ILLINOIS WORKERS' COMPENSATION COMMISSION

Illinois Workers' Compensation Commission, Insurance Compliance Division,	)	
Petitioner,	)	No. 11 INC 137
v.	)	19WC 20272
Adnan Grifat, Individually and As president of Top Class Moving, Inc. and 1st Class Moving, Inc.	)	
Respondent.	)	

ORDER

This matter, after oral request by the Petitioner, The Illinois Workers' Compensation Commission – Insurance Compliance Division, by and through its attorney, the Office of the Illinois Attorney General, is dismissed. The Office of the Attorney General has advised this Commission it no longer seeks to proceed in this matter against Respondents, as this matter has settled.

DEC 2 - 2019

L. Elizabeth Coppoletti

Commissioner L. Elizabeth Coppoletti

Dated: 11/21/19

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jack Lingenfelter,

Petitioner,

vs.

NO: 11 WC 30578

Cloverleaf Golf Course, Inc.,

19IWCC0652

Respondent.

DECISION ON REMAND

This matter coming before the Commission on an order from the Circuit Court of Madison County dated April 16, 2018; the Commission being fully apprised in the premises, reverses its prior Decision on Remand entered on April 24, 2017 as to the issue of concurrent employment pursuant to the directions of the circuit court order. The Commission further makes findings as to average weekly wage, temporary total disability benefits, and permanent partial disability benefits as directed by the Circuit Court.

Procedural History

This matter proceeded to arbitration on April 24, 2014 before Arbitrator Lindsay with the following issues in dispute: 1) employee/employer relationship, 2) accident, 3) causal relationship, 4) average weekly wage, 5) medical benefits, 6) temporary total disability benefits, 7) permanent disability benefits, 8) penalties and fees. Arbitrator Lindsay entered her decision on June 23, 2014 finding Petitioner not credible and further finding no employee/employer relationship existed, but even assuming such relationship, no accident occurred.

On May 20, 2015, the Commission entered its decision following Petitioner's timely appeal. The Commission affirmed the Arbitrator's finding as to Petitioner's credibility or lack thereof; no employee/employer relationship with additional analysis; and further found Petitioner was not concurrently employed at Bechtel Construction Company ("Bechtel").

On November 17, 2015, the Circuit Court of Madison County, the Honorable John B. Barberis, reversed the decision of the Commission on the issue of employee/employer relationship and remanded the matter to the Commission for a determination on all other issues. Both parties appealed.

On October 5, 2016, the Appellate Court, Fifth District, Workers' Compensation Commission Division, dismissed the appeals due to lack of jurisdiction as the Circuit Court's order was not final.

On April 24, 2017, the Commission entered its Decision on Remand and in accordance with the directive of the Circuit Court found an employee/employer relationship existed and determined the remaining issues. The Commission found Petitioner sustained an accident on June 26, 2011, but his current condition of ill-being is not causally related to his accident. The Commission awarded medical expenses in the amount of $3,597.00. The Commission found no concurrent employment consistent with its prior decision of May 20, 2015 and further found Petitioner failed to present sufficient evidence to establish his earnings as an employee of Respondent. As such, no benefits were awarded for temporary total or permanent partial disability benefits.

On April 16, 2018, the Circuit Court of Madison County, the Honorable Dennis Ruth, reversed the decision of the Commission on the issue of concurrent employment as a matter of law and further found Petitioner's average weekly wage from the concurrent employment at Bechtel to be $1,510.00. The Circuit Court remanded the matter to the Commission for a calculation of Petitioner's average weekly wage "and an appropriate determination of TTD and PPD benefits." *Circuit Court Decision dated April 16, 2018.*

Conclusions of Law

A. Concurrent Employment/Average Weekly Wage

Pursuant to the directions of the Circuit Court, the Commission reverses its prior Decision on Remand entered on April 24, 2017 as to the issue of concurrent employment and finds Petitioner was a concurrent employee of Bechtel and Respondent on June 26, 2011.

Pursuant to Section 10 of the Act, "When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation." *820 ILCS 305/10* (West 2013). The Commission previously found Petitioner failed to prove his earnings while employed by Respondent which finding the Circuit Court upheld. As such, the only earnings included in the calculation of Petitioner's average weekly wage are those from his concurrent employer, Bechtel. Pursuant to the Circuit Court's directive, Petitioner's average weekly wage while employed by Bechtel equals $1,510.00; this

yields a temporary total disability rate of $1,066.67 and permanent partial disability rate of $669.64.

B. Temporary Total Disability

Petitioner was off work due to his previous right eye injury at the time he sustained his June 26, 2011 left eye injury. Thereafter, he remained off work due to both injuries. On October 2, 2012, Dr. Chen, Petitioner's treating physician, provided testimony *via* evidence deposition. Dr. Chen testified Petitioner's left eye injury was stable (PX3, p. 17), and Petitioner was capable of returning to work regarding his left eye. PX3, p. 19. Dr. Chen's opinion is further supported by the opinions of Dr. Pernoud. On October 9, 2013, Dr. Pernoud provided testimony *via* evidence deposition. Dr. Pernoud testified Petitioner's vision in the left eye was measured at 20/25 minus a few letters. RX2, p. 8. Dr. Pernoud opined Petitioner was capable of returning to work. RX2, p. 14. The Commission finds Petitioner was temporarily totally disabled from June 27, 2011 through October 2, 2012, a period of 66-2/7 weeks.

C. Permanent Partial Disability Benefits

The Commission in its Decision on Remand dated April 24, 2017, p. 3 found Petitioner failed to prove a causal relationship between his left eye injury and his current condition of ill-being. The Circuit Court made no specific finding as to causation but remanded the matter for "an appropriate determination of PPD benefits."

Petitioner testified due to his vision he was unable to obtain an OSHA certification to return to work in the construction industry. T. 37-38. Petitioner testified, though, even without the left eye injury, he would be unable to return to work. T. 35-36. Petitioner testified he was able to drive in the daytime with some difficulty but was unable to drive at night. T. 38-39. Petitioner testified he is a golf fanatic and continues to play golf. T. 40-41. Petitioner testified he has difficulty with depth perception and continues to take medication to treat his left eye condition. T. 46-49.

Before the June 26, 2011 accident, Petitioner's left eye vision was measured at 20/20. Dr. Chen opined that without glasses Petitioner's vision is measured at 20/70 or 20/80. The best correction is measured at 20/40. PX3, p. 26. Based on Petitioner's testimony and Dr. Chen's records, the Commission finds Petitioner sustained permanent loss of vision in his left eye to the extent of 30%, 48.6 weeks.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,066.67 per week for a period of 66-2/7 weeks, representing June 27, 2011 through October 2, 2012, that being the period of temporary total incapacity for work pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the sum of $3,587.00 for reasonable, necessary and related medical expenses under §8(a) of the Act, subject to the Medical Fee Schedule under §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $669.64 per week for a period of 48.6 weeks, as provided in §8(e)13 of the Act, for the reason that the injuries sustained caused the permanent loss of vision of the left eye to the extent of 30%.

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

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: DEC 2 - 2019
LEC/maw
o06/04/19
43

Stephen J. Mathis

D. Douglas McCarthy

SPECIAL CONCURRENCE - DISSENT

I concur with the majority's decision on remand in all aspects other than its award of permanent partial disability benefits. I find no permanent partial disability benefits are owing. Therefore, I respectfully dissent.

The Commission in its Decision on Remand dated April 24, 2017 found Petitioner failed to prove a causal relationship between his left eye injury and his current condition of ill-being. I believe the evidence supports this finding.

Petitioner sustained a right eye injury on August 23, 2010 while working for Bechtel Construction Company. Petitioner was authorized off-work for the right injury from October 22, 2010 through the date of his left eye injury, June 26, 2011, and following. PX1; PX3, p. 22. Settlement Contracts were approved by the Commission on January 3, 2012 relating to the injury of August 23, 2010. The terms of the settlement agreement state, in part, "Respondent to pay to Petitioner the sum of $190,000.00 (plus satisfaction of Dr. Chen's charges subject to Fee Schedule) in final settlement of any and all claims resulting from the accident of August 23,

2010 and any aggravating incidents involving Petitioner's *eyes* to date of approval of the settlement." (emphasis added) RX9. Moreover, Dr. Chen, Petitioner's treating physician, authored a letter on February 14, 2014 relating all Petitioner's conditions, at that time, to his right eye- chronic keratoconjunctivitis. PX1. I would decline to award any permanent partial disability benefits.

L. Elizabeth Coppoletti

L. Elizabeth Coppoletti

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Harvey,

Petitioner,

vs. NO: 17 WC 33437

Nexus Employment Services, Inc.,

Respondent.

19IWCC0653

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice provided to all parties, the Commission, after considering the issues of accident, causal relationship, temporary total disability benefits and medical benefits and being advised of the facts and the law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof with supporting analysis. 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 (1980).

The Commission affirms the Arbitrator's finding Petitioner sustained accidental injuries arising out of and in the course of his employment on October 9, 2017. The Commission finds Petitioner's testimony credible and consistent with the testimonies of Ms. Sara Vandermolen and Mr. Alfredo Gomez.

Petitioner testified following his injury he reported the same to his supervisor, Mr. Gomez per company policy. T. 10. It was Petitioner's understanding Mr. Gomez would complete an accident report. T. 15. Moreover, it was Petitioner's understanding Mr. Gomez would provide the report to Ms. Vandermolen. T. 32, 41. Petitioner continued to attempt to

work, but as his pain increased, he sought medical treatment. T. 13. Petitioner informed Ms. Vandermolen regarding his doctor's appointment and his need to leave early, but Petitioner did not specifically advise of the work injury (T. 14) nor did Ms. Vandermolen ask about the injury. T. 46. Petitioner's failure to advise Ms. Vandermolen is certainly understandable given Petitioner followed company policy and advised his supervisor, Mr. Gomez, and it was Petitioner's belief Mr. Gomez would advise Ms. Vandermolen.

Petitioner testified prior to his doctor's appointment, Mr. Gomez approached him and advise him to tell his doctor the accident happened at home otherwise Petitioner would be fired. T. 16, 50. As such, when he initially sought treatment, Petitioner provided Dr. Weiss with an inaccurate history. PX1. Again, this is understandable given Petitioner was in fear of being terminated. Despite following the directive of his supervisor, Petitioner was nonetheless terminated. Petitioner then immediately corrected the inaccurate initial history provided to Dr. Weiss on his next visit of October 18, 2017. PX1. Thereafter, Petitioner consistently provided a history of injury while loading boxes.

Petitioner's testimony is supported by the testimonies of Mr. Gomez and Ms. Vandermolen. Mr. Gomez testified Petitioner complained of back pain when they were unloading pallets. T. 108. Such testimony is consistent with Petitioner's testimony regarding how the accident occurred. Furthermore, Mr. Gomez testified Ms. Vandermolen did not inquire as to the circumstances surrounding Petitioner's back problems. T. 111, 118. This testimony is completely inconsistent with the testimony of Ms. Vandermolen and not believable. Ms. Vandermolen testified once she was advised by Petitioner that his accident was work-related, she performed an investigation. As part of the investigation, she contacted Mr. Gomez who denied any conversation with Petitioner regarding a work injury. T. 85. Ms. Vandermolen was the office manager; she would certainly ask Petitioner's supervisor, Mr. Gomez, as to what transpired.

More importantly, Ms. Vandermolen testimony is wholly consistent with Petitioner's testimony. Ms. Vandermolen testified Petitioner presented a note to her regarding restrictions as to lifting. T. 82. Ms. Vandermolen advised Petitioner he could no longer work until she was able to speak with her supervisor. As such, she sent him home. T. 83. There was no discussion as to the cause of Petitioner's back problems. This is completely understandable as Petitioner mistakenly believed Mr. Gomez had informed Ms. Vandermolen of the injury, and Ms. Vandermolen having not been advised by Mr. Gomez of the injury had no reason to question Petitioner further.

Ms. Vandermolen testified after being informed by her supervisor no work was available (T. 91), she called Petitioner and advised him of his termination. T. 84. Petitioner then informed her, his back condition was work-related. *Id.* Such timeline is consistent with Petitioner's testimony. Petitioner testified he presented the doctor's note to Ms. Vandermolen who advised Petitioner he needed to go home until she spoke with her boss. T. 56. Petitioner testified Ms. Vandermolen called him on the phone later that day and informed him of his termination. T. 60.

Petitioner then immediately advised Ms. Vandermolen of that his back injury was work-related. *Id.*

Petitioner was injured at work. He informed his supervisor, Mr. Gomez who was to complete an accident report and advise Ms. Vandermolen. Mr. Gomez failed to complete the accident report and failed to inform Ms. Vandermolen regarding the accident. Further, Mr. Gomez told Petitioner to lie about the accident in an effort to protect his job. When Petitioner realized Mr. Gomez had provided bad advice and failed to inform Respondent of the accident, Petitioner immediately notified Ms. Vandermolen of the work accident and corrected his faulty history.

The Commission affirms all else.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's April 25, 2018 decision is affirmed with supporting analysis stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $360.00 per week for a period of 19 weeks, representing October 12, 2017 through February 21, 2018, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay $1,077.00 in reasonable, necessary and causally related medical expenses pursuant to §8(a) of the Act and subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for prospective medical care including, but not limited to, treatment recommended by Dr. Troy, pursuant to §8(a) of the Act, subject to the Medical Fee Schedule pursuant to §8.2 of the Act.

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 pursuant to §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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,000.00. 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: DEC 2 - 2019
LEC/maw
o05/01/19
43

L. Elizabeth Coppoletti

Stephen J. Mathis

D. Douglas McCarthy

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

HARVEY, DANIEL
Employee/Petitioner

Case# **17WC033437**

NEXUS EMPLOYMENT SERVICES INC
Employer/Respondent

19IWCC0653

On 4/25/2018, 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 1.98% 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:

5755 COSTA IVONE LLC
JORDAN BROWEN
6847 W CERMAK RD
BERWYN, IL 60402

4234 RIPES NELSON BAGGOT KALOBRATSO
MICHAEL R BAGGOT
650 E DEVON AVE SUITE 110
ITASCA, IL 60143

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)

DANIEL HARVEY
Employee/Petitioner

v.

NEXUS EMPLOYMENT SERVICES, INC.
Employer/Respondent

Case # 17 WC 33437

Consolidated cases: N/A

19IWCC0653

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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO, IL**, on **2/21/18**. 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. ☒ 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 _____

19IWCC0653

FINDINGS

On the date of accident, **October 9, 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 **$28,080.00**; the average weekly wage was **$540.00**.

On the date of accident, Petitioner was **27** 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 $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

Respondent shall pay reasonable and necessary medical services of **$1,077.00**, as provided in Sections 8(a) and 8.2 of the Act.

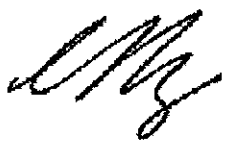
Respondent shall pay Petitioner temporary total disability benefits of **$360.00/week** for **19 weeks**, commencing **10/12/17** through **2/21/18**, as provided in Section 8(b) of the Act.

Respondent shall pay for and authorize the treatment recommendations as outlined by Dr. Troy, including any and all incidental care thereto.

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

4-25-18
Date

APR 25 2018

FINDINGS OF FACT

Petitioner, Daniel Harvey, was employed by Nexus Employment Solutions in October 2017. (T. at 8). Nexus is a staffing agency and Petitioner was assigned a position with TI Cold. (T. 9). Petitioner testified that he had been working for TI Cold for two and a half, almost three years, and worked as an operator or runner and used an electric pallet jack. Petitioner's job duties included loading and unloading pallets from trucks. *Id.*

Petitioner testified that he worked a "pretty much normal" day on October 9, 2017, until he was instructed to "build the trucks up after lunch." (T. 10). While lifting a box to stack onto a pallet, Petitioner testified that he felt a "rip" in his back. He reported the injury to his supervisor, Alfredo Gomez, but did not immediately seek medical attention. Petitioner was told to continue working since his shift ended at 1:30 p.m. *Id.* Petitioner testified that the box he lifted was between 80 and 90 pounds. He further testified that he lifted the box over his head to add another layer of boxes to the pallet. (T. 11).

On cross, Petitioner explained that he was stacking boxes of meat on the dock after lunch time. he said hi injury occurring on the dock, where half of it is receiving and the other half is shipping. He explained the Gomez unloads the incoming truck, which has shrink wrapped product on pallets. The pallet is unloaded off of the truck by Gomez and Petitioner unwraps and re-stacks the boxes, sorting by product. Petitioner then takes the new stacks and uses a hand jack to store the product where ever it needs to be stored in the facility. Petitioner said Gomez witnessed Petitioner scream and told him to continue to work and see how he felt.

Petitioner testified that the following day, Tuesday, October 10, 2017, he worked a full shift and scheduled a doctor's appointment for Thursday, October 12. Petitioner said he woke up that next day with pain the back and that his arm was numb.

Petitioner explained that his understanding of the procedure to report an injury, after being on assignment with TI Cold for over two years, was to tell a supervisor, who was responsible for filling out a report and informing the boss. (T. 15). Petitioner testified that Gomez, told him he was filling out the incident report on that following Monday. Petitioner further testified that Gomez told him that as long as he was cleared to work on the pallet jack, he could continue to work. Petitioner testified that he was told "if I told anybody, you know, that it happened there, I could lose my job because I was a temp." *Id.*

On Wednesday, October 11, 2017, Petitioner worked and did not ask to see a doctor. He said he ran pallets and stayed away from the area where he hurt himself. Petitioner testified he informed Sara that he was going to see a doctor. He did not tell Sara about the work accident because she did not ask. Petitioner testified that he still had back pain but was able to avoid lifting at work and performed other duties, such as running and wrapping pallets with the electric pallet jack. (T. 12-13). Petitioner testified he saw Gomez and asked whether the accident report was complete, and that Gomez yelled at him. Petitioner testified that Gomez later told him that an accident report had been completed.

On Thursday, October 12, 2017, Petitioner presented to work. Before leaving work early to see his physician, Petitioner testified that Gomez "caught me in the cooler" and showed him a piece of paper with words written to "tell the doctor that you were lifting a washer, you hurt your back." Petitioner testified that Gomez told him that he would be fired if he did not tell the doctor this history. (T. 16). Petitioner explained that he owned a mobile home and has a washer but that he was not responsible for its maintenance because he rents the washer from Aaron's. Petitioner said he did not get a chance to tell Sara about the conversation in the freezer. Petitioner recalled that the note was written in English and he testified that Gomez understands and speaks English.

Later that day, on October 12, 2017, Petitioner presented to Dr. Raymond Weiss. The history noted that since Monday Petitioner was complaining of pain following moving a washer and felt a pop in the right lower back and bilateral trapezius. The plan was for a blood work up, Flexeril, Medrol dose pack, moist heat, back bracing at work and no heavy lifting. Diagnosis was low back strain and strain of the trapezius muscle.

On Friday, October 13, 2017, Petitioner testified he gave his doctor note and gave it to Sara. Petitioner testified that Sara sent him home, explaining that there was not enough work to do and that he was asked to leave. On cross, Petitioner said he asked Sara to fill out an accident report but that he was told he was fired.

On Monday, October 16, 2017, Respondent's employee incident form was completed by Petitioner and Claudia Munoz, employee for Nexus. Rx2. Petitioner reported that his back and neck were injured. He indicated he was told to make the rest of the trucks and the boxes were 80 to 90 pounds and he felt something rip in his back. Petitioner had to keep working and worked until that Friday when he came in with a note and was told to go home and then fired. When asked what could have been done to prevent the injury, Petitioner wrote that it could have been prevented when he told them his back was injured and was told to keep breaking down the trucks. Petitioner listed his supervisor as Alfredo. On cross, Petitioner testified that Munoz would not let him write that he was asked to lie.

On October 18, 2017, Petitioner returned to Dr. Weiss. Px1. The history indicated that Petitioner was hurt at work originally but that his boss told him to tell Dr. Weiss that it occurred at home. He was lifting 80 to 90-pound boxes at work. He was fired after presenting a light duty note. Petitioner presented with right sided back pain shooting through the knee. On exam, there was pain with range of motion in the lumbar spine, negative straight leg raising, neurologically Petitioner was intact with sensation and motor upper and lower extremities. X-rays of the cervical spine showed straightening of the spine, likely due to muscular spasm and mild limited flexion movements but extension movements were adequate. The plan was to refer Petitioner to Dr. Troy. Diagnosis was unchanged. Petitioner was released with no heavy lifting.

On October 20, 2017, an accident report for TI Cold Storage was completed. Rx2. Petitioner related that he hurt his back on Monday, October 9, 2017 from re-stacking cases. He claimed he reported the injury to Gomez. On Friday, October 13, 2017, Alfredo Gomez told the office manager, Sara Vandermolen, that Petitioner had a doctor's note in that he was to be sent home due to his inability to do his job duties. The office manager then sent Petitioner home and told him she would call him later that day and speak with him. That evening when she spoke with Petitioner, he reported to her that he had hurt himself on Monday, October 9, 2017. On October 16, 2017, it was noted that the office manager spoke with Gomez who denied Petitioner reporting any injury to him on that day. The office manager concluded that there was no way to verify or deny what Petitioner was claiming was accurate since there were no other witnesses.

On November 14, 2017, Petitioner presented to Dr. Daniel Troy for evaluation. Px2. Petitioner presented with both neck and low back pain. he gave a history that while at work he was lifting boxes that weighed 80 to 90 pounds and that he had acute onset of pain. He reported this to his supervisor. He did not fill out a work injury report with the temporary staffing agency but told a supervisor at the facility where he was assigned to work. Petitioner's primary complaint was mainly right-sided neck in right-sided low back pain. Assessment was acute onset of right-sided neck and right-sided low back pain with intermittent complaints of pain and symptomology radiating to his upper extremities. Imaging was reviewed, and the doctor concluded it demonstrated normal views of the cervical and lumbar spine. The plan was for an MRI the lumbar spine, physical therapy and prescriptions for ibuprofen, Norco and tramadol. He was noted to be not currently working. Diagnosis was low back pain and cervicalgia.

On November 21, 2017, Petitioner returned to Dr. Weiss. Px1. Petitioner had seen Dr. Troy and MRIs were ordered along with therapy and prescriptions for medication. On exam there was pain with range of

motion in the cervical spine and pain with flexion of the lumbar spine. The plan was for medications and moist heat. Diagnosis was unchanged. Petitioner was released to work with no heavy lifting and was to follow up.

Today, Petitioner testified he feel is back is worse and that he cannot sit too long. He feels numbness from the waist down. He is currently not working.

Respondent had three witnesses testify on their behalf: Sara Vandermolen, Claudia Munoz, and Alfredo Gomez.

Vandermolen testified that she was employed directly by TI Cold in October of 2017. (T. 79). She testified that her job title was office manager, but that her duties included "[p]retty much everything" because a general manager was terminated, and an operations manager quit. (T. 80). Specifically, she was in charge of handling workers' compensation claims. She said she no longer worked there and that she was very unhappy there.

Vandermolen testified that she first became aware of Petitioner's back injury on Friday, October 13, 2017, when he came in with a doctor's note he gave her. She said he did not tell her he was injured at work at that time. She told him to wait upstairs. She later came upstairs and sent him home, telling Petitioner that she needed to speak to her boss about what they were going to do from there. She called Petitioner later that evening after she got home from work and told him she could no longer employ him. She testified that it was only after that call that Petitioner then told her his injury occurred at work. Vandermolen then told Petitioner she would call her boss and that her boss told her to call Nexus. She testified TI's lawyer instructed her to complete a form and write what she knew down. She confirmed Rx2 was that summary. On cross, Vandermolen testified her boss, Bob, told her to tell Petitioner to contact Nexus.

Munoz testified that she was a branch manager for Nexus Employment and the Petitioner's supervisor. (T. 96). Munoz first became aware of any alleged accident that day Petitioner came to fill out a report. She confirmed Rx1 was that report. Munoz testified that Petitioner filled out an incident report on October 16, 2017 and denied telling Petitioner to omit facts from the report. (T. 98-99). Munoz testified she spoke with Vandermolen that same day and she informed Vandermolen that Petitioner reported an injury and that Vandermolen said she was going to investigate. On cross, Munoz testified she told Petitioner she would investigate the accident and spoke to Sara, but not Alfredo Gomez, who was identified as the immediate supervisor. (T. 102-103).

Gomez testified that in October 2017 he was employed by TI Cold Storage as a lead man in the warehouse and also "a regular worker." (T. 106). Gomez denied any knowledge of an injury to Petitioner on October 9, 2017. (T. 107). He further testified that he did not remember the day but one day Petitioner told him he had back pain and he instructed Petitioner to stop working and go see the office manager. (T. 108-109). Gomez denied being "like a real supervisor or a real lead man" and having the power to assign Petitioner extra hours. (T. 110). On cross, Gomez explained the work duties, demonstrating lifting from the floor to the waist level. Gomez confirmed that when Petitioner told him his back hurt, Gomez told Petitioner to stop. Gomez said he instructed Petitioner to see Sara. Gomez said Sara never spoke to him about Petitioner. Gomez said he was never contacted by anyone at Nexus or an insurance company.

CONCLUSIONS OF LAW

Arbitrator's Credibility Assessment

Petitioner's testimony was credible and persuasive when weighing all other evidence. The Arbitrator finds the testimony of Gomez, Vandermolen and Munoz entitled to less weight when compared to Petitioner's testimony and when compared to the testimonies amongst those witnesses.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all the evidence, it is clear that the dispute over whether an accident occurred comes down primarily to the issue of credibility more than the issue of whether Petitioner's alleged accident, as described, arose out of and in the course of his employment. Petitioner claims he injured his low back at work but was told by Gomez to say it occurred at home, that he was ignored when attempting to report, that he lied to his doctor that his accident occurred at home and that he was fired by Vandermolen. Petitioner's unrebutted testimony was that he also gave notice of his back injury after stacking boxes to the second shift supervisor, Robert Reyes. Vandermolen, who testified on behalf of Respondent, claimed that Petitioner only told her of an alleged work accident after she was instructed to let Petitioner go. After that, she said she was told to contact Nexus. Vandermolen claimed she spoke to Munoz and Gomez about the incident. Munoz, who testified on behalf of Respondent, claimed that she first learned of an alleged work accident when Petitioner came into fill out a report. Rx1. She said she spoke with Vandermolen, who was going to investigate. Gomez, also testifying for Respondent, indicated that while he did not recall being told of any specific work accident, he did tell Petitioner to stop working after Petitioner complained of low back pain and to speak to Sara. Gomez said Vandermolen never spoke with him, neither did Nexus or any insurance company.

Having considered all testimony, along with all other available evidence, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that he did sustain an accident that arose out of and in the course of Petitioner's employment on October 9, 2017.

As to Petitioner's testimony, Petitioner put forth a story that he was told to say his injury occurred while lifting a washer. He candidly admitted this was a lie and that he was told to lie by Gomez. Petitioner's medical records reflect this admission. Petitioner maintained at trial that he was asked to lie by Gomez. Gomez did not appear credible at trial on this disputed fact. The Arbitrator notes that the near incredulous version of events given by Petitioner appear at first glance highly unlikely and it follows, in the Arbitrator's view, that Petitioner had nothing to gain in terms of credibility by providing such an incredible history of events. For the additional reasons that follow below, the Arbitrator finds Petitioner more credible than the other witnesses in deciding that an accident did occur.

Regarding Gomez's testimony, the Arbitrator notes that his testimony was that he did not recall a specific work injury, but he admitted telling Petitioner to stop work working and to see Sara (Vandermolen). Gomez said he recalled he first learned of Petitioner's back hurting after opening the dock for receiving and after Gomez started to unload the truck's pallets. In essence, Gomez's testimony corroborates Petitioner's testimony that Gomez was aware of an injury, albeit perhaps not explicitly stated as a work injury, but that he was aware of an injury nonetheless and Gomez admitted he gave instructions to Petitioner thereafter. In addition, Gomez's testimony that he learned of this while unloading a truck is identical to what Petitioner testified to; namely that Gomez was unloading the truck and that Petitioner was unwrapping those pallets and re-stacking them. The Arbitrator finds Gomez's testimony corroborative of Petitioner's. The Arbitrator does not find Gomez credible on the disputed fact over whether he spoke to Petitioner and asked him to lie. Gomez

did not deny this took place but rather only stated that he could not recall any conversation with Petitioner in a storage room. Finally, Gomez testified Vandermolen never spoke to him, which directly contradicts Vandermolen's testimony that she did. Even if Munoz first did learn of an accident as of Monday, October 16, 2017, Gomez's testimony still corroborates Petitioner's injury and thus Munoz's testimony has no effect on credibility as Petitioner as to whether an accident occurred.

As to Vandermolen's testimony, she said she did not learn of any work injury until after she fired Petitioner. Petitioner did not deny this – he testified he did not tell her before because she did not ask and he mentioned it after being terminated in order to obtain an incident report. Having found Petitioner credible, the Arbitrator places greater weight on Petitioner's testimony in this regard. As noted above, the Arbitrator finds Vandermolen's testimony that she spoke with Gomez directly contradicted by Gomez himself, who testified that Vandermolen never spoke with him, as neither did anyone from Nexus or any insurance company. Therefore, the Arbitrator places less weight on Vandermolen's testimony.

Based on the totality of the evidence, the Arbitrator finds that Petitioner testified credibly that he was initially pressured to report that the accident happened at home and relied on the belief that Alfredo Gomez filled out an accident report. Petitioner testified that he went along with their instructions so he could continue working. It was not until TI Cold terminated his assignment that he sought a copy of his incident report that he realized the work accident was not reported correctly. Petitioner's testimony is further supported by him correcting the medical record at a follow up visit on October 18, 2017 and recording a work injury. Having addressed the credibility issues regarding accident, the Arbitrator also finds that Petitioner's accident arose out of and in the course of his employment with Respondent because he was working for Respondent and performing employment related duties at the time of his injury.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all the evidence, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury on October 9, 2017. Having decided the issue of accident in favor of Petitioner, the Arbitrator relies on the treatment records of Dr. Weiss and Dr. Troy in finding that the complaints are related to the injury on October 9, 2017. Under a chain of events theory, the Arbitrator finds that the evidence most demonstrates Petitioner was in a state of good health immediately prior to the work accident and felt an onset of back pain immediately following the work accident. Respondent presented no medical opinion to the contrary. On evaluation, Dr. Troy diagnosed acute right-sided neck and low back pain. Therefore, the Arbitrator finds that Petitioner's current condition of ill-being as it relates to the lumbar and cervical spine is causally related to his work accident.

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 incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all the evidence, the Arbitrator finds that Petitioner's medical treatment has been reasonable and necessary, and that Respondent has not yet paid all appropriate charges. At trial, Petitioner introduced the following unpaid medical bills:

Merrionette Park Physicians Group:	$340.00
Chicago Ridge Medical Imaging:	$362.00
Advanced Orthopedic and Spine Care:	$375.00
TOTAL:	**$1,077.00**

Having already decided the issues of accident and causal connection in favor of the Petitioner, the Arbitrator finds that Respondent has not paid all appropriate charges as well as that all of the medical services provided were reasonable and necessary. Respondent did not offer any evidence disputing the reasonableness or necessity of the medical treatment. Petitioner testified to receiving all of the medical treatment, including treatment with Dr. Weiss and Dr. Troy. Therefore, Respondent shall pay reasonable and necessary medical services of **$1,077.00**, as provided in Sections 8(a) and 8.2 of the Act.

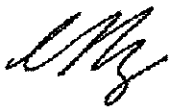
ISSUE (K) Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator finds that Petitioner has not yet reached maximum medical improvement with respect to the acute right-sided low back and neck pain as diagnosed by Dr. Troy and that Dr. Troy is recommending further medical care. Petitioner has not been back for care as he awaits approval for same. Having considered all the evidence, the Arbitrator finds that Petitioner is entitled to medical care as outlined by Dr. Troy following the November 14, 2017 evaluation.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having considered all the evidence, the Arbitrator finds that Petitioner was temporarily totally disabled from October 13, 2017 through February 21, 2018.

It is undisputed that Petitioner was terminated on October 13, 2017. It is well settled that a claimant may be entitled to TTD benefits until a work-related condition has stabilized to maximum medical improvement. Here, Petitioner has proven not only that he could not work but did not work. The evidence demonstrated that he returned to work and presented a light duty slip. Vandermolen acknowledged receipt of doctor's note, although she believed the note said that Petitioner could not work and that he should be sent home. Rather than offering light duty, which was not attested to, Vandermolen admitted that she was instructed to fire Petitioner. Munoz, who worked for Nexus, did not offer Petitioner any light duty or testify as to whether light duty was available. Having found Petitioner has not reached MMI and that he is need of further care, Petitioner is entitled to TTD from October 13, 2017 to February 21, 2018. Thus, Respondent shall pay Petitioner temporary total disability benefits of **$360.00/week** for **19 weeks**, commencing **10/12/17** through **2/21/18**, as provided in Section 8(b) of the Act.



Signature of Arbitrator

4-25-18
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)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David Bacchiere,
Petitioner,

vs. No. 15 WC 12727

19IWCC0654

Lake Shore Beverage,
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 relationship to the injury, temporary total disability, medical expenses, prospective medical expenses, 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 April 12, 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.

19IWCC0654

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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 35,700.00. 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: DEC 4 - 2019

Marc Parker

Barbara N. Flores

Deborah L. Simpson

mp-wj
o-11/21/19
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

BACCHIERE, DAVID
Employee/Petitioner

Case# **15WC012727**

LAKE SHORE BEVERAGE
Employer/Respondent

19IWCC0654

On 4/12/2018, 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 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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
STEVEN J SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

1752 LAW OFFICES OF RAYMOND L ASHER
LISA AZOORY
200 W JACKSON BLVD SUITE 1050
CHICAGO, IL 60606

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)

DAVID BACCHIERE,
Employee/Petitioner

v.

LAKE SHORE BEVERAGE,
Employer/Respondent

Case # **15** WC **12727**

Consolidated cases: **n/a**

19IWCC0654

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **MAY 3, 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. ☒ 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 5, 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 $**72,629.65**; the average weekly wage was $**1,396.72**.

On the date of accident, Petitioner was **47** 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 $**0.00** for TTD, $**13,810.47** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**13,810.47**.

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

ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law*:

1) The Arbitrator finds the Petitioner entitled to prospective medical care, namely a right hip replacement, in accordance with the recommendations of Dr. Kuesis, and;

2) The Respondent shall pay the Petitioner TPD benefits at the applicable TPD rate, that being **$523.20 per week**, for the period **from July 12, 2015 to May 3, 2017 (94.57 weeks)**.

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

April 11, 2018
Date

ICArbDec19(b)

APR 12 2018

DAVID BACCHIERE v. LAKE SHORE BEVERAGE

15 WC 12727

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on a Section 19(b)/8(a) Petition before Arbitrator Steffenson on May 3, 2017. The issues in dispute were causal connection, prospective medical care, and TPD benefits. (*Arbitrator's Exhibit* 1). The parties stipulated the nature and extent of the alleged injury is not in dispute at the time of this hearing, requested a written decision pursuant to Section 19(b), and agreed to receipt of this arbitration decision via e-mail. (*Arbitrator's Exhibit* (hereinafter, *AX*) 1).

FINDINGS OF FACT

The Petitioner, David Bacchiere, was 47-years- old and working for the Respondent as a beer deliveryman on November 5, 2014. (*Transcript* at 12-13 and *Petitioner's Exhibit* 2). The Petitioner had been working for Budweiser for 26 years and he had been with the Respondent since they took over five years ago. (*Transcript* (hereinafter, *T.*) at 13). The Petitioner's job has been the same since he started working for Budweiser, and remains the same with the Respondent. (*T.* at 14). He would arrive at the warehouse in the morning, account for all of the products on the truck, then drive to certain stops throughout the day, deliver beer, and then obtain signatures or collect money. (*T.* at 13).

Before November 5, 2014, the Petitioner had experienced some right-sided hip pain. (*T.* at 15-16). In March and April of 2013, he treated with his primary care physician, Dr. Sage, at Advocate in Mount Prospect. (*T.* at 16, 18). On April 8, 2013, Dr. Sage referred the Petitioner to a specialist, Dr. Arif Ali, at Advocate Medical Group, and, on December 2, 2013, Dr. Ali obtained x-rays of the Petitioner's right hip. (*T.* at 18-19). Dr. Sage then sent the Petitioner to physical therapy and the Petitioner attended the same, but stopped this program partway through because his hip was feeling better. (*T.* at 17-18).

The Petitioner testified his hip was fine on November 5, 2014, and there was a little bit of pain he characterized as 3 or 4 out of 10. (*T.* at 19). The right hip pain was not constant, but would come and go. (*T.* at 19). The Petitioner took no over-the-counter or prescription medication for his hip prior to November 5, 2014. (*T.* at 19-20).

On November 5, 2014, the Petitioner was two or three stops into his route and delivering beer to a 7-Eleven store. (*T.* at 20). He had a two-wheeled hand cart loaded with ten cases of Budweiser. (*T.* at 21). The Petitioner wheeled the stack of beer into the cooler where he was responsible for rotating the product. (*T.* at 20). He described this process, that deals with food products bearing an expiration date, as putting the older goods in the cooler on top and placing the newer goods on the bottom. (*T.* at 20-21). The Petitioner further explained beer has an expiration date and, as such, needs to be rotated. (*T.* at 21). While lifting and rotating the product, he felt a sensation, like someone taking a baseball bat to his lower back, and his back gave out. (*T.* at 20, 21-22). He lost his balance and fell onto the ground, hitting his right side. (*T.* at 23). At the time of this fall, the Petitioner weighed approximately 220 pounds and he characterized the impact of the fall as "heavy." (*T.* at 23).

The Petitioner further described experiencing an excruciating pain in his right side, around the area of his right hip and buttocks. (*T.* at 23-24). He went back out to the beer truck and met with another driver with an empty truck, which the Petitioner drove back to the warehouse, where he filled out accident paperwork with his supervisor. (*T.* at 24-25). He understood another driver completed his duties that day. (*T.* at 25).

The Petitioner went to treat at Alexian Brothers that same day complaining of right-sided pain in his lower back, right buttock, and right hip. (*T.* at 25 and *Petitioner's Exhibit* (hereinafter, *PX*) 2). He gave a history of stocking cases of beer for work when, on the last two cases, he experienced a sudden, severe sharp shooting pain in his low back. (*PX* 2). The Petitioner dropped to the floor, landing on his right buttock, and developed right buttock pain that was aggravated by heavy lifting. (*PX* 2).

On examination, the Petitioner's lumbar area was tender with limited forward bending due to pain. He also was noted to be tender in the right hip and right buttock area, with limited range of motion in the right hip due to pain. For the entry: "Work related?", the physician checked the "Y" box. (*PX* 2). The Petitioner was diagnosed with lumbosacral strain and a right buttock contusion, given naproxen 500 mg, and released back to work with restrictions of 10 pounds maximum lift, push, and pull; no bending, climbing, kneeling, or squatting; limit repetitive motion; no driving a commercial vehicle; and sit as needed. (*PX* 2).

On November 10, 2014, the Petitioner returned to Alexian Brothers complaining of constant right lower back and right hip pain, worse with movement and bending. On examination, the Petitioner was positive for paraspinal spasm or tenderness, had a positive straight leg raise test at 60 degrees indicating sciatic involvement, and was positive for reduced range of motion in his back. The physician noted no Waddell's signs, and again noted that the condition was work related. The Petitioner was kept on light duty. (*PX* 2).

On November 17, 2014, the Petitioner returned to Alexian Brothers complaining of right lower back and right hip pain, worse with bending and prolonged sitting. The Petitioner reported that his back was a bit better since the accident, but his hip remained the same, especially at night. The Petitioner again was positive for paraspinal spasm or tenderness, positive for straight leg raise, and positive for back range of motion. It again was noted the Petitioner's condition was work related, he was kept on light duty, and was referred to physical therapy. (*PX* 2).

On December 8, 2014, the Petitioner followed up at Alexian Brothers where he again complained of right-sided lower back pain and right hip pain, worse with bending. The Petitioner reported shooting pain when bending or sitting for a long period. He reported that he was now taking Ibuprofen for the pain. On examination, the Petitioner was tender over the right lower back and right hip. The Petitioner once again was diagnosed with a lumbosacral strain and right buttock contusion. He was instructed to continue physical therapy, apply heat three times per day, and perform home exercises. He then was released with restrictions. (*PX* 2).

On December 18, 2014, the Petitioner returned to Alexian Brothers once more. He was still having right lower back pain and right hip pain, worse with sitting and better when lying down. The hip pain was constant, and radiated to his right lower leg. (*PX* 2). The Petitioner was given a referral to an orthopedic specialist at G&T Orthopaedics "for the treatment of a work-related injury." (*PX* 2 and *PX* 3).

The Petitioner presented to Dr. Kevin Tu at G&T Orthopaedics on December 22, 2014. The Petitioner complained of ongoing right hip pain following an injury on November 5, 2014, where he was lifting two cases of beer when he had pain in his back and fell backwards, landing on his right hip. The Petitioner reported he had undergone six sessions of physical therapy with minimal improvement. Dr. Tu opined the Petitioner "likely has at least aggravation of right hip arthritis." Dr. Tu referred the Petitioner to Dr. Kuesis, a hip specialist, for evaluation and treatment while maintaining the Petitioner's then-current restrictions. (*PX* 3).

The Petitioner presented to Dr. Daniel T. Kuesis at CORE Orthopedics & Sports Medicine on February 9, 2015. The Petitioner complained of right hip and back pain and noted his back pain had improved and was only sporadic, but his hip pain was a constant problem. The Petitioner described his hip pain as localized to the lateral aspect of the hip and shooting down to his right calf, with intensity of 8/10. The Petitioner related his history of injury, indicating that he injured his hip at work on November 5, 2014, when, while lifting cases of beer at work, his back locked up causing him to lose his balance and fall, striking his right hip. (*PX* 4).

Dr. Kuesis found significant tenderness to palpation over the trochanter, mild tenderness over the anterior capsule, and palpable crepitus with flexion internal rotation. Dr. Kuesis observed significant pain with any attempts at flexion and rotation, and stated the Petitioner was missing 30 degrees of flexion and internal rotation compared to the left side. Dr. Kuesis reviewed x-rays of the hip, which revealed no acute bony abnormalities, but did show degenerative changes with narrowing of the hip joint space. Dr. Kuesis also reviewed x-rays of the lumbar spine, which revealed narrowing of the disc space at L5-S1. (*PX* 4).

Dr. Kuesis diagnosed the Petitioner with right hip degenerative joint disease, right hip sprain/strain, and right hip bursitis. Dr. Kuesis ordered MRIs of the right hip and lumbar spine to rule out stress response or concomitant avascular necrosis of the hip or disc herniation of the spine. He opined the Petitioner would likely require intervention in the long term. Dr. Kuesis put the Petitioner on light duty restrictions of no lifting greater than 15 pounds, no driving, no pushing or pulling, no stair climbing, no kneeling, no squatting, and no excessive twisting, turning, bending, sitting, or standing. (*PX* 4).

The Petitioner underwent the prescribed MRIs at Medical Imaging Center in Hoffman Estates on February 25, 2015. The right hip MRI indicated degenerative arthrosis of the right hip joint with joint space narrowing and minimal subchondral cystic change, and marrow edema of the superior aspect of the femoral head and adjacent acetabulum. The lumbar MRI revealed diffuse lumbar spondylosis with multilevel disc bulging and hypertrophy of posterior elements, a 3.5-mm diffuse disc bulge/annular tear and hypertrophy of posterior elements, bilateral neural foraminal stenosis at L4-5, worse on the right, and a 3-mm diffuse disc/ostephyte complex at L5-S1 with moderate to severe bilateral neural foraminal stenosis. (PX 4).

On April 6, 2015, the Petitioner returned to Dr. Kuesis, complaining of low back pain at 6/10 and right hip pain at 7/10, unimproved since his prior visit. He reported that his hip pain was constant, sharp, and stabbing. Dr. Kuesis reviewed the MRIs and provided a steroid injection over the right hip bursa, before releasing the Petitioner. (PX 4). The Petitioner then returned to Dr. Kuesis on May 6, 2015. He reported moderate improvement following the hip injection, but still complained of pain to the right buttock and the groin, pain when flexing at the hip, and when sitting or standing for a long time. On examination, the Petitioner exhibited significant tenderness over the trochanter and mild tenderness over the anterior capsule, with palpable crepitus with flexion internal rotation. He continued to experience pain with range of motion, and still lacked 30 degrees of flexion and internal rotation on the right. Dr. Kuesis then provided a right hip fluoro injection, continued his light duty status, and referred him to physical therapy. (*PX* 4).

The Petitioner visited Dr. Kuesis once more on June 1, 2015. He reported 50% relief from his last injection and noted his right hip pain was at 5-6/10, with a flare-up at work one week prior. On examination, Dr. Kuesis again noted crepitus with range of motion and significant pain with any attempts at flexion and rotation. He diagnosed the Petitioner with right hip arthritis and stated: "Unfortunately his hip is progressing. He is interested in hip replacement I think is a good candidate." (*PX* 4).

On June 8, 2015, pursuant to a Section 12 examination request by the Respondent, the Petitioner met with Dr. Matthew Jimenez. (*Respondent's Exhibit* 3). Dr. Jimenez noted spasm in the lumbar muscles and in the Petitioner's hip, and pain with hip range of motion beyond 120 degrees, as well as limitation of flexion and internal rotation. Dr. Jimenez reviewed the Petitioner's x-rays and diagnosed the Petitioner with end-stage hip arthritis. Dr. Jimenez opined the arthritis was not causally related to the Petitioner's work injury. Dr. Jimenez also opined the Petitioner had a contusion and lumbar strain that had improved, and further noted the Petitioner could return to work without restrictions. (*Respondent's Exhibit* (hereinafter, *RX*) 3).

The Petitioner followed up with Dr. Kuesis on August 31, 2015 with constant, stabbing, electrical pain in the lateral aspect of his right hip radiating into his groin and down his right leg. On examination, Dr. Kuesis noted his range of motion was decreasing, and that there was associated pain with range of motion. The Petitioner reported the pain in his hip, groin, and buttocks was related to his work-related injury. Dr. Kuesis opined: "His hip continues to decline," and noted that the Petitioner wished for a hip replacement. (*PX* 4).

On January 20, 2016, Dr. Tu testified at an evidence deposition. (*PX* 5). Dr. Tu is a board certified orthopedic physician, licensed since 1998. (*PX* 5 at 4). Dr. Tu practices sports medicine with a focus on shoulders and knees, though he does practice on hips as well. (*Id.* at 5). Dr. Tu testified that he reviewed the Petitioner's x-rays, and the arthritic changes in the Petitioner's hip were so significant that he referred the Petitioner to Dr. Kuesis, a total joint specialist. (*Id.* at 8-9). He testified, "Certainly he had osteoarthritis of the hip, there's no question." (*Id.* at 9).

Dr. Tu further testified that the Petitioner "had arthritic changes certainly before this injury," with his hip x-rays demonstrating narrowing in the right hip joint consistent with arthritis, but he reported symptoms post-accident that were much more severe, including significant limitations in his range of motion. (*PX* 5 at 10). Dr. Tu based his opinion on the Petitioner's subjective complaints, mechanism of injury, physical examination, and x-rays. (*Id.* at 30).

On February 12, 2016, Dr. Kuesis wrote a narrative report specifically addressing causal connection. Dr. Kuesis opined the Petitioner "likely did have arthritis prior to the work accident," but also stated: "In the setting of trauma, it is common for a joint that was previously asymptomatic to become symptomatic and sometimes require earlier intervention. Because of this I think the accident that was reported is a reasonable cause for aggravation and acceleration of his underlying condition." (*PX* 4).

On December 15, 2016, Dr. Kuesis testified at an evidence deposition. (*PX* 6). Dr. Kuesis is board certified in orthopedics and sports medicine, with about 30 to 50 percent of his practice focusing on treating hip conditions. (*PX* 6 at 5-6.) Dr. Kuesis opined to a reasonable degree of medical and surgical certainty the Petitioner was suffering from hip arthritis, hip sprain, and bursitis. (*Id.* at 10-11, 14).

Dr. Kuesis also opined the Petitioner's hip arthritis was not the sole cause of the Petitioner's current symptoms. (*PX* 6 at 10, 21). Dr. Kuesis testified, at that time, it was his opinion to a reasonable degree of medical and surgical certainty that if the Petitioner had sought prior treatment for his hip arthritis, the workplace injury could have led to aggravation of the Petitioner's arthritis. (*PX* 6 at 10, 22).

Dr. Kuesis further opined the Petitioner's hip arthritis is permanent, and it is at maximal medical improvement unless there is some sort of surgical intervention. (*PX* 6 at 10, 23). He stated, to a reasonable degree of medical and surgical certainty, that based on the Petitioner's symptoms, past injections to the Petitioner's right hip were reasonable and necessary, and a future hip replacement would be reasonable and necessary as well. (*PX* 6 at 10, 15, 18, 23).

On March 21, 2017, Dr. Matthew Jimenez testified at an evidence deposition. (*RX* 6). Dr. Jimenez testified he was not a witness to the fall and did not know anything about the force of the Petitioner's fall. (*RX* 6 at 10, 31). Dr. Jimenez opined, in addition to his arthritis, the Petitioner had evidence of a peritrochanteric contusion, lumbar spasm, and trochanteric bursitis of traumatic origin. (*Id.* at 13). Dr. Jimenez stated the Petitioner needed a total hip replacement: "That is not in dispute." (*Id.* at 14).

Dr. Jimenez further testified the treating physicians in the case were interchanging anatomic terms inappropriately. (*RX* 6 at 16-17, 32-33). Dr. Jimenez was asked to review records of the Petitioner's treatment prior to November 5, 2014. Dr. Jimenez testified that the notes were "fairly non-specific," stating:

> "It's mostly perigluteal and trochanteric bursal-type pain. I've yet to see any notes here complaining of groin pain which is true hip joint pain, but the diagnosis by Dr. Ali on the third page is again trochanteric bursitis and not hip arthritis." (*Id.* at 24).

Dr. Jimenez continued: "All the documentation pre-fall and post-fall were all about an ongoing and worsening trochanteric bursitis first from some etiology by Dr. Sage and Dr. Ali that diagnosed it and then worsened by the fall. There's no documentation in Dr. Sage or Dr. Ali's or the initial documentation when the patient came in that he had any evidence of true hip pathology; that is, the groin pain or the ball and socket joint, the hip arthritis." (*RX* 6 at 27). Dr. Jimenez opined that "this patient fell and injured their trochanteric bursa." (*Id.*).

The Petitioner testified he now works in modified duty position for the Respondent and is paid less than he was making before the accident. (*T.* at 29). He now works inside the Respondent's warehouse where he usually sweeps, cleans, checks in over-the-road truck drivers, and directs them where to park their trucks to offload any product from the trucks. (*T.* at 30). He now works 40 hours a week making $22 an hour. (*Id.*).

The Petitioner further testified he currently notices hip pain and it comes and goes. (*T.* at 30-31). He observed his hip pain is not as bad as it was on the day of accident, but if he's been standing on his feet for a while, he experiences pain going from his buttocks and hip down into his shin. (*T.* at 31). It causes him difficulty sleeping, limits what he can do with his two young children, and he cannot go back to doing what he used to do at work for the Respondent. (*Id.*). The Petitioner also testified after June 19, 2015, he no longer received any temporary partial differential pay. (*T.* at 32).[1]

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue F: Causal Connection

Trochanteric bursitis

At the outset, the Arbitrator notes the Respondent's own expert opined the Petitioner's trochanteric bursitis was "worsened by the fall," and the condition was "of traumatic origin," testifying: "this patient fell and injured their trochanteric bursa." (*RX* 6 at 27). Dr. Kuesis, for his part, opined the Petitioner was suffering from hip arthritis, hip sprain, and bursitis, and his hip arthritis was not the sole cause of his current symptoms. (*PX* 6 at 10-11, 14).

[1] The parties stipulated the Petitioner earned $72,629.65 in the year before the accident, for an average weekly wage of $1,396.72. (*AX* 1).

Based upon the foregoing, the Arbitrator finds the Petitioner's ongoing condition of trochanteric bursitis is causally related to the work accident of November 5, 2014.

Hip arthritis

The next point of analysis must focus on whether the Petitioner's right hip arthritis was also aggravated by his work accident of November 4, 2015. The record is clear on the fact the Petitioner had a preexisting degenerative hip condition. However, his unrebutted testimony establishes, prior to November 5, 2014, there was some pain, which the Petitioner characterized as 3 or 4 out of 10, but his hip was otherwise fine. (*T.* at 19). Furthermore, his right hip pain was not constant as it would come and go. (*T.* at 19). The Petitioner took no over-the-counter or prescription medication for his hip prior to November 5, 2014. (*T.* at 19-20). At the time of the accident, by contrast, the Petitioner described experiencing an excruciating pain in his right side, around the area of his right hip and buttocks. (*T.* at 23-24).

The medical evidence bolsters the Petitioner's testimony concerning the worsening of his hip only after the accident. Dr. Kuesis reviewed records of the Petitioner's treatment from prior to November 4, 2015, and testified: "from the record that I see and have been presented, it looks like it's mostly soft tissue, and there wasn't much about arthritis." (*PX* 6 at 35). He stated the Petitioner's prior treatment history was for hip bursitis, which "doesn't address the reason the patient was given a recommendation to have a hip replacement which was symptomatic hip arthritis." (*PX* 6 at 36). Dr. Jimenez, similarly, stated the Petitioner's hip joint was largely asymptomatic prior to his workplace fall. Dr. Jimenez indicated all the documentation pre-fall was:

> "about an ongoing and worsening trochanteric bursitis first from some etiology by Dr. Sage and Dr. Ali that diagnosed it and then worsened by the fall. There's no documentation in Dr. Sage or Dr. Ali's or the initial documentation when the patient came in that he had any evidence of true hip pathology; that is, the groin pain or the ball and socket joint, the hip arthritis." (*RX* 6 at 27).

Both Petitioner's treating physicians opined his hip arthritis likely was aggravated by his workplace fall. On December 22, 2014, treating physician Dr. Tu opined the Petitioner "likely has at least aggravation of right hip arthritis." (*PX* 3). Later, during his evidence deposition, Dr. Tu testified that, although he had arthritic changes before his work injury, the Petitioner's post-accident complaints were much more severe, including significant limitations in his range of motion. Dr. Tu concluded: "After his injury certainly there was some sort of aggravation." (*PX* 5 at 10). It is important to note Dr. Tu based his opinion on the Petitioner's subjective complaints, mechanism of injury, physical examination, and x-rays. (*PX* 5 at 30).

On February 12, 2016, the Petitioner's treating physician Dr. Kuesis wrote a narrative report specifically addressing causal connection. (*PX* 4). Dr. Kuesis opined the Petitioner "likely did have arthritis prior to the work accident," but further stated: "In the setting of trauma, it is common for a joint that was previously asymptomatic to become symptomatic and sometimes require earlier intervention. Because of this I think the accident that was reported is a reasonable cause for aggravation and acceleration of his underlying condition." (*PX* 4). At his deposition, Dr. Kuesis testified if the Petitioner's hip arthritis was asymptomatic before the fall, "it's likely that his injury that was reported exacerbated his underlying hip arthritis." (*PX* 6 at 22). Dr. Kuesis further stated to a reasonable degree of medical and surgical certainty that even if the Petitioner had sought prior treatment for his hip arthritis, the workplace injury could have led to aggravation of the Petitioner's arthritis. (*PX* 6 at 10, 22).

The Respondent offered the opinions of Dr. Jimenez in challenging whether the Petitioner's condition of ill-being is causally related to the accident. However, Dr. Jimenez's causal connection opinion is noticeably inconsistent between his Section 12 report and his evidence deposition. On June 8, 2015, Dr. Jimenez performed his Section 12 examination, and he reported the Petitioner had sustained a perigluteal contusion and lumbar strain. However, during his deposition, Dr. Jimenez had changed his diagnosis, testifying the Petitioner had evidence of a peritrochanteric contusion, lumbar spasm, and trochanteric bursitis of traumatic origin. (*RX* 6 at 13).

Dr. Jimenez also testified repeatedly that the treating physicians in the case were interchanging anatomic terms inappropriately. (*RX* 6 at 16-17, 32-33). However, Dr. Tu was quite explicit in separating the conditions affecting trochanter and the hip joint in his testimony: "bursitis is outside or lateral, that's where most people think the hip joint is, but that's not really where Mr. Bacchiere's complaints were when he saw me on December 22, 2014." (*PX* 5 at 11). Dr. Kuesis, too, was explicit in distinguishing between the symptoms as he observed "over his trochanter" and the Petitioner's hip symptomatology. (*PX* 6 at 14).

Dr. Jimenez then testified that the Petitioner referred to his "hip" during the Section 12 examination when he really was complaining about "his butt and his trochanter." (*RX* 6 at 18). However, Dr. Jimenez's record from the examination indicate the Petitioner distinguished between these areas: "He states that, during that event, he injured not only his low back, but his right peritrochanteric and hip region." Furthermore, the Petitioner explicitly complained of groin-area pain in the Dr. Kuesis records. (*PX* 4). According to Dr. Jimenez, true hip joint pain manifests as groin pain. (*RX* 6 at 17).

Based upon the foregoing, the Arbitrator finds the causal connection opinions of Dr. Tu and Dr. Kuesis more persuasive than those of Dr. Jimenez. As such, the Arbitrator finds the

Petitioner's current condition of ill-being is causally related to the work accident of November 5, 2014.

Issue K: Prospective Medical Care

Both Dr. Kuesis and Dr. Jimenez testified a hip replacement surgery would be reasonable and necessary treatment for the Petitioner's right hip arthritis. On June 1, 2015 Dr. Kuesis opined: "Unfortunately his hip is progressing. He is interested in hip replacement I think is a good candidate." (*PX* 4). At his deposition, Dr. Kuesis testified a hip replacement would be a reasonable and necessary treatment for the Petitioner's hip arthritis. (*PX* 6 at 18). He further stated the Petitioner's hip arthritis is permanent, and he would be at maximal medical improvement without surgical intervention. (*PX* 6 at 22-23). Dr. Jimenez, too, opined that the Petitioner needed a total hip replacement, testifying: "That is not in dispute." (*RX* 6 at 14).

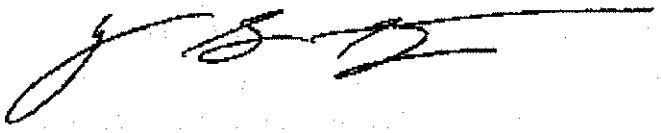
Based upon the findings regarding **Issue F**, above, the Arbitrator awards the Petitioner prospective medical benefits in accordance with the recommendations of Dr. Kuesis, including a hip replacement.

Issue L: TPD

The Respondent has paid $13,810.47 to date in temporary partial disability benefits. (*AX* 1 and *RX* 5). However, the Respondent disputed its liability to pay temporary partial disability (TPD) benefits after June 8, 2015, the date upon which Dr. Jimenez opined the Petitioner had a contusion and lumbar strain which had improved sufficiently that the Petitioner could return to work without restrictions.

Based upon the findings regarding Issue F, above, the Arbitrator finds the Respondent is liable to pay TPD benefits for all remaining periods when the Petitioner was temporarily partially disabled. Based upon the difference in the Petitioner's pay in his light duty position, the Petitioner is owed unpaid TPD benefits of $13.08 an hour, or $523.20 per week, for 94.57 weeks covering the period from July 12th, 2015, to May 3, 2017. (*RX* 5).

Finally, 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.



Signature of Arbitrator

April 11, 2018
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Donald Schmidt,
Petitioner,

vs. No: 12 WC 11730

Menard's Inc.,
Respondent.

19IWCC0655

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed timely by Respondent herein and notice given to all parties, the Commission, after considering issues of medical expenses, causal connection, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms 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 December 12, 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.

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: DEC 4 - 2019

Marc Parker

mp/wj
11/21/19
68

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHMIDT, DONALD
Employee/Petitioner

Case# **12WC011730**

MENARD'S
Employer/Respondent

19IWCC0655

On 12/12/2017, 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 1.46% 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:

0307 ELFENBAUM EVERS & AMARILLO PC
JOHN D AMARILLO
940 W ADAMS ST SUITE 300
CHICAGO, IL 60607

1296 CHILTON YAMBERT PORTER LLP
DABIEL T CROWE
303 W MADISON ST SUITE 2300
CHICAGO, IL 60606

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

☐ 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

Donald Schmidt
Employee/Petitioner

v.

Menard's
Employer/Respondent

Case # **12** WC **11730**

Consolidated cases: **n/a**

19IWCC0655

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Waukegan**, on **9/19/2017**. 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 **Motion to Bar**

FINDINGS

On **7/28/2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**21,566.06**; the average weekly wage was $**465.87**.

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

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

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

Respondent shall be given a credit of $**62,204.73** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**62,204.73**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**310.58**/week for **269-2/7** weeks, commencing **8/22/2011** through **10/18/2016**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $**297.52**/week for **300** weeks, because the injuries sustained caused the **60%** loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay reasonable and necessary medical services of $**492,163.53**, subject to the medical fee schedule, as provided in Section 8(a) 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.

Jason C. Mentz

Signature of Arbitrator

12/11/17
Date

BEFORE THE
ILLINOIS WORKERS COMPENSATION COMMISSION

State of Illinois)
)
County of Lake)

DONALD SCHMIDT,)
)
Petitioner,) No. 12 WC 11730
)
v.)
)
MENARD'S,) 19IWCC0655
)
Respondent.)

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

The Petitioner, Donald Schmidt, testified he was hired in February of 2010 as a building materials associate in Respondent's retail building-supply store in Antioch, Illinois. (Tr. 8). His job duties included sales, customer service and stocking shelves with lumber and building supplies weighing sixty pounds or more, such as sacks of concrete and roofing tiles. (Id. 9-11) The Petitioner estimated about 25% of his day was spent on computer tasks and other sales-office functions while the other 75% involved moving building materials. (Id. 79, 93) Petitioner has worked in the building-supply industry doing similar work for many years. (Id. 80-81; Rx 12)

Prior to the accident date, Petitioner had never injured his back, sought medical care for back problems, or filed a workers' compensation claim. (Tr. 13)

It is undisputed that on July 28, 2011, Petitioner felt the sudden onset of lower back pain while stocking shelves with sixty-pound sacks of cement. He reported the injury to his supervisor and was sent to Advocate Condell Occupational Health for treatment where he was diagnosed with a back strain. (Id. 13-15; Px 2a, pp. 164, 167) Petitioner underwent conservative treatment from August 1 through August 22, 2015, while working light duty for Respondent. (Rx 13)

On August 25, 2011, Petitioner presented to Advocate Condell where the examining doctor noted an antalgic gait, limited forward flexion, and swelling in the L4-L5 area. (Px 2, p. 85). An accompanying note from Petitioner's physical therapist noted complaints of severe pain at an 8/10. The doctor recommended Petitioner be allowed time off work for rest and therapy, as work was aggravating his symptoms. (Px 2, p. 90; Rx 13, p. 170) The doctor referred Petitioner "ASAP" to neurosurgeon Dr. Jonathan Citow. (Px 2, pp. 72, 74; Rx 13, pp. 171-72)

On August 31, 2011, Petitioner presented to Dr. Citow who noted complaints of "back pain without radicular leg pain or weakness but some left lateral foot numbness and paresthesias". On exam, the doctor noted lumbar tenderness and limited range of motion secondary to pain. The doctor ordered an MRI. (Px 3, p. 2)

On September 9, 2011, MRI of Petitioner's lumbar spine without contrast noted:

- At L2-3, a posterocentral disc herniation with no central canal or neural foraminal stenosis;
- At L4-5, a posterior disc protrusion with mild facet and ligamentum flavum hypertrophy without central canal stenosis. Mild bilateral neural foraminal encroachment that may affect exiting L4 nerve roots;
- L5-S1, a broad based right foraminal disc protrusion along with mild facet and ligamentum flavum hypertrophy with stenosis. Mild right neural foraminal encroachment that may affect exiting L5 nerve root.

Dr. Amjad Ali Safvi noted an impression of:

- Degenerative change in the lumbar spine with disc disease at the L2-L3 to L5-S1 levels and;
- Associated lower lumbar ligamentum flavum and facet hypertrophy further contribute to neural foraminal stenosis, especially at L4-5 to L5-S1 levels.

The report included print images of two areas: L2-3, and L5-S1. (Px 3, pp. 42-44; Rx 13, pp. 165-67)

On September 20, 2011, Dr. Citow reviewed the MRI films noting a diagnosis of "L4-S1 spondylosis with foraminal narrowing." (Px 3, p. 4) Dr. Citow recommended conservative treatment including epidural steroid injections.

On October 12, 2011, Dr. Citow's partner Dr. Juan Alzate, administered an epidural steroid injection at L2-3, noting the following diagnosis: "L4-5 spondylosis, L2-3 disc." (Px 3, p. 5)

On October 28, 2011, Petitioner returned to Dr. Citow, who now noted the prior MRI films showed "a large central L2-3 disc herniation with an extruded fragment as well as degenerative disease at L5-S1 with foraminal narrowing." (Px 3, p. 6) The doctor ordered additional physical therapy and a second epidural injection which was administered on November 28, 2011, again at L2-3, by Dr. Alzate, who noted minimal improvement from the first injection. (*Id.*, p. 8)

On December 7, 2011, Dr. Citow noted Petitioner "continues to have significant left buttock pain extending towards the knee with numbness in the leg". Petitioner reported no improvement associated with the two epidural steroid injections, physical therapy, anti-inflammatories and narcotics. On exam, positive left SLR, left hip flexion weakness and decreased sensation over the left thigh was noted. Dr. Citow recommended a left-sided microdiskectomy at L2-3, noting that conservative management of Petitioner's condition had failed (Px. 3, p. 9)

On January 23, 2012, Dr. Citow performed surgery at Advocate Condell Medical Center, consisting of an L2-3 hemilaminectomy with medial facetectomy, foraminotomy and partial discectomy. The operative report noted a large left-sided L2-3 disc herniation with an extruded fragment. (Px 5, pp. 1-2)

On February 17, 2012 Dr. Citow observed that Petitioner had "recovered nicely with significant improvement in his back and leg symptoms". The doctor noted Petitioner would begin six weeks of physical therapy and a course of Mobic. (Px 3, p. 11)

Petitioner testified his back and leg pain improved markedly at first following surgery, "and then it went bad." He further testified, "I think I got hurt worse in physical therapy." (Tr. 16-17)

On April 6, 2012, Petitioner's physical therapist noted Petitioner had made no gains despite hard work; he reported back pain at 0-1/10, but leg pain at 5-6/10. The therapist noted the "most troublesome is that his

knee has started to buckle on him ..." (Px 2, p. 6) Petitioner's spinal muscles were noted as tender to palpation at L4-L5 on the left. (*Id.*, p. 10)

On April 11, 2012, Petitioner followed-up with Dr. Citow, who noted increased left leg pain radiating to the left foot with numbness, weakness and paresthesias. Petitioner reported "zero" back pain. Dr. Citow prescribed Lyrica and a follow-up MRI. (Px 3, p. 46)

On April 10, 2012, Petitioner sought a second opinion from orthopedic surgeon Thomas McNally, M.D. of Suburban Orthopedics. (Px 1, p. 6-7) On exam, Dr. McNally noted numbness in the left buttock extending down the lateral thigh to the knee, with tenderness in the left sciatic area. (*Id.*). The doctor reviewed the report of Petitioner's first surgery, which he described as a partial removal of the left L2-3 facet and disk. Dr. McNally ordered an updated closed lumbar MRI with and without contrast and an EMG/NCV to assess bilateral lower extremities. (Id., p. 10) Dr. McNally testified the April 30, 2012, EMG/NCV revealed evidence of acute moderate degree L2-3 and L4-5 radiculopathy on the left, acute bilateral mild degree L5-S1 radiculopathy, and chronic, mild bilateral S1 radiculopathy. The updated lumbar MRI, revealed foraminal stenosis on the left at L4-5, and recurrent disk herniation at L2-3, consistent with Petitioner's symptoms. (Id., p. 11) The doctor also noted the findings of L4-5 and L5-S1 stenosis on the original MRI. (*Id.*, p. 9). Pursuant to Petitioner's history, complaints and findings on MRI and EMG/NCV, Dr. McNally noted a diagnosis of lumbar disc displacement and lumbar spinal stenosis and recommended a second, revision surgery.

On May 29, 2012, Dr. McNally discussed two proposed surgeries with Petitioner: a multi-level decompression vs. a more invasive fusion procedure:

> *We discussed the possibility of revision discectomy, just at the one level that he had. We discussed decompressing at multiple levels. We discussed that when you perform a decompression without a fusion, you're limited as to how much you can decompress. Because, number one, there is often collapse of the disc space, which collapses the foramen, which make the foramen, or the exit where the nerves leave, smaller. And also, you have to leave some of the joint to leave the spine stable when you're doing a decompression alone.*
>
> *If you do a decompression combined with fusion, you can do a much wider decompression taking out more of the facet and also putting something in between the vertebral bodies, which restore disc height, which subsequently restores foraminal height, which indirectly compresses the neural elements.*
>
> *So, we discussed combinations of focusing, again, on his main level L2-3, versus possibly L2-3, L4-5 where there was disc herniation versus decompression at those levels, and also the lower levels and also combining decompression with fusion.* (Id., pp. 13-14)

The Petitioner opted for the less invasive option, decompression alone but at multiple levels. (Tr. 18; Px 1, pp. 13-14).

On September 17, 2012, at Respondent's request, Petitioner was examined by spine surgeon Alexander Ghanayem of Loyola Medical Center. (Rx 1, Exh. 1) Dr. Ghanayem noted a July 2011 lifting injury at work, which led Petitioner to develop radicular pain into the left leg. He noted an initial good response to surgery, followed by a spontaneous recurrence of left-sided radicular pain in the buttock, posterior thigh and calf. Petitioner's left leg was now much more painful than his back. (*Id.*).

Dr. Ghanayem reviewed the original MRI from September 2011, noting an L2-3 disc herniation "extruded over the body of L3." (*Id.*). He did not comment on the lower lumbar stenosis noted in the radiology report. He also reviewed the follow-up scan obtained by Dr. McNally in April 2012, noting a recurrence of the same disc

herniation. Dr. Ghanayem recommended a repeat laminectomy and discectomy surgery at the L2-3 and L3-4 levels, and opined that such treatment would be causally related to Petitioner's workplace accident. (*Id.).*

On November 14, 2012 Petitioner underwent a second decompression surgery, performed by Dr. McNally at Alexian Brothers Medical Center consisting of a multi-level laminotomy, partial facetectomy and foraminotomy from L2-S1, with discectomies at L2-3 and L5-S1 and a laminectomy at L5-S1. (Px 6, p. 44; Px 5, pp. 4-6) Petitioner testified to a slow recovery, apparently due to infection. (Tr. 19).

On February 18, 2013, a follow-up MRI showed "well-circumscribed ring-enhancing fluid collection" at L5-S1. (Px 4, p. 75)

Petitioner testified that the second surgery "took away some of the pain but it just kept coming back." He asked Dr. McNally what could be done, as he wanted to go back to work. (Tr. 19). Dr. McNally suggested the more invasive surgery pursuant to his previous recommendation. (Tr. 20).

On August 5, 2013, at Respondent's request, Petitioner was again examined by Dr. Ghanayem. Petitioner reported a history of improved leg pain for 3-4 weeks after his November 2012 surgery before the leg pain returned. Petitioner reported current left-sided low back pain radiating to the left lateral thigh and leg, and down to the foot. (Rx 1, Exh. 3) Dr. Ghanayem's exam found muscle tenderness throughout the paraspinal area, with 30 degrees of flexion along with "decreased sensation in the lateral thigh, calf and foot." (*Id.*).

Dr. Ghanayem noted Dr. McNally's surgical recommendation at the L5-S1 level opining the procedure such might be appropriate depending on the latest imaging studies, however, it was "not the issue related to his work injury of September 2011, which was an extruded disc herniation in the upper lumbar spine." (*Id.*). Likewise, while Petitioner might need work restrictions for his lower lumbar problems, these would not be related to his work injury. "There is another unrelated issue at L5-S1, this becomes a murky issue to solve," Dr. Ghanayem concluded. (*Id.*).

On March 7, 2014 Dr. Ghanayem reviewed films from Petitioner's MRI scans of October 12, 2012 and February 18, 2013, noting "disc disease with stenosis at the L5-S1 level," which appeared to have worsened on the later scan, as well as mild stenosis at L4-5. (Rx 1, Exh. 4). Dr. Ghanayem opined that surgery to treat these findings would be reasonable, but unrelated to the original work injury.

On June 4, 2014, Dr. McNally noted Petitioner's complaints of constant burning pain down his leg. Dr. McNally recommended a decompression combined with surgical fusion, which he explained allowed for a wider decompression than the previous, less invasive procedure. (Px 1, pp. 19-20)

On September 25, 2014, Dr. McNally repeated his recommendation for L5-S1 posterior fusion. He noted Petitioner's worsening symptoms, including low back spasms and a numbness through the left leg from the buttock through the knee and down into the "gastroc" or posterior calf muscle. Petitioner described painful left leg numbness with difficulty walking and sleeping due to pain. (Px 4, p. 71)

Dr. McNally reviewed Respondent's Section 12 reports, noting disagreement with Dr. Ghanayem's conclusion that Petitioner's lower lumbar symptoms were unrelated to his accident. (Px 4, pp. 73-75) Dr. McNally noted that the L5-S1 stenosis had been present from the initial post-injury MRI, although Dr. Citow's initial surgery focused solely on the large L2-3 herniation. Because of this, Petitioner's back pain improved but his leg pain returned and worsened. (*Id.*, p. 75) The work injury did not cause the stenosis, Dr. McNally opined, but did cause the stenosis at L4-5, L5-S1 and other levels to become symptomatic. (*Id.*).

