based on his examination of Petitioner, the updated MRI scan and the Petitioner's medical records, Dr. Levin opined Petitioner sustained a contusion of the lumbar spine resulting in no current disability. He opined Petitioner required no further treatment and she had been treated appropriately to that time. Dr. Levin opined that Petitioner's current complaints were not causally related to the accident and she could work full, unrestricted duty, and that she had reached MMI within three months of the injury.

Petitioner underwent a Functional Capacity Exam (FCE) in February 2012 at ATI Physical Therapy. Petitioner testified that she told the therapist that she injured her back while performing one of the exercises and that she was in a great deal of pain. She asked the therapist for something to help her pain.

Dr. Levin then authored an addendum report dated March 26, 2012. He had reviewed the FCE report of February 15, 2012, and the MRI scan of March 23, 2012. Dr. Levin noted the FCE demonstrated Petitioner's functional capabilities showed she could perform at the light physical demand level. He noted per the U.S. Dictionary of Occupational Titles, Petitioner's job was rated as a light duty position and he found Petitioner capable of working her full duty unrestricted position. Dr. Levin again opined that Petitioner was at MMI within three months of the injury. Dr. Levin's deposition testimony reflects the same opinions.

Petitioner continued to treat with Dr. Petrone who took her off work from August 11, 2012 to October 6, 2014, declaring her to be totally incapacitated. Petitioner also continued to see Dr. Petrone, and, to her knowledge, Dr. Petrone's opinion as to whether she can return to work has not changed.

1. Vocational Rehabilitation

Petitioner worked intermittently between the date of the §19(b) hearing and the FCE, but she was not returned to her job as an investigator for Respondent. In April of 2012, Petitioner met with Shalonda Hendricks, a representative for Respondent, to discuss a position with Respondent. Ms. Hendricks had no knowledge as to Petitioner's restrictions and was calling Petitioner back to a full-time regular position. Petitioner testified she had explained to Ms. Hendricks as to what her

restrictions were and provided her with a copy of her restrictions.

After Petitioner met with Ms. Hendricks, Ms. Hendricks stated that she would try to find Petitioner a job consistent with the restrictions. Petitioner was subsequently contacted and advised to report to Respondent's Department of Finance, as her old department no longer existed. She was sent to a location where she was to assist a supervisor training new employees. She started in the position on June 16, 2012.

Petitioner's restrictions limited her to working only part-time and Ms. Hendricks stated that Respondent would abide by that restriction, as well as the FCE report. Petitioner was told she would have to use vacation time and sick days in order to work half days as required by the FCE. After a few weeks Petitioner was informed that there were no other new employees to train so she would have to return to the field. Petitioner worked in the field driving to various police districts and aldermanic offices looking for booting devices. She estimated she would spend three of her four hour workday driving. The driving increased her pain as did placing the booting devices in the vehicle. Because of her increased pain she returned to Dr. Petrone's office. Dr. Petrone placed Petitioner off work.

While Petitioner was off work in 2012, she was required by Respondent to perform a self-directed job search. She testified that she had attempted to find a job that was within her restrictions, as no job with Respondent was available within the restrictions. Petitioner testified that she called places, looked in newspapers, and filled out applications, both online and in stores. She was required to document each job that she applied for and send it to Ms. Hendricks. Petitioner testified she had complied and forwarded her job logs to Ms. Hendricks on a weekly basis. No job logs were introduced into evidence. Ms. Hendricks was not called to testify by Respondent.

Petitioner testified that she was told to stop the self-directed job search toward the end of 2012. She was instructed to begin vocational rehabilitation with Medvoc. The first meeting with Medvoc was informal and occurred on January 10, 2013. Petitioner's first formal meeting with Medvoc was with Laura Roberts on February 25, 2013. Petitioner informed Medvoc of the restrictions, of which Ms. Roberts was unaware. Ms. Roberts basically told Petitioner that she had nothing to do with Petitioner's restrictions. Ms. Roberts testified that Petitioner was initially placed in "vocational planning." Petitioner was required to complete workbook exercises, typing tests and an online computer class. Ms. Roberts attempted to enroll Petitioner in an online Microsoft computer class at a local community college. Petitioner was unable to enroll in the class because her computer did not support Microsoft. Ms. Roberts admitted during her testimony that she was aware Petitioner's computer would not support Microsoft prior to enrolling Petitioner in the class. She also acknowledged that after being unable to take the Microsoft class, Petitioner found another online computer class, Fingerfast 10.

During the time she worked with Medvoc, Petitioner testified that she never received a work release. Medvoc recommended that she attend a computer class at Truman College, which would provide certification. However, Petitioner testified she was unable to attend the classes because they were only offered at night. She was unable to attend because no one would be available to care for her children. Petitioner agreed to meet with a Cyber Navigator at the Chicago

Public Library. While working with Medvoc, Petitioner testified the computer classes she took involved typing courses and using Word. Petitioner testified that the computer course she took did not provide her with any sort of certification.

Respondent began formal job placement activities with Petitioner on August 20, 2013. According to Ms. Roberts, it was at that time she believed Petitioner's restrictions set forth in the FCE were permanent. Petitioner was provided a job lead for Northern Suburban Recreation Association on September 11, 2013. Petitioner followed up the lead as required and was given an interview. She testified the interview went well and she was called back for orientation. During orientation she learned an employee may have to lift someone weighing up to 150 pounds. Petitoner's restictions clearly prevented her from doing that and she was unable to accept the job.

Between October 2013 and December 2013 Petitioner testified that she was taken off work by her doctors. Ms. Roberts required her to continue searching for a job during that period, and Petitioner stated that she complied because she did not want anything to happen regarding her job.

Petitioner also filled out an application for a LensCrafters store near her house and was called in for an interview. She was interviewed by Catherine Nolte and told about the requirements for the job including the potential work hours. Petitioner testified that Ms. Nolte asked her what work schedule would be appropriate to which she responded a four-hour workday that totaled a 20-hour week.

Petitioner testified that she was not offered a job with LensCrafters. According to Petitioner, Ms. Nolte said that she had other people to interview and that she would get back in touch with her. Petitioner testified that Ms. Nolte called her and left a message and Petitioner had called back, but Ms. Nolte was not in the office. Petitioner testified that they played phone tag, but never connected with each other. Petitioner testified she was never told that the position was no longer available. She further testified that Ms. Nolte was not aware of her restrictions because she did not discuss them with her. In addition, Petitioner testified that nothing in writing was presented to her about a job offer at LensCrafters and no message was left on her phone that the LensCrafters job was hers.

2. Continued Medical Treatment

In January 2014, Petitioner was seen by Dr. Neckrysh at the University of Illinois, on a referral from Dr. Petrone. Dr. Neckrysh ordered x-rays and an MRI of her lumbar spine, which were performed on January 22, 2014. The January 22, 2014 MRI report from MRI of Arlington Heights noted a clinical history of lumbago and lumbar radiculopathy. The impression was mild degree of degenerative changes in the lumbar spine with disc bulging towards bilateral neural foramen and facet arthrosis at L3-4, L4-5 resulting in mild bilateral foraminal stenosis.

Petitioner followed up with Dr. Neckrysh on March 11, 2014. Dr. Neckrysh advised Petitioner that her condition had not changed, and she did not have any fluid between her discs. Dr. Neckrysh recommended surgery but gave her no guarantee that it would fix the problem. Petitioner testified that Dr, Neckrysh told her the surgery was "50/50." It could help her but it could also make her condition worse. She did not follow-up with Dr. Neckrysh because surgery

was not an option as it could not be said that she would be at 100% and have her life back.

3. Additional Vocational Rehabilitation

Following the interview with LensCrafters, Petitioner began working with Ed Steffan of EPS Rehabilitation, Inc. at her attorney's request. In a report dated April 29, 2014, Mr. Steffan stated, "Ms. McGann is both placeable and employable in positions earning between $15.00 and $20.00 It is our opinion if Ms. McGann performs a part time good faith effort to seek and secure employment, she will obtain employment matching her Rehabilitation variables." Petitioner continued to work with Mr. Steffan for 3-4 months and then stopped working with him. After she stopped working with Mr. Steffan, Petitioner did not look for work on her own. Petitioner testified her pain was simply too great to hold a job.

4. Testimony of Catherine Nolte of LensCrafters

Respondent called Catherine Nolte of LensCrafters as a witness and she testified via evidence deposition. Ms. Nolte was currently employed as the Center Director of Lasik Plus in Chicago and previously as the General Manager of the LensCrafters store in Park Ridge where she conducted the hiring of customer service personnel.

Ms. Nolte testified that LensCrafters was desperate, so she interviewed almost everyone who submitted a physical application or resume. She recalled interviewing Petitioner for a customer service position. Ms. Nolte did not remember if Petitioner submitted a resume or an application prior to the interview, but that would be the general practice. The duties of a customer service representative are to determine the customer's needs for frames and lenses and put the orders into LensCrafters' system so that the glasses could be made.

Ms. Nolte was contacted by MedVoc Rehabilitation after the interview to discuss how the interview went and about any follow-up interactions she had with Petitioner. MedVoc drafted a summary of the conversation and sent it to Ms. Nolte for her to review. Ms. Nolte testified that the summary was an accurate description of her interaction with Petitioner, which she signed, dated, and returned to MedVoc. Ms. Nolte did not recall the interview absent the summary.

The April 3, 2014 letter drafted by MedVoc and signed by Ms. Nolte was a memorialization of a conversation between Laura Roberts and Catherine Nolte about Ms. Nolte's interaction with Petitioner regarding the customer service position at LensCrafters. During her interview with Petitioner, Petitioner indicated that she had an interview with another prospective employer and wanted to weigh her options before making a final decision; she followed up with Petitioner 1½ weeks later after not hearing from Petitioner; once she got in touch with Petitioner, Petitioner indicated that she needed to discuss the offer with her husband. Ms Nolte never heard back from Petitioner and she hired someone else.

Ms. Nolte testified that she was not aware that Petitioner had a workers' compensation case or if she had either medical restrictions or restrictions against work. Ms. Nolte did not recall if a job description was provided to MedVoc as to what Petitioner's job duties were to be. Ms. Nolte did not believe she memorialized the date she reached out to Petitioner and did not recall how long

after Petitioner's interview she filled the customer service representative position; possibly within a month of the interview. Ms. Nolte acknowledged that she and Petitioner played phone tag.

Ms. Nolte would not have hired Petitioner if Petitioner's doctor prohibited her from working. She testified that the customer service position was not a sedentary position but does not really require any lifting. The position does require bending, leaning over, standing, and sitting.

5. Continued Medical Treatment and Additional Information

Dr. Petrone referred Petitioner to Dr. Steven Mardjetko on June 16, 2014 who recommended Petitioner attend physical therapy, specifically, aqua therapy as a way to not have all the weight on her back, and to continue with medications. Petitioner testified that she did not attend aqua therapy because she lacked the ability to pay for it and Illinois Bone & Joint Institute was unable to get approval from Respondent.

Between 2014 and the final hearing date before the Arbitrator, Petitioner continued to treat with Dr. Petrone. Dr. Petrone offered some injections, stimulation, adjustments, and physical therapy, but the physical therapy was limited due to pain. Petitioner testified that following her attempted return to work in 2012, Dr. Petrone provided her with a walker that she would use from time to time.

Respondent submitted some surveillance video into evidence taken of Petitioner in December of 2011, May of 2012, and January and February of 2013. The accompanying report noted Petitioner walking, bending, and standing, and noted Petitioner used no assistive device for ambulation. Petitioner has no apparent difficulty with walking or entering and exiting her minivan or carrying plastic bags in each hand. Petitioner testified that she had a bag in each hand and had to make multiple trips from her vehicle into her home because she could not lift much.

Petitioner testified that she did not have any injuries to her back before February 7, 2005. Regarding her current condition of ill-being, Petitioner testified that she is in pain and she takes pain medication, but that does not get rid of the pain. The pain continues every day, and, by the end of the night, her back and legs are spasming due to the pain. Petitioner testified that she takes her pain medication based on the severity of the pain, as the medication makes her feel either nauseous or dizzy. She tends to take her pain medication after her children are in bed. Her husband gets up every morning to help bathe their daughter. Petitioner does drive, but it is limited. Until recently, she was unable to drive, walk or even dress herself.

Petitioner currently takes Hydrocodone, Tylenol 3, Aleve, and Advil. The medications are prescribed by Dr. Barnes of Community Health and Rehab. Petitioner testified that she does not want surgery. Before February 7, 2005, Petitioner testified that she was very active and participated in volleyball, rollerblading, and softball. She had exercised with her husband and they had gym memberships. Petitioner testified that she could no longer engage in those activities.

Petitioner testified that she has been using a walker consistently since June of 2016. She has two children, ages 12 and 6 years old. Certain activities, such as walking long distances and running, are painful. She cannot run without pain and she did not think that she had run in 12

years. Petitioner testified that she cannot play on the floor with her son because of the pain she experiences when getting up. Her oldest daughter has special needs and she receives state-provided assistance to help care for her daughter. Petitioner testified that she cannot bathe or dress her daughter without increased or severe pain.

Petitioner also testified that there are quite a few things around the house that she can no longer do. She has to limit herself when cleaning, knowing that cleaning will cause more her more pain at the end of the day. Leaning over a sink to wash dishes or to wash her face can cause pain. Petitioner testified that she used to clean her floors on her hands and knees but cannot do that anymore because it makes her back hurt.

II. CONCLUSIONS OF LAW

A. Causal Connection

The Commission finds that Petitioner's current condition of ill-being is causally related to the February 7, 2005 accident. The evidence shows Petitioner had no prior low back conditions and no intervening accidents between her current condition of ill-being and the work-related accident. Petitioner remained under active medical treatment since the prior Section 19(b) hearing, which the Commission finds supports an ongoing causal connection to the date of the final hearing. The Commission takes note of gaps in Petitioner's treatment but notes Petitioner's uncontroverted testimony that it was due to non-payment of medical bills, her pregnancy, and other financial concerns. The Commission, therefore, modifies the Arbitrator's decision to find causal connection to the date of the final hearing of December 14, 2016.

B. Temporary Disability Benefits & Maintenance Benefits

A rider to the parties' request for hearing form during the bifurcated hearing reflects Petitioner's claim that she is entitled to TTD benefits from June 26, 2007 through June 15, 2012 and from September 16, 2012 through date of hearing, which was concluded on December 14, 2016. She further claimed entitlement to TPD benefits from June 16, 2012 through September 15, 2012. Respondent disputes Petitioner's temporary benefit claims in total.

Petitioner remained under active medical treatment from the date of the prior §19(b) hearing with the above explained gaps in treatment. Dr. Herman saw Petitioner on April 19, 2007, where he noted severe pain in her low back with some radiating numbness into her lateral left leg. He recommended a discogram with post discogram CT scan to determine if surgery might be indicated. Dr. Herman continued her off work because of her severe pain. He saw Petitioner on June 26, 2007, and noted she had 6-7 months of conservative care with minimal improvement. Dr. Herman again recommended a discogram and another course of physical therapy. She completed physical therapy and was discharged on September 11, 2007. There is no indication she was released to return to work at that time. Petitioner continued to treat with her chiropractor Dr. Petrone in 2008, 2009, and 2010, continuing to complain of back pain. Petitioner remained off work during this time.

Petitioner then underwent an FCE on February 16, 2012, which revealed valid effort and

20 IWCC0243

that she was capable of working at a light physical demand level limited to four hours per day. Dr. Levin reviewed the FCE and authored a report dated March 26, 2012. He noted that Petitioner demonstrated functional capabilities to work at a light physical demand level during the FCE and her position with Respondent as a security specialist is considered a light position, per the U. S. Department of Labor's Dictionary of Occupational Titles. Dr. Levin opined Petitioner could return to work full duty. The Commission notes the surveillance video reflecting Petitioner ambulating and participating in activities that tend to undermine her representation of the extent of her disability during the period of claimed temporary benefits buttressing Dr. Levin's opinions.

In consideration of the record as a whole, the Commission finds that Petitioner is entitled to temporary total disability benefits from June 26, 2007 through March 26, 2012 when she reached maximum medical improvement. In addition, Petitioner and Respondent stipulated that Respondent paid $155,742.72 in TTD benefits from the date of the final hearing, June 25, 2007. Thus, the Commission finds that Respondent is entitled to a credit for such payments, including any overpayment of the TTD benefits awarded herein.

Having found Petitioner at maximum medical improvement, the Commission turns to Petitioner's remaining temporary disability claims. Petitioner claims temporary total disability benefits beyond March 26, 2012 inclusive of a period of temporary partial disability. Specifically, Petitioner claims entitlement to TPD benefits from June 16, 2012 through September 15, 2012 during which time she was paid for four hours per day by Respondent. She contends that she is then entitled to continuing TTD benefits through the final hearing.

While Petitioner underwent an FCE and demonstrated the ability to work at the light physical demand level for four hours per day, the surveillance video tends to undermine her representation of the extent of her disability. On balance, however, the surveillance video does not show Petitioner engaged in the same duties that she would have to perform at work throughout a full eight-hour work day. Moreover, the record establishes that Petitioner's job was no longer available as her department was dissolved and Respondent did not accommodate her restrictions. Petitioner testified she attempted to find work on her own by completing applications and submitting documentation to Ms. Hendricks. Petitioner also participated in vocational rehabilitation during a self-directed job search beginning in 2012, followed by formal services with MedVoc through Respondent, and additional vocational rehabilitation with EPS Rehabilitation.

"When the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits." 820 ILCS 305/8(a) (LEXIS 2011). "[M]aintenance is awarded incidental to vocational rehabilitation, [and] 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). The foregoing may include a self-directed job search or vocational training. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004).

The Commission finds that Petitioner is entitled to maintenance benefits attendant to vocational rehabilitation from March 27, 2012 through April 3, 2014 when Petitioner failed to

20 IWCC0243

follow up with the job offer from LensCrafters. The evidence establishes that this was a bona fide job offer and, thus, the Commission finds that Petitioner is not entitled to maintenance benefits thereafter. In the interim, Petitioner testified that she was paid part-time from March 27, 2012 through September 15, 2012. Respondent was unable to accommodate Petitioner's work restrictions during this period and paid her four hours per day while Petitioner was still engaged in some form of vocational rehabilitation.

Thus, the Commission finds that Petitioner is entitled to maintenance benefits from March 27, 2012 through April 3, 2014, with Respondent is entitled to credit for all benefits paid during this period.

C. Medical Expenses

The Commission notes that the earlier §19(b) decision of the Arbitrator identified the treatment provided by Community Health & Rehabilitation (Dr. Petrone) and Dr. Monk as Petitioner's first and second choice of doctors, respectively. That decision further found the treatment of Dr. Todd Sanai and Dr. Herman to be outside the two-physician rule of §8(a). Any and all bills from Dr. Sanai and Dr. Herman, and medical treatment in those chains of referral, are therefore denied based on the law of the case doctrine and the limitations on choice of physicians found in §8(a).

The Commission finds Respondent liable for certain medical bills from June 25, 2007 (the date of the §19(b) hearing) through December 14, 2016 (the last date of the bifurcated final hearing). Petitioner has established the reasonableness and necessity of the medical treatment relating to her low back condition and the associated radicular symptoms to alleviate her of the effects of her injury at work. Thus, the Commission awards the following bills submitted into evidence to be paid pursuant to §8(a) and §8.2 of the Act, which fall within the chain of referrals (as determined in the earlier §19(b) hearing) as follows:

Dr. Monk, July 26, 2005 and August 1, 2005	$ 210.00
Community Health & Rehab Center, Dr. Barnes	
August 26 2012 to December 27, 2012	$ 9,561.00
January 3, 2013 to December 30, 2013	$21,155.00
January 9, 2014 to April 14, 2014	$ 7,812.00
April 17, 2014 to August 21, 2014	$10,379.00
September 4, 2014 to October 6, 2014	$ 1,163.00
April 25, 2016 to May 9, 2016	$ 839.00
	$50,909.00
Community Health & Rehab Center, Dr. Barnes	
February 20, 2006 to November 10, 2009	$ 3,669.50
April 15, 2010 to June 24, 2010	$ 1,149.60

	$ 4,819.10
Community Health & Rehab Center, Dr. Petrone	
August 11, 2012 to December 27, 2012	$ 4,225.00
January 3, 2013 to December 30, 2013	$12,235.00
January 3, 2014 to April 14, 2014	$ 3,775.00
April 14, 2014 to August 21, 2014	$ 2,120.00
August 25, 2014 to November 24, 2014	$ 1,235.00
December 1, 2014 to January 12, 2015	$ 455.00
January 15, 2015 to February 23, 2015	$ 390.00
August 27, 2015 to February 8, 2016	$ 465.00
May 16, 2016 to May 24, 2016	$ 270.00
May 31, 2016 to June 26, 2016	$ 180.00
June 13, 2016	$ 90.00
June 30, 2016 to July 19, 2016	$ 540.00
July 25, 2016 to August 1, 2016	$ 180.00
July 29, 2016 to September 3, 2016	$ 180.00
August 29, 2016 to September 12, 2016	$ 650.00
	$26,990.00
MRI or Arlington Heights, January 22, 2014	$ 299.97
U of I Chicago, Dr. Neckrysh, March 11, 2014	$ 103.10
	$83,331.17

Concomitantly, the Commission finds that Respondent is entitled to credit for any medical expenses paid by Respondent and for medical expenses paid pursuant to its group insurance plan as provided in Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims for reimbursement made by Petitioner's group insurance carrier.

D. Permanent Partial Disability

The evidence in this case establishes that Petitioner sustained a low back injury after she slipped and fell down a flight of wet stairs on February 7, 2005. Following an initial §19(b) hearing, Petitioner continued to undergo years of medical treatment that was necessarily interrupted by a pregnancy as well as medical bill disputes. Petitioner was eventually released to work with permanent restrictions based on a valid FCE that indicated Petitioner was capable of performing work at a light physical demand level. The evidence also establishes that the Arbitrator's award was appropriate.

The Commission finds no evidence that Petitioner was permanently and totally disabled by virtue of medical opinions. While Petitioner's chiropractic physician, Dr. Petrone, last assessed

Petitioner's ability to resume work on February 3, 2014 and found her to be totally incapacitated "at this time," the Commission cannot infer that extended subsequent to the date he expressed the opinion. Dr. Petrone continued to treat Petitioner as of June 6, 2016 and he never provided an opinion as to Petitioner's ability to return to work after February 3, 2014. Moreover, there is no specific medical opinion that Petitioner was permanently and totally disabled.

Petitioner has also failed to prove to entitlement under an odd-lot theory of recovery. "The odd-lot category for purposes of a PTD award arises when a 'claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability.'" *Valley Mould & Iron Co. v. Industrial Commission*, 84 Ill. 2d 538, 546-47 (1981). A valid FCE indicates that Petitioner could perform work at the light physical demand level, albeit only over four hours, there is evidence that Petitioner was obviously employable. Petitioner undertook a self-directed job search at Respondent's direction and was then referred to MedVoc by Respondent. Petitioner was then provided a job offer from LensCrafters. Respondent called Ms. Nolte as a witness who discussed the job offer and her discussions with Petitioner. Ms. Nolte's testimony controverts Petitioner's testimony that she never received a job offer and, thus, undermines the assertion that she was unemployable.

In addition, Petitioner's chosen vocational rehabilitation counselor, Mr. Steffan of EPS Rehabilitation, determined that Petitioner was "both placeable and employable." Mr. Steffan further stated his opinion that "... if [Petitioner] performs a part time good faith effort to seek and secure employment she will obtain employment matching her Rehabilitation variables." The FCE and Mr. Steffan's employability assessment further establish that Petitioner is employable.

Moreover, there is no persuasive evidence establishing that Petitioner is entitled to a wage differential as preferred by our supreme court. See *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 43. A wage differential award under section 8(d)(1) is intended to compensate an injured claimant for her reduced earning capacity. *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC ¶ 39. Section 8(d)(1) of the Act requires that an impaired worker meet two requirements: (1) she is "partially incapacitated from pursuing his usual and customary line of employment" and (2) there is a "difference between the average amount which [s]he would be able to earn in the full performance of h[er] duties in the occupation in which [s]he was engaged at the time of the accident and the average amount which [s]he is earning or is able to earn in some suitable employment or business after the accident." *Jackson Park Hospital*, 2016 IL App (1st) 142431WC ¶ 40 (citing 820 ILCS 305/8(d)(1) (West 2012)). Again, the Commission finds evidence in the record undermining Petitioner's assertions as to the extent of her physical disability and, thus, agrees with the Arbitrator that Petitioner has failed to establish through a preponderance of credible evidence that she is entitled to a wage differential award.

Thus, in consideration of the record as a whole, the Commission affirms the Arbitrator's finding that Petitioner sustained permanent partial disability to the extent of 15% loss of use of a person as a whole as result of the injury.

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 8, 2017, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for the temporary total disability benefits from June 26, 2007 through March 26, 2012 totaling 248 weeks at $552.61 per week.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for maintenance benefits from March 27, 2012 through April 3, 2014 totaling 105 and 3/7ths weeks at $552.61 per week. Respondent shall receive credit for amounts paid for maintenance benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for all amounts paid for TTD, TPD, or maintenance benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $497.36 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused 15% loss of use of a person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $83,331.17 for medical expenses pursuant to §8(a) and §8.2 of the Act, and subject to any applicable Section 8(j) credit for any medical expenses paid by Respondent and for medical expenses paid pursuant to its group insurance plan as provided in Section 8(j) of the Act. Respondent shall hold Petitioner harmless from any claims for reimbursement made by Petitioner's group insurance carrier.

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

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

DATED: APR 24 2020
o-2/25/20
KAD/jsf

Marc Parker

Barbara N. Flores

Dissent

Petitioner sustained a work-related accident on February 7, 2005, requiring treatment to her lumbar spine. Petitioner received conservative care and on September 11, 2007, completed her final course of physical therapy, prescribed by her treating physician Dr. Herman, and was discharged.

> It is the burden of every Petitioner before the Workers' Compensation Commission to establish with evidence every disputed issue litigated at trial, including issues establishing Respondent's liability for benefits. *Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill.2d 207 at 214, 254 N.E. 2d 522 (1969), *Edward Don v. Industrial Commission*, 344 Ill.App3d 643, 801 N.E.2d 18 (2003). A claimant must establish her current condition of ill-being is causally related to her asserted accident. *Sisbro, Inc. v. Industrial Comm'n*, 207, Ill.2d 193, 203 (2003); *Land and Lakes Co. v. Industrial Commission* 359 Ill.App.3d 582, 591-92 (2nd Dist. 2005). An employee is only entitled to recover for those medical expenses which are reasonable and causally related to her industrial accident. *Zarley v. Industrial Comm'n*, 84 Ill. 2d 380, 389, 418 N.E.2d 717, 49 Ill. Dec. 697 (1981).

Petitioner sought intermittent care with her chiropractor, Dr. Petrone, for her lumbar spine in 2008, 2009, and her final treatment in June 2010. The treatment records for June 25, 2010, indicate Petitioner's low back pain was possibly due to her pregnancy. Petitioner delivered her son on July 4, 2010.

Dr. Jay Levin, an orthopedic surgeon, examined Petitioner at Respondent's request on August 17, 2011. She was not undergoing medical treatment at that time. Dr. Levin performed an exam of her lumbar spine and referred Petitioner for an updated MRI scan. An MRI was performed on August 31, 2011, which showed some degenerative changes of the lumbar spine, similar to the findings in the initial MRI of March 17, 2005. He specifically noted there were no findings at the L1-2 level in either MRI, a singular finding previously noted by Dr. Herman.

After reviewing the mechanism of injury in the initial medical records, the initial physical exam and imaging studies, which included normal x-rays, the MRI scans of March 17, 2005, and August 31, 2011, Dr. Levin concluded on September 27, 2011, Petitioner sustained a contusion of the lumbar spine. He further concluded she does not require any additional medical care or treatment as a result of the February 7, 2005, accident, she reached MMI and she can return to work in a full duty capacity. He found Petitioner's continued complaints are not related to the February 7, 2005, accident.

Dr. Levin also reviewed the FCE of February 15, 2012, and again concluded, on March 26, 2012, Petitioner was at MMI and needed no additional medical care or treatment on account of the work-related injury. Petitioner was able to return to work full duty.

The Act requires the employer to provide all "necessary first aid, medical and surgical services . . . reasonably required to cure or relieve from the effects of the accidental injury." *820 ILCS 305/8(a)* (West 2013)

Dr. Levin's opinions of September 27, 2011, and March 26, 2012, are persuasive and as a

Epsom Wells

board certified orthopedic surgeon, should be afforded greater weight than chiropractor Petrone. Dr. Levin provided a comprehensive review of Petitioner's treating records and diagnostic studies. He referred Petitioner for an MRI scan to update her medical condition before rendering his opinion. He examined Petitioner and also reviewed and commented on her FCE. Based on the foregoing, Dr. Levin concluded Petitioner did not require additional medical care or treatment and her current complaints were unrelated to the accident. Notably, Petitioner presented no medical opinion rebutting Dr. Levin's opinion. Based on Dr. Levin's opinion, Petitioner has failed to prove medical care and treatment rendered after September 27, 2011, is reasonable, necessary or related.

Also, the two year gap in Petitioner's medical care is significant and cannot be disregarded. Petitioner ceased medical care in June of 2010. At that visit, Dr. Petrone indicated her back pain was possibly caused by her pregnancy. Petitioner sought no further treatment for her lumbar spine until August 11, 2012. Petitioner's testimony that she did not seek treatment during this two year period because of the non-payment of bills is neither corroborated nor credible. There are no medical records or correspondence to suggest Petitioner's gap in treatment at Community Health & Rehab. Center was due to non-payment of medical bills. There is no documentation to indicate Dr. Petrone would discontinue treatment unless Petitioner paid any amounts due. Petitioner's explanation for the gap is unsupported and should not be relied upon.

Further, medical records for the treatment beginning in August 2012 supports the finding that the chiropractic treatment provided little to no relief, and, as such, was not reasonable and necessary treatment. In August 2012, Petitioner began treating with Dr. Petrone two to three times per week consistently with no improvement. In 2014, for instance, Petitioner saw Dr. Petrone for 58 visits in an 8 month period, yet her areas of complaint remained unchanged. Remarkably, Petitioner has offered no medical opinion stating that the chiropractic treatment rendered after September 27, 2011, was reasonable, necessary and related. In contrast, Dr. Levin opined she did not require additional medical treatment or care referable to her lumbar spine in his report dated September 27, 2011 and again on March 26, 2012. This opinion coupled with the two year gap in treatment supports a finding that her treatment after MMI was not reasonable, necessary or related as required under the Act.

Petitioner has also failed to prove she was temporarily and totally disabled after September 27, 2011. Temporary total disability is to be awarded for the period of time between the injury and the date the employee's condition has stabilized. *Caterpillar Tractor Co. v. Industrial Comm'n*, 97 Ill. 2d 35, 44, 454 N.E.2d 252, 257 (1983). One is temporarily totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists. *Zenith Co. v. Industrial Comm'n*, 91 Ill. 2d 278, 437 N.E.2d 628 (1982). In proving such period of incapacity, it is not enough for the employee to show he did not work -- he must also show that he was unable to work. *Arbuckle v. Industrial Comm'n*, 32 Ill. 2d 581, 207 N.E.2d 456 (1965).

Dr. Levin opined Petitioner was able to return to work in his report of September 27, 2011. Petitioner has not offered any medical opinion stating she was unable to return to work at that time. In light of Dr. Levin's opinion, and in absence of any opinion to the contrary, Petitioner has failed to prove she was temporarily and totally disabled after September 27, 2011.

I would rely on the opinion of Dr. Levin, rendered September 27, 2011, and find Petitioner

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failed to prove her current complaints are related to the accident of February 7, 2005, and deny any medical expenses and temporary total disability benefits thereafter. Based on the foregoing, I dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McGANN, ELIZABETH
Employee/Petitioner

Case# **05WC044564**

CITY OF CHICAGO
Employer/Respondent

20IWCC0243

On 3/8/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.83% 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:

0059 BAUM RUFFOLO & MARZAL LTD
EFIGENIA JAMES
33 N LASALLE ST SUITE 1710
CHICAGO, IL 60602

0010 CITY OF CHICAGO
ELIZABETH MANNION
30 N LASALLE ST SUITE 800
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

Elizabeth McGann
Employee/Petitioner
v.
City of Chicago
Employer/Respondent

Case # **05 WC 44564**

20IWCC0243

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **August 22, 2016, September 19, 2016, November 16, 2016, December 13, 2016, and December 14, 2016**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 7, 2005**, 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 **$43,099.16**; the average weekly wage was **$828.93**.

On the date of accident, Petitioner was **33** years of age, *married* with **1** dependent child.

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 **$155,742.72** for TTD and for TPD, and **$13,002.00** for other benefits of salary, for a total credit of **$168,744.72**.

Respondent is entitled to a credit of **$6,843.95** under Section 8(j) of the Act.

Respondent shall have a credit for all amounts paid to or on behalf of Petitioner on account of said accidental injuries.

ORDER

Respondent is liable for the voluntary temporary total disability benefits and temporary partial disability benefits that have been paid, but no more.

Respondent is liable for the medical treatment rendered at Community Health by Dr. Petrone, the other medical professionals in that facility, and the medical professionals in that chain of referral only.

Respondent shall pay Petitioner permanent partial disability benefits of $497.36/week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall be given a credit of **$155,742.72** for TTD and for TPD, and **$13,002.00** for other benefits of salary, for a total credit of **$168,744.72**.

Respondent is entitled to a credit of **$6,843.95** under Section 8(j) of the Act.

Respondent shall have a credit for all amounts paid to or on behalf of Petitioner on account of said accidental injuries.

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.