In October 2014, Respondent proposed seeking a joint "tie-breaker" exam to resolve the differences between Dr. McNally and Respondent's examiner, Dr. Ghanayem. (Rx 3) The parties agreed on Dr. Ed Goldberg of Midwest Orthopedics, and addressed a joint letter to Dr. Goldberg. (Rx 4, Rx 5) The exam was scheduled for

December 10, 2014 but was cancelled and rescheduled for New Year's Eve, December 31, 2014. (Tr. 22) Petitioner testified he was on time for the appointment, although Dr. Goldberg was an hour late and the exam lasted no more than five minutes. Petitioner testified Dr. Goldberg had not reviewed Petitioner's MRI films, and asked Petitioner where they were. (Id. 24-25) Petitioner told the doctor that he had brought the films and that the doctor seemed flustered, "like he was in a rush." (Id. 33-34)

Petitioner testified he had agreed to the tie-breaker arrangement with Dr. Goldberg. However, after the exam he felt he "did not get a fair shake" as it had not been a real examination. (Id. 95-96).

On January 6, 2015, Dr. Goldberg faxed a letter addressed only to Respondent's attorney. (Rx 2, Exh. 2) The five-page letter listed Petitioner's current symptoms as "mild low back pain" and "pain in the left buttock, anterior thigh and hamstring." (*Id.*, p. 1). Dr. Goldberg noted on examination, two well-healed surgical scars and found "sensation intact" but trunk flexion limited with reports of pain. (*Id.*, p. 4).

Dr. Goldberg's noted a diagnosis of persistent left lower extremity radiculopathy, that Petitioner was not at MMI and that further treatment was needed, which would be related to the July 28, 2011 accident. (*Id.*, p. 4). However, he also opined that surgery was not warranted, as he found no significant stenosis or nerve compression on any of the radiological studies he had reviewed. These included the original post-injury MRI of September 9, 2011 as well as the April 2014, CT scan, on which he found no evidence of any nerve root cutoff. (*Id.*, pp. 2, 4). Instead of surgery, Dr. Goldberg recommended four weeks of physical therapy followed by an FCE, with additional work conditioning if Petitioner were found not capable of full-duty work. (*Id.*, p. 4).

On February 10, 2015, Petitioner returned to Dr. McNally, who reviewed Dr. Goldberg's report noting disagreement with Dr. Goldberg's opinion that Petitioner's imaging studies showed no significant stenosis or nerve compression to warrant surgery. While Dr. Goldberg noted the 2014 CT scan showed "relatively mild multilevel foramina compromise", Dr. McNally's analysis of those images found stenosis at L5-S1 sufficiently severe to cause a collapse of disc height. (*Id.*, p. 64) In addition, MRI studies going back to the original injury had shown lower lumbar stenosis which had also been noted by Dr. Ghanayem. (*Id.*, 64-65) Dr. McNally repeated his recommendation for surgery, while agreeing to order the physical therapy recommended by Dr. Goldberg. (*Id.*, p. 68)

On April 14, 2015, Petitioner reported to Dr. McNally that he finished his allotted physical therapy sessions but had not progressed to work hardening. Petitioner felt his pain was worsening in his low back and left buttock. Petitioner indicated he wanted the fusion surgery. (Px 4, p. 56) Dr. McNally prescribed an updated MRI with contrast to prepare for the surgery, and maintained Petitioner's off-work restrictions. (*Id.*, p. 58).

Petitioner returned to Dr. McNally on May 12, 2015 to review the MRI and discuss surgery. He reported that his left leg pain was "a constant burning" from his groin down to the calf and shin area, which interfered with sleep and walking. (*Id.*, p. 50) Dr. McNally prescribed Meloxicam and recommended a rolling walker. (*Id.*, p. 52)

On Thursday, May 14, 2015, Respondent advised the treatment prescribed by Dr. McNally was denied and that Petitioner's TTD benefits would be discontinued if he did not undergo an FCE within the next two weeks. (Rx 11)

On May 19, 2015 Dr. McNally signed an order for the FCE recommended by Dr. Goldberg. (Rx 7) This was performed on June 9, 2015 and was rated as valid, with Petitioner's effort rated at 95% of maximum. (Rx 8, p. 1) The FCE rated Petitioner's functional abilities at the light physical demand level, with lifting restrictions of twenty pounds at shoulder level, and five to fifteen pounds from floor level. This rating was below the demands of Petitioner's job which were rated as Heavy. (*Id.*, pp. 2-3) The FCE also noted Petitioner exhibited an antalgic gait, and rated his walking tolerance as occasional. (*Id.*, p. 8) While rating Petitioner as capable of frequent bending, Petitioner's forward flexion was limited to 50% of the normal range. (*Id.*, pp. 3, 5).

On June 19, 2015, Petitioner received a letter from Respondent signed by manager D. Spoonemore, offering light duty work. (Rx 9) The letter described Petitioner's FCE restrictions as frequent lifting of ten pounds and occasional lifting of twenty pounds, stating, "While these restrictions may appear to be restraining the Antioch Menards (Store #3211) does have modified work duty employment within these work restrictions and expects your prompt return on Tuesday, June 23, 2015 at 8:00 am." (*Id.*)

Petitioner's personnel file (Rx 13) contained forty-nine emails from Respondent's corporate legal department to the general manager of the Antioch store regarding Petitioner's receipt of TTD payments for a work injury. (Rx 13, pp. 162, 184-89, 194-236) Each e-mail stated that "the above listed temporary disability payment **is being charged** against your store or facility Profit & Loss statement" (emphasis in original). The emails went on to urge each store to promptly arrange light duty work as soon a team member was released with work restrictions. (*Id.*)

Petitioner testified he went to Respondent's store and spoke with one of Mr. Spoonemore's assistants, who informed him he would be offered a cashier's position. (Tr. 83-84) Petitioner declined the job, believing it was beyond his restrictions. (Tr. 39) Petitioner testified he based this opinion on his knowledge of the cashier job from prior observation. Petitioner explained that cashiers were expected to perform considerable lifting at the register, "Items in the cart, items underneath the cart, move plywood around, lumber, so they can accurately get everything paid for." (Tr. 40-41) Cashiers were also expected to obtain price checks and to bring heavy merchandise out to the customer's vehicle. Petitioner testified that the front-end boss supervised the cashiers and could call for help on their behalf from "any available associate"; however, such help was not always available when needed. He had observed checkout lines "backing up" when cashiers could not get help, especially when store traffic was heavy. (Tr. 42-46) Petitioner testified that Dr. McNally had not released him to work light duty, and he decided to follow his doctor's advice. (Tr. 40)

On July 2, 2015, Petitioner returned to Dr. McNally to review the FCE. He reported that he had been on his back for three days recuperating from the four-hour long exam, and that his neighbor had to help him from his car after the hour's drive home. (Px 4, p. 45) Dr. McNally repeated his recommendation for surgery. Dr. McNally noted, "From a workers' compensation he is "ok" to work at the light physical demand level with permanent restrictions per valid FCE ... From a disability perspective, he remains disabled in anticipation for surgical reconstruction (revision decompression and fusion at L5-S1)." On the work status form, Dr. McNally indicated Petitioner was "medically unable to work." (*Id.*, p. 43)

On October 19, 2015, Petitioner underwent the lumbar fusion surgery at Alexian Brothers which consisted of a posterior lumbar interbody fusion at L5-S1 with instrumentation and a bone graft taken from Petitioner's right iliac crest. (Px 5, p. 10) Dr. McNally's operative report found bilateral severe foraminal narrowing at L5-S1, worse on the right, with a left-sided disk herniation. (*Id.*, p. 12)

On October 21, 2015 Petitioner was discharged from Alexian Brothers. He was already walking, and was assessed as having tolerated surgery well. (Px 6, pp. 24-25)

On March 8, 2016, Petitioner began physical therapy at Athletico. (Px 7, p. 49) He reported that his back and leg pain were about 50% better, and his primary problem was stiffness. (*Id.*, p. 50)

Petitioner followed-up with Dr. McNally on May 17, 2016, reportedly after finishing physical therapy. Petitioner felt he had gained about a 30-40% improvement. Dr. McNally advised continued use of the bone stimulator prescribed post-surgery for another three months. (*Id.*, pp. 13-15)

On October 18, 2016, Petitioner presented to Dr. McNally for the last time. (Px 4, p. 3) Petitioner reportedly was satisfied with the surgery, rating himself as 75% improved. His leg pain was improved, down to a 3/10 as was his ability to sleep, although he still had activity limits. Dr. McNally advised him to continue activity as tolerated and come back in one year. (*Id.*, p. 5)

Nashaud Kazi testified for Respondent. Mr. Kazi has worked for Respondent in various stores for 20 years, the last five as a general manager. Mr. Kazi testified working at the Antioch store for fourteen months and does not know the Petitioner. (Tr. 100-101) Mr. Kazi identified Respondent's Exhibit 13 as Petitioner's personnel file and testified that it was complete. (Id., 102, 104) When asked what information had been redacted or removed, Mr. Kazi said that he did not know. (Id., 104-5)

Mr. Kazi testified Respondent's policy is to offer modified work to injured employees: "We have positions in the store that we can set them in, for example, cashiering." (Id., 106) He testified that an employee with lifting restrictions who is working as a cashier can ring a bell at the register at any time to summon the head cashier. If there is something too heavy for the employee to lift, the head cashier will get other team members to help. (Id., 107)

On cross-exam, Mr. Kazi testified that the store area is over 200,000 square feet which he can walk in a couple of minutes. (Id., 113-14). In the past year, the store was remodeled and the office manager's cubicle is located ten feet from the cash registers. (Id., 117) If a customer needs his car loaded and the job is too heavy for the cashier, he testified, the cashier can ring for the head cashier. If the head cashier is not present, the office manager can be there in seconds. (Tr. 111-12) Mr. Kazi also confirmed that if an associate is helping a customer and the cashier rings for help, the associate is to finish up with the customer first before responding to the cashier's request. (Tr. 115) He agreed he was not working at the store in 2015 when Petitioner was offered the cashier's job. (Tr. 110)

Petitioner testified on rebuttal that he did not agree with the manager, Mr. Kazi, that someone would be within seconds of his cash register to help the cashiers. (Tr. 119)

Dr. Goldberg testified by evidence deposition on October 25, 2015. (Rx 2) This was six days after the Petitioner's fusion surgery, and the operative report was not yet available. Dr. Goldberg testified that the second surgery performed by Dr. McNally reflected Dr. McNally's finding of foraminal stenosis at multiple levels in the spine, from L2 through S1. The aim of the surgery had been to relieve pressure on the exiting nerve roots at those levels. (*Id.* p. 13) Dr. Goldberg reviewed his own physical examination findings, which included limited forward flexion with pain, but "normal sensation" and a negative straight leg raise. (*Id.*, p. 12) His tests for symptom magnification by Petitioner had been negative. (*Id.*, p. 13)

Reviewing Petitioner's CT scan from April 29, 2014, Dr. Goldberg testified he found no persisting foraminal stenosis or central stenosis at L3-4, L4-5 or L5-S1. (Rx 2, p. 14) He opined there was no ongoing nerve compression that would justify another surgery. (*Id.*) Dr. Goldberg's diagnosed Petitioner with persistent left lower extremity radicular symptoms despite his two surgeries. These residual symptoms could be caused by "chronic nerve irritation" despite the lack of nerve compression. (*Id.*, pp. 14-15) Dr. Goldberg had recommended use of anti-inflammatory medications, along with four weeks of physical therapy followed by an FCE to determine Petitioner's work capacity. If found not capable of full duty, the doctor thought Petitioner might benefit from work conditioning. (*Id*, p. 15) Dr. Goldberg testified he had not reviewed Petitioner's FCE report. (*Id.*, p. 17)

When asked if a surgery that led to substantial pain relief would be considered appropriate, Dr. Goldberg responded that "hypothetically" it would. However, he questioned how much relief Petitioner had obtained from Dr. McNally's second surgery. "As a surgeon, you have to have strong indication that surgery will provide relief," he testified, and based on his review of the films he did not see such an indication for a third surgery. (Rx 2, pp. 20-21)

Dr. Ghanayem testified by evidence deposition on July 27, 2016. He reviewed his initial report of September 17, 2012 in which he found Petitioner's L2-3 disc herniation, as well as its recurrence post-surgery, to be related to his work accident. (Rx 1, p. 9) Reviewing the original MRI report from September 2011, as well as the follow-up MRI from April 2012, Dr. Ghanayem noted the L2-3 disc herniation, with no comment on any lower

lumbar findings. (*Id.*, p. 10) Dr. Ghanayem opined that the work injury caused the L2-3 herniation, which recurred "spontaneously" after the first surgery. In his opinion, both the first surgery and the second were related to the work injury. (*Id.*, pp. 12-13)

Dr. Ghanayem testified as part of his second examination of Petitioner on August 5, 2015 it would have been his practice to begin by reviewing his prior report: "I look at the last note to see where we're at, and then see where we're at before I dictate the new one." (Rx 1, p. 16) His second physical exam found limited forward flexion and decreased sensation in Petitioner's thigh, calf and foot. There was tenderness of the back musculature, and a straight leg raise caused back pain. (*Id.* p. 15) In March 2014, Dr. Ghanayem reviewed MRI scans from October 12, 2012 and February 18, 2013. He testified both studies showed "disc disease with stenosis at L5-S1" as well as milder stenosis at L4-5. (*Id.*, p. 19)

Dr. Ghanayem's diagnosed Petitioner with "degenerative stenosis" at L5-S1 which, in his opinion, was a separate, age-related pathology rather than injury-related. (Rx 1, p. 20) Dr. Ghanayem opined that the L5-S1 surgery Petitioner's treating surgeon recommended would be reasonable. However, it would be unrelated to the accident:

> *You've got a spine that ages with time. You've got a disc herniation that's acute relative to the work injury. The work injury problem is addressed ... But at the same time, the rest of his spine is aging because that's what happens every year until you die. You just get older. And what's happened in this guy is he's developed two distinct disease processes, one related to work, one related to natural history. It just so happens they're in the same back a few inches away from each other.* (Id., p. 21)

Dr. Ghanayem agreed he found no evidence of symptom magnification by Petitioner. (*Id.*, p. 26) He also agreed that stenosis could be aggravated by physical therapy. (*Id.*, pp. 25-26) However, since his reports did not document that as a concern, he assumed he had not heard or read any evidence of this. (*Id.*, p. 28)

Dr. McNally testified by evidence deposition on March 9, 2017. He began treating Petitioner in April 2012, several months after his initial L2-3 surgery. (Px 1, pp. 6-7) He reviewed Petitioner's recurrent symptoms following that surgery, and ordered an MRI and EMG which revealed both a recurrence of the L2-3 disc herniation and foraminal stenosis at L4-5 and L5-S1. (*Id.*, pp. 9-11) Dr. McNally also noted findings of L4-5 and L5-S1 stenosis on the original MRI of September 9, 2011, shortly after the accident. (*Id.*, p. 9)

Dr. McNally testified that on May 29, 2012, he discussed with Petitioner the option of proceeding with fusion versus a second decompressive surgery. He explained that a fusion could offer wider decompression and greater stability, including restoring disk height. A decompression at multiple levels was less invasive but more limited, and might lead to collapse of the disk space and narrowing of the foramen. Petitioner chose the less invasive option. (*Id.*, p. 14)

Dr. McNally testified that the November 14, 2012 surgery he performed was aimed at removing the recurrent disc herniation at L2-3 and decompressing the lower lumbar nerves, at L4-5 on the left and bilaterally at L5-S1. (Px 1, p. 16) He testified the surgery had gone well, but Petitioner continued to complain of some thigh pain and weakness. A repeat EMG revealed acute, moderate bilateral radiculopathy at S1, with milder left L5 and chronic left L3-4 radiculopathy. (*Id.*, p. 18). The doctor ordered a lumbar CT scan on April 29, 2014 to better visualize Petitioner's lumbar spine including bone spurs. This scan showed marked stenosis at L5-S1 with a collapse of the disc space. (Id., pp. 22-23) Petitioner had reported worsened pain in both sides of his back, with constant numbness and radiating pain in his left leg. (*Id.*, pp. 19-20). On April 21, 2015, Dr. McNally ordered a final MRI.

Dr. McNally testified he disagreed with Dr. Goldberg's view that Petitioner's radiological studies showed no significant nerve compression. Placing the April 2015 MRI images on a computer screen, Dr. McNally pointed to right and left lumbar levels, which showed normal foramina from L2-3 through L4-5, but marked stenosis at

the L5-S1 level on both sides. (Id., pp. 21-22) These findings were consistent with the April 2014 CT scan, which revealed a collapse of disk height at L5-S1 on the right, and a bony spur impinging the nerve roots on the left. (*Id.*, p. 23)

Dr. McNally testified that the work accident had caused the Petitioner's disc herniation at L2-3, and had also aggravated a pre-existing stenosis in his lower lumbar spine. Before the work accident at issue, Petitioner had no symptoms from the stenosis yet afterwards he did. (Px 1, p. 32) Dr. McNally further testified the injury had not caused significant structural change to the L5-S1 level, but muscle spasm and nerve inflammation triggered by the injury had aggravated the already-existing stenosis. In his opinion, both Dr. Citow's initial surgery, which addressed only the L2-3 problem, and the subsequent surgeries were related to the work accident, as were the diagnostic tests and conservative treatments, such as physical therapy and injections. (*Id.*, p. 33)

Dr. McNally testified that Petitioner had described a 75% improvement in symptoms after his third surgery. Petitioner could finally find a comfortable position which allowed him to sleep, could walk up to 45 minutes and was slowly adding additional activities. (*Id.*, pp. 35-36) Further, Petitioner's shooting pain in his left leg had resolved following this last surgery. (*Id.*, p. 37) Dr. McNally felt the reduction in pain and improvement in Petitioner's quality of life represented a good result. (*Id.*, p. 38)

Dr. McNally testified future instability was possible at the L2-3 level where disc tissue had been removed, as well as the levels between L2-3 and L5-S1 which might require additional treatment. (*Id.*, p. 39)

With respect to work restrictions, Dr. McNally testified he had not released Petitioner to any kind of work prior to the FCE on June 9, 2015. (Px 1, p. 44) His work status form on July 2, 2015 stated that "from a workers' compensation perspective" Petitioner was "okay" to work at the light level per the valid FCE and was at MMI because further intervention had been denied although "from a disability perspective, he remains disabled in anticipation for surgical reconstruction (revision decompression and fusion at L5-S1)." (*Id.*, p. 45) Dr. McNally testified that note was not intended to distinguish between a work-related and non-work-related condition, rather, he was trying to "take care of the patient" in view of "the confusion about different insurances and who is paying for what." The note reflected his understanding that workers' compensation had refused to pay for further care, along with his own opinion that the patient remained disabled and in need of further surgery. (*Id.*, pp. 45-46)

Regarding Petitioner's current or future work status, Dr. McNally testified a new FCE would be necessary to make such determinations. (*Id.*, pp. 48-49)

Regarding Dr. Ghanayem's opinion that Petitioner's lower lumbar surgery was unrelated to the work accident, Dr. McNally testified that Petitioner's anterior thigh symptoms came from the L2-3 level. Dr. Ghanayem's opinion would be reasonable if he were considering only those symptoms. However, Petitioner consistently reported posterior leg and buttock pain which came from the lower lumbar levels, representing an aggravation of the stenosis which the work accident had caused. (*Id.*, pp. 50-52)

Petitioner testified with respect to his current condition, he is "about 75% better" after the fusion surgery. (Tr. 46) He is now able to walk, to sit for a little while, and to sleep. (Id., 49) Before the fusion, he took prescribed opiates for pain, which made him feel "drunk" and unable to think clearly. After the fusion, he has stopped using opiates. (Id., 50-51) Petitioner testified that the surgery also left him with somewhat less mobility. He cannot turn the trunk of his body to look backwards. As a result, he cannot back up a car anymore, and has trouble parking. When they travel together, his wife drives. (Id., 47-48, 53)

Petitioner testified he spends most days at home. He tries to do a few chores like weeding, but has to stop and lie down for 15 minutes to an hour to relieve the pain. He testified he takes four or five such breaks a day. (Id., 54-57) He is able to mow the lawn, but this task takes him two days, while before his accident he could do it in 45 minutes. (Id., 52) Petitioner testified that he used to work on cars, "beefing up" the engines for the

racetrack and selling them. He also liked to repair guns. He testified that he cannot do either activity anymore. (Tr. 58-59)

Petitioner testified he would love to go back to work, but doubted he could handle it. He had worked in management jobs prior to this accident, but such jobs had always been "working manager" positions with physical responsibilities. At Menards, he had stood or walked on concrete floors all day, something that causes a lot of pain now. (Id., 59-60)

CONCLUSIONS OF LAW

The Arbitrator will first address Respondent's Exhibit 14, entitled "Motion to Bar." This concerns the parties' 2014 agreement to retain Dr. Goldberg as an examiner to resolve the differences of opinion between Dr. McNally, Petitioner's treating surgeon, and Dr. Ghanayem, Respondent's Section 12 examiner. Respondent asks the Arbitrator to bar any testimony as to Petitioner's medical treatment after July 2, 2015, which was beyond that recommended by Dr. Goldberg, and further asks that any testimony alleging a right to TTD after June 23, 2015 be barred as well. In support of its motion, Respondent argues that Petitioner should be bound by his "stipulation" to abide by Dr. Goldberg's decision, citing *Higginbotham v. American Family Ins. Co.*, 143 Ill. App.3d 398 (3rd Dist. 1986). However, *Higginbotham* deals with a stipulation at trial before the circuit court, rather than, as in this case, an agreement between the parties in an unsuccessful effort to avoid a trial. Moreover, it is not the practice of the Workers' Compensation Commission to consider motions of the type offered by Respondent; rather, it is the Commission's role to decide the relative weight to be given to competing testimony and evidence. Finally, the Arbitrator notes that because Respondent's "Motion to Bar" was not filed with the Commission prior to trial, it is not possible to establish proper notice to Petitioner. For the foregoing reasons, the Arbitrator will consider all the testimony and evidence offered at trial, and will not accept the designation of Dr. Goldberg's report as a "stipulation" by which either party is bound.

As to issue "F", whether the Petitioner's present condition of ill-being is causally related to his injury, the Arbitrator finds as follows:

The Arbitrator first notes that Petitioner was asymptomatic and regularly performing heavy labor up through the date of his July 28, 2011 accident. No evidence was offered to rebut Petitioner's testimony on this point. Respondent's personnel file (Rx 13), which includes multiple assessments of Petitioner's job performance as a new employee, contains no reference to any physical limitations, nor does it document any time off work for back pain or musculoskeletal injuries. His resume, offered by Respondent as Rx 4, documents years of successful prior employment in an identical or similar capacity.

Following his injury, the Petitioner was immediately placed on light-duty restrictions by the Advocate Condell occupational-health clinic, Respondent's chosen provider. Less than a month later, clinic staff found such light duty to be unsustainable, took Petitioner off work and referred Petitioner to a neurosurgeon "ASAP".

Although Petitioner reported brief improvement in his pain levels in the periods immediately following his first two surgeries, his symptoms rapidly recurred. Following his third surgery, he reported 75% improvement in pain relief.

Respondent relies on the opinion of its Section 12 examiner, Dr. Ghanayem who agrees Petitioner's herniated disk at L2-3 was caused by the accident but believes Petitioner's L4-5 and L5-S1 stenosis was a pre-existing condition that was entirely a function of age, unrelated to the workplace accident. However, Dr. Ghanayem's opinion is based on his impression, repeatedly stated, that the Petitioner's work accident led to only one pathological finding: the herniated disk at L2-3. His deposition testimony reflected his apparent belief that the lower lumbar stenosis first appeared in 2012, while Petitioner was awaiting surgery, and worsened in 2013.

In fact, the lower lumbar stenosis had been visible on the original MRI of September 9, 2011, six weeks after the accident, following a month of light duty work, physical therapy at the company clinic, and worsening pain. This was noted both by Dr. Citow and by the radiologist, who drew particular attention to the L5-S1 findings. (Px 3, p. 44; Rx 13, p. 167) Both Dr. McNally, the treating surgeon, and Dr. Goldberg, the jointly retained "tie-breaker" examiner, agreed that the stenosis was pre-existing. However, both doctors recognized that the accident had aggravated a pre-existing condition which had previously been asymptomatic. Dr. McNally diagnosed the aggravation as "nerve compression" that warranted surgery, while Dr. Goldberg labeled it "chronic nerve irritation" best treated with more conservative measures. However, both doctors opined that it was related to the original work injury. The Arbitrator adopts their opinions, and finds based on a thorough review of the evidence contained in the record, that Petitioner's current condition is causally connected to the work accident of July 28, 2011.

As to issue "J", regarding the reasonableness and necessity of medical care, the Arbitrator finds as follows:

The Respondent in this case determined that the Petitioner sustained a compensable accident on July 28, 2011. The Respondent provided TTD benefits to the Petitioner from the day after the accident through June 22, 2015. The Respondent authorized and paid for the treatment and surgery (December 2, 2012) recommended and performed by Dr. Citow, the Petitioner's first surgeon, and then authorized and paid for the second surgery performed by Dr. McNally November 14, 2012. In July, 2013, Dr. McNally recommended a third surgery at the L5-S1 level. The Respondent sent Petitioner back to Dr. Ghanayem on August 5, 2013 for an opinion on whether the need for this third surgical procedure at the L5-S1 level was in any way caused by the accident of July 28, 2011. Dr. Ghanayem had previously stated that the Petitioner did require the surgery at L2-3 and that the condition at that level, disc herniation, was caused by the accident at issue. Dr. Ghanayem, on August 5, 2013, stated that the problem in the Petitioner's lower lumbar spine was not related to the disc herniation at L2-3 which was caused by the work injury.

Having found causal connection for Petitioner's low back and left leg symptoms, the Arbitrator finds all treatment received for those symptoms through October 16, 2016 to have been reasonable, necessary and related to his work injury of July 28, 2011. This includes Dr. Citow's initial surgical treatment, for which the Respondent did not seek its own medical opinion, and Dr. McNally's first surgery of November 14, 2012, which Respondent's Section 12 examiner, Dr. Ghanayem, agreed was necessary and related to the accident. It also specifically includes Dr. McNally's second surgery and the lumbar fusion at L5-S1 performed on October 19, 2015.

The Arbitrator notes the medical opinions regarding Petitioner's third surgery is rather complex. Dr. McNally, the treating surgeon, opined that an L5-S1 fusion was both reasonable and necessary to treat Petitioner's symptoms, and causally related to his original injury. Dr. Ghanayem, Respondent's Section 12 examiner, agreed with Dr. McNally that the surgery was reasonable and necessary, but denied that it was related to the accident of July 28, 2011. Dr. Goldberg, the examiner jointly chosen by the parties, also rendered a divided opinion, but in the opposite direction: he agreed with Dr. McNally that Petitioner's lower lumbar symptoms were related to the accident, but disagreed that they warranted surgical correction.

For the reasons outlined above, the Arbitrator has found the Petitioner's condition of ill-being from the date of accident to the date of trial to be causally connected to his work accident. In doing so, the Arbitrator has adopted the opinions of Dr. McNally and Dr. Goldberg, and has rejected Dr. Ghanayem's theory of two separate and unrelated conditions: an upper lumbar disc herniation caused by the Petitioner's lifting accident, and a lower lumbar pathology that was strictly degenerative and unrelated to the accident.

On the issue of medical necessity, however, Dr. McNally and Dr. Ghanayem were in agreement that the Petitioner's lower lumbar condition was sufficiently severe to warrant surgery, while Dr. Goldberg stood alone in denying any significant pathology. Both Dr. McNally and Dr. Ghanayem agreed that the MRI films they

reviewed showed substantial stenosis at L5-S1 which appeared to be worsening. Both doctors provided detailed descriptions of Petitioner's symptoms, which were in substantial agreement. These included pain that radiated down the back of the leg to the foot, along with decreased sensation. In his testimony, Dr. McNally further explained the anatomical relationship of this symptom pattern to the Petitioner's lower lumbar stenosis rather than the upper lumbar disc herniation at L2-3.

In contrast, Dr. Goldberg's report, while providing detailed opinions on the radiological evidence, gives only the briefest account of his findings on physical examination of the Petitioner. In the process, the radiating pain to Petitioner's lower leg and foot, as well as the documented numbness and loss of sensation is absent. In this respect the cursory nature of Dr. Goldberg's report gives credibility to the Petitioner's testimony as to a brief, five-minute examination. Moreover, Dr. Goldberg's assessment of the radiological studies as showing no significant stenosis or compression is at odds with that of both treating surgeons (Dr. Citow and Dr. McNally), Respondent's Section 12 examiner (Dr. Ghanayem), and various reporting radiologists going back to Petitioner's first MRI, just six weeks after the accident.

Finally, Dr. Goldberg's deposition testimony provides a useful basis for evaluating his opinion as to Petitioner's treatment needs: He agrees at least hypothetically that "the proof is in the pudding" and that a surgery which results in substantial, long-term pain relief qualifies as appropriate. However, he considers the relief Petitioner gained from his second surgery to be unimpressive, opining no "strong indication" that the proposed fusion will provide much relief. (Rx 2, pp. 20-21) Dr. Goldberg's testimony in October 2015 was given within days of Petitioner's fusion surgery. He did not have the opportunity either to review the operative report, which documented severe bilateral foraminal narrowing and a left-sided disk herniation at L5-S1, the fusion site. Nor was Dr. Goldberg given the chance to re-examine the Petitioner and assess the practical results of the surgery.

Petitioner credibly testified to significant improvement in his quality of life two years following his fusion surgery. He is able to walk modest distances without pain, able to sleep normally and has no need for opioid pain medicines. The increase in his quality of life indicates that, at least in this case, the "more invasive" lower lumbar surgery was appropriate treatment. The Arbitrator therefore adopts the opinions of Drs. McNally and Dr. Ghanayem, and finds the medical care given Petitioner to date, including all three surgeries, to have been reasonable and necessary to cure or relieve his condition of ill-being. The medical bills submitted as Petitioner's Exhibit 8 are therefore Respondent's liability, subject to the medical fee schedule as provided in Section 8(a) of the Act. Respondent shall receive credit for any portion thereof that it can demonstrate it has already paid.

As to issue "K", regarding Petitioner's entitlement to Temporary Total Disability benefits, the Arbitrator finds as follows:

Respondent maintains that Petitioner's entitlement to TTD ended on June 23, 2015 when he failed to accept Respondent's offer of work as building-supply store cashier. Petitioner testified credibly to his belief, based on his pre-injury observations of the job, that the physical demands on cashiers were well beyond his then-current limitations. These included considerable bending and lifting required to scan customer items which included lumber, sacks of concrete, etc. Cashiers were also expected to help customers load these items into their cars or vans. Petitioner testified that he had seen long lines form at the registers when cashiers were dealing with heavy items and extra help was not readily available.

Respondent offered no job description, either at the time of the job offer or at trial, to rebut Petitioner's testimony. Rather, it relied on the testimony of its manager, Mr. Kazi, as to the physical demands of the job and the availability of help for an employee with lifting restrictions. However, Mr. Kazi's testimony made it clear that he viewed the cashier position as "light duty" per se, despite the many features of a building-supply store that make the work considerably more physical than the average retail cashier's job. The Arbitrator also

found Mr. Kazi's estimates of the amount of help available to a physically disabled cashier, and the ease with which it could be provided ("within seconds"), to be so consistently optimistic as to lack credibility.

Furthermore, the FCE report rating Petitioner as capable of "Light" work was not issued with reference to any particular job; the therapist was given no clue as to the "restricted duty," if any, contemplated by his employer. The FCE report did note Petitioner's limited forward bending and antalgic gait, and rated his walking tolerance as Occasional.

Finally, Dr. McNally's medical records note that that Petitioner was in bed for three days recuperating from the FCE. Dr. McNally testified that his July 2, 2015 note stating that Petitioner had been cleared for light duty "from a workers' comp perspective" did not constitute a recommendation that Petitioner return to work. Rather, it was an attempt to summarize the dueling recommendations of two insurance carriers, and was followed by the statement that "from a disability perspective" the Petitioner was in need of surgery. Dr. McNally's work status report for July 2, 2015 checks the same box that was checked at the office visit before and after that date: "Medically unable to work." The Arbitrator notes no medical opinion from Dr. Goldberg or Dr. Ghanayem as to the results of the FCE or whether the job offered him by Respondent was within his restrictions is contained in the evidence submitted to the Arbitrator.

The Arbitrator therefore finds that Petitioner did not refuse an offer of light-duty work within his medical restrictions, and awards TTD benefits from August 22, 2011 through October 18, 2016, when Dr. McNally found him at MMI.

As to issue "L", regarding the nature and extent of Petitioner's injuries, the Arbitrator finds as follows:

In determining the nature and extent of permanent partial disability, Section 8.1b of the Act sets out five factors that must be considered: 1) the claimant's level of impairment as determined by an examining physician pursuant to the AMA's Guides to the Evaluation of Permanent Impairment; 2) the claimant's occupation; 3) his or her age; 4) his or her future earning capacity; and 5) evidence of disability corroborated by the treating medical records.

Regarding the first factor, no impairment rating was performed by the treating surgeon, nor did Respondent obtain a Section 12 examination for that purpose. Accordingly, the Arbitrator will not consider this factor.

Regarding factors 2, 3 and 4, the Arbitrator notes that the Petitioner is unable to return to his original occupation in the building-supply industry. He is now 60 years of age, and has worked in that industry for most of his adult life. Petitioner does have some college education and management experience. However, his past career experience illustrates that management and technical employees in his industry cannot expect either sedentary or "light" employment, as all positions are to some extent physically demanding. The combination of his physical limitations and industry-specific experience suggests that his prospects for re-employment are minimal at best. Prior to his accident, the Petitioner was working without limitation, at age 54, in a job requiring frequent heavy lifting. The Arbitrator thus finds that he has suffered a major loss of earning capacity, and assigns great weight to these factors.

Finally, regarding factor 5:

- On October 19, 2015, Petitioner underwent his third surgery consisting of a posterior lumbar interbody fusion at L5-S1 with instrumentation and a bone graft taken from Petitioner's right iliac crest. (Px 5, p. 10) Dr. McNally noted intra-operative findings included bilateral severe foraminal narrowing at L5-S1, worse on the right, with a left-sided disk herniation. *(Id.*, p. 12)

- On October 21, 2015 Petitioner was discharged from Alexian Brothers. He was already walking, and was assessed as having tolerated surgery well. (Px 6, pp. 24-25).

- On March 8, 2016, Petitioner began physical therapy at Athletico. (Px 7, p. 49) He reported that his back and leg pain were about 50% better, and his primary problem was stiffness. (*Id.*, p. 50)

- Petitioner followed-up with Dr. McNally on May 17, 2016, reportedly after finishing physical therapy. Petitioner felt he had gained about a 30-40% improvement. Dr. McNally advised continued use of the bone stimulator prescribed post-surgery for another three months. (*Id.*, pp. 13-15)

- On August 16, 2016, Petitioner followed-up with Dr. McNally with complaints of some numbness in his left leg, numbness at the incision site in his low back an inability to sit or stand for long periods, trouble climbing ladders and pain when lifting 25 pounds. Petitioner reported that he could mow his lawn but needed to take a nap afterwards. Petitioner reported he felt 75% better than his pre-operative condition and rated his pain levels at a 3/10.

- On October 18, 2016, Petitioner presented to Dr. McNally for the last time. (Px 4, p. 3) Petitioner reportedly was satisfied with the surgery and rated himself as 75% improved. His leg pain was much better, down to a 3/10 and his sleep was much improved, although he still had activity limits. Dr. McNally advised him to continue activity as tolerated and come back in one year. (*Id.*, p. 5)

- At the arbitration hearing, Petitioner testified he is "about 75% better" after the fusion surgery. (Tr. 46) He is now able to walk, to sit for a little while, and to sleep. (Id., 49). Before the fusion, he took prescribed opiates for pain, which made him feel "drunk" and unable to think clearly. After the fusion, he has stopped using opiates. (Id., 50-51) Petitioner testified that the surgery also left him with somewhat less mobility. He cannot turn the trunk of his body to look backwards. As a result, he cannot back up a car anymore, and has trouble parking. When they travel together, his wife drives. (Id., 47-48, 53) Petitioner testified he spends most days at home. He tries to do a few chores like weeding, but finds he has to stop and lie down for 15 minutes to an hour to relieve the pain. He testified that he takes four or five such breaks a day. (Id., 54-57). He is able to mow the lawn, but this task takes him two days, while before his accident he could do it in 45 minutes. (Id., 52) Petitioner testified that he used to work on cars, "beefing up" the engines for the racetrack and selling them. He also liked to repair guns. He testified that he cannot do either activity anymore. (Tr. 58-59)

The Arbitrator finds the medical records in evidence corroborate Petitioner's above testimony with respect to permanency and therefore assigns more weight to this factor.

Petitioner's physical limitations may well prevent him from any return to the workforce on a meaningful level, however, no medical or vocational opinion was presented to that effect, and Petitioner testified that he has not attempted to find work. As a result, he cannot be considered permanently and totally disabled, but has clearly sustained a major loss of physical and occupational function.

In view of the evidence as a whole, the Arbitrator finds that Petitioner has suffered a loss of use of 60% of the whole person.

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
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Victor Suarez-Maldonado,

Petitioner,

vs. NO: 18WC 3286

Subzero Snow and Ice,

Respondent.

19IWCC0656

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 accident, causation, average weekly wage, medical, prospective medical, 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 February 4, 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 $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: DEC 5 - 2019

Douglas McCarthy

DDM/jrc
O: 11-13-19
052

Stephen Mathis

SPECIAL CONCURRENCE

I concur with the decision reached by the majority. I write separately to expand on the legal analysis I utilized in arriving at my decision.

Petitioner worked as a snowplow driver for Respondent. T.8. As such, his job duties, at times, qualified him as a traveling employee. See *Allenbaugh v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150284WC, ¶ 16 ("A traveling employee is an employee whose job duties require him or her to travel away from the employer's premises. [citation omitted]."). The work-related travel must be more than Petitioner's regular commute to work. See *Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Commission*, 2013 IL 115728, ¶ 16 (quoting *Common Wealth Edison Co. v. Industrial Commission*, 86 Ill. 2d 534, 537 (1981)) and *Pryor v. Illinois Workers' Compensation Commission*, 2015 IL App (2d) 130874WC, ¶ 19 ("'The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out or in the course of the employment and, hence, is not compensable.'").

Petitioner testified he was on his way to a meeting when he injured his back. T. 47. Mr. Chris Kopcansky and Mr. James Martin testified a meeting was to be held to discuss issues with Petitioner's performance in plowing certain cites. T. 66, 84. Petitioner was embarking on his normal commute to a fixed job site, Respondent's premises, and, therefore, does not qualify as a traveling employee.

Additionally, I concur with the majority's finding that Petitioner failed to prove he sustained an accident which arose out of his employment. "Even before there can be a consideration of whether an accidental injury arose out of employment, claimant must prove there was an accidental injury." *Elliot v. the Industrial Commission*, 303 Ill. App. 3d 185, 188, 707 N.E.2d 228 (1999). Petitioner is simply not credible.

For the reasons stated above, I concur with the majority's decision in affirming and adopting the decision of the arbitrator.

L. Elizabeth Coppoletti

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

SUAREZ-MALDONADO, VICTOR
Employee/Petitioner

Case# **18WC003286**

SUBZERO SNOW AND ICE
Employer/Respondent

19IWCC0656

On 2/4/2019, 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:

2998 MARKER & CRANNELL ATTYS AT LAW
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NAPERVILLE, IL 60564

0532 HOLECEK & ASSOCIATES
KENNETH SMITH
PO BOX 64093
ST PAUL, MN 55164-0093

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
19(b)

Victor Suarez-Maldonado
Employee/Petitioner

Case # **18** WC **3286**

v.

19IWCC0656

Subzero Snow and Ice
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 **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. ☒ 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 alleged, **January 2, 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 the alleged 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's average weekly wage was $**463.00**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **1** dependent child.

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

Respondent shall be given a credit of $**10,039.44** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**10,039.44**.

Respondent is entitled to a credit for all of the medical expenses it has paid on behalf of Petitioner, under Section 8(j) of the Act.

ORDER

Petitioner failed to meet his burden of proving an accident arising out of and in the course of his employment occurred. Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

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.

Arbitrator Anthony C. Erbacci

January 28, 2019
Date

FACTS:

The Petitioner testified that in January of 2018 he was an employee of Respondent Subzero Snow and Ice. Petitioner testified that he was hired by Respondent in 2014 as a snow plow driver and he worked 40 hours per week. Petitioner testified that he was also employed by Cobra Construction which was owned by Chris Kopansky, who was also the owner of Respondent Subzero Snow and Ice. The Petitioner testified that he worked 40 hours per week and was paid $25.00 per hour and then $30.00 per hour. The Petitioner testified that he earned an average of $893.34 per week and he was paid by check. In support of his claimed average weekly wage, the Petitioner offered what he identified as copies of his pay checks from Cobra Construction and Subzero Snow and Ice. (PX 9, RX 8)

The Petitioner testified that he sustained an injury on January 2, 2018 while working for Respondent Subzero Snow and Ice. The Petitioner testified that he worked the prior Friday, (12/19/17), and he parked his truck with the attached plow at his home when he had finished working. Petitioner identified Petitioner's Exhibit 8 as a photo of the truck and plow. Petitioner testified that he was off work Saturday, (12/30/17), Sunday, (12/31/17), and Monday, (1/1/18). He testified that, at approximately 9:00 a.m. on Tuesday morning, January 2, 2018, he was going to drive his truck to the Respondent's offices for a company meeting, but the plow blade attached to the truck would not go up. The Petitioner testified that the plow's hydraulic lift didn't lift the plow blade, so he got out of the truck and saw that it was stuck in ice on the pavement. The Petitioner testified that he pulled on the plow blade in an attempt to free it from the ice when he felt pain in his back and his legs gave out.

The Petitioner testified that, following the incident, he spoke by phone with Chris Kopansky and told him what had happened. He testified that his wife then took him to Edward Hospital where he complained of pain in both of his legs and his low back.

The records of Edward Hospital demonstrate that the Petitioner was seen at the Edward Hospital Immediate Care facility at 9:57 a.m. and reported a history of "... 30 minutes ago he was loading his plow and felt acute pain in his lower back. . . ". X-rays of the Petitioner's lumbar spine were taken, and the x-ray technician noted a history of "Patient was lifting a plow out of his truck and felt a sudden crack/pop to his lower back. He fell back and was then unable to bear weight. He has pain down both legs. The right leg is worse." The impression was "mild osteoarthritic changes at L5-S1" and the Petitioner was diagnosed with a "back strain".

The Petitioner was then transported to Edward Hospital where it was noted that the Petitioner presented "after trying to move his snowplow off of his truck and suddenly had right-sided back pain". An MRI of the Petitioner's lumbar spine was performed and was noted to reveal a left paracentral disc bulge at L5-S1 causing severe left neuroforaminal stenosis, and a foraminal component of disc bulge at L3-L4 abutting the right L3 nerve root. The Petitioner was seen by a neuro-surgeon, Dr. Drew Spencer, who noted a history of "trying to disengage his snow plow from his truck when he had a sudden onset of right lower back pain." Dr. Spencer examined the Petitioner and reviewed the MRI results, and noted that the Petitioner's pain was out of proportion with and did not correlate with the MRI findings. Dr. Spencer noted that there was no indication for surgical intervention at that time.

The Petitioner was then seen by Dr. Mohammad Kahn who diagnosed lumbar radiculopathy and recommended 3 transforaminal lumbar epidural steroid injections, the first of which was performed on January 5, 2018.

The Petitioner returned to Edward Hospital on January 15, 2018 and reported that he "had been doing well until his Norco ran out a few days ago". He additionally complained of right lower quadrant pain. The attending physician noted that there was no clear etiology of the Petitioner's symptoms and the Petitioner was discharged with a refill of his Norco. On February 13, 2018 and February 27, 2018, the Petitioner received the second and third of the recommended transforaminal lumbar epidural steroid injections.

On March 20, 2018 the Petitioner returned to Edward Hospital Emergency Department and reported that the epidural injections provided minimal relief and that his pain began worsening two days prior with no new injury or trauma. The Petitioner was prescribed more medication and was discharged.

On March 28, 2018 the Petitioner was again seen by Dr. Drew Spencer. The history noted by the nurse at that time was that the Petitioner was injured on January 2, 2018 "while pulling to remove a snow plow from work truck." Dr. Spencer examined the Petitioner and reviewed the MRI and reported that "with a normal exam, combined with imaging without high grade stenosis or a structural abnormality, there is not a surgery I think would benefit him at this time." Dr. Spencer prescribed a course of physical therapy for the Petitioner. The Petitioner returned to Dr. Spencer on May 7, 2018 and reported that the physical therapy had not helped at all. Dr. Spencer continued the Petitioner off work and referred him for evaluation by physiatry to improve his pain and functional status.

On April 6, 2018 the Petitioner was examined by Dr. Harel Deutsch at Rush University Medical Center at the request of the Respondent. Dr. Deutsch's report indicates that the Petitioner refused to answer any questions regarding the accident and Dr. Deutsch noted the history contained in the medical records that he injured his back "taking off the snow plow blade off his truck." Dr. Deutsch noted the medical treatment the Petitioner had received and the January 3, 2018 MRI, and he examined the Petitioner.

Dr. Deutsch noted that the Petitioner's MRI showed degenerative disk bulging at L5/5 and L5/S1 and no evidence of any acute injury. Dr. Deutsch opined that there were no findings on the MRI that were related to the alleged work injury. Dr. Deutsch indicated that while the degenerative changes shown in the Petitioner's MRI would be consistent with some back pain, the Petitioner had all positive Waddell signs and inconsistent effort which indicated symptom exaggeration. Dr. Deutsch opined that the Petitioner's diagnosis was that of a lumbar strain for which physical therapy would be appropriate and from which the Petitioner should reach Maximum Medical Improvement by May 1, 2018.

On both direct examination and cross-examination, the Petitioner acknowledged that he was not fully cooperative with Dr. Deutsch's examination and that he did not answer all of the doctor's questions.

The Petitioner testified that he then sought a second opinion from Dr. Thomas McNally. The records of Dr. McNally demonstrate that the Petitioner was first seen by Dr. McNally at Suburban Orthopaedics on June 14, 2018. The history noted indicates that the Petitioner reported that "he was trying to pull the snow plow and it was frozen so at the moment he was pulling he felt a sharp pain in the lower back and he got numbness on bilateral legs and was unable to move." X-rays were performed and noted to demonstrate "minimal left lumbar scoliosis, mild degenerative changes

consistent with age and occupation. Some spondylolisthesis of L4 on L5 with flexion, less at L3-4." Dr. McNally prescribed a bilateral lower extremity EMG/NCV which was performed on August 20, 2018 and was reported to be suggestive of mild left L5-S1 nerve root irritation.

The Petitioner returned to Dr. McNally on September 4, 2018 and complained of worsening pain. Dr. McNally noted the EMG/NCV results as well as the findings and opinions of Dr. Deutsch. Dr. McNally opined that "The work related injury on 1/2/2018 did not cause the degenerative changes in the patient's lumbar spine. To a reasonable degree of medical and surgical certainty, the work related injury on 1/2/2018 aggravated and accelerated the pre-existing previously asymptomatic degenerative lumbar spinal conditions, and caused them to become sympromatic and require treatment." Dr. McNally recommended surgery for the Petitioner and ordered a pre-surgical MRI.

On September 11, 2018 Dr. McNally noted the findings in the report of the MRI performed on September 7, 2018 and indicated that it demonstrated multilevel lumbar spondylosis with variable impingement of the dural sac and neural foramina. Dr. McNally indicated that the overall visual appearance was "grossly similar to that seen previously." Dr. McNally recommended surgery for the Petitioner consisting of bilateral L4-5 and L5-S1 laminotomies and possible laminectomies.

The Petitioner testified that currently, he continues to experience constant pain in his low back which he rated as 9/10. The Petitioner testified that he wants to undergo the surgery recommended for him by Dr. McNally.

Christopher Kopcansky, the President of Respondent Sub Zero Snow and Ice, and another company, Cobra Construction, testified that Sub Zero Snow and Ice is a snow removal company that operates only in the winter months and Cobra Construction is a contracting business that operates all year long. Mr. Kopcansky testified that in January of 2018 the Petitioner worked for his company SubZero Snow and Ice. He stated that in January of 2018 the Petitioner only worked for Sub Zero Snow and Ice but, during the construction season, the Petitioner worked for Cobra Construction Company. He stated that the Petitioner did not work for both Sub Zero Snow and Ice and Cobra Construction concurrently in that when he worked for Sub Zero Snow and Ice there were no active Construction jobs for Cobra Construction. He went through the pay stubs in Respondent's Ex. 8 and Petitioner's Exhibit 9. He identified that the checks with the rectangular insignia were from Cobra and the checks with the oval insignia were from Sub Zero Snow and Ice. He testified that snow plow drivers only work when there is snow and they are not guaranteed a 40-hour work week.

Mr. Kopcansky testified that prior to January 2, 2018, he called the Petitioner and advised him to come to the office to talk about some issues they were having regarding customers who the Petitioner serviced as a tow truck driver. He testified that at no point in time did he tell the Petitioner or instruct him to remove the snow plow blade from the truck. He testified that drivers seldom remove the snow plow from the truck during the snow season. Mr. Kopcansky testified that on the morning of January 2, 2018, the Petitioner did not appear for the scheduled meeting and he and James Harris, a co-owner of the Respondent, called the Petitioner. Mr. Kopcansky testified that when he spoke with the Petitioner, the Petitioner advised him that he was bending down to undo a pin on the snow plow and that he injured his back because of bending down one too many times. Mr. Kopcansky testified that at no point in time during the conversation did the Petitioner tell him that he was attempting to move the frozen or stuck plow blade.

James Harris, the vice president of Respondent SubZero Snow & Ice Control and of Cobra Construction Company also stated that the Petitioner did not work for both companies at the same time and that in January 2018 when the alleged accident happened, Cobra Construction did not have any construction-type jobs. He testified that drivers generally do not take the snow plow off the truck during the snow season.

Mr. Harris testified that on the morning of January 2, 2018, he was at the office with Christopher Kopcansky. He testified that prior to that date, the Petitioner had requested some time off to go skating with his daughter, and the last time the Petitioner had worked was the day of December 29, 2017. Mr. Harris testified that from December 29, 2017 to January 1, 2018, there was no snow and the company did not have any calls on those days. He identified Respondent's Exhibit #9 as the service-call log for the Petitioner and testified that these were the only service calls the Petitioner had from December 24, 2017 to January 1, 2018. Mr. Harris testified that the Petitioner's job as a snow plow driver was not a salaried position and that snow plow drivers were paid hourly based on the amount of service calls they got. If they did not get any service calls, they did not work. They were not promised or guaranteed a 40-hour work week.

Mr. Harris testified that on the morning of January 2, 2018, the Petitioner did not appear for the meeting that had been scheduled with him and Mr. Kopcansky. He stated that they called the Petitioner to inquire as to his whereabouts. At that point in time, the Petitioner advised them that he injured his back while he was trying to disengage the plow. Specifically, the Petitioner told them that he had tried to take a pin off the blade and that he tried to do this one too many times and as a result he injured his back. During this conversation he did not mention anything about trying to physically move a stuck or frozen blade.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all of the elements of his claim by a preponderance of the credible evidence. The Arbitrator finds that the Petitioner failed to meet that burden in the instant matter.

The Arbitrator notes that the Petitioner testified that his injury occurred when he was pulling on the plow blade attached to his truck in order to free it from the icy driveway to which it was stuck. The Arbitrator notes that this is not the same history noted in the initial medical records. When the Petitioner was initially seen at Edward Hospital Immediate Care he provided a history of "he was loading his plow and felt acute pain in his lower back". When he was seen later that day at Edward Hospital it was noted that the Petitioner presented "after trying to move his snowplow off of his truck and suddenly had right-sided back pain". When he was seen by Dr. Drew Spencer On March 28, 2018 the history noted was that the Petitioner was injured "while pulling to remove a snow plow from work truck." When the Petitioner was seen by Dr. Deutsch, the Respondent's examining physician, the Petitioner refused to answer any questions regarding the accident and Dr. Deutsch noted the history contained in the medical records that he injured his back "taking off the snow plow blade off his truck." It was not until the Petitioner saw Dr. McNally for a second opinion on June 14, 2018 that

the history noted indicates that "he was trying to pull the snow plow and it was frozen so at the moment he was pulling he felt a sharp pain in the lower back and he got numbness on bilateral legs and was unable to move." This specific history first appears in the medical records five months after the alleged injury occurred.

Similarly, this is not the history that the Respondent's witnesses testified that the Petitioner provided to them on the morning the alleged injury occurred. Christopher Kopcansky, the Respondent's President, testified that the Petitioner reported that he was bending down to undo a pin on the snow plow and that he injured his back because of bending down one too many times. Mr. Kopcansky testified that at no point did the Petitioner tell him that he was attempting to move the frozen or stuck plow blade. James Harris, Respondent's vice president, testified that the Petitioner advised that he injured his back while he was trying to disengage the plow. Specifically, that he had tried to take a pin off the blade and that he tried to do this one too many times and as a result he injured his back. Mr. Harris also testified that the Petitioner did not mention anything about trying to physically move a stuck or frozen plow blade. While the Arbitrator recognizes that Mr. Kopcansky and Mr. Harris have an interest in the outcome of this matter, their testimony was uncontradicted and unrebutted, and it cannot be ignored.

While all of the histories recorded in the medical records, and the histories related by Mr. Kopcansky and Mr. Harris, involve an activity associated with movement of the plow, they differ in several respects from the Petitioner's testimony. Only the Petitioner's testimony and the history noted in the June 14, 2018 record of Dr. McNally reference a plow blade stuck to the pavement by ice. That specific history first appears in the medical records more than five months after the alleged injury, and it does not appear anywhere else in the medical records. (Interestingly, it also appears in the same medical record in which Dr. McNally gives a legally worded opinion as to causation.)

The Arbitrator finds it difficult to reconcile the differences between the histories noted in the initial medical records and the Petitioner's very specific testimony that the plow blade was stuck to the pavement by ice. It is difficult to believe that had the alleged injury occurred in the manner that the Petitioner testified it did, the Petitioner would not have provided that specific history to his initial medical providers. Similarly, it is difficult to believe that had the alleged injury occurred in the manner that the Petitioner testified it did, that some mention of pulling on a stuck plow blade would not have found its way into any of the histories noted by all of the various medical providers prior to Dr. McNally. Finally, it is difficult to believe that had the Petitioner provided his initial medical providers with a history of injury consistent with his testimony, that specific history would not have appeared in any of the initial medical records.

The Arbitrator also notes that both Dr. Spencer and Dr. Deutsch questioned the veracity of the Petitioner's pain complaints. Dr. Spencer indicated that the Petitioner's pain was out of proportion with and did not correlate with the MRI findings. Dr. Deutsch reported that the Petitioner had all positive Waddell signs and inconsistent effort which indicated symptom exaggeration. Dr. Deutsch also reported, and the Petitioner admitted, that the Petitioner was not fully cooperative with the examination and did not answer all of Dr. Deutsch's questions.

The inconsistencies in the histories noted in the initial medical records, the unrebutted testimony of Mr. Kopcansky and Mr. Harris, the Petitioner's failure to fully cooperate with Dr. Deutsch's examination, and the indication of symptom magnification noted by Dr. Deutsch, all cause the Arbitrator to question the credibility of the Petitioner's testimony.

The Arbitrator also questions the plausibility of the Petitioner's version of the events leading up to his alleged injury. It is difficult to believe that had the plow blade in fact been stuck to the pavement by ice, that the force of merely moving the truck would not have been sufficient to free the plow blade, even if the plow's hydraulic lift didn't lift the plow blade. Similarly, it is difficult to believe that if the plow blade had been stuck to the pavement so severely that the Hydraulic lift designed to lift the heavy plow blade could not function, that the Petitioner, an experienced snow plow driver, would not have attempted to free the blade by moving the truck. This question of plausibility, together with the inconsistencies in the histories noted in the initial medical records, the unrebutted testimony of Mr. Kopcansky and Mr. Harris, the Petitioner's failure to fully cooperate with Dr. Deutsch's examination, and the indication of symptom magnification noted by Dr. Deutsch, all cause the Arbitrator to further question the credibility of the Petitioner's testimony

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove by a preponderance of the evidence that an accident arising out of and in the course of his employment by the Respondent occurred on January 2, 2018.

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

As the Arbitrator has found that the Petitioner failed to prove that an accident arising out of and in the course of the Petitioner' employment by the Respondent occurred, determination of the Petitioner's earnings is moot. In any event, the Arbitrator cannot determine from the evidence admitted into the record, exactly what the Petitioner's earnings were in the year preceding the alleged injury. As noted above, the Arbitrator questions the credibility of the Petitioner's testimony, which was not sufficiently specific with regard to his earnings, and the documentary exhibits were offered without sufficient explanation to allow the appropriate calculation. The Arbitrator notes that the Petitioner's wage exhibit contains what appears to be a pay check from Knight's Electrical Heating and Cooling, an entity not identified by the Petitioner or the Respondent. As the Respondent stipulated to an average weekly wage of $463.00, (See Arb. EX. 1), the Arbitrator finds that the Petitioner's average weekly wage in the year preceding the alleged injury was $463.00.

In Support of the Arbitrator's Decision relating to the remaining disputed issues, the Arbitrator finds and concludes as follows:

As the Arbitrator has found that the Petitioner failed to prove that an accident arising out of and in the course of the Petitioner' employment by the Respondent occurred, determination of the remaining disputed issues is moot.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TONY SWANSON,

Petitioner,

vs. NO: 17 WC 17030

RUSSELL CONSTRUCTION,

Respondent.

19IWCC0657

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of medical expenses and being advised of the facts and law, modifies the Decision of the Arbitrator solely to correct two scrivener's errors as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

The last sentence of the second paragraph of the Findings of Fact reads, "By way of background, Petitioner previously had underwent surgery in 2014 by Dr. Purighalla for a microsurgical discectomy at L4-5 for an issue unrelated to this case or Petitioner's employment." The Commission modifies this sentence by striking the word "had" from the sentence.

The second sentence of the third paragraph of the Findings of Fact reads, "The medical records reflect Petitioner relaying a history of a wall falling on him causing a rolling of his right ankle and low back pain with spasms." The Commission modifies this sentence by correcting the scrivener's error by replacing the word "right" with the word "left."

Save for the modifications, the Commission otherwise affirms and adopts the Decision of

19IWCC0657

the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall provide and pay for the surgical procedure as recommended by Dr. Michael Berry and Dr. Stephen Weiss, a laminectomy at L2-3 with a left-sided discectomy.

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.

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: DEC 5 - 2019
KAD/mav
O: 10/08/19
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Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

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

SWANSON, TONY
Employee/Petitioner

Case# **17WC017030**

RUSSELL CONSTRUCTION
Employer/Respondent

19IWCC0657

On 2/4/2019, 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:

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

2097 KRAKAR FANNING & OLSEN
BLAKE LYNCH
300 S RIVERSIDE PLZ SUITE 250
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

TONY SWANSON,
Employee/Petitioner

v.

RUSSELL CONSTRUCTION,
Employer/Respondent

Case # **17** WC **17030**

Consolidated cases: **N/A**

19IWCC0657

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 **Gerald Granada**, Arbitrator of the Commission, in the city of **Peoria**, on **December 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. ☒ 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

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On the date of accident, **March 11, 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 at L2-3 ***is*** causally related to the accident.
Petitioner's current condition of ill-being at L3-4 or L4-5 ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$57,616,00**; the average weekly wage was **$1,108.00**.

On the date of accident, Petitioner was **47** years of age, ***married*** 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 **$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.

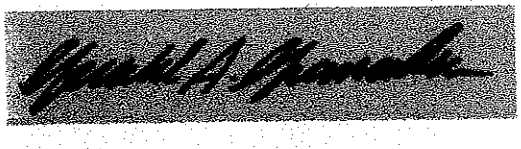
ORDER

Respondent shall pay for and authorize the surgical procedure as recommended by Dr. Berry and Dr. Weiss involving a laminectomy at L2-3 with left-sided discectomy. Petitioner's request for fusion surgery as recommended by Dr. Purighalla at all levels from L2-L5 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.



Signature of Arbitrator Gerald Granada

1/30/19
Date

FEB 4 - 2019

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FINDINGS OF FACT

This case involves a Petitioner alleging injuries sustained while working for the Respondent on March 11, 2017. Respondent disputes Petitioner's claim on the issues of causation and prospective medical care. Specifically, the parties dispute which surgical back procedure is reasonable, necessary and related to Petitioner's undisputed work accident.

Petitioner is a 48-year old carpenter who was injured while working for Respondent on March 11, 2017. On that day, Petitioner was working when a 16 x 10 foot wall fell on his back while he was in a crouched position. As a result of the accident, Petitioner suffered a fractured left ankle that was treated surgically with an open reduction and internal fixation. The ankle injury is not in dispute. Petitioner also suffered injuries to his low back as a result of the accident. By way of background, Petitioner had previously underwent surgery in 2014 by Dr. Purighalla for a microsurgical discectomy at L4-5 for an issue unrelated to this case or Petitioner's employment.

Petitioner was taken from the scene by ambulance to Unity Point Health in Rock Island. The medical records reflect Petitioner relaying a history of a wall falling on him causing a rolling of his right ankle and low back pain with spasms. Petitioner sought treatment for the ankle with Dr. Stewart of ORA Orthopedics. The ankle and any treatment of the ankle is not at issue in this case.

Petitioner was referred to Dr. Michael Berry of ORA Orthopedics on June 15, 2017 for his back complaints. Petitioner had ongoing complaints of low back pain with difficulty lifting heavier weights and issues with standing, sitting and bending. Dr. Berry prescribed a course of physical therapy. If conservative treatment failed, surgery would then be considered. Petitioner returned to Dr. Berry on September 14, 2017 and Dr. Berry determined conservative treatment was unsuccessful. Dr. Berry considered Petitioner a surgical candidate and recommended an L2-3 laminectomy with left sided discectomy.

Petitioner underwent a Section 12 examination with Dr. Stephen Weiss on February 2, 2018. Dr. Weiss examined Petitioner for the back injury. Dr. Weiss diagnosed Petitioner with a permanent aggravation of L2-3 and found a probable compression fracture at L2. Dr. Weiss found Petitioner as having a need for surgery at L2-3 as a causal result of the work accident. Dr. Weiss continued Petitioner's light duty activities.

Petitioner sought an additional opinion from Dr. Purighalla on March 7, 2018. Dr. Purighalla noted a fracture at the L2 level with moderate to severe stenosis at L2-3 and moderate stenosis at L3-4 and L4-5 levels. Dr. Purighalla recommended that Petitioner undergo a lumbar fusion at L2-3 and interbody cages along with decompression at L2-3, L3-4 and L4-5.

There is no dispute between the parties that the surgery recommended by Dr. Berry and Dr. Weiss has been approved by Respondent and that the surgery recommended by Dr. Purighalla has not been approved.

ORA Orthopedics - Dr. Michael Berry

On March 13, 2017, Petitioner was diagnosed with mechanical low back pain with radicular symptoms.

(Resp. Ex. 1, p 4). Petitioner underwent an MRI on March 25, 2017. (Resp. Ex. 1, p 14). He previously underwent an MRI on his low back on December 30, 2013. On the 2017 MRI, Degenerative endplate changes were noted throughout the spine (Resp. Ex. 1, p 14). Petitioner was found to have moderately severe degenerative disc disease in the lumbar spine and stenosis to some degree at all levels, only slightly worse than the prior study from 2013. (Resp. Ex. 1, p 15).

On May 24, 2017, Dr. Stewart at ORA referred Petitioner to Dr. Berry for his back issues. (Resp. Ex. 1, p 19). Petitioner saw Dr. Berry on June 15, 2017. Dr. Berry identified an L2 compression fracture that was either sub-acute or chronic. (Resp. Ex. 1, p 21). Dr. Berry diagnosed Petitioner with a now healed compression fracture and a left L2-3 herniated nucleus pulposus with radiculopathy. (Resp. Ex. 1, p 21). Dr. Berry at this time recommended conservative treatment initially and also proposed the possible alternative of an L2-3 decompression if conservative treatment failed. (Resp. Ex. 1, p 21). He made no recommendation for surgery at L3-4 or L4-5, only at L2-3.

Petitioner again saw Dr. Berry on July 19, 2017 for his back pain. (Resp. Ex. 1, p 23). Dr. Berry recommended an epidural steroid injection and placed Petitioner on 15 pound lifting restrictions. (Resp. Ex. 1, p 25). Petitioner underwent the injection on July 28, 2017. (Resp. Ex. 1, p 27). Petitioner next saw Dr. Berry on September 14, 2017 and the assessment at that time was L2-3 stenosis in the setting of a left L2-3 herniated nucleus pulposus. (Resp. Ex. 1, p 30). Dr. Berry felt at that time that Petitioner failed conservative treatment and he recommended surgery—specifically an L2-3 laminectomy with left-sided discectomy. (Resp. Ex. 1, p 30). Petitioner expressed his desire to proceed with the surgery and continued to work within his restrictions. (Resp. Ex. 1, p 31). Petitioner did not follow up further with Dr. Berry or schedule the recommended surgery.

Testimony of Dr. Stephen Weiss

Dr. Stephen Weiss performed an independent medical evaluation pursuant to Section 12 of the Act on January 25, 2018 and issued his report on February 6, 2018. (Resp. Ex. 2). Dr. Weiss examined Petitioner, took a history and reviewed records. He diagnosed Petitioner with pre-existing L2-3 spinal stenosis and degenerative disc disease; permanent aggravation of the above with L2 compression fracture due to the incident in question; and probable aggravation of L4-5 degenerative disc disease. (Resp. Ex. 2, p 5). Dr. Weiss agreed with the surgical recommendation of Dr. Berry as outlined in the ORA medical records. (Resp. Ex 2, p 6). He described the injury as an aggravation of the underlying L2-3 stenosis. (Resp. Ex. 2, p 6). Petitioner has not been temporarily totally disabled with respect to his back, but working within his restrictions. (Resp. Ex 2, p. 7). Dr. Weiss anticipated Petitioner would reach maximum medical improvement within 3-6 months after the recommended surgery. (Resp. Ex. 2, p 7).

Dr. Weiss testified via evidence deposition on October 25, 2018. (Resp. Ex. 3). He is Board Certified in orthopedic surgery. (Resp. Ex. 3, p. 5). Dr. Weiss noted from his physical examination that Petitioner had no neurological abnormalities. (Resp. Ex 3, p. 13). The surgery recommended by Dr. Berry was in his opinion the best way to treat Petitioner's injuries related to the work accident. (Resp. Ex. 3, p 17). Dr. Weiss further testified that Petitioner did not require surgery on the L4-5 level as a result of the work accident. (Resp. Ex. 3, pp 17-18). Dr. Weiss testified that Petitioner may have had an aggravation of his degenerative disc disease but there were no objective findings to support that conclusion - it was purely speculative. (Resp. Ex. 3, p 18). It was possible that the pain in the left leg came from the ankle and

would resolve itself in time with the left ankle or on its own without surgical intervention. (Resp. Ex. 3, p 18). He opined that it is speculative to attribute any change in the L4-5 condition to the work accident and even more speculative to conclude Petitioner needs surgery at L4-5 as a result. (Resp. Ex. 3, p 18).

Dr. Weiss opined that Petitioner would have a good prognosis if he underwent the surgery recommended by Dr. Berry. (Resp. Ex. 3, p 20). Dr. Weiss testified that surgery on L2-3 would be appropriate but not at L4-5, as L4-5 is not related to the work accident and would not be appropriate in general at L4-5 at this time. (Resp. Ex. 3, p 21). He noted that Petitioner does not have objective complaints at L3-4 or L4-5, and only has subjective complaints of intermittent pain. (Resp. Ex. 3, p 23). Surgeons operate based on symptoms confirmed by objective physical findings. (Resp. Ex. 3, p 23). With respect to the L4-5 level, Dr. Weiss in particular noted the negative finding on straight leg raise testing, which would indicate that surgery at L4-5 should not improve his condition. (Resp. Ex. 3, p 33).

Testimony of Dr. Purighalla

Dr. Purighalla was deposed on September 24, 2018. Dr. Purighalla testified that he was a member of the American Board of Neurological Surgeons. Dr. Purighalla testified that in 2014 he had previously operated upon the Petitioner with a microsurgical discectomy at the L4-5 level. The Petitioner was reported as doing very well. The last time Dr. Purighalla saw Petitioner for that condition was June 26th, 2014. Since Petitioner's release in 2014, Dr. Purighalla noted no new visits or calls from Petitioner until March of 2018.

He next saw Petitioner on March 7, 2018 - a four year gap. Dr. Purighalla recommended a fusion and decompression at L2-3and indicated Petitioner had stenosis at L3-4 and L4-5. He recommended decompression at those levels. (Dep of Purighalla, p. 11). Dr. Purighalla's concern with wanting to address levels L3-L5 was that there was already pre-existing stenosis there. In Dr. Purighalla's opinion, if the surgery is not done to include addressing the stenosis then Petitioner would need a surgery later. (Dep of Purighalla, p. 11). A second operation could be needed in a few months or a few years. (Dep of Purighalla, p. 12). Dr. Purighalla indicated on direct examination that it is hard to determine if his current symptoms are related to L3-4 or L4-5. (Dep of Purighalla, p. 14).

Dr. Purighalla did not see Petitioner between June 26, 2014 and March 7, 2018 and has no idea of the condition of Petitioner's back or any changes in it during that time period. (Dep of Purighalla, p. 17). There may have been additional degenerative changes during that time period. (Dep of Purighalla, p. 17, 18). He has no idea of the condition of the Petitioner's back on the date of the work accident. (Dep of Purighalla, p. 18). He does not know what pain Petitioner was in following the work accident or the extent of the pain. Petitioner did sustain a fracture in the accident and surgery recommended by all doctors would address the fracture area and the issues at L2-3 with the laminectomy. The need in his opinion for the fusion surgery is based on Petitioner's subjective symptoms and on his interpretation of the MRI scan. (Dep of Purighalla, p. 25). According to Dr. Purighalla, the surgery recommended by both Dr. Berry and Dr. Weiss does address the work injury. (Dep of Purighalla, p. 26). Dr. Purighalla testified that he is making his surgical recommendations based on what he feels Petitioner needs, not necessarily whether or not the need is based on the worker's compensation claim or related to the work accident. (Dep of Purighalla, p. 26,27). He does not disagree with the recommendation of Dr. Berry or Dr. Weiss as it relates to the work injury.

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CONCLUSIONS OF LAW

1. With regard to the issue of causation, the Arbitrator finds that the Petitioner's current condition of ill-being as it relates to his back at the level of L2-3 is causally related to his March 11, 2017 accident. This finding is supported by all the medical evidence that show Petitioner sustained a compression fracture at the L2 level and a herniation at the L2-3 level with radiculopathy. All the doctors involved in this case – Dr. Berry, Dr. Weiss and Dr. Purighalla - are in agreement on this diagnosis and its relation to the Petitioner's undisputed work accident from March 11, 2017.

The Arbitrator further finds that the Petitioner's condition of ill-being at the L3 through L5 levels is not causally related to his March 11, 2017 accident. This finding is supported by the medical evidence, which weigh against the Petitioner on this particular issue. Petitioner's initial treating physician, Dr. Berry specifically diagnosed Petitioner's post-accident condition at the L2-3 level and recommended a laminectomy and discectomy at that level. He did not indicate any problems at the levels of L3-4 or L4-5. Consequently, Respondent's IME, Dr. Weiss agreed with Dr. Berry and further explained the lack of any objective findings to support any causal relationship or the need for surgical intervention at the L3-4 through L4-5 levels. While the Petitioner has based his claim on this issue on the opinions of Dr. Purighalla - the medical evidence and the other experts outweigh those opinions in this case. Dr. Purighalla testified that it is hard to determine if Petitioner's current symptoms are related to L3-4 or L4-5. The Arbitrator notes that Dr. Purighalla does not entirely disagree with the findings and recommendation for surgery indicated by Dr. Berry and Dr. Weiss, but believes Petitioner is in need of additional surgery at other levels of his back to treat all of Petitioner's medical issues. That may very well be the case and it may be something Petitioner would benefit from, but it is not related to the work injury. Accordingly, the Arbitrator concludes that the Petitioner's condition of ill-being at the L3-4 through L4-5 levels is not related to his March 11, 2017 work-accident.

2. Consistent with the Arbitrator's findings on the issue of causation, the Arbitrator further finds that the prospective medical care Petitioner seeks – the fusion and decompression recommended by Dr. Purighalla – is denied as being unrelated to Petitioner's March 11, 2017 work-accident. Moreover, the Arbitrator finds persuasive the findings and recommendations of Dr. Berry and Dr. Weiss, who both indicate the need for a laminectomy and discectomy at the L2-3 level. The evidence indicates that at some point in time, the Petitioner himself was in agreement with undergoing this surgery, but apparently changed his mind by seeking the opinion of Dr. Purighalla. The fact Dr. Purighalla had treated Petitioner in the past and performed surgery on his back does not necessarily mean he is best qualified to address the issue of what surgery is needed to address the work issues. By his own admission, Dr. Purighalla stated he was not concerned with the cause of the need for surgery but more interested in what he thought best treated Petitioner's medical issues. Accordingly, the Arbitrator concludes that if the Petitioner still wants the surgery recommended by Dr. Berry and Dr. Weiss, the Respondent shall authorize and pay for said treatment.

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 down	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LAWRENCE HENDERSON,

Petitioner,

vs. NO: 17 WC 01839

ILLINOIS DEPTARTMENT OF PUBLIC HEALTH,

Respondent.

19IWCC0658

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the parties herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection and nature and extent, 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.

Permanent Disability

The Arbitrator awarded Petitioner permanent partial disability benefits of 5% loss of use of the left foot, 25% loss of use of the left leg, and 30% loss of use of the right hand. The Commission affirms the Arbitrator's award of 5% loss of use of the left foot, reduces the Arbitrator's award to 20% loss of use of the left leg and reduces the Arbitrator's award to 25% loss of use of the right hand based on the factors enumerated below.

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 the AMA guidelines;
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.

The Commission views the evidence differently with respect to Section 8.1b(b) factors (ii), (iii), and (v).

(ii) the occupation of the injured employee

Petitioner is a registered nurse and has a master's degree in Social Work. At the time of the accident, Petitioner was working in the division of long-term care for the Department of Public Health with the title of Health Facility Surveillance nurse, a position that included observation and interview at long-term care facilities across the state. After Petitioner underwent right hand and left knee surgeries, Petitioner was released to return to work without restrictions. Petitioner continues to work for Respondent and currently works in an office position. The Commission gives this factor nominal weight and further finds this factor weighs in favor of decreased permanent disability.

(iii) the age of the employee at the time of the injury

Petitioner was 54 years old on the date of accident and will likely be employed for nine years before he reaches average retirement age. Petitioner's age suggests that the partial loss of use of his left leg and right hand as a result of the work-related accident is less significant because he will have to work with the disability and live with the disability for a less significant amount of time. The Commission gives this factor moderate weight and further finds this factor weighs in favor of decreased permanent disability.

(v) evidence of disability corroborated by the treating medical records

In analyzing the evidence of disability as corroborated by the treating medical records, the Arbitrator documented Petitioner's surgical procedures to his right hand/thumb and left knee, and noted Petitioner continues to have symptoms consistent with the injury he sustained. The right-hand surgery performed on September 22, 2016, consisted of an arthroscopy, triangular fibrocartilage complex (TFCC) repair, trapeziectomy, ligamentous reconstruction and tendon interposition arthroplasty. Petitioner testified he still had difficulty opening wide-mouthed jars, that he experiences cold sensitivity and he has pain on both sides of the wrist. The Commission, reviewing the medical records for evidence of post-operative disability, notes that on April 4, 2017, the therapist documented that Petitioner reported improved overall strength and stability in his right forearm, wrist and hand. On October 4, 2017, at Dr. Ma's follow-up office visit, Petitioner denied any right-hand symptoms.

With respect to Petitioner's left knee, the Petitioner testified if he sits for longer than an hour he experiences throbbing and when he stands up his left knee is stiff. Petitioner also testified that he works on the fourth floor and that he does not take the stairs at work. Petitioner's left knee arthroscopic surgery on April 13, 2017, consisted of debridement and synovectomy, chondroplasty of the patella and intercondylar trochlear groove, medial femoral condyle, partial medial meniscectomy and synovectomy. He underwent postoperative physical therapy for his left leg and was discharged to a home exercise program only two weeks after with decreasing left knee pain, improving range of motion and strength, and normal gait. The therapist noted that his active range

19IWCC0658

of motion in flexion and extension were within normal limits. PX1, 109-110. On May 11, 2017, his pain was listed as 0-1/10. He had a normal gait and improving left knee range of motion and strength. Both treating doctors released Petitioner to return to work full duty with no restrictions. The Commission gives this factor substantial weight and further finds this factor weighs in favor of decreased permanent disability.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, the Commission finds Petitioner sustained a 20% loss of use of the left leg under Section 8(e) and 25% loss of use of the right hand under Section 8(e).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $1,015.12 per week for a period of 67 weeks commencing May 12, 2016, through August 31, 2017, 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 to Petitioner the sum of $755.22 per week for a period of 102.60 weeks, because the injury sustained caused the 5% loss of use of the left foot, 20% loss of use of the left leg, and 25% loss of use of a right hand as provided in §8(e) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, for medical services provided to Petitioner for his left ankle, left knee and right hand/thumb conditions, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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.

No bond or summons required for State of Illinois cases.

DEC 6 - 2019

DATED:
KAD/bsd
O10/8/19
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HENDERSON, LAWRENCE L Case# **17WC001839**
Employee/Petitioner

ILLINOIS DEPT OF PUBLIC HEALTH
Employer/Respondent

19IWCC0658

On 4/1/2019, 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:

2427 KANOSKI BRESNEY
KATHY A OLIVERO
2730 S MacARTHUR BLVD
APRINGFIELD, IL 62704

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

6137 ASSISTANT ATTORNEY GENERAL
CORI STEWART
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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

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

APR 01 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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

Lawrence L. Henderson
Employee/Petitioner

v.

Illinois Department of Public Health
Employer/Respondent

Case # 17 WC 01839

Consolidated cases: _____

19IWCC0658

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 Collinsville, on February 28, 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 _____

FINDINGS

On May 3, 2016, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did 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 $79,179.36; the average weekly wage was $1,522.68.

On the date of accident, Petitioner was 54 years of age, single with 0 dependent child(ren).

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 $68,013.05 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $68,013.05.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, for medical services provided to Petitioner for his left ankle, left knee and right hand/thumb conditions, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability benefits of $1,015.12 per week for 67 weeks commencing May 12, 2016, through August 31, 2017, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $755.22 per week for 123.6 weeks because the injury sustained caused the five percent (5%) loss of use of the left foot, 25% loss of use of the left leg and 30% loss of use of the right hand, 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

March 29, 2019
Date

ICArbDec p. 2

APR 1 - 2019

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on May 3, 2016. According to the Application, Petitioner sustained a "Fall" which caused injuries to the "Bilateral Hands/Arms; Left leg; Left Foot" (Arbitrator's Exhibit 2). Respondent stipulated Petitioner sustained a work-related accident and agreed Petitioner's injuries to his left leg, left foot, right hand and right thumb were causally related to the accident. However, Respondent disputed liability in regard to Petitioner's left thumb condition on the basis of causal relationship. In regard to temporary total disability benefits, Petitioner claimed he was entitled to temporary total disability benefits of 80 1/7 weeks, commencing May 12, 2016, through August 31, 2017, and November 29, 2017, through February 21, 2018. Respondent stipulated Petitioner was entitled to temporary total disability benefits of 67 weeks, commencing May 12, 2016, through August 31, 2017. Based on Respondent's disputing liability for Petitioner's left thumb condition, Respondent disputed Petitioner's entitlement to temporary total disability benefits for the remaining 13 1/7 weeks, commencing November 29, 2017, through February 21, 2018 (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as an RN/Social Worker. Petitioner's job duties required him to travel two to four hours per day and he would provide nursing care and social services to various individuals.

Petitioner testified that on May 3, 2016, he was at Respondent's office in Glen Carbon. Because of an electrical problem, the lights in the restroom were not on. When Petitioner entered the restroom, he tripped over some debris on the floor and fell to the floor with both arms outstretched. Petitioner stated he landed on both hands, both arms and that he twisted his left ankle.

Petitioner initially sought medical treatment on May 12, 2016, when he was seen by Dr. Anthony Griffin, his family physician. Dr. Griffin diagnosed Petitioner with wrist pain and a knee injury. He recommended Petitioner be evaluated by an orthopedic surgeon (Petitioner's Exhibit 1; pp 25-26).

Petitioner went to the ER of Passavant Area Hospital on May 12, 2016. At that time, Petitioner advised he had tripped on baseboards on a floor and landed on his hands and knees. Petitioner complained of pain in the left knee, left ankle in both hands/thumbs. X-rays of the left ankle and knee were obtained which were negative for fracture. The x-ray of Petitioner's right hand revealed an acute triquetral fracture. The x-ray of Petitioner's left hand was negative for fractures, but revealed mild osteoarthritis of the first carpal metacarpal joint. Petitioner was provided with a splint for his right hand and instructed to be seen by an orthopedic surgeon (Petitioner's Exhibit 2; pp 4-18).

Petitioner was subsequently seen by Dr. Jianjun Ma, an orthopedic surgeon, on May 18, 2016. According to Dr. Ma's record of that date, Petitioner was seen for pain referable to the left hand as well as numbness/tingling in the thumb, index, middle and ring fingers. It was noted Petitioner was previously seen at Passavant Hospital and had an x-ray which revealed a fracture of the triquetrum and was provided with a brace. Dr. Ma recommended conservative care and ordered

EMG/nerve conduction studies (Petitioner's Exhibit 3; pp 64-66). The Arbitrator notes the reference in the medical record to Petitioner's complaints being in regard to the left hand were erroneous, Petitioner's complaints were, in fact, in regard to the right hand.

Because of Petitioner's left ankle and left knee complaints, Dr. Ma referred Petitioner to Dr. Risha Sharma, an orthopedic surgeon, in that same office. Dr. Sharma saw Petitioner on June 13, 2016, and opined Petitioner had sustained a left ankle sprain and left knee sprain. Dr. Sharma prescribed braces for both the left ankle and left knee and ordered physical therapy (Petitioner's Exhibit 3; pp 81-82).

Dr. Ma saw Petitioner on July 19, 2016, for his right hand symptoms. In Dr. Ma's record of that date, the right hand was correctly identified as the hand in which Petitioner sustained a fracture of the triquetrum. Dr. Ma also noted EMG/nerve conduction studies had been performed which were normal. Dr. Ma administered a steroid injection into the right thumb CMC joint. He noted that if Petitioner did not respond well to the injection, he would order an MRI scan to evaluate a possible TFCC tear (Petitioner's Exhibit 3; pp 89-91).

An MRI of Petitioner's right wrist was performed on August 19, 2016. According to the radiologist, the scan revealed a full thickness defect involving the radial aspect of the triangular fibrocartilage, partial central tears of the scapholunate interosseous ligament and lunotriquetral ligament, severe first carpal metacarpal osteoarthritis and degenerative cysts and edema (Petitioner's Exhibit 3; pp 11-12).

MRIs of Petitioner's left ankle and knee were performed on September 3, 2016. According to the radiologist, the scan of Petitioner's left ankle revealed thinning of the cartilage in the medial aspect of the tibiotalor joint, mild/moderate osteoarthritis in the ankle and intertarsal joints and mild tenosynovitis in the posterior tibial and peroneal tendon sheaths (Petitioner's Exhibit 3; p 10).

Dr. Ma evaluated Petitioner on September 6, 2016, and reviewed the MRI scan of Petitioner's right wrist. He opined Petitioner should undergo surgery consisting of TFCC repair, right thumb trapeziectomy, ligamentous reconstruction and tendon interposition arthroplasty (Petitioner's Exhibit 3; p 123).

Dr. Sharma saw Petitioner on September 6, 2016, and reviewed the MRI scans of Petitioner's left ankle and left knee. He recommended continued conservative treatment for both the ankle and knee. He recommended a surgical consultation in regard to Petitioner's left knee (Petitioner's Exhibit 3; p 133).

On September 13, 2016, Petitioner was evaluated by Dr. Darr Leutz, an orthopedic surgeon in that same office, in regard to his left knee condition. Dr. Leutz reviewed the MRI scan and noted it revealed an acute medial meniscal tear and osteoarthritis. He recommended Petitioner undergo arthroscopic surgery, but noted Petitioner was scheduled to undergo right wrist surgery in a few weeks (Petitioner's Exhibit 3; pp 138-140).

Dr. Ma performed arthroscopic right wrist surgery on September 22, 2016. The procedure consisted of a TFCC repair, excision of the trapezium and ligamentous reconstruction at the CMC joint (Petitioner's Exhibit 3; pp 155-156).

Following surgery, Dr. Ma ordered physical therapy. Petitioner received physical therapy for his right hand injury from November 17, 2016, through December 21, 2016, and January 16, 2017, through April 4, 2017. The physical therapy records contained references to both the right and left thumbs; however, most of them were comparisons of the range of motion of the right thumb as compared to the left. In the physical therapy record of March 8, 2017, it was noted Petitioner had a new complaint of pain in the left thumb and was wearing a thumb spica splint per the recommendation of a physician (Petitioner's Exhibit 2; pp 60-69, 94-105).

When Dr. Ma saw Petitioner on February 22, 2017, Petitioner's right hand/thumb condition had improved. At that time, Petitioner had complaints referable to the CMC joint of the left thumb. On examination, there was tenderness and a positive grind test in the left thumb (Petitioner's Exhibit 3; pp 253-255).

Dr. Leutz performed arthroscopic surgery on Petitioner's left knee on April 13, 2017. The surgical procedure consisted of a partial medial meniscectomy with about 50% of the posterior horn removed, synovectomy and chondroplasty of the patella and intercondylar trochlear groove (Petitioner's Exhibit 3; pp 279-280).

At the direction of Respondent, Petitioner was examined by Dr. Robert Russell, an orthopedic surgeon, on August 22, 2017. The primary purpose of Dr. Russell's examination of Petitioner was to obtain his opinion as to whether Petitioner's left thumb condition was related to the accident of May 3, 2016. Dr. Russell opined Petitioner had left thumb basilar joint arthritis, but that this was a chronic condition and not related to the accident of May 3, 2016 (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Ma again saw Petitioner on October 4, 2017, and Petitioner continued to complain of left hand/thumb pain. At that time, Dr. Ma recommended Petitioner undergo left thumb surgery (Petitioner's Exhibit 3; p 361).

Dr. Ma performed arthroscopic surgery on November 30, 2017, on Petitioner's left hand/thumb. The surgical procedure consisted of excision of the trapezium and ligamentous reconstruction (Petitioner's Exhibit 3; p 401).

Following surgery, Dr. Ma directed Petitioner to perform at home exercises. When he saw Petitioner on February 21, 2018, Petitioner's left thumb condition had improved. Dr. Ma released Petitioner to return to work without restrictions (Petitioner's Exhibit 3; p 425).

The last time Dr. Ma saw Petitioner was on September 7, 2018. At that time, Petitioner was doing well and Dr. Ma recommended he continue with home exercises and return if needed (Petitioner's Exhibit 3; p 437).

Dr. Russell was deposed on August 27, 2018, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Russell's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Russell testified that basilar joint arthritis was a condition that developed over time which was already present at the time of the initial x-ray and not related to the injury (Respondent's Exhibit 1; pp 10-11).

Dr. Ma was deposed on September 11, 2018, and his deposition testimony was received into evidence at trial. Initially, Dr. Ma testified that the reference to Petitioner's left wrist in the record of May 18, 2016, was erroneous and should have referred to the right wrist. In regard to his diagnosis and treatment of Petitioner's right and left wrist/thumb conditions, Dr. Ma's testimony was consistent with his medical records. In regard to the cause of Petitioner's left thumb CMC arthritis, Dr. Ma stated "...it's hard for me to say this...I cannot make a statement and say the left thumb CMC joint arthritis was anything to do with the fall." One of the reasons Dr. Ma provided for the preceding opinion was that he had been treating Petitioner for his right hand condition for six months before Petitioner had any left thumb complaints. However, Dr. Ma also stated CMC joint arthritis could be aggravated from the traumatic injury, but he did not provide any treatment to the left thumb until six months later (Petitioner's Exhibit 4; pp 6-11, 35-39).

Petitioner testified that in the fall of 2017, he requested a change in his employment by Respondent because of his hands symptoms. Respondent granted Petitioner's request and he moved to a different department where he worked in the same office every day. Petitioner did not experience any reduction in pay because of this change; however, Petitioner testified he lost the travel pay he had received in his prior position which he estimated to be $1,000.00 to $1,500.00 per month.

In regard to his left ankle, Petitioner testified he still experiences stiffness/pain in the left ankle especially when he sits for an hour or longer. In regard to his left knee, Petitioner stated he still has pain and throbbing in his left knee. Both his ankle and knee symptoms have caused Petitioner to experience sleep disruption and problems going up/down stairs.

In regard to his right hand, Petitioner stated he has pain from his right thumb to the opposite side of his wrist. Petitioner's right hand grip strength is diminished and the right hand is very sensitive to cold. Petitioner continues to do the home exercises which he learned while in physical therapy. In regard to his left thumb, Petitioner stated he has diminished grip strength and sensitivity to cold.

Conclusions of Law

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

The Arbitrator concludes that Petitioner's current condition of ill-being in regard to the left ankle, left knee and right hand/thumb conditions are related to the accident of May 3, 2016, but that his current condition of ill-being in regard to his left thumb is not related to the accident of May 3, 2016.

In support of this conclusion the Arbitrator notes the following:

Petitioner and Respondent stipulated Petitioner's left ankle, left knee and right hand/thumb conditions were causally related to the accident of May 3, 2016.

As noted herein, Dr. Ma's reference to Petitioner having left hand/thumb symptoms when he saw him on May 18, 2016, was erroneous. Petitioner did not make any complaints of left thumb symptoms to Dr. Ma until he was seen by him on February 22, 2017.

When Dr. Ma was deposed, he stated he could not say the left thumb CMC joint arthritis was related to the accident. While he suggested the possibility of the accident aggravating the condition, he noted he did not provide any treatment to the left thumb until six months after the accident.

The Arbitrator notes that Petitioner's initial complaints to Dr. Ma of left thumb pain on February 22, 2017, was actually more than nine months after the accident of May 3, 2016.

Respondent's Section 12 examiner, Dr. Russell, opined Petitioner's left thumb condition was not related to the accident of May 3, 2016.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith in regard to the treatment provided to Petitioner for the left ankle, left knee and right hand/thumb conditions, but not for treatment provided to Petitioner for the left thumb condition.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 5, for medical services provided to Petitioner for his left ankle, left knee and right hand/thumb conditions, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 67 weeks commencing May 12, 2016, through August 31, 2017, but not thereafter.

In support of this conclusion the Arbitrator notes the following:

Petitioner and Respondent stipulated Petitioner was entitled to temporary total disability benefits for the aforestated period of time.

The subsequent period of time of 13 1/7 weeks, commencing November 29, 2017, through February 21, 2018, was because of Petitioner's left thumb condition which, as previously stated, the Arbitrator has concluded was not related to the accident of May 3, 2016.

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 five percent (5%) loss of use of the left foot, 25% loss of use of the left leg and 30% loss of use of the right hand.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

At the time of the accident, Petitioner worked for Respondent as an RN/Social Worker. This was a position which required a significant amount of travel. Because of Petitioner's bilateral hand symptoms, he sought a change in employment and presently works in a job that requires substantially less travel. As noted herein, the Arbitrator determined that only Petitioner's right hand/thumb condition was work-related. Further, Petitioner was released return to work without restrictions. The Arbitrator gives this factor moderate weight.

Petitioner was 54 years old at the time of the accident. He is presently 58 years old and has approximately nine years before he will reach normal retirement age. Petitioner will have to live with the effects of this injury for the remainder of his working and natural life. The Arbitrator gives this factor moderate weight.

Petitioner requested and obtained a change in his job assignment with Respondent that did not cause a decrease in his future earning capacity. However, Petitioner claimed that because he was no longer required to travel, it resulted in a loss of travel pay of $1,000.00 to $1,500.00 per month. Petitioner did not tender any evidence of this claim at trial. Further, whatever amount Petitioner received would be reimbursement for travel expenses, and not additional income/pay. The Arbitrator gives this factor no weight.

The medical treatment records revealed Petitioner sustained a left ankle sprain. The MRI of Petitioner's left ankle revealed osteoarthritis and tenosynovitis. Petitioner continues to have left ankle symptoms. The medical treatment records revealed Petitioner sustained a significant injury to his right hand/thumb, which required surgery. The surgical procedure consisted of TFCC repair, excision of the trapezium and ligamentous reconstruction of the CMC joint. Petitioner continues to have right hand/thumb symptoms consistent with the injury he sustained. The medical records revealed Petitioner sustained a left knee injury which required surgery. The surgical procedure consisted of a medial meniscectomy, synovectomy and chondroplasty of the patella and intercondylar trochlear groove. Petitioner continues to have symptoms consistent with the injury he sustained. The Arbitrator gives this factor significant weight.

William R. Gallagher, Arbitrator

STATE OF ILLINOIS)
) SS:
COUNTY OF KANE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dawood Syed,

Petitioner,

vs. NO: 15 WC 38088

Staffmark Holdings, Inc., *et al.*,

Respondents.

ORDER

A Petition to Enforce the Terms of the Lump Sum Settlement Contract and for Penalties, Attorney's Fees, and Costs having been filed by Petitioner herein, due notice having been given, this cause came before Commissioner Thomas J. Tyrrell for hearing on May 10, 2019, in Geneva, Illinois. The Commission, after being fully advised in the premises, hereby partially grants Petitioner's motion for the reasons set forth below.

Background

On February 20, 2018, Arbitrator Steffen approved a settlement contract in this matter. The contract included a rider that addressed any Medicare concerns and stated the following, in relevant part:

> "Regardless of said disputes, Respondent agrees, at Respondent's sole unilateral discretion, to fund an MSA in an amount determined appropriate by CMS to protect Medicare's interests, either via annuity or lump sum, whereby Petitioner's rights under Section 8(a) shall be closed, or leave medical rights open for any future issue which might otherwise arise."

Both parties agree that in May 2018 a claims adjuster forwarded a check in the amount of $9,232.00. This amount purportedly represented the Medicare Set-Aside ("MSA") allocation recommended by Respondent's MSA vendor. The adjuster sent the check in error as CMS had not yet issued an approval of the proposed MSA. Petitioner voided and returned the check to Respondent's insurance carrier. On June 21, 2018, CMS requested additional documentation from Respondent as the agency considered the Respondent's proposed MSA allocation. On August 21, 2018, CMS sent a letter stating in

relevant part, "We have evaluated your proposal along with the supporting medical documentation you submitted and have determined that Medicare's interests have been adequately considered. **Therefore, no WCMSA amount is deemed necessary in this case**."

Petitioner has now raised concerns regarding the vast difference between the initial proposed MSA amount (per the check sent mistakenly in May 2018), and CMS' August 2018 determination that no Medicare Set-Aside is needed. At Petitioner's request, Respondent previously forwarded the medical records CMS considered during their review of Respondent's proposed allocation for future medical expenses in this matter. However, Petitioner seeks a copy of the vendor summary / proposal Respondent submitted to CMS. Thus far, Respondent has refused to provide a copy of this document.

Petitioner filed the pending motion in April 2, 2019. Respondent filed its response a few days later and the Commissioner conducted a hearing on the record on May 10, 2019. Both parties were represented by counsel during the hearing. Both parties subsequently filed additional briefs in August 2019.

Conclusion

After carefully reviewing the briefs and the transcript of the hearing, the Commission partially grants Petitioner's motion. The Commission grants Petitioner's request for Respondent to produce a copy of the vendor summary / proposal submitted to CMS in this matter. However, the Commission denies Petitioner's request for penalties and fees pursuant to ¶¶16, 16a, 19(k), and 19(l) of the Act.

Petitioner has expressed a valid concern regarding the seemingly radical change between the original MSA amount recommended by Respondent's vendor and CMS' final determination that no MSA was necessary. While the Commission understands the $9,232.00 check initially sent to Petitioner was the result of an error, there is quite a difference between an apparent recommended MSA of $9,232.00 and an ultimate determination that no MSA was needed. As this matter concerns the important issue regarding payment for any reasonable and related future medical treatment Petitioner might need, the Commission is inclined to grant Petitioner's request that Respondent produce a copy of the vendor summary / proposal submitted in this matter. If there were multiple vendor summaries / proposals that led to the initial recommendation of $9,232.00 and the final approval of $0 for an MSA, Respondent must produce those as well.

While the Commission grants Petitioner's request for the vendor summary / proposal, the Commission denies his request for penalties and fees. Respondent has not violated any provision of the settlement agreement. Indeed, its reluctance to give the vendor summary / proposal to Petitioner after CMS has decided no MSA was necessary is understandable. This case presents a unique set of facts and Respondent's refusal to produce documents other than the medical records submitted to CMS absent an order by

the Commission certainly does not rise to the level of vexatious or unreasonable behavior.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition to Enforce the Terms of the Lump Sum Settlement Contract and for Penalties, Attorney's Fees, and Costs is hereby partially granted.

IT IS FURTHER ORDERED that Respondent shall produce a copy of the vendor summary / proposal submitted to CMS for consideration of the Medicare Set-Aside. If separate vendor summaries / proposals were the bases of the initial $9,232.00 recommendation and the final CMS determination that no MSA was necessary in this case, Respondent shall produce all relevant summaries.

IT IS FURTHER ORDERED that Petitioner's request for an award of penalties and fees pursuant to ¶¶ 16, 16a, 19(k), and 19(l) is hereby denied. The Commission explicitly finds Respondent has not violated the terms of the settlement agreement and has not behaved in an unreasonable or vexatious manner.

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: DEC 6 - 2019

Thomas J. Tyrrell

r-5/10/2019
TJT/jds
51

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

Jamie McGehee,

Petitioner,

vs.

NO: 15 WC 6678
14 WC 2586

Jefferson County Highway Department,

19IWCC0659

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 medical expenses, temporary total disability, wage, 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 November 5, 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: DEC 6 - 2019
TJT:yl
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Thomas J. Tyrrell

Maria E. Portela

DISSENT

I respectfully dissent from the majority opinion affirming and adopting the Arbitrator's Decision finding the Petitioner's current condition of ill-being, specifically the herniated disc at L1-2, causally related to his work accidents, sustained January 24, 2013, and February 18, 2015.

Petitioner sustained two work-related accidents causing injuries to his lumbar spine. On January 24, 2013, Petitioner was employed as a laborer for Respondent. On that date, while lifting a dump truck tire off a pickup truck, he sustained an injury to his low back. On February 18, 2015, while Petitioner was working light duty for Respondent, he slipped on ice and landed on his buttocks.

On May 22, 2015, Petitioner saw Dr. Matthew Gornet for a neurosurgical consult. Petitioner underwent conservative care. In December 2015, Petitioner underwent an anterior decompression fusion at L4-5, laminotomy and posterior fusion. On April 1, 2016, Petitioner underwent another procedure to reinsert the rod fixation device and to tighten the L5 screw. Petitioner completed a course of physical therapy from June 30, 2016, through November, 2016. (PX16)

On February 16, 2017, Petitioner returned to Dr. Gornet and reported he still had chronic back pain, yet a new MRI did not reveal progression of the disc degeneration at L1-2 or L2-3. Petitioner

underwent a Functional Capacity Evaluation (FCE) on April 11, 2017. The therapist placed Petitioner between the sedentary and light physical demand level. (PX5) On May 15, 2017, Dr. Gornet opined Petitioner was at maximum medical improvement (MMI) with permanent restrictions.

Petitioner began experiencing increased back pain over time culminating in a visit with the pain management doctor in January, 2018. (PX18) On March 5, 2018, Dr. Gornet noted Petitioner believed he was slowly getting worse. (PX2, p. 33; PX20, pp. 8-9) Dr. Gornet discussed with Petitioner that "his symptoms are most likely an adjacent level failure and given his multilevel degeneration, this is somewhat expected." Dr. Gornet ordered an MRI to compare to his previous MRI scan. Petitioner underwent another MRI on March 5, 2018 which showed a large disc herniation at L1-2. (PX3)

On May 2, 2018, Petitioner underwent an IME with Dr. deGrange at the request of Respondent. Dr. deGrange compared the MRI's of the lumbar spine, dated February 16, 2017, and March 5, 2018. In the MRI of February 16, 2017, Dr. deGrange noted the hardware artifact is still seen at L5-S1 (L4-5 level per Dr. Gornet), there is a congenital fusion at L4-5 (L3-4 per Dr. Gornet), there is a slight bulge at L3-4 (L2-3 per Dr. Gornet), but otherwise preserved, and a 2-millimeter disc bulge at L2-3 (L1-2 per Dr. Gornet), not causing stenosis or compromise of any degree. (RX1, p. 15) In contrast, the MRI of March 5, 2018, revealed the congenital fusion at L4-5 and one surgical fusion below it; there was a right-sided disc herniation at L2-3, two levels above the congenital fusion and three levels above the surgical fusion. (RX1, pp. 13-14) Dr. deGrange pointed out the disc in between the congenital fusion and the disc herniation was well-maintained. (RX1, p. 16) He testified that at the level of L2-3 (L1-2 per Dr. Gornet), three levels above the surgical fusion, the February 2017 MRI revealed a bulging disc and one year—13 months later, the bulging disc was a frank herniation. (RX1, p. 15)

At his evidence deposition, Dr. Gornet testified he performed a fusion at L4-L5, between Petitioner's congenital fusions at L3-4 and L5-S1. (PX20, p. 21) Dr. Gornet testified that the new herniation at L1-2 occurred two levels above Petitioner's congenital fusion and three levels above where he performed the surgical fusion. On cross-examination, Dr. Gornet stated all the studies looking at adjacent level failures don't look at the segment next to the fusion they look at one or two segments above. He testified that there was no other plausible explanation to associate Petitioner's sudden failure at L1-2. (PX20, p. 16)

In contrast, Dr. deGrange testified that because of the anatomic relationship to the prior fusion, the L1-2 disc herniation is not medically causally related to the prior L4-5 fusion. (RX1, p. 18) He noted the herniation is three levels from the surgical fusion. (RX1, p.18) He stated, "That has not yet been proven within a reasonable degree of scientific medical certainty that adjacent segment degeneration is probably due to a fusion, but not a level removed from a fusion." (RX1, p. 18) He further testified that most spine surgeons, be it orthopedic surgeons or spine surgeons, are not in agreement with what he termed "skip lesions". That, he testified, points more towards a genetic

influence than a mechanical influence. (RX1, p. 43) Finally, he testified, "Most spine surgeons would cast doubt that there is a connection. And especially since this fusion by Dr. Gornet was three levels removed at L5-S1." (RX1, p. 18)

Based on Dr. deGrange's testimony and Dr. Gornet's testimony, I find Dr. deGrange's opinion more persuasive regarding causation between the surgical fusion and the herniated disc three levels removed. Dr. Gornet's opinion is based on an adjacent level failure; however, Petitioner's herniation at L1-2 is not located adjacent to the surgical fusion level. Moreover, it is two levels removed from the congenital fusion and one level above what Dr. deGrange termed a "well maintained disc". (RX1, p. 16) The L1-2 herniation which was identified over one year after his treating surgeon placed him at MMI and three levels apart from the previous fusion surgery, is not an obvious sequela of his surgical fusion but more likely, as Dr. deGrange stated, the "natural history of the patient". (RX1, p. 16)

Therefore, I would find Petitioner's condition of ill-being at level L1-2 is not causally related to the work related accidents. In addition, I would vacate the award of medical expenses reflecting treatment rendered to level L1-2 and prospective medical care for treatment to level L1-2. Finally, I would vacate the TTD award for the period May 4, 2018, through September 20, 2018, because Petitioner was restricted from working due to the L1-L2 condition which is not causally related to the work related accidents. Based on the foregoing, I respectfully dissent.

Kathryn A. Doerries

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

McGEHEE, JAMIE
Employee/Petitioner

Case# **15WC006678**

14WC002586

JEFFERSON COUNTY HIGHWAY DEPT
Employer/Respondent

19IWCC0659

On 11/5/2018, 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 2.43% 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:

1580 BECKER SCHROADER & CHAPMAN PC
MATTHEW R CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

0299 KEEFE & DePAULI PC
JAMES KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

19IWCC0659

STATE OF ILLINOIS)
)SS.
COUNTY OF Madison)

- [ ] 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)

Jamie McGehee
Employee/Petitioner

v.

Jefferson County Highway Department
Employer/Respondent

Case # **15** WC **006678**

Consolidated cases: **14 WC 002586**

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 **Collinsville**, on **September 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. [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] 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 accident, 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 January 24, 2013 injury, Petitioner earned **$37,205.07**; the average weekly wage was **$750.00**.

In the year preceding the February 18, 2015 injury, Petitioner earned **$41,717.15**; the average weekly wage was **$793.50**.

On the date of the January 24, 2013 accident, Petitioner was **41** years of age, ***married*** with **1** child under 18.

On the date of the February 18, 2015 accident, Petitioner was **43** years of age, married with **1** child under 18.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$528.47/week** for **20** weeks, commencing May 4, 2018 through September 20, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule (Section 8(a) and 8.2 of the Act) as follows: MRI Partners of Chesterfield $2,700.00; Dr. Matthew Gornet $63,024.00; Pain Management Center of Marion $336.10; IDPA lien $482.87

Respondent shall approve and pay for the treatment recommended by Dr. Gornet for Petitioner's lumbar spine.

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

11/2/18
Date

NOV 5 - 2018

19IWCC0659

The Arbitrator finds the following facts:

The March 6, 2015 19(b) Decision

This case consists of two consolidated claims: case number 14 WC 002586, with a January 24, 2013 date of accident, and case number 15 WC 006678, with a February 18, 2015 date of accident. On March 6, 2015, a 19(b) arbitration decision was entered with respect to the January 24, 2013 accident. The Arbitrator takes judicial notice of that decision, which was submitted into evidence as Petitioner's Exhibit 19. At the time of that accident, Petitioner was employed as a laborer for Respondent, working on highway constructions jobs, driving dump trucks, and performing maintenance on equipment and vehicles. On the day of the accident, Petitioner injured his low back when lifting a dump truck tire off a pickup truck. Petitioner eventually came under the care of Dr. Kyle Colle who opined that Petitioner required diagnostic and therapeutic injections before he could determine which type of lumbar fusion surgery would be appropriate for Petitioner. Dr. deGrange testified on behalf of Respondent. Dr. deGrange testified Petitioner should undergo a surgical fusion. Dr. deGrange further testified Petitioner's workplace incident was a factor in causing his symptoms and treatment plan. The Arbitrator concluded Petitioner's current condition of ill-being was causally related to his work injury. The Arbitrator further concluded that all medical treatment Petitioner had received to date was reasonable and necessary. The arbitrator also ordered Respondent to approve and to pay for the treatment plan recommended by Dr. Colle, including the surgical intervention to Petitioner's lumbar spine.

The February 18, 2015 Accident

On February 18, 2015, approximately two weeks before the 19(b) decision was entered, Petitioner, while working light duty for Respondent, slipped on ice and landed hard on his buttocks. Petitioner reported the incident and sought treatment at Crossroads Community Hospital. (PX7) On May 22, 2015, Petitioner saw Dr. Matthew Gornet for a neurosurgical consult. Dr. Gornet noted that Petitioner's pain never went away after the first accident, but the second accident significantly aggravated his condition. Dr. Gornet opined that Petitioner's symptoms were causally connected to his work injury of January 24, 2013 with a subsequent aggravation of his symptoms on February 18, 2015. More specifically, Dr. Gornet opined that Petitioner aggravated his underlying foraminal stenosis bilaterally at L4-5, as well as his facet arthropathy. Dr. Gornet further opined Petitioner produced a new disc injury at L2-3 and the L1-2 levels in the form of annular tears. (PX2, 5) Dr. Gornet restricted Petitioner from all work and proceeded with a diagnostic workup, including an MRI, facet rhizotomies (PX12), and a lumbar myelogram and post myelogram CT scan. (PX8; PX13; PX14)

In December 2015, with Respondent's approval, Petitioner underwent an anterior decompression fusion at L4-5 and a laminotomy and posterior fusion at that level. (PX9; PX10) Petitioner initially experienced substantial relief after the surgery, but by March 24, 2016, x-rays revealed a loss of fixation of one screw at L5. (PX2, 22) Accordingly, on April 1, 2016, Petitioner underwent a third surgery to reinsert the rod fixation device and tighten the L5 screw. (PX15)

On June 30, 2016, Petitioner began physical therapy at Mulvaney Rehab Services, which continued through November 2016. (PX16)

On January 16, 2017, Petitioner saw Dr. Benjamin Crane at the request of Respondent for a Section 12 independent medical examination. (PX4) Dr. Crane obtained a history from Petitioner, performed a physical examination, and performed a diagnostic review. Dr. Crane concluded that Petitioner had a solid fusion but continued to experience significant back pain despite aggressive physical therapy and anti-inflammatories. Dr. Crane recommended a course of work hardening, three days a week for three half days followed by a Functional Capacity Evaluation ("FCE"). Dr. Crane would then base permanent work restrictions on the FCE. In the interim, Dr. Crane recommended placing Petitioner on light duty work restrictions with no bending, pulling, pushing or stooping, no lifting anything over 10 pounds and no overhead lifting until completion of the work hardening and FCE. Dr. Crane concluded Petitioner was not at maximum medical improvement. (PX4)

On April 11, 2017, Petitioner underwent an FCE at Apex Network Physical Therapy. (PX5) The evaluator noted Petitioner functioned in the sedentary physical demand level. He was unable to lift from floor level due to his pain complaints and limited range of motion. Petitioner was able to lift 10 pounds from 12 inches off the floor to his waist. The evaluator also noted "the workers' performance on this date is consistent with acceptable effort; however, his moderate to high pain levels from 5-7/10 did appear to effect his performance this date causing worker to stop some tests in FCE." In the recommendation section of the report, the evaluator noted "the Performance Criteria Profile is most consistent with acceptable effort." The evaluator further noted that "leveled efforts indicates the worker most likely participated with full effort." Finally, the evaluator opined "based on the level of effort displayed, the demonstrated physical tolerances may be used to be project actual functional ability at this time." Lastly, the evaluator noted the functional abilities Petitioner displayed are not consistent with the full duty demands of his employment. (PX5,2)

On May 15, 2017, Petitioner returned to Dr. Gornet, who reviewed the FCE findings. Based on the FCE, Dr. Gornet increased Petitioner's lifting limits from 10 to 15 pounds with alternating between sitting and standing as needed, and with no repetitive bending or lifting. Dr. Gornet made these restrictions permanent. (PX2, 28) Dr. Gornet also dispensed Tramadol 15 mg for ninety days. Dr. Gornet noted Petitioner was to get all future prescriptions provided by his family physician and he placed Petitioner at maximum medical improvement. (PX2, 28)

Worsening Symptoms

On May 16, 2017, Petitioner, through his counsel, forwarded the permanent restrictions to counsel for Respondent. Petitioner also dropped the off work slip to his employer and was told Respondent could not accommodate the restrictions. Accordingly, Petitioner's counsel demanded vocational rehabilitation and maintenance. (PX22) Petitioner then began a self-directed job search, as reflected in the job search logs contained within Petitioner's Exhibit 6.

In the late summer and early fall 2017, Petitioner's low back complaints began to worsen. On October 5, 2017, Petitioner went to the emergency room at Good Samaritan Hospital in Mt. Vernon, Illinois reporting pain in his lower back that radiated down into both lower extremities. (PX11, 3) Petitioner reported weakness in both legs with standing and numbness on a chronic basis. X-rays were ordered, and Petitioner was prescribed Fentanyl and Valium. (PX11,6)

On October 13, 2017, Petitioner saw a Nicole Vetter, a nurse practitioner for SSM Mt. Vernon in follow up for the emergency room. Petitioner reported sharp pain and after sitting for 20 to 30 minutes, his legs would go numb. (PX17, 2) On physical exam, Petitioner had pain with bilateral leg raises. He was referred to pain management and his Norflex prescription was refilled. (PX17, 5)

On January 3, 2018, Petitioner saw Dr. Kavita Manchikanti at the Pain Management Center of Marion. (PX18) On physical exam, Dr. Manchikanti noted moderate midline tenderness from L3 to S1 with moderate paravertebral tenderness bilaterally from L3 to S1. Range of motion of the lumbar spine was reduced 40% on flexion with moderate pain. Extension was reduced 50% with moderate pain. Right lateral rotation and left lateral rotation was reduced 30% with severe pain. Straight leg raising test was positive bilaterally. (PX18, 8) Dr. Manchikanti recommended Petitioner start a trial of Gabapentin and Hydrocodone. Dr. Manchikanti also recommended a trial of physical therapy for gait training and core strengthening, as well as lower extremity strengthening. (PX18, 9) On February 27, 2018, Dr. Manchikanti noted Petitioner went to physical therapy two times a week for four weeks and was discharged, noting the therapist did not see much improvement. (PX18, 11) Dr. Manchikanti continued Petitioner's Gabapentin, Hydrocodone, and recommended an EMG/NCS of bilateral lower extremities. Dr. Manchikanti offered a trial of caudal epidural injections which Petitioner declined. Dr. Manchikanti also provided a prescription for a cane at Petitioner's request. (PX18, 14)

On March 5, 2018, Petitioner returned to Dr. Gornet. Dr. Gornet noted Petitioner believed he was slowly getting worse. (PX2, 30) Dr. Gornet noted Petitioner's pain in the low back, both buttocks, both hips, and bilateral leg parathesias. Dr. Gornet noted Petitioner was experiencing weakness in his right leg and walking with a cane. Dr. Gornet discussed with Petitioner that "his symptoms are most likely an adjacent level failure and given his multilevel degeneration, this is somewhat expected." Dr. Gornet ordered an MRI to compare to his previous scan. Dr. Gornet opined that "his workup is directly related to his work-related injury as described on 1/24/13." (PX2, 30)

When Petitioner returned with his MRI, Dr. Gornet noted the films showed a large central herniation more to the right at L1-2. This assumes that the level L3-4 is the level of a congenital fusion. L4-5 is the level at which Dr. Gornet performed the previous fusion. With that nomenclature, the first open motion segment above his congenital fusion is L2-3. The disc herniation is L1-2. Dr. Gornet noted the herniation is clear, pronounced and fits with Petitioner's objective physical exam. Petitioner has more increased weakness on the right and it correlated with his increasing back pain and bilateral tingling. Petitioner did not report any new trauma, "so again we relate this to his original work-related injury." Dr. Gornet further noted "I believe this is an obvious sequela of his ultimate treatment fusion coupled with the dynamics of his back." Dr. Gornet noted that an adjacent level pathology and failure are well-described in the medical literature. Dr. Gornet did not want to move forward rapidly with any type of surgical intervention and, instead, recommended an epidural steroid injection at L1-2 and a transforaminal steroid injection at potentially L1-2. At this point, Dr. Gornet reduced Petitioner's lifting restriction to 15 pounds and kept the remaining restrictions permanent. (PX2,32)

On April 24, 2018, Dr. Manchikanti continued Gabapentin and Oxcycodone, which Petitioner began on a trial basis at the last appointment. (PX18,23)

On May 2, 2018, at Respondent's request, Petitioner saw Dr. deGrange for a Section 12 independent medical re-evaluation. (RX1) Dr. deGrange noted Petitioner was reporting bilateral lower extremity pain, tingling, and numbness down both legs into the toes of both feet. Petitioner described his symptoms as frequently mild and occasionally moderate to severe with prolonged sitting and standing, repeated bending and twisting, and heavy lifting more than 15-20 pounds. Dr. deGrange noted Petitioner obtained relief with change of position and sometimes walking, as well as lying down. Dr. deGrange noted Petitioner was taking Oxycodone 5/325 and Gabapentin on a regular basis. On physical examination, Dr. deGrange noted limited range of motion of the lumbar spine with flexion and extension. On motor examination, Dr. deGrange noted give-way weakness in terms of knee flexion and extension on

the right, as well as right ankle plantar flexion, dorsiflexion, and great toe extension. On sensory examination, Dr. deGrange noticed decreased sensation of the pretibial area extending onto the dorsum of both feet.

Dr. deGrange reviewed the March 5, 2018 MRI, a March 15, 2018 x-ray of the lumbar spine and November 9, 2015 CT of the lumbar spine, a September 29, 206 CT of the lumbar spine, and a February 16, 2017 MRI. Dr. deGrange also reviewed additional medical records, as reflected in his report. Dr. deGrange explained that Petitioner has undergone what appears to be a technically successful fusion anteriorly and posteriorly at L5-S1, which is referred to by Dr. Gornet as L4-5. Dr. deGrange noted there was a congenital fusion above that level and one level above that appeared to be a normal disc. One level above that disc, there is now a disc herniation putting considerable stenosis and pressure on the cauda equina at that level. The 2017 MRI revealed only a slight bulge at that time. This pathology has "gone on now to a herniation."

Since the current disc herniation is one level away from the last fused segment, Dr. deGrange opined that there is no relationship between the current herniation and the prior fusion performed by Dr. Gornet. Dr. deGrange further opined that additional treatment is not in any way related to the prior fusion surgery. With respect to work restrictions, Dr. deGrange noted Petitioner could work in a light to medium demand capacity with no lifting greater than 25 pounds and limited bending and twisting and intermittent sitting, standing, and walking. Dr. deGrange noted the use of the cane prescribed by Petitioner's physician does not conform to usual and customary practices and, therefore, Dr. deGrange did not recommend it nor did he find it reasonable, necessary, or related to his lumbar condition.

On June 20, 2018, Petitioner saw Dr. Manchikanti who continued Petitioner's pain medications. (PX18,28)

On July 22, 2018, Petitioner saw Dr. Gornet who reviewed the IME report from Dr. deGrange. Dr. Gornet noted that "I think the real issue in this case, does a fusion such as the one performed significantly enhance the risk of adjacent level failure give the overall constraints and condition of Mr. McGehee's spine. I this this is where Dr. deGrange and I respectfully disagree." (PX2,37)

Dr. Gornet's Testimony

Dr. Gornet testified on behalf of Petitioner. Dr. Gornet explained the pathology in Petitioner's lumbar spine. (PX20, 6) Petitioner has a congenital fusion at L3-4. Dr. Gornet performed surgery on L4-5. Accordingly, the two levels can be referred to as one level above the congenital fusion and two levels above the congenital fusion. (PX20,6-7) Dr. Gornet also identified as Exhibit 3 side by side views of the February 16, 2017 MRI and the March 5, 2018 MRI, which was marked at arbitration as Plaintiff's Exhibit 24. Dr. Gornet marked black lines to the changes in the L1-2 disc and the L2-3 disc. (PX20,7) Dr. Gornet identified on the exhibit at L1-2 a large herniation that is an obvious change between the previous film. Dr. Gornet also explained that there is a smaller mark next to the L2-3 disc, which Dr. Gornet believed had also changed to some extent. Dr. Gornet did not believe that change as significant, but "it has changed its character consistency." (PX20,8)

With respect to the concept of adjacent level failure, Dr. Gornet explained that fusions will increase the stress on the adjacent segments, so any change in the normal movement of the spine increases the stress on the adjacent levels. (PX20,9) In this case, "for all practical purposes, Mr. McGehee has a fusion from L3 to S1, so he has a three-level fusion and so he has significant stress in the remaining levels of his lumbar spine." (PX20,10) With respect to his comment in his chart that the diagnostic work-up was

directly related to the work-related injury on January 24, 2013, Dr. Gornet explained that "you have to have a high level of suspicion that this work-up, meaning MRI, is related to an adjacent level failure. And so, in this situation, there's no other plausible explanation than to associate that." (PX20,10) Dr. Gornet explained that the pathology at L1-2 fits Petitioner's clinical exam and his bilateral leg tingling. Dr. Gornet wanted to perform epidural and transforaminal steroid injections and explained that a microdiscectomy at L1-2 is often fraught with significant problems and may also accelerate Petitioner's adjacent level issues. So, conservative care was Petitioner's best option. (PX20,11)

Dr. Gornet then used Exhibit 3 to explain the multi-level degeneration in Petitioner's low back. Dr. Gornet testified that Petitioner initially presented with a congenital fusion at L3-4, an open segment that had been injured and worn out at L4-5, and then a congenital fusion at L5-1. So, Dr. Gornet treated the level between his two congenital fusions. While Dr. Gornet was able to help Petitioner significantly, he had the full understanding that Petitioner could never return to heavy activity. Subsequently, though, Petitioner has clearly blown out his L1-2 segment and is already developing increasing changes at L2-3. (PX20,12) The symptoms Petitioner presented with in March of 2018 were consistent with the objective data on the MRI. (PX20,12)

With respect to Petitioner's use of a cane, "I think he is doing what he needs to do to help stabilize his gait and so I would have no problem, given the pathology that we see on MRI, that he's ambulating with a cane." (PX20,13) Dr. Gornet continued by opining: "I would relate his current subjective complaints, his ambulation with a cane, and those as-I- described symptoms directly to the current MRI which correlates very well with the need to offload or protect himself using a cane." (PX20,14)

Dr. Gornet also explained his disagreement with Dr. deGrange's opinion: "...when we talk about adjacent level failure, that doesn't mean the direct adjacent segment. We're talking about the adjacent levels to a fusion. And in personal experience and practical experience, as well as the medical literature, that is defined as generally one or two segments above a fusion. It's not just the adjacent level...second is in this situation, there's clearly a blown-out segment two discs above. I don't think Dr. deGrange and I disagree on that at all. But I also believe there's structural changes occurring at the direct adjacent segment, which is happening right in front of us, so both of these things are occurring. There's no other plausible explanation than to associate that sudden failure with the change in the mechanics of his spine directly related to us fusing him and as well as his congenital fusion. And so, because of that, I think that that this still relates to his work-related injury. (PX20,15-16)

As far as a treatment plan, Dr. Gornet recommended steroid injections, restrictions, and trying to live with it. If Petitioner simply cannot live with the symptoms, Dr. Gornet would consider a microdiscectomy after a CT myelogram, but with full understanding that this is a higher risk procedure, given the location of the herniation. As for Petitioner's work abilities, Dr. Gornet opined Petitioner will always require some level of permanent restrictions that will be more sedentary in nature. Dr. Gornet did not believe Petitioner could go back to any type of laboring position. (PX20,17) Dr. Gornet explained he restricted Petitioner from all work in July of 2018, because, until they initiated some level of conservative care, Petitioner was temporary and totally disabled. (PX20,18) Dr. Gornet opined Petitioner's permanent restrictions would include 15-pound lifting with no repetitive bending or lifting, alternating between sitting and standing.

On cross-examination, Dr. Gornet was asked whether the L3-4 congenital fusion could, in and of itself, explain the failure at L1-2. Dr. Gornet explained that if we make that assumption, "that you would have to make the assumption, why now? Why did this occur now as opposed to 10 years ago, 15 years ago, 20 years? Because it was always present." (PX20, 22) Dr. Gornet continued "in this situation what

has dramatically changed is that I've altered and now the segment in between his two congenital fusions doesn't move anymore. So, all the stress goes above that. And I don't believe that just the congenital fusion at 3-4 would have done this. At least there's no indication from his life experiences of what we've seen coupled with his serial MRIs that that level really changed significantly until I performed the fusion between the two segments." (PX20,22)

On re-direct examination Dr. Gornet opined that the surgery he performed significantly enhances the risk of adjacent level failure in Petitioner's spine. Dr. Gornet also reiterated that the fusion he performed, to a reasonable degree of medical certainty, was a factor in Petitioner's current problems at L1-2.

Dr. deGrange's Testimony

Dr. deGrange testified on behalf of Respondent. Dr. deGrange testified that he performs two to three IMEs per week. Dr. deGrange testified that, when he performed his physical examination, Petitioner did not have any gait abnormalities, which Dr. deGrange would have expected given the symptoms that Petitioner reported. (RX1,10) Dr. deGrange did not make any note of Petitioner using a cane on this visit. Dr. deGrange testified the prior fusion Dr. Gornet performed explains some of Petitioner's ongoing low back pain. (RX1,14-15) Dr. deGrange opined that the disc herniation at L2-3 "was probably the natural history of this patient more likely than not." (RX1,16) When asked by Respondent's counsel whether he has an opinion as to whether the fusion performed by Dr. Gornet contributed to the new disc herniation, Dr. deGrange testified "I don't believe so. Again, this is medicine and there is always a possibility." (RX1,17-18)

Dr. deGrange continued to testify that all fusions, whether man made or congenital, do alter the biomechanics of the spine. Dr. deGrange testified an epidural steroid injection would only be appropriate if the injury was six months old as such steroids are anti-inflammatories and inflammation typically run its course significantly within the first five days. Anything after six months, the effect of the epidural is greatly significantly diminished. (RX1,20)

On cross examination, Dr. deGrange, (using his nomenclature), explained Petitioner had a congenital fusion at L4-5, a "really beat up" disc and "trashed" facets at L5-S1, a slight bulge at L3-4, and the new large disc herniation on the right side at L2-3 causing a moderate degree of stenosis with facet arthropathy. Dr. deGrange admitted he was not aware of Petitioner's February 18, 2015 workplace injury. (RX1,26-27) When asked why Petitioner is having low back pain, Dr. deGrange testified that Petitioner has a congenital fusion, disc degeneration at L2-3, and a surgical spinal fusion at L5-S1. So, Petitioner has three level disease in his low back. (RX1,29) With respect to Petitioner's back pain with prolonged sitting and standing, Dr. deGrange explained that it could be poor muscle conditioning, "could be the fusions." (RX1,30) Dr. deGrange was not provided the FCE for his review. (RX1,30)

Dr. deGrange was then asked questions about appropriate work restrictions for patients with Petitioner's pathology. First, Dr. deGrange stated that, while the herniation has a healing period of six to twelve months, the appropriate work restrictions would be 15-pound lifting limit, limited sitting and standing, and limited bending and twisting. Dr. deGrange then stated discs herniations, the vast majority of these, over 80 percent, go on to heal spontaneously without any surgical interventions. Once six to twelve months had passed, Dr. deGrange would need to see an FCE to determine Petitioner's abilities. (RX1,32) So, after six to twelve months, Dr. deGrange stated that he would place Petitioner in the medium demand capacity with an upper limit of 40-pound lifting limit.

Dr. deGrange was then shown page five of his report in which he had placed a 25-pound lifting restriction for Petitioner. (RX1,33) As for the treatment Petitioner has received since March 5, 2018, Dr. deGrange only saw that an MRI was ordered and did not know what other treatment was provided to Petitioner. (RX1,35) With respect to Petitioner's pain medications, if a pain management specialist is monitoring Petitioner's usage of Oxycodone and Gabapentin, "that's fine." "So long as he is being monitored, that's the best we can do at this point and time." (RX1,36)

Dr. deGrange admitted that three out of the six lumbar vertebrae are immobilized in Petitioner's lumbar spine. (RX1,37) Dr. deGrange also noted that there is no history of any intervening injury since Dr. Gornet released Petitioner on May 15, 2017. (RX1,37) Dr. deGrange acknowledged that, with this condition, "there certainly would be some risk for further injury." (RX1,38)

Dr. deGrange was also reminded of his notation on page four of his report that the new disc herniation was putting considerable stenosis and pressure on the cauda equina at that level. Dr. deGrange responded "yes, I did say that, you're absolutely right." The symptoms Dr deGrange would expect from this condition would be pain, tingling, numbness primarily from about the mid-thigh to the knee on the right leg. (RX1,38) Dr. deGrange also acknowledged this condition could cause pain in the right thigh and low back pain. (RX1,39) Finally, Dr. deGrange was asked why Petitioner's disc herniation occurred when it did as oppose to ten years earlier. Dr. deGrange stated he did not have an opinion on that issue: "anything I would say would be purely speculative."

Testimony of Liala Slaise

In August 2017, Respondent hired Ms. Liala Slaise to provide vocational rehabilitation for Petitioner. Ms. Slaise testified regarding her progress reports. Ms. Slaise is a certified counselor with the Union Pacific Railroad network and employed with the Triune Health Group. (RX3, 5-6) Her initial meeting with Petitioner was on August 31, 2017, which was also attended by Petitioner's counsel. Prior to the meeting, Ms. Slaise had reviewed medical records from Dr. Gornet, including Petitioner's permanent work restrictions. (RX3, 8) During the meeting, Petitioner advised he was taking Tramadol and Meloxicam. Petitioner also advised he was not able to sit for longer than 15 or 20 minutes as his leg would go to sleep. He could stand for about one to one and a half hours before he would need to either sit or lay down. Petitioner stated he lies down for about 45 minutes to an hour for a total of five to six hours per day on average. Petitioner rated his pain symptoms as 6 to 7 out of 10 on a good day and a 10 on a bad day. (RX3, 9)

Ms. Slaise noted that Petitioner had a high school diploma. However, Petitioner did not have a computer and he had no computer skills. He owns a cell phone but only uses it for conversations. Ms. Slaise discussed a Transferrable Skills Analysis that she performed, which resulted in a list of job descriptions that Petitioner may be qualified for, including information clerk, surveillance monitor, inspector and light delivery, customer service, and assembly positions. Ms. Slaise, however, did not perform a Labor Market Survey. (RX3, 13) Initially, it was Ms. Slaise's opinion that there were jobs in the open labor market that Petitioner could perform per Dr. Gornet's restrictions. (RX3, 14) Since Petitioner was already actively doing a self-directed job search without success, Ms. Slaise's recommendation was to help him with job seeking skills and to assist him with meetings, job leads, and developing a resume. (RX3, 14)

On September 28, 2017, Ms. Slaise learned that Petitioner had found a job with C&C Power Sweeping, performing parking lot maintenance. Ms. Slaise was concerned about whether Petitioner

could perform the duties of the job, but Petitioner knew the employer and thought he could do the job. (RX3, 16-17) It was a part time job, Fridays and Saturdays for eight hours a piece. He would also fill in as needed. However, Petitioner was only able to work a few hours on September 29th, due to the increased pain caused by operating a leaf blower. (RX3, 17) Petitioner later went to the emergency room for treatment, see *infra*.

Ms. Slaise noted that Petitioner was using a cane, which was concerning. However, Petitioner had been registering with staffing agencies and looking for realistic jobs. He did not have a computer at the house, and so Petitioner's wife was assisting him with applications and completing registrations at home. (RX3, 19) One of Ms. Slaise's initial recommendations was to enroll Petitioner in computer classes. At that time, she was researching availability of classes at various locations. By December 2017, Ms. Slaise suggested Career Assessment Testing to try to explore employment options that may interest Petitioner. Petitioner completed the career scope testing. Ms. Slaise noted Petitioner had trouble with the sit/stand and demonstrated pain between alternating with the two, so they stopped the testing and saved it for him to finish later, which he ultimately did. (RX3, 21) Ms. Slaise also testified Petitioner applied for a job with Securitas, but he was not offered a position. (RX3, 23)

Ms. Slaise also noted Petitioner was still dealing with pain and uncertainty about his ability to work full-time of part-time. (RX3, 23) Nevertheless, Petitioner was "definitely participating at the meetings." (RX3, 24) Ms. Slaise also discussed some issues with verifying the completion of applications for hiring agencies. Petitioner's wife was helping Petitioner with these applications and, therefore, Petitioner did not always have enough information for Ms. Slaise to follow up on his activity. (RX3, 26) By March of 2018, Ms. Slaise still had not been able to secure computer training because a class that she had found was cancelled due to lack of enrollment. (RX3, 28) Petitioner still had pain complaints and was treating with pain management. Ms. Slaise testified, during this time, Petitioner was applying for the job leads that she had provided him. (RX3, 29)

In May 2018, Ms. Slaise received an off work slip and closed Petitioner's file. (RX3, 32) Ms. Slaise provided an opinion that the expected pay for jobs that would fit Dr. Gornet's medical restrictions would be $10 to $14 per hour in the Mt. Vernon, Illinois area. Ms. Slaise testified that this opinion is based on a computer program from the Department of Labor and Bureau of Labor Statistics. (RX3, 34) Given the job descriptions from the Transferable Skills Analysis, the program will produce jobs as well as the employment rate and wages for those specific jobs. (RX3, 34)

On cross-examination, Ms. Slaise agreed that Petitioner had several barriers to employment. (RX3, 37) Petitioner's work restrictions were a barrier, which would limit the universe of acceptable jobs. (RX3, 37) Petitioner's educational background was another barrier to employment. Ms. Slaise agreed Petitioner's high school education and permanent restrictions would also decrease the universe of acceptable jobs. (RX3, 39) Ms. Slaise agreed Petitioner's complete lack of computer skills was "definitely a barrier, yes." (RX3, 39) Ms. Slaise explained that the lack of computer skills was not only a barrier to qualifying for jobs, it was also a barrier to actually looking for jobs. (RX3, 39) Ms. Slaise agreed that the lack of computer training was an issue she identified from the very beginning. This issue created hurdles for Petitioner's job seeking. (RX3, 39) Ms. Slaise agreed this barrier was never addressed during the vocational period. (RX3, 40)

Ms. Slaise testified that Petitioner was cooperating with enrollment in computer classes and expressed to her that he would go to the classes if she could find any. (RX3,40) Ms. Slaise was continuing to work with Petitioner to try and help him find a job all the way up until she received the off-work slip. (RX3,40-41) Ms. Slaise never gave up on Petitioner. (RX3, 41) Ms. Slaise never sent a letter

or report indicating vocational services would be futile for Petitioner. (RX3,41) In fact, when she closed her file, via a letter dated May 11, 2018, the reason for closing the file was the off-work slip provided by Dr. Gornet, not Petitioner's conduct or cooperation. (RX3, 41-42)

Ms. Slaise agreed Petitioner attended all the meetings she scheduled, and he was polite and responsive. (RX3, 42) Ms. Slaise acknowledged Petitioner did obtain a prescription for his cane from pain management. (RX3, 44) Ms. Slaise agreed from the time she started working with him through the Spring of 2018, she observed Petitioner's medical status changing with increased symptoms and renewed treatment. (RX3,44) However, Ms. Slaise did not receive updated medical records from Dr. Gornet or the pain management physician. (RX3,45)

Ms. Slaise discussed the purpose of a Labor Market Survey. A Labor Market Survey is a sampling of employment opportunities within a specific geographical area. It would include a sampling of jobs that were feasible, and she would contact employers who hold those positions to see if they were hiring, or expected to hire, and what the expected pay is for those positions. (RX3,46) Ms. Slaise explained that, when providing vocational services, one needs to have a worker who is not only employable, but there also needs to be jobs available. (RX3, 46) The purpose of a Labor Market Survey is to look at the second part of the equation: are there jobs available that fit the transferrable skills that she has identified for the worker? (RX3,46) Ms. Slaise testified that she would have performed a Labor Market Survey for Petitioner if her referral source had requested it. Without a Labor Market Survey, Ms. Slaise was unable to testify as to whether there were any job openings for any of the positions she identified for Petitioner. (RX3, 47-48)

Q: Whether at the end of your vocational service in May 2018 there were any available jobs that fit Mr. McGehee's qualifications within the work restrictions set by Dr. Gornet originally, you couldn't say?
A: Available, meaning open?
Q: Yes.
A: No, I cannot. (RX3, ,48)

Ms. Slaise testified that Petitioner presented job search logs that he had created during his self-directed job search. (RX3, 51) He also documented the job searches he was performing while working with Ms. Slaise. (RX3, 52) Ms. Slaise testified that Petitioner never stopped looking for work until he received his off-work slip. (RX3, 52-53) Ms. Slaise agreed the type of issues Petitioner experienced in completing applications online was something she would expect from someone who has no computer skills. (RX3, 53) Ms. Slaise testified Petitioner was never able to get an interview from an actual employer, as opposed to an employing agency. (RX3, 56) Ms. Slaise testified that, during the Career Scope testing, she observed with her own eyes Petitioner stand up, appear to be unstable, and his legs began shaking while he held onto his cane. (RX3, 58-59)

Petitioner's Testimony

Petitioner testified regarding the February 18, 2015 accident. On that date, Petitioner was working light duty as a laborer for Respondent. Petitioner slipped on ice in the course and scope of his employment and fell on his buttocks and low back. Petitioner immediately felt excruciating pain. Petitioner then underwent the treatment outlined above. Petitioner never had any back issues before the January 2013 workplace accident. After the February 2015 accident, his symptoms worsened.

Petitioner testified that he began a self-directed job search in May 2017 after Dr. Gornet released him with permanent restrictions. He looked for work and located the job at C&C Power Sweeping on his own, without Ms. Slaise's assistance. Petitioner continued to meet with Ms. Slaise and continued to look for work until Ms. Slaise closed his file.

Petitioner testified that he has been using a cane since the accident. Dr. Gornet never had a problem with it. Petitioner did bring the cane to his IME appointment with Dr. deGrange as well. Petitioner explained that his legs go numb after sitting for a few minutes.

In May 2018, after Dr. Gornet restricted him from all work, Petitioner still met with Ms. Slaise for a last visit. Petitioner testified that he was willing to continue vocational rehabilitation with Ms. Slaise under the restrictions recommended by Dr. deGrange. In addition, on June 1, 2018, Petitioner's counsel emailed Respondent's counsel, explaining that "Jamie Is willing to resume vocational rehabilitation per his original restrictions." (PX1)

Ms. Slaise never told Petitioner that she was going to close her file because of his conduct or lack of cooperation. Petitioner explained that his wife attended his meetings with Ms. Slaise, but Ms. Slaise never asked her any questions about the status of Petitioner's job applications. Petitioner also explained that, before he started working with Ms. Slaise, one employer asked him what he does to alleviate his pain. Petitioner responded by noting that laying down helps his pain. Petitioner did not mention the need to lay down to any other employers. While working with Ms. Slaise, he never received a job offer and his only interviews were with staffing agencies.

The Arbitrator witnessed Petitioner's condition at the hearing. When Petitioner was called to testify, he was unsteady on his feet and needed to take a few minutes before he could walk to the witness chair. Petitioner was clearly in discomfort throughout the hearing.

CONCLUSIONS OF LAW

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

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work injuries on January 24, 2013 and February 18, 2015. The Arbitrator bases his findings on his March 6, 2015 decision in this case, and on the testimony of Petitioner and Dr. Gornet. After the prior decision, Respondent did not dispute medical causation until May 2, 2018, when Dr. deGrange issued his IME report. In that report, Dr. DeGrange concluded that Petitioner's disc herniation at L1-2 is not related to Dr. Gornet's fusion surgery at L4-5. Yet, Dr. deGrange admitted that he was not aware of Petitioner's second accident. Dr. deGrange further conceded that, after Dr. Gornet's surgery, Petitioner now has three out of the six lumbar vertebrae immobilized. Dr. deGrange also admitted there was no history of any intervening injury that could explain Petitioner's current condition. Dr. deGrange conceded that fusions will alter the biomechanics of the spine. Most importantly, when answering a question posed by Respondent's counsel, Dr. deGrange testified that "there is always a possibility" that the fusion at L4-5 contributed to the new disc herniation.

Dr. Gornet identified on Exhibit 3 to his deposition, later marked as Petitioner's Exhibit 24, disc pathology at L2-3, immediately above the congenital fusion at L3-4 and immediately below the herniation at L1-2. Over three years ago, in May 2015, Dr. Gornet noted disc injuries at both L1-2 and L2-3 in the form of annular tears, which he related to Petitioner's workplace accident. In addition, Dr. Gornet explained that the concept of adjacent level failure contributed to the worsening pathology at these levels. Dr. Gornet explained

that fusions will increase the stress on other segments in the spine, whether one level or two levels away from the last fused segment. In this case, Petitioner has a three-level fusion from L3 down to S1, which causes significant stress on the other levels in the lumbar spine. Petitioner did not experience any problems with his congenital fusions before the work injuries in this case. Petitioner's problems at the adjacent levels above the fusions did not occur until after Dr. Gornet fused L4-5. Accordingly, Dr. Gornet opined that the workplace injuries, which required the L4-5 surgical fusion, contributed to the pathology at the adjacent levels in Petitioner's spine.

The Arbitrator finds Dr. Gornet's testimony to be more persuasive than Dr. deGrange. After Dr. Gornet's surgery, the last three lumbar vertebrae in Petitioner's spine are immobilized, which more likely than not increased the stress on the levels above L3-4, as there was nowhere else for the added stress to be distributed. In other words, if the stresses could not go down the spine, it had to go up the spine to the only non-fused levels, L2-3 and L1-2. With no issues before the accident, no intervening injury, and an obvious worsening of the pathology after Dr. Gornet's L4-5 fusion, the Arbitrator concludes that the workplace injuries, which necessitated the surgical fusion, were a factor in causing Petitioner's current condition in his lumbar spine.

Issue (G): What were Petitioner's earnings?

The parties do not dispute Petitioner's earnings prior to the two accidents. The dispute centers on which AWW applies to this case: the AWW from January 24, 2013 or the AWW from the February 18, 2015. In the March 6, 2015 19(b) decision, the Arbitrator awarded the surgery, which Dr. Gornet eventually performed. However, Dr. Gornet opined that the second accident significantly aggravated Petitioner's condition. There is no contrary testimony, as Dr. deGrange was not aware of the second accident. To establish causation, a worker must only establish that a workplace accident was a factor in causing the need for treatment. The accident does not have to be the only factor or the sole cause of the treatment. As such, the Arbitrator concludes that the February 18, 2015 accident, which resulted in injuries to Petitioner's spine, was at least a factor in the need for the surgical fusion. Also, it should be noted that Respondent is responsible for the delay in the surgery, as it denied approval for the surgery. Since Petitioner was working light duty while awaiting the decision, Respondent assumed the risk that a subsequent accident could affect its liability in this case. Accordingly, the Arbitrator concludes that Petitioner's AWW to be applied to this case is $793.50 per week.

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

The Arbitrator finds that all the treatment to date was reasonable and necessary to treat Petitioner's injuries based on the medical evidence and testimony, as well as the Arbitrator's causation finding noted above. This finding includes Petitioner's pain management treatment, which Dr. deGrange agreed was appropriate so long as Petitioner's medications were being monitored. Therefore, Respondent shall pay reasonable and necessary medial services pursuant to the medical bill fee schedule (Section 8(a) and 8.2 of the Act) as follows:

MRI Partners of Chesterfield	$ 2,700.00
Dr. Matthew Gornet	$63,024.00
Pain Management Center of Marion	$ 336.10
IDPA lien	$ 482.87

Based on the Arbitrator's causation finding and the medical evidence, the Arbitrator orders that Respondent shall approve and pay for treatment recommended by Dr. Gornet for Petitioner's lumbar spine.

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

The Arbitrator concludes that Respondent shall pay Petitioner temporary total disability benefits of $528.47 for 20 weeks, commencing May 4, 2018 through September 20, 2018, as provided in section 8(b) of the Act. There is no dispute that the disc herniation at L1-2 is, to use Dr. deGrange's words, "putting considerable stenosis and pressure on the cauda equina at that level." The Arbitrator observed Petitioner's disability first hand at the hearing in this case, which was consistent with Ms. Slaise's observations of Petitioner when he struggled to walk after completing testing. The Arbitrator places great weight on his first-hand observations of Petitioner's condition. Dr. Gornet restricted Petitioner from work until some level of conservative care can address Petitioner's worsening condition. Accordingly, the restriction is reasonable and necessary.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffrey McDonald,

Petitioner,

vs.

NO: 15 WC 18964

19IWCC0660

Lake County Press, Inc.,

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, causation, medical expenses, temporary total disability and nature and extent, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, while correcting a clerical error, said decision being attached hereto and made a part hereof.

The Commission corrects a scrivener's error in the Arbitrator's decision at page 6 of 7, second full paragraph, fifth sentence, wherein it should read that "... the detail in Petitioner's testimony that he caught his toe on this strip is not noted in the medical histories or [not "of"] the testimony of Mr. Efinger or Mr. Marcoe." (Arb.Dec., p.6 of 7).

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 1/6/17 is affirmed and adopted with changes as stated herein, and Petitioner's claim for compensation is denied.

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

DATED: DEC 6 - 2019
o:10/22/19
TJT/pmo
51

Maria Elena Portela

Maria E. Portela

Kathryn A. Doerries

Kathryn A. Doerries

DISSENT

I respectfully dissent for the reason that I believe there is more than enough evidence in the present case, based on a chain of events theory of recovery and the medical records taken as a whole, to find that Petitioner proved by a preponderance of the credible evidence that he sustained accidental injuries arising out of and in the course of his employment on 3/3/15, and that his current condition of ill-being with respect to his left foot/ankle is causally related to said accident.

As the Arbitrator noted, there is no dispute that Petitioner's injury occurred in the course of his employment. However, I disagree with the Arbitrator's decision to essentially apply a neutral risk analysis in finding that Petitioner failed to prove his injury arose out of his employment. Instead, I would characterize the risk of injury in this case as distinctly associated with and incidental to Petitioner's employment, with no need to resort to any neutral risk analysis.

The evidence shows that Petitioner's job duties required him to attend the regular 10:00 a.m. meeting in the second-floor cafeteria on those occasions when his supervisor, Bob Efinger, was unable to attend, specifically when the latter was on vacation, or about 25 times per year. Such was the case on the date of the injury when Petitioner was on his way to the meeting, with printout sheets in hand, ascending an employee-only stairway. The evidence shows that the back stairway in question was the closest and most convenient means of access to the cafeteria, where the meeting was being held, from his first-floor office in the back of the building. He also noted that there was an elevator that was "in the wrong direction" as well as stairs leading from the first floor to the second floor in the lobby that members of the general public could use. Respondent's attempt to muddy the waters by pointing out that these alternatives existed is little more than a red herring. It was by no means unreasonable for Petitioner to take the back stairwell as he did. To somehow infer that Petitioner could have avoided his injury by taking an

alternative route is patently ridiculous – as ridiculous as arguing that Respondent could have equally prevented the whole affair if only Mr. Efinger had been prescient enough to ask someone else to attend the meeting for him.

I also do not believe that the history of injury found in the medical record as well as in the recollections of Mr. Efinger and Mr. Marcoe necessarily contradict Petitioner's testimony at arbitration. Petitioner consistently related that he was injured while he was walking up the stairs, whether it happened when he "stepped wrong", as stated in the initial Vista Health charting note, or "[t]ripped going up stairs" as reflected in the Vista Health questionnaire filled out by Petitioner on the date of the accident. (PX1). Likewise, Dr. Gorelik, in her office note dated 3/16/15, recorded a history of "fall[ing] on stairs". To argue that these histories are somehow so divergent so as to call into question Petitioner's credibility, presumably because they are not verbatim to what Mr. McDonald testified to at trial, is unreasonable and fails to take into account the fact that these histories were recorded by different individuals, with their differing viewpoints, and was neither written nor reviewed by Mr. McDonald. To hold that these varying histories should or ought to be utterly consistent is unrealistic to say the least.

Furthermore, Petitioner had worked for Respondent since 1976, working in the same building for 40 years. He had never filed a previous workers' compensation claim and was by all accounts an honest and valued worker – why else would Mr. Efinger, and by extension Respondent, ask him to handle his supervisory responsibilities when he was gone? There is also no question that the incident occurred and that Petitioner injured his knee in the process. Petitioner was working full-duty at the time of the accident and had no prior treatment for or lost any time from work due to left foot/ankle problems. He reported the incident and immediately sought treatment for his injury, and he suffered no intervening accident thereafter. In addition, Respondent presented no medical opinion of its own to rebut the opinions of Drs. Gorelik and Waxman, as reflected in the former's letter dated 9/7/16, wherein it was noted that Petitioner had been referred to Dr. Waxman "... where he was found to have an Achilles tendon rupture, exacerbated by the twist of the left lower leg that occurred when he fell." (PX2).

Thus, the only issue is and always has been the legal one of how to describe the activity that Petitioner was engaged in at the time. Towards that end, the record shows that Petitioner was injured in an employee-only stairwell that was closest to his work space as he was walking to a meeting he was required to attend on behalf of his supervisor. He was carrying and studying production printouts as he was climbing the stairs and mis-stepped or tripped over a step, fell forward and injured his left ankle. This was not a neutral risk. This was a risk of injury incidental to his employment given that he was performing an act that his employer would have reasonably expected to be performed in the furtherance of his assigned duties. The fact that he was carrying the printout and reviewing it when he fell – a claim that is uncontradicted by the record -- makes it an employment risk in and of itself, and as such the injury was compensable.