Milton Black

Signature of Arbitrator

March 8, 2017
Date

MAR 8 - 2017

PROCEDURAL HISTORY

An Application for Adjustment of Claim was filed by Petitioner on October 7, 2005 for a fall at work. A 19(b) Petition was filed on January 26, 2007 by Petitioner. The matter was heard by this Arbitrator on June 25, 2007. An August 31, 2007 decision was as follows:

- The Respondent shall pay the petitioner temporary total disability benefits of $552.56 per week for 121 4/7 weeks, from February 8, 2005 through May 8, 2005, from May 12, 2005 through November 15, 2006, and from November 30, 2006 through June 25, 2007, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
- The Respondent shall pay $4,377.00 for medical services, as provided in Section 8(a) of the Act.
- The Petitioner's claim for penalties, as provided in Section 19(k) of the Act, is denied.
- The Petitioner's claim for penalties, as provided in Section 19(l) of the Act, is denied.
- The Petitioner's claim for attorney's fees, as provided in Section 16 of the Act, is denied.
- The Respondent shall have a credit for all amounts of paid to or on behalf of the Petitioner on account of said accidental injuries.
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

This Arbitrator found that Petitioner was not completely forthcoming about her lumbar spine medical history but that there was no evidence that Petitioner sustained a subsequent lumbar injury through the hearing date. The medical bills of Dr. Sinai and of Dr. Herman were denied as being Petitioner's third choice of physicians. Dr. Petrone and Dr. Monk were found to be her first and second choices respectively.

There were no appeals.

This matter has now been heard on all remaining issues.

CURRENT FACTUAL, MEDICAL AND EMPLOYMENT CHRONOLOGY

Petitioner completed her therapy at Rehabilitation Inc. on September 11, 2007, when she was discharged from care. She has had ongoing complaints of lower back pain. Petitioner's continued to seek chiropractic treatment with Dr. Petrone and other physicians at Community Health since her last hearing. Petitioner testified that she gave birth to a son on July 14, 2010. She testified that the gaps in her medical treatment are due to nonpayment of medical bills.

Petitioner received trigger point injections from Dr. Barnes at Community Health. He also provided her with work status notes authorizing her off work.

Petitioner underwent a functional capacity evaluation on February 16, 2012. Petitioner testified that following that evaluation she had painful spinal symptoms. The report indicates it was valid and that she was able to work at the light physical demand level. Petitioner testified that driving and walking caused her back pain to increase.

On January 10, 2014 she saw Dr. Sergey Neckrysh, a neurosurgeon at the University of Illinois. He recommended an MRI of the lumbar spine. She underwent the MRI, which was interpreted as showing an overall mild degree of degenerative changes with some disc bulging toward the bilateral neural foramen and facet arthrosis at L3/4 and L4/5 resulting in mild bilateral stenosis. She returned to Dr. Neckrysh on March 11, 2014. She gave a ten year history of back pain with bilateral shooting pain in the legs with non-specific nerve distribution. He indicated that she had degenerated disc at L4/5 that was black but no central or neural foraminal

stenosis. He recommended a discography to determine if this level was causing her pain. She never had the discogram or returned to see Dr. Neckrysh.

On June 16, 2014, she saw Dr. Steven Mardjetko, an orthopedic surgeon, at Illinois Bone and Joint. At that visit, she complained of lower back and neck pain. He indicated an MRI showed L5/S1 facet arthropathy on the right. He recommended a CT scan and felt she may be a candidate for a facet injection as he felt that she may have arthritis in the facet joints. He did not feel she was a candidate for surgery. Petitioner did not undergo the CT scan or the facet injection and never returned to Dr. Mardjetko.

Petitioner testified that to the best of her knowledge, Dr. Petrone's opinion regarding her returning to work has not changed and he is completely keeping her off work. Petitioner testified that she cannot engage in the activities of daily living since her 2005 accident.

Petitioner testified that in 2012 she was required by the City to perform a self-directed job search. She testified that she was trying to find a position within her restrictions. She testified she would go online, fill out applications online or go into stores. She testified that she looked for ten to fifteen places on average per week. She testified that she documented her efforts and turned those into Shalonda Hendricks. Petitioner testified that she underwent vocational rehabilitation with MedVoc Rehab and that she worked with Ms. Laura Roberts.

Ms. Roberts testified at an evidence deposition that she would meet with Petitioner to implement a plan. She testified that Petitioner did not complete the contact requirements nor was she compliant with the program. Ms. Roberts testified that Petitioner could have been hired by LensCrafters, following an interview there with a Ms. Catherine Nolte. Ms. Roberts testified that Petitioner failed to communicate with Ms. Nolte after that interview.

Ms. Catherine Nolte testified at an evidence deposition. She testified that she currently worked for Lasik Plus but that she had worked for LensCrafters prior to that as a general manager. She testified that she had conducted hiring there and was responsible for hiring customer service positions. Those job duties were to consult with patients after they leave the doctor's office, determine their needs for frames and lenses, and then

put those orders into the system to be processed. She testified that she recalled conducting the interview of Petitioner in February of 2014. She testified that following the interview she was contacted by Medvoc Rehabilitation to discuss the interview. Following her communication with Medvoc, they drafted a letter summarizing the conversation and what had occurred. She testified that she reviewed the letter and felt it was an accurate depiction of what had happened. She then signed the letter and faxed it back to MedVoc. Ms. Nolte testified that she did not have an independent knowledge of all the details surrounding the interview. She testified that she remembered reaching out to Petitioner after the interview. She did not remember the details of the phone tag or what was said in the messages back and forth. Ms. Nolte testified that at the time she reviewed and signed the letter from Medvoc, she did have a memory of what had occurred, and that she did review the letter sent to her by Medvoc. She testified that if anything in the letter was inaccurate she would have altered or changed it and that the letter was an accurate representation of what she felt happened contemporaneously with the occurrence.

The letter drafted by Medvoc and signed by Catherine Nolte indicates that the interview for the customer service position occurred on February 26, 2014. She felt that the interview went fantastic and she believed that Petitioner would be a great addition to the team. Petitioner advised Ms. Nolte during the interview that she had another interview in a few days and wanted to think about her options before making a final decision. She stated that she would give a decision in a timely manner. Approximately, a week and half went by with no communication so Ms. Nolte did follow up with a phone call. The letter indicated that Petitioner and Ms. Nolte played phone tag for a short time but that she did speak to Petitioner. Petitioner advised her that she had not made up her mind yet about the position and needed to speak to her husband prior to accepting or declining the offer. Ms. Nolte indicated that she never heard back from Petitioner and hired someone else for the position. The letter was signed and dated by Ms. Nolte on April 4, 2014.

Petitioner testified that after ending the program with MedVoc she than began working with Mr. Ed Steffan. Mr. Steffan authored a progress report dated April 14, 2014. He documented that Petitioner was

advised as to her responsibilities regarding vocational rehabilitation and that it was expected that she perform a job search twenty hours per week. Petitioner confirmed that she would do this and review her email regularly. In the next progress report, it documents that Mr. Steffan provided Petitioner with job leads to apply to online or in person and that she did not do any of them. Upon trying to reschedule an appointment, Petitioner advised that she did not want to reschedule.

Petitioner testified that she stopped working with Mr. Steffan in July of 2014.

Petitioner was examined by Dr. Jay Levin on August 17, 2011 at the request of Respondent. He issued reports and testified at an evidence deposition. He opined that Petitioner's current complaints are not related to her accident but to degenerative lumbar changes. He further opined that she has no disability from that accident.

Respondent submitted surveillance of Petitioner. At one point, Petitioner is shown walking with her daughter, lifting her daughter up into a minivan, bending over into the minivan, and walking at a brisk pace around the minivan. At another time, Petitioner is shown leaning into the back of her minivan, grabbing plastic shopping bags, and carrying them in her hands into her house. At other times, Petitioner is shown walking normally or briskly.

CAUSATION

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury that occurred on February 7, 2005. The Arbitrator further finds that Petitioner has embellished her symptoms. The Arbitrator bases his conclusions on Petitioner's testimony as well as the medical records.

MEDICAL

The Arbitrator finds that the medical treatment rendered at Community Health by Dr. Petrone, the other medical professionals in that facility, and the medical professionals in that chain of referral are reasonable, necessary and related. The gaps in that treatment were due to nonpayment of medical bills and pregnancy. The remaining medical bills are denied as outside the chain of referrals.

TEMPORARY TOTAL DISABILITY AND TEMPORARY PARTIAL DISABILITY

The Arbitrator finds that Respondent is liable for the voluntary temporary total disability benefits and temporary partial disability benefits that have been paid, but no more. The Arbitrator bases this conclusion on the totality of the evidence.

NATURE AND EXTENT

Petitioner's treating physicians have kept her off work and have not returned her to her previous job. Her functional capacity evaluation was found to be valid. Dr. Levine's opinions regarding no disability are not persuasive. Petitioner requests permanent total disability benefits, but it is clear that she can work, as evidenced by her failure to follow up with the LensCrafters interview. Petitioner is not entitled to wage differential benefits, because she has embellished her symptoms, and as a result there is no credible evidence for the work that she could do. Petitioner has sustained a back strain, and her symptoms that wax and wane over time. Based upon the evidence in this case, the Arbitrator finds that Petitioner sustained has sustained a 15% loss of use of the person as a whole.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWRENCE BOND,

Petitioner,

vs.

NO: 13 WC 26072

26TH & AUSTIN CITGO, INC., and
THE ILLINOIS STATE TREASURER as *ex officio*
Custodian Of the Injured Workers' Benefit Fund,

20IWCC0244

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, employment relationship, medical expenses, causal connection, temporary total disability, and permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms and adopts the Arbitrator's Statement of Facts except the Commission strikes the introductory title "Respondent Illinois Injured Workers' Benefit Fund's Proposed Findings of Fact and Conclusions of Law." The Commission further affirms and adopts the Arbitrator's Findings/Analysis and Conclusions of Law except the Commission views the evidence differently than the Arbitrator with respect to the issues of (C) accident and (E) notice.

The Commission reverses the Arbitrator's Decision finding that Petitioner failed to prove beyond a preponderance of the evidence that an accident occurred that arose out of and in the course of Petitioner's employment and reverses the Arbitrator's Decision finding that Petitioner failed to give timely notice of his accident. Thus, the Commission vacates the Arbitrator's Findings/Analysis with respect to the issues of accident and notice in favor of the Conclusions of

Law detailed below.

Accident

With respect to the issue of accident, the Commission finds that an accident is compensable under the Act if Petitioner establishes that it both arises out of and in the course of employment.

> "In the course of" employment refers to the time, place, and circumstances under which the accident occurred, while "arise out of" employment means there is a causal connection between the accidental injury and some risk incidental to or connected with the activity an employee must do to fulfill her duties. *Caterpillar,* 129 Ill. 2d at 57-58, 541 N.E.2d at 667.
> "Typically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Howell Tractor & Equipment Co. v. Industrial Comm'n* 78 Ill. 2d 567, 573, 403 N.E.2d 215, 217, (1980). A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar,* 129 Ill. 2d at 58, 541 N.E.2d at 667.
> "An injury is not compensable unless it is causally connected to the employment." *Caterpillar,* 129 Ill. 2d at 62, 541 N.E.2d at 669.

Metropolitan Water Reclamation Dist. v. Industrial Comm'n, 272 Ill. App. 3d 732, 735, 650 N.E.2d 671, 674, 1995 Ill. App. LEXIS 364, *5-6.

The Arbitrator found that the Petitioner's injury did not arise out of and in the course of his employment as it was a result of willful and wanton conduct which was not within the scope of his employment. The Arbitrator noted that, "negligent illegal conduct is not enough to take the accident out of the scope of employment; the conduct must rise to willful and wanton conduct in order for it to be found not compensable." *McKernin Exhibits Inc. v. Industrial Comm'n*, 361 Ill.App.3d 666, 838 N.E.2d 47 (1st Dist. 2005). The Arbitrator then went on to define willful and wanton conduct under Illinois law as "...a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Ill. Rev. Stat. 1989, ch. 85, par 1-210.

In *McKernin*, the Petitioner was a carpenter and his job duties included making deliveries. He rear-ended an 18-wheel semi-truck as the vehicles traveled southbound. A urinalysis test taken at the hospital on the date of the accident confirmed that Petitioner had cocaine is his system. Petitioner also admitted that he had been found guilty of three felony counts of delivery of cannabis and was on three-years felony probation at the time of the arbitration hearing. James McKernin testified Petitioner's wife called him and told him Petitioner did not come home the night before the accident. The Court, noting Petitioner's conduct was negligent, did not find his conduct intentional or rising to the level of willful and wanton, and held:

> However negligent the claimant might have been in the operation of the vehicle he was driving, that negligence did not remove him from the scope of his employment or the protections of the Act. *Stembridge Builders, Inc. v. Industrial Comm'n*, 263 Ill. App. 3d 878, 880, 636 N.E.2d 1088, (1994). In order to remove the claimant from the protection of the Act, his actions must have been committed intentionally, with knowledge that they were likely to result in serious injury, or with a wanton disregard of the probable consequences. *Stembridge Builders, Inc.*, 263 Ill. App. 3d at 881-82. There is no evidence in this case that the manner in which the claimant was driving was either intentional or rose to the level of willful and wanton conduct.

McKernin Exhibits Inc. v. Industrial Comm'n, 361 Ill.App.3d 666, 838 N.E.2d 47 (1st Dist. 2005).

McKernin demonstrates that willful and wanton behavior must be intentional, or with a wanton disregard of the probable consequences. In the instant case, Petitioner's unrebutted testimony was that he was instructed by the owner of the gas station, that in the event of an altercation between a customer and the store's clerk, Ali, he was to handcuff the customer and call the police. (T, p. 16) Petitioner followed these specific instructions in the performance of his duties as overnight security guard and when the store clerk, Ali, and a customer got into an altercation on July 26, 2013.

The Petitioner's contemporaneous statement to the police recounted that there was a hostile verbal exchange between the customer and the store clerk. (PX5 Supplemental Form 7/26/13 Time 0100 hours) There is no evidence that Petitioner intentionally harmed the customer or that his behavior demonstrated a wanton disregard for the customer. On the contrary, Petitioner did what he was told to do in a quickly escalating situation as evidenced by the contemporaneous witnesses' accounts; Petitioner handcuffed the customer and then called the police. (PX5) During the escalation, Petitioner tried to calm both the customer and the store clerk, evidence that he was, in fact, attempting to de-escalate the situation. (See PX5 Supplemental Form Witness Statement of James Porter "Bond was telling Ali to relax and Hester (customer) to chill out.")

The police arrested Ali and after interviewing Petitioner and the witnesses, did not arrest Petitioner. The Commission finds Petitioner's conduct cannot be considered willful and wanton, warranting a finding that he suffered an accident which arose out of and in the course of his employment for Respondent. Thus, the Commission reverses the Arbitrator's findings and conclusions of law regarding accident and finds Petitioner sustained his burden of proving he sustained a work-related accident that arose out of and in the course of his employment with Respondent.

Notice

With respect to notice, the Commission finds that the Petitioner's unrebutted testimony supports a finding that he reported the incident to the owner telephonically on the night it occurred. Petitioner also filed an Application for Adjustment of Claim within the 45 day statutory notice window afforded by the Act and the Commission infers that a copy of same was simultaneously served upon the Respondent in the absence of any objection in this regard. *820 ILCS 305/6(c)* Thus, the Commission reverses the Arbitrator's findings and conclusions of law regarding notice

20IWCC0244

and finds Petitioner sustained his burden of proving he provided timely notice of the accident to the Respondent.

Causal Connection and Medical

The Petitioner alleges that in the process of handcuffing the customer, who was trying to defend himself, Petitioner injured his back when he twisted his body, and he injured his right hand when he was struck by a bat wielded by the store clerk, Ali, and he also alleged that he was sprayed with mace when Ali sprayed the customer which exacerbated his asthma. (T, pp. 17-19) The Commission notes that Petitioner did not call an ambulance until six hours after the incident, and that after complaining of mild back pain he was diagnosed with a urinary tract infection (UTI) at the emergency room. Petitioner sought no further medical care until after he was involved in a motor vehicle accident six weeks later. The Commission further notes that the emergency room visit on the date of accident makes no mention of the alleged mace exposure or exacerbation of Petitioner's asthma condition, thereby tarnishing Petitioner's credibility. (PX7) Further, the Petitioner testified that the he hurt his back as a result of the motor vehicle accident. (T, p. 22) Thus, the Commission is not persuaded that the medical evidence after July 26, 2013 is causally related to the work accident.

The Commission finds Petitioner sustained his burden of proving accident, he provided timely notice to Respondent, and the Commission awards medical benefits subject to Section 8.2 of the Act for the Vanguard MacNeal Hospital bill for date of service July 26, 2013, less the cost of the urinalysis related to Petitioner's diagnosis of UTI. All other medical bills, including but not limited to medical bills in Petitioner's Exhibits eight and nine, for treatment sought six weeks after the work-accident, and following the Petitioner's motor vehicle accident, are properly denied.

Permanent disability

The Commission further finds that Petitioner sustained a right hand contusion on the date of accident and no permanent partial disability attaches to Petitioner's condition of ill-being as a result of the work accident. In so finding, the Commission relies upon the emergency room records from MacNeal Hospital on the date of accident wherein Petitioner was diagnosed with a right hand contusion, Petitioner reported he was hit in the upper back, he complained of rib pain, but he was also diagnosed and treated for an unrelated UTI. (PX7) The Commission notes the diagnostics taken at the hospital on the date of accident of Petitioner's lumbar spine and right hand were negative for acute fracture-dislocation. The Commission finds that there is no compelling evidence that Petitioner sustained injury to his ribs or back and that the medical reports authored by Dr. Dzielawski more than six weeks later and after Petitioner was involved in a motor vehicle accident are not persuasive, no more than a litany of the events prepared in anticipation of litigation, and confusingly interchange references to Petitioner's left hand and right hand complaints. The Commission specifically finds that all medical treatment sought after July 26, 2013, is not causally related to the instant work-accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on January 30, 2018, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

Appendix

20IWCC0244

IT IS FURTHER ORDERED BY THE COMMISSION that the Decision of the Arbitrator regarding the issues of accident and notice is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the medical expenses for services rendered at MacNeal Hospital for medical treatment on the date of service on July 26, 2013, less the cost of the urinalysis, pursuant to the provisions of §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,750.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 24 2020
KAD/bsd
O022720
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Kathryn A. Doerries

Maria E. Portela

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BOND, LAWRENCE
Employee/Petitioner

Case# **13WC026072**

26TH & AUSTIN CITGO AND THE ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE IWBF
Employer/Respondent

20IWCC0244

On 1/30/2018, 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 1.62% 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

0000 CITGO
5946 S 26TH ST
CICERO, IL 60804

0000 26
7000 W 111TH ST, #102
WORTH, IL 60482

5946 ASSISTANT ATTORNEY GENERAL
HELEN LOZANO
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

20IWCC0244

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

Lawrence Bond
Employee/Petitioner
v.
26th & Austin Citgo and the Illinois State Treasurer as *ex-officio* custodian of the IWBF
Employer/Respondent

Case # 13 WC 26072
Consolidated cases: _____

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 **Ketki Steffen**, Arbitrator of the Commission, in the city of **chicago**, on **December 14, 2017** . After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **1) Notice to Respondent-employer of hearing date and 2) liability of IWBF**

20IWCC0244

FINDINGS

On **07/26/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**15,912.00**; the average weekly wage was $**306.00**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **1** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

THE ARBITRATOR FINDS THAT PETITIONER FAILED TO PROVE BEYOND A PREPONDERANCE OF THE EVIDENCE THAT AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT, THAT HE GAVE TIMELY NOTICE OF HIS ACCIDENT TO HIS EMPLOYER AND THAT HIS CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY. PETITIONER'S CLAIM FOR COMPENSATION IS DENIED. ALL OTHER ISSUES ARE MOOT.

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.

KSSteffen — January 25, 2018

Signature of Arbitrator Ketki Shroff Steffen — Date

JAN 30 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

Lawrence Bond,	)	
	)	
Employee/Petitioner,	)	Case No. 13 WC 26072
v.	)	
	)	
26th & Austin Citgo, and the Illinois State Treasurer as *ex officio* custodian of the Injured Workers' Benefit Fund	)	
	)	**Chicago, IL**
Employer/Respondent.	)	

Respondent Illinois Injured Workers' Benefit Fund's Proposed Findings of Facts and Conclusions of Law

Petitioner, Lawrence Bond, pursued this action under the Illinois Workers' Compensation Act and sought relief from Respondent-Employer, 26th & Austin Citgo. This action also sought relief from the Illinois Injured Workers' Benefit Fund (IWBF) as the employer did not maintain workers' compensation insurance coverage on the claimed date of injury. PX 2. A hearing was held before Arbitrator Ketki Steffen on December 14, 2017. Petitioner notified the employer of the hearing date by certified mail. PX 1. The employer did not appear for any of the arbitration proceedings and was not represented by an attorney. The Office of the Illinois Attorney General appeared on behalf of the Illinois State Treasurer, as *ex officio* custodian of the IWBF, and participated in the arbitration hearing. All issues, including liability of the IWBF and notice of hearing date to Respondent-employer, are in dispute.

Factual History

Petitioner testified that his date of birth is November 12, 1972 and that he was single with one dependent minor child on July 26, 2013. He began working at 26th & Austin Citgo, a gas

station and convenience store, in April of 2013. Petitioner learned about the job through a window advertisement displayed on Respondent-employer's premises. This advertisement prompted the Petitioner to speak with Respondent's owner, Mohammed, who offered Petitioner employment as an unarmed overnight security guard. Petitioner accepted the position and agreed to be paid a $306.00 weekly cash salary. Income taxes were not withheld. He was regularly scheduled to work 10 p.m. to 6 a.m., five days per week, and was off on Mondays and Tuesdays.

His duties included stocking shelves, cleaning, and monitoring security mirrors inside the convenience store. Respondent-employer provided him with a uniform which consisted of a shirt and badge that read "security". Petitioner supplied his own handcuffs that he took home every night. Per Petitioner, Mohammed instructed him that in the event of an incident involving a customer, he was to handcuff the customer and call the police. No documentary outlining his duties or job description was provided.

Petitioner testified that on July 26, 2013, he was at 26th & Austin Citgo when a customer and his girlfriend entered the store. Ali, the store clerk, was also present in the store behind the counter. The customer and his girlfriend were at a self-serving coffee station, when Ali exclaimed to the customer that he was using too much sugar in his coffee. A verbal altercation ensued which then escalated when Ali began hitting the customer with a baseball bat. The Petitioner intervened in this altercation. He wrestled the customer to the ground where he twisted his body while handcuffing the customer. Ali continued swinging the baseball bat and striking the handcuffed customer. Additionally, Ali sprayed mace on the customer and Petitioner. Petitioner then called the police. Upon investigation, Ali was arrested for felony aggravated battery and the injured male customer was taken via ambulance for treatment. Petitioner experienced pain in his back, right hand, and asthma symptoms. He called Mohammed, the owner, and reported the incident to him. In response, Mohammed directed the Petitioner to close

and lock the store. Petitioner's did not state that he specifically advised Mohammed of any of this injuries.

The Cicero Police Department was dispatched and arrived at 26th & Austin Citgo approximately at 1:00 a.m., located at 5946 W. 26th Street, following the above incident. PX 5. Petitioner stated that he recalled speaking to responding officers and that his testimony was the same as he reported to the responding officers.

The police reports, introduced into evidence, do not show that the Petitioner reported that he was injured in any way. PX5

At 6:40 a.m., Petitioner was transported to McNeal Hospital via ambulance. He presented complaints of back and hand pain as the result of battery. PX 7. The medical records reflect that he arrived via ambulance at 6:40 a.m. *Id.* However, no records from the ambulance provider were submitted into evidence. The submitted medical records that do not include the ambulance report do not show where the Petitioner was picked up for his trip to McNeal hospital. At McNeal, Petitioner underwent x-rays to the chest, right hand, and lumbar spine, which were negative for acute fracture-dislocation. *Id.* He was discharged the same day, advised to follow up as needed, and was diagnosed with a back ache, rib pain, urinary tract infection, and contusion of hand. *Id.*

Petitioner did not seek medical care again until September 4, 2013, following a motor vehicle accident the day prior. PX 7. He presented to McNeil Hospital with complaints of back, right knee, and left wrist pain subsequent to a motor vehicle accident on September 3, 2013. *Id.* He underwent an x-ray to the lumbar back which revealed mild lumbar spondylosis with mild vertebral disc space narrowing at L5-S1 and no evidence of a fracture. *Id.* He was discharged the same day with a diagnosis of knee contusion, lumbar sprain, and was advised to follow up as needed. *Id.* Upon further questioning, Petitioner stated he did not remember whether he had

received medical treatment between July 26, 2013 and September 4, 2013 for the injury in question.

On September 26, 2013, he presented to MidCity Spine and Ortho Rehabilitation for physical therapy and reported complaints of pain in the left hand and that he was not taking medications for this pain. PX 9. A referral note to MidCity Spine is not included in Petitioner's medical records. He additionally described an injury to his right hand as a work-related accident. *Id.* He then underwent an MRI of the right hand on September 27, 2013, which revealed no definite ligamentous or bony pathology. *Id.* Petitioner testified that this MRI report is incorrect.

He presented again to MidCity Spine on September 30, October 2, and October 3, 2013, with complaints of pain in the low back, left shoulder, and right knee. PX 9. No complaints of the right hand were recorded for these dates. *Id.* On October 9 and 11, 2013, he presented complaints of pain in the left hand. *Id.* No complaints of the right hand were recorded for these dates. *Id.* Petitioner's last recorded treatment date with MidCity Spine was on December 19, 2013, where he presented low back pain after a motor vehicle accident on September 3, 2013 and improved pain in the neck and right knee. *Id.* It was recommended he undergo an MRI of the lumbar spine before continuing with additional physical therapy. *Id.* Petitioner's medical records do not reflect he underwent this recommended diagnostic or additional treatment. *Id.* However, Petitioner testified that he underwent additional treatment after his last recorded December 3, 2013 visit.

After the July 26, 2013 incident, Petitioner did not return to work for Respondent-employer. Petitioner understood that he was fired because Ali, the store clerk, was taken into custody and he was not. Today, Petitioner reports experiencing pain and problems with gripping with his right hand. As to his back, he reports spasms, experiences pain while sitting, lifting heavy items, and walking up stairs. For his symptoms, he takes over the counter pain

medications such as Advil and ibuprofen. Petitioner is not currently treating for his symptoms and does not have any pending appointment.

Findings/Analysis

The Arbitrator notes that the Petitioner has the burden of proving his case by a preponderance of the evidence. *Chicago Rotoprint v. Industrial Comm'n*, 157 Ill.App.3d 996, 1000 (1987). Liability cannot rest upon imagination, speculation or conjecture. See *United Airlines v. Comm'n*, 991 N.E.2d 458, 463 (2013). The Arbitrator relies on Petitioner's testimony and the exhibits entered into evidence in making the following conclusions of law:

A. Was Respondent-Employer operating under and subject to the Illinois Workers' Compensation Act on July 26, 2013?

Based on Petitioner's testimony, the Arbitrator finds that 26th & Austin Citgo was operating under and subject to the Illinois Workers' Compensation Act. Petitioner testified that his injury occurred while working for an establishment that stores and sells gasoline and in which goods, wares, or merchandise are sold or in which services are rendered to the public at large. These facts trigger application of Section 3.7 and 3.17(a) of the Act. 820 ILCS 305/3.7, 3.17(a).

B. Was there an employer-employee relationship?

"No rigid rule of law exists regarding whether a worker is an employee or an independent contractor." *Ware v. Industrial Comm'n*, 318 Ill.App.3d 1117 at 1122 (1st Dist. 2000). There are multiple factors to consider in assessing the nature of the relationship between the parties. *Id.* These factors include: 1) Whether the employer may control the manner in which the person performs the work; 2) Whether the employer dictates the person's schedule; 3) Whether the employer pays the person hourly; 4) Whether the employer withholds income and Social Security taxes from the person's compensation; 5) Whether the employer may discharge the

person at will; 6) Whether the employer supplies the person with the needed instrumentalities; and 7) Whether the employer's general business encompasses the person's work. *Roberson v. Industrial Comm'n*, 225 Ill.2d 159, 175 (2000).

Based on Petitioner's testimony, the Arbitrator finds that an employee-employer relationship existed between Petitioner and 26th & Austin Citgo on July 26, 2013. Although Petitioner testified that he provided some tools to engage in his work with Respondent-employer and taxes were not withheld from weekly salary, he was scheduled to work by Respondent-employer and he wore a uniform provided by Respondent-employer. These factors, when taken in totality, weigh in favor of the conclusion that there was an employer-employee relationship.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent-Employer?

The Arbitrator finds that Petitioner's July 26, 2013 injury did not arise out of and in the course of his employment as it was a result of willful and wanton conduct which was not within the scope of his employment.

1. Petitioner's injury is a result of willful and wanton conduct and is thus not compensable under the Act.

An accident is compensable under the Act if Petitioner establishes that it both arises out and in the course of employment. *Hannibal, Inc. v. Industrial Comm'n*, 38 Ill.2d 473 (1967). If the accident is the result of Petitioner's illegal conduct, it is not automatically disqualified from the recovery of benefits. *Stembridge Builders Inc. v. Industrial Comm'n*, 263 Ill. App.3d 878 (2d Dist. 1994). Negligent illegal conduct is not enough to take the accident out of the scope of employment; the conduct must rise to willful and wanton conduct in order for it to be found not compensable. *McKernin Exhbits Inc. v. Industrial Comm'n*. 361 Ill. App.3d 666 (1st Dist. 2005).

In Illinois, willful and wanton is defined as "... a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Ill. Rev. Stat. 1989, ch. 85, par 1-210.

Essentially, the Petitioner claims that the got injured while trying to handcuff a customer. His injury arose because a fellow employee, Ali, was repeatedly hitting a customer (who was down on the ground being handcuffed) with a baseball bat. Sadly, the customer, per Petitioner's testimony had done no wrong. Per Petitioner's testimony, the customer and his girlfriend had entered the store and the women was getting a cup of coffee for purchase. Petitioner's fellow employee, Ali, was working the cash register while Petitioner was working as a security guard/stockperson. Ali (who is behind the counter) becomes extremely aggravated and angry because the young lady was (according to Petitioner) using up too much sugar for her coffee. Ali became irate at the young lady and yelled at her (apparently about her sugar use). The boyfriend/customer pleaded on her behalf and told Ali that he should not talk disrespectfully to his girlfriend. In response, Ali reached behind his cash register and counter and grabbed a baseball bat, came out from behind the enclosure and into the open store area. Ali then proceeded to hit the male customer continuously (without any provocation) with the baseball bat. The victim is hit several times on or about his head and body and falls to the ground. The Petitioner, whose job included security, does nothing to help the innocent customer against Ali's violent attack. Petitioner does not stop Ali or help the customer, Instead, he effectively helps Ali cause additional harm and injury to the customer. In fact, the Petitioner, by his own clear admission, decides to handcuff the male customer who is the victim of Ali's attack. Petitioner testified that he did so for Ali's safety and because his employer had directed him to do so in the event of any incident. Petitioner had some difficulty handcuffing the victim/customer because the customer

was trying to use his arms to ward off Ali's baseball bat hits. Finally, per the Petitioner, he successfully handcuffs the customer and Ali continues to hit him and kick him. After Petitioner subdues the injured customer, Ali returns with pepper spray and sprays the customer/victim who is now on the ground. Petitioner injures his arm and gets some pepper spray on himself during this period.

Petitioner testified that he wrestled a customer to the ground to handcuff and detain him while Ali continued to strike the handcuffed customer with a baseball bat. Petitioner kept the defenseless customer in handcuffs while Ali sprayed mace at the customer. These handcuffs were not provided by Respondent-employer, rather Petitioner purchased and maintained control of the handcuffs. Petitioner gives no testimony or evidence to further explain his conduct which was not merely unreasonable but willful and wanton. Although the Petitioner does not directly say so, in the Arbitrator's opinion, he was for all intent and purpose aiding Ali by subduing the customer so Ali could continue to batter him. Petitioner's testimony does not absolve him of the logical conclusion of his actions.

In restraining the customer's ability to defend and remove himself from the danger he faced, Petitioner suffered injuries to his low back and right hand. Thus, Petitioner's injury is a direct result of his own willful and wanton conduct. Petitioner engaged in the utter indifference for the safety of the customer when he handcuffed and restrained him as the customer endured an aggravated battery. Petitioner's contention that he was directed by his employer to handcuff individuals is unsupported and defies logic. Petitioner's actions do not further the employer's lawful business but rather opened the employer to additional liability, Additionally, Petitioner did not introduce any credible evidence or testimony that he was acting with the scope of his employment. There is no job description that provides for a security guard handcuffing a customer because over the alleged sugar use.

Petitioner has provided no testimony that supports his conduct or places such conduct within even a loose or expanded definition of his employment duties. Petitioner's testimony regarding the employer directing him to use the handcuffs is wholly without support or credibility in the Arbitrator's opinion. If the employer truly required his employees to use handcuffs (even if such actions by a private citizen were legal), he would have provided them. In the Arbitrator's opinion Ali took it upon himself to get the handcuffs and used the handcuffs of his own volition in furtherance of felony battery upon the victim/customer. Per the submitted police reports, the victim/customer was severely injured, transported to the hospital and Ali was arrested for felony Aggravated Battery.

Assuming arguendo that the employer directed Ali to use handcuffs, can Ali's conduct be considered as arising from his employment, as part of this employment duties? Such a finding would sanction employers giving illegal/felonious directives to their employees and would validate/absolve an employee of the legal and ethical obligation to not commit criminal acts on behalf or at the behest of their employer. The Arbitrator finds that there was no directive to use the handcuffs, that any directive to handcuff a customer (who had not done anything wrong) so that a fellow employee can continue to do serious bodily harm to the customer is, in and of itself, a willful and wonton disregard for the safety of others. Such an act was not and cannot be arising out of and in the course of employment. Rather, Petitioner's conduct falls squarely within the definition of willful and wanton. Even if his initial intention was to merely separate the customer from Ali, his act of handcuffing the customer knowing full well that it left the customer defenseless against Ali's rage and baseball bat is a classic "...course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Ill. Rev. Stat. 1989, ch. 85, par 1-210.

In making this finding, the Arbitrator notes her finding that Petitioner wholly lacks credibility (not just in regards to the directive to use handcuffs) but also in regards to his late outcry of back injury. As discussed below, Petitioner's injuries seem to resurface after a subsequent motor vehicle accident. There is a long delay between the incident and Petitioner reporting, via ambulance, for a UT infection to McNeal hospital. Additionally, it should be noted that neither side presented the testimony of Muhammed (the employer).

2. Petitioner did not satisfy his burden that he acted within his scope of employment and thus his injury is not compensable under the Act.

Injuries outside of the Petitioner's scope of employment are not compensable under the Act. *Pub. Serv. Co. of N. Ill. v. Industrial Comm'n*, 395 Ill. 238 (1946). Here, Petitioner testified that Mohammed instructed him that in the event of an incident involving a customer, he was to handcuff the customer and call the police. No additional supporting or documentary evidence was provided that reflected this reported directive or Petitioner's full job duties. There was no testimony or evidence that handcuffing an innocent customer is within the scope of a security guard's employment.

Petitioner's statement, that he was instructed to handcuff customers by is employer, is not supported by any additional evidence. Petitioner testimony, in this regard, is not credible. Additionally, Petitioner's lack of credibility is also evident from his other testimony, including unexplained testimony of how he ended up coming to the hospital via ambulance almost 4 hours after the incident. Petitioner did not report that he was injured to the police, he did not testify that he told his employer of his injuries on the initial phone call and he did not introduce the ambulance report into evidence. Lastly, there are long and unexplained gaps in treatment that create doubt in the Arbitrators mind regarding Petitioner's entire testimony.

Based on the foregoing, the Arbitrator finds that Petitioner's July 26, 2013 injury did not arise out of and in the course of Petitioner's employment and was not within the scope of employment with Respondent-employer.

D. What was the date of the accident?

Petitioner testified that the accident occurred on July 26, 2013. Additionally, Petitioner's medical records presented at hearing reflect an injury occurred on July 26, 2013. Thus, the Arbitrator finds that the Petitioner's date of injury is July 26, 2013.

E. Was timely notice of the accident given to Respondent-Employer?

Petitioner testified that he called Mohammed, the owner, and reported the incident to him. In response, Mohammed directed the Petitioner to close and lock the store. However, from Petitioner's testimony, it is unclear whether he also advised Mohammed of his injuries. The Police report does not indicate that Petitioner had been injured or claimed to be injured. Petitioner does not report to the hospital after the incident but comes to the hospital, via ambulance, several hours later. Petitioner has a UT infection and claims then that his back and hand hurt. Based on this, the Arbitrator finds that Petitioner did not provide timely notice of the accident to Respondent-Employer.

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator notes that no specific medical testimony or opinion was offered into the record. The Arbitrator further notes that Petitioner did not present for additional treatment after July 26, 2013, that Petitioner suffered injuries in a motor vehicle accident on September 4, 2013 for which he subsequently underwent physical therapy to his lower back and right hand, and underwent an MRI to the right hand with normal findings. Petitioner's testimony, without supporting medical evidence, that his current condition of ill being is because work accident and not the subsequent motor vehicle accident of September 3, 2013 is not persuasive. Thus, the

Arbitrator finds that Petitioner's current condition of ill- being is not causally related to his July 26, 2013 injury.

Based on the foregoing, benefits to Petitioner under the Workers' Compensation Act are denied. All other issues are moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Vernestine Walker,
Petitioner,
vs.

No. 13 WC 21092

State of Illinois,
Shapiro Developmental Center,
Respondent.

20IWCC0245

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties. The Commission, after considering issues including Respondent's issue of accident, and both parties issues of causal connection, medical expenses, and permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 10, 2017, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall 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.

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

DATED: APR 24 2020
o31920
MP/wj
068

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WALKER, VERNESTINE
Employee/Petitioner

Case# **13WC021092**

SOI/SHAPIRO DEVELOPMENTAL CENTER
Employer/Respondent

20IWCC0245

On 7/10/2017, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.13% 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:

0139 CORNFIELD & FELDMAN LLP
JIM M VAINIKOS ESQ
25 E WASHINGTON ST SUITE 1400
CHICAGO, IL 60602

5855 ASSISTANT ATTORNEY GENERAL
KATHLEEN C HAGAN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

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

JUL 10 2017

RUSSELL A. KASHIAN, ASSISTANT SECRETARY
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

☐ 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

VERNESTINE WALKER
Employee/Petitioner

v.

STATE OF ILLINOIS
SHAPIRO DEVELOPMENTAL CENTER
Employer/Respondent

Case # **13** WC **21092**

Consolidated cases: _____

20 IWCC0245

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Kankakee**, on **February 10, 2016 and May 17, 2017**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **APRIL 8, 2013**, 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. SEE DECISION

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

Petitioner's current condition of ill-being in her right foot only *is* causally related to the accident. SEE DECISION

In the year preceding the injury, Petitioner earned **$49,492.27**; the average weekly wage was **$951.77**.

On the date of accident, Petitioner was **56** years of age, ***married*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$10,063.74 as indicated in Respondent's exhibit 4** for other benefits, for a total credit of **$10,063.74**.

Respondent is entitled to a credit **of any medical bills paid by BCBS group health insurance** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$634.51**/week for 1 week, commencing **April 9, 2013** through **April 15, 2013**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services incurred in the care and treatment of Petitioner's right foot injury only pursuant to Sections 8 and 8.2 of the Act.

Respondent shall pay Petitioner $571.06 per week for a period of 3.34 weeks in that Petitioner sustained 2% loss of use of her right foot pursuant to Section 8(e) of the Act.

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

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

Carolyn M. Doherty

Signature of Arbitrator

7/6/17
Date

JUL 10 2017

FINDINGS OF FACT

The trial began on 2/10/16. On that date, Petitioner, a 56 year old LPN 2, testified that on 4/8/13 she was at work for Respondent the Shapiro Developmental Center. Petitioner had worked 3 years for Respondent as an LPN 2. Petitioner testified that she worked the 6:15 am to 2:45 pm shift and that her duties included patient care and administrative assistance with patients.

Petitioner testified that on 4/8/13, she was at work at approximately 2:15 pm. Petitioner testified that she was walking from building 417 to building 415 to care for an injured resident. Petitioner testified that the entrance exterior door to building 415 is a large metal door. The door is not available to the public but is used by personnel to drop off dietary supplies. Petitioner testified that she was carrying her keys and a report sheet. No key is needed to enter the door. Petitioner was shown photos of a door which she agreed looks to be the door she entered at building 415. RX 3, 3a and 3b. However, Petitioner does not recall seeing the metal door hydraulic arm on the top of the door. She further testified that she grabbed the door with her left hand and pulled the handle to open the door. Petitioner testified that as she grabbed the door to open it and step inside the wind caught the door and caused the door to hit her from behind. She testified that the door hit her right leg and foot and that when she tried to move her leg again she fell to the ground striking her left arm and left side of her body. Petitioner further testified that she fell forward. Thereafter, she pushed herself up with her hands and her foot using the wall for support and then walked down to the A side of the building. There were no witnesses to the occurrence.

Petitioner testified that she immediately reported the incident to Robin Kress her supervisor. Petitioner testified that she told her supervisor what happened and completed and accident report. She testified that she wanted to leave and see a doctor but she finished her shift by completing the report but without doing any additional physical work. The accident report was admitted at RX 2. The description of accident reads, "walking in door and the door hit the back of right heel sustaining swelling." The body part injured lists the right heel. Ms. Kress noted a contributing factor as "already has difficulty with ambulation walks very slow." The arbitrator notes Petitioner's weight to be approximately 300 pounds at the time of the accident. RX 1 is the Employee's Notice of Injury form completed by Petitioner on 4/8/13, the date of accident. Petitioner indicated "I was walking in the back door of 415 and the hit the back of my rt foot." RX 1. She described the injured body part as "back of my rt foot in the heel area the door hit the back of my foot." RX 1. Petitioner listed previous injuries as a right ankle sprain in January 2010 and "slip on ice fell hurt shoulder" in December of 2008. RX 2.

Petitioner testified that the accident reports do not reflect that the wind caught the door and hit her because she was in "so much pain that I just wrote down the necessary stuff." ARB EX 2, p. 29. She further testified that the reports do not reflect that she fell to the ground stating, "That's true too. I was embarrassed." Petitioner testified however that she did tell Ms. Kress that she was coming through the door when the wind hit the door striking her foot. ARB EX 2, p. 29.

Petitioner testified that she could not drive to the doctor herself so she drove to a gas station and called her son to come and drive her to the doctor. She testified that her right foot was swollen. Petitioner went to the ER at Ingalls. The triage note indicates, "Pt. states at approx 1400 hrs was at work and someone closed a heavy metal door that struck the back of her right foot. Pt complains of pain and difficulty bearing weight." The record further indicates complaint of "door slammed on foot at work" and "no risk for fall." The pain was present in the right heel rated at 7 out of 10. Further history of injury indicates, "56 year old female here for evaluation of right foot pain as per the pt at work the wind slammed the door to her posterior foot/ankle pt c/o pain on weight bearing today." PX 1. A review of her right ankle showed no bruising and a positive range of motion but bilateral ankle edema was noted. Exam of the right foot noted limited range of motion due to pain but no heel tenderness but moderate swelling to the right foot. It was noted that "the bilateral foot appears similar swollen

with right greater than left." X-rays of the right ankle indicated a large amount of soft tissue swelling about the entire distal lower leg and ankle." X-rays of the right foot indicated large calcaneal bone spur and pronounced hallux valgus along with degenerative change at the first metatarsophalangeal joint. Petitioner was discharged with a diagnosis of foot/ankle pain-contusion and a splint was applied to the right ankle with ACE wrap. Petitioner was prescribed Naprosyn. She was told to return for follow up on 4/11/13. Petitioner's work status was unchanged. PX 1.

The next day on 4/9/13, Petitioner saw her primary care doctor, Dr Abbasi. Dr. Abbasi noted, "while at work, walking through door at – unit when door hit her and was pushed her, did not fall- door hit right heel. She – down able to prevent from complete fall but foot got hurt. ... woke up this am had developed left shoulder pain also complains of lower back pain more on left side." The exam notes indicate a left shoulder evaluation, depression, back mild tenderness L5-S1 area right foot in wrap." The assessment was sprain right foot, back pain and rule out left rotator cuff tear. PX 2. Petitioner was taken off work.

MRI of the left shoulder was done on April 16, 2013 and revealed supraspinatus tendinosis with a large partial thickness tear of the anterior mid fibers. There is a full-thickness component anteriorly with the tendons stump retracted .04 cm, and infraspinatus and subscauplaris tendinosis. PX 3.

On 4/27/13, Dr. Abbasi's notes indicate "Fall at work – landed on arm (left)" and "MRI done – ganglion cyst tendinosis." Petitioner was continued off work. At the visit of 5/14/13, Dr. Abbasi noted, "job related accident off work due to sprain right foot left shoulder pain..." and Petitioner was continued off work and referred to an orthopedic, Dr. Weber.

Petitioner began treating with Dr. Weber on June 17, 2013. At that visit it was noted that Petitioner was having pain in the lateral aspect of the left shoulder and superior aspect of the left shoulder. It was further noted that Petitioner was "at work and the door pushed her forward and she lost her balance on 4/8/13." PX 3. Noting the MRI indicated full thickness rotator cuff tear, surgery was presented as an option but Petitioner opted for conservative treatment. She was returned to regular work status by Dr. Weber and sent to physical therapy with a return visit in 6 weeks. PX 3.

Petitioner attended physical therapy and by the July 24, 2013 visit to Dr. Weber she noted that her shoulder was a little better. Petitioner was advised to continue home therapy with a Theraband and told to follow up as needed. PX 3. By October 2013, Petitioner noted that her pain had increased and that she now wanted surgery which was performed by Dr. Weber on December 5, 2013. Dr. Weber performed a left shoulder arthroscopy with rotator cuff repair and subacromial decompression. Petitioner was kept off work. After surgery, Petitioner reported continued pain and was kept off work. Dr. Weber released Petitioner to work on June 4, 2014 with regard to her left shoulder as Petitioner reported no limitations to her left shoulder. However, Petitioner was now being treated for low back pain and was to see Dr. Miz for those complaints. Petitioner was kept off work pending her low back treatment. PX 3. Petitioner's medical bills for her shoulder treatment through June 2014 were paid by group insurance.

Petitioner also continued her visits to Dr. Abbasi between June 2013 and June 2015. Petitioner complained of pain in her left shoulder, low back, and right shoulder on those visits. One visit on 5/5/15 indicates complaints of her right foot being cold and mild discoloration of a toe in cold weather. On each visit one of the diagnoses was obesity. PX 2. On June 10, 2015, Petitioner had an x-ray of her right foot which was compared to her prior right foot x-ray of 4/9/13. The impression was degenerative changes with severe hallux valgus deformity and no acute findings. PX 4. Petitioner continued to complain of right foot pain in August 2015.

At the first hearing on 2/10/16, Petitioner testified that she intended to seek more treatment for her left shoulder from another physician other than Dr. Weber. ARB EX 2, pp. 34-35. The trial was then bifurcated and proofs were closed at hearing on May 17, 2017. At the second hearing date, Petitioner testified that she had additional treatment for her lumbar spine including an MRI and an EMG which was normal. Dr. Abbasi then referred Petitioner to Dr. Ghaly for her lumbar complaints. Petitioner was also seen by Dr. Goldberg for cervical complaints and treatment. PX 6. Lastly, Petitioner was treated by Dr. Siminow for neck pain, bilateral arm numbness and arthritis of the left shoulder. Petitioner's last treatment was on January 3, 2017.

Petitioner attended a Section 12 exam with Dr. Fardon on 9/2/16 with regard to her low back complaints. Dr. Fardon found no causal connection between the lumbar complaints and the accident of 4/8/13 and opined that any objective findings regarding her lumbar spine are degenerative in nature. RX 7. Petitioner was also seen for a Section 12 exam by Dr. Nho on 9/2/16 with regard to her left shoulder. Dr. Nho opined that her left shoulder condition was degenerative in nature and had no causal relationship to the accident o 4/8/13. RX 8.

At the second hearing on 5/17/17, Respondent called Joseph Brady to testify in his capacity as acting director of nursing and Petitioner's supervisor at the time of the accident. He testified that Robin Kress was the assistant director of nursing on 4/8/13. Mr. Brady verified that Petitioner reported the accident to Ms. Kress who has since retired. Mr. Brady testified that he reviewed the accident reports completed by Ms. Kress and Petitioner. Mr. Brady testified that he personally checked door 415 a few days after the reported accident. He did not observe any problems or malfunctioning of the door in his personal opinion. He testified that the door must be pulled open from the outside but that it closes gradually because of the hydraulic door arm. He did not receive any complaints about the door. He recalls working with the Petitioner since 2011 and noticing that she ambulated slowly on a regular basis prior to the alleged accident.

Petitioner clarified that she alleges injury to her left shoulder, neck and left foot as a result of the accident on 4/8/13. She further agreed that she did not provide notice of a neck injury to Respondent until January 2017. With regard to her current condition, Petitioner testified that she has issues with her left shoulder and is unable to lift or carry with her left arm. She has difficulty dressing or reaching behind. She is right handed. She still takes medication for her left shoulder pain. She testified that her right foot continues to swell and that she must wear sandals or a supportive shoe. Although released to return to work in June 2014, Petitioner never returned to work.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
F. Is Petitioner current condition of ill-being causally related to the injury?

Petitioner testified that on 4/8/13, she was performing her duties as an LPN 2 for Respondent and following directions from her employer to assist an injured resident in building 415A. Petitioner testified that she entered door 415 which was a heavy metal door which she pulled open. The door was controlled by a hydraulic arm on top of the door. Petitioner testified that as she entered the door the door then closed on her right foot striking her heel. Petitioner testified that the door struck her a second time and that she fell to the ground. She further testified that the wind caught the door causing the door to strike her twice. Respondent's witness agreed that the door was made of heavy metal and that it was controlled by a hydraulic arm. He further testified that door 415 was only used by employees and that it was reasonable Petitioner use door 415 in her duties.

The accident reports completed by Petitioner supervisor and by Petitioner do not mention wind catching the door and do not mention a fall to the ground or an injury/complaint to the left shoulder. The ER records from the same day do not mention a fall to the ground or an injury/complaint to the left shoulder. The ER records do contain one reference to wind catching the door but only that Petitioner was struck by the door on her right foot. The next day on 4/9/13, Petitioner saw her primary care doctor, Dr Abbasi. Dr. Abbasi noted, "while at work, walking through door at – unit when door hit her and was pushed her, did not fall- door hit right heel. She – down able to prevent from complete fall but foot got hurt. … woke up this am had developed left shoulder pain also complains of lower back pain more on left side."

Based upon a review of the credible evidence at trial, the Arbitrator finds that Petitioner was hit in the right foot by the metal door as supported by the initial treating records at the ER and the initial accident reports completed by Petitioner and her supervisor. The Arbitrator finds that Petitioner's use of employee access only door 415 was in the course of her employment. The Arbitrator further finds that Petitioner's use of the employee only heavy metal door to enter the building to assist patients therein was an employment related risk faced by Petitioner. Accordingly, the door striking her right foot on the way into the building, regardless of any wind involvement, constituted an accident arising out of Petitioner's employment for Respondent. Based on the initial treating records and accident reports which buttress Petitioner's testimony of a right heel injury, and the lack of rebuttal evidence, the Arbitrator further finds that Petitioner's right heel injury is causally related to the accident of 4/8/13.

The Arbitrator further finds no causal connection between the accident and Petitioner's claimed left shoulder injury or to the much delayed subsequent complaints of low back or neck problems. In so finding, the Arbitrator notes that the preponderance of the credible evidence at trial and specifically the accident reports and the initial ER records do not mention a fall to the ground or any complaints of left shoulder involvement or pain. Dr. Abbasi's initial records of 4/9/13 specifically say no fall occurred on 4/8/13 and only that Petitioner woke with left shoulder pain on 4/9/13. The first mention of a fall at work in Dr. Abbasi's records is on 4/27/13, weeks after the accident. Accordingly, the Arbitrator finds causal connection for Petitioner's right heel injury only and no causal connection for any complaints to the left shoulder, neck or low back.

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?

Based on the Arbitrator's findings on the issues of accident and causal connection the Arbitrator further finds that Respondent shall pay Petitioner the reasonable, necessary and causally related medical expenses incurred in the care and treatment of her right heel injury only pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, including credit under Section 8(j) of the Act and shall hold Petitioner harmless for same.

K. What temporary benefits are in dispute? TTD

Petitioner was taken off work by Dr. Abbasi on 4/9/13. Petitioner was treated conservatively for her right foot. Petitioner began treating in earnest for her unrelated left shoulder injury on 4/16/13 when she underwent an MRI. Based on the Arbitrator's findings on the issues of accident and causal connection the Arbitrator further finds that Petitioner was temporarily and totally disabled for her right foot injury for a period of 1 week commencing 4/9/13 through 4/15/13. Respondent is ordered to pay TTD benefits for this period of 1 week pursuant to Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

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

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsections (ii) and (iii) of §8.1b(b), the occupation and age of the employee, the Arbitrator notes that the record reveals that the 56 year old Petitioner was employed as a LPN 2 at the time of the accident and that she is able to return to work in her prior capacity as a result of said injury, but for unrelated medical conditions. The Arbitrator therefore gives no weight to these factors.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner is off work and receiving social security benefits for unrelated reasons. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner was treated conservatively for a short period of time for her right heel/foot contusion and sprain. Petitioner testified that she has intermittent swelling and pain in her right foot and that she must wear sandals or a supportive shoe. The Arbitrator therefore 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 2% loss of use of right foot pursuant to Section 8(e) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donna Halters,
Petitioner,

vs. No. 17 WC 20439

City of Chicago,
Respondent.

20IWCC0246

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, permanent partial disability, medical expenses and prospective medical expenses being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 4, 2018, is hereby affirmed and adopted.

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.

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

20IWCC0246

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Pursuant to §19(f)(2) of the Act, no appeal bond is set in this case. 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 24 2020

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp-wj
o-04/16/20
68

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

HALTERS, DONNA
Employee/Petitioner

Case# **17WC020439**

CITY OF CHICAGO
Employer/Respondent

20IWCC0246

On 9/4/2018, 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 2.21% 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:

2988 CUDA LAW OFFICES LTD
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0766 HENNESSY & ROACH PC
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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)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)/8(A)

DONNA HALTERS
Employee/Petitioner

v.

CITY OF CHICAGO
Employer/Respondent

Case # 17 WC 20439

Consolidated cases: **[this case was tried separately from 16 WC 33601, by agreement of the parties]**

20IWCC0246

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 **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago** , on **8/17/2018**. 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent? [Petitioner withdrew her claim for penalties/fees following the hearing.]
N. ☐ Is Respondent due any credit?
O. ☒ Other **prospective medical**

FINDINGS

On the date of accident, **6/21/17**, 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 $**83,530.72**; the average weekly wage was $**1,606.36**.

On the date of accident, Petitioner was **62** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**46,510.26** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**46,510.26**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits from 7/11/17 through 8/17/18, with Respondent receiving credit for the stipulated payment of $46,510.26. Arb Exh 1.

Respondent shall pay reasonable and necessary knee-related medical services of $20.00 and $196.28, as provided in Section 8(a) of the Act and to the extent the claimed amounts do not represent improper balance billing. Respondent is entitled to credit for any knee-related medical payments reflected in RX 5.

Petitioner is awarded prospective care in the form of the total right knee replacement surgery prescribed by Dr. Levine.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Molly C Mason

Signature of Arbitrator

9/4/18
Date

ICArbDec19(b)

SEP 4 - 2018

Donna Halters v. City of Chicago
17 WC 20439

20IWCC0246

Procedural History

The subject claim involves an undisputed work accident of June 21, 2017 involving the right knee. The claim was previously consolidated with 16 WC 33601, which involves a different body part. Both claims were originally assigned to Arbitrator Fruth. Arbitrator Mason covered Arbitrator Fruth's call on August 17, 2018. The parties agreed to proceed before Arbitrator Mason on that date. They also agreed to proceed only in 17 WC 20439. Arb Exh 1.

RX 3 reflects Petitioner filed a claim [99 WC 12367] against Respondent on March 9, 1999, alleging a right knee injury of September 14, 1998. This claim has a lengthy and complicated history. It was consolidated with three other claims (involving body parts other than the knee). Arbitrator Lee conducted a hearing in all four cases. He issued decisions on September 12, 2001. In 99 WC 12367, he awarded medical expenses and 25% loss of use of the right leg under Section 8(e). Respondent filed a review. On November 21, 2001, Petitioner sustained another work accident, re-injuring her right knee, cervical spine and other body parts. Petitioner filed a claim numbered 02 WC 44307 in connection with this accident. The Commission main frame shows this case was dismissed for want of prosecution in December 2015. In 2002, the Commission, in a unanimous decision, affirmed and adopted Arbitrator Lee's decisions. Neither party filed an appeal. On January 21, 2004, Petitioner filed a petition pursuant to Sections 8(a) and 19(h), seeking to re-open the four cases tried before Arbitrator Lee on the basis her conditions had recurred or worsened and seeking medical expenses for subsequent treatment. On January 31, 2006, Petitioner underwent a right knee arthroscopy and partial medial meniscectomy performed by Dr. Tonino. Dr. Tonino released Petitioner to full duty in late May 2006 but Petitioner remained off work, while undergoing additional cervical spine care. After Petitioner reported re-injuring her right knee due to falling on a sidewalk on February 7, 2010, her longtime treating physician, Dr. Coniglio ordered a new right knee MRI. Petitioner underwent this MRI in May 2010. After Dr. Coniglio reviewed this MRI, he recommended a total knee arthroplasty and referred Petitioner to Dr. Verma. On August 17, 2010, Dr. Verma issued a letter diagnosing symptomatic arthrosis of the knee and recommending anti-inflammatory medication. [See summary of pre-arbitration treatment below].

Following multiple continuances, a 19(h) hearing was held on June 11, 2012. **

On January 25, 2013, the Commission, with one Commissioner dissenting, issued a decision denying the 19(h) petition on the basis of an intervening accident. The Commission concluded there was "no causal relationship" between the original four accidents, including the accident alleged in 99 WC 12367, and Petitioner's "current condition of ill-being or any additional medical services post-arbitration." The Commission also found that Petitioner "failed to prove a material increase in her disability" as to each involved body part, including the right knee. The Commission noted that, following Arbitrator Lee's decision, Petitioner had returned to full duty and did not undergo any additional right knee treatment until after the accident of November 26, 2001.

Petitioner filed a Circuit Court review. On January 9, 2014, the Circuit Court affirmed the Commission's decision. Petitioner filed an appeal. In a Rule 23 order issued on September 25, 2015, the Appellate Court upheld the Commission.

Summary of Disputed Issues

The parties agree that Petitioner sustained an accident on June 21, 2017, while working as a construction laborer for Respondent's Department of Transportation. They also agree that Petitioner provided Respondent with timely notice of the accident. As of the hearing, the disputed issues included causal connection, medical expenses, temporary total disability, penalties/fees and prospective care, with Petitioner seeking a total right knee replacement. Arb Exh 1. Petitioner's counsel withdrew his claim for penalties and fees following the hearing.

Arbitrator's Findings of Fact

Petitioner testified she lives in Chicago. She has worked as a construction laborer for Respondent's Department of Transportation since 1994. Her duties during her first year of employment consisted of bringing buckets of hot tar to designated work yards. After that year ended, she began shoveling asphalt. She worked six days per week, near the "grinder" operator, transferring broken-up asphalt to trucks, using a shovel, and operating a jackhammer to break up asphalt. She also filled potholes and moved garbage cans as needed. She testified she was on her feet throughout each workday. She continued shoveling asphalt throughout the winter, depending on weather conditions.

Petitioner acknowledged sustaining other work injuries during her time with Respondent. She underwent a cervical spine fusion in approximately 2002. She fell off a truck at work "a long time ago," injuring her right shoulder. She subsequently underwent right shoulder surgery. She also underwent left shoulder surgery due to a work accident. Prior to the June 21, 2017 accident, she injured her right knee at work and underwent three right knee arthroscopic surgeries, with the third taking place in approximately 2013.

Respondent offered into evidence a collection of records from Midwest Orthopaedics at Rush. Some of these records relate to right knee treatment predating the subject accident of June 21, 2017:

9/18/98 A right knee MRI demonstrated a sprain of the medial collateral ligament and a questionable small vertical tear at the junction of the posterior horn with the body of the medial meniscus.

10/16/98 Dr. Romeo saw Petitioner for her right knee and documented a history of a work fall occurring September 14, 1998. He indicated there was no evidence of any prior right knee problem. He also noted that, "remarkably," Petitioner had continued her heavy job despite pain and a sensation of "giving way" in the knee. He reviewed the MRI and noted Petitioner wanted to continue working.

10/23/98 Dr. Romeo re-evaluated Petitioner's right knee, noting improvement, and released her to work "as tolerated." He directed her to return on November 24, 1998, or earlier if necessary. He noted that right shoulder surgery was scheduled for November 24, 1998.

2/19/99 Dr. Romeo noted that Petitioner's right knee sprain improved while she was off work due to right shoulder surgery performed in November 1998. He prescribed a knee brace with a

patellar cutout along with home exercises.

4/29/99 Dr. Romeo noted some ongoing right knee symptoms but indicated Petitioner was not currently a surgical candidate. He released her to full duty.

12/17/99 Dr. Romeo noted ongoing right knee symptoms, including stiffness and instability. He indicated Petitioner "wants to schedule surgery."

1/19/00 Dr. Romeo performed a right knee arthroscopy and partial medial meniscectomy.

3/24/00 Dr. Romeo noted that Petitioner's intra-operative photographs showed significant chondromalacia, particularly in the medial joint compartment, but that Petitioner was not experiencing any catching or mechanical symptoms in her right knee.

6/9/00 Petitioner was discharged from right knee therapy with directions to continue home exercises.

7/10/00 Dr. Romeo released Petitioner to full duty.

7/28/00 Dr. Romeo noted that Petitioner had resumed her asphalt worker duties and was able to perform them, despite some ongoing right knee pain. He discharged Petitioner from care.

5/27/10 A right knee MRI demonstrated an anterior medial meniscus tear, "extensive degenerative change versus tear in the posterior horn of the medial meniscus" and degenerative change of the anterior horn of the lateral meniscus.

8/12/10 Dr. Verma saw Petitioner, noting a history of two prior right knee surgeries and a complaint of increasing medial-sided pain with no history of re-injury. He described Petitioner's gait as non-antalgic. He interpreted an MRI as showing a previous medial meniscectomy with medial compartment arthrosis. He recommended medication and injections, noting Petitioner wanted to avoid the latter. He prescribed Voltaren and indicated Petitioner could return as needed.

11/19/12 Dr. Levine evaluated Petitioner, noting complaints of right hip and bilateral knee pain, "as bad as 10/10 on the pain scale." On knee examination, he noted significant medial joint line tenderness, anterior tenderness and and lateral tenderness throughout the right knee. He described knee X-rays as showing "only mild to moderate" degenerative joint disease" and only in the medial compartment of the knee. He did not view Petitioner as a candidate for either a partial or total knee replacement. He recommended that she pursue non-operative management with Dr. Weber or Dr. Cole. He found her capable of sedentary work.

1/21/13 Petitioner completed a "knee intake survey" per Dr. Cole. In this survey, Petitioner indicated she was experiencing bilateral knee problems that were making it "totally hard to do anything." She complained of 10/10 knee pain along with swelling, instability and locking.

1/24/13 Dr. Cole evaluated Petitioner and found her to be a reasonable candidate for a total knee replacement, while simultaneously noting that her pain scores and smoking rendered her a "less than predictable/ideal" candidate. He interpreted the November 2012 X-rays as showing 75% joint space narrowing consistent with degenerative joint disease. He did not believe a meniscectomy would be helpful. He found Petitioner capable of performing a job with limited squatting, kneeling and climbing.

RX 1.

Based on Dr. Garelick's report (RX 2), Petitioner underwent a right knee arthroscopy and debridement on July 10, 2013, followed by a series of Orthovisc injections. The records concerning this surgery and the injections are not in evidence.

Petitioner testified she resumed her usual laborer duties after recovering from the 2013 right knee surgery. She continued performing those duties until the June 21, 2017 accident. She denied having right knee pain during the interval between her return to work and the accident.

Petitioner testified that, on June 21, 2017, she met her crew at a yard and went to a jobsite on Orange Street, on the north side of Chicago. The grinder had already ground up asphalt. She got a shovel and started approaching the grinder. She had to walk through long grass because there was no sidewalk to use. She suddenly stepped into a hole. She did not see the hole in advance because it was obscured by the grass. Her right leg went into the hole and she fell, landing on her buttocks and back. She twisted her right knee while falling and heard the knee "pop." A co-worker named "Epi" helped her get up. She was experiencing indescribable right knee pain at that point and could barely walk. The pain was very different from the right knee pain she had experienced in the past.

Petitioner testified that "Epi" helped her get over to a work van. She got into the van and waited for her supervisor. After the supervisor arrived, he drove her to the lot where her personal vehicle was parked.

Petitioner testified she underwent care at MercyWorks on June 21, 2017. She testified she was diagnosed with right knee, back and pelvis sprains, given a steroid and taken off work.

No treatment note of June 21, 2017 is in evidence. The earliest treatment records are Physicians Immediate Care notes of July 5, 2017. The notes of that date reflect diagnoses of sprains of the lumbar spine, pelvis and right knee. They also reflect an injury date of June 21, 2017. Dr. Soler prescribed Prednisone and took Petitioner off work. He directed Petitioner to return to the facility in one week. The following note, dated July 12, 2017, reflects the same diagnoses. Dr. Damasaru prescribed Nabumetone, a right knee MRI and physical therapy for both the right knee and the back. He released Petitioner to light duty with no kneeling, squatting, jumping, running, ladder usage or

prolonged sitting/standing/bending, no lifting/pushing/pulling over 15 pounds and use of knee and back braces. PX 2, pp. 95-100.

Petitioner testified she has not worked since July 11, 2017.

The right knee MRI, performed without contrast on July 15, 2017, showed degenerative disease, primarily in the medial compartment, with a joint effusion, a complex Baker's cyst, Grade IV chondromalacia, a Grade II sprain of the anterior cruciate ligament and "significant reduction in the size of the body of the medial meniscus, likely representing chronic tear/prior partial meniscectomy." The radiologist saw "no evidence of a fresh meniscal tear." PX 3, pp. 107-108.

Petitioner testified she participated in physical therapy for four weeks, per Dr. Damasaru's recommendation.

Petitioner testified that Physicians Immediate Care recommended she see an orthopedic surgeon. She elected to see Dr. Cole, an orthopedic surgeon she had seen in the past. She saw Dr. Cole on August 17, 2017, at which point he injected her right knee.

Dr. Cole's lengthy note of August 17, 2017 sets forth a consistent account of the June 21, 2017 work accident. Dr. Cole noted that Petitioner "has previously undergone 3 arthroscopic surgeries for the right knee and has received lubricant injections many years ago that temporarily alleviated her symptoms." He indicated that Petitioner denied experiencing right knee pain prior to the June 21, 2017 accident. He noted complaints of right knee pain and swelling, with Petitioner describing the pain as "more severe than any previous knee pain."

On right knee examination, Dr. Cole noted a trace effusion, full terminal extension and flexion to 130 degrees, no palpable medial or lateral joint line tenderness, negative McMurray's testing, 1A Lachman's, negative posterior drawer testing and no tenderness to the patella, patellar tendon or quadriceps tendon. Dr. Cole obtained X-rays, which demonstrated "moderate medial compartment joint space narrowing and patellofemoral joint space narrowing and mild lateral compartment osteoarthritis." He also reviewed the MRI images. He recommended and administered a cortisone injection. He prescribed four weeks of therapy and indicated Petitioner might require three hyaluronic acid injections if the cortisone injection did not provide relief. He imposed restrictions of minimal bending, stooping, squatting and kneeling and no lifting/pushing/pulling over 10 pounds for the next four weeks.

Dr. Cole addressed causation as follows: "Mrs. Halters is a pleasant 62-year-old female who has right knee aggravation of underlying osteoarthritis." PX 5, pp. 154-155.

Petitioner testified she underwent additional therapy, at ATI, after seeing Dr. Cole. PX 7. She testified that neither the therapy nor the cortisone injection provided relief. She returned to Dr. Cole on September 21, 2017, at which point he discussed the idea of her undergoing knee replacement surgery.

Dr. Cole's note of September 21, 2017 reflects that Petitioner remained symptomatic and denied relief from the injection or therapy. On right knee re-examination, Dr. Cole noted a trace effusion, a range of motion from 0 to 120 degrees, medial and lateral pain and diffuse mild tenderness. He indicated that Petitioner could undergo different injections but described the results as somewhat unpredictable given the "severity of the arthritis." He described right knee replacement as "more

definitive treatment." He referred Petitioner to Dr. Levine for consideration of replacement surgery. He continued the previous restrictions.