As a result, I would reverse the Arbitrator and award benefits accordingly.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

McDONALD, JEFFREY
Employee/Petitioner

Case# **15WC018964**

LAKE COUNTY PRESS INC
Employer/Respondent

19IWCC0660

On 1/6/2017, 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 0.63% 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:

0152 LINN CAMPE & RIZZO
LARRY APPLEBAUM
215 N MARTIN L KING JR AVE
WAUKEGAN, IL 60085

1120 BRADY CONNOLLY & MASUDA PC
DANIEL J CODY
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

19IWCC0660

STATE OF ILLINOIS)
)SS.
COUNTY OF LAKE)

- ☐ 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

Jeffrey McDonald
Employee/Petitioner

v.

Lake County Press, Inc.
Employer/Respondent

Case # **15** WC **18964**

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 **Waukegan**, on **December 20, 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 _____

19IWCC0660

FINDINGS

On **March 3, 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 alleged accident ***was*** given to Respondent.

In the year preceding the injury, Petitioner earned $**55,747.20**; the average weekly wage was $**1,072.06**.

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 $**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 paid benefits of $**6,454.21** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF HIS EMPLOYMENT WITH RESPONDENT, THE CLAIM FOR COMPENSATION 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

January 5, 2017
Date

JAN 6 - 2017

ICArbDec p. 2

19IWCC0660

Statement of Facts

Petitioner Jeffrey McDonald testified that he was employed by Respondent Lake County Press, Inc. since 1976. Respondent is a commercial printer. Respondent operates 3 shifts for production. Respondent employs 225 to 250 persons. Petitioner is employed in the pre-production department. This department prepares electronic files and computer files for the press operation. Petitioner testified that his job includes preparing the files for customers and cutting proofs. Petitioner graduated high school and has taken a few college courses. There are two shifts in the Petitioner's department. He works first shift from 6:30 AM to 2:30 PM, Monday through Friday. Petitioner's supervisor is Bob Efinger. Petitioner testified that he has been his supervisor for 10 years.

Respondent's facility is a large two story building. The first floor is the production and presses. The second floor is the cafeteria, offices and accounting. Petitioner works on the first floor in the shop. The pre-production office is in the middle of the building. There is an elevator and three stairways between the floors. There are two employee-only stairways and a front lobby stairway.

Respondent conducts daily meetings at 10:00 AM in the second floor cafeteria to review the status of the jobs in progress. The meetings include supervisors, department heads and customer service. The meetings are run by the company scheduler. There are 15-18 participants. Petitioner testified that the meeting is usually attended by his supervisor. He attends only if his supervisor is on vacation or otherwise unavailable. He testified that his supervisor is never sick. Petitioner testified that he attends 25 meetings per year. The pre-production presentation is the first one. There is a question and answer session. The presentation lasts a few minutes.

On March 3, 2015, Petitioner's supervisor was on vacation and Petitioner was to attend the meeting to present status of the jobs. He had attended the meeting the day before as well. He arrived at work at 6:30 AM and needed to review the status of each job. He reviewed the list of jobs on the computer. The status of each job changes daily and he needs to obtain the information right before the meeting. This is done on the first floor.

On March 3, 2015, he was going to the meeting using the back stairway. He had used this stairway hundreds of times. He was not required to use any particular stairway. He testified that he could use the elevator but it was in the wrong direction. The stairway he chose was closest to his desk and leads directly to the cafeteria where the meeting was to be held. The stairway consists of a first section of stairs, a landing, and a second section of stairs. He testified he was wearing rubber soled loafers. Petitioner identified the photographs marked PX 11 A-E as accurately depicted the stairway involved. There is a metal riser that folds over the concrete step. Petitioner testified that he was reviewing the information while he was going to the meeting. He testified that he is not comfortable with public speaking. He was nervous. He was not in a hurry. He was carrying the papers and wearing his reading glasses. He testified that while climbing the first section of stairs, his right foot caught on the riser; he caught the other leg and heard a pop in his left ankle. There was nothing on the stairs, the lighting was not broken. He testified he felt pain in his left ankle and calf and went down immediately. He testified that there was no one in front of him. Mark Wegman and Jill were behind him.

Petitioner testified he assumed he had pulled a muscle. He attended the meeting and stayed to the end. He testified that he spoke with Lee Marcoe in HR and told him what happened. He filled out an accident report and went to Vista for a urinalysis and 5 minutes check up for his leg. He was told to ice it and go back to work.

Bob Efinger testified that he has been employed by Respondent for 36 years. He is the pre-production manager. He has worked as Petitioner's manager for 6-7 years. He testified he learned of Petitioner's injury when he returned from vacation. He was told Petitioner was going to the meeting and missed a step. Mr. Efinger testified that he attends the daily meetings of department heads and customer service when he is there. The meeting is to update what is going on and schedule work. He testified that the meeting last 5-10 minutes. The information from pre-production is new each day. When he is on vacation or not at work, Petitioner will attend. He testified that this occurs 40-50 times per year. Petitioner never told him that the meeting made him nervous. Petitioner never requested that someone else attend the meeting

Mr. Efinger testified that the pre-production department is located in the front office on the first floor of Respondent's facility. The building has three sets of stairs and an elevator. Employees can use any one of them. One set of stairs is like a fire escape. There are stairs in the front lobby and the stairs towards the back of the new addition to the cafeteria. These stairs are not in the public area of the offices.

Lee Marcoe testified that he has been employed by Respondent for 21 years. He is the EHS manager, responsible for safety. He heard that Petitioner had injured himself at 11:00 AM on March 3, 2015. He went to see Petitioner and speak to him. Petitioner told him he injured his leg when he stumbled on the stairs. They went to the site of the injury and stood on the spot. Petitioner did not say there was anyone in his way. There was nothing on the stairs. He did not say he was carrying anything. He said he just tripped over his own two feet. Mr. Marcoe testified that he inspected the stair. There was nothing wrong with it. He testified that Petitioner did not tell him he caught his foot. He did not tell him which leg he stumbled on.

Mr. Marcoe testified they went back to his office and filled out an accident report. Petitioner then went to Vista Medical Center. He saw Petitioner when he returned to work and turned in the paperwork. He did not know if anyone else saw Petitioner. He testified Petitioner said he was alone. He did not talk to Mark Wagner or Jill.

Mr. Marcoe testified that the meeting was in the cafeteria. There is an elevator, the front stairway or the stairway Petitioner used to get to the second floor. There is no requirement of which stair or elevator to use. The stairway Petitioner used goes to the cafeteria.

The records of Vista Corporate Health were admitted as Petitioner's Exhibit 1. The March 3, 2015 records document that Petitioner had a breath alcohol test and drug screen. The chart note records that Petitioner reported he was walking up the stairs and stepped wrong and felt a pop. He complained of pain in the left leg and ankle. There is no history of prior injury to the left leg or ankle. The record notes edema and bruising with full range of motion. Petitioner was diagnosed with a muscle strain, advised to use ice and Ibuprofen, and returned to work (PX 1).

Petitioner testified that when he returned to work he felt pain and swelling in his ankle and calf. He had difficulty walking. He felt it was getting worse so he went to his family doctor Dr. Gorelik about 10 days after the injury. Dr. Gorelik's records were admitted as Petitioner's Exhibit 2. On March 16, 2015, Petitioner reported he fell on stairs at work. Dr. Gorelik diagnosed an acute muscle trauma, contusion and possible DVT. She scheduled a Doppler study. The March 16, 2015 Doppler found acute DVT in the left calf, posterior tibial and soleal veins. Petitioner was begun on anti coagulation therapy with Lovenox and Warfarin. On April 15, 2015, Petitioner reported shortness of breath while doing gardening work for a while. A March 16, 2015 CT of the chest was negative for pulmonary embolism. Cardiac workup was unremarkable. A repeat Doppler study performed on June 3, 2015 was negative for ongoing DVT (PX 2).

Petitioner testified that Dr. Gorelik referred him to Dr. Waxman for his ankle. Dr. Waxman's records were admitted as Petitioner's Exhibit 4. Dr. Waxman's initial April 2, 2015 referral letter includes a history of an injury on a stairwell. Petitioner felt a pop in his lower leg. Dr. Waxman notes the finding of DVT and Coumadin therapy. Physical examination documents swelling and a palpable defect in the Achilles tendon. Dr. Waxman's impression is possible Achilles tendon rupture. The May 5, 2015 MRI notes a partial thickness tear of the distal Soleus muscle, Achilles myotendon junction and proximal Achilles tendon. On May 8, 2015, Dr. Waxman's impression is a rupture more or less healing in an elongated position. Dr. Waxman began physical therapy. He noted Petitioner may need a reconstruction. On July 24, 2015, Dr. Waxman records complaints of weakness in the leg with an abnormal gait. Petitioner feels he has plateaued in therapy. Dr. Waxman discussed surgery, which Petitioner would like to get done. Dr. Waxman notes Petitioner will need to complete the anticoagulation therapy and scheduled him to return 10 days before surgery (PX 4).

On September 18, 2015, Dr. Waxman saw Petitioner for a preoperative visit for his ankle surgery and unrelated issues in his right shoulder. Petitioner had surgery on October 1, 2015 consisting of a repair of the left Achilles tendon with excision of Haglund deformity and FHL tendon transfer. Petitioner was placed in a cast and returned to blood thinners postoperatively. Dr. Waxman wrote a prescription stating Petitioner could return to work on October 8, 2015. Petitioner was transferred from a cast to a boot on October 29, 2015 and started on physical therapy. Petitioner began weening himself out of the boot on December 1, 2015. Petitioner was discharged from physical therapy on December 30, 2015. The patient status notes that he thinks his walking is much better with less of a visible limp. Petitioner last saw Dr. Waxman on January 11, 2016. The Achilles is doing well with some swelling, but is continuing to improve in terms of strength. He is not having a lot of pain. Dr. Waxman notes Petitioner can continue therapy and exercises. He can use compression hose followed by icing and elevation for swelling (PX 4).

Petitioner testified he still notices swelling and pain at times. He gets cramps and limps. He wears looser shoes to allow for the swelling. He now golfs using a cart and no longer snow skis, plays racquetball, runs or lifts weights. When he tries he notices his left leg swells and cramps. He now tries to use elevators. His leg cramps on stairs. Going down is more difficult.

Conclusions of Law

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

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. There is no dispute that Petitioner's injury occurred in the course of his employment. The issue is whether the injury "arises out of" his employment. 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. There are three categories of risks an employee may be exposed to: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. The mere fact that the claimant's duties took him to the place of injury and that, but for her employment, he would not

have been there, is not sufficient, of itself, to support a finding that his injuries arose out of his employment. In the context of falls, neutral risks include falls on level ground or while traversing stairs. Injuries from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. The increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public.

Petitioner's evidence was that, at the time of the injury, he was climbing the stairs for a single time to attend the morning meeting, so there is no evidence of a quantitative increased risk. Petitioner raises a claim of a qualitative increase risk based upon both the nature of the stairway itself and the nature of his required attendance at the morning meeting in his supervisor's place. The Arbitrator does not find that either created an increased risk of injury.

With respect to the stairway itself, Petitioner presented photos of the stairway and testified that there is a metal riser that folds over the concrete step. There was no debris on the stairway. The lighting was not an issue. The Arbitrator has viewed the photos and finds that there was no evidence that Respondent's premises were defective or that the metal strip upon which Petitioner allegedly caught his toe otherwise interfered with one's ability to traverse the area where claimant fell. The Arbitrator notes that the detail in Petitioner's testimony that he caught his toe on this strip is not noted in the medical histories of the testimony of Mr. Efinger or Mr. Marcoe. The evidence that the stairway was not used for access by the public does not create an increased risk of injury. *Joan Anderegg v. Kesler, Garman, Brougher & Townsley, P.C., 2012 Ill. Wrk. Comp. LEXIS 1131, 12 IWCC 1070.* This would only be relevant if the condition of the premises somehow contributed to the injury. *Laurie Frohlich v. Village of Lyons, 2012 Ill. Wrk. Comp. LEXIS 1549; 12 IWCC 1455.*

With respect to his attendance at the morning meeting, Petitioner presented evidence that he needed to obtain updated information each day before the meeting. The Arbitrator notes that he testified that he had arrived at work that morning at 6:30 AM and therefore had over three hours to collect and review the information he was to present before the meeting. He also testified that he is not comfortable with public speaking. He was nervous. Yet Petitioner had presented at the morning meeting between 25 and 50 times per year for many years. He never requested to have someone else handle this in Mr. Efinger's absence. He had been employed by Respondent for almost 30 years and presented no evidence that he had ever been criticized or reprimanded for his performance, which lasted only 5 to 10 minutes.

He testified that he was carrying the papers and wearing his reading glasses and was reviewing the information while he was going to the meeting but there was no evidence that this caused or contributed to his fall. He testified that he was not hurrying. He had used this stairway hundreds of times without falling. The Arbitrator infers that many of these times were to attend similar morning meetings.

It is claimant's burden to present evidence that would permit a reasonable inference that the fall was related to his employment. Circumstantial evidence can only support an inference which is reasonable and probable, not merely possible. Where the evidence allows for the inference of the nonexistence of a fact to be just as probable as its existence, the conclusion that the fact exists is a matter of speculation, surmise, and conjecture, and the inference cannot reasonably be drawn. The claimant must show more than a mere possibility of an increased risk of injury from her employment. Petitioner did not testify to why he believes he fell. It is not the employer's burden of proof to disprove the existence of an increased risk of injury. The Arbitrator notes that Petitioner did not mention any of the issues in his attendance at the meeting in his

accident reporting to Respondent or in his medical histories. The Arbitrator finds that Petitioner failed to establish that any of these elements created an increased employment-related risk of his falling on the stairway.

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 his employment with Respondent on March 3, 2015.

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

Based upon the Arbitrator's finding with respect to Accident, the remaining issues of Causal Connection, Medical, Temporary Compensation, and Nature and Extent are moot.

The 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teresa Fernando,

Petitioner,

vs.

NO: 14 WC 9942

19IWCC0661

Specialty Print Communications,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent (Liberty Mutual) herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, said decision being 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 notes that on 5/2/18 Respondent (Liberty Mutual) filed a Petition for Review disputing findings relative to the Arbitrator's decision in claim 16 WC 6296, while also noting on the Petition that said claim was consolidated with claims 14 WC 9942 and 16 WC 6297. The Commission notes that it does not appear it was the intention of Respondent (Liberty Mutual) to review the Arbitrator's decisions with respect to claims 14 WC 9942 and 16 WC 6297, only to note it in the Petition for Review caption, in light of the parties' failure to address said claims either in their briefs or at oral argument, other than perfunctorily, since neither Petitioner nor Respondent (Hartford) filed a Review on any of the claims in question. However, given that the Commission's computer records will continue to show Petitions for Review pending relative to the remaining two claims unless and until they are specifically addressed by this tribunal, the Commission hereby affirms and adopts the decision of the Arbitrator concerning this claim, 14 WC 9942.

19IWCC0661

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision with respect to claim 14 WC 9942 dated 4/6/18 is affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 21 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of $1,884.83 pursuant to §8(a) and §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $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: DEC 6 - 2019
o:10/22/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

19IWCC0661

FERNANDO, TERESA
Employee/Petitioner

Case# **14WC009942**

16WC006296
16WC009297

SPECIALTY PRINT COMMUNICATIONS
Employer/Respondent

On 4/6/2018, 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 1.90% 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

2837 LAW OFFICES JOSEPH MARCINIAK
MATTHEW AMEDEO
200 W MADISON ST SUITE 501
CHICAGO, IL 60606

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)

TERESA FERNANDO
Employee/Petitioner

v.

SPECIALTY PRINT COMMUNICATIONS
Employer/Respondent

Case # **14 WC 9942**

Consolidated cases: **16 WC 6296**
16WC6297

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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO, ILLINOIS**, on **1/19/2018**. 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. [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. [ ] 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 19IWCC0661

On the date of accident, **11/4/2013**, 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.

Petitioner's current condition of ill-being as it relates to the ***right shoulder is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$21,060.00**; the average weekly wage was **$405.00**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **2** 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 **$10,393.46** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$10,393.46**. Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

As to case **14 WC 9942**, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **21 weeks**, commencing **3/4/14** through **7/28/14**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$10,393.46** for temporary total disability benefits that have been paid.

As to case **14 WC 9942**, Respondent shall pay the outstanding medical charges totaling **$1,884.83**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

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

4/4/2018
Date

ICArbDec19(b)

APR 6 - 2018

FINDINGS OF FACT

Petitioner's Testimony and Medical Treatment

Petitioner, Teresa Fernando, is a 48 year old woman who lives in Chicago, Illinois with her five children. She is a divorcee, and two of her five children are minors. She is right-hand dominant.

Petitioner has worked for Respondent, Specialty Print Communications, since 2011. Respondent is a printing company that operates a facility that prints various promotions and other products for its customers. Petitioner worked as a sorter for Respondent at this facility. When she first started working for Respondent her shifts were 8 hours long; she would work Monday through Saturday, beginning at 7:00 AM and ending at 3:00 PM each day. Sometime in January of 2015, new management at Respondent modified her schedule so that she worked 12-hour shifts. After the change, Petitioner worked 6:00 AM to 6:00 PM three days a week, and then one six-hour day each week, from 12:00 PM to 6:00 PM. After the change to 12-hour days, Respondent's production was divided into two shifts: first and second shift. Petitioner always worked first shift. The first shift typically involved a higher level of production requiring a faster pace of work.

On November 4, 2013, Petitioner was lowering a wooden pan full of material when she felt a popping sensation followed by pain in her left shoulder. She informed her supervisor, who relayed the information to the general manager. Petitioner testified that, prior to this incident, she had never experienced pain or sought medical treatment related to her left shoulder, nor had she ever missed time from work due to her left shoulder.

On the day of her left shoulder injury, Petitioner was driven to Concentra by one of Respondent's employees. She presented with complaints of left shoulder pain after picking up a tray of product. (She was recommended a course of physical therapy and provided light duty restrictions. She returned to work at Respondent within those restrictions. She began physical therapy at Concentra on November 6, 2013, and returned for a follow-up visit on November 13, 2013. She was again recommended therapy and provided light duty restrictions. She continued treating with Concentra in this manner through the rest of November and the beginning of December of 2013. By December 6, 2013, her shoulder still had not improved; at this stage the physician at Concentra recommended an MRI of the left shoulder. The MRI was performed on December 14, 2013 and revealed a partial tear of the distal supraspinatus. She returned to Concentra on December 18, 2013, at which time the MRI was reviewed and she was referred to an orthopedic surgeon.

Petitioner was first examined by Dr. Craig Westin at Concentra on January 3, 2014. He recommended continued therapy and light duty restrictions. Petitioner continued the course of treatment recommended by Dr. Westin but realized little improvement. At this stage, Petitioner opted to seek treatment with her own choice of medical provider: her primary care physician Dr. Ravi Barnabas at Herron Medical Center. She was examined by Dr. Barnabas on February 27, 2014, at which time he immediately referred her for an orthopedic evaluation with Dr. Christos Giannoulias.

Pursuant to that referral, Petitioner was examined by Dr. Giannoulias on March 4, 2014. He reviewed the MRI and diagnosed Petitioner with a partial thickness rotator cuff tear. He administered a lidocaine injection and removed her from work. He further indicated that if the symptoms persisted Petitioner would be a candidate for arthroscopic surgery. Petitioner returned to Dr. Giannoulias on March 25, 2014 with ongoing symptoms; as a result, Dr. Giannoulias scheduled her for surgery. She underwent pre-surgical clearance testing with Dr. Barnabas, and later underwent surgery with Dr. Giannoulias on April 1, 2014. She returned to Dr. Giannoulias for a post-operative evaluation on April 8, 2014, at which time he ordered a course of physical therapy. She began that therapy at Flexeon Physical Therapy on April 11, 2014. She continued therapy and returned to Dr. Giannoulias at monthly increments for follow-up visits. Dr. Giannoulias kept Petitioner off work until July 29, 2014, at which time he allowed her to return to work with restrictions. Petitioner returned to

work but continued to follow-up with Dr. Giannoulias and undergo physical therapy. On October 28, 2014, Dr. Giannoulias released Petitioner from care and imposed permanent restrictions avoiding overhead lifting.

Petitioner subsequently continued to work for Respondent and Respondent accommodated her restrictions. Petitioner said this continued until a management change in January of 2015. Thereafter, Petitioner alleged Respondent stopped honoring her restrictions and directed her to perform overhead work. Shortly after the change, Petitioner testified she began to experience increased symptoms in her left shoulder. This prompted her to return to Dr. Giannoulias on January 20, 2015. She presented with complaints of left shoulder pain. The record specifically indicates that "at work [Petitioner's] shifts have changed. They have gone to 12-hour shifts where they added time per day. She is having significant trouble with her [left] arm." Dr. Giannoulias modified her restrictions and limited her to working no more than 8-hour days. Nevertheless, Petitioner testified she continued to work 12-hour days but began favoring her right arm to compensate for her increased left shoulder complaints.

She returned to Dr. Giannoulias on March 3, 2015, this time with complaints of numbness and tingling in both arms. Dr. Giannoulias recommended an EMG to evaluate the possible source of the numbness and removed her from work. The EMG was performed on March 16, 2015 by Dr. James Keller-Shabrokh. Petitioner then returned to Dr. Giannoulias on March 31, 2015, complaining of right arm and shoulder pain. Dr. Giannoulias indicated that the primary concern for Petitioner was the repetitive nature of the work that she does. He allowed her to return to work starting April 8, 2015 but with restrictions to avoid working over 8 hours a day and he recommended that she avoid repetitive activity.

She returned to work on April 8, 2015 and she testified Respondent continued to ignore her restrictions. Respondent placed her in a role where she was required to bind packets of printed materials. Once the packets were bound, she would need to stack them into a box on a table. In order to do this, she would need to reach above her head with the packets in her hand. She primarily used her right arm when she was doing this work due to the limitations in her left arm.

Petitioner returned to Dr. Giannoulias on August 11, 2015 for persistent right shoulder complaints. She presented with complaints of bilateral upper extremity pain and Dr. Giannoulias documented that Petitioner has been having flare up of pain in her right shoulder. She has a permanent injury with her left shoulder and has been favoring her right shoulder at her job. Dr. Giannoulias administered a lidocaine injection in her right shoulder and again provided work restrictions. Petitioner returned to work and Petitioner alleged that her restrictions were not accommodated. She returned to Dr. Giannoulias on October 6, 2015 with ongoing right shoulder complaints. He noted that her work was not honoring her restrictions and removed her from work until October 20, 2015, at which time she could again return with restrictions.

She returned to Dr. Giannoulias on November 3, 2015 with ongoing right shoulder complaints. Dr. Giannoulias recommended an MRI of the right shoulder. The MRI revealed a full thickness perforation of the supraspinatus tendon. Dr. Giannoulias reviewed the MRI on December 8, 2015 and diagnosed Petitioner with a rotator cuff tear. He performed another lidocaine injection and removed Petitioner from work. He referred her to Dr. Jay Kiokemeister for pain management, who she saw on December 14, 2015. Dr. Kiokemeister recommended that she continue her treatment with Dr. Giannoulias. She returned to Dr. Giannoulias on December 22, 2015 with ongoing right shoulder complaints. Dr. Giannoulias recommended surgical repair of the right shoulder. Petitioner returned to Dr. Giannoulias for several follow-ups throughout 2016 and Dr. Giannoulias continued to recommend surgery and removed her from work. Petitioner testified she has not had the surgery due to lack of insurance approval but testified that she would undergo the treatment if she could. It was her understanding that the surgery would permit her to return to work.

Petitioner testified that she never experienced pain in her right shoulder until the early part of 2015. Prior to this time, she never sought medical treatment for her right shoulder, and her right shoulder never interfered with her ability to work.

Petitioner reviewed a job analysis video during her testimony. Px10. The video depicts several positions at Respondent's printing facility. Petitioner testified that most of the positions depicted in the video were not roles she frequently filled while working for Respondent. However, the work shown from 1:10 through 2:43 on the video depicts work that was typical of Petitioner's duties for Respondent. Specifically, Petitioner filled this role after the management changed in January of 2015, and continued to do so up until December of 2015, at which time Dr. Giannoulias removed her from work for her right shoulder injury. Petitioner said she was required to gather papers that came out of a machine and assemble them into a stack. Petitioner would then take that stack and place it in another machine that would bind the stack together. Each stack would contain approximately 300 pieces of paper and would weigh about two pounds. In a typical shift, Petitioner would have to bind up to 200,000 pieces. At a rate of 300 pieces per stack, this would amount to over 650 stacks in a single shift. Once the stacks were bound, Petitioner would have to place them into a box.

Petitioner alleged that due to her short height, she would need to lift the packet higher than chest-level in order to be able to place it into the box. She testified that the top of the box would be about as tall as she was, and as a result she would need to stand on her toes to see inside. During the period between her return to work after the left shoulder surgery and before Dr. Giannoulias removed her from work for her right shoulder injury, Petitioner was using only her right arm to perform this type of work. Petitioner also testified that the video depicted work done during the second shift, which was done at a slower rate than the work she typically did during her work on the first shift.

On cross-examination, Petitioner agreed that the restrictions Dr. Giannoulias initially imposed after the left shoulder surgery were limited to the left shoulder. She also acknowledged that the right shoulder complaints likely began some time before that visit on March 3, 2015, when she first noted them to Dr. Giannoulias. She also acknowledged that Dr. Giannoulias' physical examination of her shoulder at that visit was essentially normal. She agreed that her left shoulder's condition has improved since then but the right shoulder continues to bother her.

Deposition Testimony of Dr. Christos Giannoulias

Dr. Christos Giannoulias testified on behalf of Petitioner by way of an evidence deposition on September 18, 2017. Px11.

Dr. Giannoulias treated Petitioner as his patient, and drafted a narrative report per Petitioner's request dated April 18, 2017. He started treating Petitioner in relation to her left shoulder injury. He initially attempted conservative management but after that failed he performed surgery and supervised her post-operative treatment. He released her back to work on September 9, 2014 but she continued to have problems after returning to repetitive work. At the beginning of 2015, Dr. Giannoulias imposed permanent restrictions limiting her to 8-hour shifts. By March, she was complaining of bilateral arm numbness and tingling. He recommended an EMG and reviewed the results on March 31, 2015. He imposed additional restrictions limiting her from performing repetitive work with the arms. Petitioner returned to Dr. Giannoulias several months later on August 11, 2015. He noted right shoulder pain; he administered an injection and again imposed work restrictions. He eventually obtained an MRI of the right shoulder and diagnosed Petitioner with a rotator cuff tear and recommended surgery. As of August 16, 2016, the last time he saw Petitioner, he still recommended surgery and still removed her from work.

Dr. Giannoulias reviewed the same job analysis video that was admitted as Petitioner's Exhibit 10. Based on that video, as well as his treatment and examinations of Petitioner, Dr. Giannoulias opined that

Petitioner's work activities caused her right shoulder's present condition of ill-being. Specifically, Dr. Giannoulias opined that "[f]rom reviewing the video and also recalling from my records that Ms. Fernando is a short person, she is five feet tall, her arm is in the shoulder level or above the majority of the time that this is occurring and she is doing it constantly on a daily basis. I believe the information that I had received earlier was about 800 times per day. So that's a significant amount of time with the arm in a position that's repetitively moving in the shoulder or above level that's engaging that rotator cuff. And it's not in this particular case the weight as much as it is the repetition of the arm and the level of the arm's height."

Upon re-reviewing the video during his deposition, Dr. Giannoulias further opined that "the arm level of this person is constantly going from waist to shoulder to above the shoulder and it's happening . . . five, six times a minute . . . but the point is that arm is constantly at that shoulder level and then when she puts it in the box, it's going over the shoulder level to rotate it in." In terms of frequency of this motion, Dr. Giannoulias opined that "any time you're over 4 [sic] to 500 times per day, I think that's significant repetitive activity." He further explained that Petitioner reported that she was favoring her right arm during these activities because of the permanent condition of her left arm; which is consistent with Petitioner's testimony. Dr. Giannoulias testified that this further strengthens his opinion that her right shoulder condition is related to her work activities.

Dr. Giannoulias reviewed the report of Dr. Charles Carroll and disagreed with his assessment that Petitioner's right shoulder condition was degenerative and unrelated to her work activities. He based his disagreement on the fact that typically degenerative tears are found in patients older than Ms. Fernando and that she did not have any complaints of right shoulder pain until she began doing this repetitive activity.

Dr. Giannoulias also discussed the chronology of the onset of Petitioner's right shoulder complaints on cross-examination. He agreed that Petitioner's EMG in March of 2015 was essentially normal. As a result, he could not point to anything objective that was explaining her symptoms at that time. Accordingly, he could not be sure whether Petitioner had a right-sided rotator cuff tear as of March 31, 2015. Nevertheless, based upon his review of the job video, and the fact that Petitioner was favoring the right arm, he believed that the right shoulder condition was related to her work activities. The work activities were either the sole cause of the rotator cuff tear or they aggravated a pre-existing rotator cuff tear if it was there. He acknowledged that, due to Petitioner's short stature, Petitioner would have to reach overhead in her activities of daily living, but explained that reaching overhead a few times a day would not be sufficient to qualify as repetitive activity that would aggravate the shoulder. Rather, the work she was doing for Respondent, that required her to lift overhead 400 to 500 times per day, is more likely to have aggravated the right shoulder.

Dr. Giannoulias was further questioned about the manifestation of the right shoulder's rotator cuff tear; he agreed that he had no objective reason to suspect that Petitioner had a right-sided rotator cuff tear on March 31, 2015. However, at Petitioner's next follow-up on August 11, 2015, he did document signs of rotator cuff pathology during his physical examination. Accordingly, the right-sided rotator cuff pathology most likely developed sometime between March 31, 2015 and August 11, 2015. However, it is possible that the pathology developed as early as January of 2015, based in part on Dr. Keller-Shabrokh's evaluation prior to his EMG.

Deposition Testimony of Dr. Charles Carroll

Dr. Charles Carroll testified on behalf of Respondent by way of an evidence deposition on October 17, 2017. Rx1. Dr. Carroll performed a physical examination at that visit and he noted right-sided rotator cuff weakness, among other findings. Based on the records he reviewed, and his physical examination, he concluded that her right shoulder diagnosis included a strain, arthritis, and a rotator cuff tear with impingement. However, he opined that only the strain was related to Petitioner's work; the arthritis and the tear were not. Rather, he felt those two conditions were degenerative in nature. Accordingly, he felt that the right shoulder condition as it

related to Petitioner's work activities, reached maximum medical improvement within three months from the strain. He opined that the appropriate AMA impairment rating for Petitioner is 2 percent, although he agreed that this rating would be inappropriate if she was not at MMI. Regardless of causation, Dr. Carroll agreed that Petitioner requires work restrictions.

Dr. Carroll also reviewed the job video admitted as Petitioner's Exhibit 10. He was specifically questioned on the role depicted on the video from 1:10 through 2:43. He again confirmed that nothing on that video would suggest Petitioner's job activities contributed to the development of her right shoulder condition. Nevertheless, he acknowledged that forceful, repetitive and overhead activities can cause rotator cuff tears.

On cross-examination, Dr. Carroll acknowledged that all of the medical records along with the job video were provided by Respondent for his review. Rx1. Dr. Carroll admitted that a degenerative rotator cuff tear could be asymptomatic, and that repetitive movement above the chest level could either cause a rotator cuff tear or aggravate a previously asymptomatic rotator cuff tear so that it becomes symptomatic. He explained that work above the chest level can minimize the space available for the rotator cuff, which can cause a degenerating tendon to tear or tear more. When he was questioned about the frequency with which Petitioner performed the various roles depicted in the job video, or the lengths of her shifts, or how frequently she worked, he had no specific information.

Dr. Carroll agreed that what would constitute above-the-chest-level work for Petitioner may not constitute above-the-chest-level work for an individual taller than Petitioner. He further acknowledged that he found no co-morbidities that may have contributed to Petitioner's right shoulder condition. He admitted that Petitioner had a valid and objective anatomic source of her right shoulder pain, specifically a rotator cuff tear, and that arthroscopic repair of the right rotator cuff was necessary. Based on his review of the records, he further agreed that Petitioner's right rotator cuff was asymptomatic prior to March 3, 2015. Despite his opinion that Petitioner's right shoulder complaints should have resolved within six months of her injury, he admitted that they had not.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Respondent disputed the issue of accident as to Petitioner's alleged March 2015 and August 2015 accidents. Ax2, Ax3. Having weighed all evidence, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that she sustained an accidental injury to her right shoulder that arose out of and in the course of her employment on March 31, 2015 under a theory of repetitive trauma in case 16 WC 6297. Further, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she did sustain an accidental injury to her right shoulder that arose out of and in the course of her employment on August 11, 2015 under a theory of repetitive trauma in case 16 WC 6296.

a. Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment on March 31, 2015 in case 16 WC 6297.

The Arbitrator concludes that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on March 31, 2015. Ax2. In so concluding the Arbitrator notes that Petitioner returned to Dr. Giannoulias on March 3, 2015 with complaints of numbness and tingling in both arms from shoulder to hands. This was the first time that Petitioner had made reference to

complaints in her right arm but no specific information was given or taken down as to what, if anything, was causing or contributing to the reported symptoms. Exam indicated there was full elevation of the shoulder, but which shoulder was not specified. Impression was bilateral hand numbness. Dr. Giannoulias recommended an EMG to evaluate the possible source of the numbness and removed her from work. The EMG was essentially negative. At the March 16, 2015 EMG visit, Petitioner related that she eventually developed right shoulder pain as she states she was compensating with the right arm due to her limitations on the left. Further, it was noted that over the last 3 months she had developed bilateral hand numbness and tingling. Petitioner was unable to say what made her hands better or worse. Petitioner then returned to Dr. Giannoulias on March 31, 2015 complaining of right arm and shoulder pain. No physical exam was undertaken and Dr. Giannoulias agreed with this fact at his deposition. He indicated that the main issue was her repetitive activity but that as long as she minimized the repetition in her arm, she should be okay. He could not explain her symptoms. In the Arbitrator's view, again no specific information is noted with respect to what activities were repetitive, which arm he referenced and no diagnosis is given for either arm. He allowed her to return to work starting April 8, 2015, but with restrictions to avoid working over 8 hours a day and he recommended that she avoid repetitive activity. Petitioner alleged that she returned to work thereafter for Respondent. While Petitioner and her doctor discussed her right arm as early as March 2015, Dr. Giannoulias testified that, at that time, he had no objective basis to diagnose right-sided rotator cuff pathology and therefore could not be sure whether the rotator cuff tear was present at that time.

In order to obtain compensation under the Act in a repetitive trauma claim, an employee must point to a date on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Durand v. Indus. Comm'n*, 224 Ill.2d 53, 64, 862 N.E.2d 918 (2006). The date of injury in a repetitive trauma claim is the date in which the injury manifests itself. In determining the manifestation date, Courts have typically set the manifestation date on the day the employee requires medical treatment or the date in which the employee can no longer work. Because repetitive trauma claims by nature are progressive, the employee's medical treatment as well as severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work.

Given the aforementioned, it cannot be concluded that Petitioner's date of accident/manifestation date was March 31, 2015 as it was not plainly apparent what Petitioner's condition was and what activities may or may not have caused or contributed to it. For the foregoing reasons, the Arbitrator concludes that Petitioner failed to prove she sustained accidental injuries on March 31, 2015. Any and all other claims for compensation for case 16 WC 6297 is hereby denied. All other issues in connection with this claim are rendered moot.

b. Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296.

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found Petitioner failed to prove accident injuries occurring on March 31, 2015, the Arbitrator does conclude that Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296.

In so finding, the Arbitrator notes that Petitioner returned to work following her March 31, 2015 visit with Dr. Giannoulias. Petitioner alleges that thereafter, she continued to work in a repetitive fashion and overused her right arm in order to protect her previously injured and affected left arm/shoulder. Petitioner's allegations are supported by her treatment records and by Dr. Giannoulias' testimony. Specifically, when she returned to her doctor on August 11, 2015 the doctor noted that Petitioner had a flare up of right shoulder pain

and that she had been favoring her right arm in her job. The doctor noted it was very repetitive in her job. He diagnosed her then with a right shoulder strain.

Petitioner's testimony was that she worked as sorter for Respondent with typical 8 hour shifts but that around January 2015, those shifts turned to 12 hour shifts. During these new shifts, she worked the first shift, which she described as having more production or having to produce more. Prior to this shift change, Petitioner was released with permanent restrictions to avoid lifting overhead in October 2014. Petitioner testified that these permanent restrictions were honored up until supervisors were changed, around January 2015, the same in which her shift hours also changed. Petitioner described that her new supervisors had her performing work activities that required her to raise her arm. Specifically, she stated she had to lower and push pans. In lowering, she stated that the pans were high, requiring her to reach above her head. She said her left arm began hurting and she related this to Dr. Giannoulias, who then reduced her work hours to 8 hours but that this was not respected. Petitioner stated she began to notice her left shoulder hurting and thus began using her right arm more because the left was hurting. She then treated in March 2015 and was released back to work. Upon her return to work, she said she worked tying bands together using a machine. After they were tied, she would pile the packets sometimes above her head. During this time, she primarily used the right arm. She said her right shoulder problems did not get better during this time. She then returned to Dr. Giannoulias, who noted a flare up, injected the right shoulder and diagnosed Petitioner with a right shoulder strain.

Regarding the video job analysis, Petitioner testified that she was almost never sent to place labels. She viewed the video and confirmed that she had to make packets and put them in small boxes. She said she piled them up. She testified she began doing this particular type of job activity after her left shoulder surgery upon her return to work. She spent almost the entire day performing this activity. She said each packet contained 200-300 pieces and she would then pack about 7 packets into a box. On average, 160,000 to 200,000 pieces were bound into packets per day. She used her right arm to reach and place these into the box sometimes higher than her head. She said she began using the right arm around December 2015. Petitioner testified that the only difference in the video she viewed was that the speed of the machine was slower in the video compared to when she performed that job activity. She also stated the video showed second shift rather than first shift. Petitioner testified that she performed jobs after minute 2:44 in the video only once or twice in her time working for Respondent.

Petitioner said she first began noticing problems with the right arm in March 2015 but she also admitted under cross that she had noticed right shoulder problems before March. However, as discussed, *supra*, Dr. Giannoulias testified that, at that time, he had no objective basis to diagnose right-sided rotator cuff pathology and therefore could not be sure whether the rotator cuff tear was present at that time. When she returned in August, she clearly described a flare up to the right arm, indicating that the right arm had been affecting her and became apparent to her and prompted her to returned for medical care. Petitioner testified that from April to August she continued to perform the job of taking stacks of paper, binding them and placing them into the stacked boxes. It was on August 11, 2015 that Dr. Giannoulias noted the right arm, that Petitioner was specific about the right arm and that a diagnosis was made as to the right shoulder. Dr. Giannoulias testified that he believed that the August 11, 2015 date is the date in which he was able to identify a right shoulder condition. Therefore, the Arbitrator concludes that this is the date in which Petitioner's injury plainly manifested itself.

The Arbitrator further finds that Petitioner's August 11, 2015 injury occurred in the course of her employment. The repetitive activities that she performed were all performed at Respondent's printing facility where she worked at its direction. Petitioner's injury to the right shoulder occurred while she was performing those activities. As a result, the Arbitrator finds that that Petitioner's accident occurred in the course of her employment with Respondent.

The Arbitrator finds that Petitioner's accident arose out of her employment as well because the repetitive activities in which she performed were employment related duties, performed at Respondent's direction. Petitioner described in detail how she as required to near constantly band and load paper packets. Her description of these job duties was unrebutted and were supported by the job description, job video, her medical records and Dr. Giannoulias' testimony. Based on the foregoing, the Arbitrator concludes that Petitioner's August 11, 2015 work injury arose out of her employment.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296, the Arbitrator finds that Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296. The Arbitrator finds that Petitioner's right shoulder condition is not casually related to any other pending claim.

a. Petitioner's condition of ill-being as it relates to the right shoulder is not causally related to her November 4, 2013 work accident in case 14 WC 9942.

At trial, the parties did not dispute that Petitioner's left shoulder condition was causally related to the November 4, 2013 accident but rather disputed whether the right shoulder was causally related. The Arbitrator adopts the stipulation as to the left shoulder. However, because Petitioner was essentially at MMI and working during the time period said to have caused or contributed to Petitioner's right shoulder repetitive trauma claim, the Arbitrator does not believe the right shoulder condition is a sequalae of her original left shoulder injury. In support thereof, the Arbitrator notes and adopts Dr. Giannoulias' opinion that Petitioner's rights shoulder condition (rotator cuff tear/pathology) manifested itself on August 11, 2015. Further, the doctor noted that Petitioner's overuse of the right arm when her restrictions were not being accommodated, coupled with the repetitive nature of her work activities as imposed upon the right shoulder, caused the right shoulder condition. This opinion supports a conclusion that Petitioner's right shoulder condition occurred after the November 2013 injury and after being placed at MMI for the left shoulder. Therefore, the Arbitrator finds Petitioner's right shoulder is not causally related to the November 4, 2013 accident.

b. Petitioner's condition of ill-being as it relates to the right shoulder is not causally related to an alleged March 31, 2015 work accident in case 16 WC 6297.

Having concluded Petitioner failed to prove accident for an alleged March 31, 2015 repetitive trauma claim in case 16 WC 6297, the Arbitrator finds that the issue of causation moot for this claim

c. Petitioner's condition of ill-being as it relates to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296.

At trial, the parties clarified that at issue was whether Petitioner's right shoulder condition was causally related to one or more of her pending workers' compensation claims. Specifically, whether the right shoulder was related to the original November 4, 2013 date of accident (14 WC 9942) as a sequelae or overuse injury, whether the right shoulder was causally related to the March 31, 2015 (16 WC 6297) alleged date of accident as a repetitive trauma injury manifesting itself on this date or whether the right shoulder condition was causally related to the August 11, 2015 (16 WC 6296) alleged date of accident as a repetitive trauma injury manifesting itself on this date. Petitioner alleges that the right shoulder condition was caused as a result of over compensation or overusing the right arm in order to avoid using her left shoulder and also caused from the repetitive nature of her work activities.

A claimant who seeks an award of benefits under a repetitive-trauma theory will be held to the same standard of proof as a claimant seeking benefits for a sudden traumatic injury. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918 (2006). As with any work-related injury, the claimant's employment need only be *a* cause of the claimant's condition of ill-being, it need not be the sole or primary cause. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003). An employee who alleges an injury based upon repetitive trauma must "show that the injury is work-related and not the result of a normal degenerative aging process." *Peoria County Bellwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, (1987); *Glister Mary Lee Corp. v. Indus. Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979 (2001). It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). However, the Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Indus. Comm'n*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1993) citing *Perkins Product Co. v. Indus. Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942) (claimant's injury "was directly connected with the method and manner in which she was required to do her work, and to use her arm in the discharge of her duties"). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case.

Based on the record as a whole, the Arbitrator finds that Petitioner's right shoulder condition is causally related to her August 11, 2015 accident. The Arbitrator is persuaded that Petitioner overused the right shoulder and was exposed to repetitive work activities that caused or contributed to her condition of ill-being. Petitioner described in detail the nature of her job duties, which included tying bands together and reaching at or above shoulder level in order to stack packets. Dr. Giannoulias provided persuasive and compelling testimony regarding the number of times Petitioner would have repeated the task of raising her arm, relying on his review of the video, his review of the written essential functions and physical demands report as well as Petitioner's description of her work.

Specifically, Dr. Giannoulias opined that Petitioner's right shoulder condition likely occurred sometime after January 2015. The Arbitrator notes that Dr. Giannoulias related Petitioner's right shoulder condition to the August 11, 2015 date and no other prior date. Regarding causal connection between Petitioner's job duties at her current condition of ill-being as it relates to the right shoulder, her doctor opined that favoring an arm or avoiding using the other, can cause a rotator cuff tear or aggravate a pre-existing rotator cuff tear it one existed. The doctor explained that having reviewed the essential functions and required physical demand report provided by Respondent, it was still his opinion that even constantly handling bundles of printing materials even if they weigh 1 pound or less is consistent with his opinions, explaining that in this particular case, it was not the weight as much as it is the amount of times one is performing the task and what position the arm is at when performing that task. The doctor further elaborated that Petitioner stands only 5 feet tall and that her arm is at the shoulder level or above a majority of the time that this is occurring and that she was doing that on a constant daily basis. The doctor concluded that this was done approximately 800 times per day. The doctor concluded that it was a significant amount of time with the arm in that position that is repetitively moving in the shoulder or above level that is engaging the rotator cuff. The doctor also reviewed the video provided by Respondent and testified that beginning at minute 1:10 and continuing, he identified that activity as associated with contributing to Petitioner's right shoulder condition. He explained that in the video arm level of that person is constantly going from waist to shoulder to above the shoulder and is occurring 5 to 6 times per minute. The doctor noted that in the case of the woman in the video, she was constantly at the shoulder level and that when she puts it in the box it is going over the shoulder level to rotated in. The doctor went on to calculate that this type of activity was occurring 300 times in one hour and if someone were working seven hours per day doing that constantly, it amounts to over 2,000 times in one day.

Regarding Dr. Carroll's opinion, which was that Petitioner's right shoulder condition was degenerative in nature, the Arbitrator finds the opinion is not supported the preponderance of the evidence and therefore is accorded less weight. Dr. Carroll took a history that right shoulder complaints began or about March 31, 2015. The doctor diagnosed a strain to the right shoulder, AC joint arthritis and rotator cuff tear with impingement. The doctor opined that the strain was related to an alleged work accident but that the arthritis and the rotator cuff tear was not. The doctor based his conclusion on the nature of the general problem, the nature of the alleged activity and the physical findings and what he saw based on her history in treatment and MRI studies, which appeared to be a degenerative rotator cuff tear. The doctor concluded that the strain had essentially reached the equivalent of maximum medical improvement. Regardless of causation, the doctor did opine Petitioner was in need of restrictions.

The doctor issued a supplemental report dated November 8, 2016 after being provided with a video job analysis. Based upon his review of the video, the doctor a pint that his opinions did not change compared to the first report. The doctor viewed the portion of the video showing paper being jogged together, placed into a box at chest level and below by a short individual who is height he did not have. He concluded that he did not believe that this specific activity would aggravate a rotator cuff tear of a degenerative in nature. When asked how forceful and how repetitive does an activity have to be to cause a rotator cuff tear, the doctor responded that there was no exact criteria. Rather you look at the job itself, the position of the arm, the size of the individual and make an assessment.

The Arbitrator finds a key difference in medical opinions offered in that Dr. Carroll did not provide any specific assessment as to the weight of the activity performed, the individual performing the activity, the position of the arm, the size of the individual or Petitioner and the amount of movement spent doing any of the activities in the video. However, Dr. Giannoulias did so, providing specific numbers as to what he believed was sufficiently repetitive and gave Petitioner's height, the estimated weight of the materials and the number of times Petitioner wound have performed certain activities. While Dr. Carroll testified that there are no exact criteria as to how forceful or how repetitive something must be to cause a rotator cuff tear, the Arbitrator assigns more weight to Dr. Giannoulias' assessment as he appears to have evaluated the information provided more thoroughly.

Further, despite Dr. Carroll concluding that Petitioner's condition was a degenerative rotator cuff tear, when asked whether he could tell whether the cuff tear was degenerative versus acute, Dr. Carroll could not tell a time course from that. The doctor testified you can look at the factors that could play a role in developing the problem, including surrounding structures. The Arbitrator finds the doctor's testimony in this regard internally inconsistent. The doctor failed to provide clear and persuasive evidence or testimony on this issue, admitting that there was no way to date a degenerative rotator cuff tear and that he would look to other structures to come to a conclusion. Also of note, he testified he agreed with the radiologists' interpretation of the right shoulder MRI but at no time did the radiologist find a degenerative rotator cuff tear. The Arbitrator is not persuaded that evidence of other surrounding degenerative structures equates to the rotator cuff also being degenerative in nature. The Arbitrator also disagrees, based upon the evidence presented, that Petitioner's work activities did not cause, aggravate, accelerate and or exacerbate any rotator cuff pathology, whether acute or degenerative in nature. Rather the evidence shows that Petitioner engaged in work activities that, given her condition, height, were sufficiently at or above shoulder level and/or sufficiently repetitive in nature as explained by Dr. Giannoulias' opinions and testimony. Dr. Carroll admitted that repetitive movement above chest level could aggravate an asymptomatic degenerative rotator cuff tear so that it becomes symptomatic. The doctor further commented that repetitive movement around chest level could cause a rotator cuff tear even if there was not a tear there in the first place. Although answered on a hypothetical basis, the Arbitrator notes that the preponderance of the evidence suggests that is exactly what occurred here.

Both doctors and the Arbitrator reviewed the video in question. Px10. The position depicted between 1:10 and 2:43 on the video clearly shows a woman loading packets of paper into a box; as she is doing this, she lifts a bundle of papers above at or above her chest and shoulder and into the machine that wraps them. She then is observed taking the bundled paper at or above chest and shoulder level and reaching into the cardboard box to place them in there. This was activity identified by Petitioner has being performed using the right arm on a repetitive basis. The Arbitrator does not find the video inconsistent with what Petitioner described. Accordingly, the Arbitrator finds that Petitioner's work during the repetitive work period did require her to lift the packets above chest and shoulder level. As a result, this activity caused the present condition of ill-being in Petitioner's right shoulder. This is entirely consistent with Dr. Carroll's opinions that work requiring lifting higher than chest level could cause a rotator cuff tear, or aggravate a pre-existing degenerative tear.

Based on the foregoing, the Arbitrator concludes that Petitioner has proven that her right shoulder condition, under a repetitive trauma theory, is causally related to her August 11, 2015 date of injury.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Petitioner claimed the following bills as unpaid as part of Respondent's liability for all three claims:

Health Benefits Physicians	12/14/15-12/14/15	$248.52
G&T Orthopedics	12/8/15-8/16/16	$2,170.00
Flexeon Rehab	4/16/14-8/8/14	$14,270.00
Western Touhy Anest.	4/1/14	$1,625.00
Herron Med. Svcs.	4/9/14	$570.00

a. Whether medical charges were reasonable and necessary for 14 WC 9942?

As noted above, Petitioner submitted and alleged various bills as unpaid and as part of Respondent's liability in some or all of the claims. Ax1, Px12. Having found Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner's treatment from August 11, 2015 to the present as submitted is related to the August 2015 injury in case 16 WC 6296. The Arbitrator further concludes that all prior medical treatment before August 11, 2015 is causally related to Petitioner's original injury on November 2013.

In reviewing the records, Petitioner utilized her first choice of provider when she opted to see her primary care physician, Dr. Ravi Barnabas, at Herron Medical Center on February 27, 2014. Dr. Barnabas referred her to Dr. Giannoulias, who she first saw on March 4, 2014. Dr. Giannoulias performed surgery on her left shoulder at Lakeshore Surgery Center, and referred her to Flexeon Rehabilitation for post-operative physical therapy. Dr. Giannoulias also referred her to Dr. James Keller-Shabrokh for an EMG on March 16, 2015, and to Dr. Jay Kiokemeister for a pain management evaluation on December 14, 2015. The Arbitrator finds all of this treatment to be necessary in order to treat Petitioner for her left shoulder and right shoulder claims. Petitioner underwent a reasonable course of treatment for each shoulder.

As to Flexeon Rehabilitation, the Arbitrator finds Respondent liable for the $750.00 in unpaid medical charges for case 14 WC 9942. Px6, Px12.

As to Western Touhy Anesthesia, the Arbitrator finds Respondent liable for the $564.83 in unpaid medical charges for case 14 WC 9942. Px5, Px12.

As to Herron Medical Services, the Arbitrator finds Respondent liable for the $570.00 in unpaid medical charges for case 14 WC 9942. Px2, Px12.

In summary, as to case **14 WC 9942**, Respondent shall pay the outstanding medical charges totaling **$1,884.83**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

b. Whether medical charges were reasonable and necessary for 16 WC 6297?

Having found no accident in case 16 WC 6297, the Arbitrator finds the issue of liability for unpaid medical bills moot as to this claim.

c. Whether medical charges were reasonable and necessary for 16 WC 6296?

Having found accident and causal connection as to Petitioner's right shoulder for 16 WC 6296 under a theory of repetitive trauma, the Arbitrator finds that certain medical services were reasonable and necessary and that Respondent has not yet paid all such appropriate charges.

Having found Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner's treatment from August 11, 2015 to the present as submitted is related to the August 2015 injury in case 16 WC 6296. The Arbitrator further concludes that all prior medical treatment before August 11, 2015 is causally related to Petitioner's original injury on November 2013.

In reviewing the records, Petitioner utilized her first choice of provider when she opted to see her primary care physician, Dr. Ravi Barnabas, at Herron Medical Center on February 27, 2014. Dr. Barnabas referred her to Dr. Giannoulias, who she first saw on March 4, 2014. Dr. Giannoulias performed surgery on her left shoulder at Lakeshore Surgery Center, and referred her to Flexeon Rehabilitation for post-operative physical therapy. Dr. Giannoulias also referred her to Dr. James Keller-Shabrokh for an EMG on March 16, 2015, and to Dr. Jay Kiokemeister for a pain management evaluation on December 14, 2015. The Arbitrator finds all of this treatment to be necessary in order to treat Petitioner for her left shoulder and right shoulder claims. Petitioner underwent a reasonable course of treatment for each shoulder.

As to Health Benefits Physicians, the Arbitrator finds Respondent liable for the $248.52 in unpaid medical charges for case 16 WC 6296. Px8, Px12.

As to G&T Orthopedics, the Arbitrator finds Respondent liable for the $2,170.00 in unpaid medical charges for case 16 WC 6296. Px4, Px12.

In summary, as to case **16 WC 6296**, Respondent shall pay the outstanding medical charges totaling **$2,418.52**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

ISSUE (K) Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein.

a. Prospective medical treatment for 14 WC 9942

Having found Petitioner's right shoulder condition of ill-being is causally related to the August 11, 2015 work accident in case 16 WC 6296 and not to the 14 WC 9942 case, the Arbitrator finds no prospective medical treatment is awarded under 14 WC 9942.

b. Prospective medical treatment for 16 WC 6297

Having found no accident in 16 WC 6297, the Arbitrator finds the issue of prospective medical treatment moot for this claim.

c. Prospective medical treatment for 16 WC 6296

Having found Petitioner's right shoulder condition of ill-being is causally related to the August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to further prospective medical treatment. The record established that Dr. Giannoulias has recommended a right shoulder surgery and that he has opined that the need for the right shoulder surgery was the result of the repetitive use of same in the workplace, which he opined became apparent on August 11, 2015. Furthermore, both Dr. Giannoulias and Dr. Carroll credibly testified that a right shoulder rotator cuff repair was reasonable and necessary treatment to relieve Petitioner from the effects of her right shoulder condition. As to 16 WC 6296, Respondent shall pay for and authorize the treatment recommendations as outlined by Dr. Giannoulias, including any and all incidental care thereto.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator, having found that Petitioner's medical condition and the restrictions are causally connected to her accident, awards TTD for the periods:

a. TTD for the November 4, 2013 accident for 14 WC 9942

Petitioner alleged TTD from 3/4/14 through 7/28/14 representing 21 weeks. Ax1. Respondent disputed liability for same. However, the record shows that during this time, Petitioner was treating for the left shoulder, which was not disputed in this claim. Only the issue of whether the right shoulder was causally related was disputed. Petitioner testified that, from the time of her initial accident on November 4, 2013 through the time when Dr. Giannoulias first removed her from work on March 4, 2014, she worked an accommodated position with Respondent. She remained off work from March 4, 2014 through the time Dr. Giannoulias released her back to work with restrictions following the left shoulder surgery on July 29, 2014. Therefore, as to case **14 WC 9942**, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **21 weeks**, commencing **3/4/14** through **7/28/14**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$10,393.46** for temporary total disability benefits that have been paid.

Petitioner also alleges TTD from March 5, 2015 through April 8, 2015. However, Petitioner failed to lodge this time period into dispute on Ax1 and therefore the Arbitrator declines to make any award under 14 WC 9942.

b. TTD for the March 31, 2015 alleged accident for 16 WC 6297

Having found no accident in 16 WC 6297, the Arbitrator finds the issue of TTD moot for this claim.

c. TTD for the August 11, 2015 accident for 16 WC 6296

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. As noted before, Petitioner returned to light duty work until Dr. Giannoulias again removed her from work on March 3, 2015. She remained off work until her March 31, 2015 Dr. Giannoulias visit when he permitted her to return to work with restrictions beginning April 9, 2015. She returned to work light duty on April 9, 2015, and continued to work light duty until she was again removed from work beginning October 7, 2015. She again remained off work until Dr. Giannoulias released her to work with restrictions on October 20, 2015. She again returned to work until Dr. Giannoulias removed her from work on December 8, 2015. Since December 8, 2015, Petitioner has not returned to work for Respondent or any other employer, nor has Dr. Giannoulias released her to return to work. As a result, she has been removed from work through the date of trial: January 19, 2018. Petitioner's unrebutted testimony regarding the times periods she was removed from work is further corroborated by the medical records.

Regarding the period 3/3/15 through 4/8/15, the Arbitrator declines to award TTD during this period as it predates the August 11, 2015 accident.

Regarding the period 10/7/15 through 10/19/15 and 12/8/15 through 1/19/18, the Arbitrator finds that such period is related to the August 11, 2015 work accident. Dr. Giannoulias testified that Petitioner was kept off work as of August 16, 2016 due to the pending recommended arthroscopic right shoulder surgery. The doctor testified that he kept her off work at that time due to the recommended surgical repair to the right shoulder. Therefore, as to case 16 WC 6296, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **108-1/7th weeks**, commencing **10/7/15** through **10/19/15** and from **12/8/15** through **1/19/18**, as provided in Section 8(b) of the Act.

Signature of Arbitrator

4/4/2018
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)
		☐ PTD/Fatal denied
	☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teresa Fernando,

Petitioner,

vs. NO: 16 WC 6296

19IWCC0662

Specialty Print Communications,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent (Liberty Mutual) herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, while correcting a clerical error, said decision being 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 corrects the Arbitrator's decision to show that in claim 16 WC 6296 Petitioner was temporarily totally disabled from 10/7/15 through 10/19/15 and from 12/8/15 through 1/19/18, for a period of 112-3/7 weeks (not 108-1/7 weeks).

The Commission further notes that Respondent (Liberty Mutual) only filed a Petition for Review disputing findings relative to claim 16 WC 6296, while noting that said claim was consolidated with claims 14 WC 9942 and 16 WC 6297. However, these companion claims were not argued in the briefs and as such were not part of this review. Neither Petitioner nor Respondent (Hartford) filed a Petition for Review with respect to any of the three (3) claims.

All else otherwise affirmed and adopted.

19IWCC0662

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 4/6/18 is affirmed and adopted with changes as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 112-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical expenses in the amount of $2,418.52 pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the treatment recommendations outlined by Dr. Giannoulias, pursuant to §8(a) and §8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,000.00. 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: DEC 6 - 2019
o:10/22/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

FERNANDO, TERESA
Employee/Petitioner

Case# **16WC006296**

14WC009942
16WC006297

SPECIALTY PRINT COMMUNICATIONS
Employer/Respondent

19IWCC0662

On 4/6/2018, 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 1.90% 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

1596 MEACHUM BOYLE & TRAFMAN
KYLE CARLSON
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

19IWCC0662

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)

TERESA FERNANDO
Employee/Petitioner

v.

Case # **16 WC 6296**

Consolidated cases: **14 WC 9942**
16WC6297

SPECIALTY PRINT COMMUNICATIONS
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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO, ILLINOIS**, on **1/19/2018**. 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. [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. [ ] 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 _____

19IWCC0662

FINDINGS

On the date of accident, **8/11/15**, 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 as it relates to the ***right shoulder*** ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$8,274.39**; the average weekly wage was **$344.77**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **2** 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, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of $0. Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

As to case **16 WC 6296**, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **108-1/7th weeks**, commencing **10/7/15** through **10/19/15** and from **12/8/15** through **1/19/18**, as provided in Section 8(b) of the Act.

As to case **16 WC 6296**, Respondent shall pay the outstanding medical charges totaling **$2,418.52**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

As to **16 WC 6296**, Respondent shall pay for and authorize the treatment recommendations as outlined by Dr. Giannoulias, including any and all incidental care thereto.

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

4/4/2018
Date

ICArbDec19(b)

APR 6 - 2018

Petitioner's Testimony and Medical Treatment

Petitioner, Teresa Fernando, is a 48 year old woman who lives in Chicago, Illinois with her five children. She is a divorcee, and two of her five children are minors. She is right-hand dominant.

Petitioner has worked for Respondent, Specialty Print Communications, since 2011. Respondent is a printing company that operates a facility that prints various promotions and other products for its customers. Petitioner worked as a sorter for Respondent at this facility. When she first started working for Respondent her shifts were 8 hours long; she would work Monday through Saturday, beginning at 7:00 AM and ending at 3:00 PM each day. Sometime in January of 2015, new management at Respondent modified her schedule so that she worked 12-hour shifts. After the change, Petitioner worked 6:00 AM to 6:00 PM three days a week, and then one six-hour day each week, from 12:00 PM to 6:00 PM. After the change to 12-hour days, Respondent's production was divided into two shifts: first and second shift. Petitioner always worked first shift. The first shift typically involved a higher level of production requiring a faster pace of work.

On November 4, 2013, Petitioner was lowering a wooden pan full of material when she felt a popping sensation followed by pain in her left shoulder. She informed her supervisor, who relayed the information to the general manager. Petitioner testified that, prior to this incident, she had never experienced pain or sought medical treatment related to her left shoulder, nor had she ever missed time from work due to her left shoulder.

On the day of her left shoulder injury, Petitioner was driven to Concentra by one of Respondent's employees. She presented with complaints of left shoulder pain after picking up a tray of product. (She was recommended a course of physical therapy and provided light duty restrictions. She returned to work at Respondent within those restrictions. She began physical therapy at Concentra on November 6, 2013, and returned for a follow-up visit on November 13, 2013. She was again recommended therapy and provided light duty restrictions. She continued treating with Concentra in this manner through the rest of November and the beginning of December of 2013. By December 6, 2013, her shoulder still had not improved; at this stage the physician at Concentra recommended an MRI of the left shoulder. The MRI was performed on December 14, 2013 and revealed a partial tear of the distal supraspinatus. She returned to Concentra on December 18, 2013, at which time the MRI was reviewed and she was referred to an orthopedic surgeon.

Petitioner was first examined by Dr. Craig Westin at Concentra on January 3, 2014. He recommended continued therapy and light duty restrictions. Petitioner continued the course of treatment recommended by Dr. Westin but realized little improvement. At this stage, Petitioner opted to seek treatment with her own choice of medical provider: her primary care physician Dr. Ravi Barnabas at Herron Medical Center. She was examined by Dr. Barnabas on February 27, 2014, at which time he immediately referred her for an orthopedic evaluation with Dr. Christos Giannoulias.

Pursuant to that referral, Petitioner was examined by Dr. Giannoulias on March 4, 2014. He reviewed the MRI and diagnosed Petitioner with a partial thickness rotator cuff tear. He administered a lidocaine injection and removed her from work. He further indicated that if the symptoms persisted Petitioner would be a candidate for arthroscopic surgery. Petitioner returned to Dr. Giannoulias on March 25, 2014 with ongoing symptoms; as a result, Dr. Giannoulias scheduled her for surgery. She underwent pre-surgical clearance testing with Dr. Barnabas, and later underwent surgery with Dr. Giannoulias on April 1, 2014. She returned to Dr. Giannoulias for a post-operative evaluation on April 8, 2014, at which time he ordered a course of physical therapy. She began that therapy at Flexeon Physical Therapy on April 11, 2014. She continued therapy and returned to Dr. Giannoulias at monthly increments for follow-up visits. Dr. Giannoulias kept Petitioner off work until July 29, 2014, at which time he allowed her to return to work with restrictions. Petitioner returned to

work but continued to follow-up with Dr. Giannoulias and undergo physical therapy. On October 28, 2014, Dr. Giannoulias released Petitioner from care and imposed permanent restrictions avoiding overhead lifting.

Petitioner subsequently continued to work for Respondent and Respondent accommodated her restrictions. Petitioner said this continued until a management change in January of 2015. Thereafter, Petitioner alleged Respondent stopped honoring her restrictions and directed her to perform overhead work. Shortly after the change, Petitioner testified she began to experience increased symptoms in her left shoulder. This prompted her to return to Dr. Giannoulias on January 20, 2015. She presented with complaints of left shoulder pain. The record specifically indicates that "at work [Petitioner's] shifts have changed. They have gone to 12-hour shifts where they added time per day. She is having significant trouble with her [left] arm." Dr. Giannoulias modified her restrictions and limited her to working no more than 8-hour days. Nevertheless, Petitioner testified she continued to work 12-hour days but began favoring her right arm to compensate for her increased left shoulder complaints.

She returned to Dr. Giannoulias on March 3, 2015, this time with complaints of numbness and tingling in both arms. Dr. Giannoulias recommended an EMG to evaluate the possible source of the numbness and removed her from work. The EMG was performed on March 16, 2015 by Dr. James Keller-Shabrokh. Petitioner then returned to Dr. Giannoulias on March 31, 2015, complaining of right arm and shoulder pain. Dr. Giannoulias indicated that the primary concern for Petitioner was the repetitive nature of the work that she does. He allowed her to return to work starting April 8, 2015 but with restrictions to avoid working over 8 hours a day and he recommended that she avoid repetitive activity.

She returned to work on April 8, 2015 and she testified Respondent continued to ignore her restrictions. Respondent placed her in a role where she was required to bind packets of printed materials. Once the packets were bound, she would need to stack them into a box on a table. In order to do this, she would need to reach above her head with the packets in her hand. She primarily used her right arm when she was doing this work due to the limitations in her left arm.

Petitioner returned to Dr. Giannoulias on August 11, 2015 for persistent right shoulder complaints. She presented with complaints of bilateral upper extremity pain and Dr. Giannoulias documented that Petitioner has been having flare up of pain in her right shoulder. She has a permanent injury with her left shoulder and has been favoring her right shoulder at her job. Dr. Giannoulias administered a lidocaine injection in her right shoulder and again provided work restrictions. Petitioner returned to work and Petitioner alleged that her restrictions were not accommodated. She returned to Dr. Giannoulias on October 6, 2015 with ongoing right shoulder complaints. He noted that her work was not honoring her restrictions and removed her from work until October 20, 2015, at which time she could again return with restrictions.

She returned to Dr. Giannoulias on November 3, 2015 with ongoing right shoulder complaints. Dr. Giannoulias recommended an MRI of the right shoulder. The MRI revealed a full thickness perforation of the supraspinatus tendon. Dr. Giannoulias reviewed the MRI on December 8, 2015 and diagnosed Petitioner with a rotator cuff tear. He performed another lidocaine injection and removed Petitioner from work. He referred her to Dr. Jay Kiokemeister for pain management, who she saw on December 14, 2015. Dr. Kiokemeister recommended that she continue her treatment with Dr. Giannoulias. She returned to Dr. Giannoulias on December 22, 2015 with ongoing right shoulder complaints. Dr. Giannoulias recommended surgical repair of the right shoulder. Petitioner returned to Dr. Giannoulias for several follow-ups throughout 2016 and Dr. Giannoulias continued to recommend surgery and removed her from work. Petitioner testified she has not had the surgery due to lack of insurance approval but testified that she would undergo the treatment if she could. It was her understanding that the surgery would permit her to return to work.

Petitioner testified that she never experienced pain in her right shoulder until the early part of 2015. Prior to this time, she never sought medical treatment for her right shoulder, and her right shoulder never interfered with her ability to work.

Petitioner reviewed a job analysis video during her testimony. Px10. The video depicts several positions at Respondent's printing facility. Petitioner testified that most of the positions depicted in the video were not roles she frequently filled while working for Respondent. However, the work shown from 1:10 through 2:43 on the video depicts work that was typical of Petitioner's duties for Respondent. Specifically, Petitioner filled this role after the management changed in January of 2015, and continued to do so up until December of 2015, at which time Dr. Giannoulias removed her from work for her right shoulder injury. Petitioner said she was required to gather papers that came out of a machine and assemble them into a stack. Petitioner would then take that stack and place it in another machine that would bind the stack together. Each stack would contain approximately 300 pieces of paper and would weigh about two pounds. In a typical shift, Petitioner would have to bind up to 200,000 pieces. At a rate of 300 pieces per stack, this would amount to over 650 stacks in a single shift. Once the stacks were bound, Petitioner would have to place them into a box.

Petitioner alleged that due to her short height, she would need to lift the packet higher than chest-level in order to be able to place it into the box. She testified that the top of the box would be about as tall as she was, and as a result she would need to stand on her toes to see inside. During the period between her return to work after the left shoulder surgery and before Dr. Giannoulias removed her from work for her right shoulder injury, Petitioner was using only her right arm to perform this type of work. Petitioner also testified that the video depicted work done during the second shift, which was done at a slower rate than the work she typically did during her work on the first shift.

On cross-examination, Petitioner agreed that the restrictions Dr. Giannoulias initially imposed after the left shoulder surgery were limited to the left shoulder. She also acknowledged that the right shoulder complaints likely began some time before that visit on March 3, 2015, when she first noted them to Dr. Giannoulias. She also acknowledged that Dr. Giannoulias' physical examination of her shoulder at that visit was essentially normal. She agreed that her left shoulder's condition has improved since then but the right shoulder continues to bother her.

Deposition Testimony of Dr. Christos Giannoulias

Dr. Christos Giannoulias testified on behalf of Petitioner by way of an evidence deposition on September 18, 2017. Px11.

Dr. Giannoulias treated Petitioner as his patient, and drafted a narrative report per Petitioner's request dated April 18, 2017. He started treating Petitioner in relation to her left shoulder injury. He initially attempted conservative management but after that failed he performed surgery and supervised her post-operative treatment. He released her back to work on September 9, 2014 but she continued to have problems after returning to repetitive work. At the beginning of 2015, Dr. Giannoulias imposed permanent restrictions limiting her to 8-hour shifts. By March, she was complaining of bilateral arm numbness and tingling. He recommended an EMG and reviewed the results on March 31, 2015. He imposed additional restrictions limiting her from performing repetitive work with the arms. Petitioner returned to Dr. Giannoulias several months later on August 11, 2015. He noted right shoulder pain; he administered an injection and again imposed work restrictions. He eventually obtained an MRI of the right shoulder and diagnosed Petitioner with a rotator cuff tear and recommended surgery. As of August 16, 2016, the last time he saw Petitioner, he still recommended surgery and still removed her from work.

Dr. Giannoulias reviewed the same job analysis video that was admitted as Petitioner's Exhibit 10. Based on that video, as well as his treatment and examinations of Petitioner, Dr. Giannoulias opined that

Petitioner's work activities caused her right shoulder's present condition of ill-being. Specifically, Dr. Giannoulias opined that "[f]rom reviewing the video and also recalling from my records that Ms. Fernando is a short person, she is five feet tall, her arm is in the shoulder level or above the majority of the time that this is occurring and she is doing it constantly on a daily basis. I believe the information that I had received earlier was about 800 times per day. So that's a significant amount of time with the arm in a position that's repetitively moving in the shoulder or above level that's engaging that rotator cuff. And it's not in this particular case the weight as much as it is the repetition of the arm and the level of the arm's height."

Upon re-reviewing the video during his deposition, Dr. Giannoulias further opined that "the arm level of this person is constantly going from waist to shoulder to above the shoulder and it's happening . . . five, six times a minute . . . but the point is that arm is constantly at that shoulder level and then when she puts it in the box, it's going over the shoulder level to rotate it in." In terms of frequency of this motion, Dr. Giannoulias opined that "any time you're over 4 [sic] to 500 times per day, I think that's significant repetitive activity." He further explained that Petitioner reported that she was favoring her right arm during these activities because of the permanent condition of her left arm; which is consistent with Petitioner's testimony. Dr. Giannoulias testified that this further strengthens his opinion that her right shoulder condition is related to her work activities.

Dr. Giannoulias reviewed the report of Dr. Charles Carroll and disagreed with his assessment that Petitioner's right shoulder condition was degenerative and unrelated to her work activities. He based his disagreement on the fact that typically degenerative tears are found in patients older than Ms. Fernando and that she did not have any complaints of right shoulder pain until she began doing this repetitive activity.

Dr. Giannoulias also discussed the chronology of the onset of Petitioner's right shoulder complaints on cross-examination. He agreed that Petitioner's EMG in March of 2015 was essentially normal. As a result, he could not point to anything objective that was explaining her symptoms at that time. Accordingly, he could not be sure whether Petitioner had a right-sided rotator cuff tear as of March 31, 2015. Nevertheless, based upon his review of the job video, and the fact that Petitioner was favoring the right arm, he believed that the right shoulder condition was related to her work activities. The work activities were either the sole cause of the rotator cuff tear or they aggravated a pre-existing rotator cuff tear if it was there. He acknowledged that, due to Petitioner's short stature, Petitioner would have to reach overhead in her activities of daily living, but explained that reaching overhead a few times a day would not be sufficient to qualify as repetitive activity that would aggravate the shoulder. Rather, the work she was doing for Respondent, that required her to lift overhead 400 to 500 times per day, is more likely to have aggravated the right shoulder.

Dr. Giannoulias was further questioned about the manifestation of the right shoulder's rotator cuff tear; he agreed that he had no objective reason to suspect that Petitioner had a right-sided rotator cuff tear on March 31, 2015. However, at Petitioner's next follow-up on August 11, 2015, he did document signs of rotator cuff pathology during his physical examination. Accordingly, the right-sided rotator cuff pathology most likely developed sometime between March 31, 2015 and August 11, 2015. However, it is possible that the pathology developed as early as January of 2015, based in part on Dr. Keller-Shabrokh's evaluation prior to his EMG.

Deposition Testimony of Dr. Charles Carroll

Dr. Charles Carroll testified on behalf of Respondent by way of an evidence deposition on October 17, 2017. Rx1. Dr. Carroll performed a physical examination at that visit and he noted right-sided rotator cuff weakness, among other findings. Based on the records he reviewed, and his physical examination, he concluded that her right shoulder diagnosis included a strain, arthritis, and a rotator cuff tear with impingement. However, he opined that only the strain was related to Petitioner's work; the arthritis and the tear were not. Rather, he felt those two conditions were degenerative in nature. Accordingly, he felt that the right shoulder condition as it

related to Petitioner's work activities, reached maximum medical improvement within three months from the strain. He opined that the appropriate AMA impairment rating for Petitioner is 2 percent, although he agreed that this rating would be inappropriate if she was not at MMI. Regardless of causation, Dr. Carroll agreed that Petitioner requires work restrictions.

Dr. Carroll also reviewed the job video admitted as Petitioner's Exhibit 10. He was specifically questioned on the role depicted on the video from 1:10 through 2:43. He again confirmed that nothing on that video would suggest Petitioner's job activities contributed to the development of her right shoulder condition. Nevertheless, he acknowledged that forceful, repetitive and overhead activities can cause rotator cuff tears.

On cross-examination, Dr. Carroll acknowledged that all of the medical records along with the job video were provided by Respondent for his review. Rx1. Dr. Carroll admitted that a degenerative rotator cuff tear could be asymptomatic, and that repetitive movement above the chest level could either cause a rotator cuff tear or aggravate a previously asymptomatic rotator cuff tear so that it becomes symptomatic. He explained that work above the chest level can minimize the space available for the rotator cuff, which can cause a degenerating tendon to tear or tear more. When he was questioned about the frequency with which Petitioner performed the various roles depicted in the job video, or the lengths of her shifts, or how frequently she worked, he had no specific information.

Dr. Carroll agreed that what would constitute above-the-chest-level work for Petitioner may not constitute above-the-chest-level work for an individual taller than Petitioner. He further acknowledged that he found no co-morbidities that may have contributed to Petitioner's right shoulder condition. He admitted that Petitioner had a valid and objective anatomic source of her right shoulder pain, specifically a rotator cuff tear, and that arthroscopic repair of the right rotator cuff was necessary. Based on his review of the records, he further agreed that Petitioner's right rotator cuff was asymptomatic prior to March 3, 2015. Despite his opinion that Petitioner's right shoulder complaints should have resolved within six months of her injury, he admitted that they had not.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Respondent disputed the issue of accident as to Petitioner's alleged March 2015 and August 2015 accidents. Ax2, Ax3. Having weighed all evidence, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that she sustained an accidental injury to her right shoulder that arose out of and in the course of her employment on March 31, 2015 under a theory of repetitive trauma in case 16 WC 6297. Further, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she did sustain an accidental injury to her right shoulder that arose out of and in the course of her employment on August 11, 2015 under a theory of repetitive trauma in case 16 WC 6296.

a. Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment on March 31, 2015 in case 16 WC 6297.

The Arbitrator concludes that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on March 31, 2015. Ax2. In so concluding the Arbitrator notes that Petitioner returned to Dr. Giannoulias on March 3, 2015 with complaints of numbness and tingling in both arms from shoulder to hands. This was the first time that Petitioner had made reference to

complaints in her right arm but no specific information was given or taken down as to what, if anything, was causing or contributing to the reported symptoms. Exam indicated there was full elevation of the shoulder, but which shoulder was not specified. Impression was bilateral hand numbness. Dr. Giannoulias recommended an EMG to evaluate the possible source of the numbness and removed her from work. The EMG was essentially negative. At the March 16, 2015 EMG visit, Petitioner related that she eventually developed right shoulder pain as she states she was compensating with the right arm due to her limitations on the left. Further, it was noted that over the last 3 months she had developed bilateral hand numbness and tingling. Petitioner was unable to say what made her hands better or worse. Petitioner then returned to Dr. Giannoulias on March 31, 2015 complaining of right arm and shoulder pain. No physical exam was undertaken and Dr. Giannoulias agreed with this fact at his deposition. He indicated that the main issue was her repetitive activity but that as long as she minimized the repetition in her arm, she should be okay. He could not explain her symptoms. In the Arbitrator's view, again no specific information is noted with respect to what activities were repetitive, which arm he referenced and no diagnosis is given for either arm. He allowed her to return to work starting April 8, 2015, but with restrictions to avoid working over 8 hours a day and he recommended that she avoid repetitive activity. Petitioner alleged that she returned to work thereafter for Respondent. While Petitioner and her doctor discussed her right arm as early as March 2015, Dr. Giannoulias testified that, at that time, he had no objective basis to diagnose right-sided rotator cuff pathology and therefore could not be sure whether the rotator cuff tear was present at that time.

In order to obtain compensation under the Act in a repetitive trauma claim, an employee must point to a date on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Durand v. Indus. Comm'n*, 224 Ill.2d 53, 64, 862 N.E.2d 918 (2006). The date of injury in a repetitive trauma claim is the date in which the injury manifests itself. In determining the manifestation date, Courts have typically set the manifestation date on the day the employee requires medical treatment or the date in which the employee can no longer work. Because repetitive trauma claims by nature are progressive, the employee's medical treatment as well as severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work.

Given the aforementioned, it cannot be concluded that Petitioner's date of accident/manifestation date was March 31, 2015 as it was not plainly apparent what Petitioner's condition was and what activities may or may not have caused or contributed to it. For the foregoing reasons, the Arbitrator concludes that Petitioner failed to prove she sustained accidental injuries on March 31, 2015. Any and all other claims for compensation for case 16 WC 6297 is hereby denied. All other issues in connection with this claim are rendered moot.

b. Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296.

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found Petitioner failed to prove accident injuries occurring on March 31, 2015, the Arbitrator does conclude that Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296.

In so finding, the Arbitrator notes that Petitioner returned to work following her March 31, 2015 visit with Dr. Giannoulias. Petitioner alleges that thereafter, she continued to work in a repetitive fashion and overused her right arm in order to protect her previously injured and affected left arm/shoulder. Petitioner's allegations are supported by her treatment records and by Dr. Giannoulias' testimony. Specifically, when she returned to her doctor on August 11, 2015 the doctor noted that Petitioner had a flare up of right shoulder pain

and that she had been favoring her right arm in her job. The doctor noted it was very repetitive in her job. He diagnosed her then with a right shoulder strain.

Petitioner's testimony was that she worked as sorter for Respondent with typical 8 hour shifts but that around January 2015, those shifts turned to 12 hour shifts. During these new shifts, she worked the first shift, which she described as having more production or having to produce more. Prior to this shift change, Petitioner was released with permanent restrictions to avoid lifting overhead in October 2014. Petitioner testified that these permanent restrictions were honored up until supervisors were changed, around January 2015, the same in which her shift hours also changed. Petitioner described that her new supervisors had her performing work activities that required her to raise her arm. Specifically, she stated she had to lower and push pans. In lowering, she stated that the pans were high, requiring her to reach above her head. She said her left arm began hurting and she related this to Dr. Giannoulias, who then reduced her work hours to 8 hours but that this was not respected. Petitioner stated she began to notice her left shoulder hurting and thus began using her right arm more because the left was hurting. She then treated in March 2015 and was released back to work. Upon her return to work, she said she worked tying bands together using a machine. After they were tied, she would pile the packets sometimes above her head. During this time, she primarily used the right arm. She said her right shoulder problems did not get better during this time. She then returned to Dr. Giannoulias, who noted a flare up, injected the right shoulder and diagnosed Petitioner with a right shoulder strain.

Regarding the video job analysis, Petitioner testified that she was almost never sent to place labels. She viewed the video and confirmed that she had to make packets and put them in small boxes. She said she piled them up. She testified she began doing this particular type of job activity after her left shoulder surgery upon her return to work. She spent almost the entire day performing this activity. She said each packet contained 200-300 pieces and she would then pack about 7 packets into a box. On average, 160,000 to 200,000 pieces were bound into packets per day. She used her right arm to reach and place these into the box sometimes higher than her head. She said she began using the right arm around December 2015. Petitioner testified that the only difference in the video she viewed was that the speed of the machine was slower in the video compared to when she performed that job activity. She also stated the video showed second shift rather than first shift. Petitioner testified that she performed jobs after minute 2:44 in the video only once or twice in her time working for Respondent.

Petitioner said she first began noticing problems with the right arm in March 2015 but she also admitted under cross that she had noticed right shoulder problems before March. However, as discussed, *supra*, Dr. Giannoulias testified that, at that time, he had no objective basis to diagnose right-sided rotator cuff pathology and therefore could not be sure whether the rotator cuff tear was present at that time. When she returned in August, she clearly described a flare up to the right arm, indicating that the right arm had been affecting her and became apparent to her and prompted her to returned for medical care. Petitioner testified that from April to August she continued to perform the job of taking stacks of paper, binding them and placing them into the stacked boxes. It was on August 11, 2015 that Dr. Giannoulias noted the right arm, that Petitioner was specific about the right arm and that a diagnosis was made as to the right shoulder. Dr. Giannoulias testified that he believed that the August 11, 2015 date is the date in which he was able to identify a right shoulder condition. Therefore, the Arbitrator concludes that this is the date in which Petitioner's injury plainly manifested itself.

The Arbitrator further finds that Petitioner's August 11, 2015 injury occurred in the course of her employment. The repetitive activities that she performed were all performed at Respondent's printing facility where she worked at its direction. Petitioner's injury to the right shoulder occurred while she was performing those activities. As a result, the Arbitrator finds that that Petitioner's accident occurred in the course of her employment with Respondent.

The Arbitrator finds that Petitioner's accident arose out of her employment as well because the repetitive activities in which she performed were employment related duties, performed at Respondent's direction. Petitioner described in detail how she as required to near constantly band and load paper packets. Her description of these job duties was unrebutted and were supported by the job description, job video, her medical records and Dr. Giannoulias' testimony. Based on the foregoing, the Arbitrator concludes that Petitioner's August 11, 2015 work injury arose out of her employment.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296, the Arbitrator finds that Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296. The Arbitrator finds that Petitioner's right shoulder condition is not casually related to any other pending claim.

a. Petitioner's condition of ill-being as it relates to the right shoulder is not causally related to her November 4, 2013 work accident in case 14 WC 9942.

At trial, the parties did not dispute that Petitioner's left shoulder condition was causally related to the November 4, 2013 accident but rather disputed whether the right shoulder was causally related. The Arbitrator adopts the stipulation as to the left shoulder. However, because Petitioner was essentially at MMI and working during the time period said to have caused or contributed to Petitioner's right shoulder repetitive trauma claim, the Arbitrator does not believe the right shoulder condition is a sequalae of her original left shoulder injury. In support thereof, the Arbitrator notes and adopts Dr. Giannoulias' opinion that Petitioner's rights shoulder condition (rotator cuff tear/pathology) manifested itself on August 11, 2015. Further, the doctor noted that Petitioner's overuse of the right arm when her restrictions were not being accommodated, coupled with the repetitive nature of her work activities as imposed upon the right shoulder, caused the right shoulder condition. This opinion supports a conclusion that Petitioner's right shoulder condition occurred after the November 2013 injury and after being placed at MMI for the left shoulder. Therefore, the Arbitrator finds Petitioner's right shoulder is not causally related to the November 4, 2013 accident.

b. Petitioner's condition of ill-being as it relates to the right shoulder is not causally related to an alleged March 31, 2015 work accident in case 16 WC 6297.

Having concluded Petitioner failed to prove accident for an alleged March 31, 2015 repetitive trauma claim in case 16 WC 6297, the Arbitrator finds that the issue of causation moot for this claim

c. Petitioner's condition of ill-being as it relates to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296.

At trial, the parties clarified that at issue was whether Petitioner's right shoulder condition was causally related to one or more of her pending workers' compensation claims. Specifically, whether the right shoulder was related to the original November 4, 2013 date of accident (14 WC 9942) as a sequelae or overuse injury, whether the right shoulder was causally related to the March 31, 2015 (16 WC 6297) alleged date of accident as a repetitive trauma injury manifesting itself on this date or whether the right shoulder condition was causally related to the August 11, 2015 (16 WC 6296) alleged date of accident as a repetitive trauma injury manifesting itself on this date. Petitioner alleges that the right shoulder condition was caused as a result of over compensation or overusing the right arm in order to avoid using her left shoulder and also caused from the repetitive nature of her work activities.

A claimant who seeks an award of benefits under a repetitive-trauma theory will be held to the same standard of proof as a claimant seeking benefits for a sudden traumatic injury. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918 (2006). As with any work-related injury, the claimant's employment need only be *a* cause of the claimant's condition of ill-being, it need not be the sole or primary cause. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003). An employee who alleges an injury based upon repetitive trauma must "show that the injury is work-related and not the result of a normal degenerative aging process." *Peoria County Bellwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, (1987); *Glister Mary Lee Corp. v. Indus. Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979 (2001). It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). However, the Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Indus. Comm'n*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1993) citing *Perkins Product Co. v. Indus. Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942) (claimant's injury "was directly connected with the method and manner in which she was required to do her work, and to use her arm in the discharge of her duties"). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case.

Based on the record as a whole, the Arbitrator finds that Petitioner's right shoulder condition is causally related to her August 11, 2015 accident. The Arbitrator is persuaded that Petitioner overused the right shoulder and was exposed to repetitive work activities that caused or contributed to her condition of ill-being. Petitioner described in detail the nature of her job duties, which included tying bands together and reaching at or above shoulder level in order to stack packets. Dr. Giannoulias provided persuasive and compelling testimony regarding the number of times Petitioner would have repeated the task of raising her arm, relying on his review of the video, his review of the written essential functions and physical demands report as well as Petitioner's description of her work.

Specifically, Dr. Giannoulias opined that Petitioner's right shoulder condition likely occurred sometime after January 2015. The Arbitrator notes that Dr. Giannoulias related Petitioner's right shoulder condition to the August 11, 2015 date and no other prior date. Regarding causal connection between Petitioner's job duties at her current condition of ill-being as it relates to the right shoulder, her doctor opined that favoring an arm or avoiding using the other, can cause a rotator cuff tear or aggravate a pre-existing rotator cuff tear it one existed. The doctor explained that having reviewed the essential functions and required physical demand report provided by Respondent, it was still his opinion that even constantly handling bundles of printing materials even if they weigh 1 pound or less is consistent with his opinions, explaining that in this particular case, it was not the weight as much as it is the amount of times one is performing the task and what position the arm is at when performing that task. The doctor further elaborated that Petitioner stands only 5 feet tall and that her arm is at the shoulder level or above a majority of the time that this is occurring and that she was doing that on a constant daily basis. The doctor concluded that this was done approximately 800 times per day. The doctor concluded that it was a significant amount of time with the arm in that position that is repetitively moving in the shoulder or above level that is engaging the rotator cuff. The doctor also reviewed the video provided by Respondent and testified that beginning at minute 1:10 and continuing, he identified that activity as associated with contributing to Petitioner's right shoulder condition. He explained that in the video arm level of that person is constantly going from waist to shoulder to above the shoulder and is occurring 5 to 6 times per minute. The doctor noted that in the case of the woman in the video, she was constantly at the shoulder level and that when she puts it in the box it is going over the shoulder level to rotated in. The doctor went on to calculate that this type of activity was occurring 300 times in one hour and if someone were working seven hours per day doing that constantly, it amounts to over 2,000 times in one day.

Regarding Dr. Carroll's opinion, which was that Petitioner's right shoulder condition was degenerative in nature, the Arbitrator finds the opinion is not supported the preponderance of the evidence and therefore is accorded less weight. Dr. Carroll took a history that right shoulder complaints began or about March 31, 2015. The doctor diagnosed a strain to the right shoulder, AC joint arthritis and rotator cuff tear with impingement. The doctor opined that the strain was related to an alleged work accident but that the arthritis and the rotator cuff tear was not. The doctor based his conclusion on the nature of the general problem, the nature of the alleged activity and the physical findings and what he saw based on her history in treatment and MRI studies which appeared to be a degenerative rotator cuff tear. The doctor concluded that the strain had essentially reached the equivalent of maximum medical improvement. Regardless of causation, the doctor did opine Petitioner was in need of restrictions.

The doctor issued a supplemental report dated November 8, 2016 after being provided with a video job analysis. Based upon his review of the video, the doctor a pint that his opinions did not change compared to the first report. The doctor viewed the portion of the video showing paper being jogged together, placed into a box at chest level and below by a short individual who is height he did not have. He concluded that he did not believe that this specific activity would aggravate a rotator cuff tear of a degenerative in nature. When asked how forceful and how repetitive does an activity have to be to cause a rotator cuff tear, the doctor responded that there was no exact criteria. Rather you look at the job itself, the position of the arm, the size of the individual and make an assessment.

The Arbitrator finds a key difference in medical opinions offered in that Dr. Carroll did not provide any specific assessment as to the weight of the activity performed, the individual performing the activity, the position of the arm, the size of the individual or Petitioner and the amount of movement spent doing any of the activities in the video. However, Dr. Giannoulias did so, providing specific numbers as to what he believed was sufficiently repetitive and gave Petitioner's height, the estimated weight of the materials and the number of times Petitioner wound have performed certain activities. While Dr. Carroll testified that there are no exact criteria as to how forceful or how repetitive something must be to cause a rotator cuff tear, the Arbitrator assigns more weight to Dr. Giannoulias' assessment as he appears to have evaluated the information provided more thoroughly.

Further, despite Dr. Carroll concluding that Petitioner's condition was a degenerative rotator cuff tear, when asked whether he could tell whether the cuff tear was degenerative versus acute, Dr. Carroll could not tell a time course from that. The doctor testified you can look at the factors that could play a role in developing the problem, including surrounding structures. The Arbitrator finds the doctor's testimony in this regard internally inconsistent. The doctor failed to provide clear and persuasive evidence or testimony on this issue, admitting that there was no way to date a degenerative rotator cuff tear and that he would look to other structures to come to a conclusion. Also of note, he testified he agreed with the radiologists' interpretation of the right shoulder MRI but at no time did the radiologist find a degenerative rotator cuff tear. The Arbitrator is not persuaded that evidence of other surrounding degenerative structures equates to the rotator cuff also being degenerative in nature. The Arbitrator also disagrees, based upon the evidence presented, that Petitioner's work activities did not cause, aggravate, accelerate and or exacerbate any rotator cuff pathology, whether acute or degenerative in nature. Rather the evidence shows that Petitioner engaged in work activities that, given her condition, height, were sufficiently at or above shoulder level and/or sufficiently repetitive in nature as explained by Dr. Giannoulias' opinions and testimony. Dr. Carroll admitted that repetitive movement above chest level could aggravate an asymptomatic degenerative rotator cuff tear so that it becomes symptomatic. The doctor further commented that repetitive movement around chest level could cause a rotator cuff tear even if there was not a tear there in the first place. Although answered on a hypothetical basis, the Arbitrator notes that the preponderance of the evidence suggests that is exactly what occurred here.

Both doctors and the Arbitrator reviewed the video in question. Px10. The position depicted between 1:10 and 2:43 on the video clearly shows a woman loading packets of paper into a box; as she is doing this, she lifts a bundle of papers above at or above her chest and shoulder and into the machine that wraps them. She then is observed taking the bundled paper at or above chest and shoulder level and reaching into the cardboard box to place them in there. This was activity identified by Petitioner has being performed using the right arm on a repetitive basis. The Arbitrator does not find the video inconsistent with what Petitioner described. Accordingly, the Arbitrator finds that Petitioner's work during the repetitive work period did require her to lift the packets above chest and shoulder level. As a result, this activity caused the present condition of ill-being in Petitioner's right shoulder. This is entirely consistent with Dr. Carroll's opinions that work requiring lifting higher than chest level could cause a rotator cuff tear, or aggravate a pre-existing degenerative tear.

Based on the foregoing, the Arbitrator concludes that Petitioner has proven that her right shoulder condition, under a repetitive trauma theory, is causally related to her August 11, 2015 date of injury.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Petitioner claimed the following bills as unpaid as part of Respondent's liability for all three claims:

Health Benefits Physicians	12/14/15-12/14/15	$248.52
G&T Orthopedics	12/8/15-8/16/16	$2,170.00
Flexeon Rehab	4/16/14-8/8/14	$14,270.00
Western Touhy Anest.	4/1/14	$1,625.00
Herron Med. Svcs.	4/9/14	$570.00

a. Whether medical charges were reasonable and necessary for 14 WC 9942?

As noted above, Petitioner submitted and alleged various bills as unpaid and as part of Respondent's liability in some or all of the claims. Ax1, Px12. Having found Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner's treatment from August 11, 2015 to the present as submitted is related to the August 2015 injury in case 16 WC 6296. The Arbitrator further concludes that all prior medical treatment before August 11, 2015 is causally related to Petitioner's original injury on November 2013.

In reviewing the records, Petitioner utilized her first choice of provider when she opted to see her primary care physician, Dr. Ravi Barnabas, at Herron Medical Center on February 27, 2014. Dr. Barnabas referred her to Dr. Giannoulias, who she first saw on March 4, 2014. Dr. Giannoulias performed surgery on her left shoulder at Lakeshore Surgery Center, and referred her to Flexeon Rehabilitation for post-operative physical therapy. Dr. Giannoulias also referred her to Dr. James Keller-Shabrokh for an EMG on March 16, 2015, and to Dr. Jay Kiokemeister for a pain management evaluation on December 14, 2015. The Arbitrator finds all of this treatment to be necessary in order to treat Petitioner for her left shoulder and right shoulder claims. Petitioner underwent a reasonable course of treatment for each shoulder.

As to Flexeon Rehabilitation, the Arbitrator finds Respondent liable for the $750.00 in unpaid medical charges for case 14 WC 9942. Px6, Px12.

As to Western Touhy Anesthesia, the Arbitrator finds Respondent liable for the $564.83 in unpaid medical charges for case 14 WC 9942. Px5, Px12.

As to Herron Medical Services, the Arbitrator finds Respondent liable for the $570.00 in unpaid medical charges for case 14 WC 9942. Px2, Px12.

In summary, as to case **14 WC 9942**, Respondent shall pay the outstanding medical charges totaling **$1,884.83**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

b. Whether medical charges were reasonable and necessary for 16 WC 6297?

Having found no accident in case 16 WC 6297, the Arbitrator finds the issue of liability for unpaid medical bills moot as to this claim.

c. Whether medical charges were reasonable and necessary for 16 WC 6296?

Having found accident and causal connection as to Petitioner's right shoulder for 16 WC 6296 under a theory of repetitive trauma, the Arbitrator finds that certain medical services were reasonable and necessary and that Respondent has not yet paid all such appropriate charges.

Having found Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner's treatment from August 11, 2015 to the present as submitted is related to the August 2015 injury in case 16 WC 6296. The Arbitrator further concludes that all prior medical treatment before August 11, 2015 is causally related to Petitioner's original injury on November 2013.

In reviewing the records, Petitioner utilized her first choice of provider when she opted to see her primary care physician, Dr. Ravi Barnabas, at Herron Medical Center on February 27, 2014. Dr. Barnabas referred her to Dr. Giannoulias, who she first saw on March 4, 2014. Dr. Giannoulias performed surgery on her left shoulder at Lakeshore Surgery Center, and referred her to Flexeon Rehabilitation for post-operative physical therapy. Dr. Giannoulias also referred her to Dr. James Keller-Shabrokh for an EMG on March 16, 2015, and to Dr. Jay Kiokemeister for a pain management evaluation on December 14, 2015. The Arbitrator finds all of this treatment to be necessary in order to treat Petitioner for her left shoulder and right shoulder claims. Petitioner underwent a reasonable course of treatment for each shoulder.

As to Health Benefits Physicians, the Arbitrator finds Respondent liable for the $248.52 in unpaid medical charges for case 16 WC 6296. Px8, Px12.

As to G&T Orthopedics, the Arbitrator finds Respondent liable for the $2,170.00 in unpaid medical charges for case 16 WC 6296. Px4, Px12.

In summary, as to case **16 WC 6296**, Respondent shall pay the outstanding medical charges totaling **$2,418.52**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

ISSUE (K) Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein.

a. Prospective medical treatment for 14 WC 9942

Having found Petitioner's right shoulder condition of ill-being is causally related to the August 11, 2015 work accident in case 16 WC 6296 and not to the 14 WC 9942 case, the Arbitrator finds no prospective medical treatment is awarded under 14 WC 9942.

b. Prospective medical treatment for 16 WC 6297

Having found no accident in 16 WC 6297, the Arbitrator finds the issue of prospective medical treatment moot for this claim.

c. Prospective medical treatment for 16 WC 6296

Having found Petitioner's right shoulder condition of ill-being is causally related to the August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to further prospective medical treatment. The record established that Dr. Giannoulias has recommended a right shoulder surgery and that he has opined that the need for the right shoulder surgery was the result of the repetitive use of same in the workplace, which he opined became apparent on August 11, 2015. Furthermore, both Dr. Giannoulias and Dr. Carroll credibly testified that a right shoulder rotator cuff repair was reasonable and necessary treatment to relieve Petitioner from the effects of her right shoulder condition. As to 16 WC 6296, Respondent shall pay for and authorize the treatment recommendations as outlined by Dr. Giannoulias, including any and all incidental care thereto.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator, having found that Petitioner's medical condition and the restrictions are causally connected to her accident, awards TTD for the periods:

a. TTD for the November 4, 2013 accident for 14 WC 9942

Petitioner alleged TTD from 3/4/14 through 7/28/14 representing 21 weeks. Ax1. Respondent disputed liability for same. However, the record shows that during this time, Petitioner was treating for the left shoulder, which was not disputed in this claim. Only the issue of whether the right shoulder was causally related was disputed. Petitioner testified that, from the time of her initial accident on November 4, 2013 through the time when Dr. Giannoulias first removed her from work on March 4, 2014, she worked an accommodated position with Respondent. She remained off work from March 4, 2014 through the time Dr. Giannoulias released her back to work with restrictions following the left shoulder surgery on July 29, 2014. Therefore, as to case **14 WC 9942**, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **21 weeks**, commencing **3/4/14** through **7/28/14**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$10,393.46** for temporary total disability benefits that have been paid.

Petitioner also alleges TTD from March 5, 2015 through April 8, 2015. However, Petitioner failed to lodge this time period into dispute on Ax1 and therefore the Arbitrator declines to make any award under 14 WC 9942.

b. TTD for the March 31, 2015 alleged accident for 16 WC 6297

Having found no accident in 16 WC 6297, the Arbitrator finds the issue of TTD moot for this claim.

c. TTD for the August 11, 2015 accident for 16 WC 6296

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. As noted before, Petitioner returned to light duty work until Dr. Giannoulias again removed her from work on March 3, 2015. She remained off work until her March 31, 2015 Dr. Giannoulias visit when he permitted her to return to work with restrictions beginning April 9, 2015. She returned to work light duty on April 9, 2015, and continued to work light duty until she was again removed from work beginning October 7, 2015. She again remained off work until Dr. Giannoulias released her to work with restrictions on October 20, 2015. She again returned to work until Dr. Giannoulias removed her from work on December 8, 2015. Since December 8, 2015, Petitioner has not returned to work for Respondent or any other employer, nor has Dr. Giannoulias released her to return to work. As a result, she has been removed from work through the date of trial: January 19, 2018. Petitioner's unrebutted testimony regarding the times periods she was removed from work is further corroborated by the medical records.

Regarding the period 3/3/15 through 4/8/15, the Arbitrator declines to award TTD during this period as it predates the August 11, 2015 accident.

Regarding the period 10/7/15 through 10/19/15 and 12/8/15 through 1/19/18, the Arbitrator finds that such period is related to the August 11, 2015 work accident. Dr. Giannoulias testified that Petitioner was kept off work as of August 16, 2016 due to the pending recommended arthroscopic right shoulder surgery. The doctor testified that he kept her off work at that time due to the recommended surgical repair to the right shoulder. Therefore, as to case 16 WC 6296, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **108-1/7th weeks**, commencing **10/7/15** through **10/19/15** and from **12/8/15** through **1/19/18**, as provided in Section 8(b) of the Act.

Signature of Arbitrator

4/4/2018
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)
		☐ PTD/Fatal denied
	☐ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Teresa Fernando,

Petitioner,

vs.

NO: 16 WC 6297

19IWCC0663

Specialty Print Communications,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent (Liberty Mutual) herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability and prospective medical treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator with respect to claim 16 WC 6297, said decision being attached hereto and made a part hereof.

The Commission notes that on 5/2/18 Respondent (Liberty Mutual) filed a Petition for Review disputing findings relative to the Arbitrator's decision in claim 16 WC 6296, while also noting on the Petition that said claim was consolidated with claims 14 WC 9942 and 16 WC 6297. The Commission notes that it does not appear it was the intention of Respondent (Liberty Mutual) to review the Arbitrator's decisions with respect to claims 14 WC 9942 and 16 WC 6297, only to note it in the Petition for Review caption, in light of the parties' failure to address said claims either in their briefs or at oral argument, other than perfunctorily, since neither Petitioner nor Respondent (Hartford) filed a Review on any of the claims in question. However, given that the Commission's computer records will continue to show Petitions for Review pending relative to the remaining two claims unless and until they are specifically addressed by this tribunal, the Commission hereby affirms and adopts the decision of the Arbitrator concerning this claim, 16 WC 6297.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision with respect to claim 16 WC 6297 dated 4/6/18 is affirmed and adopted.

19IWCC0663

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: DEC 6 - 2019
o:10/22/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

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

FERNANDO, TERESA
Employee/Petitioner

Case# **16WC006297**

14WC009942
16WC006296

SPECIALTY PRINT COMMUNICATIONS
Employer/Respondent

19IWCC0663

On 4/6/2018, 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 1.90% 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

1596 MEACHUM BOYLE & TRAFMAN
KYLE CARLSON
225 W WASHINGTON ST SUITE 500
CHICAGO, IL 60606

19IWCC0663

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)

TERESA FERNANDO
Employee/Petitioner

v.

SPECIALTY PRINT COMMUNICATIONS
Employer/Respondent

Case # **16 WC 6297**

Consolidated cases: **14 WC 9942**
16WC6296

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 **MARIA S. BOCANEGRA**, Arbitrator of the Commission, in the city of **CHICAGO, ILLINOIS**, on **1/19/2018**. 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. [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. [ ] 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 _____

19IWCC0663

FINDINGS

On the date of accident, **3/31/15**, 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 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 as it relates to the ***right shoulder is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$8,274.39**; the average weekly wage was **$344.77**.

On the date of accident, Petitioner was **45** years of age, ***single*** with **2** 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, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of $0. Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

The Arbitrator concludes that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on March 31, 2015. All other disputes issues are rendered moot.

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

4/4/2018
Date

ICArbDec19(b)

APR 6 - 2018

FINDINGS OF FACT

Petitioner's Testimony and Medical Treatment

Petitioner, Teresa Fernando, is a 48 year old woman who lives in Chicago, Illinois with her five children. She is a divorcee, and two of her five children are minors. She is right-hand dominant.

Petitioner has worked for Respondent, Specialty Print Communications, since 2011. Respondent is a printing company that operates a facility that prints various promotions and other products for its customers. Petitioner worked as a sorter for Respondent at this facility. When she first started working for Respondent her shifts were 8 hours long; she would work Monday through Saturday, beginning at 7:00 AM and ending at 3:00 PM each day. Sometime in January of 2015, new management at Respondent modified her schedule so that she worked 12-hour shifts. After the change, Petitioner worked 6:00 AM to 6:00 PM three days a week, and then one six-hour day each week, from 12:00 PM to 6:00 PM. After the change to 12-hour days, Respondent's production was divided into two shifts: first and second shift. Petitioner always worked first shift. The first shift typically involved a higher level of production requiring a faster pace of work.

On November 4, 2013, Petitioner was lowering a wooden pan full of material when she felt a popping sensation followed by pain in her left shoulder. She informed her supervisor, who relayed the information to the general manager. Petitioner testified that, prior to this incident, she had never experienced pain or sought medical treatment related to her left shoulder, nor had she ever missed time from work due to her left shoulder.

On the day of her left shoulder injury, Petitioner was driven to Concentra by one of Respondent's employees. She presented with complaints of left shoulder pain after picking up a tray of product. (She was recommended a course of physical therapy and provided light duty restrictions. She returned to work at Respondent within those restrictions. She began physical therapy at Concentra on November 6, 2013, and returned for a follow-up visit on November 13, 2013. She was again recommended therapy and provided light duty restrictions. She continued treating with Concentra in this manner through the rest of November and the beginning of December of 2013. By December 6, 2013, her shoulder still had not improved; at this stage the physician at Concentra recommended an MRI of the left shoulder. The MRI was performed on December 14, 2013 and revealed a partial tear of the distal supraspinatus. She returned to Concentra on December 18, 2013, at which time the MRI was reviewed and she was referred to an orthopedic surgeon.

Petitioner was first examined by Dr. Craig Westin at Concentra on January 3, 2014. He recommended continued therapy and light duty restrictions. Petitioner continued the course of treatment recommended by Dr. Westin but realized little improvement. At this stage, Petitioner opted to seek treatment with her own choice of medical provider: her primary care physician Dr. Ravi Barnabas at Herron Medical Center. She was examined by Dr. Barnabas on February 27, 2014, at which time he immediately referred her for an orthopedic evaluation with Dr. Christos Giannoulias.

Pursuant to that referral, Petitioner was examined by Dr. Giannoulias on March 4, 2014. He reviewed the MRI and diagnosed Petitioner with a partial thickness rotator cuff tear. He administered a lidocaine injection and removed her from work. He further indicated that if the symptoms persisted Petitioner would be a candidate for arthroscopic surgery. Petitioner returned to Dr. Giannoulias on March 25, 2014 with ongoing symptoms; as a result, Dr. Giannoulias scheduled her for surgery. She underwent pre-surgical clearance testing with Dr. Barnabas, and later underwent surgery with Dr. Giannoulias on April 1, 2014. She returned to Dr. Giannoulias for a post-operative evaluation on April 8, 2014, at which time he ordered a course of physical therapy. She began that therapy at Flexeon Physical Therapy on April 11, 2014. She continued therapy and returned to Dr. Giannoulias at monthly increments for follow-up visits. Dr. Giannoulias kept Petitioner off work until July 29, 2014, at which time he allowed her to return to work with restrictions. Petitioner returned to

work but continued to follow-up with Dr. Giannoulias and undergo physical therapy. On October 28, 2014, Dr. Giannoulias released Petitioner from care and imposed permanent restrictions avoiding overhead lifting.

Petitioner subsequently continued to work for Respondent and Respondent accommodated her restrictions. Petitioner said this continued until a management change in January of 2015. Thereafter, Petitioner alleged Respondent stopped honoring her restrictions and directed her to perform overhead work. Shortly after the change, Petitioner testified she began to experience increased symptoms in her left shoulder. This prompted her to return to Dr. Giannoulias on January 20, 2015. She presented with complaints of left shoulder pain. The record specifically indicates that "at work [Petitioner's] shifts have changed. They have gone to 12-hour shifts where they added time per day. She is having significant trouble with her [left] arm." Dr. Giannoulias modified her restrictions and limited her to working no more than 8-hour days. Nevertheless, Petitioner testified she continued to work 12-hour days but began favoring her right arm to compensate for her increased left shoulder complaints.

She returned to Dr. Giannoulias on March 3, 2015, this time with complaints of numbness and tingling in both arms. Dr. Giannoulias recommended an EMG to evaluate the possible source of the numbness and removed her from work. The EMG was performed on March 16, 2015 by Dr. James Keller-Shabrokh. Petitioner then returned to Dr. Giannoulias on March 31, 2015, complaining of right arm and shoulder pain. Dr. Giannoulias indicated that the primary concern for Petitioner was the repetitive nature of the work that she does. He allowed her to return to work starting April 8, 2015 but with restrictions to avoid working over 8 hours a day and he recommended that she avoid repetitive activity.

She returned to work on April 8, 2015 and she testified Respondent continued to ignore her restrictions. Respondent placed her in a role where she was required to bind packets of printed materials. Once the packets were bound, she would need to stack them into a box on a table. In order to do this, she would need to reach above her head with the packets in her hand. She primarily used her right arm when she was doing this work due to the limitations in her left arm.

Petitioner returned to Dr. Giannoulias on August 11, 2015 for persistent right shoulder complaints. She presented with complaints of bilateral upper extremity pain and Dr. Giannoulias documented that Petitioner has been having flare up of pain in her right shoulder. She has a permanent injury with her left shoulder and has been favoring her right shoulder at her job. Dr. Giannoulias administered a lidocaine injection in her right shoulder and again provided work restrictions. Petitioner returned to work and Petitioner alleged that her restrictions were not accommodated. She returned to Dr. Giannoulias on October 6, 2015 with ongoing right shoulder complaints. He noted that her work was not honoring her restrictions and removed her from work until October 20, 2015, at which time she could again return with restrictions.

She returned to Dr. Giannoulias on November 3, 2015 with ongoing right shoulder complaints. Dr. Giannoulias recommended an MRI of the right shoulder. The MRI revealed a full thickness perforation of the supraspinatus tendon. Dr. Giannoulias reviewed the MRI on December 8, 2015 and diagnosed Petitioner with a rotator cuff tear. He performed another lidocaine injection and removed Petitioner from work. He referred her to Dr. Jay Kiokemeister for pain management, who she saw on December 14, 2015. Dr. Kiokemeister recommended that she continue her treatment with Dr. Giannoulias. She returned to Dr. Giannoulias on December 22, 2015 with ongoing right shoulder complaints. Dr. Giannoulias recommended surgical repair of the right shoulder. Petitioner returned to Dr. Giannoulias for several follow-ups throughout 2016 and Dr. Giannoulias continued to recommend surgery and removed her from work. Petitioner testified she has not had the surgery due to lack of insurance approval but testified that she would undergo the treatment if she could. It was her understanding that the surgery would permit her to return to work.

Petitioner testified that she never experienced pain in her right shoulder until the early part of 2015. Prior to this time, she never sought medical treatment for her right shoulder, and her right shoulder never interfered with her ability to work.

Petitioner reviewed a job analysis video during her testimony. Px10. The video depicts several positions at Respondent's printing facility. Petitioner testified that most of the positions depicted in the video were not roles she frequently filled while working for Respondent. However, the work shown from 1:10 through 2:43 on the video depicts work that was typical of Petitioner's duties for Respondent. Specifically, Petitioner filled this role after the management changed in January of 2015, and continued to do so up until December of 2015, at which time Dr. Giannoulias removed her from work for her right shoulder injury. Petitioner said she was required to gather papers that came out of a machine and assemble them into a stack. Petitioner would then take that stack and place it in another machine that would bind the stack together. Each stack would contain approximately 300 pieces of paper and would weigh about two pounds. In a typical shift, Petitioner would have to bind up to 200,000 pieces. At a rate of 300 pieces per stack, this would amount to over 650 stacks in a single shift. Once the stacks were bound, Petitioner would have to place them into a box.

Petitioner alleged that due to her short height, she would need to lift the packet higher than chest-level in order to be able to place it into the box. She testified that the top of the box would be about as tall as she was, and as a result she would need to stand on her toes to see inside. During the period between her return to work after the left shoulder surgery and before Dr. Giannoulias removed her from work for her right shoulder injury, Petitioner was using only her right arm to perform this type of work. Petitioner also testified that the video depicted work done during the second shift, which was done at a slower rate than the work she typically did during her work on the first shift.

On cross-examination, Petitioner agreed that the restrictions Dr. Giannoulias initially imposed after the left shoulder surgery were limited to the left shoulder. She also acknowledged that the right shoulder complaints likely began some time before that visit on March 3, 2015, when she first noted them to Dr. Giannoulias. She also acknowledged that Dr. Giannoulias' physical examination of her shoulder at that visit was essentially normal. She agreed that her left shoulder's condition has improved since then but the right shoulder continues to bother her.

Deposition Testimony of Dr. Christos Giannoulias

Dr. Christos Giannoulias testified on behalf of Petitioner by way of an evidence deposition on September 18, 2017. Px11.

Dr. Giannoulias treated Petitioner as his patient, and drafted a narrative report per Petitioner's request dated April 18, 2017. He started treating Petitioner in relation to her left shoulder injury. He initially attempted conservative management but after that failed he performed surgery and supervised her post-operative treatment. He released her back to work on September 9, 2014 but she continued to have problems after returning to repetitive work. At the beginning of 2015, Dr. Giannoulias imposed permanent restrictions limiting her to 8-hour shifts. By March, she was complaining of bilateral arm numbness and tingling. He recommended an EMG and reviewed the results on March 31, 2015. He imposed additional restrictions limiting her from performing repetitive work with the arms. Petitioner returned to Dr. Giannoulias several months later on August 11, 2015. He noted right shoulder pain; he administered an injection and again imposed work restrictions. He eventually obtained an MRI of the right shoulder and diagnosed Petitioner with a rotator cuff tear and recommended surgery. As of August 16, 2016, the last time he saw Petitioner, he still recommended surgery and still removed her from work.

Dr. Giannoulias reviewed the same job analysis video that was admitted as Petitioner's Exhibit 10. Based on that video, as well as his treatment and examinations of Petitioner, Dr. Giannoulias opined that

Petitioner's work activities caused her right shoulder's present condition of ill-being. Specifically, Dr. Giannoulias opined that "[f]rom reviewing the video and also recalling from my records that Ms. Fernando is a short person, she is five feet tall, her arm is in the shoulder level or above the majority of the time that this is occurring and she is doing it constantly on a daily basis. I believe the information that I had received earlier was about 800 times per day. So that's a significant amount of time with the arm in a position that's repetitively moving in the shoulder or above level that's engaging that rotator cuff. And it's not in this particular case the weight as much as it is the repetition of the arm and the level of the arm's height."

Upon re-reviewing the video during his deposition, Dr. Giannoulias further opined that "the arm level of this person is constantly going from waist to shoulder to above the shoulder and it's happening . . . five, six times a minute . . . but the point is that arm is constantly at that shoulder level and then when she puts it in the box, it's going over the shoulder level to rotate it in." In terms of frequency of this motion, Dr. Giannoulias opined that "any time you're over 4 [sic] to 500 times per day, I think that's significant repetitive activity." He further explained that Petitioner reported that she was favoring her right arm during these activities because of the permanent condition of her left arm; which is consistent with Petitioner's testimony. Dr. Giannoulias testified that this further strengthens his opinion that her right shoulder condition is related to her work activities.

Dr. Giannoulias reviewed the report of Dr. Charles Carroll and disagreed with his assessment that Petitioner's right shoulder condition was degenerative and unrelated to her work activities. He based his disagreement on the fact that typically degenerative tears are found in patients older than Ms. Fernando and that she did not have any complaints of right shoulder pain until she began doing this repetitive activity.

Dr. Giannoulias also discussed the chronology of the onset of Petitioner's right shoulder complaints on cross-examination. He agreed that Petitioner's EMG in March of 2015 was essentially normal. As a result, he could not point to anything objective that was explaining her symptoms at that time. Accordingly, he could not be sure whether Petitioner had a right-sided rotator cuff tear as of March 31, 2015. Nevertheless, based upon his review of the job video, and the fact that Petitioner was favoring the right arm, he believed that the right shoulder condition was related to her work activities. The work activities were either the sole cause of the rotator cuff tear or they aggravated a pre-existing rotator cuff tear if it was there. He acknowledged that, due to Petitioner's short stature, Petitioner would have to reach overhead in her activities of daily living, but explained that reaching overhead a few times a day would not be sufficient to qualify as repetitive activity that would aggravate the shoulder. Rather, the work she was doing for Respondent, that required her to lift overhead 400 to 500 times per day, is more likely to have aggravated the right shoulder.

Dr. Giannoulias was further questioned about the manifestation of the right shoulder's rotator cuff tear; he agreed that he had no objective reason to suspect that Petitioner had a right-sided rotator cuff tear on March 31, 2015. However, at Petitioner's next follow-up on August 11, 2015, he did document signs of rotator cuff pathology during his physical examination. Accordingly, the right-sided rotator cuff pathology most likely developed sometime between March 31, 2015 and August 11, 2015. However, it is possible that the pathology developed as early as January of 2015, based in part on Dr. Keller-Shabrokh's evaluation prior to his EMG.

Deposition Testimony of Dr. Charles Carroll

Dr. Charles Carroll testified on behalf of Respondent by way of an evidence deposition on October 17, 2017. Rx1. Dr. Carroll performed a physical examination at that visit and he noted right-sided rotator cuff weakness, among other findings. Based on the records he reviewed, and his physical examination, he concluded that her right shoulder diagnosis included a strain, arthritis, and a rotator cuff tear with impingement. However, he opined that only the strain was related to Petitioner's work; the arthritis and the tear were not. Rather, he felt those two conditions were degenerative in nature. Accordingly, he felt that the right shoulder condition as it

related to Petitioner's work activities, reached maximum medical improvement within three months from the strain. He opined that the appropriate AMA impairment rating for Petitioner is 2 percent, although he agreed that this rating would be inappropriate if she was not at MMI. Regardless of causation, Dr. Carroll agreed that Petitioner requires work restrictions.

Dr. Carroll also reviewed the job video admitted as Petitioner's Exhibit 10. He was specifically questioned on the role depicted on the video from 1:10 through 2:43. He again confirmed that nothing on that video would suggest Petitioner's job activities contributed to the development of her right shoulder condition. Nevertheless, he acknowledged that forceful, repetitive and overhead activities can cause rotator cuff tears.

On cross-examination, Dr. Carroll acknowledged that all of the medical records along with the job video were provided by Respondent for his review. Rx1. Dr. Carroll admitted that a degenerative rotator cuff tear could be asymptomatic, and that repetitive movement above the chest level could either cause a rotator cuff tear or aggravate a previously asymptomatic rotator cuff tear so that it becomes symptomatic. He explained that work above the chest level can minimize the space available for the rotator cuff, which can cause a degenerating tendon to tear or tear more. When he was questioned about the frequency with which Petitioner performed the various roles depicted in the job video, or the lengths of her shifts, or how frequently she worked, he had no specific information.

Dr. Carroll agreed that what would constitute above-the-chest-level work for Petitioner may not constitute above-the-chest-level work for an individual taller than Petitioner. He further acknowledged that he found no co-morbidities that may have contributed to Petitioner's right shoulder condition. He admitted that Petitioner had a valid and objective anatomic source of her right shoulder pain, specifically a rotator cuff tear, and that arthroscopic repair of the right rotator cuff was necessary. Based on his review of the records, he further agreed that Petitioner's right rotator cuff was asymptomatic prior to March 3, 2015. Despite his opinion that Petitioner's right shoulder complaints should have resolved within six months of her injury, he admitted that they had not.

CONCLUSIONS OF LAW

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Respondent disputed the issue of accident as to Petitioner's alleged March 2015 and August 2015 accidents. Ax2, Ax3. Having weighed all evidence, the Arbitrator concludes that Petitioner has failed to prove by a preponderance of the evidence that she sustained an accidental injury to her right shoulder that arose out of and in the course of her employment on March 31, 2015 under a theory of repetitive trauma in case 16 WC 6297. Further, the Arbitrator concludes that Petitioner has proven by a preponderance of the evidence that she did sustain an accidental injury to her right shoulder that arose out of and in the course of her employment on August 11, 2015 under a theory of repetitive trauma in case 16 WC 6296.

a. Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment on March 31, 2015 in case 16 WC 6297.

The Arbitrator concludes that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on March 31, 2015. Ax2. In so concluding the Arbitrator notes that Petitioner returned to Dr. Giannoulias on March 3, 2015 with complaints of numbness and tingling in both arms from shoulder to hands. This was the first time that Petitioner had made reference to

complaints in her right arm but no specific information was given or taken down as to what, if anything, was causing or contributing to the reported symptoms. Exam indicated there was full elevation of the shoulder, but which shoulder was not specified. Impression was bilateral hand numbness. Dr. Giannoulias recommended an EMG to evaluate the possible source of the numbness and removed her from work. The EMG was essentially negative. At the March 16, 2015 EMG visit, Petitioner related that she eventually developed right shoulder pain as she states she was compensating with the right arm due to her limitations on the left. Further, it was noted that over the last 3 months she had developed bilateral hand numbness and tingling. Petitioner was unable to say what made her hands better or worse. Petitioner then returned to Dr. Giannoulias on March 31, 2015 complaining of right arm and shoulder pain. No physical exam was undertaken and Dr. Giannoulias agreed with this fact at his deposition. He indicated that the main issue was her repetitive activity but that as long as she minimized the repetition in her arm, she should be okay. He could not explain her symptoms. In the Arbitrator's view, again no specific information is noted with respect to what activities were repetitive, which arm he referenced and no diagnosis is given for either arm. He allowed her to return to work starting April 8, 2015, but with restrictions to avoid working over 8 hours a day and he recommended that she avoid repetitive activity. Petitioner alleged that she returned to work thereafter for Respondent. While Petitioner and her doctor discussed her right arm as early as March 2015, Dr. Giannoulias testified that, at that time, he had no objective basis to diagnose right-sided rotator cuff pathology and therefore could not be sure whether the rotator cuff tear was present at that time.

In order to obtain compensation under the Act in a repetitive trauma claim, an employee must point to a date on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Durand v. Indus. Comm'n*, 224 Ill.2d 53, 64, 862 N.E.2d 918 (2006). The date of injury in a repetitive trauma claim is the date in which the injury manifests itself. In determining the manifestation date, Courts have typically set the manifestation date on the day the employee requires medical treatment or the date in which the employee can no longer work. Because repetitive trauma claims by nature are progressive, the employee's medical treatment as well as severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work.

Given the aforementioned, it cannot be concluded that Petitioner's date of accident/manifestation date was March 31, 2015 as it was not plainly apparent what Petitioner's condition was and what activities may or may not have caused or contributed to it. For the foregoing reasons, the Arbitrator concludes that Petitioner failed to prove she sustained accidental injuries on March 31, 2015. Any and all other claims for compensation for case 16 WC 6297 is hereby denied. All other issues in connection with this claim are rendered moot.

b. Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296.

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found Petitioner failed to prove accident injuries occurring on March 31, 2015, the Arbitrator does conclude that Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296.

In so finding, the Arbitrator notes that Petitioner returned to work following her March 31, 2015 visit with Dr. Giannoulias. Petitioner alleges that thereafter, she continued to work in a repetitive fashion and overused her right arm in order to protect her previously injured and affected left arm/shoulder. Petitioner's allegations are supported by her treatment records and by Dr. Giannoulias' testimony. Specifically, when she returned to her doctor on August 11, 2015 the doctor noted that Petitioner had a flare up of right shoulder pain

and that she had been favoring her right arm in her job. The doctor noted it was very repetitive in her job. He diagnosed her then with a right shoulder strain.

Petitioner's testimony was that she worked as sorter for Respondent with typical 8 hour shifts but that around January 2015, those shifts turned to 12 hour shifts. During these new shifts, she worked the first shift, which she described as having more production or having to produce more. Prior to this shift change, Petitioner was released with permanent restrictions to avoid lifting overhead in October 2014. Petitioner testified that these permanent restrictions were honored up until supervisors were changed, around January 2015, the same in which her shift hours also changed. Petitioner described that her new supervisors had her performing work activities that required her to raise her arm. Specifically, she stated she had to lower and push pans. In lowering, she stated that the pans were high, requiring her to reach above her head. She said her left arm began hurting and she related this to Dr. Giannoulias, who then reduced her work hours to 8 hours but that this was not respected. Petitioner stated she began to notice her left shoulder hurting and thus began using her right arm more because the left was hurting. She then treated in March 2015 and was released back to work. Upon her return to work, she said she worked tying bands together using a machine. After they were tied, she would pile the packets sometimes above her head. During this time, she primarily used the right arm. She said her right shoulder problems did not get better during this time. She then returned to Dr. Giannoulias, who noted a flare up, injected the right shoulder and diagnosed Petitioner with a right shoulder strain.

Regarding the video job analysis, Petitioner testified that she was almost never sent to place labels. She viewed the video and confirmed that she had to make packets and put them in small boxes. She said she piled them up. She testified she began doing this particular type of job activity after her left shoulder surgery upon her return to work. She spent almost the entire day performing this activity. She said each packet contained 200-300 pieces and she would then pack about 7 packets into a box. On average, 160,000 to 200,000 pieces were bound into packets per day. She used her right arm to reach and place these into the box sometimes higher than her head. She said she began using the right arm around December 2015. Petitioner testified that the only difference in the video she viewed was that the speed of the machine was slower in the video compared to when she performed that job activity. She also stated the video showed second shift rather than first shift. Petitioner testified that she performed jobs after minute 2:44 in the video only once or twice in her time working for Respondent.

Petitioner said she first began noticing problems with the right arm in March 2015 but she also admitted under cross that she had noticed right shoulder problems before March. However, as discussed, *supra*, Dr. Giannoulias testified that, at that time, he had no objective basis to diagnose right-sided rotator cuff pathology and therefore could not be sure whether the rotator cuff tear was present at that time. When she returned in August, she clearly described a flare up to the right arm, indicating that the right arm had been affecting her and became apparent to her and prompted her to returned for medical care. Petitioner testified that from April to August she continued to perform the job of taking stacks of paper, binding them and placing them into the stacked boxes. It was on August 11, 2015 that Dr. Giannoulias noted the right arm, that Petitioner was specific about the right arm and that a diagnosis was made as to the right shoulder. Dr. Giannoulias testified that he believed that the August 11, 2015 date is the date in which he was able to identify a right shoulder condition. Therefore, the Arbitrator concludes that this is the date in which Petitioner's injury plainly manifested itself.

The Arbitrator further finds that Petitioner's August 11, 2015 injury occurred in the course of her employment. The repetitive activities that she performed were all performed at Respondent's printing facility where she worked at its direction. Petitioner's injury to the right shoulder occurred while she was performing those activities. As a result, the Arbitrator finds that that Petitioner's accident occurred in the course of her employment with Respondent.

The Arbitrator finds that Petitioner's accident arose out of her employment as well because the repetitive activities in which she performed were employment related duties, performed at Respondent's direction. Petitioner described in detail how she as required to near constantly band and load paper packets. Her description of these job duties was unrebutted and were supported by the job description, job video, her medical records and Dr. Giannoulias' testimony. Based on the foregoing, the Arbitrator concludes that Petitioner's August 11, 2015 work injury arose out of her employment.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. Having found Petitioner has proven by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent, manifesting on August 11, 2015 in case 16 WC 6296, the Arbitrator finds that Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296. The Arbitrator finds that Petitioner's right shoulder condition is not casually related to any other pending claim.

a. Petitioner's condition of ill-being as it relates to the right shoulder is not causally related to her November 4, 2013 work accident in case 14 WC 9942.

At trial, the parties did not dispute that Petitioner's left shoulder condition was causally related to the November 4, 2013 accident but rather disputed whether the right shoulder was causally related. The Arbitrator adopts the stipulation as to the left shoulder. However, because Petitioner was essentially at MMI and working during the time period said to have caused or contributed to Petitioner's right shoulder repetitive trauma claim, the Arbitrator does not believe the right shoulder condition is a sequalae of her original left shoulder injury. In support thereof, the Arbitrator notes and adopts Dr. Giannoulias' opinion that Petitioner's rights shoulder condition (rotator cuff tear/pathology) manifested itself on August 11, 2015. Further, the doctor noted that Petitioner's overuse of the right arm when her restrictions were not being accommodated, coupled with the repetitive nature of her work activities as imposed upon the right shoulder, caused the right shoulder condition. This opinion supports a conclusion that Petitioner's right shoulder condition occurred after the November 2013 injury and after being placed at MMI for the left shoulder. Therefore, the Arbitrator finds Petitioner's right shoulder is not causally related to the November 4, 2013 accident.

b. Petitioner's condition of ill-being as it relates to the right shoulder is not causally related to an alleged March 31, 2015 work accident in case 16 WC 6297.

Having concluded Petitioner failed to prove accident for an alleged March 31, 2015 repetitive trauma claim in case 16 WC 6297, the Arbitrator finds that the issue of causation moot for this claim

c. Petitioner's condition of ill-being as it relates to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296.

At trial, the parties clarified that at issue was whether Petitioner's right shoulder condition was causally related to one or more of her pending workers' compensation claims. Specifically, whether the right shoulder was related to the original November 4, 2013 date of accident (14 WC 9942) as a sequelae or overuse injury, whether the right shoulder was causally related to the March 31, 2015 (16 WC 6297) alleged date of accident as a repetitive trauma injury manifesting itself on this date or whether the right shoulder condition was causally related to the August 11, 2015 (16 WC 6296) alleged date of accident as a repetitive trauma injury manifesting itself on this date. Petitioner alleges that the right shoulder condition was caused as a result of over compensation or overusing the right arm in order to avoid using her left shoulder and also caused from the repetitive nature of her work activities.

A claimant who seeks an award of benefits under a repetitive-trauma theory will be held to the same standard of proof as a claimant seeking benefits for a sudden traumatic injury. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918 (2006). As with any work-related injury, the claimant's employment need only be *a* cause of the claimant's condition of ill-being, it need not be the sole or primary cause. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003). An employee who alleges an injury based upon repetitive trauma must "show that the injury is work-related and not the result of a normal degenerative aging process." *Peoria County Bellwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, (1987); *Glister Mary Lee Corp. v. Indus. Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979 (2001). It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (2005). However, the Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Indus. Comm'n*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177 (1993) citing *Perkins Product Co. v. Indus. Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942) (claimant's injury "was directly connected with the method and manner in which she was required to do her work, and to use her arm in the discharge of her duties"). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case.

Based on the record as a whole, the Arbitrator finds that Petitioner's right shoulder condition is causally related to her August 11, 2015 accident. The Arbitrator is persuaded that Petitioner overused the right shoulder and was exposed to repetitive work activities that caused or contributed to her condition of ill-being. Petitioner described in detail the nature of her job duties, which included tying bands together and reaching at or above shoulder level in order to stack packets. Dr. Giannoulias provided persuasive and compelling testimony regarding the number of times Petitioner would have repeated the task of raising her arm, relying on his review of the video, his review of the written essential functions and physical demands report as well as Petitioner's description of her work.

Specifically, Dr. Giannoulias opined that Petitioner's right shoulder condition likely occurred sometime after January 2015. The Arbitrator notes that Dr. Giannoulias related Petitioner's right shoulder condition to the August 11, 2015 date and no other prior date. Regarding causal connection between Petitioner's job duties at her current condition of ill-being as it relates to the right shoulder, her doctor opined that favoring an arm or avoiding using the other, can cause a rotator cuff tear or aggravate a pre-existing rotator cuff tear it one existed. The doctor explained that having reviewed the essential functions and required physical demand report provided by Respondent, it was still his opinion that even constantly handling bundles of printing materials even if they weigh 1 pound or less is consistent with his opinions, explaining that in this particular case, it was not the weight as much as it is the amount of times one is performing the task and what position the arm is at when performing that task. The doctor further elaborated that Petitioner stands only 5 feet tall and that her arm is at the shoulder level or above a majority of the time that this is occurring and that she was doing that on a constant daily basis. The doctor concluded that this was done approximately 800 times per day. The doctor concluded that it was a significant amount of time with the arm in that position that is repetitively moving in the shoulder or above level that is engaging the rotator cuff. The doctor also reviewed the video provided by Respondent and testified that beginning at minute 1:10 and continuing, he identified that activity as associated with contributing to Petitioner's right shoulder condition. He explained that in the video arm level of that person is constantly going from waist to shoulder to above the shoulder and is occurring 5 to 6 times per minute. The doctor noted that in the case of the woman in the video, she was constantly at the shoulder level and that when she puts it in the box it is going over the shoulder level to rotated in. The doctor went on to calculate that this type of activity was occurring 300 times in one hour and if someone were working seven hours per day doing that constantly, it amounts to over 2,000 times in one day.

Regarding Dr. Carroll's opinion, which was that Petitioner's right shoulder condition was degenerative in nature, the Arbitrator finds the opinion is not supported the preponderance of the evidence and therefore is accorded less weight. Dr. Carroll took a history that right shoulder complaints began or about March 31, 2015. The doctor diagnosed a strain to the right shoulder, AC joint arthritis and rotator cuff tear with impingement. The doctor opined that the strain was related to an alleged work accident but that the arthritis and the rotator cuff tear was not. The doctor based his conclusion on the nature of the general problem, the nature of the alleged activity and the physical findings and what he saw based on her history in treatment and MRI studies, which appeared to be a degenerative rotator cuff tear. The doctor concluded that the strain had essentially reached the equivalent of maximum medical improvement. Regardless of causation, the doctor did opine Petitioner was in need of restrictions.

The doctor issued a supplemental report dated November 8, 2016 after being provided with a video job analysis. Based upon his review of the video, the doctor a pint that his opinions did not change compared to the first report. The doctor viewed the portion of the video showing paper being jogged together, placed into a box at chest level and below by a short individual who is height he did not have. He concluded that he did not believe that this specific activity would aggravate a rotator cuff tear of a degenerative in nature. When asked how forceful and how repetitive does an activity have to be to cause a rotator cuff tear, the doctor responded that there was no exact criteria. Rather you look at the job itself, the position of the arm, the size of the individual and make an assessment.

The Arbitrator finds a key difference in medical opinions offered in that Dr. Carroll did not provide any specific assessment as to the weight of the activity performed, the individual performing the activity, the position of the arm, the size of the individual or Petitioner and the amount of movement spent doing any of the activities in the video. However, Dr. Giannoulias did so, providing specific numbers as to what he believed was sufficiently repetitive and gave Petitioner's height, the estimated weight of the materials and the number of times Petitioner wound have performed certain activities. While Dr. Carroll testified that there are no exact criteria as to how forceful or how repetitive something must be to cause a rotator cuff tear, the Arbitrator assigns more weight to Dr. Giannoulias' assessment as he appears to have evaluated the information provided more thoroughly.

Further, despite Dr. Carroll concluding that Petitioner's condition was a degenerative rotator cuff tear, when asked whether he could tell whether the cuff tear was degenerative versus acute, Dr. Carroll could not tell a time course from that. The doctor testified you can look at the factors that could play a role in developing the problem, including surrounding structures. The Arbitrator finds the doctor's testimony in this regard internally inconsistent. The doctor failed to provide clear and persuasive evidence or testimony on this issue, admitting that there was no way to date a degenerative rotator cuff tear and that he would look to other structures to come to a conclusion. Also of note, he testified he agreed with the radiologists' interpretation of the right shoulder MRI but at no time did the radiologist find a degenerative rotator cuff tear. The Arbitrator is not persuaded that evidence of other surrounding degenerative structures equates to the rotator cuff also being degenerative in nature. The Arbitrator also disagrees, based upon the evidence presented, that Petitioner's work activities did not cause, aggravate, accelerate and or exacerbate any rotator cuff pathology, whether acute or degenerative in nature. Rather the evidence shows that Petitioner engaged in work activities that, given her condition, height, were sufficiently at or above shoulder level and/or sufficiently repetitive in nature as explained by Dr. Giannoulias' opinions and testimony. Dr. Carroll admitted that repetitive movement above chest level could aggravate an asymptomatic degenerative rotator cuff tear so that it becomes symptomatic. The doctor further commented that repetitive movement around chest level could cause a rotator cuff tear even if there was not a tear there in the first place. Although answered on a hypothetical basis, the Arbitrator notes that the preponderance of the evidence suggests that is exactly what occurred here.

Both doctors and the Arbitrator reviewed the video in question. Px10. The position depicted between 1:10 and 2:43 on the video clearly shows a woman loading packets of paper into a box; as she is doing this, she lifts a bundle of papers above at or above her chest and shoulder and into the machine that wraps them. She then is observed taking the bundled paper at or above chest and shoulder level and reaching into the cardboard box to place them in there. This was activity identified by Petitioner has being performed using the right arm on a repetitive basis. The Arbitrator does not find the video inconsistent with what Petitioner described. Accordingly, the Arbitrator finds that Petitioner's work during the repetitive work period did require her to lift the packets above chest and shoulder level. As a result, this activity caused the present condition of ill-being in Petitioner's right shoulder. This is entirely consistent with Dr. Carroll's opinions that work requiring lifting higher than chest level could cause a rotator cuff tear, or aggravate a pre-existing degenerative tear.

Based on the foregoing, the Arbitrator concludes that Petitioner has proven that her right shoulder condition, under a repetitive trauma theory, is causally related to her August 11, 2015 date of injury.

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

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. At trial, Petitioner claimed the following bills as unpaid as part of Respondent's liability for all three claims:

Health Benefits Physicians	12/14/15-12/14/15	$248.52
G&T Orthopedics	12/8/15-8/16/16	$2,170.00
Flexeon Rehab	4/16/14-8/8/14	$14,270.00
Western Touhy Anest.	4/1/14	$1,625.00
Herron Med. Svcs.	4/9/14	$570.00

a. Whether medical charges were reasonable and necessary for 14 WC 9942?

As noted above, Petitioner submitted and alleged various bills as unpaid and as part of Respondent's liability in some or all of the claims. Ax1, Px12. Having found Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner's treatment from August 11, 2015 to the present as submitted is related to the August 2015 injury in case 16 WC 6296. The Arbitrator further concludes that all prior medical treatment before August 11, 2015 is causally related to Petitioner's original injury on November 2013.

In reviewing the records, Petitioner utilized her first choice of provider when she opted to see her primary care physician, Dr. Ravi Barnabas, at Herron Medical Center on February 27, 2014. Dr. Barnabas referred her to Dr. Giannoulias, who she first saw on March 4, 2014. Dr. Giannoulias performed surgery on her left shoulder at Lakeshore Surgery Center, and referred her to Flexeon Rehabilitation for post-operative physical therapy. Dr. Giannoulias also referred her to Dr. James Keller-Shabrokh for an EMG on March 16, 2015, and to Dr. Jay Kiokemeister for a pain management evaluation on December 14, 2015. The Arbitrator finds all of this treatment to be necessary in order to treat Petitioner for her left shoulder and right shoulder claims. Petitioner underwent a reasonable course of treatment for each shoulder.

As to Flexeon Rehabilitation, the Arbitrator finds Respondent liable for the $750.00 in unpaid medical charges for case 14 WC 9942. Px6, Px12.

As to Western Touhy Anesthesia, the Arbitrator finds Respondent liable for the $564.83 in unpaid medical charges for case 14 WC 9942. Px5, Px12.

As to Herron Medical Services, the Arbitrator finds Respondent liable for the $570.00 in unpaid medical charges for case 14 WC 9942. Px2, Px12.

In summary, as to case **14 WC 9942**, Respondent shall pay the outstanding medical charges totaling **$1,884.83**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

b. Whether medical charges were reasonable and necessary for 16 WC 6297?

Having found no accident in case 16 WC 6297, the Arbitrator finds the issue of liability for unpaid medical bills moot as to this claim.

c. Whether medical charges were reasonable and necessary for 16 WC 6296?

Having found accident and causal connection as to Petitioner's right shoulder for 16 WC 6296 under a theory of repetitive trauma, the Arbitrator finds that certain medical services were reasonable and necessary and that Respondent has not yet paid all such appropriate charges.

Having found Petitioner's current condition of ill-being with respect to the right shoulder is causally related to her August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner's treatment from August 11, 2015 to the present as submitted is related to the August 2015 injury in case 16 WC 6296. The Arbitrator further concludes that all prior medical treatment before August 11, 2015 is causally related to Petitioner's original injury on November 2013.

In reviewing the records, Petitioner utilized her first choice of provider when she opted to see her primary care physician, Dr. Ravi Barnabas, at Herron Medical Center on February 27, 2014. Dr. Barnabas referred her to Dr. Giannoulias, who she first saw on March 4, 2014. Dr. Giannoulias performed surgery on her left shoulder at Lakeshore Surgery Center, and referred her to Flexeon Rehabilitation for post-operative physical therapy. Dr. Giannoulias also referred her to Dr. James Keller-Shabrokh for an EMG on March 16, 2015, and to Dr. Jay Kiokemeister for a pain management evaluation on December 14, 2015. The Arbitrator finds all of this treatment to be necessary in order to treat Petitioner for her left shoulder and right shoulder claims. Petitioner underwent a reasonable course of treatment for each shoulder.

As to Health Benefits Physicians, the Arbitrator finds Respondent liable for the $248.52 in unpaid medical charges for case 16 WC 6296. Px8, Px12.

As to G&T Orthopedics, the Arbitrator finds Respondent liable for the $2,170.00 in unpaid medical charges for case 16 WC 6296. Px4, Px12.

In summary, as to case **16 WC 6296**, Respondent shall pay the outstanding medical charges totaling **$2,418.52**, subject to Sections 8(a) and 8.2. Respondent shall be given a credit for medical benefits that have been paid against this specific award, 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.

ISSUE (K) Is Petitioner entitled to any prospective medical care?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein.

a. Prospective medical treatment for 14 WC 9942

Having found Petitioner's right shoulder condition of ill-being is causally related to the August 11, 2015 work accident in case 16 WC 6296 and not to the 14 WC 9942 case, the Arbitrator finds no prospective medical treatment is awarded under 14 WC 9942.

b. Prospective medical treatment for 16 WC 6297

Having found no accident in 16 WC 6297, the Arbitrator finds the issue of prospective medical treatment moot for this claim.

c. Prospective medical treatment for 16 WC 6296

Having found Petitioner's right shoulder condition of ill-being is causally related to the August 11, 2015 work accident in case 16 WC 6296, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that she is entitled to further prospective medical treatment. The record established that Dr. Giannoulias has recommended a right shoulder surgery and that he has opined that the need for the right shoulder surgery was the result of the repetitive use of same in the workplace, which he opined became apparent on August 11, 2015. Furthermore, both Dr. Giannoulias and Dr. Carroll credibly testified that a right shoulder rotator cuff repair was reasonable and necessary treatment to relieve Petitioner from the effects of her right shoulder condition. As to 16 WC 6296, Respondent shall pay for and authorize the treatment recommendations as outlined by Dr. Giannoulias, including any and all incidental care thereto.

ISSUE (L) What temporary benefits are in dispute?

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. The Arbitrator, having found that Petitioner's medical condition and the restrictions are causally connected to her accident, awards TTD for the periods:

a. TTD for the November 4, 2013 accident for 14 WC 9942

Petitioner alleged TTD from 3/4/14 through 7/28/14 representing 21 weeks. Ax1. Respondent disputed liability for same. However, the record shows that during this time, Petitioner was treating for the left shoulder, which was not disputed in this claim. Only the issue of whether the right shoulder was causally related was disputed. Petitioner testified that, from the time of her initial accident on November 4, 2013 through the time when Dr. Giannoulias first removed her from work on March 4, 2014, she worked an accommodated position with Respondent. She remained off work from March 4, 2014 through the time Dr. Giannoulias released her back to work with restrictions following the left shoulder surgery on July 29, 2014. Therefore, as to case **14 WC 9942**, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **21 weeks**, commencing **3/4/14** through **7/28/14**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of **$10,393.46** for temporary total disability benefits that have been paid.

Petitioner also alleges TTD from March 5, 2015 through April 8, 2015. However, Petitioner failed to lodge this time period into dispute on Ax1 and therefore the Arbitrator declines to make any award under 14 WC 9942.

b. TTD for the March 31, 2015 alleged accident for 16 WC 6297

Having found no accident in 16 WC 6297, the Arbitrator finds the issue of TTD moot for this claim.

c. TTD for the August 11, 2015 accident for 16 WC 6296

The Arbitrator incorporates the foregoing findings of fact and conclusions of law as though fully set forth herein. As noted before, Petitioner returned to light duty work until Dr. Giannoulias again removed her from work on March 3, 2015. She remained off work until her March 31, 2015 Dr. Giannoulias visit when he permitted her to return to work with restrictions beginning April 9, 2015. She returned to work light duty on April 9, 2015, and continued to work light duty until she was again removed from work beginning October 7, 2015. She again remained off work until Dr. Giannoulias released her to work with restrictions on October 20, 2015. She again returned to work until Dr. Giannoulias removed her from work on December 8, 2015. Since December 8, 2015, Petitioner has not returned to work for Respondent or any other employer, nor has Dr. Giannoulias released her to return to work. As a result, she has been removed from work through the date of trial: January 19, 2018. Petitioner's unrebutted testimony regarding the times periods she was removed from work is further corroborated by the medical records.

Regarding the period 3/3/15 through 4/8/15, the Arbitrator declines to award TTD during this period as it predates the August 11, 2015 accident.

Regarding the period 10/7/15 through 10/19/15 and 12/8/15 through 1/19/18, the Arbitrator finds that such period is related to the August 11, 2015 work accident. Dr. Giannoulias testified that Petitioner was kept off work as of August 16, 2016 due to the pending recommended arthroscopic right shoulder surgery. The doctor testified that he kept her off work at that time due to the recommended surgical repair to the right shoulder. Therefore, as to case 16 WC 6296, Respondent shall pay Petitioner temporary total disability benefits of **$286.00/week** for **108-1/7th weeks**, commencing **10/7/15** through **10/19/15** and from **12/8/15** through **1/19/18**, as provided in Section 8(b) of the Act.

Signature of Arbitrator

4/4/2018
Date

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ILLINOIS WORKERS' COMPENSATION COMMISSION,
INSURANCE COMPLIANCE DEPARTMENT,

Petitioner,

19IWCC0664

vs.

No: 18 WC 28003
14 INC 106

MAREK KOWALKOWSKI a/k/a
MARK KOWALKOWSKI,
INDIVIDUALLY AND AS PRESIDENT OF
KOWALKOWSKI GROUP, INC.,
A DISSOLVED CORPORATION,

Respondents

DECISION AND OPINION ON PETITION FOR
FINES DUE TO INSURANCE NON-COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Department, brings this action, by and through the Office of the Illinois Attorney General, against the above captioned Respondent, alleging violation of Section 4(a) of the Illinois Workers' Compensation Act. Proper and timely notice was provided to Respondent and a hearing was held before Commissioner Charles DeVriendt in Chicago, Illinois on March 22, 2018. A record was made. No one appeared on behalf of Respondents. Mark Kowalkowski was served with timely and proper notice. (PX 1)

Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance coverage from July 20, 2005 through September 16, 2005 and from September 18, 2006 to July 1, 2014 in violation of Section 4(a) of the Illinois Workers' Compensation Act. Petitioner seeks the maximum fine allowed under the act, $500.00 per day for each of the 2,901 days Mark Kowalkowski did business and failed to provide coverage for its employees, in addition to the $7168.83 paid to Mark Kowalkowski's injured employee through the Injured Workers' Benefit fund. Petitioner seeks a total fine of $1,457,668.83.