Dr. Cole addressed causation as follows: "aggravation of pre-existing osteoarthritis right knee after a twisting injury on 6/21/17 falling in a hole while at work." PX 5, pp. 176-178.

Petitioner was discharged from right knee therapy on September 29, 2017. The ATI discharge note reflects that Petitioner was contemplating additional knee surgery due to pain that was not bearable. PX 7, p. 331.

Petitioner first saw Dr. Levine on October 23, 2017. In his note of that date, the doctor recorded a history of the previous right knee arthroscopies, the "twisting type" work injury of June 2017, resulting in an "acute onset of right knee pain" and the post-accident treatment. He noted that Petitioner had undergone therapy, and was wearing a knee brace, but remained symptomatic. He described Petitioner as having constant right knee pain, difficulty walking any distance, difficulty using stairs and needing to use her arms to rise from a chair. He indicated that Petitioner "understands her right knee has end-stage osteoarthritis and is here today to discuss knee replacement surgery."

Dr. Levine described Petitioner's gait as antalgic. He noted that she limped "to the right side." On right knee examination, he noted no effusion, well-healed arthroscopic portal sites, pain with range of motion and stability to ligamentous testing. He interpreted the prior right knee X-rays as showing "end-stage osteoarthritis with bone-on-bone articulation present in the medial and patellofemoral compartments." He discussed treatment options with Petitioner, noting that Petitioner felt as if she had exhausted non-surgical options. He indicated he would schedule a replacement procedure. He also indicated that the work restrictions would remain in place until after Petitioner had recovered from that procedure. PX 5, pp. 180-181.

Petitioner testified that Dr. Levine did not recommend additional conservative care.

At Respondent's request, Petitioner submitted to a Section 12 examination by Dr. Garelick on December 18, 2017. Petitioner testified the doctor examined her right knee, with the examination lasting 10 to 15 minutes. She indicated he told her she needed surgery.

In his report of December 18, 2017, Dr. Garelick indicated he reviewed various treatment records along with the right knee MRI images. He described the MRI as showing a "post medial meniscectomized right knee" and "significant medial compartment degenerative arthritis."

Dr. Garelick described Petitioner as an asphalt laborer for 23 years who "stepped in a hole approximately 18 inches deep" on June 21, 2017, injuring her knee. He indicated that Petitioner reported experiencing significant right knee pain since this event and last working on July 11, 2017.

Dr. Garelick noted that Petitioner reported undergoing three right knee arthroscopic surgeries prior to the June 21, 2017 accident. He indicated the first two surgeries took place in 2000 and 2006, while noting he did not have the operative reports. He indicated that Petitioner experienced "recurrent pain" in 2010 and underwent a third right knee arthroscopy and debridement on July 10, 2013, followed by a series of Orthovisc injections. He indicated that Petitioner described these injections as "not very beneficial." He noted that Petitioner "has continued to have pain since 2013" and that replacement

surgery "was discussed as recently as 2013." He also noted a history of a cervical fusion and bilateral shoulder surgeries.

Dr. Garelick described Petitioner as wearing a brace on her right knee. On right knee examination, he noted three well-healed arthroscopic portals, a range of motion from 10 to 130 degrees, no effusion or instability, negative Lachman, pain with McMurray's testing and a midpatellar circumference of 40 centimeters versus 39.5 on the left. He obtained standing right knee X-rays. He interpreted the films as showing bone on bone degenerative arthritis of the medial compartment and moderate patellofemoral degenerative arthritis with bone spurs.

Dr. Garelick opined that the work accident of June 21, 2017 "exacerbated the pre-existing, underlying degenerative arthritis in the right knee." He described Petitioner's current symptoms as "primarily" related to the underlying degenerative arthritis that pre-dated the accident. He based this opinion on the three surgeries and Petitioner's report of only three weeks of relief following each viscosupplementation injection. He noted that the eventuality of replacement surgery was discussed by an orthopedic surgeon in 2013. He went on to state that, while stepping in a hole exacerbated the arthritis, the exacerbation was "temporary" and "has subsequently resolved." He agreed that Petitioner needed replacement surgery but attributed this need to the underlying degenerative condition. He viewed Petitioner as at maximum medical improvement from the work accident. He did not find Petitioner capable of full duty. He stated that her inability to return to work "would be based on her pre-existing arthritic condition." He characterized the treatment to date as reasonable and necessary. RX 2. PX 9, pp. 425-428.

Petitioner saw Dr. Levine's nurse practitioner for a pre-operative visit on January 3, 2018. Dr. Levine scheduled a right total knee arthroplasty for January 16, 2018 but this surgery was cancelled. PX 5, p. 202. Petitioner testified she did not cancel the surgery. She wants to undergo it. The surgery was cancelled due to lack of approval.

Dr. Levine testified by way of evidence deposition on April 25, 2018. PX 10. Dr. Levine attended medical school at Georgetown. He underwent fellowship training at Rush thereafter. He obtained board certification in orthopedic surgery, with a sub-specialty in adult reconstruction, in 2008. Levine Dep Exh 1. He has taught at Rush since 2008 and has published medical articles. He performs knee and hip replacement surgery. PX 10, p. 6.

Dr. Levine testified he first saw Petitioner on October 23, 2017, at Dr. Cole's referral. He does not independently recall Petitioner. PX 10, p. 8. Petitioner provided a history of an acute onset of right knee pain after falling into a hole while working on June 21, 2017. Petitioner told him her job consists of manual labor. PX 10, p. 9. Because Petitioner was coming to him for treatment, he didn't really get into the issue of causation, although he reviewed her records. Petitioner described her pain as constant. She reported having difficulty walking, using stairs and rising from a chair. Petitioner had a "painful limp on the right side" but was not using assistive devices. She had well-healed portal sites from prior right knee surgeries. She had pain with full flexion and extension but her knee was "pretty stable." PX 10, p. 11. Her X-rays showed "pretty significant arthritis on the inside part of her knee and underneath her kneecap." Petitioner had tried various non-surgical types of treatment and was ready to have her knee replaced. He believes he would have reviewed Dr. Cole's records prior to seeing Petitioner. PX 10, p. 12.

Dr. Levine testified that Petitioner saw his nurse practitioner for a pre-operative visit on January 3, 2018. Petitioner was still symptomatic at that time and expressed a desire to proceed with surgery. PX 10, pp. 20-21. Petitioner described herself as a laborer. To him, this meant she was required to carry, lift and maybe climb stairs. PX 10, p. 21. As of January 3, 2018, he believed she had "enough arthritis to go forward with a knee replacement." PX 10, p. 22. He views replacement surgery as a "good option for treating osteoarthritis." He believes the care he rendered was reasonable and necessary. PX 10, pp. 22-23. If Petitioner does not undergo the replacement, she "typically will get a little worse over time." PX 10, p. 23. This is "just what happens with arthritis." PX 10, p. 23. The surgery would relieve a lot of Petitioner's current limitations. She would still have difficulty crawling and squatting but she would find walking, stair climbing and lifting relatively easy. PX 10, p. 24. If her job entails a lot of squatting and crawling, she might have to undergo vocational retraining. PX 10, p. 24.

Dr. Levine testified he has no opinion as to whether Petitioner's injury was causally related to her employment. PX 10, pp. 24-25. He noted Petitioner was not under treatment for a right knee issue as of the June 21, 2017 accident. PX 10, p. 25. He has no opinion as to whether this accident accelerated or exacerbated Petitioner's pre-existing condition. PX 10, pp. 25-26. Petitioner's complaints did not change between her October 2017 and January 2018 visits to him. PX 10, p. 27. Some patients have "terrible X-rays" in terms of the degree of arthritis yet are less symptomatic than others who have "mild X-rays." PX 10, p. 27. If a patient has arthritis, an event such as stepping in a hole or twisting the leg could aggravate that condition. PX 10, pp. 27-28. It is possible that such an aggravation would prompt a physician to recommend a total knee replacement. PX 10, p. 28. An event such as stepping in a hole or twisting the leg could severely aggravate underlying arthritis. PX 10, p. 28.

Dr. Levine testified he has never released Petitioner to full duty. PX 10, p. 28.

Under cross-examination, Dr. Levine testified that, before seeing Petitioner on October 23, 2017, he reviewed "what would be in our system from Dr. Cole." PX 10, p. 29. He did not review any operative reports or records from Physicians Immediate Care. He does not know the dates of Petitioner's three right knee surgeries or her diagnoses as of those surgeries. PX 10, pp. 30-31. He typically does not review a patient's MRI because, at the point at which a patient comes to him, the MRI is "sort of meaningless" to him. PX 10, pp. 31-32. Petitioner described an acute onset of pain at the time of the June 2017 accident. He is not aware of Petitioner having reported ongoing right knee pain since 2013 or being told in 2013 that she would need to undergo replacement surgery in the future. PX 10, p. 32. He guesses it sounds as if Petitioner was first diagnosed with right knee osteoarthritis in 2012, based on Petitioner's self-reporting. PX 10, p. 33. He has no opinion on causation. PX 10, p. 33.

On redirect, Dr. Levine testified it is possible for someone to undergo multiple knee surgeries and injections and still cope with arthritis. It is also possible for someone to continue to perform laborer-type duty after undergoing multiple knee surgeries and injections. PX 10, pp. 33-34.

Dr. Cole issued a narrative report to Petitioner's counsel on April 25, 2018. In this report, he indicated he first saw Petitioner for an "eval only" appointment on January 24, 2013, after Dr. Levine recommended non-arthroplasty options for her degenerative right knee condition. Dr. Cole indicated that, as of that appointment, Petitioner had "10/10 constant pain in the right knee and lower extremity above and below the knee" as well as right calf and thigh pain. Based on her X-rays, which showed significant arthritis, she "appeared to be a reasonable candidate" for knee replacement but, per his report, "her constellation of symptoms made her a less than ideal candidate for any treatment for that matter." Petitioner had "declined cortisone injections offered on multiple occasions." At that time, he

felt she was not likely to improve with a simple right knee arthroscopy. She was also a daily cigarette smoker.

Dr. Cole indicated he next saw Petitioner on January 5, 2017, following a work accident of August 2016 in which a post fell on her, striking her shoulders and neck. She was taking Tramadol, Codeine and Ibuprofen at that time. Petitioner was working full duty but complaining of bilateral shoulder and arm pain. He prescribed bilateral shoulder MRI scans.

Dr. Cole indicated he next saw Petitioner on August 17, 2017, for purposes of an examination following a right knee injury of June 21, 2017. He administered an injection on that date, prescribed therapy and imposed work restrictions. When he next saw Petitioner, on September 21, 2017, she reported no improvement so he referred her to Dr. Levine. Dr. Levine saw her on October 23, 2017 and deemed her a candidate for knee replacement surgery.

Dr. Cole indicated he has not seen Petitioner since September 21, 2017, based on his records.

Dr. Cole opined that, based on the fact pattern and records, "it does appear that, on a more likely than not basis, [Petitioner] incurred a work-related aggravation of a pre-existing condition and rendered her right knee osteoarthritis symptomatic as a result of the June 2017 incident." He went on to state: "absent [the June 21, 2017] injury, it does not appear Petitioner was headed toward any imminent right knee care." PX 8, pp. 422-424.

On May 15, 2018, Respondent's counsel sent Dr. Garelick's December 18, 2017 report to Petitioner's counsel. Referencing Dr. Garelick's opinions and Dr. Levine's "indication that he cannot provide a causation opinion with regard to Petitioner's current condition and the recommendation for knee replacement surgery," Respondent's counsel stated Respondent "will not authorize any additional treatment or issue any additional TTD benefits in connection with this case." PX 9, pp. 429-430.

Petitioner testified her right knee condition has not improved. Her knee is ruining her life. She experiences severe pain when trying to get up from a chair. She sleeps on her couch and has to avoid touching one knee against the other. She feels "wobbly" and cannot walk. She has to decline social invitations due to her symptoms. She has received no benefits or income since May 11, 2018. She has to borrow money to pay her bills. This is making her anxious. She has fallen behind on her credit cards. She wants to undergo the surgery and be able to walk again.

Under cross-examination, Petitioner acknowledged injuring her right knee at work in the past. She recalled seeing Dr. Cole before the June 21, 2017 accident but did not recall seeing Dr. Verma. She does not know whether she told Dr. Verma in 2010 that her right knee pain was increasing. She has tried her best to provide accurate information to her treating physicians and to examining physicians. She has not returned to Dr. Cole or Dr. Levine since January 2017. She has health insurance through her union.

No witnesses testified on behalf of Respondent. In addition to the exhibits previously referenced, Respondent offered into evidence Commission records concerning the outcome of the right knee claim numbered 99 WC 12367 [see the procedural summary at the beginning of this decision] along with a Section 12 examination report dated January 30, 2011 (RX 4) and a print-out of the medical expenses and temporary total disability benefits it has paid in this case (RX 5).

Dr. Gleason, an orthopedic surgeon, authored the Section 12 examination report of January 30, 2011. In the report, the doctor indicated he was examining Petitioner "relative to at least five body parts related to six different work accidents, while working for [Respondent]." He went on to address the right knee, referencing an accident date of September 18, 1998. He indicated Petitioner was not able to describe the mechanism of the injury that occurred on that date. Based on his records review and examination, he indicated that Petitioner's current right leg diagnosis was "post operative arthroscopy right knee with partial medial meniscectomy on January 19, 2000 as well as January 31, 2006 with residual well-healed wounds and new complaints subsequent to a fall in February 2010, with findings as in MRI scan of the right knee on May 27, 2010." He expressed the belief that Petitioner's right leg diagnosis "has worsened since her surgery in 2000 with Dr. Romeo." He did not attribute the worsening to the work accident of September 18, 1998. He saw no need for additional treatment or restrictions "as a result of the September 18, 1998 accident." At the end of the report, Dr. Gleason found Petitioner capable of full-time work "restricted to at least a light level." He did not attribute the need for restrictions to any of the work accidents referenced in his report. RX 4.

Arbitrator's Credibility Assessment

Petitioner's lengthy tenure with Respondent weighs in her favor, credibility-wise.

Dr. Cole noted some extreme pain ratings when he saw Petitioner in January 2013. He did not note similar ratings when Petitioner returned to him after the June 21, 2017 work accident. Neither Dr. Levine nor Dr. Garelick noted any pain magnification or inconsistencies.

Petitioner's testimony that she did not experience right knee pain between the time she recovered from the 2013 right knee surgery and the June 21, 2017 work accident does not seem plausible, given the long duration of her right knee problem, the 10/10 pain ratings she reported to Dr. Cole in January 2013 and Dr. Garelick's 2017 report, which reflects Petitioner "has continued to have pain since 2013." However, the Arbitrator notes that, when Petitioner returned to Dr. Cole on January 5, 2017, for evaluation of her shoulders, the doctor noted no knee complaints. PX 5, pp. 132-133. Moreover, no Respondent witness refuted Petitioner's testimony that she returned to her laborer job after recovering from the 2013 surgery and performed that job until the June 21, 2017 work accident. To the extent Petitioner had right knee symptoms during this period, those symptoms did not prevent her from performing strenuous tasks such as shoveling asphalt.

Arbitrator's Conclusions of Law

<u>Did Petitioner establish a causal connection between the undisputed accident of June 21, 2017 and her current right knee condition of ill-being?</u>

The Arbitrator finds that the undisputed work accident of June 21, 2017 aggravated Petitioner's underlying degenerative right knee condition of ill-being and accelerated the need for the replacement surgery recommended by Dr. Levine and Respondent's examiner, Dr. Garelick. In so finding, the Arbitrator relies on the following: 1) the fact that neither Dr. Verma nor Dr. Levine recommended replacement surgery when they saw Petitioner in 2010 and 2012; 2) Petitioner's credible testimony that she was able to perform strenuous asphalt laborer duties for Respondent between the time she returned to work, following the 2013 right knee surgery, and the June 21, 2017 accident; 3) Dr. Cole's note of January 5, 2017, which pre-dates the accident by about five months and contains no mention of right knee problems; 4) Petitioner's credible testimony concerning the mechanism of injury – i.e.,

stepping into an obscured hole and twisting her right knee in the process; 5) Dr. Cole's causation opinion; 6) Dr. Levine's testimony that stepping into a hole, twisting the knee in the process, can severely aggravate underlying degenerative arthritis; and 7) Dr. Garelick's concession that the June 21, 2017 accident constituted an aggravation, albeit one he described as temporary.

The Arbitrator also relies on the recent case of Schroeder v. IWCC, 2017 IL App (4th) 160192WC. The claimant in Schroeder is not unlike Petitioner in that she was injured after she made the decision to forego a recommended surgery and instead return to a physical job. Schroeder first worked as a truck driver for Swift Transportation in 2005, for a period of five or six months. She underwent a lumbar fusion in 2009 and a discectomy in 2011. She was not working at the time of each of these surgeries. She saw Dr. Yazbak, a neurosurgeon, in early 2013. He ordered a repeat MRI and subsequently recommended another fusion. Schroeder "declined this recommendation as she wished to return to truck driving." Schroeder resumed driving a truck for Swift Transportation in May 2013, with the only proviso being she could not drive at certain times of the day due to her fibromyalgia-related medication. On December 19, 2013, she dropped off her trailer at a delivery site and slipped and fell on an icy surface, landing on her back. She went to an emergency room and subsequently returned to Dr. Yazbak. The doctor again recommended a fusion, to be "done in a different way" because Schroeder now had a preponderance of back symptoms. At his deposition, he conceded that the lumbar spine MRIs taken before and after the accident were not significantly different. Swift's examiner, Dr. Lami, like Dr. Garelick in the instant case, viewed the accident as only temporarily increasing Schroeder's symptoms. The arbitrator sided with Dr. Lami and denied benefits, finding that the accident "resulted in only a temporary aggravation." The Commission reversed, citing the "chain of events" and highlighting the fact that Schroeder was able to work full-time following Dr. Yazbak's 2013 surgical recommendation. The Commission criticized Dr. Lami's characterization of Schroeder's post-accident pain as "transient," noting that her pain never subsided after the accident. The trial court set aside the Commission's decision but the Appellate Court reinstated it. The Appellate Court noted that Schroeder "drove a truck on a near daily basis for over six months" before the accident and was unable to do so afterward. The Appellate Court also pointed out that "where an accident *accelerates* [emphasis in the original] the need for surgery, a claimant may recover under the Act," citing Caterpillar Tractor Co. v. Industrial Commission, 92 Ill.2d 30, 36 (1982).

In certain respects, the facts of the instant case are more compelling than those of Schroeder. Petitioner worked for several years, not several months, before the accident. The job she performed during that interval was more strenuous than Schroeder's in that she was on her feet all day, shoveling asphalt and performing other physical tasks. Moreover, although one of her physicians, Dr. Cole, recommended an arthroplasty before she resumed working in 2013, the replacement specialist, Dr. Levine, did not. In his note of November 19, 2012, Dr. Levine indicated he did not view Petitioner as a candidate for either a partial or total knee replacement. RX 1.

The facts of the two cases coincide insofar as immediate post-accident symptomatology is concerned. Petitioner testified to feeling her right knee twist and "pop" when she accidentally stepped into a hole on June 21, 2017. She also testified she could barely walk afterward and was experiencing "indescribable" pain. This pain has not abated.

In addressing causation, the Arbitrator has considered the potential precedential effect of the Appellate Court's Rule 23 order upholding the Commission's denial of Petitioner's prior 19(h) petition. Pursuant to amended Supreme Court Rule 23, this order could support contentions of *res judicata*, collateral estoppel or law of the case. The Arbitrator does not view the order, and the underlying

causation findings, as barring a finding of causation in this case. The Court affirmed the Commission's finding that, although Petitioner's right knee worsened over time, the worsening was not due to the September 14, 1998 accident alleged in 99 WC 12367. The Commission attributed the worsening to an intervening accident that occurred years before the accident at issue herein. Under Illinois law, a claimant need only prove that an accident was a cause of her condition of ill-being. She need not eliminate all other potentially contributing causes. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003). The issues in the instant case, i.e., whether the undisputed accident of June 21, 2017, is a factor in Petitioner's current right knee condition of ill-being and accelerated the need for replacement surgery, are clearly distinct from those addressed in the Rule 23 order.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims the knee-related medical expenses listed on the attachment to the Request for Hearing form. Those expenses include a $20.00 co-pay balance relating to Petitioner's January 3, 2018 visit to Dr. Levine's nurse practitioner (PX 5, p. 130) and a $196.28 balance relating to the knee therapy Petitioner underwent at ATI in September 2017 (PX 7, p. 330). The Arbitrator awards these amounts, subject to the fee schedule and to the extent they do not represent improper balance billing, with Respondent receiving credit for any related payments listed in RX 5. When Dr. Garelick examined Petitioner in December 2017, on behalf of Respondent, he conceded that all of the treatment to date was reasonable and necessary. RX 2.

Is Petitioner entitled to temporary total disability benefits?

At the hearing, Petitioner claimed she was temporarily totally disabled from June 21, 2017 (the day the accident occurred) through August 17, 2018. Respondent disputed this claim. The parties agree Respondent paid $46,510.26 in temporary total disability benefits prior to the hearing. Arb Exh 1.

The Arbitrator has found that the accident of June 21, 2017 aggravated Petitioner's underlying right knee condition and accelerated the need for the knee replacement surgery recommended by the treating physicians and Respondent's Section 12 examiner. The Arbitrator views Petitioner's causally related right knee condition as unstable as of the hearing, based on the surgical recommendation. No physician involved in this case found Petitioner capable of full duty. Dr. Garelick, Respondent's Section 12 examiner, acknowledged Petitioner is "significantly impaired," although he did not attribute the impairment to the accident. RX 2.

The Arbitrator finds that Petitioner was temporarily totally disabled from July 11, 2017 (based on the treatment records and Petitioner's credible testimony that she has not worked since July 11, 2017) through the hearing of August 17, 2018, with Respondent receiving credit for its payment of $46,510.26, pursuant to the parties' stipulation. Arb Exh 1. Respondent offered no evidence indicating it offered Petitioner work within her stringent restrictions at any point between July 11, 2017 and the hearing.

Is Petitioner entitled to prospective care in the form of a right total knee replacement?

The Arbitrator has previously found that the undisputed accident of June 21, 2017 is a factor in Petitioner's current right knee condition of ill-being and accelerated the need for replacement surgery. The Arbitrator awards prospective care in the form of additional treatment with Dr. Levine and the right total knee replacement surgery.

Is Respondent liable for penalties and fees?

Following the hearing, Petitioner's counsel advised the Arbitrator and opposing counsel he was withdrawing his claim for penalties and fees. This issue is moot.

STATE OF ILLINOIS	)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
	) SS.	☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK	)	☐ 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

EDWARD HOLLAND,

Petitioner,

vs. NO: 15 WC 041079

UNITED RENTALS,

Respondent.

20IWCC0247

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, including prospective medical, 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 14, 2018 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule to: Advocate Occupational Health; Dr. Victor Antonacci and OrthoIllinois; and Forest City Diagnostic Imaging from June 19, 2014 to June 2, 2015 if previously unpaid and not written off, under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's current condition of ill-being is causally related to the accident and that as provided in §19(b) of the Act,

20IWCC0247

this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 24 2020
KAD/bsd
O022720
42

Kathryn A. Doerries

Maria E. Portela

Marc Parker

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

HOLLAND, EDWARD
Employee/Petitioner

Case# **15WC041079**

15WC041080

UNITED RENTALS
Employer/Respondent

20IWCC0247

On 12/14/2018, 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 2.48% 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
ZBIGNIEW BEDNARZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2965 KEEFE CAMPBELL BIERY & ASSOC
SHAWN BIERY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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
19(b)

Edward Holland
Employee/Petitioner

v.

United Rentals
Employer/Respondent

Case # **15** WC **41079**

Consolidated cases: **15 WC 41080**

20IWCC0247

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **November 14, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **March 3, 2014**, 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 $**72,196.28**; the average weekly wage was $**1388.39**.

On the date of accident, Petitioner was **49** years of age, ***single*** with **0** dependent children.

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

Respondent is entitled to a credit for any amounts paid for medical services from June 19, 2014 to June 2, 2015.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule to: Advocate Occupational Health; Dr. Victor Antonacci and Orthollinois; and Forest City Diagnostic Imaging from June 19, 2014 to June 2, 2015 if previously unpaid and not written off.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

December 14, 2018
Date

ICArbDec19(b)

DEC 14 2018

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Bleibel,
Petitioner,

vs.

No: 18WC 14851

Northwest Community Hospital,
Respondent.

20IWCC0248

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, permanent partial disability, and medical bills and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 7, 2018 is hereby affirmed and adopted.

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.

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 Circuit Court.

DATED: APR 24 2020

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/wj
d040620
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BLEIBEL, MARIA
Employee/Petitioner

Case# **18WC014851**

NORTHWEST COMMUNITY HOSPITAL
Employer/Respondent

20IWCC0248

On 11/7/2018, 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 2.45% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2333 WOODRUFF JOHNSON & EVANS
LYNN TAYLOR
10 S LASALLE ST SUITE 2170
CHICAGO, IL 60603

2461 NYHAN BAMBRICK KINZIE & LOWRY
LISA AZOORY-KELLER
20 N CLARK ST SUITE 1000
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

Maria Bleibel,
Employee/Petitioner

v.

Northwest Community Hospital,
Employer/Respondent

Case # **18** WC **14851**

Consolidated cases: **None**

20IWCC0248

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 **October 9, 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. ☒ 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 1, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**74,468.16**; the average weekly wage was $**1,432.08**.

On the date of accident, Petitioner was **64** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator finds and concludes Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with Respondent on March 1, 2018. Therefore, her claim for compensation is denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Robert M. Harris

Signature of Arbitrator

Date: November 7, 2018

NOV 7 - 2018

MEMORANDUM OF DECISION OF ARBITRATOR

STATEMENT OF FACTS

Petitioner, Maria Bleibel, was employed by Northwest Community Hospital as a Registered Nurse on the date of alleged accident, March 1, 2018. In her Application for Adjustment of Claim, Petitioner alleges injuries to her bilateral feet, right knee, spine, left arm, and left shoulder as a result of the March 1, 2018 injury.

Petitioner testified on direct examination that on the date of accident, she was standing at the foot of a patient's bed. Petitioner testified she turned to her left, twisted her ankle and fell onto her hands.

Petitioner filled out a "Workplace Incident Report" on March 1, 2018. In the report, Petitioner wrote, "While checking on my patient, I turned to the left to leave the room, twisted my left ankle, my back, and landed on my knees and hands on the floor." On page two of the Report, Petitioner was asked to describe what happened in her own words. Petitioner wrote that "after checking (doing rounds) on patient I turned to the left and twisted my ankle (left ankle) and back and landed on my knees and hands on the floor." (RX2) When confronted with her accident report on cross-examination, Petitioner testified that her written recitation of events was an accurate account of the injury.

Respondent's witness, Colette Sutton, completed a "Supervisor's Investigation/Analysis of Workplace Incident" on March 2, 2018. (RX3) Regarding the mechanism of injury, Sutton wrote, "employee turned and tripped – fell on right knee and both hands." (RX3) Sutton testified at the hearing that Petitioner's verbal recitation of events was consistent with her (Sutton's) report, and also consistent with Petitioner's written report of the incident. Sutton additionally testified that when Petitioner verbally told her about the incident, she (Petitioner) [additionally] stated that one of her feet twisted over the other, and that she fell.

On March 2, 2018, Petitioner was evaluated by Physician's Assistant Stephanie Metevelis at Northwest Community Hospital Immediate Care in Arlington Heights. Metevelis wrote that Petitioner "States she was leaving a patient's room and turned toward her left. States her ankle twisted causing her to fall to her hands and knees." (PX3, P. 325) Petitioner told Metevelis she completed her shift that night, but that she needed to be evaluated due to persistent pain. X-rays of the left elbow, left shoulder, and left ankle were normal. Petitioner was given an ACE wrap, as well as an air cast for her left ankle. (PX3, P. 329)

On March 5, 2018, Petitioner had a follow up visit at Northwest Community Healthcare Immediate Care. Metevelis again chronicled the injury, stating that Petitioner was leaving a patient's room and turned to her left. After turning to her left, Metevelis wrote that Petitioner twisted her left ankle, causing her to fall on her hands and knees. (PX3, P. 359). Petitioner also saw Nurse Rabs on the same date, who wrote that Petitioner "was leaving a patient's room and twisted to her left causing her ankle to twist and she fell onto her hands and knee." (PX3, P.364).

On March 8, 2018 Petitioner had a follow-up visit at NCH with Metevelis. Metevelis again recited the consistent mechanism of injury, stating that Petitioner was leaving a patient's room and turned to her left, when she fell onto her hands and knees. Petitioner was referred to orthopedics and given work restrictions of no lifting, pushing or pulling greater than 10 pounds. (PX3 P. 378-380)

On March 9, 2018, Petitioner was evaluated by Dr. Michael Birman, Orthopedic physician, at Hand to Shoulder Associates. Regarding the mechanism of injury, Birman wrote "She works as a Nurse on the orthopedic floor of a local hospital. She was in a patient's room, when she accidently turned and twisted her ankle, falling onto both her hands and knees." Petitioner reported initial pain in the knees and ankles with gradual symptoms in the left upper extremity. (PX 1, P. 13)

Physical examination of the left shoulder was largely unremarkable, but Petitioner displayed significant focal tenderness localized to the AC joint. Dr. Birman suspected a primary diagnosis of left shoulder of acromioclavicular joint sprain. Regarding work, Dr. Birman stated that Petitioner could work with restrictions, and follow up in the clinic in three weeks' time. Petitioner's lifting/pulling/pushing restrictions were increased to 20 pounds. (PX1, P.13-14).

On March 21, 2018, Petitioner was evaluated at NCH Immediate Care, this time with Physician's Assistant Anna Kawa. Regarding the mechanism of injury, Kawa wrote, "States that she was leaving a patient's room and turned towards her left. States her ankle twisted causing her to fall of her hands and knees." (PX3, P. 394) Physical therapy was recommended and Petitioner was instructed to remain off work. At this office visit, Petitioner was primarily complaining of left hip pain. Specifically, Petitioner reported to Kawa that initially, her knees and left arm were hurting, and that she did not mention her hip pain. (PX3, 394-397).

On April 2, 2018, Petitioner had a follow-up visit with Dr. Birman, primarily for her left shoulder. Physical examination of the left shoulder was largely unremarkable, and Dr. Birman noted that Petitioner was improving overall. Petitioner told Dr. Birman that she was concerned with resuming full duty work, due to pain with certain activities. Dr. Birman stated that the work restrictions should be maintained to facilitate improvement, and that a recheck would be done in three weeks. He estimated return to work full duty at that time. (PX2, P. 11) Petitioner was evaluated by Dr. Gregory at NCH on April 4, 2018, who ordered a left hip X-ray. The X-ray was normal.

Petitioner underwent physical therapy for her left shoulder at Chicago Metro Hand Therapy between April 3, 2018 and May 17, 2018. In the first therapy evaluation of April 3, 2018, the records indicate the mechanism of injury simply states, "fell at work; acromioclavicular sprain." (PX4, P 2)

On April 12, 2018, Petitioner had an initial physical therapy evaluation at Northwest Community Healthcare. Regarding the mechanism of injury, the therapist wrote that Petitioner fell onto her left shoulder and ankle after leaving a patient's room. (PX 3, P. 414-415). Petitioner continued therapy at NCH up until May 10, 2018. In that timeframe, there are no alternative mechanisms of injury listed. (PX 3, P.414 - 491)

On April 29, 2018, Dr. Birman evaluated Petitioner at Hand to Shoulder Associates. Petitioner reported that her left shoulder pain was significantly improved, and that therapy was helpful. Dr. Birman offered the option of a subacromial steroid injection, but the patient declined. (PX2, P. 9)

On May 21, 2018, Petitioner had her final visit with Dr. Birman. Petitioner reported improvement with her symptoms, specifically noting that her left shoulder felt better. Overall, Petitioner's current symptoms were much less frequent and minimal. Petitioner was instructed to return to work full duty with no restrictions. (PX2, P. 7-8)

Petitioner testified that at the time of the accident, she was at the foot of a hospital bed, a foot in length from the doorway, and that the door swung inward. Petitioner testified that the lighting was dim, but that lighting came in from the door. When confronted with her own written accident report, Petitioner stated that her written recitation of events (indicating that she turned to her left and fell) was an accurate description of what occurred.

On cross-examination, Petitioner admitted that she never told any of her providers about the dim lighting, hospital equipment or furniture in Room 800 when describing how she got hurt.

In support of the Arbitrator's decision with respect to disputed issue (C), accident, the Arbitrator makes the following findings and conclusions:

Arbitrator finds and concludes Petitioner failed to meet her burden of proof regarding the issue of whether an accident occurred that arose out of and in the course of her employment with Respondent on March 1, 2018. Petitioner offered no evidence that her employment conditions on that date contributed to or caused her fall, or presented **any** risk of injury or hazard or increased her risk of injury.

An injury is compensable under the Illinois Workers' Compensation Act if it arises out of and in the course of the employment. The "arising out of" component is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro Inc., 207 Ill. 2d 203* (2003).

For an injury to arise out of one's employment, it must have its origin in some risk connected with or incidental to the employment, so that there is a causal connection between the employment and the injury. There are three types of risks to which an employee might be exposed: (1) risks directly associated with the employment; (2) risks which are personal to the employee; and (3) neutral risks which have no particular employment or personal characteristic. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App.3rd 102, 106 (2006).

Risks which are personal to the employee include idiopathic falls, which result from some internal condition personal to the employee, and typically are not compensable, "as employment does not significantly increase the danger of falling or risk of injury." *Williams v. Industrial Comm'n*, 38 Ill. 2d 593, 595 (1967). An "unexplained fall" would be considered a neutral risk and would be compensable where a reasonable inference can be drawn that the employee's performance of his or her job duties could have caused the fall. *Chicago Tribune Co.*

v. Industrial Comm'n, 136 Ill. App. 3d 260, 264 (1985). "The fact that an injury arose out of the employment need not be proved by direct evidence. It may be established as well by circumstantial evidence leading to a logical and reasonable inference that the injury originated in a risk of the employment." *Schroeder Iron Works v. Industrial Comm'n*, 36 Ill. 2d 519, 522-523 (1967). Here, however, based on the paucity of evidence, no "logical and reasonable inference" can be made that the injury originated in the risk of employment, as described further below. Such an inference would be pure speculation.

The Arbitrator must first determine whether the risk alleged by Petitioner would qualify as a personal risk, an employment risk or a neutral risk. But because there are insufficient facts in evidence on which to base a conclusion, the Arbitrator cannot conclude that **any** risk (whether type 1, 2 or 3 identified above) was present in this case.

The clear, repeated documentary and testimonial evidence shows that Petitioner was injured simply – and only - while "walking and turning." Petitioner testified to the accuracy of this mechanism of injury at trial. There is no evidence that Petitioner suffered from aby personal physical condition that caused her to fall or increased her risk of falling, and the Arbitrator therefore concludes that the risk of falling was not personal in nature.

The Arbitrator finds and concludes there was no evidence offered of any risk to which Petitioner was exposed on that date; plainly put, there was no an employment risk. Employment risks associated with injuries sustained from a fall are those to which the general public are not exposed, such as the risk of tripping on a defect at the employer's premises, falling on an uneven or slippery ground at the work site, or performing some work-related task which contributes to the risk of falling. *First Cash Financial Services v. Industrial Commission*, 367 Ill. App. 3d 102 (2006).

The evidence clearly shows Petitioner was not performing a specific work-related task that contributed to or caused her fall. Petitioner simply turned, twisted her

left ankle and fell. In her own accident report, Petitioner wrote that she fell *after* checking on a patient; therefore, she was not engaged in any employment task when she simply turned and fell. (RX2) On March 5, 2018, Nurse Rabs wrote that Petitioner fell when *leaving* a patient's room. (PX3, P.364). Metevelis wrote the same history on March 8, 2018. (PX3 P. 378-380) On March 9, 2018, Birman wrote that Petitioner *accidentally twisted her* ankle. (PX 1, P. 13) On March 21, 2018, Physician's Assistant Kawa also wrote that Petitioner was *leaving* the patient's room at the time of the fall. (PX3, 394-397). There is essentially no dispute regarding what happened, that is, the mechanism of injury.

Petitioner testified on cross-examination that her written accident report was an accurate recitation of the occurrence (mechanism of injury). She simply turned and twisted her ankle and fell. Petitioner never offered any explanation as to why she fell.

"Walking and turning" to leave a room is not an act that is distinctly associated with Petitioner's employment as a Nurse (or any employment) and all of the medical and factual evidence in the record confirms that Petitioner was not performing any work-related task that caused or contributed to her fall. Petitioner never offered any evidence that she was carrying anything when she fell, or that she was "rushing."

In *Terry Noonan v. Illinois Worker's Compensation Commission*, 2016 Ill. App. (1st. Dist. 2016) Petitioner argued that the act of "reaching and grabbing" was an employment risk because filling out forms was a task that was "in furtherance of his duties" as a Clerk. The Appellate Court disagreed, holding that the act of reaching and retrieving "was not one he was instructed to perform or had a duty to perform." The risk, therefore, was not distinctly associated with his employment.

The *Noonan* Court specifically rejected the cases Petitioner relied upon to support the employment risk theory, including cases that were factually distinguishable. For example, Petitioner relied upon *Young v. Illinois Workers' Compensation Commission*, 2014

Ill. App (4th Dist), where Petitioner was a Parts Inspector and had to reach into boxes as part of his inspections. In *Autumn Accolade v. Illinois Worker's Compensation Commission,* 2013 Ill. App. (3d Dist) Petitioner was a Caregiver who had to reach to remove a safety hazard while holding onto an individual in the shower. Concluding that *Young* and *Autumn Accolade* were factually distinguishable, the *Noonan* court noted that the act of "reaching and retrieving" was not distinctly associated with Petitioner's employment as a Clerk.

In any event, Petitioner never testified, nor was any evidence offered to even suggest, that she was "reaching and retrieving" when she turned and fell. She was merely leaving a room.

Walking and turning to leave a room – like reaching and retrieving in *Noonan* - is not a risk that is distinctly associated with Petitioner's employment. Petitioner was not performing a work-related task at the time she fell, but was leaving Room 800, having already completed a work-related task. The Arbitrator notes that Petitioner did not provide any testimony whatsoever regarding her performance of any work-related task at the time of the incident, but instead admitted that she had finished tending to a patient. The overwhelming evidence in the record confirms that Petitioner was leaving the patient's room, doing nothing in particular related to her job as a Nurse. Petitioner never testified to the contrary at trial. The Arbitrator notes that even in *Noonan,* Petitioner testified that filling out paperwork was part of his job duties as a Clerk; in the instant case, Petitioner never alleged at trial that her work duties in any way caused or contributed to her fall.

In addition, quite significantly, **Petitioner never offered any** potential – let alone actual - **reason or explanation as to why she fell or any facts or evidence that could lead to a reasonable inference as to why she fell.** Therefore, she presented no evidence of any increased risk or hazard of employment or, in fact, any reason as to why she fell.

For example, there was **no testimony or other evidence** that: the hospital room floor was wet/slippery; an object or hazard was on the floor which caused her to twist/slip/fall/lose her balance; an object or hazard was on the floor which she bumped into, causing her to twist/slip/fall/lose her balance; an object or hazard was on the floor or situated in the room that caused her to try to avoid, move away from, causing her to twist/slip/fall/lose her balance; she was not carrying anything (related to her work or not) that could have caused her to twist/slip/fall/lose her balance; she was not in a rush to perform a work-related errand or any activity; she was not responding to a call from anyone. Lastly, Petitioner presented no evidence that she suffered any personal condition that placed her at greater risk of injury at work, such as epilepsy.

The Arbitrator finds that Petitioner clearly did not know why she fell (what caused her fall), a fact she admitted at trial. This strongly suggests, if it does not actually indicate, that there was no work-related reason why she fell.

Petitioner also presents an alternative recovery theory which must also fail: If Petitioner herein was not performing a job-related task at the time of the accident, she alternatively attempts to present a scenario that she was exposed to a "hazardous" workplace environment; that is, "dim lighting" in the hospital room and "awkward positioning" of hospital furniture and equipment, thereby making these "risks" to which she was allegedly exposed to injury distinctly related to her employment. In that regard, Petitioner testified to the presence of a "Compression Sequential Unit" in the room, as well as IV polls and a telephone.

The Arbitrator is not persuaded by this "alternative" theory. Most importantly, the Arbitrator notes Petitioner completely failed to offer any testimony or other supporting that any such "dim lighting" or "positioning" of furniture/equipment contributed to or caused her fall. Petitioner admitted that she never told any of her

providers about the dim lighting, hospital equipment or furniture in Room 800 when describing how she got hurt.

Petitioner merely testified that the lighting was dim, but then admitted that light came in from the doorway. Further, Petitioner offered **no testimony or other evidence** that this alleged "dim lighting" caused or contributed to her fall, and the Arbitrator will not draw any such inference. To the contrary, the Arbitrator draws the inference that had this "dim lighting" caused or contributed to her fall in any way, there would be evidence in the record to support that position, but there is not.

The same argument applies regarding Petitioner's testimony of the presence of a "Compression Sequential Unit" in the room, as well as IV polls and a telephone, to argue an increased risk. Petitioner merely testified to the presence of these items in the patient's room, but Petitioner offered **no testimony or other evidence** that these items caused or contributed to her fall. Petitioner, for instance, did not hit or trip over or into any of these items, nor did she fall as a result of trying to avoid hitting or tripping into anything. The Arbitrator will not draw the inference these items caused or contributed to her injury. To the contrary, the Arbitrator draws the inference that had any of these items in the patient's room caused or contributed to Petitioner's fall in any way, there would be evidence in the record to support that position, but there is not.

As the Court noted in *First Cash*, the burden cannot be shifted to Respondent to disprove the existence of any alleged defects or risks.

The Arbitrator also places great weight and emphasis on the fact that the details about the dim lighting and items and landscape of Room 800 were first - and only - described by Petitioner during direct examination. Although Petitioner went into great detail about IV polls, telephones, compression sequential units, hospital beds, dim lighting and the direction of the door swing at trial, Petitioner agreed **she never**

mentioned any of these facts to her physicians, nurses, physician's assistants, or therapists, or her supervisor.

The Arbitrator finds and concludes that the risk - if any and which is **unknown** - to which Petitioner was exposed was a neutral risk. In neutral risk cases, Petitioner's injury is compensable only if she was exposed to the risk to a greater degree than the general public. The increased risk may be either qualitative (i.e., when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than members of the general public by virtue of the employment.) *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission*, 407 Ill. App. 3d 1010 (2011).

But Petitioner has clearly failed to make that showing here. Walking and turning is an "act" - (the Arbitrator hesitates to label this a "risk") - to which the general public is equally exposed. Everyone, everywhere, all the time, turn and walk. All of the factual and medical information in the record confirms that Petitioner simply turned, twisted her ankle, and fell. The Arbitrator notes that the mere act, standing alone, of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public. See, *Illinois Consolidated Telephone Co. v Industrial Commission*, 314 Ill. App.3d 347 (2000). The mere act of turning is also an everyday act common to the general public with no usual risk associated with employment. *Jeffrey Hummel v. Horseman's Guarantee*, (95 IIC 1304).

In her trial testimony, Petitioner alludes to a different history, with additional and new facts, inviting the Arbitrator to piece together a theory of increased risk on her behalf. But such a theory would improperly be based on speculation without any supporting evidence.

In that regard, the Arbitrator cannot speculate as to just how dim the lights were, or how the dim lighting allegedly contributed to (or caused) Petitioner's fall. There is

no evidence on which to even present a theory. Petitioner hopes that the Arbitrator will assume that (1) the lighting was dark (2) that the reduced dark lighting contributed to or caused her to twist her ankle and fall, and (3) that Petitioner was exposed to either a qualitative or quantitative increased risk of falling (or generic injury) due to the dim lighting. Supporting such a theory would be based on speculation. To make such a finding, the Arbitrator would effectively create a Positional Risk precedent for every night shift employee, hospital worker, warehouse worker or any other employee who works in less than full lighting at all times. The Arbitrator notes that Illinois has rejected the Positional Risk doctrine.

The Arbitrator further notes Petitioner had an abundance of opportunity to notify her physicians, nurses and therapists that dim lighting and/or the hospital equipment contributed to or caused her fall, having been seen more than a dozen times at Metro Hand Therapy, four times by Dr. Birman, and many times by NCH (between clinical appointments and therapy). Throughout her course of treatment, Petitioner was further seen by various therapists, nurses, Physician's Assistants Physicians. But Petitioner did not mention or explain, even once, to *any* of her many providers, that the dim lighting or hospital equipment/positioning contributed to her fall. But just as significant, Petitioner at trial did not offer any explanation, reason or cause as to how or why the dim lighting or hospital equipment/positioning caused or contributed to her fall. Further,

Further, and very significant, Petitioner also had the opportunity to recite the above-listed facts in her own accident report, which she failed to do. The "Supervisor's Investigation Report" is consistent with Petitioner's own testimony of the events, indicating that Petitioner twisted her ankle when turning to walk and leave the hospital room.

The Arbitrator makes note of a variety of factually similar cases. In *Noonan*, the Court concluded that reaching for a pen while sitting in a rolling chair was "no greater

than if the claimant had been reaching to retrieve any other object, including one wholly personal to him" and that Petitioner was not at an increased risk due compared to the general public. In the instant case, Petitioner was turning and walking out of Room 800 when she twisted and fell, for unknown reason, which equally could have occurred anywhere.

In *Mary Hongsermeier v. Rockford Memorial Hospital* (2010 Ill. Wrk. Comp. LEXIS 721), the Court denied compensation to a Nurse who fell forward and landed on the floor while walking down the hallway of the hospital. Petitioner testified that she was carrying a cup of coffee and wearing a 10-pound bag across her chest, but she did not state the bag or coffee caused her to fall or contributed to her fall. The Commission affirmed the Arbitrator's decision, finding no increased risk, and no accident. The Commission concluded that mere speculation and conjecture was not sufficient to prove a case. Similarly, in *Jeff Flatt v. Caterpillar Inc.*, (16 IWCC 604), the Commission noted that even if a hazard is alleged, Petitioner still needs to show that the alleged hazard contributed to the fall. (Id. at 28).

In *Lori Oakley v. Menard Correctional Center*, (2017 Ill. Wrk. Comp. LEXIS 475), the Commission reversed the Arbitrator's decision on accident, concluding that Petitioner failed to meet her burden of proof on an increased risk theory. Petitioner struck her left shoulder against an open doorway when she left her office. Petitioner testified that she was hurrying to print a document, and that she exited her office fifty times per day to retrieve documents. Petitioner's testimony regarding the mechanism of injury went into greater detail than what was written in the accident investigation reports. The Commission found that the Arbitrator incorrectly relied on Petitioner's testimony to the exclusion of the accident reports.

In *David Evelsizer v. State of Illinois/Menard Correctional Center* (2013 Ill. Wrk Comp. LEXIS 409), Petitioner testified he heard a pop in his knee while hurrying upstairs and fiddling/searching for 50 or 60 keys on his key ring. The Commission,

reversing the Arbitrator's decision on accident, found that the record as a whole did not support a finding of accidental injuries arising out of Petitioner's employment. The Commission concluded the Arbitrator failed to give proper weight to the fact that **Petitioner never mentioned hurrying or fidgeting in the accident investigation reports, or to medical providers.**

The fact pattern in the instant case is similar to the fact patters in the above-listed cases, and Petitioner has failed to prove that she sustained an injury that arose out of her employment. The Arbitrator notes that unlike the Petitioners in *Hongsermeier*, *Oakley, Evelsizer* and *Flatt*, Petitioner herein never presented a valid theory of increased risk at trial. Petitioner requests that the Arbitrator piece together a theory of increased risk, based upon loose facts such as the existence of hospital furniture/equipment, or dim lighting. Even if such a theory *was* pieced together, the Arbitrator would not rely upon Petitioner's testimony alone, to the exclusion of *all* of the accident reports, medical records, and testimony of Respondent's witness.

Credibility

Among the factors to be considered in determining whether Petitioner has carried her burden is her credibility. Credibility is the quality of a witness, which renders her evidence worthy of belief. The Arbitrator, whose province it is to evaluate credibility, evaluates a witness' demeanor and internal and external inconsistencies in her testimony.

The Arbitrator places great weight on the fact that Petitioner gave detailed information about all the things that *possibly* could have caused or contributed to her fall at trial, but failed to mention those same facts to any of her medical providers, or to her supervisor. This leaves an impression on the Arbitrator that Petitioner's testimony is more of a self-serving embellishment acting as an attempt to remedy missing

significant facts regarding the March 1, 2018 fall at work conspicuously absent in all evidence other than her trial testimony.

The Arbitrator also places weight on many other inconsistencies in Petitioner's testimony, further diminishing her overall credibility. The Arbitrator cannot reconcile Petitioner's testimony that she was at the foot of the hospital bed when the accident occurred, but also one foot from the doorway, which, according to Petitioner, swung inward. Petitioner could not have been at the foot of the hospital bed at the time of the fall if she was also leaving the room. Petitioner initially testified that she fell on one knee, and later testified that she fell on her bilateral knees. Petitioner testified that she felt pain in her left hip immediately after the accident, but later testified that the onset of her left hip pain came later.

Having considered all of the evidence in the record, as well as considering Petitioner's credibility, the Arbitrator finds and concludes Petitioner has failed to meet her burden of proof, and that an accident did not arise out of Petitioner's employment with Respondent on March 1, 2018.

In Support of the Arbitrator's decision with respect (F), (J), (K) and (L):

Given that Petitioner failed to meet her burden of proof regarding whether an accident arose out of her employment, the Arbitrator concludes that all other issues are moot.

Robert M. Harris

Dated: November 7, 2018

Robert M. Harris, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diane Pacheco f/k/a Diane Taylor,

Petitioner,

vs. NO: 12 WC 43293

City of Chicago,

20IWCC0249

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of maintenance and vocational rehabilitation, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 27, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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

DATED: APR 24 2020
MP:pmo
o 2/25/20
68

Marc Parker

Maria E. Portela

Kathryn A. Doerries

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

PACHECO, DIANE F/K/A TAYLOR, DIANE
Employee/Petitioner

Case# **12WC043293**

14WC029314
15WC029123

CITY OF CHICAGO
Employer/Respondent

20IWCC0249

On 8/27/2018, 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 2.18% 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:

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
QUINN M BRENNAN
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20IWCC0249

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
19(b)

Diane Pacheco f/k/a Diane Taylor
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **12** WC **43293**

Consolidated cases: **14WC 29314** **and 15WC 29123**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago IL**, on **July 13, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [ ] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [ ] Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On the date of accident, **November 26, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**67,916.16**; the average weekly wage was $**1,306.08**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **3** dependent children.

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

Respondent shall be given a credit of $**4,229.21** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**4,229.21**.

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

ORDER

The Arbitrator finds that the accident of November 26, 2012 was not a cause of Petitioner's current lumbar spine condition of ill-being.

The parties stipulated Petitioner was temporarily totally disabled from November 27, 2012 through December 30, 2012, a period of 4 6/7 weeks. They further stipulated Respondent is entitled to credit for the $4,229.21 in temporary total disability benefits it paid. Arb Exh 1.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Molly C Mason

Signature of Arbitrator

8/27/18
Date

ICArbDec19(b)

AUG 27 2018

Diane Pacheco v. City of Chicago
12 WC 43293, 14 WC 29314 and 15 WC 29123 (consolidated)

Summary of Disputed Issues in All Cases

The parties agree Petitioner was injured on November 26, 2012 [12 WC 43293] and July 22, 2014 [14 WC 29314], while working as a sanitation laborer for Respondent. The only issue in dispute in these two cases is causal connection. Arb Exh 1-2. The parties also agree Petitioner sustained a third accident on August 26, 2015 [15 WC 29123]. Petitioner claims no outstanding medical expenses in this case. At issue are causal connection, maintenance and/or temporary total disability from August 11, 2017 through the hearing of July 13, 2018, whether Petitioner cooperated with vocational rehabilitation, whether Respondent is entitled to credit for the maintenance benefits it paid from August 11, 2017 through February 2, 2018 and whether vocational rehabilitation should be resumed. Arb Exh 3.

Arbitrator's Findings of Fact Relative to All Cases

Petitioner testified she has received no benefits since February 2, 2018, when Respondent discontinued vocational rehabilitation. She currently lives in Hammond, Indiana, with her husband, son and brother-in-law. T. 14-15.

Petitioner testified she was 21 years old when she started working for Respondent. She is currently 42. T. 15-16. She always worked as a sanitation laborer, behind a garbage truck. Her duties included pushing and pulling garbage carts, walking in alleys and lifting. She stood throughout each shift. She was required to lift up to 100 pounds according to her job description. T. 16-17.

Petitioner testified she was born with a condition that causes seizures. She has never had a driver's license. T. 18. During the years she worked for Respondent, she got to work by walking, taking a CTA bus or getting a ride from a co-worker. She took medical transportation, provided by her health insurance, to doctor's appointments. T. 19.

Petitioner testified she graduated from Kelly High School. T. 19-20.

Petitioner testified she was pulling a garbage can toward a truck on **November 26, 2012,** when she hit the truck hard. She went to MercyWorks the same day and complained of low back pain and tingling in her legs. The doctor who examined her obtained X-rays and ordered ice applications, home exercises and Flexeril. She made six or seven more visits to MercyWorks thereafter. In January 2013, she was released to full duty and resumed her usual work duties. T. 20-21.

Petitioner testified she continued working until she sustained another accident on **July 22, 2014**. The garbage truck driver went "too far ahead" of the workers. She fell over a speed bump, with a heavy garbage can landing on top of her. A co-worker came to her aid. She injured her back. Her back was red. T. 21. She went back to MercyWorks, at Respondent's direction, where she complained of her back and left shoulder. She was sent back to full duty. She lost no time from work. T. 24. She returned to MercyWorks three or four more times, while continuing to perform full duty. On her own, she underwent therapy at Athletico and saw her neurologist, Dr. Rioja, on August 14 and 28, 2014. On August 28, 2014, she underwent EMG/NCV testing at Dr. Rioja's recommendation. T. 23. She underwent a lumbar spine MRI on September 27, 2014, at RX Pain. In October 2014, she underwent additional back and left shoulder therapy at RX Pain, while continuing to perform full duty. T. 23-24.

The lumbar spine MRI, performed without contrast on June 27, 2015, showed a small foraminal disc protrusion at L4-L5 on the right side, resulting in narrowing of the neural foramen inferiorly, and early degenerative changes in the facet joints at L4-L5 and L5-S1. PX 6.

Petitioner testified she injured her back again on **August 26, 2015**. She was pulling a garbage can toward the truck when she twisted her low back. She felt a pop in the center of her back and tingling in her legs. T. 24-25. She notified her boss and went to MercyWorks the same day.

Petitioner saw Dr. Branovacki, an orthopedic surgeon, on September 10, 2015. T. 26. In his note of that date, the doctor recorded a past history of low back pain dating back to 2013 along with a history of the August 26, 2015 work accident. He noted complaints of low back pain radiating down the right leg. He indicated that Petitioner "had prior right leg pains but never this bad."

On initial examination, Dr. Branovacki noted positive straight leg raising bilaterally, weakness with ankle dorsiflexion, right worse than left, a weakly positive FABER sign and a labored gait. He obtained X-rays and described the films and recent MRI as showing some degenerative disc disease. He took Petitioner off work and recommended therapy along with a consultation with Dr. Lim, a spine surgeon. PX 6.

Petitioner first saw Dr. Lim on October 20, 2015. T. 27. The doctor noted a complaint of 7/10 low back pain aggravated by sitting, walking and using stairs. He indicated this pain started the previous year, after a work injury, and worsened after another work injury in August 2015. He noted Petitioner was now experiencing occasional radiation down the right leg and reported at least 35% improvement following some therapy sessions.

Dr. Lim indicated Petitioner's current medications included Tramadol, Norco and Flexeril.

On initial lumbar spine examination, Dr. Lim noted paraspinal tenderness, a normal range of motion, 5/5 strength, negative straight leg raising and negative Waddell's signs. He interpreted the June 2015 lumbar spine MRI as showing mild bulging at L5-S1. He prescribed Ibuprofen and additional therapy. He released Petitioner to light duty and directed her to return in two weeks. PX 6.

Petitioner testified Respondent had no light duty available. T. 27-28.

A therapy note of November 18, 2015 reflects Petitioner was being discharged, after eighteen sessions, "secondary to insurance denial." PX 6.

Petitioner returned to Dr. Lim on December 1, 2015 and informed him therapy had been "cancelled by work comp." The doctor noted improvement but a pain rating of 8/10. He found Petitioner capable of light duty with no bending, twisting or lifting. He anticipated she would be able to resume full duty after three to four weeks of work conditioning. He directed Petitioner to return to him in three weeks. PX 6.

On December 9, 2015, Phil Rios, an occupational therapist affiliated with Athletico, sent Advocate Health Group a letter indicated that Petitioner presented "with a history of a seizure last week." Rios indicated he did not conduct a work conditioning evaluation based on this history. He

requested "further medical clearance" regarding Petitioner's ability to participate in work conditioning. PX 6.

Petitioner returned to Dr. Lim on December 22, 2015 and informed him that work conditioning was scheduled to begin the following day. The doctor again noted a pain rating of 8/10. He expressed concern about this rating, noting that, on examination, Petitioner manifested "minimal pain findings, posturing or signs of excruciating [pain]." He recommended she return to him after completing work conditioning. PX 7.

On December 23, 2015, Petitioner began a course of work conditioning at Athletico. T. 28.

On January 20, 2016, the work conditioning therapist issued a report finding Petitioner capable of medium physical demand level work. The therapist went on to state that Petitioner was not capable of resuming her heavy physical demand level sanitation laborer job, referencing a job description provided by Respondent. She recommended four more weeks of work conditioning. PX 6.

Petitioner returned to Dr. Lim on January 29, 2016, with the electronic note of that date documenting both 10% improvement and worsening back pain. The doctor noted the therapist's recommendations and prescribed an additional four weeks of work conditioning. PX 6.

At the next visit, on February 26, 2016, Dr. Lim noted both 60-70% improvement and the development of "electric shock" pain in the right leg. T. 29. The doctor noted no evidence of a nerve compression lesion on re-examination. He started Petitioner on a Medrol Dosepak and recommended a trial return to light duty. He directed Petitioner to return in two weeks. On a separate work status form, he released Petitioner to "trial light duty, x 1 week," as of February 29, 2016, with occasional lifting/carrying/pushing/pulling of up to 15 pounds and occasional bending and twisting. PX 6.

On February 26, 2016, Dr. Lim issued another work status form directing Petitioner to remain off work and complete four more weeks of work conditioning. PX 6.

Petitioner returned to Dr. Lim on March 11, 2016. Petitioner reported that she developed vomiting after taking the Medrol Dosepak for three days and discontinued the medication. She also reported worsening symptoms and "request[ed] a new MRI." The doctor ordered a new MRI and directed Petitioner to remain off work in the interim. PX 7. T. 29.

Petitioner went to the Emergency Room at Christ Hospital on March 13, 2016. She testified she complained of falling due to her legs giving out. T. 30.

The repeat lumbar spine MRI, performed without contrast on April 13, 2016, showed changes secondary to spondylosis, a small posterior disc protrusion at L5-S1 and multi-level neural foraminal stenosis. PX 7.

Petitioner returned to Dr. Lim on May 6, 2016, with the doctor recording the following interval history:

> "Patient reports she was in the Emergency Room on 3/13 after a fall because her leg gave out on her. She is seen [sic] another physician for her knee. MRI was completed no change in her

back pain symptoms."

T. 29. The doctor interpreted the repeat MRI as showing "very mild disc degeneration" and "minimal foraminal stenosis." He noted he did not yet have access to the recent Emergency Room records. He explained to Petitioner that he little left to offer her. He viewed surgery as an option but counseled against it due to Petitioner's young age. He explained that "at this point" Petitioner could probably have chronic pain symptoms. He recommended a functional capacity evaluation and indicated Petitioner planned to follow up with her other treating physician for her knee problem. PX 7.

Petitioner underwent the recommended functional capacity evaluation at Athletico Physical Therapy on May 27, 2016. T. 30. The evaluator, Phillip Rios, OT, noted a history of seizures and a right knee arthroscopy in 2009. He described Petitioner's laborer job as a heavy physical demand level occupation, referencing a job description provided by Respondent. He described Petitioner's performance as inconsistent and her effort as unacceptable. Nevertheless, he found Petitioner capable of 63% of her job demands and indicated she was functioning "at least in the medium physical demand level." He described her as "functionally employable." RX 3.

Petitioner returned to Dr. Lim on June 24, 2016. T. 30. In his note of that date, the doctor indicated he discussed the invalid functional capacity evaluation with Petitioner. He recommended that Petitioner attempt to return to work "in a graduated fashion," starting at approximately 30 pounds and "working [her] way up to hopefully a full-level job." He directed Petitioner to return to him in one month. PX 7.

On July 22, 2016, Petitioner returned to Dr. Lim and reported no improvement. She also reported that she had been unable to return to work because Respondent would only accept her on a full, unrestricted basis. She requested a second opinion. The doctor indicated he re-reviewed the invalid functional capacity evaluation with Petitioner. He also indicated he had nothing else to offer her, noting she rated her pain as severe despite remaining off work. He prescribed pain creams, noting that Petitioner described oral medication as making her sleepy. He found it reasonable for her to seek another opinion. PX 7.

At Respondent's request, Dr. Goldberg of Midwest Orthopaedics examined Petitioner on July 25, 2016. T. 31. In his report of the same date, he described Petitioner's past medical history as "pertinent for Chiari malformation and seizures." He noted a history of the August 26, 2015 work accident as well as prior injuries in 2012 and 2014. He indicated that Petitioner complained of low back pain and intermittent numbness into both legs.

Dr. Goldberg indicated he reviewed records from Mercyworks and Drs. Branovacki and Lim, along with the 2016 MRI and the functional capacity evaluation of May 27, 2016.

Dr. Goldberg described Petitioner as "cooperative." On lumbar spine examination, he noted limited flexion, pain with extension to 20 degrees, diminished sensation at L3-S1 bilaterally, no atrophy or long tract findings and negative straight leg raising.

Dr. Goldberg diagnosed Petitioner with a "small central disc herniation resulting in discogenic low back and some parasthesias in the lower extremity at L5-S1." He found it likely that Petitioner aggravated the disc herniation "from the work-related accident." He did not view Petitioner as a surgical candidate and saw no need for further care. Noting the inconsistent functional capacity

evaluation, he found Petitioner capable of returning to work subject to a 50-pound lifting restriction occasionally from floor to waist for two weeks, increasing the weight to 75 pounds over the following two weeks and "then 100 pounds thereafter." He rated the "degree of disability" as "mild." RX 2.

Kari Stafseth, CRC, a certified vocational rehabilitation counselor, conducted an initial evaluation of Petitioner on October 3, 2016. T. 31. In her lengthy report of November 7, 2016, Stafseth noted that Petitioner reported experiencing seizures since birth, with the last seizure occurring in 2013. She also noted that Petitioner denied being on any seizure-related medication at that time. She indicated Petitioner reported graduating from high school in 1994. She denied any additional education or special training. She noted that Petitioner reported having a home computer and being able to use the Internet, send E-mails and type two-handed while looking at the keyboard.

Stafseth recorded a history of the work accidents and subsequent care. She also documented the invalid functional capacity evaluation results and Dr. Goldberg's opinions. She noted that, according to Petitioner, Dr. Lim was recommending pain management but Respondent had denied this care. She indicated that Petitioner reported using a cane, per Dr. Lim, if she needed to walk more than two or three blocks. She also indicated that Petitioner reported taking about five Extra Strength Tylenols per day for her back pain.

Stafseth indicated that Petitioner denied having a valid Illinois driver's license and reported "her license had been suspended in 2013."

Stafseth noted that Petitioner reported applying to Respondent's rodent control department but being advised she "applied too late."

Stafseth described Petitioner as "not the clearest speaker," indicating she had to request clarification several times during the interview.

Stafseth opined that Petitioner "does not have any transferable skills." She recommended that Petitioner undergo vocational testing and computer training. She viewed Petitioner as "prospectively employable" if Dr. Lim's restrictions were accepted as accurate. She stated that prospective jobs would include customer service representative, front desk clerk, cashier, security guard, receptionist, assembly worker, office clerk and dispatcher.

Petitioner testified she began seeing Dr. Jido at Christ Hospital on January 3, 2017. T. 32-33. Dr. Jido recommended a series of three lumbar epidural steroid injections. Petitioner testified she underwent these injections on February 21, March 15 and April 12, 2017. T. 33.

James Boyd, M.S., CRC, a certified vocational counselor, issued a report on January 17, 2017, after conducting vocational testing. T. 32. He noted that Petitioner had started pain management, per Dr. Lim, on January 3, 2017, despite the workers' compensation denial. She indicated that Petitioner clarified her driver's license suspension occurred after her last seizure in 2013 and she was using her son's service dog and taking public transportation.

With respect to the Wide Range Achievement Test [WRAT] results, Boyd indicated that Petitioner "demonstrated very limited word recognition in English," had difficulty pronouncing words phonetically and "frequently came up with nonsense words that had no meaning." He indicated the results showed Petitioner to be a "non-reader" who "could not utilize any language-based material in a

job situation." He described Petitioner's math skills as limited to addition and subtraction of one- and two-digit whole numbers. He indicated this would "limit her to jobs that require only the most basic and routine arithmetic functions, such as counting, batching, order filling, stock checking or change making."

Boyd indicated the Kaufman Brief Intelligence Test results suggested "considerably below average verbal and nonverbal reasoning ability, consistent with [Petitioner's] academic achievement scores." He described her non-verbal score as suggesting a "very limited ability to work with visual tasks that require logical thinking and conceptual reasoning." Petitioner was verbally at the 2nd percentile and nonverbally at the 0.1 percentile.

Boyd noted that, "within time restraints," Petitioner demonstrated "average to above average perceptual speed when comparing pairs of alphabetical and numerical data." He described Petitioner as "working very quickly on both subtests", with 6 errors out of 140 pairs on the number section and 14 errors out of 135 pairs on the name comparison section. **

In a progress report dated March 5, 2017, Sharon Zajac, a case manager with Vocamotive, described Petitioner as "very vague in her responses" to a "tough interview questions" document she had been given as homework. Zajac described the responses as "disability focused." She noted that Petitioner scored 88% on a Word 2013 Basic Final examination but also noted that Petitioner attempted to spell the word "supervisor" multiple times. She indicated Petitioner "seemed to have difficulty understanding the questions asked of her." Petitioner called Vocamotive on March 1, 2017 to reschedule computer lab class, indicating she did not feel well.

In a progress report dated April 11, 2017, Zajac noted that Petitioner completed E-mail training and a resume. She also noted that Petitioner "reported she was interested in assembly and mailroom clerk positions." Zajac indicated Petitioner needed help spelling "resources" and "customer." She advised Petitioner of various job search expectations, including the need for daily communication, submitting requests for time off, documenting her search and checking her E-mail regularly.

Petitioner testified she returned to Dr. Jido on May 19, 2017 and reported that the injections did not help. T. 33-34. At Dr. Jido's referral, she saw Dr. Farhat, a neurosurgeon, on June 16, 2017. She underwent another lumbar spine MRI the same day. T. 34. That MRI, performed without contrast, demonstrated diffuse bulges at L4-L5 and L5-S1, with no central stenosis. PX 5.

On July 3, 2017, Dr. Farhat noted the MRI results. He indicated Petitioner's leg pain "does not appear to follow a radicular pattern." He did not recommend surgery but indicated Petitioner could continue conservative measures. PX 13.

Petitioner's former counsel arranged for her to undergo a second functional capacity evaluation at ATI Physical Therapy on July 25, 2017. T. 34. The evaluator, Christopher Sullivan, AT, rated the study as valid. He described Petitioner's laborer job as a "very heavy" physical demand occupation, based on the Dictionary of Occupational Titles. He found Petitioner to be functioning at a medium to heavy physical demand level, noting she "displayed below average lifting capabilities." He recommended a work conditioning program. PX 11.