The Commission notes at the outset that on August 4, 2014, Respondent, after proper and timely notice, was found to be in default and found to have knowingly and willfully failed to insure their liability to pay compensation in accordance with Section 4(a) of the Act.

The Workers' Compensation Commission Insurance Compliance Department Notice of Non-Compliance and Notice of Insurance Compliance Hearing states that Mark Kowalkowski was not in compliance with the requirements of Section 4(a) of the Act from July 20, 2005 through April 17, 2014. (Px8). After considering the entire record, the Commission finds that Respondent knowingly and willfully violated Section 4(a) of the Act and Section 7100.100 of the Rules Governing Practice before the Illinois Workers' Compensation Commission from July 20, 2005 to September 16, 2005, from September 18, 2006 to July 1, 2014 and any other periods that the employer operated in violation of the Act, as applicable. The Commission finds, after reasonable notice and hearing, Respondent knowingly and willfully failed or refused to comply with the provisions of Section 4(a) of the Act and 7100.100(b) of the Rules Governing Practice before the Illinois Workers' Compensation Commission. The Commission assesses a civil penalty under Section 4 of the Act in the sum of $1,457,668.83 against Respondents for the reasons set forth below:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On March 19, 2014, the case of Wojeciech Cudzich v. Kowalkowski Construction Group, Inc. and Injured Worker's Benefit Fund ("IWBF"), case number 09 WC 34493, was heard in arbitration before the Illinois Workers' Compensation Commission. (PX 2) Petitioner Cudzich testified that he worked for Kowalkowski as a laborer. Petitioner was hurt at a work site when a wheel-barrow tire exploded as he was inflating it with a powered air pump. Petitioner testified that Kowalkowski owned and oversaw everything related to his work with Kowalkowski Construction Group. (PX 2 at 21)

2. The Arbitrator found an employment relationship existed between the Petitioner and Respondent-Kowalkowski with Mark Kowalkowski identified as the owner and manager. (PX 3)

3. The Arbitrator awarded Petitioner 10% loss of use of the eye under section 8(e) of the Illinois Worker's Compensation Act. (PX 3)

4. The Petitioner appealed the decision. The Commission affirmed the findings of the Arbitrator and adjusted the Petitioner average weekly wage from $500.00 to $600.00. (PX 3, See decision for 15 IWCC 0456)

5. Investigator Don Johnson of the Illinois Worker's Compensation Commission's Insurance Compliance Division testified that his agency collects fines for the Injured Worker's Benefit Fund and that the Fund paid $7,168.43 to Petitioner Cudzich pursuant to the Commission's award. (PX 4)

6. Investigator Johnson further testified that after the award, the Insurance Compliance Division began investigations into Mark Kowalkowski and Kowalkowski Construction Group for a violation of 820 ILCS 305/4(a).

7. The Insurance Compliance Division sought the certification of the National Center for Compensation Insurance ("NCCI") to determine whether the Respondent had any workers'

compensation policy of insurance. The returned certification from NCCI states that their records did not show proof of workers' compensation insurance for the period from 7/20/05 to 9/16/05 and from 9/18/06 to 7/1/14 for Marek Kowalkowski, Mark Kowalkowski, Kowalkowski Group Inc., Kowalkowski Construction, or Kowalkowski Construction Group, Inc. (PX 5)

8. The Insurance Compliance division also requested a search with the Illinois Workers' Compensation Commission, Office of Self-Insurance Administration. A certificate from Maria Sarli-Dehlin states that no certificate of approval to self-insure was issued by the Illinois Worker's Compensation Commission. (PX 6)

9. Respondent was notified of the hearing on this matter held on March 22, 2018 by certified mail. (PX 1) Petitioner's exhibit 1 shows that Investigator Geoffrey C. Gibbs of the Attorney General of Illinois Police successfully provided effective substitute service of the hearing date to Respondent's listed address as indicated by the Illinois Secretary of State corporate agent report included in Petitioner's exhibit 1.

The Commission can, through this case, deter other businesses from disregarding the insurance laws of this State by exacting a severe penalty commensurate with the conduct of Mark Kowalkowski. For the forgoing reasons, and after considering the entire record, the Commission finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act and was an employer during the periods of non-compliance. The Commission finds that Respondent knowingly and willfully failed to comply with the requirements of Section 4(a) of the Act and shall be assessed penalties under Section 4(d) of the Act. The Commission finds Respondents knowingly and willfully were in non-compliance with Section 4 of the Act for a period of 2,901 days and shall pay a penalty of $1,450,500.00 under Section 4 of the Act (2,901 days x $500 per day). Additionally, the Commission finds Respondent liable for $7,168.34 paid by the Injured Workers' Benefit fund to Respondent's injured employee as ordered by the Illinois Workers' Compensation Commission in case 15 IWCC 0456.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Mark Kowalkowski, pay to the Illinois Workers' Compensation Commission the sum of $1,457,668.83 pursuant to Section 4(d) of the Act.

Bond for the removal of this case 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: DEC 9 - 2019

Maria Elena Portela

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

R: 3/22/18
49

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ILLINOIS WORKERS' COMPENSATION COMMISSION,
INSURANCE COMPLIANCE DEPARTMENT,

Petitioner,

19IWCC0665

vs.

No: 18 WC 27964
12 INC 558

MITCHELL MORTAZA, INDIVIDUALLY
AND PRESIDENT OF
LINGERIE FOOTBALL LEAGUE LLC
a/k/a LEGENDS FOOTBALL LEAGUE,
d/b/a CHICAGO BLISS

Respondents

DECISION AND OPINION ON PETITION FOR
FINES DUE TO INSURANCE NON-COMPLIANCE

Petitioner, the Illinois Workers' Compensation Commission, Insurance Compliance Department, brings this action, by and through the Office of the Illinois Attorney General, against the above captioned Respondents, alleging violation of Section 4(a) of the Illinois Workers' Compensation Act. Proper and timely notice was provided to Respondents and a hearing was held before Commissioner Charles DeVriendt in Chicago, Illinois on November 7, 2017, and a record was made. No one appeared on behalf of Respondents. Mitchell Mortaza was served with timely and proper notice.

Petitioner alleges that Respondent knowingly and willfully lacked workers' compensation insurance coverage from July 20, 2005 through December 8, 2014 in violation of Section 4(a) of the Illinois Workers' Compensation Act. Petitioner seeks the maximum fine allowed under the act, $500.00 per day for each of the 3,428 days Mitchell Mortaza did business and failed to provide coverage for its employees, in addition to the amount paid to Mr. Mortaza's injured employee through the Injured Workers' Benefit Fund which amounts to $38,100.65. Petitioner seeks a total fine of $1,752,100.00.

This Commission notes at the outset that on January 27, 2016 Respondents, after proper and timely notice, were found to be in default and found to have knowingly and willfully failed to insure their liability to pay compensation in accordance with Section 4(a) of the Act.

19IWCC0665

The Workers' Compensation Commission Insurance Compliance Department Notice of Non-Compliance and Notice of Insurance Compliance Hearing states that Mitchell Mortaza was not in compliance with the requirements of Section 4(a) of the act from July 20, 2005 through December 8, 2014. After considering the entire record, the Commission finds that Respondent knowingly and willfully violated Section 4(a) of the Act and Section 7100.100 of the Rules Governing Practice before the Illinois Workers' Compensation Commission, from July 20, 2005 to December 8, 2014. The Commission finds, after reasonable notice and hearing, Respondents knowingly and willfully failed or refused to comply with the provisions of Section 4(a) of the Act and 7100.100(b) of the Rules Governing Practice before the Illinois Workers' Compensation Commission. The Commission assesses a civil penalty under Section 4 of the Act in the sum of $1,752,100.65 against Respondents for the reasons set forth below:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On June 2, 2014, the case of Kelli Lebau v. Lingerie Football League and Injured Worker's Benefit Fund ("IWBF"), case number 11 WC 47940, was heard at arbitration before the Illinois Workers' Compensation Commission. (PX 3) Petitioner Leabu testified that she worked for the Lingerie Football league as a cornerback. Petitioner was hurt in a practice and injured her knee. Petitioner claimed she was paid $300.00 dollars per week and that she reported her injury to coach Matt Sinclair. Petitioner stated that she reported the injury via an email to Heather Theisen. Heather Theisen was described as Mitchell Mortaz's fiancée.
2. Petitioner testified that Mitchell Mortaza owned and oversaw everything related to the Lingerie Football League. (PX 3 at 42)
3. The Arbitrator found an employment relationship existed between the Petitioner and the Respondent Lingerie Football League with Mitchell Mortaza identified as the owner and manager.
4. The Arbitrator awarded Petitioner 40% loss of use of the person as a whole under section 8(d)(2) of the Illinois Workers' Compensation Act. (PX 4)
5. The Injured Workers' Benefit Fund appealed the decision. The Commission affirmed the findings of the Arbitrator but reduced the award from 40% loss of use of the person as a whole to 30% loss of use of the person as a whole. (PX 5, See decision for 15 IWCC 0428)
6. Investigator Don Johnson of the Illinois Workers' Compensation Commission's Insurance Compliance Division testified that his agency collects fines for the Injured Workers' Benefit Fund and that the Fund paid $38,100.65 to Petitioner Lebau pursuant to the Commission's award. (Petitioner's Exhibit 6)
7. Investigator Johnson further testified that after the award, the Insurance Compliance Division started investigations into Mitchell Mortaza and Lingerie Football League for a violation of 820 ILCS 305/3, 305/4(a) and 305/4(d).
8. The Insurance Compliance Division sought the certification of the National Center for Compensation Insurance ("NCCI") to determine whether the Respondent had any workers' compensation policy of insurance. The returned certification from NCCI states that their records did not show proof of workers' compensation insurance for the period from 7/20/05 to 12/8/14 for Mitchell S. Mortaza, Legends Football League, Lingerie Football League, and Chicago Bliss Football Club. (PX 7)
9. The Insurance Compliance division also requested a search with the Illinois Workers' Compensation Commission, Office of Self-Insurance Administration. A certificate from Maria Sarli-Dehlin states that no certificate of approval to self-insure was issued by the Illinois Worker's Compensation Commission. (PX8)

19IWCC0665

10. Respondent was notified of the hearing on this matter held on November 7, 2017 by certified mail. Petitioner's exhibits 1 and 2 show that Special Agent Daniel Torres of the California Department of Justice successfully served notice of a prior hearing date to Respondent-Employer's address as indicated by the California Department of Motor Vehicles. Respondent did not appear and the case was proved up by Petitioner. (Petitioner's Exhibit 12). Petitioner sent Respondent notice of another hearing to re-open proofs that was to be held on January 19, 2018. (Id.) Again, Respondent did not appear. On January 19, 2018, Commissioner DeVriendt re-opened proofs and admitted into evidence certified return receipts from the USPS to show that Petitioner received notice for both the original November 7, 2017 and the subsequent January 19, 2018 hearings. (Petitioner's Exhibit 12)

The Commission can, through this case, deter other businesses from disregarding the insurance laws of this State by exacting a severe penalty commensurate with the conduct of Mitchell Mortaza. For the forgoing reasons, and after considering the entire record, the Commission finds that Respondent was operating under and subject to the Illinois Workers' Compensation Act under Section 3 and was an employer during the periods of non-compliance. The Commission finds that Respondents have knowingly and willfully failed to comply with the requirements of Section 4(a) of the Act and shall be assessed penalties under Section 4(d) of the Act. The Commission finds Respondents knowingly and willfully were in non-compliance with Section 4 of the Act for a period of 3,428 days and shall pay a penalty of $1,714,000.00 (3,428 days x $500.00 per day) under Section 4 of the Act. Additionally, the Commission finds Respondent liable for $38,100.65 paid by the Injured Workers' Benefit fund to Respondent's injured employee as ordered by the Illinois Workers' Compensation Commission in case 15 IWCC 0428.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent Mitchell Mortaza, pay to the Illinois Workers' Compensation Commission the sum of $1,752,100.65 pursuant to Section 4(d) of the Act.

Bond for the removal of this case 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: DEC 9 - 2019

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

R: 1/19/18
49

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)
☐ Modify	☐ PTD/Fatal denied
	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Roland Rheude,

Petitioner,

vs.

19IWCC0666

NO: 14 WC 42590

F.H. Paschen,

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, causation, medical expenses and prospective medical, temporary total disability, permanent partial disability, temporary total disability 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 3, 2017 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.

19IWCC0666

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: DEC 9 - 2019
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MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

RHEUDE, ROLAND
Employee/Petitioner

Case# **14WC042590**

F H PASCHEN
Employer/Respondent

19IWCC0666

On 7/3/2017, 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 1.11% 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 CHTD
CASEY VANWINKLE
501 RUSHING DR
HERRIN, IL 62948

2674 BRADY CONNOLLY & MASUDA PC
NEIL MOOKERJEE
211 LANDMARK DR SUITE C-2
NORMAL, IL 61761

19IWCC0666

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

ROLAND RHEUDE
Employee/Petitioner

v.

F.H. PASCHEN
Employer/Respondent

Case # **14** WC **42590**

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 **Paul Cellini**, Arbitrator of the Commission, in the city of **Herrin**, on **March 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 **Evidentiary finding**

FINDINGS

On **November 29, 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 ***was*** causally related to the accident, but the causal connection of the Petitioner's groin/hernia injuries ended as of March 3, 2015, and the causal connection of his lumbar injury ended as of June 5, 2015.

In the year preceding the injury, Petitioner earned **$66,560.06**; the average weekly wage was **$1,280.00**.

On the date of accident, Petitioner was **40** years of age, ***single*** 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 **$24,885.62** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$24,885.62**.

Respondent is entitled to a credit of **$28,454.49** for payment of medical expenses under Sections 8(a) and 8.2 of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained an accident which arose out of and in the course of his employment on 11/29/14. The Petitioner also proved by a preponderance of the evidence that his hernia and lumbar conditions were causally related to the 11/29/14. The preponderance of the evidence also indicates that the causal relationship of the hernia condition ended as of 3/3/15, and the causal relationship of the lumbar condition ended as of 6/5/15.

Respondent shall pay Petitioner temporary total disability benefits of **$853.33** per week for **20-2/7 weeks**, commencing **1/15/15 through 6/5/15**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$24,885.62** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services contained in Petitioner's Exhibit 11, as provided in Sections 8(a) and 8.2 of the Act, which were incurred by Petitioner through 3/3/15 with regard to the hernia/groin injury, and which were incurred through 6/5/15 with regard to the lumbar spine. The Respondent is not liable for any medical expenses incurred thereafter.

Respondent shall be given a credit of **$28,454.49** 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 pay Petitioner permanent partial disability benefits of **$735.37** per week, the maximum statutory rate, for **37.5 weeks**, because the injuries sustained caused the **7.5% loss 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 **June 5, 2015** through **March 17, 2017**, 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

May 15, 2017
Date

JUL 3 - 2017

STATEMENT OF FACTS

A union laborer since 1998, Petitioner testified that he was working for Respondent as a foreman on a dam/bridge building crew, and performing work inside of a cotterdam. In the process of this, a mini-excavator, operated by Jason Dwyer, was in the hole. On 11/29/14, around 1:30/1:45 PM, they had gotten down to a certain spot, and a 3" pump was resting on the smooth side of the excavator bucket. Petitioner went to untie it to get it into the water, and had the rope attached to it wrapped up in his hand. The pump slipped off the bucket, Petitioner was holding the rope with both hands, and it went to "suck me down". Petitioner testified that the pump was very heavy, with several inches of attached pipe. Petitioner testified he was screaming to Dwyer, who was below him further in the hole, and trying to hold the pump while trying to stop himself from falling another 15' down. Dwyer finally got back underneath the pump, and Petitioner was able to tie it off. He had some words with Dwyer about it, indicating, with profanity, that he was hurt. Petitioner testified that he felt immediate groin pain, a little burning sensation, and felt "something went wrong" when the incident with the pump occurred. Petitioner testified that it was close to the end of his shift, and since he was hurting, they finished up work for the day and he went home. He didn't seek treatment on 11/29/14 and went straight home, testifying "I was preparing to get married" on 12/13/15.

Petitioner testified that he believed the injury occurred on a Saturday, that he did not work on Sunday, and got rained out on Monday before returning to work on Tuesday, 12/2/14. That morning, there was a safety meeting, and a sheet was passed around which is used to report "if anybody had been injured that day or the previous day or, you know, the previous couple days." The sheet basically was a questionnaire asking if you are injured or saw anyone that was, and you could check yes or no.

At the safety meeting, Petitioner and the superintendent, Dustin Vibbert, got into a verbal disagreement over something unrelated to the Petitioner's alleged injury. Petitioner noting the two of them have "butted heads" in the past, the argument got out of hand, and Vibbert fired Petitioner for talking out of line to him. Petitioner contacted the union Business Agent (BA), who came to the site and spoke to Petitioner and Vibbert. Jimmy O'Donnell, Dustin's boss, also came to the scene. Petitioner testified O'Donnell told him he wasn't fired, that he would be laid off so an unemployment benefit claim wouldn't be blocked, and advised Petitioner to call a different Respondent foreman up north to try to get work. Petitioner also testified that he didn't have a drivers' license, so the BA came to pick him up. Petitioner testified that he was planning to report his injury on 12/2/14 before he got into the argument with Vibbert, and believed he would likely be sent to the company medical clinic. Petitioner agreed that Respondent usually had safety meetings every morning, and a sheet is available there to indicate if there was any injury the prior shift, or if anyone saw anyone get injured, and agreed he didn't indicate his injury on the sheet on 12/2/14.

Petitioner agreed he'd had prior disagreements with Dustin Vibbert, noting he has been a laborer's union steward, and Vibbert was a carpenter.

The operator of the mini-excavator/track hoe on 11/29/14, Jason Dwyer, testified on behalf of the Petitioner. He testified that they were digging mud out of the river at the dam. He was down low digging around the pumps, which had to be raised up to dig and then lowered back down, and Petitioner was about 30' to 40' above him. While he was operating, he heard the Petitioner holler out and scream. Dwyer shut his machine off and asked him what was going on, and Petitioner said that he "f****d himself up", saying something to the effect that he "felt something go." Dwyer was lifted out of the cofferdam with a crane, and that's when he found out Petitioner was complaining of "his back and guts". Petitioner was bent over and saying he wasn't messing with that anymore. Dwyer believed this was towards the end of the shift because they were in a hurry to get the pumps set before the weekend. Because he was in the bottom of the cofferdam, Dwyer didn't actually see Petitioner holding the rope, but did see the pump going up and down.

Dwyer testified that he didn't indicate on the report sheet that he witnessed an injury because he thought Petitioner had just pulled a muscle or something, and "that happens." At some point after that, a company person came out and asked Dwyer about what happened, and asked him to complete a statement regarding what occurred on 11/29/14.

Dwyer indicated he is friends with the Petitioner, but they would only see each other at work. They worked together in the fall of 2016 for Southern Asphalt, where Petitioner was "dumping trucks" – this involved signaling the truck to back up, stop, what to do with the bed, and to leave when the truck was empty. That job was full time and lasted approximately two to three months. It was a full time job, including overtime. Dwyer hadn't otherwise seen or worked with Petitioner since 11/29/14. Dwyer testified that the Petitioner called him about 4 to 5 months prior to the hearing indicating the Respondent was saying he wasn't hurt on the job and he might need Dwyer to testify that it was the Petitioner pulling the pump and that he did get hurt.

On cross exam, Dwyer testified that at the time of the incident, Petitioner said he pulled something in his back and groin. He reviewed his 12/23/14 statement (Rx9), which he agreed he completed and signed. He agreed that they continued to work for a while after the incident, so he didn't find out what happened to Petitioner until later that day. He agreed the statement indicated Petitioner said he pulled "something" trying to pull the pump, but isn't specific as to whether the Petitioner hurt his back or groin. The Petitioner was angry because he had to deal with the pumps when it should have been an operator's job, not a laborer's, but there were no other operators

present to help. Dwyer indicated he has seen "regular worksite arguments" between Petitioner and Dustin Vibbert.

The 12/23/14 witness statement of Jason Dwyer states: "I was digging around the water pumps with the mini-ex. Roland was trying to move a 3" pump up and out of the way for me. He through (sic) a fit, saying he was going to mess with the pumps no more. I didn't know why he was in such a bad mode (sic) until after I got out from digging later that day. He said 'I'm not messing with those pumps no more less (sic) I have some help. I pulled something trying to pull that 3" pump up." (Rx9).

Respondent's general superintendent, Jimmy O'Donnell was the project manager of the Petitioner's jobsite in November 2014. This involved handling scheduling, training, terminations and general operations. He would go over the safety training sheets with all employees, and encouraged them to report injuries. If an injury is reported, he would first touch base with the injured employee's supervisor, then investigate, including taking witness statements and photos, and getting as much information as possible relevant to the injury. Since Petitioner was a foreman, he would report an injury to superintendent Vibbert, general foreman Rich Patrick, or to O'Donnell himself.

Respondent's general safety rules included the reporting of any injury, including minor injuries, and Petitioner signed off on a copy of these on 1/2/14. (Rx6).

Mr. O'Donnell testified that Petitioner was a good employee – knowledgeable, punctual, great work ethic - but he also had issues with his temper. He trusted Petitioner's opinions regarding work, and as a union rep, Petitioner would assist with recruiting workers. However, when Petitioner would identify work and/or union-related issues, he would have an outburst about it rather being professional and discussing it with his supervisor, and this occurred multiple times. In the spring of 2014, on a job the Petitioner saw a Chicago finisher shoveling concrete, had an outburst and pulled workers off the jobsite before shift end. It was a public job that forebade work stoppage. The Respondent notified the union about Petitioner having prior outbursts, and that he now shut a job down, and that his addressing problems unprofessionally in the future would not be tolerated, after which the Petitioner met with the union.

O'Donnell was out of town on 11/29/14. The Petitioner had his cell phone number and they had previously discussed work issues by phone, both during and after work hours. Petitioner agreed he had O'Donnell's cell phone number and had spoken to him by phone prior to the accident. At no time between 11/29/14 and 12/2/14 did anyone, including Petitioner, report an 11/29/14 work injury to him. On 12/2/14, O'Donnell got a call from Vibbert indicating that he let the Petitioner go due to a big argument that occurred during a morning Job Hazard Analysis meeting, and that the BA was going to be at the site, so O'Donnell went out there as well. When he got there, Petitioner was pacing up and down the access road, but he didn't appear to be walking abnormally or in pain. He let Petitioner know he was a good worker and he would be laid off, not fired, and to hold tight and hopefully things would blow over and Dustin would take him back. Petitioner did not report any injury to himself at that time, but did report that an operator, Nikki Gibbs, had twisted her ankle the prior Friday or Saturday.

The "Job Hazard Analysis" is a form where you list the task, the hazard, and the planned preventative measures, and everyone signs it. There is also a column which asks if the worker was involved in or witnessed any injury on the prior shift. On 12/2/14, neither Petitioner nor any other employee indicated that they had knowledge of an accident/injury. Petitioner testified he didn't indicate his injury on the form because he had already been fired by Dustin, and he himself was the crew foreman.

Between 12/2 and 12/11/14, there was at least phone call with Petitioner to let him know the check he received was short, and he did not report a work injury at that time. On 12/11/14, Petitioner came in to get his check shortage and indicated he had other opportunities to work, including Barry Concrete, that he hadn't pursued because he was hoping to return to work with Respondent. O'Donnell told him that it was not going to happen. The Petitioner testified that he did not recall telling O'Donnell that he was receiving offers from other contractors and he was expecting to be rehired by Respondent's Patrick, and that he didn't ask at that time if Respondent was going to hire him back.

It was after this that the Petitioner then brought up injuring his groin the prior Saturday shift while handling the pumps. He didn't say anything about having had medical treatment. O'Donnell didn't believe he told Petitioner the Respondent was going to fight his claim, but he didn't believe him and felt like it was a strong arm move by Petitioner to get back to work, noting his was a reasonable assumption given Petitioner's prior use of such tactics when disputes occurred. O'Donnell didn't report this to his superiors until 7 to 10 days thereafter, and he did his investigation. He noted Petitioner hadn't been dishonest with him in the past, and agreed that workers with more minor injuries often don't report them on the Job Hazard Analysis forms. Petitioner agreed he had previously reviewed and signed off on Respondent's safety documents (Rx6), and underwent training, and he was aware he was to report every injury right away, even if minor.

Asked how he felt after the injury prior to returning to work on 12/2/14, Petitioner testified: "I was extremely tender from – I guess I had pulled the right side of a hernia during the time of the pump, and I was tender, you know, I mean, and I -- it was extremely painful. I mean, I didn't have much time to talk to him about it; however, but I was -- I mean, I was in quite a bit of pain of the actual tear of the hernia. My back was -- you know, I was beat up from the whole deal. We were in a big hurry trying to get this job done like usual, you know what I mean, and I was beat down."

Petitioner testified that his work is heavy and that he would have daily aches and pains as a result. On the dam job, he testified he had been working 10-12 hours per day, 6 days per week, but he thinks the 11/29/14 was an 8 hour shift.

Petitioner testified he had been treating with primary care provider Leslie Curry at in-town clinic, Galatia Primary Care, noting he is an "excited" person, and she was prescribing Xanax to calm him down. Petitioner also had a prior heart problem. He had a 12/2/14 visit that had been scheduled three months prior, and when Petitioner saw Curry after leaving the jobsite that day he told her he "had done something", indicating she told him he would need to make a separate appointment because he was only there to refill his medication prescription. He testified he reported being hurt at work and that he was going to find out if the Respondent wanted him to go to their company clinic.

In the 12/2/14 report of Galatia Primary Care, nurse practitioner Leslie Curry indicated the Petitioner's chief complaint as "here for one month f/u since starting Prozac", noting he had missed a cardiology visit. Ms. Curry noted a history of Petitioner seeing Dr. Newell for right shoulder pain management. Review of symptoms was normal and the note stated specifically that there was no abdominal pain. There was no indication of a work injury or accident. (Px1).

Petitioner testified that at some point prior to 12/11/14, Dustin called him and said he would be the better man and apologized. Petitioner testified that he went to pick up his check from Jimmy on 12/11/14, and at that time reported that he had hurt himself. He testified that he didn't see Jimmy document it at that time, and that he told Petitioner he would fight it.

Petitioner followed up at Galatia Primary Care on 12/11/14 and reported: "States he was pulling up a pump at work on 11/29/14 at work when he felt a burn in the RLQ (i.e., right lower quadrant) and states has a bulge in groin area since then. He states that the pain is constant and states that it hurts no matter if he is standing, sitting or laying flat. Today he is having trouble urinating." He reported 10 out of 10 pain, but declined a pain medication prescription. The record indicated that he had abdominal pain in the right inguinal area under "review of systems." However, no low back pain or any other pain was described within the physical examination or the history. He had a history of laproscopic left hernia repair. A large right inguinal hernia was palpated, and easily reduced, and was diagnosed. An abdominal CT scan was prescribed and he was referred to specialist Dr. Joyt. (Px1).

The Petitioner testified that when he went back to Curry on 12/11, he told her what happened and that the main problem was his groin, but that he said he hurt all the way around, including his back. He also testified: "And she had thought that I had seen another doctor for my back, and she basically, I guess, didn't write that down or however." He indicated his right groin was bulging out significantly.

At a 12/16/14 follow up, Petitioner noted he hadn't followed up with a surgeon because he was sure if workers' compensation was going to cover his hernia condition. He had no other musculoskeletal symptoms, and did not mention any low back pain or low back injury. Petitioner was "adamant" that he would go to Herrin hospital for tests, and not HMC. He noted blood in his stool two days prior. The Arbitrator notes that an 8/28/14 note stated that he'd had blood in his stool for a year. He was advised to go to the ER immediately if pain got worse, and otherwise he was scheduled for the CT and a surgical consultation on 1/5/15. (Px1).

At a 12/18/14 visit to SIH / RIC, Petitioner presented for right shoulder pain. He reported the following: "Having severe hernia pain – going to ED. Wanted to keep appointment. Cold making pain worse. Worst first thing in AM. Sleeps ok – heated mattress. Multiple areas of pain." The history did not indicate an injury including the low back. However, under "review of symptoms, musculoskeletal summary," the doctor noted back pain severe in nature exacerbated by walking and bending. Under impression, the doctor noted "Multiple chronic conditions including hernia pain today complicating clinical picture..." The rest of the note did not indicate any other diagnosis, treatment or history of back injury of problems. Petitioner was taking Flexeril and Norco at the time. (Px3). Petitioner testified he was sure he told Dr. Newell about the accident, but couldn't recall with certainty.

An abdominal CT scan was obtained at Herrin Hospital on 12/18/14, which reportedly reflected minor bilateral inguinal hernias, right greater than left, without induration or incarceration. (Px5). It is unclear if the Petitioner had appeared for this CT per it being scheduled, or if it was obtained due to the Petitioner going to the Herrin Hospital ER on this date. The triage report states: "I pulled my back in November and it was terrible and I went to my doctor because I had pain in my groin too, I went to my primary and she referred me to a surgeon and I have the appointment January 5th." The chief complaint section of the subsequent notes states Petitioner complained of right inguinal pain, that he saw his primary care provider and was diagnosed with a hernia and was being set up for CT and referral to a surgeon. Petitioner stated that his pain got much worse that morning. The clinical impression at that time was an inguinal hernia and no further treatment or comments were made regarding the low back at that time. (Px5).

Respondent submitted a "First Report of Injury", dated 12/23/14. (Rx8). This document was signed off on by Respondent risk manager, Nick Bilski. The document indicates the Petitioner, on 12/22/14, reported an 11/29/14 injury. The document also noted Petitioner last worked on 12/1/14, and states: "Injury not reported. Told us 12 days after he was terminated that he had pain in groin." No further detail is indicated. (Rx8).

On 12/30/14, Ms. Curry noted Petitioner was sent by the ER to the surgeon's office, but "for some reason the patient states that he got mad and left without seeing the surgeon (Dr. Brewer)." Petitioner said he stopped taking his blood thinner medication and the blood in his stool resolved. He was taken off work pending 1/5/15 surgical evaluation. Interestingly, despite no mention of left sided complaints, the diagnosis changed from a right inguinal hernia to bilateral inguinal hernias. (Px1).

In his testimony, the Petitioner agreed Curry's 12/11/14 note references a work injury but not back complaints, and that the next note of 12/16/14 didn't reflect back complaints. The Petitioner testified he wasn't positive if he reported back pain at his 12/30/14 visit.

On 1/5/15, Dr. Brewer noted a painful bulge in the right groin with associated burning pain. CT scan indicated a right-sided hernia and a possible hernia on the left. Dr. Brewer noted a prior left inguinal hernia with repair. He was taken off work through the scheduled 1/20/15 hernia surgery by Dr. Brewer. (Px3).

On 1/12/15, Petitioner went to the ER at Ferrell Hospital with complaints of 8 out of 10 low back pain. He reported pulling on a pump on 11/29/14 and that he was barely able to bend. Differential diagnoses were lumbar strain versus spinal stenosis versus herniated disc, and Petitioner was prescribed medication and advised to get an MRI and follow up with NP Curry. (Px2).

On 1/14/15, Curry noted Petitioner was scheduled for hernia surgery. The report stated: "The patient is here with C/O mid to low back pain that he attributes to the work related injury that occurred on 11/29/14 when he was lifting a pump. The pain does not radiate down his leg, he states that is continuous pressure and feels like it needs to be popped. He has no prior HX of a back injury or back pain. He was seen in my office shortly after that due to groin pain. He did not C/O back pain at that time. He was seen in the ER at Ferrell Hospital on 1/12/15 with C/O back pain." The pain did not radiate, but Petitioner reported continuous pressure and that it felt like it needed to be "popped". He reported taking Flexeril and Norco "from an old rx", and that helped his pain. The only abnormal finding on exam was back spasms. Lumbar x-rays showed no acute abnormalities. Lumbar strain was diagnosed. It appears he was referred to Dr. Alexander and for a therapy consult. (Px1 & 5).

As to Curry's 1/14/15 note stating that was the first time that he reported back pain to her, Petitioner testified he had excruciating groin pain, and his back was the least of his worries. He also testified that when Jimmy O'Donnell said Respondent wasn't going to do anything about his alleged injury, he went to see Curry, though he couldn't recall the date.

Petitioner underwent bilateral laproscopic inguinal hernia repairs with mesh implantation with Dr. Brewer on 1/20/15. The right hernia was noted to be bigger than the left, noting he had a prior left-sided hernia repair. He was held off work (Px5).

On 2/6/15, Petitioner reported continuing low back pain to P.A. Curry. He hadn't seen Dr. Alexander because it had been scheduled for the day after his hernia surgery. The pain was from his mid back to his buttocks, without radiating pain, numbness or weakness. Lumbar exam appeared entirely normal. He had been taking Lortab, Percocet and Flexeril, without pain relief. He was again advised to follow up with Dr. Alexander and PT when his hernia surgery recovery allowed. (Px1).

On 1/29/15, Dr. Brewer kept Petitioner off work. On 2/12/15, Dr. Brewer noted Petitioner was doing well with regard to his hernias, and the repairs seemed "solid". Petitioner was released from care as of 3/3/15, and was to follow up after that with NP Curry. His activities were not restricted based on the hernia. (Px3).

At a 3/2/15 follow up with Curry, Petitioner noted ongoing low back pain, which was severe with activity. He also again reported that he had a sudden onset of low back pain at the time of the 11/29/14 work accident. Exam this time noted positive SLR bilaterally. Lumbago was diagnosed, and he was prescribed Tylenol 3 with codeine, and was held off work pending evaluation with Dr. Alexander. (Px1).

Petitioner saw Dr. Alexander at Galatia Primary Care on 3/9/15. He reported picking up a pump at work and had back issues at the same time as a hernia issue. He reported being off work since 11/29, "+/-", and that he was let go after that. He reported chronic low back pain with no radicular symptoms. Exam noted low back tenderness and spasm, with normal neurological exam. The diagnosis was lumbar disc degeneration and herniated disc. Dr. Alexander prescribed lumbar MRI, home exercise, work restrictions and follow up with a physical therapist. (Px1).

The 3/20/15 lumbar MRI reportedly showed a mild lateral L4/5 disc bulge that, combined with minimal spondylosis and facet arthropathy, resulted in foraminal encroachment at L3/4 and L4/5 with mild compression of the L3 and L4 nerve roots. Lateral recess stenosis at these levels resulted in displacement or mild compression of the L4 and L5 nerve roots. Disc dessication at L5/S1 with mild posterior disc protrusion resulted in abutment of the S1 nerve roots within the lateral recess, as well as mild circumferential spinal stenosis. There also was foraminal encroachment with compression of the L5 nerve roots due to facet arthropathy and lateral spondylosis. (Px1).

At a 4/10/15 follow up with Dr. Alexander, Petitioner indicated he was to be examined by Dr. deGrange at the Respondent's request. Exam findings were the same and the MRI was reviewed, though Dr. Alexander did not comment on the MRI and the diagnoses remained the same. He prescribed 6 weeks of PT, after which he may or may not need an epidural and/or work hardening. (Px1).

Petitioner returned to SIH/RIC on 4/20/15 with complaints of right shoulder and low back pain. He reported that he was treating with Dr. deGrange for his back, and was advised to follow up with him. (Px3).

Petitioner saw Dr. deGrange on 4/22/15. He reported injuring his back on 11/29/14: "The patient says that he and a fellow worker were attempting to lift a heavy pump weighing approximately 300 – 400 pounds that was anchored in silt, and as they were lifting this piece of equipment, the coworker lost his grip and all of the weight transferred to Mr. Rheude. As a severe injury he sustained bilateral inguinal hernias eventually undergoing surgery by Dr. Brewer, who performed a bilateral hernia repair surgery, which was extremely painful for the patient. He did, in fact, complain of back pain initially along with severe groin pain and was seen immediately after the injury by Dr. James Alexander....He did undergo some physical therapy at the time without any improvement. Therapy was put on hold until the hernia surgery by Dr. Brewer approximately two months ago now. After the hernia surgery he said as he recovered the back pain became much more noticeable. At this point in time, it has not improved since the time of injury." Petitioner reported previous back strains due to the heavy nature of his job, but no prior serious injury. His back complaints were essentially mechanical at the lumbosacral junction that radiated occasionally into the buttock and legs, but no significant radicular component. Physical exam noted reduced lumbar range of motion and mild spasm, while neurological exam was normal. After reviewing the MRI, Dr. deGrange diagnosed a lumbar strain and degenerative disc disease with stenosis from L3 to S1. He indicated the Petitioner's described mechanism of injury was consistent with a strain superimposed on "a backdrop of established and evolving" degeneration at multiple lumbar levels. He stated: "This was a significant injury, specifically of an axial load with torsional component, more likely than not is responsible for his current symptoms and need for continued treatment and ongoing disability." Petitioner was held off work and referred for PT. (Px4).

On 5/13/15, Dr. deGrange noted Petitioner was making progress in PT until he told the therapist his back needed to be popped, and after it was he had fairly severe pain. He noted he was somewhat loosened up now, and that "his upper back symptoms have improved too." The Arbitrator saw no indication of prior upper back complaints in the medical records. He was continued off work and advised to complete PT. (Px4).

The Petitioner saw Dr. Mirkin at the request of the employer on 6/5/15. He indicated Petitioner was uncooperative through most of the exam and initially refused to answer any questions, and "changed his answers multiple times". The history was as follows:

> "He claims he was injured on 11/29/2014. On that date, he was picking up a pump when he developed pain in his low back and entire body. He tells me he reported this to his employer. He was eventually taken to his doctor where he claims he reported back pain and groin pain. His history is very inconsistent. He tells me that he voiced back pain throughout and tells me he went to the emergency room immediately. I showed him the emergency room report and it was not until 1/12/2015, and he does admit that it is when he went to the emergency room at that point in time, that is the first indication he had low back pain. Mr. Rheude tells me that he has 10/10 back pain." (Rx5)

Dr. Mirkin stated that upon review of the MRI scan, he described it as essentially benign for any neurocompressive lesion. On physical examination, Petitioner complained of pain when he lightly touched his back, compressed his head and distracted his legs, which were all positive Waddell's signs. The Petitioner had no radicular symptoms, and straight leg raise was to 100 degrees bilaterally and did not elicit any back pain nor leg pain. The Petitioner reported that he could not bend, extend, flex or rotate his back, walk on his toes or squat and rise from a squat position. Lumbar x-rays were normal. Dr. Mirkin reviewed the medical records of Petitioner. (Rx5).

Dr. Mirkin believed the Petitioner had severe antisocial personality problems as well as symptom magnification behavior. His history was not consistent with an acute lumbar strain on 11/29/14. Lumbar examination was essentially normal and there were no signs of significant abnormality in the radiographic studies. The history of the work injury from November 29, 2014 was inconsistent. It was further noted that as the Petitioner was walking out, he told the doctor's nurse to "f--- off." He also called the doctor multiple vulgar names. After initially stating he needed help getting dressed, he was able to get dressed on his own and walked out with none of the pain behavior shown on the examination. Dr. Mirkin indicated he was unwilling to examine Petitioner again in the future. (Rx5).

With regard to his visit to Dr. Mirkin, Petitioner testified "it didn't start off well." He testified that when he was called into the room to see Dr. Mirkin, he asked if his wife could come in and was told she couldn't, despite Petitioner having seen another family being allowed to do so. Petitioner testified Dr. Mirkin came in and right away said "you aren't taping or recording this." Petitioner indicated Mirkin said his back was not hurt and "started on me" and "started getting loud with me". The Petitioner agreed he was extremely rude with the doctor, and that he and Mirkin were yelling at each other. He testified that Mirkin never performed a physical exam, and mainly just kept saying how the Petitioner wasn't hurt. He estimated he spent 5 to 10 minutes at most with Dr. Mirkin.

On 6/11/15, Petitioner reported a late May flare up in therapy to Dr. deGrange, but he improved. Dr. deGrange noted the therapist was not certain what was causing Petitioner's hip to remain so tight. Exam findings remained the same. An L4/5 epidural was recommended to "get him beyond where he seems to be stuck, no doubt due to inflammation." Petitioner was released to light duty with no repetitive bending/twisting, intermittent sit/stand/walk and no lifting over 25 pounds. (Px4).

On 7/2/15, Petitioner again went to the Ferrell Hospital ER, this time complaining of generalized joint pain, light-headedness and racing heart. He reported having multiple tick bites in the prior 2 weeks. (Px2).

A 7/7/15 phone note of Dr. deGrange indicates Petitioner called stating he saw the doctor at Respondent's request and "the dr has reported to WC that he went off on the dr. Patient states that he got upset some when the dr told him nothing was wrong with him. Pt states he is waiting to hear about getting his ESI." The office called the workers compensation carrier and was advised that workers compensation was denying further treatment. Petitioner was advised that he would need his private health insurance to cover continued treatment. Petitioner refused to go under his private insurance and was instead contacting his attorney. As such, his next visit scheduled for 7/15/15 was canceled. (Px4).

On 8/3/15, Petitioner saw Dr. Ferrell at Galatia Primary Care seeking a referral to Dr. Newell for a lumbar epidural on referral from Dr. DeGrange, noting workers compensation had "stopped". (Px1).

Petitioner's attorney referred him for examination with neurosurgeon Dr. Colle. Petitioner agreed that no doctor has prescribed lumbar surgery. Dr. Colle prescribed a functional capacity evaluation.

Petitioner underwent a 7/19/16 functional capacity evaluation (FCE) which indicated the Petitioner was limited to the medium physical demand level (occasional lifting up to 50 pounds, frequent lifting up to 25 pounds, and constant lifting up to 10 pounds), which his job as a laborer, per the DOT, would be classified at the heavy level. He did demonstrate the ability to perform 96.3% of the physical demands of his job, but this was applicable to multiple types of activities. The Petitioner was noted to have provided full and consistent effort, and thus that testing was valid. However, the therapist also stated: "Since (Petitioner) hasn't had any formal work conditioning program and he was able to lift up to 65# I would recommend a work conditioning program to maximize his physical demand level. In my opinion he has a good chance of improving and meeting his physical demand level of 90#." The Arbitrator notes this report also notes Petitioner provided a history of having back pain at the time of the alleged accident, and that he had increasing low back pain after his hernia repairs. He reported no improvement with prior therapy and injections. (Px9). Petitioner testified that he returned to Dr. DeGrange for treatment, including injections (2 epidurals with Dr. Criste, and 3 cortisone injections in his buttocks with Curry), therapy, medication and work restrictions. The Arbitrator notes that no medical records were submitted into evidence indicating any epidural steroid injections or physical therapy were performed for the low back.

A 10/19/16 note of Nurse Practitioner Ferrell noted Petitioner was present for a three month follow up and medication refill, and he reported anxiety improvement with medication. Petitioner reported his back had been really hurting since he had been back to work. He reported his pain management doctor had left and he was trying to figure out what to do about it. He noted that his new pain management doctor would not treat the back because it was involved with workers' compensation. Examination reflected low back tenderness with deep palpation, and lumbago was one of his diagnoses. (Px10).

Petitioner testified that his limitation per the FCE to medium duty would not allow him to return to his regular job, via the union hall, as it is considered a heavy job. He testified he cannot get a job through the union hall without being able to fully perform the job given the heavy nature of the job. Petitioner testified that temporary total disability benefits were terminated in June 2015 following the visit with Dr. Mirkin, and he has struggled tremendously financially since then, including having to access his annuity/retirement. His work history involves various construction/concrete jobs. He has 15 pension credits, and his plan was to keep working and retire when he was able, needing an additional 14 credits for a full pension. He testified that he can't

jackhammer anymore, and he wears a back brace. Petitioner testified he has not sought employment outside of his union. He has no idea how he would restart working in another field. Petitioner testified that Dr. Colle indicated for him to "grin and bare it" as to his ongoing condition, as he was not going to get better.

Dr. Colle's evidence deposition was taken on 8/18/16. (Px8). A board certified neurosurgeon, Dr. Colle testified consistently as to the history given to him by Petitioner as stated in his report. He testified that he saw Petitioner once, on 5/17/16, and he did not see any neurological abnormalities on exam in terms of motor, sensory or reflexes, including the bilateral Achilles reflexes which were trace. The Petitioner had normal gait, and his main issue was tenderness to palpation of his lumbar paraspinals and limited lumbar range of motion. Dr. Colle noted that Petitioner was tender to palpation even with just touching him throughout the lumbar spine. Dr. Colle testified the 3/4/16 lumbar MRI showed good curvature, very good intervertebral disc height and hydration, some mild disc darkening at L2/3 and L4/5, very mild broad based disc bulge at L4/5 causing mild narrowing of the neuroforamen, but no disc herniations, subluxations, or fractures. He further noted that there was no spondylolisthesis and just minimal mild facet hypertrophy at L4/5 and L5/S1. (Px8).

Dr. Colle testified that he believed the Petitioner had a chronic lumbar strain/sprain. No acute neurosurgical intervention was necessary, and he was not a surgical candidate. However, because of his ongoing pain and inability to continue to do his activities especially at work, he recommended a functional capacity examination (FCE). Petitioner had reported prior back aches and pains, but that he had not sought any prior treatment for it. Dr. Colle reviewed the 7/19/16 FCE and testified it showed that Petitioner was able to perform within a medium physical demand category, meaning he could occasionally lift 20 - 50 pounds, frequently lift 10 - 25 pounds, and constantly lift up to 10 pounds. He opined that the Petitioner had reached maximum medical improvement, and testified that the noted restriction were permanent basis. The doctor also testified that he believed that the petitioner was at maximum medical improvement. He testified that it would be difficult to determine whether there was any malingering behavior with a patient that he took at face value and saw only once, and thus he had no opinion in this regard. (Px8).

On cross-examination, Dr. Colle confirmed that the Petitioner had full strength and normal muscle tone, except for lumbar spasm. He acknowledged that tenderness to palpation is a subjective finding, agreeing Petitioner complained of significant tenderness to even light touch. The doctor also agreed that Petitioner had increased pain with light axial loading and extension of the cervical spine, but testified that because the paraspinal musculature travels from the sacrum all the way to the back of the head, this was not abnormal in someone with low back pain. Dr. Colle testified that Petitioner's lumbar spondylosis was all chronic, and then lumbago which would be incorporated into the low back pain. He agreed that the FCE indicated Petitioner was capable of performing 96.3% of his physical job demands as a laborer. He further agreed that the therapist who performed the FCE recommended work conditioning, and believed he could work up to lifting 90 pounds. (Px8).

The doctor testified that when determining whether a patient is malingering he looks at pain that is not improving with any type of treatment and a constant need for narcotic pain medication over a chronic period of time. He also notes if it gets to a point where the exam may change consistently from one visit to the next and there is nothing neurosurgically involved while the patient continues to push to have some type of surgical intervention. He further testified: "But usually, it's an inconsistent story line or inconsistent physical finding while we consistently follow that patient and, you know, where there's nothing that is occurring that the patient has no benefit from any aspect of treatment." He indicated that because Petitioner does not have any significant stenosis, the failure to improve with an epidural doesn't mean there is malingering. A lack of improvement with therapy, as long as the exam is persistent and consistent, can become a chronic issue as opposed to indicating malingering. He testified: "I wouldn't just say that they are malingering just because they don't get any better. There has to be inconsistencies within the story and some fabrications that can go along that you may find as

you continually treat the patient where the story becomes, you know, all over the place or the exam becomes all over the place and we're not being inconsistent with our exam or the complaint." Dr. Colle indicated that people can have paraspinal and paramuscular pain despite no surgical indication. (Px8).

Dr. Colle agreed that if Petitioner did not have any complaints of back pain on 12/2, 12/11, 12/16 and 12/30/14, and alleged an immediate onset of back pain on 11/29/14, this would be inconsistent. However, he noted that the hernia groin pain could override the back pain, and once that is treated, the other pain, i.e. low back pain, can come forward. He agreed that Petitioner's report to him of no prior drug use would be inconsistent if his prior medical records indicated that there was. (Px8).

Dr. Mirkin testified on behalf of Respondent on 1/16/17. A board certified orthopedic surgeon, he testified that he examined Petitioner on 6/5/15. He provided the following history: "He claims he was injured on 11/29/2014. On that date, he was picking up a pump when he developed pain in his low back and entire body. He tells me he reported this to his employer. He was eventually taken to his doctor where he claims he reported back pain and groin pain. His history is very inconsistent. He tells me that he voiced back pain throughout and tells me he went to the emergency room immediately. I showed him the emergency room report and it was not until 1/12/2015, and he does admit that it is when he went to the emergency room at that point in time, that is the first indication he had low back pain. Mr. Rheude tells me that he has 10/10 back pain." Dr. Mirkin's review of the 3/22/15 MRI films indicated very minimal disc bulging in the lower spine, and that it was essentially a negative MRI, with no significant pathology, ruptured disc or nerve compression. Disc heights were well maintained, there was no significant degeneration, and mild bulging at several levels without nerve compression. He felt this was a good looking MRI given Petitioner's work, age and size. Petitioner's complaints of 10 out of 10 pain was inconsistent with the films. On physical examination, Dr. Mirkin described that the Petitioner complained of pain when he lightly touched his back, compressed his head and distracted his legs, which were all positive Waddell's signs, which he opined was a sign of symptom magnification. The petitioner had no radicular symptoms, and straight leg raise was to 100 degrees bilaterally and did not elicit any back pain nor leg pain. The Petitioner told Dr. Mirkin that he could not bend, that he could not forward or backwards flex, rotate his back, walk on his toes or squat and rise from a squat position. Neurological exam was intact. X-rays of the lumbar spine taken at the office where normal.

Dr. Mirkin also opined that Petitioner displayed a "psychiatric or antisocial personality disorder", noting he called the doctor and members of his staff profane names, and accused the doctor of essentially having his opinion paid for. He testified he was not sure what he said that triggered the behavior. (Rx5).

Dr. Mirkin testified that he reviewed Petitioner's medical records, noting there were no complaints of groin or back pain at a 12/2/14 visit to his primary care facility, and at the same facility on 12/11, 12/16 and 12/30/14, there was no indication of a report of low back pain. He felt this was unusual if Petitioner indicated he hurt his back on 11/29/14 and had subsequent significant back pain. While it wouldn't be unusual for a back injury/strain to manifest pain for a day or so, it would be unusual to manifest several days or more later – "the only scenario I can think of if (sic) its not related to that incident." (Rx5).

Given these findings, Dr. Mirkin opined that he had no work injury to the low back. As to whether hernia pain could mask significant lumbar symptoms, he testified: "I've never heard of that before. I'm not aware of that being a real thing." Given no sign of lumbar abnormalities, and Petitioner being young and physically fit, he did not see any need for work restrictions related to the lumbar spine. Even if he had a lumbar strain on 11/29/14, it would have long since resolved. (Rx5).

After reviewing the MRI, FCE, Dr. Colle's deposition and reports from Dr. deGrange and Dr. Gornet, Dr. Mirkin issued an 11/13/16 addendum report. He testified that, after seeing four spine physicians, no one had diagnosed a significant lumbar abnormality, it was only subjective complaints without objective support. He issued a third report after reviewing an updated 3/4/16 MRI, and indicated it was consistent with the 2015 films. He noted that the 12/18/14 note of SIH/RIC indicated complaints of back pain, but no back treatment was recommended, nor was any back condition diagnosed. He reiterated that it would be very unusual for someone to hurt their back on 11/29/14 and have no symptoms until 12/18/14. (Rx5). The Arbitrator notes that no records of Dr. Gornet were submitted into evidence. On cross exam, Dr. Mirkin did agree that a hernia like Petitioner had could be very uncomfortable until they are repaired. (Rx5).

Petitioner submitted his alleged medical expenses as Petitioner's Exhibit 11. Respondent submitted logs of TTD and medical payments made by Respondent as Rx3 and Rx4, respectively.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner has fulfilled his burden of proving that he sustained an 11/29/14 accident which arose out of and the course of his employment.

The Petitioner testified that he sustained injury to his groin and low back on 11/29/14 when he had to catch and hold a falling heavy water pump while holding it by a rope. While he did not see the actual incident happen, Jason Dwyer was present on the scene and he credibly testified that he heard the Petitioner screaming to him, and when he spoke to him after this the Petitioner complained about having to work with the pumps and that he injured his guts and his back.

While the Respondent questioned the Petitioner regarding the consistencies of the histories of the accident given at Petitioner's initial visits to Dr. deGrange and Dr. Colle, the Arbitrator believes these histories were significantly consistent such that there is no real discrepancy. The gist of the histories are consistent that Petitioner had to take on the full weight of a pump at some point, and the Arbitrator believes this is consistent enough that there is no real credibility issue as to what occurred on 11/29/14.

Based significantly on the supportive testimony of Mr. Dwyer, the Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent on 11/29/14.

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

With regard to the Petitioner's hernia conditions, the Arbitrator finds that there was a causal relationship to the 11/29/14 accident. First, the mechanism of injury is the type that the Arbitrator believes is fairly obvious as a potential cause of a hernia. He had to essentially catch a heavy pump with a rope that had slipped off an excavator bucket and was falling into the cotterdam. The Petitioner did not immediately report the injury to the Respondent, and did not complain of the incident at his initial medial visit of 12/2/14, per the records of Galatia Primary Care, he did report the accident and groin injury on his next visit there on 12/11/14. The Arbitrator

notes that the testimony of Mr. Dwyer appeared to be significantly credible that the Petitioner reported injuring his guts on 11/29/14. Taking all of this information together, the Arbitrator believes the preponderance of the evidence supports a causal relationship existed between the 11/29/14 accident and the Petitioner's hernia condition. The Arbitrator also finds that this causal relationship ended as of the 3/3/15 release by Dr. Brewer.

With regard to the lumbar spine, the Arbitrator finds that the Petitioner sustained a lumbar strain that was causally related to the 11/29/14 accident. The Arbitrator acknowledges that the medical records in evidence reflect that he initially complained of the low back on 12/18/14 at Dr. Newell's office (SIU/RIC). Additionally, the Respondent's incident report indicates Petitioner reported his injury shortly thereafter. While there are issues with regard to the Petitioner's testimony, as noted, the mechanism of injury, again, appears to the Arbitrator to be a competent cause of a low back injury, and Mr. Dwyer's testimony supported a back injury. While there is some questionability of Dwyer's testimony in that the Petitioner clearly contacted him to request his support of a work accident occurring, the Arbitrator found Dwyer's testimony to be credible.

While the Arbitrator, below, relies upon Dr. Mirkin's opinion in determining that the causal relationship of Petitioner's low back condition ended as of 6/5/15, he also notes that Dr. Mirkin's report did gloss over the 12/18/14 report from SIU/RIC to some degree in terms of the fact that it did specifically note complaints of low back pain prior to the initial indication by Curry in her 1/14/15 note. Thus, his opinion that there was no initial injury is not as persuasive. Overall, the Arbitrator believes the preponderance of the evidence supports that the Petitioner injured his low back on 11/29/14.

However, as the Arbitrator will outline, the Petitioner had some significant issues with credibility in his testimony. The Arbitrator finds that this, along with the opinion of Dr. Mirkin, leads to the conclusion that the Petitioner's lumbar condition was no longer causally related to the accident as of 6/5/15.

First, while the Arbitrator did find accident and causation, the Petitioner did not report an injury to the Respondent until approximately 12/22/14. This is based on the incident report and the testimony of O'Donnell. While there was testimony that he reported it on 12/11/14, the evidence does not seem to support this in the Arbitrator's view.

Secondly, the Arbitrator finds it difficult to believe the Petitioner's testimony that he reported low back pain to NP Curry on 12/2/14. Not only is this not supported by the 12/2/14 report, the initial report noting low back pain of 1/14/15 specifically states that the Petitioner did not previously complain of back pain.

It is true hat the FCE report indicates the Petitioner's pain ratings were reliable and could have been considered a limiting factor during the functional testing. However, the Arbitrator notes that this testing did not take place until 7/19/16, and only after the Petitioner saw Dr. Colle at his attorney's request. This allegedly took place following epidural and cortisone injections via Dr. deGrange. The Arbitrator notes that there are no contemporaneous records in evidence which support that injections took place. Because of this, if the injections did in fact take place, the lack of records make it unclear where any such injections were performed, what the results were and what Dr. deGrange's opinions were. It leads to further questioning of what Dr. deGrange may have indicated in such records, and why Dr. Colle became involved in this case and was deposed versus Dr. deGrange.

Of great significance to the Arbitrator, the Petitioner testified that he would not be able to get a job through the union if he had work restrictions, but Mr. Dwyer credibly testified that the worked together on a job in the fall of 2016 for Southern Asphalt. Dwyer indicated that job was full time and lasted approximately two to three months, including overtime. Not only does this show the Petitioner was able to work, but it leads the Arbitrator

to question whether the Petitioner was working at any other time subsequent to 3/3/15 that was not disclosed at the hearing. Mr. Dwyer's candor on this topic, likely with no knowledge on his part that this could impact the Petitioner's case negatively, is a big part of what leads the Arbitrator to put trust in Mr. Dwyer's credibility in this case.

As to Dr. DeGrange indicating at Petitioner's first visit of 4/22/15 (Px4) that he had immediately sought treatment with Dr. Alexander, Petitioner agreed that he did not seek treatment until 12/2/14. Thus, Dr. deGrange was relying on inconsistent information in his opinion regarding causation. While the Arbitrator nevertheless agrees that there was, by a preponderance of the evidence, an initial back injury, the Petitioner here supplied incorrect information to the doctor that he immediately complained of his low back and sought low back treatment. Additionally, as noted below, it appears that Petitioner either did not see Dr. deGrange after 6/11/15, or if he did the records of such visits were not provided by the doctor and submitted into evidence.

At multiple times in this case, unfortunately, the Petitioner's anger made him his own worst enemy. This led to what the Arbitrator believes were completely unnecessary conflicts and bad behavior by the Petitioner at his initial visit to Dr. Brewer (see the 12/30/14 note of NP Curry), as well as his visit with Section 12 examiner Dr. Mirkin on 6/5/15. There clearly is a history of the Petitioner having such conflicts at work, per O'Donnell's testimony, and really his own testimony, and another conflict led to the Petitioner's termination on 12/2/14, as well as a failure to report the injury at that time as a result by Petitioner's own admission.

Overall, the Arbitrator notes that Jimmy O'Donnell supported that the Petitioner was a hard worker for the Respondent, and there was enough evidence in this case to give the Petitioner the benefit of the doubt that he did injure his low back on 11/29/14. However, his own actions and behavior thereafter, as well as the flaws in his own testimony and the evidence, as noted, lead the Arbitrator to find that the preponderance of the evidence supports the opinion of Dr. Mirkin on 6/5/15 that the Petitioner's lumbar condition was no longer causally related to the accident as of that date. The MRI supported that the Petitioner's lumbar condition was significantly due to degeneration of the lumbar spine, and Dr. Mirkin's opinions that there were no significant findings is well taken, particularly as, per Petitioner's own testimony, no one has recommended surgery for his low back in this case. There was no evidence of any significant radicular problems, and the Petitioner mainly had general low back pain. The Arbitrator believes that the Petitioner had a lumbar strain which resolved as of 6/5/15.

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:

The Arbitrator finds, based on the facts and findings noted in the causation analysis, that the Petitioner is entitled to the causally related medical expenses incurred from 12/2/14 through 6/5/15. This includes treatment related to the bilateral hernias that was incurred through 3/3/15, as well as the low back which were incurred through 6/5/15. The Petitioner is not entitled to medical expenses incurred subsequent to 6/5/15.

The Respondent is entitled to credit for any of the awarded medical expenses that were paid prior to the hearing date, and the Respondent shall hold the Petitioner harmless with regard to same. If there are any awarded medical expenses that remain unpaid, the Respondent shall, pursuant to the stipulation of the parties, pay such medical expenses, as indicated by Sections 8(a) and 8.2 of the Act, directly to the providers.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner is entitled to temporary total disability benefits from 1/5/15 through 6/5/15.

The first indication in the medical records that the Arbitrator was able to find indicating Petitioner was being held off work was the 1/5/15 note of Dr. Brewer. He underwent hernia surgery shortly thereafter and was held off work until 3/3/15. He was thereafter held off work or on restrictions from NP Curry or Dr. deGrange. The Arbitrator relies upon the opinion of Dr. Mirkin, as noted above, in finding that the causal relationship of the Petitioner's condition ended as of 6/5/15.

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 "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 no permanent partial disability impairment report and/or opinion was submitted into evidence. As such, the Arbitrator gives this factor 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 was employed as a laborer at the time of the accident and that he alleges that he is not able to return to work in his prior capacity as a result of said injury. The Arbitrator notes that the Petitioner testified that he was unable to obtain work through the union unless he was able to work full duty. Mr. Dwyer credibly testified that he worked with Petitioner for two or three months in the fall of 2016, where he was an operator and the Petitioner was responsible for signaling dump trucks. While the Arbitrator understands that this job appears to be much less physical than the job he was working with the Respondent, it also appears that the Petitioner was, in fact, able to obtain a union position. Whether he indicated to the employer at that time that he

had work restrictions is unclear. However, this is because the Petitioner did not testify in this regard. It was only through the testimony of Mr. Dwyer that this information was revealed. While the Petitioner did not specifically state that he had not worked since leaving the Respondent's employ, his testimony certainly inferred this to be the case. Additionally, pursuant to stipulation, the Petitioner was seeking TTD during a 2 to 3 month period of time where the greater weight of the testimony, in the Arbitrator's view, indicates that he was working.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 40 years old at the time of the accident. Neither party presented evidence which provides information as to how the Petitioner's age impacts his permanent disability, and therefore the Arbitrator gives this factor no weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner alleges that he has permanent work restrictions as a result of his low back injury. As outlined above, the Arbitrator relies upon Dr. Mirkin's determination that the Petitioner did not require work restrictions as a result of his 11/29/14 accident. Therefore, the Arbitrator does not believe that this factor significantly impacts the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator believes that the greater weight of the evidence indicates that the treating medical records are not corroborated by the Petitioner's subjective complaints. As noted above, the Petitioner apparently had conflicts on his initial visit to Dr. Brewer as well as his visit with Section 12 examiner Dr. Mirkin. While there are references to Petitioner undergoing epidurals and cortisone injections, there were no records in evidence which reflect treatment after 8/3/15. The only evidence after that was his visit to Dr. Colle at his attorney's recommendation. The Petitioner's credibility with regard to ongoing lumbar complaints and the credibility of the FCE findings, particularly given that the Petitioner performed work during a time he sought TTD, is questionable. The Arbitrator believes the Petitioner sustained a lumbar strain. With regard to the Petitioner's hernias, there is no evidence which indicates he had any continuing complaints, problems or limitations following recovery from surgery and his 3/3/15 release by Dr. Brewer.

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 7.5% loss of use of the person as a whole pursuant to §8(d)2 of the Act. The Arbitrator believes strongly in this case that the Petitioner sustained bilateral hernias that were repaired with mesh, and a lumbar strain, and that the award reflects common awards by the Commission for these types of injuries with no significant post-treatment sequelae.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The parties have stipulated that Respondent shall be given a credit of $24,885.62 for previously paid TTD. Any overpayment of TTD, if any, may be credited against the permanency award.

The parties have stipulated that Respondent is entitled to a credit of $28,454.49 for payment of medical expenses under Sections 8(a) and 8.2 of the Act. For any awarded expenses that the Respondent receives such credit, Respondent shall hold the Petitioner safe and harmless from any attempts by the relevant providers who may seek reimbursement.

WITH RESPECT TO ISSUE (O), EVIDENCE, THE ARBITRATOR FINDS AS FOLLOWS:

The Respondent attempted to elicit testimony from Mr. O'Donnell with regard to a conversation he had with union BA Rick Hilliard about statements allegedly made by the Petitioner. The Petitioner objected, and the Arbitrator took it under advisement and allowed Respondent to make an offer of proof. The Arbitrator sustains the Petitioner's objection, and this offer of proof has not been considered as evidence in this case.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Leonard Goforth,

Petitioner,

19IWCC0667

vs.

NO: 16 WC 05759

Decatur Public Schools,

Respondent.

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 accident and causation, medical expenses and prospective medical care, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 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.

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: DEC 9 - 2019
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MEP/ypv
049

Maria Portela

Thomas J. Tyrrell

Kathryn Doerries

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

GOFORTH, LEONARD
Employee/Petitioner

Case# **16WC005759**

DECATUR PUBLIC SCHOOLS
Employer/Respondent

19IWCC0667

On 6/6/2018, 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:

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

0771 FEATHERSTUN GAUMER POSTLEWAIT
DAN GAUMER
PO BOX 1760
DECATUR, IL 62523

19IWCC0667

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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)

LEONARD GOFORTH,
Employee/Petitioner

v.

DECATUR PUBLIC SCHOOLS,
Employer/Respondent

Case # **16** WC **5759**

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 **Maureen Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **4/24/18 and 5/11/18**. 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. ☒ 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, **12/28/15**, 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $**46,571.20**; the average weekly wage was $**895.60**.

On the date of accident, Petitioner was **58** years of age, ***single*** 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 $**00.00** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**00.00**.

Respondent is entitled to a credit of $**00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee on 12/28/15 that arose out of and in the course of his employment by respondent. The petitioner's claim for compensation is denied.

Respondent is entitled to credit for any workers' compensation benefits it has paid.

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

5/23/18
Date

ICArbDec19(b)

JUN 6 – 2018

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 58 year old custodian, alleges he sustained an accidental injury to his left knee that arose out of and in the course of his employment by respondent on 12/28/15. Petitioner denied any problems with his left knee before this injury. Petitioner has been a custodian for respondent for 29 years. His duties include maintaining the schools, and keeping the schools clean and safe for staff and students. His specific duties include picking up garbage, vacuuming, cleaning, and setting up for different programs. Petitioner's regular duties do not usually include any heavy duty work.

Records from SIU HealthCare Decatur Family Services for treatment to petitioner prior to 12/28/15 were offered into evidence. On 10/25/07 petitioner complained of an exacerbation of the bilateral knee osteoarthritis in his right knee. He was prescribed Tylenol #3 for pain. On 7/13/09 petitioner's bilateral osteoarthritis of the knees was improved, and he was feeling better. He reported that he needed no pain medications and Tylenol #3 was removed from his medication list. On 1/13/10, petitioner's bilateral osteoarthritis of the knees was unchanged, and he was feeling better. He reported that he needed no pain medications and Tylenol #3 was removed from his medication list. On 8/6/10 and 4/28/11 it was noted that petitioner's bilateral osteoarthritis of the knees was improved. Petitioner stated that he was feeling better and did not require any pain medication. Dr. Arguelles discussed strengthening exercises, and use of heat, ice, and medications with petitioner . On 12/4/12, 2/27/14, included in petitioner's past medical history section was osteoarthritis of his bilateral knees.

On 12/27/15 and 12/28/15 petitioner testified that he was not doing his regular duty job, but had been called to Johns Hill Magnet School to carry computer carts with laptops in them, that weighed from 90-100+ pounds, from the basement to classrooms on both the first and 2nd floor. The carts were on wheels and were approximately to petitioner's belly. Each cart held between 20-30 laptops. There were two stairways between each floor separated by a landing. Petitioner testified that he was assigned this duty on 12/27/15 by Jack Schenkel, his main supervisor, and the supervisor in charge of all other custodial supervisors and all custodians. Petitioner testified that this was the first time he ever had to perform this task. He stated that the students getting booklet and laptops was something new.

Since there were no elevators in Johns Hill Magnet School each of these carts had to be carried up the stairs and then taken to each classroom. Petitioner testified that on 12/27/15 he and a co-worker, he did not know, spent the entire day carrying the carts up the stairs from the basement to the 1st and 2nd floors. Petitioner testified that this task required squatting down to lift the carts and carrying them by hand up the stairs. He stated that it was sometimes awkward trying to get them turned around at the

landing and some carts they had to lift over the railing. Petitioner testified that he performed this task from 6am to about 2:00 on 12/27/15, and when he was lifting carts felt pain in his left knee. Petitioner testified that he and his coworker did not have enough time to get all the carts up the floors on 12/27/15. Petitioner testified that Schenkel told him he would get him some more help for the next day. By the end of the day, petitioner testified that his left knee was bothering him. However, petitioner did not report any injury that day.

When petitioner arrived for work on 12/28/15 at Johns Hill Magnet School to continue the task of moving these laptop carts from the basement to the classrooms on the 1st and 2nd floor, his co-worker from the previous day was not there, but 2 new employees that started with respondent that day were present. The new employees were Mitchell Johnson, and possibly James Firmand. Petitioner testified that when he arrived at work that day his left knee was still hurting from the day before. Petitioner testified that after carrying 2 or 3 carts up the stairs his left knee was hurting so bad he could not carry up anymore carts, and reported this to his co-workers that day. Petitioner testified he was told by Johnson to take a break and that he and Firmand would finish up.

Mitchell Johnson, who started as a custodian for respondent on 12/28/15, was called as a witness of behalf of respondent. Johnson testified that on 12/28/15 he was assigned to move 30 ipad carts around the building from the basement to the 1st and 2nd floor. He testified that he was working with petitioner and Firmand. Johnson testified that petitioner did not carry any carts up the stairs that day. He testified that when petitioner tried to lift a cart he was struggling, and he told petitioner that he and Firmand would carry it. Johnson testified that petitioner just watched or held the door open for them. Johnson testified that petitioner never told him that he injured his left knee that day.

Johnson testified that he has no idea what petitioner's work duties were on 12/27/15. He also testified that petitioner could not have lifted any laptop carts the day before because they were all there when he started on 12/28/15.

Johnson testified that 6 months after the alleged injury he got a call from Schenkel who asked him what happened on 12/28/15. Johnson told Schenkel that he noticed petitioner was having trouble lifting the cart and he took it away from him. He told Schenkel that petitioner never lifted anymore. Johnson testified that approximately 6 months later he got a call from petitioner. He stated that petitioner asked him if he remembered him carrying carts, and he told petitioner that he and Firmand carried the carts. Johnson also testified that he spoke with respondent's Dan Gaumer three times: a year after the alleged injury, 6 months later, and then 6 months after that.

Ken Christy, custodial supervisor, was called as a witness on behalf of respondent. Christy was one f petitioner's supervisors on 12/28/15. Christy typically works the 2nd shift. Christy testified that chenkel is his boss, and in charge of all custodians. Christy testified that on 12/28/15 he arrived at ohns Hill Magnet School shortly after 7:00 am. He stated that petitioner, Johnson, and Firmand were here to take the ipad carts up to the classrooms. He stated that there were approximately 30 carts that needed to be brought up. Christy testified that his understanding was that this was a 1 day job. He had no knowledge that carts were moved on 12/27/15, but could not state for certain they were not also moved on 12/27/15. He stated that it is possible that there could have been carts that needed to be carried as part of the project, and that petitioner carried the carts up on 12/27/15. Christy testified that petitioner did not report any injury to him on 12/28/15. Christy testified that he found out about the injury from Schenkel. Christy testified that petitioner's immediate supervisor was Schenkel, because he worked the 1st shift with petitioner. Christy testified that the task of bringing carts from the basement to the classrooms on the 1st and 2nd floor on 12/28/15 was run by Schenkel, but Schenkel told him to get them started. Christy testified that he talked to petitioner, Frimand and Johnson for about 5 minutes and then left. Christy did not find out about the accident until after the accident report came in. He testified that Schenkel did the investigation and completed all witness interviews and reports. Christy testified that the first time he asked Johnson about the report was about a month before trial.

Christy testified that petitioner never had problems doing jobs he was assigned. He also testified that petitioner had mentioned knee problems in the past for which he called off, but could not state which knee was causing petitioner's problem.

Petitioner testified that on the night of 12/28/15 his left knee was swollen and very painful. On 12/29/15 petitioner called his doctor to make an appointment to be seen by his primary care physician, Dr. Arguelles. The first appointment he could get was on 1/7/16. Petitioner testified that on 12/29/15 he called in and told either Schenkel, Christie, or both, that his knees were swollen and he needed to see a doctor.

Normal Slaw, a custodian for respondent for 37 years was called as a witness on behalf of petitioner. Slaw testified that he was familiar with what petitioner did as a custodian. Slaw testified that the majority of his job duties were doing set-ups and heavy lifting. He testified that he was familiar with computer carts and had lifted them up and down stairs maybe 10-15 times with a coworker. He stated that that carts weigh between 90-110 pounds, and the laptops inside can add an additional 30 pounds to the cart. Slaw has not lifted the carts at Johns Hill Magnet School. Slaw noted that one worker will squat to

grab the cart bar and lift it to hand level. He stated that this was not difficult for him, but may be for others. Although Slaw was never hurt performing this job, he stated that it is possible someone could injure themselves lifting carts. For him, Slaw stated that the job of lifting carts was hardest on his upper body. Slaw testified that petitioner had left knee issues before 12/28/15, and took some time off due to pain. However, he did not know which of petitioner's knees were the issue. He testified that petitioner had always been able to do his job.

On 12/31/15 petitioner completed an Employee Injury or Assault with respect to the alleged injury on 12/28/15. Petitioner reported that at 9:50 am he injured his knee. He reported that his knee had swelled while taking carts up stairs. Petitioner noted that he was off work on 12/29/15 as a result of this injury. This report was signed by petitioner and a supervisor (whose signature is illegible) in 12/31/15. Could be Jack Schenkel.

On 1/7/16 petitioner presented to Dr. Patel and Dr. Junker at SIU Healthcare Decatur Family Physicians for left knee pain and swelling following a work injury. He gave a history of a one week history of left knee pain. Most of the pain was on the anterior medial knee. He gave a history of it occurring after he had walked up and down stairs multiple times caring laptop carts at work. Petitioner had improvement with conservative treatment at home. He was instructed to rest the knee as needed at work. He was released to work with restrictions on sitting as tolerated, allow elevation and icing of the knee as needed.

On 1/20/16 Jennifer Sommer at CMI completed a "Complete At Once" Report for petitioner's alleged injury on 12/28/15 at Johns Hill Magnet School at 9:50 am. The nature of the injury was identified as "knee". How the illness occurred was identified as "taking carts up steps".