Petitioner testified she returned to Dr. Jido on August 8, 2017 and complained of low back pain radiating down her legs. The doctor noted that, according to Petitioner, "Dr. Farhat is against surgery

due to [Petitioner's] Chiari malformation." The doctor prescribed additional therapy and lumbar facet injections. He imposed a 30-pound lifting restriction. T. 35. PX 10, 10 of 19.

On August 11, 2017, Petitioner went to the Emergency Room at Advocate Christ Medical Center for treatment of right ankle and right great toe pain. Petitioner reported having inverted her ankle and stubbing her toe that morning while getting out of bed. Right ankle and right great toe X-rays showed edema and no fractures or dislocations. Emergency Room personnel provided Petitioner with a right ankle Ace wrap and ortho shoe. PX 10, 11 of 19.

Petitioner started a course of aquatherapy at Advocate Christ Medical Center on September 11, 2017. PX 10. On December 12, 2017, her therapist issued a progress note documenting improvement in lumbar range of motion and overall function. She noted that Petitioner was still symptomatic but reported being able to go grocery shopping and be on her feet for almost an hour. She recommended that Petitioner continue attending therapy. PX 12.

Petitioner returned to Dr. Jido on October 5, 2017. The doctor noted a very high pain score. He indicated the MRI "confirms disc herniation as the cause of the pain." He recommended and administered an epidural steroid injection at L5-S1 and prescribed Norco. PX 10, 13 of 19. On October 12, 2017, Dr. Jido noted persistent low back and bilateral leg complaints. He recommended and administered a lumbar facet injection and refilled the Norco. PX 10, 14 of 19.

A Vocamotive progress report dated December 17, 2017 reflects that Petitioner attended an interview at a submarine sandwich shop and "remained in job search throughout the reporting period." The report also reflects that Petitioner required "extensive assistance with completion of applications and correspondence." Stafseth Dep Exh 6.

Petitioner returned to Dr. Jido on December 26, 2017. The doctor noted that Petitioner "did not respond well to the lumbar facet blocks" and derived only temporary relief from the epidural steroid injection. He recommended transforaminal injections. PX 10, 15 of 19.

On December 27, 2017, Petitioner saw Dr. Zager, a podiatrist, due to a fungal nail condition and right lateral ankle pain and swelling. The doctor noted a previous ankle injury in 2009, with Petitioner reporting she resumed working "too early" following this injury, as well as an injury occurring two months earlier. The doctor obtained right ankle X-rays, which were negative. He described Petitioner's gait as normal. On right ankle examination, he noted pain on palpation and swelling along the right anterior tibio-fibular ligament and calcaneo-fibular ligament. He diagnosed a sprain and applied a soft cast to the right foot and ankle. He instructed Petitioner to keep the cast "clean, dry and intact." He directed Petitioner to return to him in one week. PX 9.

Petitioner testified that at no point during 2017 did Stafseth tell her she was considering recommending that vocational rehabilitation be stopped. T. 38.

Petitioner returned to Dr. Zager on January 3, 2018 and complained of cast-related discomfort and 8/10 right ankle pain. The doctor inspected the cast and prescribed physical therapy. He directed Petitioner to return to him in one week. PX 9.

On January 12, 2018, Dr. Zager noted ongoing complaints. He performed an ultrasound of the right leg and dispensed a cast boot, to be worn with the cast at all times. He instructed Petitioner to return to him in one week. PX 9.

At the next visit, on January 20, 2018, Petitioner complained to Dr. Zager that the cast felt heavy and that she was having difficulty walking. The doctor dispensed a CAM walker and directed Petitioner to wear this device when standing or walking. He directed Petitioner to return to him in one week. PX 9.

A Vocamotive progress report dated January 21, 2018 indicates that Petitioner had lost five job opportunities as of mid-January 2018. Petitioner attributed her failure to attend interviews and job fairs to a physical therapy appointment for her foot and lack of transportation. Stafseth indicated she notified Petitioner's counsel of "ongoing issues with Petitioner" and the reasons Petitioner was giving for missing appointments. Stafseth recommended that Petitioner be "immediately discharged from vocational services." Stafseth Dep Exh 8.

On February 2, 2018, Dr. Zager noted that Petitioner presented with her boot and CAM walker and denied improvement. The doctor applied a soft cast and a below the knee cast. He directed Petitioner to return to him in one week. He issued a note directing Petitioner to remain off work and wear a shoe/brace/boot at all times. PX 9.

Petitioner testified that vocational rehabilitation was discontinued on February 2, 2018. She stopped receiving benefits as of the same date. T. 41. Petitioner testified that at no point in 2018 did Stafseth warn her that vocational rehabilitation was going to be stopped. T. 41.

Petitioner returned to Dr. Jido on February 6, 2018, with the doctor again recommending transforaminal injections. PX 10, 16 of 19.

On February 9, 2018, Dr. Zager obtained new right ankle X-rays. He described the films as showing a radiolucent line at the right fibula with 2 millimeters of displacement. His impression was "fibula fracture, right lower extremity." He applied a below the knee cast to Petitioner's right leg and instructed her to return to him in one week. PX 9.

The last therapy note, of February 6, 2018, reflects that Petitioner complained of 7/10 low back soreness and was still wearing a hard cast on her right lower extremity. PX 12.

On February 16, 2018, Dr. Zager noted that the case "was broken down in three spots." He applied another cast and ordered a right ankle MRI. He directed Petitioner to stay off work. PX 9.

On February 20, 2018, Dr. Jido administered a lumbar transforaminal injection. PX 10, 17 of 19.

Stafseth issued a final report to Respondent on February 20, 2018. She indicated Petitioner reported 30 contacts for the week starting January 19, 2018 and 48 contacts for the week beginning January 26, 2018. She also indicated Petitioner attended an appointment at Vocamotive on February 5, 2018 "and provided a doctor's note from her appointment on February 2, 2018." She noted that, on February 7, 2018, she sent a letter to Petitioner concerning programs she had improperly loaded onto the loaner laptop. She advised Petitioner to come to Vocamotive on February 8, 2018 to return the laptop. Stafseth Dep Exh 8.

The right ankle MRI, performed without contrast on February 22, 2018, showed a focal high signal in the navicular bone, "most likely representing edema." The radiologist noted no other abnormalities. PX 9.

On February 23, 2018, Dr. Zager discussed the MRI results with Petitioner and directed her to wear the CAM walker with any walking or standing. He also directed her to minimize weight bearing. PX 9.

On March 5, 2018, Dr. Zager noted that Petitioner was wearing the CAM boot and reported trying to stay off her foot as much as possible. He repeated the instructions relating to CAM walker usage. PX 9.

On March 19, 2018, Dr. Zager prescribed an AFO brace. PX 9.

The last treatment note in evidence from Dr. Zager is dated March 22, 2018. In that note, he indicated Petitioner described her right ankle as "a little bit sore." He recommended she continue immobilization until the AFO brace arrived. PX 9.

On March 26, 2018, Dr. Jido noted that Petitioner did not respond to the transforaminal injection. He indicated Petitioner "refused surgery" and declined to consider a spinal cord stimulator. He described medical management as the sole remaining option. He prescribed Fentanyl patches and Tylenol 3. He referred Petitioner to his pain nurse practitioner. PX 10, 18 of 19.

Petitioner saw Dr. Jido's nurse practitioner on April 26, 2018. The nurse practitioner noted that Petitioner discontinued the Fentanyl patches after two weeks because of associated memory and gait problems. She also noted that Norco "caused adverse effects." She indicated Petitioner wanted to continue the Tylenol 3 for pain. She noted that Petitioner had no history of substance abuse and that the last urine screening was within normal limits. She discontinued the patches. She prescribed Tylenol 3 and a functional capacity evaluation with validation. PX 10, 19 of 19.

Respondent offered into evidence Kari Stafseth's evidence deposition of May 3, 2018. Ms. Stafseth testified she began working with Vocamotive in July 2008. She obtained certification in vocational rehabilitation counseling in 2009. RX 1, pp. 4-5. Stafseth Dep Exh 1. Since becoming certified, her duties have included assessing injured workers' ability to return to gainful employment, providing job counseling and completing labor market surveys. RX 1, p. 6. She interviews 70 to 80 injured workers annually. RX 1, p. 6.

Stafseth testified that Respondent referred Petitioner to Vocamotive. She first met with Petitioner on October 3, 2016. Petitioner advised her of her three back injuries. Petitioner also told her that Dr. Lim had recommended surgery but "would not proceed due to other health conditions." RX 1, pp. 11-12. Petitioner had most recently seen Dr. Lim on July 22, 2016. Petitioner indicated that Dr. Lim had imposed restrictions of lifting up to 30 pounds and no bending. Petitioner also indicated that Dr. Lim had recommended pain management but this had been denied. RX 1, pp. 12-13.

Stafseth testified that Petitioner complained of pain traveling from her back to her legs and giving out of her legs. Petitioner reported using a cane, as recommended by Dr. Lim, when she needed to walk more than two to three blocks. RX 1, p. 15. She reported being able to stand for 20 to 30

minutes and needing to readjust when sitting for long. RX 1, p. 17. Petitioner told her she had experienced seizures since birth but had not experienced one since 2013. She was not taking any seizure-related medication. RX 1, p. 15. Petitioner reported having undergone right knee surgery in 2009, following an injury, and having resumed full duty six months later. Petitioner indicated her driver's license had been suspended in 2013 and that it would likely take another year to get that license back. She reported using public transportation and obtaining rides from her husband and co-workers. RX 1, pp. 16-17.

Stafseth testified she reviewed Dr. Goldberg's report and an invalid functional capacity evaluation of May 27, 2016. RX 1, pp. 18-19.

Stafseth testified that Petitioner reported graduating from high school. Petitioner denied further education. She reported owning a computer and being able to use the Internet. Petitioner also reported being able to use Word to type a resume but denied word processing proficiency. She had worked as a laborer for Respondent since 1997 but had been off work since August 26, 2015. Her job involved walking, pulling garbage carts, lifting furniture and sweeping alleys. She was required to lift up to 100 pounds. RX 1, pp. 22-23. Stafseth testified that Petitioner's job is categorized as a "very heavy" physical demand level occupation per the Dictionary of Occupational Titles. The job is also classified as "unskilled." RX 1, p. 23.

Stafseth testified Petitioner was polite and appropriately groomed. Petitioner was "not the clearest speaker." Stafseth had to ask her to repeat herself at times. Petitioner was 41. Her age "would not have any negative impact on her ability to return to employment." She did not, however, have any transferable skills. RX 1, p. 27. Stafseth recommended vocational testing to determine Petitioner's aptitudes and interests. RX 1, p. 25.

Stafseth testified that, if she accepted Dr. Goldberg's opinions as accurate, Petitioner would have no vocational impairment or wage loss exposure. Alternatively, if she accepted Dr. Lim's lifting restriction, Petitioner had lost access to her laborer job but was "prospectively employable." RX 1, pp. 28-29. She targeted jobs for Petitioner with a wage earning potential of between $10 and $13 per hour. Based on Dr. Lim's restrictions, she recommended that Petitioner receive vocational rehabilitation services. RX 1, p. 29.

Stafseth testified that, throughout 2017, Petitioner sought out care and saw pain specialists. Petitioner "had difficulties when it came to verbal communication." There were "many times when [Petitioner] was unclear [and] difficult to understand and that is evidenced in the vocational testing" administered by James Boyd. In 2017, Petitioner attended fewer than ten interviews. RX 1, pp. 35-36. At one point she called Petitioner to advise her of a position and noted that her voicemail message was not clear. She instructed Petitioner to update this message. RX 1, pp. 38-39. On December 19, 2017, she noted that two E-mails from prospective employers had been deleted from Petitioner's account. Petitioner denied deleting them. RX 1, p. 40. Petitioner had to be coached as to how to properly ask to speak with a hiring manager. RX 1, p. 41. During a coaching session, Petitioner was "advised not to use workers' compensation" during an interview if she was asked why she left Respondent. Petitioner was supposed to get a ride to an interview at Longhorn restaurant but ended up needing to take a taxi provided by Vocamotive. She later described the interview as going well but indicated she would need to participate in two more interviews before a decision would be made. RX 1, pp. 43-45. In late December 2017, Vocamotive determined that Petitioner had permanently deleted two more requests for interviews from her E-mail account. A call was placed to Petitioner but she did not answer. Later

Petitioner reported she was wearing an air cast due to injuring her foot over Christmas break. RX 1, p. 47. On January 3, 2018, it was noted that Petitioner was having trouble logging into an application because she was using a different password than the one she had been advised to use. She left early that day. Petitioner also twice reported that her restrictions had changed. She was advised the "new" restrictions were different from those outlined in the functional capacity evaluation. RX 1, p. 51.

Stafseth testified that Petitioner declined to attend a job fair scheduled for January 10, 2018 because she had a physical therapy appointment earlier the same day. RX 1, p. 55. Stafseth quoted Petitioner as saying her health was her main priority and she "was only attending Vocamotive appointments to maintain her TTD benefits" and because she "was being forced to do so by the insurance company." RX 1, p. 56. Stafseth testified that Petitioner declined to attend a job interview on January 11, 2018 because she had already arranged for transportation to Vocamotive that day and could not afford additional transportation to get to the interview. RX 1, pp. 57-58. Petitioner reported using a variety of medical transportation companies to travel to and from Vocamotive appointments. RX 1, p. 59. Petitioner indicated these rides were covered by her medical insurance. RX 1, p. 59. In total, Petitioner declined to pursue five job opportunities in January 2018. Stafseth testified that, at this point, she recommended Petitioner be discharged from vocational rehabilitation. RX 1, p. 61. As long as Petitioner refused to follow Vocamotive's advice and directives, she would not gain employment. RX 1, p. 61.

Stafseth testified she issued her last report on February 20, 2018. Stafseth Dep Exh 8. At that point, Petitioner was still active in terms of attending appointments at Vocamotive and completing telephone calls with prospective employers. "There were still some aspects of job search that were being performed." RX 1, p. 63. On February 8, 2018, Petitioner came to Vocamotive and presented a letter indicating that vocational rehabilitation was being terminated due to non-compliance. Petitioner "reported she was unsure why she was being terminated." RX 1, p. 64. Petitioner was disrupting other Vocamotive clients so she was taken to a conference room, at which point she returned her computer equipment and security badge. RX 1, p. 65. Over Petitioner's relevancy objection, Stafseth testified that, to date, Respondent has paid $41,527.19 for vocational rehabilitation services. RX 1, p. 66.

Stafseth testified Vocamotive provided Petitioner with a laptop computer for home use, with the proviso that no one other than Petitioner was to use the laptop and that the laptop was not to be used for downloading material. RX 1, p. 68. After Petitioner returned the laptop, a Vocamotive representative went through the history of the computer and found three videos that had been downloaded. These videos had nothing to do with the job search process. RX 1, pp. 69-70. She notified Lisa Soto of Respondent of these videos via a letter dated March 16, 2018. RX 9.

Under cross-examination, Stafseth testified Petitioner is her client. She has been associated with Vocamotive for almost ten years. During the last five years, Vocamotive has received about 30 cases per year from Respondent. Clients are informed that, if they cannot attend an appointment due to a conflicting medical appointment, they are to notify Vocamotive of the conflict as soon as they become aware of it, to facilitate rescheduling. RX 1, p. 73. Petitioner advised her of her history of seizures at the initial assessment. Petitioner also told her that the last seizure occurred in 2013, the same year her driver's license was reportedly suspended. Petitioner took the Metra to the Hinsdale station in order to go to Vocamotive. RX 1, p. 75. During non-rush-hour periods, the Metra trains do not run frequently. RX 1, p. 76. Petitioner was not proficient with any computer programs but reported having used Microsoft Word to create a resume. RX 1, p. 77. Petitioner spent her entire adult work life as a garbage collector for Respondent. RX 1, p. 77. A garbage collection job is unskilled and rated "very

heavy." RX 1, p. 78. Petitioner was required to lift in excess of 100 pounds. RX 1, p. 79. Petitioner's speech was garbled at times. She does not know whether Petitioner would be classified as having a speech impediment. RX 1, pp. 79-80. Petitioner "would be limited in terms of jobs that would require verbal communication skills." RX 1, p. 80. Petitioner has no transferable skills. Petitioner's lack of a driver's license would "definitely be a factor in her ability to find employment." RX 1, p. 81. She concluded Petitioner is employable in the $10 to $13 per hour range. RX 1, p. 81. She knows James Boyd and considers him to be highly competent. The test scores he noted "would have an overall impact on the types of jobs that would be considered for [Petitioner]." RX 1, pp. 82-83. Given Petitioner's limitations, Vocamotive would be looking at "hands-on" jobs such as jobs involving assembly, cleaning and food preparation. RX 1, pp. 83-84. Since Boyd described Petitioner as a "non reader," Petitioner would "not be successful in a job situation" involving reading skills. RX 1, p. 86. Petitioner's garbage collection job did not require reasoning. Boyd concluded Petitioner had a very limited ability to perform visual tasks. RX 1, p. 87.

Stafseth testified that Vocamotive initially identified several target occupations for Petitioner, including front desk clerk and customer service representative. However, given Petitioner's lack of language skills, she would not succeed at a hotel front desk clerk job. Petitioner would not be any kind of problem solver in the workforce. RX 1, p. 90. Boyd's testing revealed Petitioner has below average ability to follow directions. RX 1, p. 90. The testing also showed she has poor fine motor and eye hand coordination. RX 1, p. 91. It is "possible, probable" that a job search as long as Petitioner's could generate 2,000 pieces of paper. RX 1, p. 92.

Stafseth testified she did not know what kind of job was being offered by Jewel-Osco. RX 7, p. 11. She was not familiar with a career fair Petitioner was asked to attend. RX 7, p. 11. Petitioner was asked to attend a hiring event held by Pactiv. Stafseth testified she believes Pactiv does work with the special needs population. She believes the position that was available involved packing. RX 1, p. 94. Packing is an unskilled occupation. The positions paid $10.33 to $11.70 per hour, depending on the department. RX 1, p. 96. Petitioner would not have been physically capable of performing this job based on Dr. Lim's 30-pound restriction but would have been capable per Dr. Goldberg. RX 1, pp. 96-97. In her report of January 21, 2018, she identified two available food service jobs at a nursing home. RX 1, pp. 97-98. Based on her experience, these jobs would likely have paid between minimum wage and $12 per hour. Petitioner was supposed to be available, on a full-time basis, to go to interviews, unless she had completed a "time off request" form in advance. RX 1, p. 100. Vocamotive does not provide transportation but has, on occasion, asked an employer to provide transportation if a client lacks it. RX 1, p. 101.

Stafseth testified that, through 2017, she did not recommend that services be terminated based on lack of cooperation. The decision to terminate was hers alone. RX 1, pp. 101-102. From what she can remember, she discussed termination with her contact person at Respondent, Lisa Soto, in 2018. RX 1, p. 102. The discussion took place via phone or E-mail. RX 1, p. 103. She indicated that, if Petitioner was not going to attend interviews, she was not going to obtain a job. Soto asked for documentation of the reasoning behind the termination. She provided this to Soto. RX 1, pp. 103-104. Petitioner was not made a party to the discussion. RX 1, p. 104.

Petitioner testified she continues to experience pain in the center of her low back. Her legs "still go out." T. 42-43. She last saw Dr. Jido in May 2018. T. 43. The doctor's nurse practitioner gave her Tylenol 3 with codeine for pain. She takes this medication twice a day. T. 44. She plans to see Dr. Jido again. She also sees a "neural doctor." She has not looked for work since February 2, 2018. She has

had no income since that date. T. 44. Her husband is receiving Social Security disability benefits. T. 45. She is using up her savings. T. 45. She needs to find a residence before she could restart vocational rehabilitation. T. 45.

Under cross-examination, Petitioner testified she got married in October 2017. T. 46. She settled two prior workers' compensation claims for 20% loss of use of her right leg and 2% loss of her foot. T. 46-47. In her current three cases, all of her benefits were paid until 2018. T. 47. She underwent a lumbar spine MRI in June 2015, while she was performing full duty. She requested this MRI and Dr. Lim agreed. T. 48. After the MRI, Dr. Lim told her there was no change and ordered a functional capacity evaluation. She believes she put forth full effort at this evaluation. T. 49. Dr. Lim recommended she return to work in a graduated fashion. T. 49. She last saw Dr. Lim on July 22, 2016. T. 49. She underwent an examination by Dr. Goldberg in July 2016. She contacted Respondent about returning to work on a gradual basis but "they denied it." T. 50. She needs a stable residence to restart vocational rehabilitation. T. 50. If vocational rehabilitation started again, she would engage in it in the same way she did before. T. 51. She understands that the purpose of vocational rehabilitation is to "go look for work somewhere else." T. 52. At the second meeting, Respondent and Stafseth told her that her benefits would be stopped if she did not look for work. T. 53. Vocamotive gave her a laptop at the initial meeting. She used that laptop only for job search purposes. At that time, Vocamotive did not explain its expectations of her. She Skyped with Vocamotive. T. 54. She was unable to find work because of ongoing medical treatment and physical therapy. She acknowledged saying that she was participating in vocational rehabilitation only to get benefits. T. 56. She denied leaving vocational rehabilitation appointments early. Vocamotive told her to lie on job applications. T. 57. She did not change the password on her laptop. T. 57. She cancelled an interview with a prospective employer due to a medical appointment. T. 57. She refused to attend interviews if it was "against her will" or she had a conflicting therapy appointment. T. 57-58. She has been referred to see a new neurologist but no appointment has been set up yet. T. 59.

On redirect, Petitioner testified the interviews that were cancelled had been set up by Vocamotive. She had asked for those days off ahead of time. T. 60. She turned in job logs while she was undergoing vocational rehabilitation. T. 60. If Stafseth testified she probably turned in 2,000 pieces of paper, that sounds right. She applied to library clerk and rodent control jobs at Respondent. Respondent did not offer her these jobs. The jobs she applied for were within her restrictions. T. 61-62.

Arbitrator's Credibility Assessment

Petitioner's answers were brief and sometimes non-responsive. She was not always easy to understand, as Respondent's vocational rehabilitation counselor and test administrator noted in their reports.

The evidence bearing on Petitioner's believability is mixed.

Petitioner's lengthy tenure with Respondent weighs in her favor, credibility-wise.

Dr. Lim, one of Petitioner's treating physicians, noted no positive Waddell's signs on examination. The therapist who oversaw work conditioning at Athletico in late 2015 and early 2016 described Petitioner as compliant. PX 6. Dr. Goldberg, Respondent's Section 12 examiner, did not note any symptom magnification. He described Petitioner as cooperative. The therapist who performed the first functional capacity evaluation noted inconsistencies and poor effort but nevertheless made

recommendations as to Petitioner's work capacity. RX 3. The second functional capacity evaluation, performed by a different therapist, was rated valid. Dr. Farhat, a neurosurgeon who evaluated Petitioner in 2017, recommended against surgery, noting that Petitioner's "structural findings do not correlate with her symptoms." PX 13. James Boyd, a certified vocational rehabilitation counselor who performed a battery of comprehension and intelligence tests for Vocamotive, did not note any manipulation of the test results. Kari Stafseth, the certified vocational rehabilitation counselor who ultimately found Petitioner non-compliant, conceded that Petitioner has "no transferable skills." She also acknowledged that Petitioner's speech-related issues affect her employability and that, as a "non-reader," per Boyd's testing, Petitioner would not succeed in any job requiring reading.

Stafseth further testified that Petitioner's lack of a driver's license impeded her job search. There was a discrepancy between Petitioner's testimony concerning her ability to drive and the responses Stafseth recorded in her report. Petitioner testified she has had a seizure disorder since birth and has never held an Illinois driver's license. T. 18. Stafseth indicated that Petitioner described her license as having been suspended in 2013, "following her last seizure." The Arbitrator notes that a therapist affiliated with Athletico documented a very recent seizure in a note dated December 9, 2015. PX 6. While it appears Petitioner has seen a neurologist for seizures over the years, no records concerning this care are in evidence.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between her undisputed work accidents and her current condition of ill-being?

The Arbitrator views the injury in the first case, 12 WC 43293, as a relatively minor back strain that did not contribute to Petitioner's current lumbar spine condition of ill-being. No one recommended MRI imaging during the brief course of care following the injury.

The Arbitrator finds a causal relationship between the injury in the second case, 14 WC 29314, and Petitioner's current condition. MRI scanning performed after this injury demonstrated a disc herniation.

The Arbitrator also finds a causal relationship between the injury in the third case, 15 WC 29123, and Petitioner's current condition. In so finding, the Arbitrator relies primarily on Dr.Goldberg's opinion that the accident aggravated the disc herniation demonstrated on the MRI. RX 2.

Is Respondent entitled to credit for the maintenance benefits it paid between August 11, 2017 and February 2, 2018?

The Arbitrator declines to award Respondent credit for the maintenance benefits it paid between August 11, 2017 and February 2, 2018. Respondent's witness, Kari Stafseth, CRC, acknowledged that Petitioner applied for many jobs and attended some interviews in 2017. Stafseth went so far as to agree that Petitioner's job search could have generated 2,000 pieces of paper. She also acknowledged that Petitioner would not have been capable of performing some of the jobs that Vocamotive targeted for her. It was not until January 2018, at which point Petitioner missed some interviews due to ankle-related treatment (with Dr. Zager initially placing her in an air cast and then a CAM walker, PX 9), that she recommended vocational services be discontinued. There is evidence Stafseth warned Petitioner about misuse of the computer, deletion of potentially relevant E-mails and

an incomprehensible voice mail message in late 2017 but no evidence indicating she told Petitioner she was contemplating discontinuing services. She agreed that, when she issued her last report, on February 20, 2018 (Stafseth Dep Exh 8), Petitioner was still pursuing some job leads. Petitioner was still under active care with Dr. Zager at that point.

Is Petitioner entitled to maintenance and/or temporary total disability benefits from August 17, 2017 through the hearing of July 13, 2018?

The Arbitrator finds that Petitioner is entitled to maintenance from August 17, 2017 through the essentially negative right ankle MRI of February 22, 2018. Petitioner underwent this MRI at approximately the same time Stafseth issued her last report (Stafseth Dep Exh 8), in which she acknowledged some ongoing job search efforts, despite Respondent having terminated the payment of benefits. Stafseth also acknowledged that Petitioner provided Vocamotive with notes documenting her appointments with Dr. Zager. The Arbitrator recognizes that the ankle care rendered by Dr. Zager is unrelated to the work injury. Regardless, Petitioner would have had to ignore the instructions of the doctor, who was directing her to avoid weight bearing, to travel to job interviews and appointments per Stafseth.

The Arbitrator recognizes that Petitioner continued seeing Dr. Jido for her back after February 22, 2018. The Arbitrator declines to award temporary total disability benefits, as an alternative to maintenance, from February 23, 2018 through the hearing. The Arbitrator finds Drs. Lim and Goldberg more persuasive than Dr. Jido as to Petitioner's treatment needs and the issue of maximum medical improvement. Petitioner derived no benefit from the injections administered by Dr. Jido. PX 10, 18 and 19 of 19.

Should vocational rehabilitation be resumed?

In National Tea v. Industrial Commission, 97 Ill.2d 424 (1983), the Illinois Supreme Court considered a scenario not unlike that faced by the Arbitrator, namely, whether an individual with a narrow work history, several barriers to employment and the ability to perform only unskilled labor should undergo vocational rehabilitation. The Court noted the unembellished language set forth in Section 8(a), and the frequency with which disputes as to the nature and duration of rehabilitation efforts arise. The Court also noted factors considered by courts in other jurisdictions, indicating that, in general, a claimant "has been deemed entitled to rehabilitation where he sustained an injury which caused a reduction in earning power and there is evidence rehabilitation will increase his earning capacity." The Court also cited other related factors, including "the likelihood that [the claimant] will be able to obtain employment upon completion," whether he "unsuccessfully underwent similar" rehabilitation in the past, whether he is in fact "trainable" due to age, education and other factors and whether he has sufficient skills to find work without additional training. The Court also stressed that the Commission needs to consider the interests of the employer as well as the employee, since the employer is required to "underwrite" the attendant expenses. The Court concluded that the program selected should be "reasonable and realistic" so as ensure success.

In resolving this issue, the Arbitrator has considered the above, along with some circumstances unique to this case. Petitioner's job with Respondent was unusual in that it required no skills yet afforded an excellent salary and benefits. It could be difficult for a person who held such a job for twenty years to contemplate performing a similar job for essentially minimum wage. The nuances of a supplemental wage differential benefit are not always to explain. Petitioner is also unusual in that she

has a seizure disorder with attendant transportation-related problems, is a "non-reader" and sometimes has difficulty making herself understood. These factors did not prevent her from working for Respondent but they have affected her ability to find another job, as Respondent's own witness admits.

The Arbitrator awards an additional six-month period of vocational rehabilitation, with accompanying maintenance benefits. There is precedent for an award of this limited scope. See Donald Margraff v. State of Illinois, 16 IWCC 833, in which the Commission upheld this Arbitrator's award of six months of vocational rehabilitation and maintenance to an older individual who had been out of the workforce for several years. Respondent is directed to zero in on job opportunities that actually meet Petitioner's limited skills and that fall within a medium to heavy physical demand level, per the valid functional capacity evaluation of July 25, 2017. The Arbitrator finds this evaluation more reliable than the initial evaluation. It was incongruous for the therapist who performed the first evaluation to rate it invalid yet conclude Petitioner was capable of "at least" medium duty level work. Specifically, Respondent is to avoid scheduling interviews for jobs that require reading, sophisticated mathematics, dealing with the public or problem solving, consistent with the testimony of its witness, Kari Stafseth. The Arbitrator notes that, while Stafseth readily acknowledged potential barriers to employment, she never described Petitioner as unemployable. Petitioner is a relatively young individual who worked successfully for Respondent for two decades. In the Arbitrator's view, it may be appropriate to expand the search to include sheltered workshops or other facilities relying on manpower supplied by developmentally disabled adults. It may also be appropriate to directly involve Respondent human resource employees. Petitioner's willingness to perform physical, indeed unsavory, work was on display when she credibly testified to applying to Respondent's rodent control department. Petitioner is directed to adhere to Vocamotive's general rules concerning attendance and computer usage.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diane Pacheco f/k/a Diane Taylor,

Petitioner,

vs. NO: 14 WC 29314

City of Chicago,

Respondent.

20IWCC0250

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of maintenance and vocational rehabilitation, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 27, 2018, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

20IWCC0250

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

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

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

DATED: APR 24 2020
MP:pmo
o 2/25/20
68

Marc Parker

Maria E. Portela

Kathryn A. Doerries

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

PACHECO, DIANE F/K/A TAYLOR, DIANE
Employee/Petitioner

Case# **14WC029314**

12WC043293
15WC029123

CITY OF CHICAGO
Employer/Respondent

20IWCC0250

On 8/27/2018, 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 2.18% 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:

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60606

0766 HENNESSY & ROACH PC
QUINN M BRENNAN
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20IWCC0250

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
19(b)

Diane Pacheco f/k/a Diane Taylor
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **14** WC **29314**

Consolidated cases: **12WC 43293 and 15WC 29123**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago IL**, on **July 13, 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. ☐ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **July 22, 2014**, 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 $**71,853.08**; the average weekly wage was $**1,381.79**.

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** dependent children.

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

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

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

ORDER

The Arbitrator finds that Petitioner established a causal connection between the accident of July 22, 2014 and her current lumbar spine condition of ill-being.

There are no benefits in dispute in this matter.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Molly C Mason

Signature of Arbitrator

8/27/18
Date

ICArbDec19(b)

AUG 27 2018

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 up	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Diane Pacheco f/k/a Diane Taylor,

Petitioner,

vs. NO: 15 WC 29123

City of Chicago,

Respondent.

20IWCC0251

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of maintenance and vocational rehabilitation, 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission modifies the decision of the Arbitrator with respect to claim 15 WC 29314 to find that Petitioner was entitled to maintenance benefits from 8/11/17 through 7/13/18, for a period of 48-1/7 weeks. The Arbitrator had extended maintenance only through 2/22/18, or the date she noted an "essentially negative right ankle MRI" was performed, even though she agreed that the right ankle was not related to the present proceedings and despite the fact that Petitioner had continued to see Dr. Jido for her lower back thereafter. (Arb.Dec. [12 WC 43293] Addendum, p.15). In modifying the Arbitrator's decision along these lines and extending maintenance to the date of hearing, the Commission finds that Petitioner sufficiently cooperated in the vocational rehabilitation program initiated by Respondent, considering her physical and mental limitations. More to the point, the Commission believes that the plan in question was inadequate to address Petitioner's specific needs and in fact appears to have had little chance of

20IWCC0251

success -- a fact the Arbitrator all but acknowledged in her decision by tailoring a vocational rehabilitation plan for an additional six months that better addresses the unique circumstances in this case. (See Arb.Dec. [12 WC 43293] Addendum, p.16). Therefore, the Commission finds that Petitioner proved her entitlement to maintenance benefits through the date of arbitration, 7/13/18.

Furthermore, the Commission corrects the decision of the Arbitrator at page 15 of the addendum to companion case 12 WC 43293 (which essentially encompassed the Findings of Fact and Conclusions of Law for all three claims -- namely 12 WC 43293, 14 WC 29314 and 15 WC 29123) to show that the period of maintenance under consideration actually started on 8/11/17, not 8/17/17, given that the parties had agreed that Petitioner was entitled to maintenance from 7/23/16 through 8/10/17. (See Arb.Ex.#3).

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated August 27, 2018 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $870.72 per week from 8/27/15 through 7/22/16, for a period of 47-2/7 weeks, as stipulated to by the parties [Arb.Ex.#3], 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 $870.72 per week from 8/11/17 through 7/13/18, for a period of 48-1/7 weeks, that being the period of additional maintenance benefits due and owing under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to an additional six months of vocational rehabilitation and maintenance, subject to the directives set forth in the Arbitrator's decision, and pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

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.

20IWCC0251

DATED:
o:2/25/20
MP/pmo
68

APR 24 2020

Marc Parker

Maria E. Portela

Kathryn A. Doerries

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

PACHECO, DIANE F/K/A TAYLOR, DIANE
Employee/Petitioner

Case# **15WC029123**

12WC043293
14WC029314

CITY OF CHICAGO
Employer/Respondent

20IWCC0251

On 8/27/2018, 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 2.18% 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:

1836 RAYMOND M SIMARD PC
205 W RANDOLPH ST
SUITE 815
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
QUINN M BRENNAN
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

20IWCC0251

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
19(b)

Diane Pacheco f/k/a Diane Taylor
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **15** WC **29123**

Consolidated cases: **12WC 43293 and 14WC 29314**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago IL**, on **July 13, 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. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. Is Petitioner entitled to any prospective medical care?
L. [ ] What temporary benefits are in dispute?
[ ] TPD [x] Maintenance [ ] TTD
M. [ ] Should penalties or fees be imposed upon Respondent?
N. x Is Respondent due any credit?
O.X Other **Should vocational rehabilitation be resumed?**

FINDINGS

On the date of accident, **August 26, 2015**, 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 $**71,853.08**; the average weekly wage was $**1,381.79**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**43,558.92** for TTD, $**0** for TPD, $**73,694.40** for maintenance, and $**0** for other benefits, for a total credit of $**117,253.32**.

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

ORDER

The parties stipulated Petitioner was temporarily totally disabled from August 27, 2015 through July 22, 2016 and entitled to maintenance from July 23, 2016 through August 10, 2017. Arb Exh 3. The Arbitrator finds Petitioner is also entitled to maintenance from August 11, 2017 through February 22, 2018. See above for the parties' stipulations as to credit for the temporary total disability and maintenance benefits Respondent paid.

The Arbitrator finds Petitioner is entitled to an additional six months of vocational rehabilitation and maintenance, subject to the directives set forth in the attached decision.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Molly C Myson

Signature of Arbitrator

8/27/18
Date

ICArbDec19(b)

AUG 27 2018

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	☐ 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

EDWARD HOLLAND,

Petitioner,

vs. NO: 15 WC 041080

UNITED RENTALS,

Respondent.

20IWCC0252

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of causal connection, temporary total disability, medical expenses, including prospective medical, 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's Decision in its entirety except the Commission views the evidence differently with respect to disputed issue (K) that of prospective medical treatment. The Commission agrees with the Arbitrator's analysis under the disputed issue (K) prospective medical section, until the last paragraph, the Arbitrator's Conclusion that the Petitioner is not entitled to knee replacement surgery. The Commission reverses the Arbitrator's Decision with respect to prospective medical, and strikes the fourth full (last) paragraph of (K), the prospective medical section on page 6 of the Arbitrator's Decision. The Commission further modifies the Arbitrator's Decision as referenced below.

20IWCC0252

Prospective Medical

The Arbitrator notes Petitioner testified Dr. Antonacci, in August 2016, recommended a partial knee replacement but he would have to lose 30 pounds. Petitioner testified at that time he weighed about 341 pounds. (T, p. 33, PX3, 8/5/16) Dr. Antonacci's August 5, 2016, office note documents:

> Advised him he is a candidate for a partial knee replacement, however, I also explained that at this time his current BMI is 43, which places them in an unsafe surgical category. I explained that he needs to lose weight to decrease the risks and complications of surgery. The patient was advised that he would need to lose 30 pounds in order to be in a safer weight category. I counseled the patient on possible ways to lose weight, including pool exercises and weight loss centers. (PX3, 8/5/16)

Dr. Antonacci noted that the Petitioner, "had the opportunity to ask and have answered any and all questions and appeared to voice complete understanding of the diagnosis, treatment, and expected outcomes as well as the need to lose weight prior to any consideration for surgery." (PX3, 8/5/16) The Commission agrees with the Arbitrator that Dr. Antonacci's testimony in regard to the August 5, 2016, office visit was not so unequivocal, and that what he told Petitioner specifically was , "...he possibly might be a candidate for a partial knee replacement but that he had to lose at least 30 pounds before we would consider any surgery." (PX4, p. 27)

Petitioner saw Dr. Antonacci next on November 11, 2016 and weighed 334 pounds. (Px3, 11/11/16) Dr. Antonacci documented, "At last appointment 8/05/16 he was instructed to lose 30 pounds to further discuss a partial knee replacement." Dr. Antonacci further documented, " I have reviewed the history of the condition with him in full. I had a discussion with him that he is to continue with his weight loss to place him in a safer category for surgery as he will need a partial knee replacement. I counseled the patient on possible ways to lose weight, including pool exercises and weight loss centers." (PX3, 11/11/16)

Petitioner returned to Dr. Antonacci more than one year later, on January 12, 2018. Treatment recommendations remained the same:

> At the last appointment on 11/11/2016 he was instructed to (lose) 30 pounds prior to any consideration for surgery, however, he has only lost 2 pounds. At this time I have nothing to offer him yet until the weight is lost, which then we will proceed with a left medial unicondylar knee replacement. I strongly encouraged and counseled the patient on possible ways to lose weight, including pool exercises and weight loss centers. (PX3, 11/11/16)

Petitioner testified that at the time of his last office visit with Dr. Antonacci on January 12, 2018, his weight was "about 331 pounds." (T, p. 34) At the time of trial Petitioner testified he weighed "about 325" (pounds).

As the Arbitrator recounted, Dr. Antonacci testified that Petitioner's weight is keeping him from having even a partial knee replacement, and if Petitioner does not lose the weight, Dr.

Case 1:10

Antonacci will not do the surgery. (PX4, pp. 42-43) On June 26, 2018, Dr. Antonacci further testified, "...at this time, you know, he would have to be re-evaluated to determine whether or not a partial knee replacement or a total knee replacement would be of beneficial (sic) to him." (PX4, p. 31)

The Commission finds that Petitioner would have to be re-evaluated by Dr. Antonacci for a determination of whether or not a knee surgery is warranted, and, if affirmative, whether or not a partial or total knee replacement was appropriate, although Dr. Antonacci cautioned that a final determination is made at the time of surgery. (PX4, pp. 31-32) Dr. Antonacci testified the Petitioner's BMI of 43 would cause stress on the implants and that, "The other reason for losing weight is higher BMIs are associated with other significant complications." (T, p. 43) Unequivocally, Dr. Antonacci testified that if Petitioner did not lose weight, he would not do the surgery. (PX4, pp. 42-43)

"Questions regarding entitlement to prospective medical care under section 8(a) are factual inquiries for the Commission to resolve." *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193, 367 Ill. Dec. 465.

The Commission finds Petitioner's weight loss is a pre-requisite given Dr. Antonacci's testimony that he would not do surgery if Petitioner did not lose weight. The Commission finds Dr. Antonacci's recommendation for a weight loss program to be reasonable and necessary care. Respondent shall authorize this non-invasive weight loss program, said program not to exceed six months. The Commission finds that any cost incurred in a non-invasive formal weight loss program, as indicated by Dr. Antonacci, should be at Respondent's expense pursuant to Section 8(a).

Section 8(a) of the Act, states, in pertinent part:

> The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to Section 8.2, in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury.

820 ILCS 305/8(a) (West 2013)

"Prescribed services not yet performed or paid for are considered to have been "incurred" within the meaning of the statute." *City of Springfield v. Ill. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 317, 901 N.E.2d 1066, 1082, 2009 Ill. App. LEXIS 64, *43, 327 Ill. Dec. 333, 349 quoting *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 948, 856 N.E.2d 602, 305 Ill. Dec. 797 (2006).

The Commission finds that the instant award is unique to this particular set of facts and in so doing effectuates the goal of Section 8(a) of the Act.

20IWCC0252

Finally, the Commission corrects two scrivener's errors in the Arbitrator's Decision. In the Preface, the fourth sentence of the first paragraph references case number 15 WC 0410, omitting the last two case numbers; the corrected sentence begins, "In 15 WC 041080:" On page four of the Arbitrator's Decision, the first sentence of the last paragraph under the section entitled, "Findings of Fact" the date of the MRI is July 2016, not 2015, so the sentence reads, "Antonacci testified Petitioner's meniscus tear was identified on the July 2016 MRI and was acute."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on December 14, 2018 is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's Conclusion of Law, that the Petitioner is not entitled to knee replacement surgery, is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule to: Advocate Occupational Health; Dr. Victor Antonacci and OrthoIllinois; and Forest City Diagnostic Imaging from June 19, 2014 to June 2, 2015 if previously unpaid and not written off, under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION Respondent shall provide and pay under §8(a) and §8.2 of the Act for a non-invasive weight loss program for a period of up to six months wherein the progress of Petitioner's weight loss goal is monitored and recorded. Contingent upon Petitioner's achieving the afore-referenced weight-loss goal, as outlined previously by Dr. Antonacci, then Respondent shall provide and pay for a re-evaluation with Dr. Antonacci for an opinion regarding the reasonableness and necessity of a partial or total knee replacement surgery.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner's current condition of ill-being is causally related to the accident and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

20IWCC0252

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $100.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: APR 24 2020
KAD/bsd
O022720
42

Kathryn A. Doerries

Maria E. Portela

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HOLLAND, EDWARD
Employee/Petitioner

Case# **15WC041080**
15WC041079

UNITED RENTALS
Employer/Respondent

20IWCC0252

On 12/14/2018, 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 2.48% 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
ZBIGNIEW BEDNARZ
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2965 KEEFE CAMPBELL BIERY & ASSOC
SHAWN BIERY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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
19(b)

Edward Holland
Employee/Petitioner

v.

United Rentals
Employer/Respondent

Case # **15** WC **41080**

Consolidated cases: **15 WC 41079**

20IWCC0252

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 **Thomas L. Ciecko**, Arbitrator of the Commission, in the city of **Chicago**, on **November 14, 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. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **November 25, 2015**, 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 $**74568.00**; the average weekly wage was $**1434.00**.

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

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

Respondent is entitled to a credit for any amounts paid for medical services from November 25, 2015 to November 14, 2018.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the fee schedule to: Dr. Victor Antonacci from November 25, 2015 to November 14, 2018 if previously unpaid and not written off.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $956.00 per week that have accrued from December 2, 2015 through November 14, 2018, and shall pay the remainder of the award in weekly payments.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

December 14, 2018
Date

ICArbDec19(b)

DEC 14 2018

Edward Holland v. United Rentals, No. 15 WC 041079, consolidated with 15 WC 041080

Preface

The parties proceeded to hearing November 14, 2018, on a Request for Hearing for both cases. Those requests indicated the following disputed issues. In 15 WC 041079: whether Petitioner's current condition of ill-being is causally connected to the injury; whether Respondent is liable for unpaid medical bills; and whether Respondent is responsible for prospective medical treatment. In 15 WC 0410: whether Petitioner's current condition of ill-being is causally connected to the injury; whether Respondent is liable for unpaid medical bills; whether Petitioner is entitled to temporary total disability; and whether Respondent is responsible for prospective medical treatment. The hearing proceeded on a Petition for Immediate Hearing under Section 19(b) of the Act. Edward Holland v. United Rentals, No. 15 WC 41079; 15 WC 41080 (cons.) Transcript of Evidence on Arbitration 19(b) Hearing at 4-7; Arbitrator's Exhibit 1; Arbitrator's Exhibit 2; Arbitrator's Exhibit 3.

Findings of Fact

Edward Holland (Petitioner) a 49 year old male, testified that on March 4, 2014, he was working for United Rentals (Respondent). He had been with Respondent since 1995 and was a member of Local 150. Respondent brought aerial lifts to construction sites. His job was as a driver delivering equipment to job sites. He worked five days a week, starting at 5:00 a.m. and working eight to twelve hours a day. He loaded the equipment for the day, delivered it to the job sites and then picked them up at the end of the day. He worked out of a yard in Elk Grove Village. That day he was inspecting a truck, slipped on ice and fell on his left knee. He testified he immediately told his two bosses what happened, telling them he was in a lot of pain. Those bosses, for the company Petitioner had worked for almost 20 years, cajoled Petitioner to "...just go on with your day and see how it is..." Petitioner testified this went on for a long time. He would tell them he was in pain, and they would fend him off. Finally, Petitioner said he had to see a doctor. Despite Petitioner's testimony, the parties have stipulated the fall occurred March 3, 2014. That date is also reflected in the medical records. Holland at 17, 12, 13, 14-15, 18; Arbitrator's Exhibit 1.

Petitioner testified he sought medical care at Advocate Occupational Heath on June 19, 2014. Up to that time, he had not sought medical treatment to his left knee either before or after the accident. The records of Advocate indicate Petitioner was seen June 19, 2014. Petitioner told medical providers he slipped and injured his knee at work and did not seek medical attention, but the pain and swelling became progressively worse. He was working full duty. An x-ray of the left knee revealed a nonspecific 1cm lesion of the distal femur and no acute fracture. The

diagnosis was knee contusion and the records reflect the cause as related to work activities. Petitioner's Work Status Discharge Instruction reflects a left knee compression support brace and work with accommodation (no climbing, squatting, kneeling, occasional standing/walking). There were additional Work Status Discharge Instructions given June 20, 2014, with work with accommodations (maximum lifting of 10 pounds, no squatting or kneeling, occasional standing/walking. No driving company vehicles or vehicles using the left foot). Petitioner was discharged from care July 9, 2014, requesting to see his own orthopedist. The work restrictions remained. The Summary notes that day reflect Petitioner's belief his knee is getting worse. He was diagnosed with knee pain, and a medical meniscal tear, left knee by MRI. Holland at 18; Petitioner's Exhibit 1 (unpaginated).

Petitioner testified he sought treatment from Dr. Victor Antonacci. Dr. Antonacci testified by means of an evidence deposition. Antonacci is a board certified orthopedic surgeon. Fifty percent of his practice involves the knee. He examined Petitioner for the first time July 15, 2014. Petitioner complained of left knee pain since he fell at work March 3, 2014. Petitioner was not working at the time. Antonacci's review of the MRI taken July 1, 2014, showed a vertical tear of the posterior horn of the medial meniscus. His diagnosis was osteoarthritis of the left knee with medial meniscal tear which was acutely aggravated by Petitioner's recent trauma, the slip and fall of March 3, 2014. Petitioner was given medication and advised to lose weight. He was given an injection to his knee. Holland at 20; Petitioner's Exhibit 4 at 4, 6, 7, 15, 17; Petitioner's Exhibit 4 at exhibit 2.

Thereafter, Antonacci performed arthroscopic surgery because of the meniscus tear, December 18, 2014. Antonacci testified the surgery was related to the accident of March 3, 2014, the MRI showed the tear, which he saw during surgery, and Petitioner had failed conservative treatment. In April 2015, Petitioner testified, after physical therapy and work conditioning, he was released to work in a restricted capacity which he started April 27, 2015. Antonacci testified Petitioner was to work eight hours a day. Petitioner returned to Antonacci June 2, 2015, telling him work required him to do overtime and he could not handle getting in and out of his truck and had increased pain and instability. A work note with an eight hour limit was rewritten for Petitioner and he was started on medication. Petitioner testified he got better and better and continued working without restrictions and was able to do his job. He had no additional treatment on his left knee into November 2015. Petitioner's Exhibit 4 at 29, exhibit 2, 20, 22; Petitioner's Exhibit 3 (unpaginated); Holland at 24-25.

Petitioner submitted to an independent medical examination by Dr. Stephen Weiss on April 30, 2015. Weiss testified by evidence deposition. Weiss, 75 years old, testified that ten years ago he had a general orthopedic practice, but stopped actively treating patients when he turned 65. His curriculum vitae is empty of any dates whatsoever, providing no context to his credentials. He testified he is certified to perform AMA impairment ratings, but admitted he never use AMA impairment ratings in his clinical practice and stopped treating patients before the ratings were introduced in Illinois. Weiss also admitted his certification for AMA impairment ratings is not really a board certification. Respondent's Exhibit 1 at 5, 41.

Dr. Weiss examined Petitioner on April 30, 2015. He testified he did a report of his findings, reviewed records and took a history. Weiss noted his examination was regarding the impact of the March 3, 2014 injury. At the time of examination, Weiss noted, Petitioner had undergone a surgery on his left knee and returned to work with a 40 pound lifting restriction and allowed to work eight hours of a normal 12-14 hour day. Weiss agreed with the interpretation of Petitioner's MRI, presumably July 1, 2014, since he did not say. Weiss diagnosed Petitioner with preexisting osteoarthritis in his left knee and status/post partial medial meniscectomy secondary to incident in question. He believed Petitioner had reached MMI. He both said Petitioner could return full time to his regular duties and placed a restriction on Petitioner of limited kneeling and squatting to an infrequent basis. There is no indication Weiss knew what Petitioner's duties were. He believed the accident resulted in permanent physical impairment to Petitioner. Weiss testified the accident of March 3, 2014, was a causative factor of Petitioner's meniscal injury. Petitioner's need for the meniscectomy was the result of the accident. The restrictions Weiss placed on the Petitioner were permanent as of April 30, 2015. There is a curiosity in the testimony of Weiss. He testified he reviewed records in advance of his examination of Petitioner. Among them was "...an IME by Dr. Player...." That IME is not in the evidence submitted at trial, or the subject of any testimony by Petitioner. Respondent's Exhibit 1 at 7-9, exhibit 2, 31, 33-34, 11.

Petitioner testified that on November 25, 2015, he was at work and looking for equipment to load onto his truck about 5:00 a.m. The yard was dark, and he stepped into a pothole, fell over and landed on his left knee. He said he told his bosses. This time they sent him home. Petitioner said that after this fall, his knee was very bad. He made an appointment to see Dr. Antonacci. Holland at 25-26.

Antonacci testified Petitioner came to see him December 18, 2015. He examined Petitioner and provided a cortisone injection. By August 2016, Petitioner continued to be in pain, walked with a limp, had an injection of Synvisc, and had been referred to Dr. Robin Borcharat for work conditioning and evaluation. An MRI of July 15, 2016, indicated a degenerative tear of the posterior horn of the medial meniscus with changes of patella chondromalacia. Petitioner was not working. Antonacci testified he did not think arthroscopic meniscectomy would have any lasting benefit in light of the arthritic changes in the knee. He said Petitioner's arthritic condition was aggravated or accelerated by the fall of November 25, 2015. In his records. Antonacci said the "...second accident of November 25, 2015 also aggravated his arthritic condition to the point where he developed a degenerative tear of the meniscus." Petitioner testified he last worked December 2, 2015. He was told to go home and not come back until he was at 100%. Petitioner's Exhibit 3 (unpaginated); Petitioner's Exhibit 4 at exhibit 2, 23-26, 28; Holland at 27-28.

Dr. Weiss testified he again examined Petitioner June 7, 2016, and wrote a report. That report specifically indicates "Edward Holland was seen for an Independent Medical Examination on June 7, 2016 regarding the impact of an alleged March 3, 2014 work-related injury." Yet Weiss acknowledged Petitioner had a subsequent second injury in November 2015, falling and landing directly on his knee. Weiss's diagnosis of Petitioner after this examination is shrouded in obfuscation: "...he was status post medial meniscectomy, that he had a preexisting degenerative

joint disease or osteoarthritis of the knee or that he had suffered a contusion in the knee in the incident in question." The incident in question Weiss was referencing was clearly the March 3, 2014 fall. He never addressed the November 2015 injury. Neither party asked why. The specific questions Weiss was asked to answer were all directed to the March 3, 2014 fall. Weiss offered nothing on the question whether Petitioner could return to work after the November 2015 fall. He admitted he had not reviewed any medical records since May 2016. So, he was unaware of the meniscus tear in the left knee. Respondent's Exhibit 1 at 14-15, exhibit 3, 19, 20, 24.

Petitioner saw Dr. Antonacci August 15, 2016. At that time, Antonacci told Petitioner he was a candidate for partial knee replacement but had to lose 30 pounds before he would consider further surgery. Dr. Antonacci, in testimony and in his records, indicated Petitioner's weight placed him in an unsafe surgical category and petitioner understood the need to lose weight prior to any consideration for surgery. He testified if Petitioner does not lose the weight he will not do the surgery. He testified at the time of his evidence deposition, June 26, 2018, Petitioner would have to be reevaluated to determine whether or not a partial knee replacement or total knee replacement would be beneficial to him. Petitioner's Exhibit 4 at exhibit 2, 43, 31; Petitioner's Exhibit 3 (unpaginated).

Antonacci testified Petitioner's meniscus tear was identified on the July 2015 MRI and was acute. The accident in November 2015 aggravated Petitioner's arthritic condition to the point where he developed a degenerative tear of the meniscus. He said Petitioner is not at MMI and cannot return to work without restrictions. At trial, over two years since Antonacci told Petitioner he had to lose 30 pounds, Petitioner was nowhere near that weight loss. Petitioner's Exhibit 4 at 44, 45, 35; Holland at 34.

Conclusions of Law

15 WC 41079, date of accident March 3, 2014

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. The accident need not be the sole or principal cause as long as it was a causative factor in a claimant's condition of ill-being. Certified Testing v. Industrial Commission, 367 Ill. App. 3d 938, 944 (2006).

Petitioner's condition as a result of the fall on March 3, 2014, was osteoarthritis of the left knee with meniscal tear which was acutely aggravated by the slip and fall as stated by Dr. Antonacci. Dr. Weiss seems to agree. Petitioner's Exhibit 4 at 15-17; Respondent's Exhibit 1 at exhibit 2, 31-32. Relying on such medical testimony, I find as a conclusion of law, Petitioner's current condition of ill-being causally related to the accident of March 3, 2014.

Disputed issue **J** is were the medical services that were provided to Petitioner reasonable and necessary; and has Respondent paid all appropriate charges for reasonable and necessary medical

services. An employer is liable for all necessary medical services and all necessary medical and hospital services thereafter incurred that are reasonably required to cure or relieve one from the effects of the accidental injury. 820 ILCS 305/8(a).

Causation having been found, a review of the medical records of Advocate Occupational Health, Dr. Victor Antonacci and OrthoIllinois, and Forest City Diagnostic Imaging, appear to reflect diagnosis of Petitioner's condition and attempts to relieve his symptoms or cure his condition. There is no evidence the medical services were unusual or not customary treatment based on Petitioner's complaints and history. Treatment was conservative until it failed.

I find as a conclusion of law, the medical services provided by Advocate Occupational Health, Dr. Victor Antonacci and OrthoIllinois, and Forest City Diagnostic Imaging from June 19, 2014, to June 2, 2015, to be reasonable and necessary. Respondent shall pay for those services, if previously unpaid and not written off, in accordance with the fee schedule. Petitioner's Exhibit 5 purports to be a bill list. It is a collection of disparate documents without context or understandable content. Several pages have large "X's" through them without explanation. These documents include self described "Health Insurance Claim Forms" which are neither bills nor proof of medical service. There is no evidence Rockford Orthopedic Services are associated with Petitioner. I give this exhibit no weight at all. I note Respondent has asked for no credits.

Disputed issue **K** is, is Petitioner entitled to any prospective medical care. Petitioner testified that on June 2, 2015, when he visited Dr. Antonacci, Antonacci said he could go back to work without restrictions. Petitioner continued working. He testified he was getting better and better and was able to do his job. He had no additional treatment after June 2015 for this injury. There is no evidence, at this point, Antonacci was proposing any prospective medical care. Dr. Weiss testified when he examined Petitioner in April 2015, he was at MMI for this injury.

I find as a conclusion of law, Petitioner is not entitled to prospective medical care for the injury of March 3, 2014.

15 WC 41080, date of accident November 25, 2015

Disputed issue **F** is, is Petitioner's current condition of ill-being causally related to the injury. Petitioner's condition as a result of the fall on November 25, 2015, was osteoarthritis of the left knee aggravated by the fall to the point where he developed a degenerative tear of the meniscus as stated by Dr. Antonacci. Dr. Weiss offered nothing on this injury. Relying on the testimony and records of Dr. Antonacci, I find as a conclusion of law Petitioner's current condition of ill-being causally related to the accident of November 25, 2015.

Disputed issue **J** is were the medical services that were provided to Petitioner reasonable and necessary; and has Respondent paid all appropriate charges for reasonable and necessary medical services. Causation having been found, I find as a conclusion of law the medical services

provided by Dr. Antonacci and OrthoIllinois, and any associated diagnostic testing from November 25, 2015, to November 14, 2018, to be reasonable and necessary. Respondent shall pay for these services, if previously unpaid and not written off according to the fee schedule. The comments in 15 WC 41079 as to Petitioner's Exhibit 5 apply equally here. Again, I note Respondent asks for no credits.

Disputed issue **K** is, is Petitioner entitled to any prospective medical care. At hearing the Petitioner suggested the primary dispute is really whether the recommended knee replacement surgery is causally related to either accident or both accidents. The Request for Hearing forms place total left knee replacement surgery at issue. Holland at 9; Arbitrator's Exhibit 1; Arbitrator's Exhibit 2.

Petitioner testified Dr. Antonacci, in August 2016, recommended a partial knee replacement but he would have to lose about 30 pounds. Dr. Antonacci's testimony was not so unequivocal. He testified he told Petitioner "...he *possibly might* be a candidate for a partial knee replacement but that he had to lose *at least* 30 pounds before we would *consider* any surgery." Antonacci testified that Petitioner's weight is keeping him from having even a partial knee replacement, and if petitioner does not lose the weight, Antonacci will not do the surgery. However, with the passage of time, such surgery is not clearly currently recommended. Antonacci testified "...at this time [June 26, 2018], you know, he would have to be re-evaluated to determine whether or not a partial knee replacement or a total knee replacement would be of beneficial[sic]to him." Holland at 32-33; Petitioner's exhibit 4 at 27 (emphasis added), 43, 31.

Two years after being told to lose weight, Petitioner is nowhere near the weight loss recommended prior to consideration for knee surgery. Petitioner is either unable or unwilling to put himself in line for surgery.

I find as a conclusion of law Petitioner is not entitled to knee replacement surgery. Dr. Antonacci was equivocal about whether Petitioner was a candidate. He now says a reevaluation is necessary on the whole issue of knee replacement. In any event, Petitioner has made the issue moot by his failure to lose the weight required for any surgery.

Dispute issue **L** is, what temporary benefits are in dispute. Here it is temporary total disability. Arbitrator's exhibit 2. To be entitled to a temporary total disability award under the Act, an injured worker must prove not only he did not work but he was unable to work. Such award exists from the time the injury incapacitates him from work until such time as he is recovered or restored as the permanent character of the injury will permit.

Here, Petitioner testified the last day he worked after he fell November 25, 2015, was December 2, 2015. Dr. Antonacci testified as of June 26, 2018, Petitioner was not at MMI and could not return to work without restrictions. Petitioner testified he was told by Respondent to go home and not come back until he was at 100 percent. Antonacci's testimony as well as Petitioner's is unrebutted. Weiss offered no opinions on the November 25, 2015, fall or Petitioner's off work status.

I find as a conclusion of law Petitioner is not recovered or restored and is still in need of medical care, though no prospective care is currently proposed based on the passage of time and weight of the Petitioner. I find Petitioner entitled to temporary total disability benefits from December 3, 2015, through November 14, 2018, at $956.00 per week.

Arbitrator

12/14/18

Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BYRON KAWA,

Petitioner,

vs. NO: 07 WC 23805

FORD MOTOR COMPANY,

Respondent.

20IWCC0253

DECISION AND OPINION ON REMAND

This matter now comes before the Commission on remand from the Circuit Court of Cook County. This matter has been the subject of previous remands from the Illinois Appellate Court and the circuit court. A history of these proceedings useful to the understanding of this Decision and Opinion follows.

I. PROCEDURAL BACKGROUND

The parties proceeded to a hearing pursuant to section 19(b) of the Illinois Workers' Compensation Act (Act) on October 5, 2009. An arbitration decision was filed on October 26, 2010 followed by appeals to the circuit court and appellate court with several remands back to the Commission. In a comprehensive decision, the initial phase of these proceedings was summarized by the appellate court as follows:

> "The claimant, Bryon Kawa, was employed as a launch engineer for the employer, Ford Motor Co., when he was involved in a job-related vehicle accident. As a result of the accident, the claimant underwent treatments for injuries to his right shoulder, right knee, and low back, and the claimant has experienced continuous shoulder, back, and knee pain since the date of the accident. After a hearing pursuant to section 19(b) of the Workers' Compensation Act (the Act) (820 ILCS 305/19(b) (West 2010)), the arbitrator found that the claimant engaged in an injurious practice, which both imperiled

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and retarded his recovery, by declining to participate in a multidisciplinary pain management program that included psychological treatments. The arbitrator further found that, due to the claimant's failure to participate in the multidisciplinary pain management program, he failed to prove that his conditions of ill-being were causally related to the work accident and found that he was at maximum medical improvement (MMI) as of February 25, 2008, the day his treating physician recommended the multidisciplinary pain management program. The arbitrator also found that 'any and all treatment after February 25, 2008, was and is neither necessary nor reasonable unless and until [the claimant] fully complies with the prescription of participation in a multidisciplinary pain management program with strong psychological elements.' The arbitrator denied temporary total disability (TTD) benefits after June 4, 2008, and found that the claimant was not entitled to any further TTD benefits until he completed the multidisciplinary pain management program. The arbitrator also denied vocational rehabilitation and maintenance benefits and denied the claimant's request for penalties and attorney fees.

The claimant appealed the arbitrator's decision to the Commission. The Commission affirmed and adopted the arbitrator's decision, except that the Commission found that the claimant did not engage in an injurious practice by declining to participate in the multidisciplinary pain management program. The Commission found, however, that the claimant had reached MMI because he 'chose not to avail himself of further treatment.' The claimant appealed the Commission's decision to the circuit court, and the circuit court entered a judgment confirming the Commission's decision." *Kawa v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 120469WC, ¶¶ 1-2.

Petitioner, the claimant, appealed. On February 4, 2013, the appellate court affirmed in part and reversed in part. *Id.* ¶ 140. The reversals are the most pertinent to this Decision and Opinion.[1] The appellate court reversed on the issue of causation, reasoning that "[r]egardless of whether the claimant's complaints of pain on and after February 25, 2008, are based on physical findings, psychological conditions, or a combination of the two, the undisputed evidence establishes that the onset of the claimant's conditions began no sooner than his work-related accident." *Id.* ¶ 87.

The appellate court also reversed the finding that Petitioner reached MMI as of February 25, 2008. The court concluded that Respondent failed to prove that the recommended multidisciplinary pain management program was either reasonably essential to promote Petitioner's recovery or that his refusal to attend that program was in bad faith or outside the bounds of reason. *Id.* ¶ 104. The court added that "[o]n and after February 25, 2008, all of the medical experts agreed that the claimant suffered from work-related conditions of ill-being, whether psychological, physical, or a combination of both." *Id.* ¶ 105.

[1] The appellate court affirmed the Commission on the issues of penalties and attorney fees (*id.* ¶¶ 126-28), as well as the calculation of the average weekly wage. *Id.* ¶¶ 133-37. Neither issue is presented in this remand.

20IWCC0253

For similar reasons, the *Kawa* court reversed on the issue of temporary total disability (TTD) benefits. Respondent failed to prove that the recommended multi-disciplinary pain management program was either reasonably essential to promote Petitioner's recovery or that his refusal to attend that program was in bad faith or outside the bounds of reason. *Id.* ¶ 113. Accordingly, Petitioner's refusal could not be a basis for denying TTD benefits. *Id.* Furthermore, the recommended program was the only multidisciplinary pain management program refused by Petitioner. *Id.* The court further rejected an alternative finding based on an MMI date of June 4, 2008 and remanded for further consideration of the issue. *Id.* ¶ 114.

The same basic concerns further caused the appellate court to reverse the findings that denied the claimant's medical care after February 25, 2008. *Id.* ¶ 117. Although the court gave several examples in which the denial of medical care was against the manifest weight of the evidence (*id.* ¶ 123), the court remanded for a consideration of all of Petitioner's medical expenses. *Id.* ¶ 124.

In addition, the *Kawa* court reversed the findings that vocational rehabilitation would be futile because Petitioner believed he could not work and that Petitioner was not entitled to vocational rehabilitation and maintenance benefits unless and until he elected to participate in and successfully complete a multidisciplinary pain management program with strong psychological elements. The appellate court remanded for further proceedings on the issue. *Id.* ¶ 131.

On November 3, 2014, the Commission issued its first Decision and Opinion on Remand. *Kawa v. Ford Motor Co.*, 14 IWCC 941. Following a brief recitation of facts, the Commission determined there was no evidence that there had been any change in Petitioner's symptoms from February 25, 2008 through the arbitration hearing date and thus TTD benefits should have remained payable through this latter date. The Commission also concluded that "[t]he Appellate Court effectively found that all medical expenses related to Petitioner's neck, chest, right shoulder, low back and right knee injuries subsequent to February 25, 2008 were reasonable and necessary" and found Respondent liable to pay them. The Commission further concluded that it was unclear when or if Petitioner completed the anesthesiology-based pain management program which was the alternate to the program Petitioner had refused. Accordingly, the Commission remanded the case to the Arbitrator for a determination on maintenance and rehabilitation issues.

Respondent sought administrative review of the Commission's Decision and Opinion on Remand in the circuit court, arguing that the Commission: (a) failed to make any additional findings on MMI; (b) erred in interpreting the appellate court opinion as mandating an award of TTD benefits through the arbitration hearing date; and (c) failed to include findings of fact in support of the award of medical expenses subsequent to February 25, 2008.

On July 1, 2015, following oral arguments by the parties, the circuit court entered an order remanding the matter to the Commission "for additional findings and determinations, consistent with the transcript of argument before the court." A review of the transcript discloses that the parties and the court initially discussed whether jurisdiction was proper in the circuit court, given that the matter had been remanded by the appellate court. After the court determined it had jurisdiction, Respondent's counsel then presented the crux of the matter as

being whether the Commission made the findings and determined the issues required by the appellate court. Respondent's counsel mentioned that the appellate court asked the Commission to determine the issues of MMI, TTD benefits, and medical expenses. The circuit court was concerned that the Commission's decision lacked the findings of fact necessary to assess whether its determinations were against the manifest weight of the evidence. The court observed: "[S]tructurally if they simply do the findings of fact, tie it to the conclusion that they make, it will be easier for all three of us if – even though I don't practice, all three of us as lawyers will be able to follow the footprints. And I'm happy to affirm the decision as long as I know how they got there."

On November 16, 2018, the Commission issued its second Decision and Opinion on Remand in accordance with the circuit court's order. *Kawa v. Ford Motor Co.*, 18 IWCC 704. Following a different, yet still brief recitation of facts, the Commission concluded in part as follows:

> "Subsequent to February 2008, Petitioner continued treating conservatively, culminating in chiropractic treatment and work hardening in the summer of 2009. On August 13, 2009, after reviewing a July 22, 2009 FCE report, Petitioner's treating physician, Dr. Koh, opined that Petitioner was at or near MMI. Although Respondent's physician, Dr. Bare, found MMI on June 17, 2009, medical records indicate that Petitioner was still receiving beneficial medical care into July of 2009. The Commission finds the opinion of Dr. Koh to be more persuasive, and thus the Commission terminates TTD benefits as of August 13, 2009, at a rate of $776.16 per week."