Petitioner returned to SIU Healthcare Decatur Family Physicians on 1/26/16 and was seen by Physician's Assistant Laura Law. Petitioner was assessed with acute left knee pain. He was started on Meloxicam and a left knee brace. An x-ray was ordered. Law noted pain and associated swelling. Petitioner provided a consistent history of the accident. Petitioner was taken off work from 1/26/16 through 2/2/16.

X-rays of the left knee taken 1/26/16 revealed a slightly atypical appearance of the distal quadriceps musculature. Correlation for any possibility of a quadriceps injury in petitioner was recommended.

On 1/28/16 petitioner presented to Julie Maley, APN, FNP-BC in Dr. Raycraft's office. Petitioner complained of left knee pain at work about 3 1/2 weeks ago, that worsened throughout the day, after

moving heavy equipment. Maley noted swelling of the left knee. Petitioner stated that the swelling had decreased since the injury. Petitioner's range of motion was limited due to swelling. X-rays were taken that showed mild to moderate osteoarthritis to the medial knee. Petitioner was authorized off work. Maley drafted a letter to Law. It stated that petitioner has a large joint effusion with primarily medial knee pain; mild to moderate osteoarthritis of his medial knee; some lateral patellar tilt; and wear at his patellofemoral joint. Due to the large joint effusion, as well as the history of injury, Maley ordered an MRI to evaluate petitioner for internal derangement with the possibility of a meniscal tear.

On 2/8/16 Dr. Raycraft reviewed the results of the MRI of the left knee. He noted osteoarthritis and degenerative medial and lateral meniscus tears. He recommended a steroid injection. Petitioner was told he could return to work if improved.

On 2/4/16 petitioner underwent an MRI of the left knee. The impression was medial meniscal an lateral meniscal tearing; large knee joint effusion; and tricompartmental degenerative osteophyte spurring with patellofemoral and medial compartment chondromalacia.

On 2/17/16 petitioner presented to Dr. Raycraft. Dr. Raycraft injected petitioner's left knee. He noted that petitioner had some slight swelling. He was not sure if a scope would help petitioner especially since his osteoarthritis was pretty significant. He noted that petitioner may need a total knee replacement. He did not take petitioner off work, but limited his use of stairs and requested that petitioner be allowed to ice knee as needed for 20 minutes.

On 3/9/16 petitioner returned to Dr. Raycraft. Petitioner reported slight improvement following the injection, but still had pain. Dr. Raycraft recommended a scope, but also noted that it may not completely fix the knee with his osteoarthritis. He also noted that he did not want to put a new knee in petitioner at the age of 58. It was noted that petitioner was working light duty with limited use of stairs and being allowed to ice as needed.

On 3/21/16 Dr. Raycraft received written authorization from Don Petravick at York Risk Services Group for the recommended arthroscopy.

On 3/31/16 petitioner underwent a left knee arthroscopy with debridement of the medial meniscus tear performed by Dr. Raycraft. Petitioner's postoperative diagnosis was medial mensicus tear with severe osteoarthritis about the medial femoral condyle; large spurring about the lateral joint line; and severe osteoarthritic changes of the trochlear groove. Intraoperatively, Dr. Raycraft found a meniscal tear and osteoarthritis. He was of the opinion that these findings could be work related, based on petitioner's

history that his left knee pain started when he was lifting heavy things. Dr. Raycraft was of the opinion that this activity certainly could have aggravated or even caused petitioner's meniscal pathology, but would not necessarily cause petitioner's osteoarthritis. Petitioner followed-up post-operatively with Dr. Raycraft. This treatment included physical therapy.

On 4/13/16 petitioner followed-up with Dr. Raycraft. Dr. Raycraft told petitioner that his osteoarthritis intraoperatively was worse than expected. He did not feel petitioner could return to work at that time.

On 5/25/16 petitioner returned to Dr. Raycraft. He reported ongoing pain and swelling. Dr. Raycraft performed a left knee steroid injection into the lateral suprapetellar of the left knee. Physical therapy was continued.

Petitioner continued in physical therapy and continued to follow-up with Dr. Raycraft.

On 7/1/16 petitioner presented to Dr. David Anderson, at Orthopedics of Illinois, for a Section 12 examination, at the request of the respondent. In addition to examining petitioner's left knee, Dr. Anderson reviewed multiple outside records including the Employee Injury Report; office notes of Dr. Junker , Laura Law PA-C, and Dr. Raycraft; left knee x-rays and MRI; and, physical therapy notes. Dr. Anderson took a history of petitioner injuring his left knee while taking carts up steps on 12/28/15. He noted that petitioner described knee swelling after he and another worker were moving an 800 pound cart full of laptop computers up and down flights of stairs, and halfway through noted left knee pain and swelling. Petitioner complained of constant pain in the left knee, mainly diffuse over the anterior aspect of the knee. He also reported popping associated with pain anteriorly with activities. He stated that he felt the knee was unstable and locked at times.

Following his examination and record review Dr. Anderson diagnosed significant left knee osteoarthritis. He noted that he did not review the operative report, but noted that Dr. Raycraft noted that petitioner had significant degenerative changes, which were much worse than initially thought preoperatively. Dr. Anderson believed petitioner should have reached maximum medical improvement within this period. He was of the opinion that petitioner's ongoing symptoms were related to his underlying, preexisting degenerative arthritis, and not related to his work injury. He believed petitioner is significantly limited in his physical activities. He believed physical therapy to this point was reasonable and necessary and related to the injury, but petitioner did not have significant improvement up to this time to warrant continued supervised therapy. He attributed petitioner's current condition to his

underlying arthritis and not his work injury. Dr. Anderson was of the opinion that petitioner was at maximum medical improvement as of 7/1/16 for his left knee surgery. Dr. Anderson was of the opinion that the future left knee replacement recommended by Dr. Raycraft would be reasonable and necessary, but not related to the injury on 12/28/15. He based this finding on his opinion that the arthritic changes seen on petitioner's MRI were not caused by the work injury.

Petitioner returned to work on 7/25/16. On 7/27/16 petitioner returned to Dr. Raycraft. He reported moderate pain in his left knee. Some swelling was noted. Dr. Raycraft did not refill petitioner's narcotics. Dr. Raycraft encouraged petitioner to wait as long as could prior to undergoing a total knee replacement. He noted that petitioner had osteoarthritis before injury, and may not have had symptoms until after the injury. Dr. Raycraft release petitioner to return to work with time to ice and elevate 2-3 times daily as needed. No further therapy was ordered.

On 10/19/16 petitioner followed-up with Dr. Raycraft. He had severe pain in his left knee. Petitioner had tenderness about the medial and lateral joint line of the left knee, and normal left knee strength. X-rays were taken of the left knee that showed mild osteoarthritis and effusion. Dr. Raycraft was of the opinion that the next surgical steps would be a total knee replacement, but advised petitioner to put up with the pain as long as he can. Petitioner's restrictions were continued.

On 11/4/16 petitioner underwent a nuclear medicine bone scan with spect. The impression was monoarticular uptake within the knee, which was tricompartmental in nature. It was noted that though this may related to osteoarthritis, erosive arthritis is a consideration.

On 12/12/16 petitioner returned to Dr. Raycraft after undergoing a bone scan. Petitioner had moderate pain in his left knee and tenderness in the medial joint line anteriorly. Dr. Raycraft reiterated his advice that petitioner wait as long as he can before undergoing a total knee replacement.

On 2/20/17 petitioner followed-up with Dr. Raycraft and reported that his pain in his left knee was moderate to severe. Petitioner had no tenderness. Dr. Raycraft noted palpable crepitance medial and PF. Dr. Raycraft ordered more physical therapy. Petitioner had some left knee effusion. Dr. Raycraft took petitioner off work.

On 3/23/17 petitioner noted in physical therapy that he was 100% better. He stated that he had been doing his exercises at home. It was noted that petitioner had met all his goals, had good strength in his left knee, and wanted to return to work. Petitioner was discharged from physical therapy.

On 3/27/17 petitioner returned to Dr. Raycraft after an additional course of physical therapy. Petitioner stated that he wanted to return to work. His pain in his left knee was mild. Petitioner had tenderness in the patella of his left knee, but had normal strength. Dr. Raycraft discontinued physical therapy. He continued petitioner's restrictions of allowing petitioner to ice and rest knee 15 minutes when his knee swells. Dr. Raycraft released petitioner on an as needed basis.

On 9/11/17 petitioner returned to Dr. Raycraft. His pain in his left knee ranged from mild to moderate, with associated swelling and popping. Tenderness was noted in the medial and lateral joint lines. He had normal left knee strength. Dr. Raycraft performed a steroid injection into petitioner's left knee. Dr. Raycraft continued petitioner's restrictions. He told petitioner that once he was ready to proceed with the total knee replacement, he should call at least 3 months prior to get on the schedule. Dr. Raycraft discharged petitioner on an as needed basis.

On 10/17/17 petitioner called Dr. Raycraft's office and stated that he was ready to proceed with the total knee replacement. He stated that he wanted it to go through worker's comp and not use his Blue Cross Blue Shield insurance. Surgery was scheduled for 4/10/18. Dr. Raycraft tried to get authorization from worker's comp and was told by Potravik that work comp would not authorize the surgery. It was noted on 12/11/17 that surgery would go through petitioner's insurance.

On 1/12/18 the evidence deposition of Dr. Raycraft was taken on behalf of the petitioner. Dr. Raycraft stated that the osteoarthritis on the MRI was a bit worse than it was on the plain x-rays that never showed very much. Dr. Raycraft was of the opinion that it would be common for someone to have osteoarthritis of this nature in their knee and be essentially asymptomatic. Dr. Raycraft noted that when he saw petitioner on 2/17/16 his left knee was a bit more swollen than most folks with similar conditions. Dr. Raycraft was of the opinion that even with the amount of osteoarthritis he found in petitioner's knee during surgery, a person with that much osteoarthritis could still be totally asymptomatic. Dr. Raycraft opined that the act of lifting heavy equipment at work could cause a meniscal tear. Dr. Raycraft noted that the bone scan of petitioner's bilateral knees showed changes in the left knee osteoarthritis with no changes of osteoarthritis in the right knee. Dr. Raycraft was of the opinion that petitioner is a candidate for a total knee replacement whenever he chooses. Dr. Raycraft was of the opinion that petitioner's left meniscus was intact, and then it tore, and that led to petitioner having more symptoms. He stated that if petitioner's history is true he had no symptoms before the injury on 12/28/15.

On cross examination Dr. Raycraft stated that there is no way to know how long the meniscus tear was there before the surgery. Dr. Raycraft was of the opinion that in people that have osteoarthritis in

their knees it will progress absent an injury, but not necessarily to the point where surgery is needed. Dr. Raycraft was of the opinion that petitioner has osteoarthritis in both knees, worse in the left. Dr. Raycraft was of the opinion that looking at the x-rays of petitioner's left knee there was no evidence of any progression of his osteoarthritis.

On redirect examination Dr. Raycraft was of the opinion that since petitioner was asymptomatic before the injury, petitioner's injury led to all his symptoms. Dr. Raycraft was of the opinion that an injury can cause a knee to have worse osteoarthritis.

On 2/20/18 petitioner called Dr. Raycraft's office to inform them that he needed to reschedule his surgery.

At trial petitioner testified that he wants to undergo the left total knee replacement recommended by Dr. Raycraft. He stated that he did not want to undergo it without work comp approval because his insurance would not pay for all of it and he had no sick time to use after the surgery.

At the conclusion of the trial on 4/24/18 the parties stipulated that proofs would be left open until the May 2018 trial call in Urbana, IL, so that the parties could present any further evidence regarding what the petitioner did on 5/27/15, since respondent claims that prior to trial on 4/24/18 they had no knowledge that petitioner was alleging that his left knee problems began when he was working for respondent on 12/27/15.

On 5/11/18 petitioner offered into evidence Personnel Actions that were taken by respondent's Board of Elections on 5/2/18. The personnel actions taken on 5/2/18 included a transfer for Mitchell Johnson from 2nd Shift Custodian at MacArthur to 2nd shift Custodial Foreman at Buildings and Grounds effective 5/9/18. (PX6)

On 5/11/18 respondent offered into evidence petitioner's time sheets for the period 12/19/15 through 12/31/15. These records show that during this period petitioner worked 8 hours on 12/21/15, 12/22/15, 12/23/15, 12/28/15, 12/30/15, and 12/31/15. Petitioner took a sick day on 12/29/15. Petitioner was off for the holiday on 12/24/15 and 12/25/15. Petitioner did not work the weekends of 12/19/15-12/20/15 and 12/26/15-12/27/15, but served as bench personnel on 12/26/15 for 3 1/2 hours. (RX5)

On 5/11/18 respondent also offered into evidence prior IWCC claims for petitioner. One was for a right hand/wrist injury on 7/18/02 (02 WC 38675) that was settled for 15% of the right hand; left middle fingers injury on 5/22/08 (08 WC 53043) that was settled for 27.830% of the left middle finger and 27.830% of the left ring finger; right elbow injury on 12/26/96 (97 WC 6002) that was settled for 15% of the right arm. (RX6)

On 5/11/18 petitioner offered rebuttal testimony following the admission of exhibits PX7, and RX5 and RX6. After reviewing respondent's payroll records petitioner testified that he did not work on 5/27/15. He testified that the last day he worked prior to 5/28/15 was Wednesday, 12/23/15. Petitioner claims that the was the day he first moved carts with computers up to the 2nd and 3rd floors of the school. Petitioner claims he was confused about the dates. Petitioner did not work his regular job from 12/24/15 through 12/27/15, but did work as a field manager for respondent on 12/26/15 for 3.5 hours. He testified that he paid the referees and made sure the teams were in the right place.

On cross-examination petitioner testified that he had his dates confused. Petitioner testified that his knee was already hurting on 12/28/15 because he had hurt it on 12/23/15.

On redirect petitioner testified that prior to 12/23/15 he did not have any problems with his left knee. He further testified that on 12/28/15 he only lifted 2-3 carts and moved them to the 2nd and 3rd floors of the school.

On recross examination petitioner then testified that he reported the injury on 12/31/15, and denied hurting his left knee before 12/23/15.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

Petitioner is alleging that he sustained an accidental injury to his left knee that arose out of and in the course of his employment by respondent on 12/28/15. The respondent disputes this claim.

The courts have held that the burden is on the party seeking an award to prove by a preponderance of the credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Hannibal, Inc. v, Industrial Commission,* 38 Ill.2d 473, 231 N.E.2d 409, 410 (1967); *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853, 12 Ill. Dec. 146 (1977). The Workers' Compensation Commission, based on the factual situation presented to it, has the obligation and duty to draw all reasonable inferences from the facts (*City of Chicago v. Industrial Commission*, 60 Ill.2d 283, 326 N.E.2d 769 (1975)), including determining the credibility of the witnesses (*Allen v. Industrial Commission,* 61 Ill.2d 177, 334 N.E.2d 142 (1975)) and making judgment thereon.

In the case at bar, proofs were opened on 4/23/18, and then remained open until 5/11/18 for the parties to present any evidence they had regarding petitioner's work duties and work status on 12/27/15, since at the hearing on 4/23/18, petitioner, for the first time, testified that he had initially injured his left

knee on 12/27/15 while lifting computer carts and computers from the basement to the 1st and 2nd floors all day. He further testified that his left knee remained painful when he attempted to do the same on 12/28/15, and could not lift more than 2-3 carts.

At the hearing on 4/23/18 petitioner testified that on 12/27/15 he was called by Schenkel to come to Johns Hill Magnet School to carry computer carts filled with computers from the basement to the 1st and 2nd floors. Petitioner testified that the carts weighed 90-100+ pounds and he performed this task with an unknown coworker from 6:00 am to 2:00 pm on 12/27/15. He testified that this task required squatting down to lift the carts and carry them by hand up the stairs. He noted that at times it was awkward getting the carts turned around on the platform between the sets of stairs between each floor. Petitioner testified that by the end of the day on 12/27/15 his left knee was bothering him. He testified that on 12/27/15 he and his coworker did not have enough time to get all the carts and computers up the floors and Schenkel told him he would get him some more help for the next day. Petitioner did not report any injury that day.

Petitioner testified that when he arrived for work on 12/28/15 to complete the task of taking the carts and computers to the 1st and 2nd floors, his coworker from the previous day was not there, and two other coworkers, who were working their first day, were present. One of them was Johnson. Petitioner testified that his left knee was still hurting when he got there. He stated that after carrying 2-3 carts up the stairs his left knee was hurting so bad he could not carry up any more carts, and reported the same to his coworkers. He testified that Johnson told him to take a break and they would finish up.

At the hearing on 4/23/18 Johnson testified that on 12/28/15 he was assigned to move 30 carts with computers from the basement to the 1st and 2nd floor. He stated that petitioner did not carry any carts up the stairs that day. Johnson testified that when petitioner tried to lift the cart he was struggling, and he told petitioner that he and the other coworker would carry it. Johnson testified that petitioner just watched or opened doors. Johnson disputes that petitioner ever told him he hurt his left knee that day. Neither petitioner nor Johnson testified as to the number of rooms they needed to bring computers to, or the total number of computers that had to be brought up from the basement.

Neither Johnson nor Christy had any knowledge of any carts or computers being moved on 12/27/15, but could not say it did not happen. Had either provided this information one could have reasonably inferred whether or not this job could have been completed in one or two days, given that Johnson had testified that there were 30 carts of computers to bring up on 12/28/15.

Christy testified that petitioner did not report any injury to him on 12/28/15. He further testified that Schenkel was in charge of the moving of the carts and computers from the basement to the 1st and 2nd floor. He also testified that Schenkel did the investigation and completed all witness interviews and reports with respect to petitioner's claimed injury on 12/28/15.

On 12/29/15 petitioner testified that he called and reported that his knees were swollen and he needed to see a doctor. He could not recall if he spoke to Schenkel, Christy, or both.

On 12/31/15 petitioner and his supervisor completed an Employee Injury or Assault report. He alleged an injury on 12/28/15 at 9:50 am, and indicated that his knee had swelling while taking carts up stairs. The report is signed by petitioner and his supervisor. The supervisor's signature may be Schenkel's, but is somewhat illegible.

Petitioner first sought treatment on 1/7/16. He reported a one week history of left knee pain and swelling following a work injury. He reported that it occurred after he had walked up and down stairs multiple times while carrying laptop carts at work. He did not provide a date of accident. On 1/20/16 petitioner gave the same accident history to Jennifer Sommer at CMI, and on 1/26/16 he also gave the same history to PA Law. On 1/28/16 he reported to Maley in Dr. Raycraft's office that he developed left knee pain at work 3.5 weeks ago, that worsened throughout the day, after moving heavy equipment. Up to this date petitioner did not provide a specific accident date to any of his healthcare providers. The arbitrator reasonably infers from this evidence that petitioner's alleged left knee pain came about while carrying computer carts up and down stairs multiple times throughout the day, and not just doing it 2-3 times.

When petitioner underwent a Section12 examination with Dr. Anderson on 7/1/16 he reported injuring his left knee on 12/28/15 while taking carts up steps. He described left knee swelling after he and another worker were moving an 800 pound cart full of laptop computers up and down flights of stairs, and halfway through noted left knee pain and swelling.

At the hearing on 5/11/18 respondent offered into evidence payroll records that show the petitioner did not work from 12/24/15 through 12/27/15. When petitioner was presented with this evidence he testified that the date he must have started the task of carrying carts and computers up to the 1st and 2nd floor was on 12/23/15, and he continued that task on 12/28/15. He testified that he was simply confused about the dates, and his left knee was already hurting when he got to work on 12/28/15 because he hurt it

on 12/23/15. The arbitrator finds this testimony less than credible because petitioner had earlier testified that this was a two day job that was performed two days back to back.

The petitioner admitted records into evidence that show Johnson was promoted on 5/2/18. The petitioner offered this record into evidence in support of an inference that Johnson was promoted in return for his testimony on 4/23/18. Absent any other credible evidence to support this claim, the arbitrator finds the petitioner's claim merely speculative.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee on 12/28/15. The arbitrator bases this finding on the fact that given the admission of payroll records on 5/11/18 that show the petitioner did not work for respondent on 12/27/15, the arbitrator finds petitioner's testimony regarding the history of his injury on 12/27/15 and 12/28/15 less than credible.

The arbitrator also bases this finding on the accident report petitioner completed 12/31/15, just 3 days after the alleged injury, where he was very clear that his injury occurred on 12/28/15. The arbitrator finds it hard to believe that if the pain in petitioner's left knee actually came about after performing a full day of lifting computer carts up and down stairs on 12/23/15 or 12/27/15 as he alleged, that he would not have identified either of those dates as the date of injury, given the fact that during his testimony at trial on 4/23/18 he testified that the pain in his left knee actually occurred on 12/27/15 while lifting computer carts and computers all day.

The arbitrator also bases this finding on the petitioner's less than credible testimony after he was presented with evidence that he did not work on 12/27/15, the date the pain in his left knee allegedly occurred. The arbitrator finds it significant that petitioner's entire accident history changed after he was presented with payroll records that showed he did not work on 12/27/15. The arbitrator finds petitioner's testimony at that point self-serving and less than persuasive, given the fact that after being presented with evidence that he did not work from 12/24/15 through 12/27/15, he had to change the date he initially injured his left knee carrying computer carts all day from 12/27/15 to 12/23/15, to conform to the evidence. The arbitrator reasonably infers from this testimony that the history of petitioner's alleged injury is questionable at best, with respect to when he was actually injured and how this alleged injury occurred. The arbitrator does not believe the petitioner's testimony that he was simply confused. The arbitrator also questions how petitioner could have worked 3.5 hours at the game on 12/26/15 if his left knee was so painful after he allegedly injured it on 12/23/15 carrying carts filled with computers up and down stairs all day.

Based on the petitioner's own testimony, that the pain in his left knee actually occurred as a result of him carrying carts filled with computers up and down stairs all day on 12/23/15 or 12/27/15, the arbitrator questions why petitioner never made any attempt to change his accident date instanter to 12/23/15 or 12/27/15. Based on the petitioner's inconsistent testimony regarding the accident and when it occurred, the arbitrator also has questions as to whether or not petitioner actually lifted a few carts on 12/28/15 as he claims, or if he simply watched and opened doors after he could not even lift one cart, as Johnson claims.

Although the arbitrator found Johnson's testimony to be less than persuasive at times, the arbitrator finds the petitioner's testimony was less than credible given that his entire accident history changed after he was presented with proof that he did not work on 12/27/15. Had respondent not offered evidence on 5/11/18 showing that petitioner did not work on 12/27/15, the arbitrator reasonably infers that petitioner would not have changed his initial accident history. The arbitrator further believes that if petitioner had injured his left knee on 12/23/15 as he claimed, that he would have been more likely to have remembered this fact on 12/31/15, when he completed his accident report that day, rather than 2.5 years later at his hearing, after being presented with evidence that contradicted his earlier testimony.

The arbitrator also questions petitioner's decision to not call Shenkel as a witness since petitioner claims it was Shenkel who was his immediate supervisor and the one who assigned him the job of carrying the computer carts filled with laptops up the stairs to the 1st and 2nd floors on either 12/23/15 and12/27/15. Petitioner has two opportunities to call him as a witness, on both 4/23/18 and 5/11/18. However, the arbitrator also knows it is petitioner's decision to present his case as he sees fit.

Based on the above, as well as the credible, and given the fact that the burden is on the party seeking an award to prove by a preponderance of the credible evidence the elements of the claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment, the arbitrator finds the petitioner has not met this burden, and his claim for compensation is denied.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
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?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee on 12/28/15 that arose out of and in the course of his employment by respondent, the arbitrator finds these remaining issues moot.

N. IS RESPONDENT DUE ANY CREDIT?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that he sustained an accidental injury to his left knee on 12/28/15 that arose out of and in the course of his employment by respondent, the arbitrator finds the respondent is entitled to credit for any workers' compensation benefits it has paid.

	)	☐ 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

REBECCA HOLT,

Petitioner,

vs.

NO: 16 WC 10555

SILGAN PLASTICS,

19IWCC0668

Respondent.

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 medical expenses,prospective medical care, temporary total disability, penalties and fees,credit and mileage 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 Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner sustained a work- related accident on February 17, 2016 while working as a packer and material handler trainee for Respondent. Accident was stipulated. Petitioner fell after slipping on a bottle. She hit her head and lost consciousness. Petitioner testified that she had pain in her head, neck, and back following the fall. She was diagnosed with a concussion by her primary care provider, Dr. Sweet Friend. Petitioner complained of severe headaches and difficulty with concentration. Dr. Sweet Friend ordered Petitioner off-work. Petitioner had a remote history of significant spinal problems preceding the work injury which included a spinal cord stimulator which was removed in 2002.

Dr. Sweet Friend referred Petitioner to Dr. Rerri, an orthopedic surgeon and to a neuropsychologist. She treated with Dr. Rerri from February 2016 through May 2017. An MRI was performed on March 10, 2016 which revealed disc protrusion at the C4-5 level without significant cervical stenosis. On April 1, 2016 Dr. Rerri diagnosed post-concussion syndrome, thoracolumbar strain and cervicalgia. He continued Petitioner's off work status and recommended physical therapy. Petitioner had increased pain with physical therapy and did not complete the prescribed course. The neuropsychologist noted issues with chronic depression and anxiety.

Petitioner was released to light duty work by Dr. Rerri with a lifting restriction. In July 2016 Dr. Rerri performed a right epidural steroid injection at C7-T1 which provided only limited relief. In August 2016 Dr. Rerri continued work restrictions limiting lifting to 30 lbs., limiting bending, twisting, and prohibiting forward neck flexion. Dr. Rerri recommended Petitioner undergo an anterior cervical disc fusion at C4-5 for continuing neck and left shoulder pain that was refractory to conservative treatment.

On September 19, 2016 Petitioner had a Section 12 examination by Dr. Chabot at the request of Respondent. Dr. Chabot opined that Petitioner sustained a neck and back contusion and sprain and that her condition was causally connected to her work injury. He recommended further conservative treatment i.e. a course of physical therapy under the guidance of a physiatrist. Dr. Chabot continued Petitioner's 30 lb. lifting restriction. In Dr. Chabot's opinion Petitioner had not reached MMI. He did not agree with the recommendation for cervical surgery.

In late March 2017 Respondent sent a letter to Bonutti Orthopedics denying further treatment under workers' compensation based upon the IME report of Dr. Chabot. Dr. Rerri ordered Petitioner off work pending cervical surgery due to progression of her symptoms in January 2017. On April 17, 2017 Dr. Rerri scheduled Petitioner for an ACDF at C4-5. There was discussion about Petitioner proceeding with cervical surgery and submitting the bills through her husband's group health insurance. Petitioner and her husband subsequently divorced so the surgery was not performed as she had no medical coverage.

On May 3, 2017 Petitioner was informed that Dr. Rerri had resigned from Bonutti Orthopedics and she subsequently came under the care of Dr. Richard Kube at Prairie Spine and Pain Center in July 2017. Dr. Kube ordered a repeat MRI and EMG study and returned Petitioner to light duty. Respondent advised that no light duty work was available and Petitioner was placed on short-term disability.

An EMG was performed by Dr. Trudeau on referral from Dr. Kube on July 27, 2017. Petitioner expressed complaints at the time of the examination of pain, numbness, and tingling in both upper extremities, left worse than right and pain and paresthesias up and down both arms.

The electrodiagnostic study confirmed bilateral C5 radiculopathy, that was moderate on the left side and mild on the right, as well as carpal tunnel syndrome in the right wrist.

An updated MRI was performed on October 9, 2017. Dr. Kube identified a disc herniation with protrusion centrally at C-4 with an annular tear. In Dr. Kube's opinion there was effacement of the cord at the level of the protrusion. Based upon the EMG and updated MRI and Petitioner's continuing symptoms he recommended nerve decompression via a disc replacement procedure. Dr. Kube continued medications and work restrictions.

On November 17, 2017 Dr. Chabot performed a second Section 12 examination of Petitioner. He reviewed the EMG report and updated MRI ordered by Dr. Kube. Dr. Chabot opined for the first time that Petitioner's symptoms are caused by a previously undiagnosed, underlying myofascial disorder. Petitioner has had medical treatment by her primary care physician, Dr. Sweet Friend, Dr. Rerri and Dr. Kube, both orthopedists and Dr. Trudeau, a neurologist and no one has suggested a diagnosis of myofascial disorder. In reaching his conclusion Dr. Chabot dismisses the objective EMG findings of Dr. Trudeau that confirm bilateral C5 radiculopathy on the basis that his physical examination of Petitioner was not consistent with the EMG findings.

Dr. Chabot opines that while Petitioner's work restrictions up to November 17, 2018 were causally connected to the work injury, that any further work restrictions were not work related but rather arose from a newly identified unrelated myofascial component. Nevertheless Dr. Chabot endorses the continuation of the 30 lb. lifting restriction as permanent. He opines that Petitioner is at maximum medical improvement and that all prior medical treatment was reasonable and necessary. Commencing November 17, 2017 all restrictions, according to Dr. Chabot now are based solely on Petitioner's age, physical conditioning and somatization of complaints due to depression and anxiety. Respondent paid TTD benefits and medical bills until receipt of the second Section 12 examination by Dr. Chabot.

In the Commission's view the evidence supports the finding that Petitioner's continued condition of ill-being regarding her cervical spine is causally connected to her work injury. Dr. Chabot's new opinions, first expressed at the time of the second Section 12 examination conducted seven weeks before the commencement of hearing, are unpersuasive due to their inconsistency with his prior opinions, the lack of foundation for a diagnosis of myofascial disorder and his willingness to disregard the objective findings on EMG in order to defend his report.

Two separate MRI studies reveal the presence of cervical pathology. An EMG demonstrated bilateral C5 radiculopathy. Both Petitioner's treating orthopedic surgeons have recommended cervical surgery. The Commission finds based upon the preponderance of the evidence that Petitioner has not reached maximum medical improvement as it relates to her cervical spine and that the surgical recommendation made by Dr. Kube for prospective treatment is reasonable and necessary.

The Commission modifies the award of the Arbitrator and finds continuing causal connection and that Petitioner has not reached MMI with regard to her cervical spine injury. Respondent stipulated to temporary total disability benefits in the amount of $370.45 per week commencing February 17, 2016 through June 24, 2016, July 27, 2016 through August 3, 2016 and August 24, 2016 through November 6, 2016. Respondent was awarded a credit of $10,743.05 for temporary total disability benefits paid. The Commission finds that Petitioner has not reached maximum medical improvement of her cervical spine condition and is entitled to continued temporary total disability benefits through January 4, 2018.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $370.45 per week for a period of 81 3/7 weeks, for the following time periods: February 17, 2016 to June 24, 2016; August 24,2016 to November 9, 2016; and January 5, 2017 to January 4, 2018, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses under §8(a) and 8.2 of the Act before November 17, 2017. Respondent shall pay to Petitioner all reasonable and necessary medical bills related to cervical spine treatment from November 17, 2017 to January 4, 2018 pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for all medical benefits paid under Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $10,743.05 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for all prospective diagnostic and medical procedures related to treatment of the cervical spine as recommended by Dr. Kube, as well as all reasonable and necessary rehabilitation pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for "mileage" is denied, and Respondent shall not be liable for any mileage expenses incurred by Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that petitions for penalties, attorney's fees and costs pursuant to Sections 16, 19(k), and 19(l) of the Act are denied, and Respondent shall not be liable for such additional compensation, fees, or costs.

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 $20,000.00. 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: DEC 10 2019
o-11-6-19
SM/msb
44

Stephen Mathis

Douglas McCarthy

DISSENT

I respectfully dissent. I would adopt and affirm the well-reasoned Decision of the Arbitrator.

L Elizabeth Coppoletti

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

HOLT, REBECCA
Employee/Petitioner

Case# **16WC010555**

19IWCC0668

SILGAN PLASTICS
Employer/Respondent

On 2/27/2018, 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 1.83% 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:

4617 HOFFE LAW FIRM
HEIDI A HOFFE
109 W MAIN ST
FAIRFIELD, IL 62837

1120 BRADY CONNOLLY & MASUDA PC
PAUL W PASCHE
10 S LASALLE ST SUITE 900
CHICAGO, IL 60603

19IWCC0668

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
19(b)

REBECCA HOLT
Employee/Petitioner

v.

SILGAN PLASTICS
Employer/Respondent

Case # **16** WC **10555**

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, Illinois**, on **January 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. ☐ 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 **"Mileage"**

FINDINGS

On the date of accident, **February 17, 2016**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* 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 **$3,987.92**; the average weekly wage was **$555.68**.

On the date of accident, Petitioner was **43** years of age, *married* with **1** dependent child.

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

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

ORDER

Respondent shall be given credit for all medical benefits paid under Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services for treatment rendered to the petitioner for her work injuries described herein, only for such treatment rendered on or before November 17, 2017, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall not be liable for any medical treatment rendered after November 17, 2017, as the petitioner has reached maximum medical improvement.

Petitioner's request for "mileage" is denied, and Respondent shall not be liable for any mileage incurred by Petitioner.

Respondent shall pay Petitioner temporary total disability benefits of **$370.45**/week for **29** weeks, commencing 2/18/2016 through 6/24/2016 and from 8/24/2016 through 11/06/2016, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$10,743.05** for temporary total disability benefits that have been paid.

Petitioner's petitions for penalties, attorney's fees and costs pursuant to Sections 16, 19(k), and 19(l) are denied, and Respondent shall not be liable for such additional compensation, fees or costs.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of compensation for 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

2/24/18
Date

ICArbDec19(b)

FEB 27 2018

19IWCC0668

ADDENDUM TO ARBITRATRION DECISION 19(b)

FINDINGS OF FACT

The arbitrator makes the following findings of fact. The parties stipulated that on February 17, 2016, the petitioner, Rebecca Holt, sustained accidental injuries that arose out of and in the course of her employment by the respondent, Silgan Plastics.

Medical Records and Trial Testimony

Specifically, the testimony of petitioner and of the respondent's HR manager, Kelly Conard, show that the petitioner was working as a packer and material handler trainee when she stepped on an empty plastic bottle, slipped, and fell, striking her left arm and head. T. 22, 81. The petitioner testified she was taken to the emergency room of Clay County Hospital the same day. T. 23. No records of this treatment were offered into evidence, except for radiology records which showed complaints of midback pain, head pain and left forearm pain. PX 2. A CT scan of the head dated February 17, 2016, was "unremarkable." PX 2. X-rays of the lumbar spine and left forearm were normal. PX 2. A CT scan of the cervical spine showed no bony abnormality, as well as normal vertebral alignment, no disc height narrowing, and no disc bulge, protrusion or extrusion with no significant spinal or neural foraminal stenosis. PX 2. Petitioner later reported to Dr. Sweet-Friend that she was discharged home with Flexeril and Norco, with instructions to rest. PX 2. On February 19, 2016, the petitioner apparently returned to the emergency room, but again no record of this visit was submitted into evidence. According to the petitioner, she was given anti-nausea medication Zofran, advised to remain off work, and recommended follow-up with her primary care physician, Dr. Sweet-Friend. PX 2.

On February 23, 2016, the petitioner was seen at Clay Medical Center by Dr. Sweet-Friend. PX2. Dr. Sweet-Friend recounted the petitioner's treatment to date, including her past medical history, which included previous carpal tunnel surgery "X2 in 1987 and 1997," and prior back surgery in 2005. The petitioner admitted to Dr. Sweet-Friend she still had back problems related to that. The petitioner asked Dr. Sweet-Friend for a referral to an orthopedic surgeon. On examination, Dr. Sweet-Friend noted no symptoms of the cervical spine, a "grossly normal" cognitive examination, neck supple, motor strength normal. The only diagnoses were concussion and dorsalgia (lower back pain.) She prescribed Ambien (anti-insomnia) and Zoloft (anti-depressant) and referred the petitioner to an orthopedic surgeon, Dr. Rerri. She also advised the petitioner to remain off work "till concussion free."

On February 29, 2016, the petitioner was examined by Physician's Assistant Andrea Furlong at Dr. Rerri's clinic, Bonutti Orthopedics. PX 6. The petitioner completed an extensive questionnaire, complaining of headaches, neck and back pain, but no symptoms in her upper or lower extremities. She provided PA Furlong with prior treatment records, including the radiology reports from February 17, 2016, Dr. Sweet-Friend's records from February 23, 2016, an operative report from October 18, 2002, in which her spinal column stimulator was removed

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by Dr. Walker, and an x-ray and CT scan of her cervical spine from St. Francis Hospital on February 4, 2006, with findings identical to those of the CT scan of February 17, 2016 (i.e., no abnormalities.) The records of Dr. Walker reflected the stimulator was removed because it had been damaged and became unusable when the petitioner was kicked in the low back in 2002. PX 6. On examination, the petitioner had normal reflexes and strength in her upper and lower extremities, and normal sensory and motor findings in her lumbar and cervical spine dermatomes except some sensation loss on the left at C6. Extension/flexion x-rays showed mild degenerative changes at C4-5 and C5-6. PA Furlong ordered an MRI of the cervical spine and MRI of the lumbar spine, and advised the petitioner to remain off work. PX 6. Both MRIs were authorized by the respondent's insurer, Gallagher Bassett, on March 2, 2016. PX 6.

On March 11, 2016, the petitioner had the cervical MRI at Open MRI of Effingham, which showed a small central disc protrusion at C4-5, without significant spinal stenosis and with no neural foraminal narrowing. PX 6. She also had the lumbar spine MRI the same date, with normal results. PX 6. The arbitrator also notes the petitioner denied having prior back surgery when she completed her MRI questionnaire on March 11, 2016. PX 6.

On March 21, 2016, the petitioner returned to Dr. Sweet-Friend and complained of losing consciousness following a day in which she fed horses hay and feed and drove her car. PX 2. Dr. Sweet-Friend referred her to the emergency room. PX 2 and PX 3. At Fairfield Hospital, the petitioner reported passing out the night before when arising from her couch. PX 4. A CT of the petitioner's head was normal. The ER physician noted no cognitive or functional deficits, and he discharged her with a prescription for Meclizine (motion sickness inhibitor). PX 4.

On April 1, 2016, PA Furlong examined the petitioner a second time. She noted the petitioner denied any headaches. What hurt the most was the neck with rotation to the right. On examination, however, the petitioner's reflexes, motor, and sensory examinations were normal throughout bilateral upper and lower extremities. PA Furlong interpreted the MRI as showing a small disk herniation at C4-5, despite the lack of evidence of stenosis, foraminal narrowing or nerve root impingement. PX 6. She recommended the medication Soma, physical therapy of the back and neck, and that the petitioner remain off work.

The petitioner offered a bill for a follow-up visit at Bonutti Orthopedics on May 2, 2016 (PX 13), but no record of this visit was offered into evidence. On May 4, 2016, the petitioner began physical therapy at Fairfield Hospital and reported to the therapist that her low back pain was worse (4 on a scale of 1-10) than her neck pain (3/10). PX 4. On May 9, 2016, the therapist referred her back to Dr. Rerri because she would not relax her neck muscles to perform passive range of motion. (PX 4). On May 27, 2016, Dr. Rerri next saw the petitioner, who gave a history of having too much pain to continue physical therapy. PX 6. Rerri also noted the petitioner was "no longer working," although there is no record any physician had released her to work up to that point. PX 6. The petitioner's attendance records also showed no return to work as of that date. RX 3. Dr. Rerri recommended a right epidural steroid injection at C6-T1, noting that if it reduced her symptoms, he might "allow her to return to light duty somehow." PX 6. He then released her to return to work with no lifting, bending, twisting, or overhead reaching. PX 6.

The petitioner also saw Dr. Sweet-Friend on May 25, 2016, for her depression and concussion. No new episodes of syncope had occurred, and Dr. Sweet-Friend's examination findings, including a cognitive exam, were "grossly normal," but she referred the petitioner to a neurologist. PX 2.

On June 7, 2016, the petitioner returned to Fairfield Memorial Hospital for her next physical therapy visit, and the arbitrator finds there is no mention of a TENS unit in the notes from that facility. PX 4. However, the records of Dr. Rerri from the same date show the petitioner called to say the therapist told her she would benefit from a TENS unit, and he then wrote an order mailed to the petitioner to use "as directed by the therapist." PX 6.

On June 14, 2016, the petitioner called Dr. Sweet-Friend to advise her attorney had recommended a neuropsychiatrist, and Dr. Sweet-Friend provided a referral. PX 2.

The petitioner attended two more therapy appointments, and then saw Dr. Rerri again on June 24, 2016. PX 4 and PX 6. Dr. Rerri noted only one symptom—4/5 weakness in left elbow extension—and he continued to recommend the right epidural steroid injection. PX 6. Dr. Rerri also wrote that the petitioner was "still unable to work," but issued a work status slip indicating the petitioner was released to work with new restrictions: no lifting over 20 pounds, "rework only." PX 6. The petitioner did not report to work, but on July 1, 2016, the petitioner called Dr. Rerri and stated that her employer wanted clarification of the term "rework," but she then requested that Dr. Rerri simply remove this from her restrictions. PX 6. Dr. Rerri complied and issued a new work release with the only restriction being no lifting over 20 pounds. PX 6.

- The parties stipulated the petitioner returned to work on June 25, 2016. Arb. Ex. No. 1.

On July 13, 2016, Dr. Rerri scheduled the epidural steroid injection for July 27, 2016. PX 6. The next day, July 14, 2016, the petitioner called Dr. Sweet-Friend to ask for a note to get out of jury duty due to unspecified memory problems, and Dr. Sweet-Friend complied. PX 2. The petitioner also called Dr. Rerri and requested a restriction against layer packing, which Dr. Rerri provided. PX 6. The petitioner and Ms. Conard testified the petitioner's job duties as a packer involved taking small, empty plastic bottles coming off a conveyor and putting them in boxes. Some bottles were packed in the same position where they lay after falling off the conveyor, and some were arranged in layers. T. 16-18, 80.

On July 22, 2016, the physical therapist discharged the petitioner after 12 total sessions, stating her neck pain had worsened to 6/10, and that she had plateaued. PX 4. Dr. Rerri saw the petitioner on the same date and changed her restriction to no lifting over 30 pounds with no forward neck flexion. PX 6. Dr. Sweet-Friend also saw the petitioner that date for a wellness examination, noted a normal exam with non-focal neurologic findings, and she advised the petitioner to quit smoking. PX 2.

On July 27, 2016, Dr. Rerri performed the epidural injection on the right at C7-T1 at St. Anthony's Hospital. PX 6. The petitioner testified she only had relief for three days. T. 37. The records show that on August 3, 2016, the petitioner reported 20% improvement to petitioner's attorney Furlong. PX 6. The petitioner had normal sensory, motor, reflex and strength testing. PX 6. Furlong refilled prescriptions for Norco and Soma, and released the petitioner to return to work with the same restrictions. PX 6.

On July 28, 2016, Dr. Herberger performed a neuropsychological evaluation of the petitioner. PX 5. Dr. Herberger noted the petitioner's performance validity was limited and she could not be sure if memory and cognitive testing accurately measured her abilities. More importantly, Dr. Herberger noted the petitioner suffered ongoing psychological distress characterized by somatic complaints and cognitive dysfunction. PX 5. Dr. Herberger opined that the continued cognitive difficulties and concussion-like symptoms were not caused by the concussion from February 17, 2016, but by psychosocial stressors and lack of sleep. PX 5. These stressors included marital strain and stressors associated with her son. She also had a history of depression and anxiety, and physical and sexual abuse. PX 5. Dr. Herberger recommended treatment of her mood and sleep and opined this would lead to resolution of her other symptoms. PX 5.

On August 5, 2016, Dr. Sweet-Friend restarted a prescription for Zoloft (anti-depressant.) PX 2.

On August 10, 2016, the petitioner returned to see Furlong, and complained her neck pain had worsened and was now radiating into her bilateral arms and shoulders, and Norco and Soma were not helping. Furlong mentioned that an IME had been set for September. On exam, Furlong found normal sensation, motor and reflex testing of the upper extremities, and the petitioner's strength was normal (5/5), except left wrist extension was 4+/5. PX 6. Dr. Rerri was consulted, and he refilled the Norco at a higher dosage, recommended a spinal fusion at C4-5, and continued the same work restrictions. PX 6. On August 22, 2016, the petitioner called Dr. Rerri to advise her neck pain was then 9/10, and the Norco was not helping. Dr. Rerri set an appointment for August 24, 2016. PX 6. At that appointment, Dr. Rerri again recommended the cervical fusion surgery, prescribed a cortisone injection of the petitioner's left shoulder, and took the petitioner completely off work as of August 23, 2016. PX 6. PA Furlong performed the injection the same date. PX 6. The injection had no effect. PX 6. The petitioner stopped working as of August 23, 2016. RX 3 and RX 4.

On September 19, 2016, the petitioner was examined by Dr. Chabot, at the request of the respondent. PX 6. In his report, offered by the petitioner as part of Dr. Rerri's treatment records, Dr. Chabot noted the petitioner denied having a prior back injury and also denied having the prior spinal stimulator implantation. PX 6. On examination, Dr. Chabot noted normal neck range of motion, normal reflexes and intact sensation and motor strength in the petitioner's upper extremities, with decreased sensation in the lateral left arm and positive Hoffman's sign on the right. Dr. Chabot reviewed the previous x-rays, CT scans and MRI studies, and found mild central bulging at C4-5 and C5-6, no evidence of nerve compression or disc herniation. PX 6. He

noted no pathology was indicated at the C6-T1 level. PX 6. Dr. Chabot opined surgical intervention was not warranted, but recommended four additional weeks of physical therapy focused on myofascial release. PX 6. Dr. Chabot recommended a return to work with a 30-pound lifting restriction.

On October 6, 2016, Dr. Rerri refilled the prescriptions for Norco and Soma, and recommended the petitioner stay off work. PX 6. On November 2, 2016, Dr. Rerri issued another off-work slip. PX 6.

On November 4, 2016, Ms. Conard offered the petitioner work within the 30-pound restriction given by Dr. Chabot. T. 51, RX 7. The date for return to work was set for November 7, 2016, and the petitioner accepted this offer. T. 51, RX 7. The petitioner testified that Ms. Conard told her she would be fired if she did not sign the offer letter. T. 51-52. Ms. Conard denied ever saying that and further testified that not only would the petitioner have not been fired, but she had never fired the petitioner through the date of trial for any reason. T. 79-80. She affirmed this on cross-examination. T. 91.

On November 7, 2016, the petitioner returned to work. RX 3, RX 4. That same date, the petitioner's attorney, Kerry O'Sullivan, faxed a letter to Dr. Rerri, requesting his response to Dr. Chabot's report. PX 6.

The petitioner worked both her scheduled days on November 7 and 8, 2016. RX 3. She was scheduled off on November 9, 2016, and the petitioner returned to Dr. Rerri on that date. RX 3, PX 6. Dr. Rerri reported the petitioner "lost 2 days of work already," and her medications were not providing relief. On physical examination, Dr. Rerri found no shoulder impingement, no arm or leg weakness. PX 6. Dr. Rerri noted the letter from the petitioner's attorney and in response agreed with the recommendation for physical therapy supervised by a physiatrist, but also continued to recommend a cervical spine fusion at C4-5. He released her to work light duty with no lifting over 30 pounds and no forward flexion of the neck. PX 6. Dr. Rerri scheduled his next appointment for December 6, 2016. PX 6.

On November 14, 2016, the respondent sent a letter to Dr. Rerri denying authorization for the cervical fusion at C5-6. RX 8.

In the meantime, also on November 14, 2016, the petitioner went to the emergency room at Clay County Hospital for increased neck pain with onset of two hours ago, and chronic back pain, both described as 10/10. PX 1. Physical examination was normal, except for the pain complaints. PX 1. The petitioner was given an injection of morphine and released with a restriction of no work. PX 1.

On November 16, 2016, the petitioner returned to Clay County Hospital to start physical therapy. At the initial evaluation, she complained of neck pain and left worse than right arm pain with tingling in her hands. PX 1. She rated the pain at 8/10, and also reported daily headaches.

PX 1. This therapy continued until January 9, 2017, but the therapist noted the petitioner refused manual therapy and made very little progress with exercises. PX 1.

Also on November 16, 2016, the petitioner returned to see Dr. Rerri. PX 6. Dr. Rerri added Tramadol and a Medrol Dose Pack to the petitioner's medications, and issued the same work restrictions as his last visit. PX 6. On November 21, 2016, the petitioner attended her second physical therapy appointment. PX 1.

The petitioner continued working her scheduled shifts until November 22, 2016, when she was a no-call, no-show. RX 3. The plant was closed for the Thanksgiving holiday November 24-25, 2016, and the petitioner worked November 26 and 27, 2016. RX 3, RX 4.

On Sunday, November 27, 2016, the petitioner returned to the Clay County Hospital ER with complaints of left neck and arm pain worse "due to work required to do this evening." PX 1. She denied any new symptoms or new injury. PX 1. Another morphine injection was given, and the petitioner was released to follow up with Dr. Rerri. PX 1. On November 29 and 30, 2016, the petitioner attended her third and fourth physical therapy appointments. PX 1.

On December 5, 2016, the petitioner returned to work, and she also worked her full shift on December 6, 2016. RX 3 and RX 4.

On December 7, 2016, the petitioner saw Dr. Rerri, complaining of worsening left arm numbness and weakness, and reported the Medrol provided no relief. PX 6. Dr. Rerri refilled the petitioner's medications and advised her to complete physical therapy and continue her work restrictions. PX 6. On the same date, the petitioner attended her fifth physical therapy appointment, followed by two more sessions on December 8 and 13, 2016. PX 1.

The petitioner worked full shifts December 9, 10 and 11, 2016. RX 3 and RX 4.

On December 14, 2016, the petitioner left work early and went back to the ER at Clay County Hospital. PX 1. She reported an acute onset of neck pain and was given oral Prednisone. PX 1. She worked on December 15, 2016. RX 3. On December 16, 2016, she was scheduled to be off, and she went to the emergency room again at Clay County Hospital and received another morphine injection. PX 1. There was no mention of any prescription of a soft collar in the records for this visit, but the nurse noted that the petitioner had put one on herself during the visit. PX 1.

The petitioner worked December 19, 2016. RX 3, RX 4. She attended physical therapy. PX 1. She also called Dr. Rerri that day to advise about her hospital visits, and then came in for an examination. PX 6. Dr. Rerri advised her to use the soft collar as needed and added a work restriction of no overhead reaching. PX 6. The petitioner called Dr. Rerri later to advise she had hired a new attorney and would put the surgery through private insurance. PX 6.

On December 20, 2016, the petitioner left work early and returned the Clay County Hospital ER, but this time complained only of left shoulder pain after a box fell on her. PX 1. Her neck was noted to be negative for pain. RX 1. X-ray of the left shoulder was normal and the diagnosis was a sprain of the shoulder girdle. The ER physician prescribed Gabapentin and Cyclobenzaprine for the shoulder and discharged the petitioner with a restriction to be off work for one day. PX 1.

The petitioner worked her full shift December 23. 2016. RX 4. The plant was closed from December 24, 2016, through January 1, 2017. RX 3, RX 4.

On December 27, 29 and 30, 2016, the petitioner attended physical therapy and reported no improvement since December 19, although she rated her pain at 6/10. PX 1. The petitioner worked January 2, 2017, and also attended physical therapy. PX 1, RX 3 and RX 4.

The petitioner testified she stopped working on January 4, 2017, because the respondent could not accommodate Dr. Rerri's restrictions. The records show that on January 3, 2017, the petitioner left work early and went to the emergency room after midnight on January 4, 2017, at Clay County Hospital, complaining of neck pain and new numbness in her left hand. PX 1. She was prescribed a second round of Prednisone. PX 1. On the same date, she returned to Dr. Rerri, who released her with the same work restrictions, and he refilled her Norco, but noted the petitioner's urine screen showed no Norco. PX 6. He ordered a new screening before any further treatment.

The petitioner attended physical therapy on January 6, 2017. PX 1. Afterward, she called Dr. Rerri to request an off-work note. PX 6. Dr. Rerri provided the off-work note. PX 6. The petitioner then applied for and was granted short-term disability through the respondent's group plan. PX 6 and RX 6. The plan paid the petitioner a total of $8,848.11 from the pay period ending January 21, 2017, through the period ending July 21, 2016. RX 6.

On January 9, 2017, the petitioner was discharged from physical therapy, and reported she did not note any improvement, with her pain rated at 7/10. PX 1. On January 11, 2017, she returned to Dr. Rerri and advised she was considering the recommended surgery, with the cost to be billed to her husband's health insurance plan. PX 6. Dr. Rerri refilled the Norco prescription, despite the petitioner failing to obtain the drug screen. PX 6.

The petitioner next saw Dr. Rerri on February 1, 2017, and he again recommended surgery. PX 6. Despite the respondent's prior denial letter of November 14, 2016, Dr. Rerri indicated he was holding the surgery until he received a denial letter. PX 6. On February 24, 2017, respondent's attorney sent petitioner's attorney a letter denying liability for the surgery. RX 10.

On March 20, 2017, Dr. Rerri refilled the Norco again without a urine screen. PX 6. On March 31, 2017, respondent's claims representative at Gallagher Bassett resent the November surgery denial letter to Dr. Rerri. PX 6, RX 11. Dr. Rerri confirmed at his April 17, 2017,

appointment that we would schedule the surgery for April 26, 2017, under petitioner's husband's insurance. PX 6. On April 18, 2017, that insurance, Healthlink, certified the surgery to occur at St. Anthony's Hospital on April 26, 2017. PX 6.

However, the surgery did not occur on April 26, 2017, and there is no evidence in the record of the reason why. PX 6. On May 3, 2017, the petitioner called Bonutti Orthopedics to advise that Medicaid was set up and she was "ready to schedule the surgery." PX 6. Bonutti Orthopedics advised the petitioner Dr. Rerri had resigned from that clinic. PX 6. The petitioner was offered the choice of following Dr. Rerri to his new office, or having another physician at Bonutti take over the case. PX 6. There is no evidence that Dr. Rerri ever lost or resigned his privileges at St. Anthony's Hospital.

Rather than wait several weeks for Dr. Rerri to set up in his new location, the petitioner decided to transfer her care to Dr. Kube. Over two months later, she first saw Dr. Kube on July 12, 2017. PX 7 and PX 8. Dr. Kube found a positive Hoffman's sign bilaterally and requested an EMG and a repeat MRI, but his records were not made available to the respondent until September 7, 2017, the day before Dr. Chabot's deposition was originally scheduled. Dr. Kube also released the petitioner to return to work with restrictions of frequent lifting of 10 pounds and limited lifting up to 35 pounds. PX 8. The respondent could not accommodate that restriction. PX 12.

The EMG was performed by Dr. Trudeau on July 27, 2017. PX 10. Dr. Trudeau noted Dr. Kube was looking for C5 radiculopathy. PX 10. By the time Dr. Trudeau started taking a verbal history from the petitioner, he noted she had been at his office for "several hours." PX 10. Dr. Trudeau noted the right-handed petitioner complained of pain, numbness and tingling in both upper extremities, left worse than right, and she also reported pain and paresthesias up and down both arms, in a diffuse pattern. PX 10. On examination, Dr. Trudeau noted the petitioner had diffuse tenderness over her neck and upper back. Even with mild compression on the shoulder, the petitioner complained of numbness in all cervical dermatomes bilaterally and weakness in the left arm "out of proportion." Dr. Trudeau found a negative Hoffman's sign bilaterally. PX 10. The electrodiagnostic study showed bilateral C5 radiculopathy, moderate on the left and mild on the right, as well as carpal tunnel syndrome in the right wrist. PX 10. There was no evidence of any other nerve entrapment, and no neurological explanation for the petitioner's symptoms throughout both arms and hands. PX 10.

In September and October 2017, the petitioner was seen by Dr. Bhandarkar, Dr. Kube's associate, who added Mobic to the petitioner's medication regimen of Norco and Soma. PX 10. When the Mobic caused stomach upset, Dr. Bhandarkar changed the prescription to Nabumetone. PX 10.

The MRI of the cervical spine was done on October 9, 2017, and showed no disc herniation or extrusion, no spinal canal stenosis, and no neural foraminal stenosis at any level. PX 10. There was no annular tear noted, or any other ligamentous injury. PX 10. The C4-5 level in particular was normal but for "minimal facet and ligamentous hypertrophy" which was found

throughout the other levels. PX 10. The impression of the radiologist, Dr. Berger, was: "minimal relatively nonfocal degenerative changes with no significant foraminal or central canal narrowing." PX 10.

On October 18, 2017, Dr. Kube reviewed the MRI and noted that he did see a C4-5 disk herniation or "small protrusion" that touched (effaced) the spinal cord, along with an annular tear. PX 10. He recommended nerve decompression via a disk replacement procedure, but did not specify the level. PX 10. He continued the medications and work restrictions. PX 10.

On November 17, 2017, Dr. Chabot re-examined the petitioner and reviewed the EMG and new MRI studies. PX 10. Dr. Chabot disagreed with Dr. Kube's diagnosis and surgical recommendation, noting that the MRI showed no evidence of nerve compression and the EMG was inconsistent with the petitioner diffuse, nonfocal complaints of symptoms. Dr. Chabot also noted the petitioner had been previously examined for psychological factors that would better explain her physical complaints. PX 10, RX 1. Alternatively, Dr. Chabot opined an unrelated myofascial disorder may also be involved. Dr. Chabot felt the treatment received to that point had been reasonable, but he found the petitioner had reached maximum medical improvement, was not a surgical candidate, and needed no further care related to the work accident. RX 1. He also recommended continuing the same work restriction of no lifting over 30 pounds, but opined only that her past time off work was related to the work injury. RX 1.

At trial, the petitioner denied that she needed any further treatment of her low back or concussion. T. 40-41. She testified that she received temporary total disability benefits during the two periods she was off work prior to November 7, 2016: the first period from February 18, 2016, through June 24, 2016, and the second period from August 23, 2016, through November 6, 2016. T. 32. The parties stipulated the respondent paid 29 weeks of benefits covering these periods, in the total amount of $10,743.05. Arbitrator's Exhibit No. 1.

Ms. Conard testified that at all times from November 4, 2016, to the present, the respondent had work available for the petitioner within the 30-pound lifting restriction set by Dr. Chabot. T. 80.

Deposition of Dr. Kube

Dr. Kube testified that he is an orthopedic surgeon. PX 7, p. 5. According to his CV, he completed his residency and became a licensed physician in 2005. PX 7, p. 5; Ex. 1. He became board certified in orthopaedic surgery in 2009. Id. He had no idea how many patients he sees in a week. PX 7, p. 14. He had no independent recollection of the petitioner, and needed to refer to his notes to testify. Id. At his first examination of the petitioner on July 12, 2017, Dr. Kube found physical findings more consistent with cervical myelopathy (spinal cord or brain disturbance) than with a radiculopathy. PX 7, p. 23. He felt the petitioner's low back problems had resolved. PX 7, pp. 25, 60. Dr. Kube did not directly answer the question as to whether the petitioner's symptoms on that date were causally related to the work injury of February 17, 2016. PX 7, p. 27. Instead, he stated: "I felt there was a direct relationship between the symptoms that she

started to have immediately following that injury and the symptoms that she continued to have associated with that." Id. He testified that he noted the petitioner's "diffuse" symptoms made it so he could not pinpoint which nerve distribution was involved. PX 7, p. 33-34. Dr. Kube interpreted Dr. Trudeau's EMG as bilateral C5 radiculopathies by reading Trudeau's report. RX 7, p. 30. Dr. Kube testified that Dr. Trudeau's physical examination results were different from his, both examinations were somehow consistent with the EMG result. PX 7, p. 31. When asked if these showed neurocompression at C5, Dr. Kube responded: "More or less." Id. Dr. Kube testified the MRI of October 2017 showed a central protrusion at C4-5, small, and "at least effacing," or touching the spinal cord, consistent with the prior MRI" from 2016. RX 7, p. 38. Dr. Kube clarified that his surgery recommendation was for disc replacement at C4-5 to decompress the cervical spine and nerve roots. PX 7, pp. 38-39. His diagnosis was a disc protrusion at C4-5 with concomitant radiculopathy at C5 bilaterally with intermittent spasticity consistent with spinal cord involvement. PX 7, pp. 41-42. He also believed the petitioner's headaches could be cervicogenic. PX 7, p. 42. Dr. Kube opined that if the petitioner did not have the proposed surgery, she would have some significant degree of limitations, and he would recommend an functional capacity evaluation to set those. PX 7, p. 43.

On cross-examination, Dr. Kube could not recall reviewing any records of the petitioner's treatment prior to July 2017, other than the cervical MRI from March 2016. PX 7. P. 54. The petitioner advised him she was working outside the restrictions set by Dr. Rerri, but Dr. Kube did not know what those restrictions were. PX 7, p. 56. He did not know what restrictions Dr. Chabot had given. Id. He agreed that the disk herniation he saw on the MRI was not huge. PX7, p. 65. Dr. Kube was not aware of the petitioner's mental health issues that existed prior to the work accident. PX 7, p. 67. Dr. Kube testified he has never seen somatization disorder in his practice as a spine surgeon. PX 7, p. 69. Dr. Kube agreed he would probably order a functional capacity evaluation even if the petitioner had surgery, implying there would be permanent restrictions even if the surgery was done. PX 7, p. 70-71. Dr. Kube was unable to determine that the surgery he recommended would improve the petitioner's symptoms. PX7, pp. 72-75.

Deposition of Dr. Chabot

Dr. Chabot testified that he has been an orthopedic spine surgeon since 1994, and has been board-certified since 1996. PX 1, pp. 5-6, Ex. A. He is also an instructor at Kirksville College of Osteopathic Medicine since 1997, and Chief of the Department of Orthopedics at Des Peres Hospital since 2010. PX 1, Ex. A. Dr. Chabot trains medical residents. PX 1, p. 7. His practice focuses on conditions of the spine, including neck, thoracic spine, lumbar spine and sacrum, and he sees between 90 to 100 patients per week, performing an average of 7 surgeries per week, primarily to the neck and lumbar spine. PX 1, p. 7.

At the time of his first evaluation of the petitioner on September 19, 2016, Dr. Chabot reviewed the records of Drs. Cwik, Kumar, Sweet-Friend, and Rerri, as well as PA Furlong. RX 1, p. 11. In the records was evidence of pre-accident low back pain, depression and anxiety. RX 1, pp. 11-12. Dr. Chabot reviewed the petitioner's verbal history and compared it with the records. RX 1, pp. 12-14. He noted the petitioner had failed to mention the pre-accident back

pain or the implantation and removal of the spinal column stimulator. RX 1, p. 17. He reviewed the 2016 x-rays of the cervical spine that showed facet joint degeneration that was genetic based, and pre-existed the date of injury of February 17, 2016. RX 1, p. 14-15. He reviewed 2016 x-rays of the lumbar spine that showed no evidence of any defects. RX 1, pp. 14, 16. On examination, he found mild tension and loss of curvature of the cervical spine, mild reductions in full range of motion, and pain complaints with all movement. RX 1, p. 18. The lumbar spine exam was normal. Id. He found a positive Hoffman sign on the right, decreased sensation in the left arm, and normal reflexes and motor strength in both upper extremities. RX 1, p. 19. Examination of the lower extremities was normal. Id. Dr. Chabot reviewed the cervical spine MRI from March 10, 2016 and found mild bulging with desiccation (or dehydration) of the disc centrally at C4-5 and C5-6, but no evidence of neurocompression. RX 1, pp. 19-20. He explained that a mild bulge, especially in the presence of desiccation, is a progression of degeneration of the disc, whereas with a disc herniation, there is material from the disc which projects out and may produce compression of nerve roots or surrounding tissue. RX 1, p. 20. The lumbar spine MRI from the same date showed no abnormalities. RX 1, p. 20. Dr. Chabot found these MRI findings did not show any evidence of an acute injury to the petitioner's cervical or lumbar spine that was consistent with the petitioner's work accident. RX 1, p. 21. Dr. Chabot's diagnoses were cranial contusion with concussion and neck and back contusions/strains. RX 1, pp. 21-22. He opined these were causally related to the work accident. RX 1, p. 22. At that time, Dr. Chabot felt the petitioner had not reached a permanent state with regard to her work injury, and he recommended physical therapy under the supervision of a physiatrist, focusing on myofascial release. RX 1, p. 23. He also gave her a work restriction of no lifting over 30 pounds. RX 1, p. 23.

At his second evaluation on November 17, 2017, Dr. Chabot reviewed the petitioner's history since his first exam, noting new complaints of pins and needles in her right arm since November 2016, the same left arm complaints, the petitioner's divorce, new diagnostic testing, and the surgery recommendation by Dr. Kube. RX 1, p. 24. He reviewed the records of Dr. Rerri, PA Furlong, Dr. Kube, Dr. Trudeau, Fairfield Memorial Hospital (PT) and Clay County Hospital (ER and PT), as well as the then-new cervical spine MRI of October 9, 2017. RX 1, pp. 25- 26. Dr. Chabot noted Trudeau's report was interesting because his physical examination did not support his diagnosis of C5 radiculopathy. RX 1, pp. 26-27. Dr. Trudeau found multiple diffuse symptoms that did not correlate to the C5 nerve root or dermatome: bilateral tenderness in the occipital region at the base of the skull, hypesthesia in all dermatomes (not just C5), weakness in both upper extremities, left greater than right, out of proportion to being right-handed, reduction of left biceps and brachial radialis reflexes, and no spasticity. RX 1, pp. 26, 55-56. Dr. Chabot also noted the MRI results from October 2017 were also inconsistent with Dr. Trudeau's diagnosis. RX 1, p. 27. At C4-5 and C5-6, Dr. Chabot noted ridging or minimal bulging, but no evidence of neural compression or spinal cord compression, no evidence of signal within the spinal cord to suggest myelomalacia, and no evidence of disc herniation. RX 1, p. 28. Dr. Chabot explained that EMG results are not infallible, and must be taken in the context of physical findings and MRI results. RX 1, pp. 60-62. Here, the physical exam findings were diffuse, not limited to the C5 dermatome, and the MRI showed no evidence of abnormal function of the C5 nerve. RX 1, pp. 60-62.

On examination, the petitioner's cervical and lumbar spine findings were the same as Dr. Chabot's prior exam, but the upper extremities were different: the petitioner now had decreased sensation to pinwheel testing on the entire right arm, which did not fit any specific dermatome, the Hoffman sign was now negative bilaterally, and the Phalen's test and Tinel's signs for carpal tunnel syndrome were now positive bilaterally. RX 1, pp. 30-31. As before, the Spurling test, to check for nerve compression in the cervical spine, was negative. RX 1, pp. 30-31. The Hoffman sign tests for spasticity, and its presence may suggest evidence of a central nervous system problem, possibly spinal stenosis. RX 1, p. 32. Based on his examination and review of the records and diagnostic images, Dr. Chabot's diagnoses remained unchanged. RX 1, p. 32-33. He opined that the petitioner's treatment up to that time was reasonable, although he did not believe the epidural steroid injection was warranted. RX 1, pp. 33-34. Dr. Chabot opined that the petitioner had reached maximum medical improvement as of November 17, 2017, needed no further treatment related to her injury. RX 1, pp. 34, 36. She had already undergone conservative measures over a long period of time without any sign of improvement, with her complaints varying significantly in location and type, but her physical exam and diagnostic studies did not support any active radiculopathy as the source. RX 1, pp. 34-35. Dr. Chabot noted the non-physiologic patterns of symptoms strongly suggested an unrelated psychosocial role, and that there may be an unrelated myofascial component as well. RX 1, pp. 35-36, 55-56. Dr. Chabot opined the petitioner had reached a state of permanency, and he further testified that he would keep the 30-pound lifting restriction in place. RX 1, pp. 37-38. If work was available within that restriction, the petitioner would have been permitted to work during the period between his examinations. RX 1, p. 38.

On cross-examination, Dr. Chabot further testified that these work restrictions after November 17, 2017, were not related to the work injury of February 17, 2016. RX 1, p. 47. After that date, there was no physiological basis for her restrictions, and they were based solely on her age, physical conditioning and factors of that sort. RX 1, pp. 47-48. As far as psychosocial factors, Dr. Chabot noted the petitioner had a history of depression and anxiety, and a component of those is somatization of complaints, including subjective complaints of physical symptoms associated with the psychological disorder. RX 1, p. 51.

CONCLUSIONS OF LAW

With regard to the issue of (F) whether Petitioner's current condition of ill-being is causally related to the injury, the arbitrator concludes:

The petitioner testified that she sustained a concussion and neck and back injuries when she fell on February 17, 2016. She further testified that she no longer needed any medical attention for her concussion or low back. With regard to her neck, the petitioner claimed to have had symptoms immediately following the work accident, but she failed to submit the emergency room records or any records of any treatment of the cervical spine that occurred within a week of the accident date. On February 23, 2016, Dr. Sweet-Friend found no complaints of neck pain, and noted no physical evidence of a neck injury. She referred the petitioner to Dr. Rerri for

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treatment of the low back pain only. A CT scan of the cervical spine on the date of accident showed no disc bulge, no disc herniations, and no other abnormalities. The cervical spine MRI of March 10, 2016, also showed no disc herniations or any nerve compression that would explain the petitioner's ongoing complaints of neck pain and upper extremity pain, numbness or tingling. The MRI of October 9, 2017 also showed no herniations or nerve compression. The petitioner underwent extensive conservative treatment, including two rounds of physical therapy, medications, and an epidural steroid injection, none of which helped. This evidence all shows there was no physiological basis for the petitioner's subjective complaints regarding her neck. Dr. Chabot concluded that the objective evidence established an initial injury that included a concussion and contusion/strains of the cervical and lumbar spine. However, based on the lack of objective evidence of any continuing physical injury to the neck, Dr. Chabot concluded that as of November 17, 2017, the petitioner's neck complaints were no longer related to her work accident.

Dr. Chabot was the only physician involved in this case who had access to all of the petitioner's records from her various treaters. He specifically noted the lack of objective evidence of injury in the petitioner's CT and MRI scans, the diffuse and non-specific nature of the petitioner's subjective complaints, and inability of conservative measures to treat the complaints. Dr. Chabot was the only physician whose reading of the MRI films agreed with the radiologist readings of the same films. Dr. Chabot also has over a decade more experience as an orthopedic spine surgeon than Dr. Kube. Furthermore, the report of Dr. Herberger, the petitioner's own physician, corroborates Dr. Chabot's opinion that the petitioner's pain and numbness symptoms were more likely related to her psychological issues than to her work accident.

On the other hand, the petitioner's own testimony was contradicted by the medical records, as discussed above. The histories given by the petitioner to Dr. Chabot and Dr. Kube were not supported by her actual treatment records. Her account of her conversation with Ms. Conard was directly contradicted by Ms. Conard, whereas Ms. Conard's testimony was corroborated by the documentary evidence, including attendance and payroll records, as well as the letter signed by both the petitioner and Ms. Conard on November 4, 2016. (RX 7.) As such, the arbitrator assigns less weight to the petitioner's testimony.

Similarly, Dr. Kube testified he only examined the petitioner on three dates, or just one time more than Dr. Chabot. Dr. Kube's opinions that the petitioner had cervical radiculopathy are contradicted by the radiologist's reports of two normal cervical spine MRIs, as well as the ever-changing subjective complaints of the petitioner which were not associated with any specific dermatome. Dr. Kube was not familiar with the petitioner's prior health history before July 2017, and he did not review any of her prior treatment records. He was unaware of her past mental health history, to which two doctors attributed the petitioner's diffuse subjective symptoms. Although he noted in his records that the MRI of October 9, 2017, showed a herniation at C4-5, he also stated he was not impressed it was "not huge." PX7, p. 65; PX 8. Because Dr. Kube's opinions were based on inaccurate information, and because he was missing additional information about the petitioner's past history, the arbitrator assigns little weight to

Dr. Kube's opinions. The arbitrator assigns greater weight to the opinions of Dr. Chabot. See, *McRae v. Industrial Comm'n*, 285 Ill.pp.3d 448, 674 N.E.2d 512 (1996).

Similarly, Dr. Rerri's finding of the existence of a herniated disk at C5-6 was contrary to the radiology report. Dr. Rerri offered no medical explanation for the petitioner's changing symptoms or the location of her symptoms, and he gave no basis for his recommendation for his spinal fusion or which problems that surgery was intended to address. Furthermore, Dr. Rerri's opinions regarding the petitioner's work status were clearly based more on the petitioner's requests than on any medical basis. Whenever the petitioner asked for a specific addition or deletion to her restrictions, Dr. Rerri provided it, even at times when he had just opined markedly different restrictions. Dr. Rerri's demonstrated willingness to change his mind undermines his credibility in this case. As such, the arbitrator assigns greater weight to the opinions of Dr. Chabot. *McRae, supra.*

Therefore, the arbitrator finds the petitioner proved a causal connection between the accident of February 17, 2016, and her injuries of concussion, low back strain and neck strain. The arbitrator further concludes that as of November 17, 2017, the petitioner's conditions of ill-being were no longer causally connected to the accident of February 17, 2016.

With regard to the issues of (J) whether the medical services that were provided to petitioner were reasonable and necessary, whether respondent has paid all appropriate charges for all reasonable and necessary medical services, and (K) whether the petitioner is entitled to any prospective medical care, the arbitrator concludes:

The petitioner testified she did not need any further medical treatment for her concussion or low back. Dr. Chabot and Dr. Kube also testified that they recommended no further treatment for these conditions. Dr. Chabot testified that as of November 17, 2017, the petitioner's care and treatment had been reasonable and necessary. The respondent stipulated to liability for all reasonable and necessary care incurred through November 17, 2017. Based on this evidence, the arbitrator concludes that medical services provided to the petitioner from February 23, 2016, through November 17, 2017, for treatment of her concussion, neck and low back strains were reasonable and necessary.

Dr. Chabot opined that the petitioner had reached maximum medical improvement and required no further treatment of the neck after November 17, 2017. His opinion was based on the objective diagnostic studies showing no disk herniations or nerve compression in the cervical spine, combined with the petitioner's diffuse complaints that did not correlate with any surgical condition. Dr. Kube recommended disk replacement surgery. For the reasons stated above, the arbitrator affords greater weight to the opinions of Dr. Chabot than to those of Dr. Kube or Dr. Rerri. Dr. Chabot had access to more information about the petitioner's history and treatment. Dr. Chabot's reading of the MRI results was consistent with two radiologists' interpretation. Dr. Chabot's opinion about psychosocial factors playing a causative role in the petitioner's symptoms was corroborated by the finding of Dr. Herberger, who found petitioner's

depression and anxiety stemmed from her prior history of abuse and family problems. Dr. Kube's opinions were not consistent with the objective evidence, but relied on the petitioner's subjective symptoms, which were not consistently reported, and were contradicted by the MRI results. The arbitrator places little weight on these complaints.