The Commission also concluded again that the appellate court found that all medical expenses subsequent to February 25, 2008 were reasonable and necessary. The Commission added: "Even though the Commission finds MMI as of August 13, 2009, this does not necessarily terminate additional medical expenses, as stated above, Petitioner was ordered to return for follow up with Dr. Koh after his MMI designation." The Commission further concluded that Petitioner was entitled to maintenance benefits beginning on August 14, 2009 and continuing "until Petitioner's vocational rehabilitation is completed or terminated for any valid legal reason."

Respondent again sought administrative review of the Commission's Decision and Opinion on Remand in the circuit court, arguing that the Commission: (a) failed to make an independent determination of the issues of vocational rehabilitation and maintenance benefits; (b) exceeded its authority by awarding maintenance benefits beyond the date of the arbitration hearing; and (c) failed to provide an appropriate factual basis for its award of medical benefits.

On October 4, 2019, following briefing and argument, the circuit court issued an order that the Commission's Decision and Opinion on Remand of November 16, 2018 be "set aside" on the ground that the commission failed to provide sufficient factual findings in support of its conclusions. The circuit court remanded the matter to the Commission for further proceedings, directing the Commission make findings of fact and independent determinations as to the following issues: (a) MMI; (b) TTD benefits; (c) medical expenses; (d) vocational rehabilitation; and (e) maintenance benefits.

II. FINDINGS OF FACT

The Commission hereby incorporates by reference the findings of fact contained in the arbitration decision to the extent it does not conflict with the Illinois Appellate Court's opinion dated June 3, 2013. The Commission also incorporates by reference the Illinois Appellate Court's opinion, which delineates the relevant facts and analysis, attached hereto and made a part hereof. The Commission's incorporation of the Illinois Appellate Court's opinion specifically includes but is not limited to the facts stated in paragraphs 1 through 67 of the opinion. See *Kawa*, 2012 IL App (1st) 120469WC, ¶¶ 1-67. Any additional findings of fact in this Decision and Order on Remand will be specifically identified in the discussion of particular issues.

III. CONCLUSIONS OF LAW

The circuit court has directed the Commission to make independent determinations as to the following issues: (a) MMI; (b) TTD benefits; (c) medical expenses; (d) vocational rehabilitation; and (e) maintenance benefits. The Commission addresses each issue in turn.

A. Maximum Medical Improvement (MMI)

The Commission first turns to determine the date upon which Petitioner reached MMI, as this determination affects the remaining issues in this case. MMI does not necessarily mean full recovery from an injury — it means the point at which the employee's condition stabilizes or the employee has recovered as far as the character of the injury will permit. See, *e.g.*, *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 177 (2000). The factors to be considered in determining whether a claimant has reached MMI include a release to return to work, with restrictions or otherwise, and medical testimony or evidence concerning claimant's injury, the extent thereof, the prognosis, and whether the injury has stabilized. *Id.* at 178.

In 2018, the Commission found Petitioner reached MMI as of August 13, 2009. *Kawa*, 18 IWCC 704. In the most recent appeal before the circuit court, Respondent acknowledged in its brief that "[t]he five-page Commission decision dated November 16, 2018, did set forth a factual explanation for the determination of a date for Maximum Medical Improvement ***." Indeed, Respondent's brief in the circuit court raised no substantive argument against the Commission's conclusion that Petitioner reached MMI as of August 13, 2009. Nevertheless, the circuit court "set aside" the Commission's November 16, 2018 order and has required a determination of the issue, perhaps because the factual support for the determination of MMI appeared in the Commission's discussion of TTD benefits. Accordingly, the Commission will revisit and elaborate on the question.

As previously noted, the appellate court concluded that finding Petitioner had reached MMI in February 2008 was against the manifest weight of the evidence. *Kawa*, 2012 IL App (1st) 120469WC, ¶ 104. The appellate court emphasized that "[o]n and after February 25, 2008, all of the medical experts agreed that the claimant suffered from work-related conditions of ill-being, whether psychological, physical, or a combination of both." *Id.* ¶ 105. The appellate court also rejected an alternate MMI date of June 2008, noting that Respondent's medical expert,

20IWCC0253

Dr. Bare, concluded on June 9, 2008 that Petitioner was not at MMI and later admitted that Petitioner's arthroscopic knee surgery performed by Dr. Koh (Petitioner's treating surgeon) on October 27, 2008 was reasonable. *Id.* ¶ 108.

However, during the period from February 25, 2008 through August 13, 2009, Petitioner's condition had improved for a number of reasons. On March 12, 2008, Dr. Koh wrote that he believed that the claimant was improving and recommended continued physical therapy. *Id.* ¶ 33. Dr. Koh stated that he preferred a multidisciplinary program. *Id.* ¶ 30. Nevertheless, he also wrote that while the benefit of the recommended multidisciplinary pain management program was high, if the claimant was not willing to participate, an alternative pain management program would be reasonable to consider. *Id.* ¶ 31. Dr. Koh referred the claimant to a pain management program at St. Margaret Mercy Hospital in northwest Indiana. *Id.* ¶ 33. This program was closer to Petitioner's home, thereby satisfying one of Petitioner's objections to the multidisciplinary program originally recommended by Respondent's medical examiner, Dr. Rhode. See *id.* ¶¶ 21, 29, 33. Petitioner first went to St. Margaret Mercy for pain management on September 18, 2008. *Id.* ¶ 44. At St. Margaret Mercy, Petitioner was treated by Dr. Kanakamedala. *Id.*

On October 27, 2008, Dr. Koh performed arthroscopic surgery on Petitioner's right knee. *Id.* ¶ 46. At that time, Petitioner was receiving physical therapy for his knee, back, and shoulder three times per week. *Id.*

In January 2009, Dr. Kanakamedala also referred Petitioner to a chiropractor; at first, Petitioner had chiropractic sessions three times per week but at the time of the hearing, she was treating him two times per month. *Id.* ¶ 47. On April 2, 2009, Dr. Kanakamedala reported that the Petitioner's pain was being managed with medications that reduced his pain by 70%. *Id.* ¶ 53. In his reevaluation report dated May 29, 2009, Dr. Kanakamedala noted that Petitioner reported that his pain was reduced by 40% with medications. *Id.*

On May 21, 2009, Petitioner was seen by Dr. Koh, who noted in relevant part:

> "[Petitioner] has had an extensive and prolonged course of physical therapy for his shoulder and knee. Over the last 7 months since his knee arthroscopy, he has underwent physical therapy. His therapist has indicated to me that he has plateaued and I feel that his improvement is quite minimal since his last visit. * * * My recommendation at this time is for a functional capacity evaluation to work hardening followed by repeat FCF to the functional capacity evaluation. I spent an extensive amount of time expressing to him the fact that I was hoping that we could do better, that he would have a better end result, but I think that given the amount of damage that he has, that we have plateaued with the medical treatments that are available to measure t [sic] this point in time ***." Petitioner's Exhibit 31.

Petitioner underwent the functional capacity evaluation on June 4, 2009, followed by a six-week work hardening program that, in conjunction with physical therapy and chiropractic treatment, improved Petitioner's strength and range of motion. *Id.* ¶ 60. During this period, Dr.

Kanakamedala further recommended that Petitioner use a TENS unit on his shoulder and back. *Id.* ¶ 62.

In a letter dated June 17, 2009, Dr. Bare stated that the Petitioner was at MMI. *Kawa*, 2012 IL App (1st) 120469WC, ¶ 63. Two months later, perhaps most important, "[i]n a report dated August 13, 2009, Dr. Koh wrote that he believed that the claimant was at MMI and that he had permanent restrictions with respect to his right shoulder and his ability to stand, stoop, squat, and kneel." *Id.* ¶ 66.

In sum, over the course of approximately 13 months of treatment, ranging from physical therapy to chiropractic sessions to arthroscopic surgery, the situation changed from one in which both Drs. Bare and Koh did not believe Petitioner had reached MMI to one in which both doctors concluded he had reached MMI.

In 2018, the Commission found the opinion of Dr. Koh to be more persuasive than that of Dr. Bare. Although the circuit court "set aside" the Commission's 2018 Decision and Opinion on Remand, the Commission again concludes that Dr. Koh's opinion is more persuasive.

The record indicates that Petitioner's course of treatment has been a key subject of debate. As noted above, Dr. Koh initially preferred a multidisciplinary program. Indeed, on May 4, 2009, he testified that there were psychosocial elements to Petitioner's complaints, and he believed that there would be value to addressing those elements. *Id.* ¶¶ 54, 57. In a letter dated June 17, 2009, Dr. Bare opined that a multidisciplinary pain management program was "necessary," at least in the sense that Petitioner would likely require medication indefinitely without such a program, but ultimately concluded Petitioner was at MMI. *Id.* ¶ 63. Despite this debate, when Petitioner refused the recommended multidisciplinary program, Dr. Koh believed an alternative pain management program would be reasonable to consider. *Id.* ¶ 31. Dr. Koh, not Respondent, referred the claimant to St. Margaret Mercy. See *id.* ¶ 33.

Julie Bose, Respondent's vocational rehabilitation consultant, had doubts about the anesthesiology-based program at St. Margaret Mercy because physicians who had evaluated Petitioner believed that there was "a psychological overlay," but conceded that the type of approach St. Margaret Mercy provided could have some positive effect. *Id.* ¶ 33. Yet Bose testified that the recommended multidisciplinary program likely would be unsuccessful due to Petitioner's lack of confidence in the program. *Id.* ¶ 84. From Dr. Koh's perspective, having recommended an alternative pain management program, and Bose's perspective, anticipating that the multidisciplinary program would not have been successful given Petitioner's objections to it, the evidence bears out that the treatment recommended by Dr. Koh was effective to ameliorate Petitioner from symptoms of his conditions post-accident.

Following the extensive course of treatments described above, Dr. Koh concluded that Petitioner reached MMI on August 13, 2009. Dr. Koh imposed work restrictions based on a valid functional capacity evaluation after concluding that Petitioner's condition had plateaued. Petitioner's Exhibit 31. After listing these restrictions in detail, Dr. Koh noted that "[t]hese restrictions are permanent." *Id.* Nevertheless, Dr. Koh also administered corticosteroid injections to Petitioner's right shoulder and knee, "[d]ue to the continued nature of the pain and

20 IWCC0253

discomfort around his shoulder and his knee ***." *Id.* Dr. Koh's treatment was consistent with Dr. Bare's opinion that a Petitioner would likely require medication indefinitely after reaching MMI. See *Kawa*, 2012 IL App (1st) 120469WC, ¶ 63. In sum, the record indicates that Petitioner had not fully recovered, but his condition had stabilized to the point that permanent restrictions were deemed appropriate and Petitioner was expected to continue a future regimen of pain and symptom management. Accordingly, the Commission again concludes that Petitioner reached MMI on August 13, 2009.

B. Temporary Total Disability Benefits (TTD)

The Commission next turns to consider the award of TTD benefits to Petitioner. As noted earlier, in 2018, the Commission terminated TTD benefits as of August 13, 2009. *Kawa*, 18 IWCC 704. Again, in the last round of appeal before the circuit court, Respondent acknowledged in its brief that the Commission's November 16, 2018 decision set forth a factual explanation for the determination of a date for MMI, "with a corresponding termination of TTD benefits as of that date." Respondent's brief in the circuit court raised no substantive argument against the Commission's conclusion terminating TTD benefits as of August 13, 2009. Nevertheless, the circuit court has "set aside" that decision and ordered the Commission to make another determination of the issue.

A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). The dispositive test is whether the claimant's condition has stabilized, *i.e.*, whether he has reached MMI. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118.

In this case, based upon our re-consideration of the record, the Commission has concluded that Petitioner reached MMI as of August 13, 2009. Accordingly, the Commission again concludes that Petitioner is eligible for TTD benefits through that date.

C. Medical Expenses

The appellate court originally remanded this matter to the Commission "to reconsider all of the claimant's medical expenses that he incurred on and after February 25, 2008." *Kawa*, 2012 IL App (1st) 120469WC, ¶ 124. The circuit court has similarly directed the Commission make findings of fact and independent determinations regarding Petitioner's medical expenses. The Commission now considers the medical expenses awarded to Petitioner.

Under the provisions of section 8(a) of the Act, an employer is required to pay for all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of an accidental injury sustained by an employee and arising out of and in the course of her employment. 820 ILCS 305/8(a) (West 2006). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v.*

20IWCC0253

Industrial Comm'n, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)). However, the employee is only entitled to recover for those medical expenses which are reasonable and causally related to her industrial accident. *Second Judicial District Elmhurst Memorial Hospital*, 323 Ill. App. 3d at 764 (citing *Zarley v. Industrial Comm'n*, 84 Ill. 2d 380, 389 (1981)). The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 258, 267 (2011). Paid bills are presumptively reasonable. See *id.* The question of whether medical treatment is causally related to a compensable injury is one of fact to be determined by the Commission. *Second Judicial District Elmhurst Memorial Hospital*, 323 Ill. App. 3d at 764 (citing *Zarley*, 84 Ill. 2d at 389-90).

In this case, Petitioner claimed total medical expenses of $99,013.92, subdivided into 16 categories as listed in an attachment to Arbitrator's Exhibit 1. The bills at issue were admitted into evidence as Petitioner's Exhibit 13. The Arbitrator ruled on each of these categories. The Commission now reviews each of these rulings specifically.

1. Avanti Limousines, Ltd.

This charge was incurred on June 9, 2008, for Petitioner to travel 5.5 hours for an independent medical examination. This bill was the first of two Respondent specifically disputed in the most recent circuit court proceedings. Travel expenses to cover the cost of transportation to and from treatment can be awarded under the same standard of reasonableness and necessity as medical expenses. *General Tire & Rubber Co. v. Industrial Comm'n,* 221 Ill. App. 3d 641, 651 (1991).

The Arbitrator declined to award payment of $450.44 ($403.69 following application of a mileage reimbursement) because there was no evidence to explain why a limousine was appropriate as opposed to some other mode of transportation. The record and the Arbitrator's findings of fact indicate Petitioner has had difficulty driving for years. See also *Kawa*, 2012 IL App (1st) 120469WC, ¶¶ 35 (Petitioner reported an inability to drive for more than 10 to 15 minutes in May 2008), 55 (Dr. Koh testified in May 2009 that Petitioner's driving was limited to no more than 15 to 20 minutes).

Moreover, Petitioner was cross-examined about this bill at the arbitration hearing. C. 239-41 (Transcript of proceedings, October 5, 2009, pp. 177-79).[2] Petitioner testified that he had used other transportation for medical visits, but Respondent gave him less than a week to ask relatives and friends to drive him the considerable distance from his home in Indiana. Petitioner also testified that Respondent did not respond to his inquiries as to whether Respondent would provide transportation to the medical examination it requested be conducted 5.5 hours away with Dr. Bare. The weight of the evidence establishes the reasonableness and necessity of this mode of transportation to the exclusion of others in this unique circumstance and awards the $403.69 charge from Avanti.

[2] "C." refers to the common law record on administrative review in the circuit court.

2. EMPI

These charges, totaling $3,020.99 and related to the purchase of a TENS unit, were disallowed by the Arbitrator on the premise that there was no evidence that its use had been prescribed. The appellate court ruled that this finding was against the manifest weight of the evidence, as one of Petitioner's physicians, Dr. Rittenburg, had directed issuing a home TENS unit if Petitioner tried TENS and found it effective. *Kawa*, 2012 IL App (1st) 120469WC, ¶ 119. Dr. Kanakamedala later recommended that Petitioner use a TENS unit on his shoulder and back. *Id.* ¶ 62. The Commission therefore concludes that the weight of the evidence supports finding these charges were reasonable and necessary.

3. Help for Home

This $17.00 charge for a shoulder pulley was awarded by the Arbitrator, based on the underlying condition of Petitioner's shoulder. As the appellate court observed, Petitioner injured his right shoulder in the work-related motor vehicle accident, was diagnosed with a high-grade A/C joint separation, underwent surgery on his shoulder, and had difficulty moving his shoulder after the surgery, requiring physical therapy. *Id.* ¶¶ 5-11. In May 2009, Dr. Koh ultimately testified that it was likely that the claimant would have some permanent limitations with respect to his right shoulder. *Id.* ¶ 57. Accordingly, the Commission agrees with the Arbitrator that the weight of the evidence establishes this $17.00 charge was reasonable and necessary.

4. Northwestern Memorial Hospital

Petitioner sought an award for two charges from Northwestern Memorial Hospital. The Arbitrator declined to make an award for the first $714.26 for MRI services because Respondent produced evidence it had paid the bill. As noted above, paid bills are presumptively reasonable. The Commission awards this charge, but also awards a credit to Respondent in the same amount.

The second bill, in the amount of $9,657.10, relating to Petitioner's right knee surgery, was disallowed by the Arbitrator. The appellate court found the denial of an award for this surgery was against the manifest weight of the evidence, observing that Respondent's medical examiner had found it reasonable. *Id.* ¶ 118. Accordingly, the Commission awards this charge.

5. Northwestern Medical Faculty Foundation

Petitioner sought an award of $4,823.00 for services rendered by Dr. Koh. As the Arbitrator observed, these bills were paid by Respondent through August 2008 and denied thereafter. The Arbitrator disallowed these charges based on the length of Petitioner's treatment and the opinion of Respondent's medical examiner. The paid bills are presumptively reasonable. The services rendered by Dr. Koh after August 2008 through April 13, 2009 are of a similar nature, relating to and following up on the right knee surgery deemed reasonable by Respondent's medical examiner. See Petitioner's Exhibit 13. Accordingly, the Commission awards these charges.

20IWCC0253

6. North Shore University Health

As the Arbitrator found, these bills, totaling $463.00, relate to office visits with Dr. Koh in March and May 2009. The Arbitrator declined to award these charges for the same reason he disallowed the charges from Northwestern Medical Faculty Foundation. The Commission has awarded those charges and, for the same reasons, awards these charges.

7. St. Margaret Mercy Hospital

The Arbitrator declined to award this $1,657.00 expense based on the Arbitrator's conclusion that the program was unreasonable and unnecessary. However, the appellate court ruled that the denial of medical expenses for treatments at St. Margaret Mercy was against the manifest weight of the evidence. *Kawa*, 2012 IL App (1st) 120469WC ¶¶ 120, 123. Accordingly, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary and awards payment of this bill.

8. Pain Management Specialists

As the Arbitrator found, this $1,120.00 charge relates to the treatment provided by Dr. Kanakamedala beginning on September 18, 2008. See Petitioner's Exhibit 13. The Arbitrator declined to award this charge because St. Margaret Mercy did not offer a multidisciplinary pain management program. However, as noted above, when Petitioner refused the recommended multidisciplinary program, Dr. Koh believed an alternative pain management program would be reasonable and referred Petitioner to St. Margaret Mercy. *Kawa*, 2012 IL App (1st) 120469WC, ¶¶ 31, 33. By April 2009, this treatment had significantly reduced Petitioner's pain. See *id.* ¶ 53. The appellate court relied upon the benefits of Dr. Kanakamedala's treatment in finding the denial of medical expenses through St. Margaret Mercy to be against the manifest weight of the evidence. *Id.* ¶ 123. The Commission observes that the final billed visit with Dr. Kanakamedala occurred on August 20, 2009, one week after Petitioner was found to have reached MMI by Dr. Koh. However, given the chronic nature of Petitioner's condition, the Commission sees no evidence warranting exclusion of this isolated charge, or establishing that this final visit to Dr. Kanakamedala was unreasonable or unnecessary. The Commission therefore concludes that the weight of the evidence supports award of these bills.

9. Rehabilitation Institute of Chicago

Petitioner sought an award of $406.00 for his visit to this provider in connection with the recommended multidisciplinary pain management plan he ultimately refused. The Arbitrator declined to award this charge after Respondent produced evidence the bill had been paid. See Respondent's Exhibit 17. As noted above, paid bills are presumptively reasonable. The Commission awards this charge, but also awards a credit to Respondent in the same amount.

10. Community Hospital

The single largest charge sought by Petitioner is the $45,816.76 for physical therapy provided through Community Hospital. Respondent did not object to this aspect of the award in

20 IWCC0253

the most recent circuit court proceedings. The Arbitrator awarded these charges through April 30, 2008, as the record showed Respondent stopped paying these expenses on that date. See Respondent's Exhibit 19. The Arbitrator also noted that a utilization review did not recommend certification for much of the physical therapy from May 31, 2007 through February 1, 2008, and none from February 1, 2008 and forward. See Respondent's Exhibit 7. On this last point, the Commission must consider a utilization review "along with all other evidence and in the same manner as all other evidence, in the determination of the reasonableness and necessity of the medical bills or treatment." 820 ILCS 305/8.7(i) (West 2006).

The Commission weighs Respondent's utilization review against the evidence that physical therapy contributed to Petitioner reaching MMI in this case. On May 28, 2008, Dr. Koh wrote that the claimant was making slow but steady progress in physical therapy. *Kawa*, 2012 IL App (1st) 120469WC, ¶ 35. A physical therapy report dated June 23, 2008, indicated that physical therapy treatments for the claimant's right shoulder had resulted in improvement in the areas of functional passive and active range of motion, assisted mobility, and functional strength. *Id.* ¶ 38. Dr. Kanakamedala prescribed additional physical therapy. *Id.* ¶ 44. Dr. Dasari recommended continued physical therapy. *Id.* ¶ 45. Drs. Kanakamedala and Dasari did so as part of the pain management program which helped Petitioner reach MMI. In his May 2009 deposition, Dr. Koh testified that physical therapy and pain management were important parts of the claimant's treatment. *Id.* ¶ 54. Dr. Koh believed Petitioner had developed "complex regional pain syndrome" in his shoulder and wanted to avoid Petitioner developing chronic pain syndrome with respect to his knee. He also testified that chronic pain syndrome "may actually be part of the reason why he has some continued discomfort around his knee" and that the usual treatment for chronic pain syndrome is medications and physical therapy. *Id.* ¶ 54. The final service date listed in these bills is May 27, 2009. Given this record, the weight of the evidence supports awarding the unpaid physical therapy charges through August 13, 2009.

11. Patawari Medical

The Arbitrator awarded this $20.00 charge because Petitioner testified that it was paid for X-rays Petitioner brought to a medical examination performed at Respondent's request. Petitioner's testimony was unrebutted, and the Commission agrees that payment for the out-of-pocket cost was properly awarded to Petitioner.

12. Quest Diagnostics

The Arbitrator found that this $177.70 bill was paid by Respondent with a $117.26 check dated October 19, 2008. See Respondent's Exhibit 18. Petitioner's counsel stated that he was unsure whether the check matched the bill but introduced no evidence to the contrary. Given that a paid bill is presumptively reasonable, the Commission awards this charge, but also awards a credit to Respondent in the same amount.

13. Sammons Preston

This $44.94 bill was for a dual action knee strap purchased on November 7, 2007. The record indicates that Petitioner continued to report right knee pain in October 2007. *Kawa*, 2012

20IWCC0253

IL App (1st) 120469WC, ¶ 19. Dr. Rhode, in a medical examination conducted on November 26, 2007, wrote that Petitioner appeared to exhibit significant pain referred to the medial parapatellar retinaculum. *Id.* ¶ 20. Accordingly, the Commission agrees with the Arbitrator's award of this expense to Petitioner.

14. Walgreen's

The charges, totaling $1,704.29, represent prescriptions for medications including Norco, Celebrex, and Lyrica. These medications related to Petitioner's treatment for his work-related injuries. See, *e.g.*, *id.* ¶ 53. In addition, Dr. Bare opined in June 2009 that Petitioner would likely require prescription medication indefinitely if Petitioner did not participate in a multidisciplinary program. *Id.* ¶ 63.

The Arbitrator accepted the representation of Respondent's counsel that the charges for 2007 were paid, which would be consistent with the time period during which Respondent paid Petitioner's medical expenses generally. The prescription charges for 2007 totaled $91.14. The Arbitrator found that the remaining prescriptions relate to 2009, which is not entirely accurate. Petitioner also submitted a $4.44 bill for a prescription of methylprednisolone from October 27, 2008, which is the same date as Petitioner's right knee arthroscopic surgery. See *id.* ¶ 46. This bill, as well as those charges incurred through September 4, 2009, indicate that Petitioner's charges were reduced due to his insurance plan, demonstrating the bills were paid at a negotiated rate. Given this record and the chronic nature of Petitioner's current condition, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary. Respondent will be awarded a credit of $91.14 for bills already paid.

15. Athletic & Therapeutic Institute

These bills, totaling $25,621.48, represent charges for evaluations and work hardening from June 4 through July 22, 2009. These services were prescribed by Dr. Koh. *Id.* ¶ 60. Petitioner testified that, over the course of the work hardening program, he gained some strength in his right arm and, with the help of physical therapy and chiropractic treatments, gained a little more range of motion. *Id.* These charges also include transportation expenses, albeit one-way expenses, from which it may be inferred Petitioner found alternate transportation for the other halves of the trips. Given that the services were prescribed and beneficial to Petitioner and his efforts to reach MMI, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary.

16. New Life Chiropractic Care

Lastly, there are charges totaling $3,347.41 for chiropractic services. The second of Respondent's two objections in the most recent circuit court proceedings was to the treatment of Petitioner's neck. Chiropractic services were prescribed by Drs. Kanakamedala and Dasari as part of the program offered through the St. Margaret Mercy pain management center. *Id.* ¶¶ 45, 47. The Arbitrator declined to award the charges on the ground that he found the St. Margaret Mercy program unreasonable and unnecessary. The appellate court ruled that the "denial of medical expenses for treatments at St. Margaret Mercy, *including chiropractic treatments*

recommended by Dr. Kanakamedala, is against the manifest weight of the evidence." (Emphasis added.) *Id.* ¶ 123.

Moreover, regarding the services provided related to Petitioner's neck, the Commission notes that Petitioner was questioned specifically about them during the arbitration hearing. C. 224-25 (Transcript of proceedings, October 5, 2009, p. 162-63). Petitioner testified without rebuttal that the chiropractic adjustments from the neck down most of the spine was intended to get him realigned because after the accident he was leaning to the left and tilted off kilter. He also testified that the neck treatment was intended to soften the tissue, which gained Petitioner more movement and range of motion. For all of the above reasons, the Commission concludes that the weight of the evidence supports finding these charges were reasonable and necessary.

In sum, the Commission finds Respondent liable for the disputed medical expenses. Respondent shall pay Petitioner directly for the out-of-pocket costs incurred for charges from Help for Home, Patawari Medical, Sammons Preston, and Walgreen's. Respondent shall pay the remaining unpaid charges pursuant to sections 8(a) and 8.2 of the Act and the fee schedule. Respondent is to hold Petitioner harmless for any claims for reimbursement from the remaining providers and shall provide payment information to Petitioner relative to any credit due.

D. Vocational Rehabilitation and Maintenance

The circuit court listed these issues separately in its most recent remand order but the appellate court remand treated them as related issues, a convention the Commission adopts here. See *Kawa*, 2012 IL App (1st) 120469WC, ¶ 131. The Commission originally adopted the Arbitrator's finding that vocational rehabilitation would be futile because Petitioner believed he could not work. The Commission also had adopted the Arbitrator's conclusion that Petitioner was not entitled to vocational rehabilitation and maintenance benefits until he successfully completed a multidisciplinary pain management program. *Id.* The appellate court reversed because the Commission had relied on the Arbitrator's erroneous view of the causation issue and remanded for further proceedings. *Id.*

In 2015, Respondent did not raise the issue of vocational rehabilitation and maintenance in the circuit court. Nonetheless, in 2019, Respondent argued to the circuit court that the Commission failed to make an independent determination of the issue and also improperly awarded benefits beyond the date of the arbitration hearing. Accordingly, the Commission will revisit and elaborate on the question.

Under section 8(a) of the Act, 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." 820 ILCS 305/8(a) (West 2006). "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

20IWCC0253

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). "[S]ection 8(a) does not place any burden upon employees to request vocational rehabilitation from their employer before maintenance may be awarded." *Id.* at 505. However, rehabilitation is neither mandatory for the employer nor appropriate if an injured employee does not intend, although capable, to return to work. *Euclid Beverage*, 2019 IL App (2d) 180090WC, ¶ 31 (citing *Schoon v. Industrial Comm'n*, 259 Ill. App. 3d 587, 594 (1994)).

In the circuit court, Petitioner argued that where the employer knowingly fails to prescribe an appropriate and necessary vocational rehabilitation program, the claimant is arguably entitled to maintenance benefits as a remedy. Petitioner cited what was then 50 Ill. Adm. Code 7110.10 (eff. June 22, 2006) (since recodified with minor changes at 50 Ill. Adm. Code 9110.10 (eff. Nov. 9, 2016)), which requires 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. Respondent relied upon *Euclid Beverage* to argue that rehabilitation (and by implication, maintenance) was not "appropriate" under the regulation because Petitioner did not intend to return to work. See *Euclid Beverage*, 2019 IL App (2d) 180090WC, ¶¶ 31-32.

Although Respondent did not specifically delineate the facts upon which it was relying in 2019, it generally argued to the circuit court that Petitioner's "trial testimony made it clear he would not consider any job without unreasonable and exhausting qualifications, limitations and accommodations." Respondent specifically referred to this testimony in its 2015 circuit court filings in the context of TTD benefits. Respondent quoted the following exchange from the transcript of the arbitration hearing:

> "[Respondent's counsel:] Is it fair to say that as you sit here today, you do not feel that you are capable of returning to work?
>
> [Petitioner:] Based on all the therapies I've gone through and my current restrictions, I would leave that up to based on that, that in the future I have to do something. I don't know with my restrictions what that something may be, but it's ***" C. 165 (Transcript of proceedings, October 5, 2009, p. 103).

Respondent also quoted a later exchange in which Respondent's counsel asked whether Petitioner would have accepted a supervisor's job in June 2008. Petitioner indicated that he would have, if Respondent had made a written offer and made accommodations based on his restrictions at the time. C. 181-84 (Transcript of proceedings, October 5, 2009, pp. 119-22).[3]

A review of the record thus discloses that it was *not* clear that Petitioner did not intend to return to work. Rather, the record discloses that Petitioner would have returned to work if

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[3] The Commission also notes that the issue of whether Petitioner would have accepted alternative employment in June 2008 must be viewed in light of the Commission's determination that Petitioner did not reach MMI until August 2009.

20IWCC0253

Respondent had offered him a job accommodating his medical restrictions. Moreover, reading the same record, the appellate court concluded that Respondent "never offered the claimant any job that fit within his medical restrictions or established that such work was available to him." *Kawa*, 2012 IL App (1st) 120469WC, ¶ 114.

Nevertheless, the evidence in this case establishes that Respondent knew Petitioner needed vocational rehabilitation and alternative employment. In June 2008, Respondent's counsel sent Petitioner a letter indicating that the employer had the ability to accommodate the claimant's work restrictions. *Id.* ¶ 36. In the same month, one of Respondent's supervisors met with Petitioner to discuss returning to work, although Petitioner indicated he was then physically unable to perform the job duties of the suggested position. *Id.* The supervisor testified she provided Petitioner with additional job listings the following month and weekly thereafter. See *id.* ¶ 40-41. Respondent terminated Petitioner's employment in July 2008, more than one year before Petitioner reached MMI. See *id.* ¶ 42.

In sum, the record establishes that Petitioner did not request vocational rehabilitation and was not in a prescribed vocational rehabilitation program. However, given the length of Petitioner's disability, the reason Petitioner was not in a prescribed program was twofold. First, Petitioner was still undergoing active medical treatment necessary to assist him in reaching MMI through August 13, 2009. Indeed, all of the physicians that examined Petitioner believed that he required medical treatment, they simply disagreed as to the appropriate modalities. Second, even if Petitioner been at MMI in June of 2008 and the months leading up to his termination from employment, Respondent failed to comply with the Commission's regulation requiring it to prepare a written assessment of the vocational rehabilitation required to return Petitioner to employment. The weight of the evidence does not establish that Petitioner was unwilling to return to work even when he had yet to reach MMI and complete medical treatment for all of his injuries. Accordingly, the Commission concludes that Petitioner was entitled to maintenance benefits through the arbitration hearing date of October 5, 2009, and to vocational rehabilitation.

The record is silent on the nature of the specific vocational rehabilitation appropriate for Petitioner, due in part to Respondent's noncompliance with the Commission's regulation. Although the circuit court's October 4, 2019 order does not specifically direct the Commission to remand this matter to the Arbitrator, this case remains a proceeding under sections 19(b) and 8(a) of the Act. Accordingly, the Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of maintenance and vocational rehabilitation, if any, or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's condition of ill-being at the time of the arbitration hearing was causally connected to his work accident on February 13, 2007.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner reached maximum medical improvement as of August 13, 2009.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $776.16 per week for a period of 129 and 6/7ths 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 pay Petitioner's reasonable and necessary medical bills of: Avanti Limousines, Ltd.; EMPI; Northwestern Memorial Hospital; Northwestern Medical Faculty Foundation; North Shore University Health; St. Margaret Mercy Hospital; Pain Management Specialists; Rehabilitation Institute of Chicago; Community Hospital; Quest Diagnostics; Athletic & Therapeutic Institute; and New Life Chiropractic Care, if previously unpaid and not written off, as listed in Petitioner's Exhibit 13, pursuant to the fee schedule and §§8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from the remaining providers and shall provide payment information to Petitioner relative to any credit due.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner for out-of-pocket medical expenses paid to Help for Home, Patawari Medical, Sammons Preston, and Walgreen's.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for payments of medical expenses already paid to Rehabilitation Institute of Chicago; Community Hospital; Quest Diagnostics; and Walgreen's.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to maintenance benefits of $776.16 per week for a period of 7 and 3/7ths weeks, that being the period from August 14, 2009 through the initial hearing date of October 5, 2009.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to receive vocational rehabilitation benefits.

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 this case be remanded to the Arbitrator for further proceedings consistent with this decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

20IWCC0253

expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

DATED: APR 28 2020
o: 03/05/20
BNF/kcb
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Barbara N. Flores

Marc Parker

Kathryn A. Doerries