Based on this evidence, the arbitrator concludes the petitioner reached maximum medical improvement and did not require surgery or other treatment as of November 17, 2017. As such, the respondent is not liable for any medical treatment recommended or rendered after that date.

With regard to the issues of (L): whether the petitioner is entitled to temporary total disability benefits, the arbitrator concludes:

Based on the stipulation of the parties, the petitioner was off work and entitled to temporary total disability from February 18, 2016, through June 24, 2016, and from August 24, 2016, through November 6, 2016. Arb. Ex. No. 1. The parties also stipulated the respondent paid $10,743.05 in temporary total disability.

The medical records show that on June 24, 2016, Dr. Rerri released the petitioner to work with new restrictions: no lifting over 20 pounds, "rework only." On July 1, 2016, the petitioner called Dr. Rerri and requested that Dr. Rerri remove the term "rework only" from her restrictions. PX 6. Dr. Rerri complied and the petitioner returned to work at her regular job as a packer. PX 6, RX 3, RX 4. The petitioner continued working until Dr. Rerri took her completely off work on August 23, 2016. PX 6. When Dr. Chabot gave the petitioner a 30-pound lifting restriction, the respondent offered the petitioner work within that restriction, and the petitioner accepted this on November 4, 2016. RX 7. She returned to work on November 7, 2016. After that date, per Ms. Conard's testimony, the respondent had work available within this 30-pound weight restriction. The arbitrator notes that at various times after that date, Dr. Rerri and Dr. Kube gave the petitioner different work restrictions. From July 12, 2017, forward, Dr. Kube released the petitioner to work with restrictions of frequent lifting of 10 pounds and limited lifting up to 35 pounds. However, the arbitrator assigns more weight to the opinions of Dr. Chabot than to Dr. Kube, because Dr. Chabot's opinions were based on significantly more objective medical evidence than the opinions of Dr. Kube. *McRae, supra.*

To prove TTD, a claimant must show not only that he did not work, but also that he was unable to work. *Presson v. Industrial Comm'n*, 200 Ill.App.3d, 558 N.E.2d 127 (1990). If a claimant is able to work light duty and the employer offers light duty work, then the claimant is not entitled to TTD. *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 559 N.E.2d 526 (1990). In this case, Dr. Chabot opined the petitioner was able to work with a 30-pound lifting restriction, and the respondent offered such work to the petitioner beginning November 7, 2016. The petitioner presented no evidence that the work she did after that date was beyond the restriction given by Dr. Chabot. The petitioner presented no evidence that she ever returned to work within the Dr. Chabot restrictions, per her agreement to do so, after January 4, 2017. Furthermore, Dr. Rerri had released the petitioner to light duty as of November 9, 2016, with the

same 30-pound lifting restriction added to no forward flexion. The petitioner presented no evidence that the work offered by respondent after that date fell outside Dr. Rerri's restrictions. Although Dr. Rerri took the petitioner off work on January 6, 2017, this restriction was based solely on the request of the petitioner, who was seeking to apply for short-term disability. Just three days earlier, Dr. Rerri had opined that the petitioner could still work restricted duty. The respondent was not able to accommodate the restrictions given by Dr. Kube. PX 12.

Based on the foregoing reasons, the arbitrator concludes that the petitioner was not entitled to temporary total disability benefits after November 7, 2016. The preponderance of the evidence shows that she was capable of working light duty after that date, and that the respondent offered light duty work, within Dr. Chabot's restrictions, from that date forward. *Gallentine*; *Presson.*

With regard to the issues of (M): whether penalties and fees should be imposed on the respondent, the arbitrator concludes:

Based on the arbitrator's decision above, the arbitrator concludes there was sufficient basis for the respondent to rely on the opinions of Dr. Chabot, and the arbitrator further concludes this reliance was reasonable. Respondent offered work to the petitioner within the restrictions given by Dr. Chabot, and the petitioner elected to decline this offer. As such, as explained above, the respondent's denial of temporary total disability was reasonable, and penalties and attorney's fees and costs are not warranted here. *Mechanical Devices v. Industrial Comm'n*, 344 Ill.App.3d 752, 800 N.E.2d 819 (2003).

On the date of trial, the parties negotiated stipulations, including the stipulations regarding the periods of temporary total disability for which respondent accepted liability, and the period of medical bills for which the respondent accepted liability, and the parties further agreed that the respondent had paid benefits for these periods. The arbitrator concludes that these negotiations were not only reasonable, but are encouraged to minimize the disputed issues that needed to be tried. As such, the arbitrator concludes that no penalties or attorney's fees or costs are warranted. Id.

Lastly, the arbitrator declines to impose penalties or attorney's fees and costs on account of any medical treatment bills that were unpaid as of the date of arbitration. The respondent submitted a payment ledger of bills it had paid. RX 15. The petitioner offered a group exhibit of allegedly unpaid medical bills at trial. PX 13. Some of the bills were certified over a year prior to trial, and were clearly subsequently paid by the respondent. The vast majority of the bills were certified less than two weeks prior to trial, and for each bill in the exhibit, the petitioner submitted no evidence that she had provided respondent with a complete bill and supporting medical records prior to trial. Pursuant to *Anders v. Industrial Comm'n*, 332 Ill.App.3d 501, 773 N.E.2d 746 (2002), the arbitrator concludes that the petitioner is not entitled to penalties or attorney's fees or costs on account of the timing of the respondent's payment of these bills.

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With regard to the issues of (N): whether respondent is due any credits, the arbitrator concludes:

The parties stipulated that respondent paid $10,743.05 in temporary total disability benefits. Arb. Ex. No. 1. After applying a credit for those prior payments to the period of temporary total disability awarded above, the respondent owes no further temporary total disability benefits.

The arbitrator finds respondent's group short-term disability plan would qualify for a credit under Section 8(j) of the Act. The parties stipulated that this plan paid $8,848.11 for 26 weekly pay periods with ending dates from January 21, 2017, through July 21, 2017. Arb. Ex. No. 1, RX 6. However, the arbitrator has determined the petitioner was not entitled to temporary total disability after November 7, 2016, and therefore no credit is due on account of the petitioner's receipt of these short-term disability payments.

The arbitrator finds the respondent is entitled to a credit for all medical expenses paid prior to trial.

With regard to the issues of (O): whether petitioner is entitled to "mileage," the arbitrator concludes:

The petitioner has the burden of proof that she was required to incur extraordinary travel to receive treatment for her work injuries in order to recover mileage. *General Tire & Rubber Co. v. Industrial Comm'n*, 221 Ill.App.3d 641, 582 N.E.2d 744 (1991). In this case, the petitioner had treated at Bonutti Orthopedics for her previous orthopedic issues, which included carpal tunnel and leg surgeries. Bonutti Orthopedics is located in Effingham, which is only 60 miles from petitioner's residence in Fairfield, where she lived at the time of her visits. Dr. Kube's office in Marion was only 17 miles from petitioner's residence in West Frankfort, where she lived at the time of her visits to Dr. Kube. Memorial Hospital in Carbondale, where the October 2017 MRI was performed, was 40 miles from the petitioner's residence. The arbitrator concludes that these distances are not extraordinary, and declines to award any mileage for the petitioner's treatment at these facilities. *General Tire.*

The petitioner also claims mileage for her EMG by Dr. Trudeau on July 17, 2017, in Springfield, Illinois, which she alleged was 367 miles. The arbitrator takes judicial notice that Google Maps and Map Quest both list the round trip mileage at 330 miles. Nonetheless, the petitioner presented no evidence that she was unable to obtain an EMG study at any of the many hospitals and clinics closer to her home, including the same hospital where she obtained the MRI. As such, petitioner has failed to meet her burden of proof that her mileage was reasonable, and the arbitrator denies the award of mileage for this date. *General Tire.*

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Lastly, the petitioner claims mileage for a visit to "Mercy, St. Louis/Rinard" on "July 16," but there is no record of any such visit on that date in 2016 or 2017. As such, the petitioner had failed to prove entitlement to any mileage as alleged.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

POLIXENI TINGAS,

Petitioner,

19IWCC0669

vs. NO: 14 WC 11888

118 GREEN LTD d/b/a ROG'S PUB & EATERY,

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 all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner failed to prove she sustained an accident that arose out of and in the course of her employment on January 24, 2014.

Petitioner was employed by Respondent as a manager and bookkeeper on January 24, 2014. As a manager, Petitioner's job duties included closing the business, making sure employees were in position, filling coolers, bringing liquor upstairs, and receiving deliveries. As a bookkeeper, her job duties included scheduling, reporting at the end of the day, closing the register, putting information into daily sheet reports, and turning in weekly and monthly reports to the accountant.

I. Petitioner's testimony

Petitioner testified that on the accident date, she had to stay at work until after 2:00 a.m. to close Respondent's business. To do so, Petitioner had to close the register, count the cash, put the credit cards in sequence, and close the credit card machine. Petitioner testified that she owned a Honda Civic that she drove to Respondent's business on the accident date, but it was not the vehicle she used to leave. Petitioner testified that George Tingas, her brother and one of Respondent's owners, had taken her vehicle and left her his Grand Marquis to drive home. Petitioner testified that when she went to close the register for the evening, she saw a note left there from Mr. Tingas that read: "Hey, you know, I have stuff in the car. There is like a pink soap. Please bring it in

because you're going to need it in the morning to mop the floors because it's anti-slippery soap." T. at 19. Petitioner testified that she only became aware that Mr. Tingas had swapped their vehicles when she saw this note around 2:00 a.m.

Petitioner testified that after she finished closing the register and preparing for the next day, she went outside after 3:00 a.m. to bring in the pink soap per Mr. Tingas' instructions. She testified that before walking into the parking lot, which was owned by Mr. Tingas, she grabbed her coat and purse that contained Mr. Tingas' car keys. Petitioner testified that although she realized how cold it was when she got outside, it was not her intention to just get in her vehicle and go home, because she still had work to do to close the business down. Petitioner testified that she then opened the driver's side door and attempted to start the vehicle to warm it up, but the vehicle's battery was dead.

Petitioner testified that she then scanned the area and looked across the street toward a hotel to see if anybody was around to jump start her car, but she did not see anyone and decided that she had to go back into the building. Petitioner testified that she then took one to two steps toward the vehicle's trunk to retrieve the pink soap, slipped, and brought herself back into balance. She testified that she then looked around very carefully to not slip on anything again and did not think there was anything there; however, she slipped again on her third step and fell.

Petitioner clarified that she had been going toward her trunk but fell before she got there. She testified that had her vehicle started, she would have gotten the pink soap out of the trunk, used her keys to unlock the building's door, and gone back inside to put the pink soap in its position. Petitioner testified that in the time it would have taken to warm up her vehicle, it would have been natural for her to take the pink soap in, close the register, take the credit cards, complete the daily sheet, take items downstairs to the basement office, and lock up.

When asked if she had seen what she had slipped on, Petitioner responded: "When I looked down, I didn't see anything like a stone or – I was trying to see that there was no ice so I would not, you know, slip again because the first time I slipped. So I didn't see anything. It was dark, you know, all the lights on the building, had shut off by then. And the only light that I had was from the pole. So I looked very carefully so that I wouldn't slip. I was careful, trying to be careful not to slip, but unfortunately before I could get to the trunk, before I could get to the building, I fell." T. at 40.

Nevertheless, Petitioner thereafter testified that she had slipped on ice, causing her to fall onto her right side and twist her ankle. Petitioner testified that she had felt pain at that moment but had also passed out. She testified that when she came to, she did not know how much time had elapsed, but realized something was wrong with her leg. Petitioner testified that she then raised up her torso and waved to get a nearby driver's attention. She testified that the driver acknowledged her before she passed out again.

Petitioner testified that when she woke up again, a police officer named Officer Rosenstein was there and informed her that she had slipped on ice and fallen. Petitioner testified that Officer Rosenstein had found her on the ground in the middle of the parking lot near her or Mr. Tingas' vehicle. She testified that an ambulance then came and transported her to Resurrection Medical

Center. She testified that she had been unconscious for a long time, although she did not know how much time and pieced it together after the fact. She described it as going in and out of a sleep-like state.

The area in which Petitioner fell was open to the general public. Petitioner testified that although the parking lot did not have specific assigned spots for employees, there was a general understanding that employees were to park a little further away so that the parking spots nearest to the building were available to customers.

Petitioner testified that three weeks after her accident, on February 11, 2014, she provided the insurance company with a recorded statement after being contacted by "Ms. Pankau." Petitioner testified that she never mentioned in the recorded statement that the vehicle she was using was Mr. Tingas' vehicle, because Ms. Pankau did not ask her specific questions and it did not matter whose car she was using. She further testified that she had taken Norco at the time of her recorded statement and might not have been thinking straight.

Petitioner further recalled participating in a pretrial conference where both parties' counsel were present before the Arbitrator. She testified that she also did not mention that she was using Mr. Tingas' vehicle at the pretrial conference, because everyone present was geared up for her to sign off on the contract and no one asked her detailed questions.

II. Petitioner's Recorded Statement

The transcript of Petitioner's recorded statement with Kristen Pankau of Society Insurance was admitted into evidence as Respondent's Exhibit 1. Throughout the February 11, 2014 statement, Petitioner referred to the vehicle she was going to on the accident date as her own. She never mentioned that it was Mr. Tingas' vehicle.

Petitioner also told Ms. Pankau that she had closed the business and intended to bring something in from the vehicle that she had bought, but when she realized how cold it was outside, she thought "forget this" and that she better just get in the vehicle and go home. She stated that she then locked the doors, got into the vehicle, and saw that the battery had died. Petitioner stated that she got out of the vehicle and thought she better get some help quickly, given that it was so cold outside. Petitioner explained that she debated whether to go back into the building or to the hotel across the street. She stated that she then took three steps, hit ice, twisted her ankle, and fell.

Ms. Pankau directly asked Petitioner: "So you were going out to the car to grab something to bring it back in but you decided hey I'm just going to take off and then your car didn't start and so you were planning to go back into the building." Rx 1. Petitioner responded: "Ah originally yes." *Id.* Petitioner further explained that in that moment, she was thinking that she maybe should go to the hotel lobby and call a cab when she took the three steps and fell. Petitioner stated that when she fell, she had immediate right leg pain but no damage to her head.

Petitioner further stated that after she fell, she went in and out of "sleeping almost" while being picked up by the ambulance. She explained that it was like she was sleeping, but she could focus on the paramedic who was talking to her. Petitioner stated that she then went to sleep in the

ambulance, and the next thing she knew, she was sitting in the emergency room. Petitioner did not know if she was given something in the ambulance or if she had passed out.

III. Treatment Records

Treatment records show that an ambulance arrived at the parking lot on the accident date and found Petitioner with complaints of right leg pain after a fall. Petitioner denied any loss of consciousness to the responding paramedics. The ambulance immediately transported her to Resurrection Medical Center, where she again denied any loss of consciousness. Petitioner reported that she was walking out to her vehicle and slipped and fell on ice prior to her arrival. X-rays were obtained and revealed comminuted fractures of the distal right tibia and fibula. Dr. Frank Minardi thereafter diagnosed Petitioner with a pilon fracture of the right distal tibia with impaction and comminution as well as a comminuted fracture of the right distal fibula. On the same day, January 24, 2014, Petitioner underwent an open reduction internal fixation of the comminuted right distal fibula fracture.

Petitioner was discharged from the hospital on January 27, 2014. While in-patient, she participated in physical therapy and had a rehabilitation consultation with Dr. Stephen Talty. On January 25, 2014, Petitioner told Dr. Talty that her accident had occurred when she left work and her car would not start so she decided to cross the street and stay at the hotel. Petitioner stated that she then slipped and fell on ice. She again denied any loss of consciousness to Dr. Talty.

At a follow-up visit on February 10, 2014, Dr. Minardi spoke with Petitioner about using her external fixator as a temporizing measure to help the soft tissue heal and swelling decrease. He explained that Petitioner's options were either to proceed with an open reduction internal fixation of the distal tibia or to maintain the external fixator and observe Petitioner before switching her over to a high-top walker or short leg cast. At that time, Petitioner opted to maintain the external fixator.

On March 26, 2014, Dr. Minardi indicated that he still wanted to see callus formation or evidence of healing before taking Petitioner's external fixator off. Additional surgical options were discussed, including another open reduction internal fixation with a medial plate and bone grafting, but Petitioner chose to take the less aggressive approach. Dr. Minardi refilled Petitioner's prescription for Norco and recommended that Petitioner use an Exogen ultrasound bone stimulator to increase the healing time.

After utilizing the ultrasound bone stimulator and remaining non-weightbearing, Dr. Richard Hayek found that Petitioner's radiographs had shown improvement on June 19, 2014. Dr. Hayek recommended hardware removal and believed Petitioner would no longer require a tibia fixation or bone graft. On July 7, 2014, Petitioner's external fixation was removed, and a short-leg case was applied. On August 8, 2014, Dr. Hayek noted that Petitioner had progressive improvement with less demineralization, no instability at the fracture site, and some mild residual at the tibial metaphysis. Dr. Hayek instructed Petitioner to progress to weightbearing as tolerated and discontinue any external support.

Petitioner thereafter participated in physical therapy from August 11, 2014 to September

22, 2015. Petitioner informed the physical therapist that her accident had occurred when she slipped on ice and fell while leaving work. Despite not being discharged from physical therapy until September 2015, Petitioner last saw Dr. Hayek on November 24, 2014. At this visit, Dr. Hayek noted that Petitioner had significant functional and clinical improvement, but he believed she would likely have some residual clinical impairment and develop posttraumatic arthrosis.

IV. Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner's credibility was significantly diminished as a result of the numerous inconsistencies amongst Petitioner's testimony, prior recorded statement, and the treatment records. As the Commission has determined that Petitioner lacked credibility in her retelling of the alleged accident, the Commission finds that Petitioner failed to prove that she sustained an accident that arose out of and in the course of her employment on January 24, 2014.

In pointing out the specific inconsistencies, the Commission first acknowledges that Petitioner testified that she was using her brother's vehicle on the accident date. However, in her prior recorded statement, Petitioner never mentioned that it was Mr. Tingas' vehicle and often referred to it as her own vehicle. Petitioner also failed to mention that it was Mr. Tingas' vehicle during the pretrial conference before the Arbitrator.

A second inconsistency occurred when Petitioner testified at the hearing that Mr. Tingas had left her a note instructing her that there was pink soap in his car that she was supposed to bring into the business to use to mop the floors the following morning. Petitioner testified that she was walking toward the trunk of the vehicle to get the pink soap when she fell. However, in her recorded statement, Petitioner never mentioned Mr. Tingas' note or the pink soap. Instead, Petitioner stated that she intended to bring something in from the vehicle that she herself had bought, but when she realized how cold it was, she thought she would forget it and just go home. Petitioner stated that she then got in the vehicle, started it, and saw that the battery had died.

A third inconsistency occurred when Petitioner testified that she was walking toward the trunk with the intention of getting the pink soap when she fell. However, in her recorded statement, Petitioner stated that she was debating whether to go back into the building or to the hotel across the street after her vehicle failed to start. She explained that in that moment, she was thinking that she could go to the hotel lobby and call a cab when she took the three steps and fell. Petitioner also told Dr. Talty on January 25, 2014 that her accident had occurred when her car would not start and she decided to cross the street to stay at a hotel.

A fourth inconsistency exists regarding whether Petitioner lost consciousness as a result of her fall. In both her testimony and the recorded statement, Petitioner indicated that she had passed out or lost consciousness after the fall. However, the ambulance record from the accident date stated that Petitioner had denied any loss of consciousness. Petitioner also denied any loss of consciousness to Dr. Talty on January 25, 2014.

The final inconsistency concerns whether Petitioner had fallen on ice. In her testimony and the recorded statement, Petitioner claimed that she had fallen on ice. However, also during

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Petitioner's testimony, she stated that before she slipped and fell, she looked very carefully on the ground and did not think there was anything there.

The totality of these inconsistencies when considered together damage Petitioner's credibility. The inconsistencies that relate to whether Petitioner was walking to get the pink soap when she fell are further troublesome, because whether her trial testimony is true determines whether or not her accident occurred while she was in the process of performing a work task at Respondent's instruction. The numerous inconsistencies have rendered Petitioner's testimony unreliable, and as such, the Commission finds that Petitioner has failed to meet her burden of proving that she sustained a compensable accident on January 24, 2014.

IT IS HEREBY FOUND that Petitioner failed to meet her burden of proving that she sustained an accident that arose out of and in the course of her employment on January 24, 2014.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated June 1, 2018 is hereby reversed as stated herein.

IT IS FURTHER ORDERED that all benefits under the Illinois Workers' Compensation Act are hereby denied.

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

DATED: DEC 10 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 10/17/19
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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: Down	☒ None of the above

JERRY MATHIEU,
Petitioner,

19IWCC0670

vs.

NO: 17 WC 5890

ESTES EXPRESS LINES, LTD.,
Respondent.

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

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, temporary total disability benefits, the denial of penalties and fees, and medical expenses both current and prospective, 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 Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

Petitioner worked for Respondent as a spotter in a truck yard. In that job he moved trucks around the facility, loaded them, and unloaded them. He suffered a stipulated accident on February 18, 2017 while cranking a handle raising the level of the dolly apparently involved in loading a truck. Petitioner testified that there was a lot of force involved in turning the crank, the crank snapped back, and struck him in the head. He was taken to an Emergency Department, where he reported 5/10 headache, dizziness, and a spinning sensation, but no loss of consciousness or neck/back pain. He scored 14/15 in a Glasgow coma test. A head CT showed

no acute intracranial abnormality and a CT of the cervical spine showed no evidence of fracture or subluxation. Petitioner began treating with Dr. Ericson for a head injury.

Dr. Ericson testified by deposition on February 27, 2018. He is board-certified in neurology and electrophysiology and his practice is in general neurology. He explained that a concussion is a traumatic brain injury and post-concussion syndrome is "persistent symptoms that follow the concussion and which often include headache, neck and shoulder pain, cognitive change, and psychiatric symptoms."

Dr. Ericson first saw Petitioner on February 27, 2017. Petitioner reported the accident in which he was struck by a rapidly spinning crank handle. He reported daily migraine-like headaches consistently throughout his treatment. He had no history of headaches prior to the accident, and such headaches are common in patients with post-concussion syndrome. He also reported dizziness, lightheadedness, sense of vertigo, stiffness, slow cognition, mental fogginess, anxiety, and depression. He thought all of his symptoms were causally related to his concussion. Dr. Ericson prescribed physical therapy and medication. On examination, Petitioner showed tenderness to palpitation in the neck and shoulder, but otherwise Dr. Ericson's neurological exam was normal. Dr. Ericson noted that his neurological exams were always normal throughout his treatment of the Petitioner.

As treatment continued, Petitioner began to be troubled more and more by mood symptoms. There were problems regarding Petitioner getting medications Dr. Ericson prescribed due to insurance issues. He also thought Petitioner would benefit from treatment from a psychologist/psychiatrist. Dr. Ericson noted that Petitioner showed difficulty with memory, concentration, and manual dexterity tests.

Dr. Ericson ordered an MRI of Petitioner's brain, which was normal. However, the injuries Petitioner had would likely not show up on an MRI and Dr. Ericson "would have been surprised if the imaging showed us anything." He explained that patients' recovery from concussion vary. Some people recover very quickly and little treatment may be necessary. However, when symptoms persist medication, physical therapy, and mood management may be indicated. Dr. Ericson had no idea how long Petitioner's symptoms would persist, but he knew that Petitioner "only wants to resume his normal life" and the interventions they talked about were critical in attaining that goal. He noted that depriving a patient of pain and mood medication will result in increased symptoms and patients can have a type of withdrawal being cut off from mood-affecting medication.

Dr. Ericson did not believe Petitioner was ready to return to work in the job he had previously. The work environment was fast-paced and potentially dangerous, and he did not believe the pain, anxiety, and depression that Petitioner still experienced would allow him to function at that level. He was aware of the Section 12 medical report of Dr. McManus and his

opinion that Petitioner he had a mild injury which should have resolved. Dr. Ericson disagreed with Dr. McManus' characterization of the injury as mild. However, while he agreed that most concussions resolve quickly, there are outliers. Petitioner was an outlier because he still had symptoms.

Dr. Ericson was also familiar with the Section 12 medical report of Dr. Kessler and had similar opinions that most concussions resolve quickly, but opined Petitioner is not the only patient for whom post-concussion symptoms persisted. Dr. Ericson did not believe Petitioner was a malingerer and found he had cooperated fully with his treatment.

On cross examination, Dr. Ericson agreed that when he last saw Petitioner about a year after the accident, he still reported headaches a couple of times a week. Dr. Ericson knew of nothing that could contribute to Petitioner's headaches other than his sustaining a concussion and having to fight a battle with his employer for benefits. He agreed that Petitioner's report of headaches is purely subjective. He also agreed that there are many causes of headache. There was no reason to have imaging for Petitioner's neck pain because that would be indicated for disc bulging or nerve root impingement, which Petitioner did not exhibit.

Dr. Ericson noted that there are a lot of sources of pain in the neck and shoulders that would not appear on an MRI, such as muscle tension. He did not believe he ever received emergency department records, but it would not surprise him at all if Petitioner did not complain of neck pain at that time because often people "don't really notice [musculoskeletal symptoms] until the next day." The only neck symptom he solicited was pain with palpitation. Petitioner's report of cognitive difficulties was subjective.

Dr. Ericson did not know the weight of the object that struck Petitioner, but Petitioner indicated that he was struck with about 10,000 pounds of force. He did not believe Petitioner could return to work based on Petitioner's statements. Dr. Ericson agreed that he recommended that Petitioner have a neuropsychological evaluation, and Dr. McManus is a neuropsychologist. Dr. Ericson was unfamiliar with a MMPI-2-RF test that Dr. McManus performed. Dr. McManus "did not seem to skimp" on the tests he performed on Petitioner. However, he did not know whether they were entirely objective. Commenting on Dr. McManus' statement that Petitioner's performance on memory was consistent with severe dementia, Dr. Ericson stated: "when there are psychiatric symptoms overlying there can be a little bit of a disconnect between how people perform on these tests and how they perform in some aspects of their day-to-day function." His diagnosis of cervicalgia is simply neck pain and is inherently subjective. He believed Petitioner had to get back on his medications, be treated by pain management and have mental health treatment.

On redirect examination, Dr. Ericson testified the report of pain scale is subjective and he believed Petitioner was honest when he reported his pain level. He did not believe Petitioner

had severe dementia; "he was more highly functional that that." He agreed with Dr. McManus that Petitioner could benefit from a few psychological visits to prepare him to return to work.

On re-cross examination, Dr. Ericson agreed that Dr. McManus expressed disbelief in Petitioner's complaints. Dr. McManus' recommendation for limited mental health treatment did not indicate that the treatment was needed because of his work accident.

Dr. McManus testified by deposition on March 18, 2018 that he has a doctoral degree in clinical psychology and is board-certified in neuropsychology and rehabilitation psychology. He is a licensed psychologist, but noted there is no criteria for neuropsychologists in Illinois. In his job he treats patients with disrupted functionality from various causes, including those with head injuries resulting in post-concussion syndrome. About 35% of his practice involves medico-legal evaluations.

Dr. McManus evaluated Petitioner on August 1, 2017. The evaluation took 6-7 hours. Petitioner reported working as a dock worker and being struck in the left frontal region of his head. He was uncertain whether he lost consciousness. Dr. McManus noted that Petitioner recalled the ambulance ride and that if there was a loss of consciousness, "there would be momentary period where they couldn't initially recall all that happened." He also noted that he did not remember a Glasgow Coma Scale included in the emergency department records, which is particularly useful if there is a loss of consciousness.

Petitioner currently complains of being anxious and depressed since the accident with irritability, frustration, reduced endurance, headaches with exertion/prolonged TV watching, and inability to focus. He reported more dysphoric mood due to financial condition caused by the injury and it was causing increased stress in his marriage. Petitioner's complaints are all subjective, while the tests Dr. McManus administered are objective. The tests are intended to "evaluate multiple areas of brain functioning as an indication of how this person is currently functioning." Each test has its "norms" which is based on how they "know normal people function at the person's age and gender."

The tests are the gold standard and accepted by the psychological and neuropsychological communities as primary diagnostic tools to assess neuropsychological function. The tests include factors to determine the validity of the symptoms. In particular, the MMPI has nine initial validity scales to determine "the nature of the validity of the reporting." Petitioner scored the highest possible score indicating "improbable credible reporting." In the "forced choice" test, Petitioner scored less than random choice which means, "there's a likelihood to incorrectly respond, or likely intent to incorrectly respond." In the intellectual functioning test, Petitioner scored "the equivalent of severe mental retardation." However, in some tests he scored within the normal range or borderline impairment. These results were not internally consistent. Based

upon the test results, Dr. McManus did not believe Petitioner's report of symptoms was credible' "the objective data does not support his clinical representation."

Dr. McManus also considered the severity of the injury. He explained that mild injuries result in mild symptoms, moderate injuries result in moderate symptoms, and severe injuries result in severe symptoms. Dr. McManus testified that "the medical record infers that his was a mild head injury." He noted that there was no record of hospitalization, no imaging that suggest anything more than a mild injury, and the records of Dr. Ericson did not indicate "that the severity was anything greater than mild."

After his evaluation, Dr. McManus diagnosis was "best consistent with psychological factors affecting medical condition." He explained that meant there are "potentially some level of emotional behavioral social functioning that is impacting the one is recovering from a medical condition." He would have expected Petitioner to have completely recovered from his mild injury by the time of his evaluation. Since there was no support for credible emotional, personality, or cognitive impairment, Dr. McManus could not ascribe his complaints to the work accident. However, Dr. McManus would not opine whether Petitioner's incredible responses were intentional. He also noted that he observed some vision issues and recommended optometric evaluation. He opined that "there wasn't sufficient evidence to establish any disability." He thought the treatment provided was consistent with treatment of symptoms of a mild concussion, but there was insufficient evidence to support prospective treatment. Petitioner could return to work with 2-4 psychological sessions to address transition-to-work issues. He anticipated no permanency as a result of the injury.

On cross examination, Dr. McManus testified that the evaluation included about one and a half hours of face-to-face interaction and the rest of the time was spent in testing. He acknowledged that he was a psychologist and not a physician. He gets referrals from both plaintiffs and defendants in his medicolegal work.

Dr. McManus was asked how he would respond if the emergency department records indicated there was a Glasgow coma score of 14 in a scale to 15. He responded that it was below the perfect score, but within the mild range. Petitioner was cooperative in the testing. Dr. McManus agreed that he noted Petitioner had some difficulty visually pursuing objects, and one "would want to be able to scan, correct, and pinpoint" objects for a person working in a truck yard, however, he also thought it was inadvisable for such a person to drive. Petitioner said he drives during the day.

Dr. McManus agreed that Petitioner demonstrated memory deficits and that he opined that mild head injuries "typically" and not "always" resolve within six months. He also agreed that Petitioner's reports were consistent with Dr. Ericson's diagnosis of post-concussion syndrome causally related to his work accident. He also agreed that Petitioner's "pursuit

movements and visual convergence insufficiency" is seen in patients with post-concussion syndrome. Furthermore, he indicated he would defer to neurology for possible restrictions, and Dr. Ericson is a neurologist, as far as he knew. He did not know the force of the blow Petitioner experienced. He did not ask whether Petitioner suffered headache, and he did not report any. Dr. McManus did not cite any literature supporting his opinions. Regarding the testing, he agreed that pain and medications "can have some impacting factor, but not to the extent that it did in this case." Concussions generally are not detected in CTs/MRIs.

On redirect examination, Dr. McManus testified that Petitioner told him he drove to the appointment. He did not recall or note that Dr. Ericson administered any objective tests.

Dr. Kessler testified by deposition on March 22, 2018 that she is board-certified in neurology and specializes in neurology and behavioral neurology, which deals with "conditions that can affect the brain that may be thought of a neurological or psychiatric." She is on the traumatic brain injury team at the Lovell Federal Health Care Center where she practices and where she treats brain trauma patients including soldiers returning from combat areas. She is also an associate professor of neurology, psychology, and behavior sciences. About 65% of her work time is on expert witness work.

Dr. Kessler examined Petitioner on October 17, 2017, reviewed his medical records, and issued a report. Petitioner reported that a dolly handle struck him in the head, he was almost unconscious, and his mind went blank for an unspecified period of time. He was taken to Loyola by ambulance. He reported minimal recall of being in the ambulance and no recollection of being in the emergency department but that he was diagnosed with a concussion. He was discharged the same day.

Dr. Kessler testified that in her treatment of patients with concussion/post-concussion syndrome she generally does not prescribe physical therapy, "because a concussion does not cause anything that physical therapy would address and post-concussion syndrome resolves within days to weeks." However, if the patient sustains another injury, such as to the neck, he/she could be treated for that condition, but that treatment would not be for the concussion.

Petitioner reported he had no improvement since the accident eight months earlier. He had pounding, 10/10 headache at least once a day, felt dizziness/lightheaded with difficulty concentrating/focusing, but no light/sound sensitivity associated with the headaches. Dr. Kessler opined that there was no physical explanation for his report of dizziness/lightheaded. He also reported numbness in all his fingers at least twice a week and in his right leg a couple of times. He reported weakness in his arms and legs with some lack of coordination in his hands. He also reported continuing memory deficits which had not improved since the accident, got headaches while reading, he got lost driving, and drove as little as possible. Dr. Kessler noted that the reported numbness did not follow any neuroanatomical pattern and concussion does not affect

long-term memory. Petitioner reported he had no change in vision or hearing after the accident. He was very depressed; but indicated that he would be "cheered up by money." That statement had no relevance to the accident but showed that he was under financial stress. Petitioner also reported hearing inaudible voices. Dr. Kessler indicated that concussions never cause auditory hallucinations.

Dr. Kessler testified that in her observation, Petitioner showed no apparent difficulty finding words and no apparent difficulty in comprehension. Dr. Kessler noted that Petitioner was given two opportunities to complete a memory test. He performed both times in a manner consistent with an individual attempting to demonstrate memory impairment. On drawing a clock, Petitioner put the 12 at the bottom, the six at top and the numbers spaced on either side almost all incorrectly. He then placed his hands incorrectly to a designated time. This was "entirely inconsistent with this man's ability to function, to know what time he has to be at an appointment." "Somebody with a concussion would be able to complete this normally." It involves ingrained long-term memory not affected by concussion. In testing visual fields in which an examinee would be correct 50% of the time, she did not believe Petitioner gave any correct answer. Petitioner demonstrated reduced range of motion in his neck and tenderness to light touch and giveaway on strength testing throughout both arms and legs. These responses represent positive Waddell signs. In addition, he reported non-physiological sensory deficits.

In reviewing the medical records, Dr. Kessler noted that the emergency department records do not indicate that Petitioner sustained a major head injury. In addition, in Dr. Ericson's records, "the neurologist does not actually document observing deficits corresponding to [Petitioner's] reported symptoms." She also noted that in Dr. McManus's neuropsychological testing, he found that Petitioner had reported "noncredible symptoms, that he had invalid responses in his attempt at demonstrating his memory, and reported deficits outside of what one would see with an individual with a severe neurological disorder. He reported symptoms far greater than what people with psychosis report. He was much worse than people who have always had low intelligence. So the results showed that his responses were invalid on the rest of the testing." This pattern "could not possibly have resulted from a concussion." Dr. McManus' findings were consistent with hers.

However, she did not agree with Dr. McManus' concern about Petitioner's vision. She noted that an ophthalmology evaluation did not show the deficits that Dr. McManus noted. In addition, as a neurologist, Dr. Ericson would have evaluated eye movements and he did not find difficulties with horizontal/vertical pursuit movements. His eye movements were entirely normal when he was looking around. She explained that the diagnosis of Presbyopia by Dr. Keitzman, an ophthalmologist, simply means vision changes with age.

Dr. Kessler testified that she received a letter from Petitioner's lawyer, and noted that she never received such a letter from "opposing" counsel in her 40 years of practice. He asserted

that the characterization that the injury was mild was erroneous and that he had not been given PET or SPECT tests. Dr. Kessler noted that the severity of a traumatic brain injury is not determined by the force that is inflicted but rather by the symptoms that a person has at the time of the event. "It's the medical information that enables one to determine if somebody had a mild injury or a severe injury, not the potential for injury indicated in the mechanism of the accident." In addition, the tests referenced by Petitioner's lawyer were not indicated for concussion but rather for conditions such as epilepsy, seizures, and dementia/Alzheimer's disease.

Dr. Kessler diagnosed closed head injury with scalp laceration. There was a question of whether Petitioner actually had a concussion. "Concussion means that there had to be a loss of consciousness, amnesia or memory impairment, or other transient bran-related neurological dysfunction at the time of the event. Petitioner's histories were inconsistent and unclear. At most Petitioner sustained "a mild concussion with a brief episode of potentially memory loss or confusion." Such a concussion has no *sequalae*. "Concussions do not cause long-lasting recurrent or permanent symptoms." He needed no activity restrictions or additional treatment.

On cross examination, Dr. Kessler testified her examination of Petitioner took less than an hour. Her total bill for the examination was $2,937.50. She does not do any accident reconstruction and is not trained in the area. She agreed that a 14/15 Glasgow Coma score can be consistent with a concussion and she acknowledged that Petitioner could have suffered a concussion.

The Arbitrator found that Petitioner proved causation to a current condition of ill-being, but only to the extent opined by Drs. McManus and Kessler. She noted that Dr. Ericson relied mostly on Petitioner's subjective complaints and the lack of objective evidence of pathology. The Arbitrator found that the opinion testimony of Dr. Kessler and Dr. McManus was more persuasive than that of Dr. Ericson. She also noted that Petitioner's contemporaneous complaints did not support his current complaints and that his symptoms inexplicably worsened over time.

The Commission agrees with the Arbitrator that the opinions of Dr. McManus, and particularly Dr. Kessler, were more persuasive that those of Dr. Ericson. As noted by the Arbitrator, Dr. Ericson relied on Petitioner's subjective complaints, which appeared to be at odds with the objective medical records. In contrast, Dr. McManus and Dr. Kessler reviewed the entire medical record and administered objective tests to discern Petitioner's physical and psychological conditions. The Arbitrator's inherent determination that Petitioner was not credible in his complaints is amply supported by the record and objective evidence. Therefore, the Commission affirms and adopts the Decision of the Arbitrator regarding her determination of causation and the extent of Petitioner's condition of ill-being.

19IWCC0670

On the issue of temporary total disability, the Arbitrator awarded benefits through October 30, 2017, the date of Dr. Kessler's Section 12 medical examination and report. Petitioner argues that the award was erroneous and asserts he is entitled to disability benefits through the date of arbitration because of his allegedly ongoing and serious post-concussion syndrome symptoms. Again, the Commission agrees with the analysis of the Arbitrator and affirms and adopts the Decision of the Arbitrator in awarding temporary total disability benefits from February 18, 2017 through October 30. 2017.

On the issue of medical expenses, the Arbitrator awarded both current and prospective medical services "to the extent opined by Dr. McManus and Dr. Kessler." While the Commission agrees with the Arbitrator's analysis and the underlying intent of her award, the Commission notes that the award of medical expenses is indefinite and subject to subjective interpretation. In order to clarify the award of current medical expenses, the Commission awards medical expenses incurred through October 30, 2017, the date of Dr. Kessler's Section 12 report and the termination date of temporary total disability benefits.

In addition, the Commission notes that Dr. McManus and Dr. Kessler differed slightly in their recommendations for possible prospective medical with Dr. McManus recommending a vision test and a few psychological treatment sessions to deal with his return to work while Dr. Kessler opined that no prospective treatment was indicated whatsoever. In looking at the entire record before us, the Commission concludes that the opinions of Dr. Kessler are more persuasive on the issue of prospective treatment than those of Dr. McManus. Therefore, the Commission vacates the Arbitrator's award for prospective medical services and denies Petitioner's request for prospective medical treatment. Finally, the Commission affirms and adopts the Decision of the Arbitrator in denying the imposition of penalties and fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $429.60 per week for a period of 36&3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay medical expenses incurred through October 30, 2017 under §8(a) of the Act, subject to the medical fee schedule in §8.2.

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.

19IWCC0670

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 $20,000.00. 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: DEC 10 2019

Deborah L. Simpson

Maria E. Portela

Marc Parker

DLS/dw
O-11/22/19
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

19IWCC0670

MATHIEU, JERRY R
Employee/Petitioner

Case# **17WC005890**

ESTES EXPRESS LINES INC
Employer/Respondent

On 12/18/2018, 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:

0612 DWYER & COOGAN PC
PATRICK E DWYER
140 S DEARBORN ST SUITE 1603
CHICAGO, IL 60603

0560 WIEDNER & McAULIFFE LTD
PATRICK J MORRIS
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0670

19IWCC0670

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) & 8(a)

Jerry R. Mathieu
Employee/Petitioner

v.

Estes Express Lines, Inc.
Employer/Respondent

Case # **17** WC **5890**

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 George Andros, Arbitrator of the Commission, in the city of Chicago, on April 18, 2018 and May 22, 2018, and reassigned for issuance of a decision to the Honorable Barbara N. Flores, Arbitrator of the Commission. 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] Is Petitioner entitled to any prospective medical care?
L. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other

FINDINGS

On the date of accident, February 18, 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 as explained *infra.*

In the year preceding the injury, the average weekly wage was $644.37. *See* AX1.

On the date of accident, Petitioner was 54 years of age, *married* with 1 dependent child.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services as explained *infra.*

Respondent shall be given a credit of $15,894.46 for TTD, $0 for TPD, $0 for maintenance, $0 for other benefits and $27,877.79 (i.e., medical bills) for other benefits for a total credit of $43,772.25. *See* AX1.

Respondent is entitled to a credit of $0 under Section 8(j) of the Act. *See* AX1.

ORDER

Causal Connection

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work on February 18, 2017 to the extent opined by Respondent's Section 12 examiners.

Temporary Disability Benefits

Respondent shall pay Petitioner temporary total disability benefits of $429.60/week for 36 & 3/7th weeks, commencing February 19, 2017 through October 30, 2017 as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $15,894.46 for TTD benefits that have been paid.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from February 18, 2017 through May 22, 2018, and shall pay the remainder of the award, if any, in weekly payments.

Prospective Medical Treatment

As explained in the Arbitration Decision Addendum, the Arbitrator finds that Petitioner is entitled to prospective medical treatment as opined by Dr. McManus and Dr. Kessler.

Medical Benefits

Respondent shall pay reasonable and necessary medical services as reflected in Petitioner's Exhibits for medical bills that remain unpaid pursuant to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act to the extent opined by Dr. McManus and Dr. Kessler. Respondent shall be given a credit of for any medical benefits that have been paid, if any, as agreed by the parties, 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.

Penalties

As explained in the Arbitration Decision Addendum, Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act 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.

Signature of Arbitrator

December 17, 2018
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION *ADDENDUM*
19(b) & 8(a)

Jerry R. Mathieu
Employee/Petitioner

v.

Estes Express Lines, Inc.
Employer/Respondent

Case # **17** WC **5890**

Consolidated cases: **N/A**

FINDINGS OF FACT

A hearing was held in the above-captioned case on April 18, 2018 and May 22, 2018. Arbitrator's Exhibit[1] ("AX") 1. The issues in dispute include causal connection, Respondent's liability for certain unpaid medical bills, Petitioner's entitlement to temporary total disability benefits from February 19, 2017 through May 22, 2018, whether he is entitled to prospective medical care as ordered by Dr. Ericson, and whether Respondent is liable for penalties and attorneys' fees pursuant to Sections 16, 19(k) and 19(l) of the Act. AX1. The parties have stipulated to all other issues. *Id.*

Background

Jerry Mathieu (Petitioner) testified that he was employed as a Spotter since 1981. He was employed by Estes (Respondent) in February of 2017. Petitioner described the duties of the spotter position and explained that he would back trailers in and out of the docks, pull "empties," take full trailers out and replace them with empty ones. Petitioner explained that the dock is where one backs the trailer for the dock people to load up the trailers with freight, then he would pull the trailers to the yard. Trailers come in different sizes; 28-footers, 48-footers, 53-footers, etc.

Petitioner also explained the process of hooking up a trailer. He testified that he would back (the tractor) into the trailer, and there's a fifth wheel on the spotting horse (i.e., tractor) that raises up the trailer to hook them together. Petitioner testified that he also uses a dolly to crank up and raise the trailer so he can get the tip bar out (which secures the trailers with a pin so they do not tip over while in use at the dock by forklift drivers, for example), otherwise one cannot move the trailer from the dock.

Petitioner testified that when he worked for Respondent, he reported every day to McCook, Illinois. He was employed by Respondent for approximately nine months. Petitioner testified that he performed all of the duties of a spotter while working for Respondent. Prior to February 18, 2017, Petitioner testified that he had not suffered any head injury, concussion, or had problems with chronic headaches.

February 18, 2017 Accident

On the date of accident, Petitioner testified that he went to work and was hit in the head with a crank case handle. He explained that he was working with a 28-foot trailer full of freight (i.e., 20,000 lbs.). Petitioner had to pull up the tip bar before he could move it. To do this, he explained that he had to move the crank case

[1] The Arbitrator similarly references the parties' exhibits herein. Petitioner's exhibits are denominated "PX" and Respondent's exhibits are denominated "RX" with a corresponding number as identified by each party.

handle and get the dolly legs to go up higher. Petitioner testified that he tried to pull the tip bar, but was could not do so because the dolly legs had to go up higher for the tip bar to release. Then, he went to crank the dolly leg handle and while using all of his strength to do this "the thing flew back and whacked [him] in the head." At the hearing, Petitioner demonstrated that he was crouching down and cranking the dolly in a hunched-over position.

Petitioner testified that he knows that he was hit in the head because he was bleeding all over and laying there. He did not know whether he lost consciousness. Petitioner testified that he crawled to the walkie-talkie and called his boss, the foreman that was on duty that night who came to the scene and called an ambulance.

Medical Treatment

The medical records reflect that Petitioner presented to the emergency department at Loyola Medical Center. PX1. Petitioner reported the following in pertinent part during triage: "states was at work, hit by a heavy piece of equipment, denies LOC, reports spinning sensation, denied n/v, no neck or back pain, lac to back of L head per EMS, bleeding controlled, presented to hospital with bboard, ccollar, and SL, GCS 14 upon arrival, A&Ox2(person and time), denies ETOH or drug use, denies medical problems...." PX1. He also reported headache at a level of 5/10 with associated dizziness or lightheadedness. *Id.* Paulina Kuchinic, M.D. evaluated Petitioner at approximately 7:00 p.m. noting a history that he was "accidentally hit in the back of his head by a heavy metal handle at work today, now c/o spinning sensation moderate constant since this incident, mild HA, no vomiting. Pt denies LOC or amnesia. Pt denies any other injuries, no cp/sob, no Abd pain. No symptoms prior to his injury[.]" *Id.* Petitioner had a Glasgow-Coma score of 14 and reported headaches, a spinning sensation, but denied a loss of consciousness. *Id.* Dr. Kuchinic ordered a head CT scan to evaluate the blunt head injury with post-traumatic vertigo. *Id.* The CT scan results were all normal. *Id.* Ultimately, Petitioner was a diagnosed with an acute head injury and posttraumatic vertigo. *Id.* He was released early the next day, February 19, 2017, with meclizine for his vertigo. *Id.*

On cross-examination, Petitioner could not recall whether he reported no neck or back pain when he presented to the emergency room on February 18, 2017. He did recall reporting no vomiting, but he did not recall reporting any sort of loss of consciousness. Petitioner did not recall whether diagnostic tests of his head, brain, or neck showed any specific pathology.

On February 20, 2017, Petitioner saw Anthony Billotta, D.O. at Willowbrook Medical Center. PX2. He noted that Petitioner's CT scans were normal, but he was diagnosed with a concussion at Loyola. *Id.* Petitioner reported that he was not "feeling right" and periodic dizziness. *Id.* Dr. Billotta placed Petitioner off work until February 24, 2017. *Id.* When Petitioner returned, Dr. Billotta updated Petitioner's diagnosis to post-concussion syndrome and kept him off work until he could see a neurologist. *Id.*

On February 27, 2017, Petitioner first presented to Eric Ericson, M.D. of Neurology Consultants, S.C./EMG Centers of Chicagoland. PX3. He reported that he was injured at work when he was struck by a rapidly spinning crank handle in the left frontal region above the hairline. *Id.* Petitioner explained that he fell to the ground and was able to crawl to a walkie-talkie to contact his boss. *Id.* Petitioner also reported that he was dazed but did not think that he lost consciousness, and he was taken to Loyola. *Id.* Since then, Petitioner reported daily headaches that were worse in the morning at a level of 6/10, phono/photophobia, stiffness upon awakening, and a recent episode of difficulty helping his daughter with her homework, which he did "not think he would have had this difficulty prior to the accident." *Id.* Petitioner further reported becoming easily anxious

and difficulty dealing with conflicts at home, such as those accompanying raising a teenage daughter. *Id.* He was concerned about returning to work with persistent dizziness and mental fogginess. *Id.*

Dr. Ericson indicated that Petitioner sustained a concussion at work with typical subsequent symptoms. *Id.* He stated that there were elements of Petitioner's headaches that suggested migraine, but he suspected a muscle strain affecting the shoulders and cervical paraspinal muscles. *Id.* Dr. Ericson recommended physical therapy, ordered migraine prevention medication, and Tylenol as needed. *Id.* He further stated that Petitioner's "dizziness is nonspecific and likely a consequence of the concussion. *Id.* Dr. Ericson diagnosed Petitioner with a concussion without loss of consciousness, migraine without aura, cervicalgia, and dizziness and giddiness. *Id.* he kept Petitioner off work. *Id.*

On March 23, 2017, Petitioner presented to the Franciscan St. James Emergency Department complaining of headache and dizziness. PX5. He also complained of trouble walking, slowed speech, and confusion. *Id.* After reviewing the history of the event at work, Dr. Amar Bhardwaj diagnosed him with chronic post-traumatic headache. *Id.* A CT scan of the head was negative for acute cranial hemorrhage. He was prescribed meclizine *Id.* He was provided information regarding head injury and post-concussion syndrome. *Id.*

On March 29, 2017, Petitioner returned to Dr. Ericson reporting no improvement, a recent severe 10/10 headache that led to an emergency room visit, dizziness with prolonged standing, continued difficulty helping his daughter with her homework, and a feeling of cognitive impairment. PX3. Petitioner also reported that he "would like to go back to work but he does not feel that it is safe to do so." *Id.* Dr. Ericson diagnosed Petitioner with postconcussional syndrome, migraine without aura, not intractable, and cervicalgia. *Id.* He indicated that Petitioner's reported symptoms were directly attributable to the injury at work. *Id.* Dr. Ericson prescribed divalproex, ordered a brain MRI and physical therapy, and kept Petitioner off work stating that "inattentiveness related to pain and concussion-related cognitive change, as well as dizziness while on his feet, would pose a hazard to him and others in this environment." *Id.*

On April 10, 2017, Petitioner attended his first physical therapy session of approximately twenty-four total visits. PX4.

On April 27, 2017, Petitioner returned to Dr. Ericson with continued complaints including daily headaches at a level of 5/10 "less than what it was previously[,]" lightheadedness, mental fogginess, impaired concentration, inability to help his daughter with her homework, and anxiety/depression. PX3. He wondered whether he was trying to push himself too much, and did not feel that he could even handle restricted duty at work. *Id.* Dr. Ericson diagnosed post-concussion syndrome, recommended "neuropsychological testing due to the persistence of your memory symptoms[,]" and prescribed duloxetine. PX3. Twice in his report, Dr. Ericson stated that Petitioner should call him at any time with questions or concerns, and kept Petitioner off work. *Id.*

On May 25, 2017, Dr. Ericson recommended that Petitioner visit a neuropsychologist and undergo lab tests. PX3. Petitioner continued to report symptoms and a belief that he could not return to work. *Id.* Dr. Ericson kept Petitioner off work. *Id.*

On July 6, 2017, Petitioner returned to Dr. Ericson reporting ongoing symptoms. PX3. Noting his report of continued headaches and cognitive symptoms, Dr. Ericson recommended a brain MRI as well as a referral to pain management for his neck and shoulder discomfort. *Id.* He agreed that Petitioner was not ready to return to work. *Id.* Petitioner underwent the recommended brain MRI on July 19, 2017, which was unremarkable. PX6.

Section 12 Examination – Dr. McManus

On August 1, 2017, Petitioner underwent a neuropsychological evaluation by a clinical psychologist, Timothy McManus, PsyD., ABN, ABPP-RP, at Respondent's request. RX1. Petitioner gave a history that he was injured on February 18, 2017 when he was struck in the left frontal region of the head while loading a truck, was stunned, and "maybe had a loss of consciousness; however, he recalls being knocked down, bleeding, and arising and asking for assistance." *Id.*

Dr. McManus noted the following regarding symptom validity:

> Mr. Mathieu scored within the invalid range on the validity scales of hte MMPI-2-RF. He scored within normal limits on two scales associated with internal consistency, indicating that he accurately regarded the item content. He obtained the highest score possible on a measure of Infrequent Responses, and when combined with an extremely elevate score on the Infrequent Psychopathological Responses scale, his protocol was invalidated. He also obtained invalid scores on the "Fake Bad" scale and the Response Bias Scale. In the presence of normal scores on measures of Internal Consistency indicating accurate understanding of the test items, this protocol was regarded as invalid and would be consistent with non-credible symptom reporting.

RX1. Dr. McManus reviewed various medical records, performed a battery of tests, and rendered various opinions regarding the relatedness, if any, of Petitioner's condition to the accident at work. *Id.* Specifically, Dr. McManus diagnosed Petitioner with Psychological Factors Affecting Medical Condition. *Id.* He noted that Petitioner's description of injury was consistent with the presence of a mild head injury as reflected in the medical records that he reviewed, and that Petitioner's report of symptoms was consistent with the presence of post-concussion syndrome as diagnosed by Dr. Ericson that would be causally related to his work incident of February 18, 2017. *Id.* Dr. McManus stated that a mild head injury typically resolved within six months. *Id.* He also found that Petitioner's neuropsychological testing did not support the presence of disabling symptoms from either a psychological or neuropsychological perspective. *Id.* He further stated:

> Symptom validity could not be credibly and consistently established during this testing. Mr. Mathieu's performance on measures of memory was within the moderately to severely impaired range and, if valid, would be consistent with those with severe dementia requiring 24-hour supervision. There is no evidence within the medical records submitted the presence of dementia, much less moderate to severe dementia, represents a diagnostic consideration for Mr. Mathieu. Further, mild injuries resulting in mild changes in functioning; mild injuries do not result in severe functional impairments as reflected by Mr. Mathieu's test performance and measures of memory. Thus, current neuropsychological testing does not provide support for the presence of a disabling condition from a psychological or neuropsychological perspective.

Id.

Dr. McManus opined that Petitioner's medical treatment had been reasonable and stated that "[t]he possible presence of an optometric condition that may preclude his ability to return to work could not be ruled out within the medical records provided. All other medical opinions regarding Mr. Mathieu's capacity to return to work from a neurological perspective are deferred to Dr. Ericson." RX1. However, Dr. McManus also opined that his evaluation did not provide support the presence of any psychological or neuropsychological symptoms resulting in a functionally impairing condition that would preclude Petitioner from returning to work. *Id.* Dr. McManus indicated that Petitioner "may benefit from a brief period (2-4 sessions) of psychological services to facilitate his transitional return to work." *Id.*

Continued Medical Treatment

On August 17, 2017, Dr. Ericson noted his review of Dr. McManus' report and the conclusions with which he disagreed. PX3. He noted the following in pertinent part:

> ...
> I reviewed his neuropsychological evaluation. The visual concern is a reasonable one and i have provided Mr. Mathieu with an opthamology referral. Vision disturbance could be contributing to both cognitive impairment and headache.
> I do take issue with the characterization of the head injury as mild. Although there was no fracture or bleed Mr. Mathieu was struck in the head by an object moving with a great deal of force (25,000 lbs, he reports) behind it. I do not think that anyone can reasonably call such an experience mild. Neither are symptoms mild. He is in moderate to severe pain on a regular basis and has not returned to his prior level of cognitive functioning.
> Statements were made within the report that seem to characterize his responses as "invalid" and "non-credible". I have never viewed Mr. Mathieu in that way. He has never experessed any desire to me other than to find relief from symptoms and return to his prior activities. He is frustrated by his inability to work and deeply dissatisfied with his current disabled state. He does not want to be disabled.
> The statement was also made that such symptoms should resolve within 6 months. Medical data supporting such statements are derived from studies of groups and should not be regarded as absolute predictors of the courses that individuals will follow. There are always outliers.
> Mr. Mathieu was diagnosed with "psychological factors affecting medical condition" at the time of the neuropsych evaluation. Psychological/psychiatric disturbance is a known complication of concussion and that diagnosis should be not regaded as an assessment that suggest his syptoms are not concussion/work-injury related.
> ....

Id. Dr. Ericson further stated that he hoped all of the requested interventions and evaluations that he ordered would be approved in a timely manner "as all are medically reasonable." *Id.* He also kept Petitioner off work. *Id.*

On September 14, 2017, Petitioner presented to a neurologist, Young Ro, M.D. PX16. He complained of dizziness, headaches, and ringing in his ears, among other symptoms. *Id.* Dr. Ro administered a Mini Mental State Exam on which Mathieu scored 12/30, but Dr. Ro was not sure of the reliability of those results. *Id.* Dr. Ro also noted that he was missing records, such as those from Dr. Ericson. *Id.* He diagnosed Petitioner with a closed head injury with post-concussion syndrome and a cervical strain. *Id.*

On cross-examination, Petitioner testified that he never returned or followed up with Dr. Ro after this visit because he wanted money every time. Petitioner testified that his benefits were terminated.

On cross-examination, Petitioner further testified that he did not know how he got to or was referred from Willowbrook from Loyola. Petitioner testified that he was told by an unspecified person that if he had real bad headaches, to go to the emergency room and that if he was enhancing to go to the emergency room to check himself in because he could have a seizure. Petitioner testified that he was referred to Dr. Ro through Franciscan Hospital.

On September 15, 2017, Petitioner presented to an ophthalmologist, Timothy Keitzman, M.D. PX7. Dr. Keitzman's primary diagnosis was post-concussion syndrome. *Id.* He also diagnosed chronic post-traumatic

headache, deficiency of smooth pursuit movements, presbyopia, and pallor temporal optic disk, left. *Id.* In his progress noted the following in pertinent part:

> Post-concussion syndrome – mild saccadic pursuits OU – the vertical saccadic pursuits were not observed today. The horizontal pursuit deficiency create tension when trying to coordinate concerted binocular gaze movements. Few intermittent square wave jerks OU – when staring at a visual target this will create instability and tension when the brain attempts to compensate to hold them steady. Accommodative Insufficiency OU. No convergence insufficiency was noted today.

Id. Dr. Keitzman noted faint optic nerve fiber thinning OS temporal side and noted no corresponding visual field defect OS. *Id.* He ordered vitamin B12, Super B complex vitamins, new glasses with instructions to wear them all the time and let the lenses do the work of focusing his eyes, and counseled Petitioner to use his visual system up to pain tolerance limits which would slowly improve with time. *Id.* On cross-examination, Petitioner did not recall Dr. Kietzman diagnosing presbyopia.

Section 12 Examination – Dr. Kessler

On October 17, 2017, Petitioner underwent an evaluation with Elizabeth S. Kessler, M.D. (Dr. Kessler) at Respondent's request. RX3. Petitioner testified that Dr. Kessler's office was located in Highland Park approximately 4½ hours from him. He testified that his son went with him because there was no way he could find the office on his own.

Dr. Kessler authored a report dated October 30, 2017 after completing her evaluation. RX3. Dr. Kessler noted a history from Petitioner that he was injured at work on February 18, 2017, and that he consulted a paper to report that date to her. *Id.* She further noted Petitioner's report that he was cranking a dolly handle when the weight of the trailer forced the handle forward and it swung back hitting the left upper side of his head. *Id.* Petitioner also reported that "he was 'almost unconscious,' did not know where he was in his mind was blank for some unknown length of time about what she has 'no clue.' [Petitioner] then stated that he has been unconscious and has no idea how long he lay on the ground as no one else was still there at work. [Petitioner] states that he then crawled to the walkie-talkie where he contacted his supervisor who had been ready to leave. [Petitioner] states that he had lost an awful lot of blood. His supervisor came to the scene which he recalls 'vaguely, a little.'"

Regarding his symptoms at the time of his evaluation with Dr. Kessler, Petitioner reported no improvement since the date of accident eight months prior. RX3. He reported daily headaches, lightheadedness, difficulty concentrating, trouble focusing when he has a headache, and no other associated symptoms including sound or light sensitivity. *Id.* He reported dizziness twice per week, lightheadedness that lasted for two hours, numbness in all of his fingers lasting 10 to 20 minutes occurring about twice a week, numbness in his right leg about twice a week, which resolves if he hits it and moves it, and weakness in his arms and legs with some in coordination of his hands that he could not further describe. *Id.* Petitioner for the reported constant stiffness in the neck at a level of 8/10 intensity that was worsening without physical therapy. *Id.* Petitioner also reported that it was not easy for him to move his arms and legs since the accident, but he did not know why. *Id.* Among other symptoms, Petitioner also reported continuing memory impairment that had not improved since the date of accident, difficulty recalling conversations and events, impairment in long-term memory, lack of comprehension and inability to do too many things at once, trouble with word finding, the need to follow written instructions to use a telephone and microwave because he hits the wrong buttons, forgetful list to shower, and that his "memory bank is shot." *Id.* Petitioner further reported depression, hearing voices although he could not recall when that

began, ability to feel in his bones when it will be hot, cold, or will rain, and that he does not sleep soundly as he did previously. *Id.* Petitioner reported that he had none of the symptoms prior to his accident at work. *Id.*

Dr. Kessler noted inconsistencies demonstrated by Petitioner throughout the examination. RX3. She also noted her review of various medical records, but indicated that she did not have records from the paramedics, Willow Brook medical center, or Dr. Ro. *Id.*

Ultimately, Dr. Kessler opined that Petitioner did not sustained an injury on February 18, 2017 that would correlate with his reported depression, anxiety, vague auditory hallucinations, or chronic pain. RX3. She stated that Petitioners first visit to the emergency room and two following outpatient visits as well as one neurology visit we were related to the accident. *Id.* However, she opined that he did not require repeated visits two neurologists, the second emergency room visit, any of the physical therapy, or the ophthalmology evaluation. *Id.* Dr. Kessler specifically opined that Petitioner "reported multiple symptoms that do not have a physiological exclamation and demonstrated multiple non-physiological findings on examination. On a test of memory effort, he performed in a manner consistent with intentional demonstration of apparent memory impairment. While [Petitioner] reports continued symptoms, he requires no additional valuations or treatment for any injuries sustained in the 2/18/17 accident." *Id.* She further opined that, "[i]f he sustained a concussion in the accident, [Petitioner] could have limited his activities for the first couple of weeks after the accident. Within a month, he could have resumed all of his usual activities, including at work, at home, and recreation and other aspects of his life." *Id.*

On cross-examination, Petitioner testified that he physically drove a car to see Dr. Kessler in Highland Park, but with his son navigating. Petitioner testified that the drive took 4 ½ hours or longer. Petitioner maintained that it was safe for him to drive this distance with his son whereas he believed it would not be safe for him to drive at work because he could not pull over, he would have to keep going. He explained that "[d]riving a car and spotting trailers are two different things. Driving in a yard with a busy yard and trucks coming in and out of there flying all the time and backing those trucks in and people walking…."

Continued Medical Treatment

On November 17, 2017, Dr. Ericson noted his review of Dr. Kessler's report and the conclusions with which he disagreed. PX3. He noted the following in pertinent part:

> It remains my opinion that he sustained a concussion at the time of the accident at work and that the symptoms which he has experienced subsequently are a consequence of that head injury. These have included headache, muscle strain, dizziness, cognitive change, and anxiety/depression. All are common consequences of concussion. There have been notes written by other providers which raise dout as to the severity of the injury. I disagree with that assessment. The type of head injury describe to me by Mr. Mathieu, caused by a rapidly spinning handle under a great deal of force, can be regarded as nothing other than serious.
> Notes from other providers have also mentioned that concussion symptoms should resolve more quickly that his have. It is true that most concussion symptoms will resolve within a matter of weeks but there are outliers under any diagnosis. His course may be an atypical one but his symptoms should not be regarded as illegitimate as a result. I do not regard Mr. Mathieu as anything other than honest. He is not malingering.
> I do not think that his symptoms should continue to be treated under the umbrella of workers compensation. It is also my opinion that he remains disabled by his condition. There has been improvement in terms of headache, neck discomfort, and dizziness over time but his psychiatric

symptoms remain prominent. These psychiatric symptoms are a significant contributor to his persistent cognitive impairment and are made worse by financial concerns and the struggle of being treated under worker's compensation. It is my opinion that the cognitive and psychiatric symptoms are still a direct consequence of his head injury.

....

Id. Dr. Ericson recommended divalproex, butalbital, duloxetine as well as psychiatry and psychology evaluations. *Id.* He also kept Petitioner off work. *Id.*

On December 11, 2017, Petitioner presented to the emergency room at Cook County Stroger Hospital. PX8. Petitioner testified that he went to Cook County Stroger because his medical benefits ended and his headaches were coming back so he went for treatment and medication. He was evaluated by Dr. Monica Cholewinski and Dr. Scott Sherman complaining of headaches, dizziness and lightheadedness. *Id.* Petitioner was diagnosed with migraines, and tension headaches. *Id.* His prescriptions for divalproex and venlafaxine were refilled. *Id.*

On cross-examination, Petitioner testified that he went to Stroger Hospital because his benefits had been terminated and he could not go to any other doctors. He testified that did report that his headaches were well-controlled with medication. Petitioner testified that he then went to Dr. Ericson for more treatment, but he did not require Petitioner to have insurance.

As of February 16, 2018, Dr. Ericson maintained that his symptoms were caused by the February 18, 2017 incident at work. PX11. He reiterated his recommendation for psychiatric and psychological testing and treatment, as well as work conditioning, and divalproex and duloxetine among other treatments and medications. *Id.* At his deposition, he stated that Petitioner was unable to work as of that date. *Id.*

On February 26, 2018, Petitioner presented to a neurologist, Dr. Reena Ghode, at Cook County Stroger/Oak Forest Health Center complaining of headaches. PX9. She performed an examination and noted Petitioner's difficulty with tandem walking. *Id.* She diagnosed Petitioner with post-concussion syndrome, headaches and mood symptoms that have persisted longer than expected, but were well controlled with medication. *Id.* Petitioner testified that he saw Dr. Ghode for his headaches, anxiety, injury, and hearing voices among other issues. He acknowledged reporting that his headaches were manageable with medication.

Evidence Deposition Testimony – Dr. Ericson

On February 27, 2018, Petitioner called Dr. Ericson as a witness and he gave testimony at an evidence deposition. PX11. Dr. Ericson is board-certified in neurology and electropsysiology. *Id.*, at 4.

Dr. Ericson's primary diagnosis of Petitioner was of post-concussion syndrome. This diagnosis consists of "persistent symptoms that follow the concussion and which often include headache, neck and shoulder pain, cognitive change and psychiatric symptoms." PX11 at 8, 24, 25.

Dr. Ericson testified that he remembered Petitioner's first office visit well and described Petitioner's reported symptoms, condition and his orders at the time. PX11 at 11-16. He continued to see Petitioner in April, May, July, August, and November and prescribed duloxetine and divalproex. *Id.*, at 17.

As of February 16, 2018, Dr. Ericson testified that his examination of Petitioner "was very similar to what he's had in the past with migraines and the cervicalgia. We're beyond the phase of just acute concussion though.

With the symptoms as persistent as they've been, I'm calling it post-concussion syndrome." *Id.*, at 18. He noted that "anxiety and depression have always been an issue for him." "They've always been there but they were troubling him more and more, and I gave him a diagnosis of depression too." *Id.*, at 19.

Regarding future treatment, Dr. Ericson wanted Petitioner to continue on the Depakote (divalproex) and the Cymbalta (duloxetine) but there was an issue with insurance. PX11 at 19. He also prescribed physical therapy and a visit to a pain management specialist. *Id.* Dr. Ericson deferred to the pain management specialist to recommend any necessary further treatment. *Id.* He also stated that Petitioner's psychiatric/psychological condition needed to be addressed more aggressively and he should therefore see both a psychiatrist and a psychologist, possibly for cognitive behavioral therapy. *Id.* Dr. Ericson deferred to the psychiatrist and psychologist to recommend further treatment specific to their respective specialties. *Id.*

Dr. Ericson testified that he noted cognitive decline in other tests that he administered to Petitioner. PX11 at 20. He noted that Petitioner could not spell the word "world" backwards and that he had difficulty with hand constructions, such as "where you make little opposing L's and you have to put your thumbs and forefingers together into a rectangle shape." *Id.*, at 21. Dr. Ericson further noted Petitioner's difficulty with short-term memory because he was unable to recall two or three words after five minutes. *Id.*, at 22. Dr. Ericson also testified that he had reviewed the results of the CT scan and MRI of Petitioner's brain and both studies revealed no abnormal findings, but testified that he would have been surprised if concussions came up on an MRI. *Id.*, at 24, 31.

Consistent with the opinions stated in his medical records, Dr. Ericson opined that Petitioner's injuries including post-concussion syndrome were caused by an incident at work on February 18, 2017. *Id.*, at 25. Dr. Ericson's basis for the opinion was "because [Mathieu] did not have the symptoms before the accident, he sustained a significant head injury at work and he had the symptoms after the accident, and all of the symptoms that he reported to me are consistent with that kind of head injury." *Id.* These symptoms include the headache, cognitive change, mood symptoms, and neck and shoulder discomfort. *Id.*

Dr. Ericson further opined that recommended treatment was reasonable and necessary. PX11 at 25-26. Dr. Ericson stated that without the medications one might expect depression and anxiety to worsen and that one would experience a "very unpleasant experience" with withdrawal. *Id.*, at 28. Dr. Ericson also opined that Petitioner could not return to work explaining that the environment he described to "was very fast paced and potentially dangerous one where everybody who is participating in it needs to be on their toes and needs to be a skilled multi-tasker. And I don't think the pain, anxiety, depression or cognitive symptoms which Mr. Mathieu continues to experience allow him to function at that level." *Id.*

Dr. Ericson disagreed with Dr. McManus that Petitioner's injury was mild and "while most concussions do resolve in a short period of time, some do not. There are outliers. And I believe Mr. Mathieu is one of those outliers." PX11 at 29. He also disagreed with Dr. Kessler stating that "the gist of her report was essentially that Mr. Mathieu should have recovered by the time of her examination and presumably through the future." *Id.*, at 30. Dr. Ericson further stated, "I don't disagree that most concussions do resolve in a short period of time but the bottom line is that there some are persistent, and those are the people who end up coming to see neurologists in the long term. And it's not entirely unheard of. You know, he's not the only person to have persistent post-concussion symptoms." *Id.* Dr. Ericson maintained that Petitioner had been honest, cooperative in treatment and not a malingerer in his opinion. *Id.*

On cross-examination, Dr. Ericson was questioned regarding the objective or subjective nature of Petitioner's reports and Dr. Ericson testified that he had to rely on Petitioner's reporting of symptoms. PX11 at 37-39. As an example, however, Dr. Ericson stated that his palpation of Petitioner's neck was objective, but he was forced to rely on Petitioner's subjective report of pain. *Id.* Dr. Ericson opined that Petitioner was experiencing headaches, neck pain, cognitive difficulties, and depression and anxiety as a result of the alleged work accident. However he testified that Petitioner's headaches, neck pain, cognitive difficulties, and depression and anxiety are all purely subjective complaints. *Id.*, at 33, 39, 43, & 55. Despite the lack of objective findings to support the aforementioned complaints, Dr. Ericson recommended pain management treatment and psychological therapy. *Id.*, at 52-58. Dr. Ericson agreed with Dr. McManus statement that "Mr. Mathieu may benefit from a brief period, two to four sessions, of psychological services, to facilitate his transitional return to work. *Id.*, at 61.

Evidence Deposition Testimony – Dr. McManus

On March 13, 2018, Respondent called Dr. McManus as a witness and he gave testimony at an evidence deposition. RX2. Dr. McManus is a licensed clinical psychologist with additional board certification in neuropsychology and rehabilitation psychology. *Id.*

Dr. McManus testified that he evaluated Petitioner over the course of six to seven hours on August 1, 2017. RX2 at 15. He testified as to a detailed history that he took from Petitioner at the time of that examination. *Id.*, at 18-21. Dr. McManus also testified at length as to the various validity tests that he had Petitioner undergo and the results of those tests. *Id.*, at 26-42. According to Dr. McManus Petitioner failed all of the validity tests. *Id.*, at 45-47.

Dr. McManus testified that on the "Forced Choice" test Petitioner scored so low that he would be suffering from severe dementia if the test findings were deemed valid. *Id.*, at 48-49. According to Dr. McManus the objective data from Petitioner's testing simply did not match up with his clinical presentation. *Id.*, at 50. In fact, according to Dr. McManus, Petitioner scored low enough to be considered severely mentally retarded on word knowledge testing. *Id.*, at 51. However this was completely inconsistent with Petitioner's presentation in Dr. McManus' office on August 1, 2017, which was that of an average person. *Id.*

Evidence Deposition Testimony – Dr. Kessler

On March 22, 2018, Respondent called Dr. Kessler as a witness and she gave testimony at an evidence deposition. RX4. Dr. Kessler is a board-certified neurologist with a specialization in behavioral neurology. *Id.*, at 4-6.

Dr. Kessler testified that she felt that it made no sense medically speaking to have Petitioner undergo physical therapy for a concussion. RX4 at 18. Dr. Kessler opined that there is no actual, physical explanation or support for Petitioner's complaints of dizziness and light-headedness at least twice per week. *Id.*, at 22. According to Dr. Kessler, Petitioner's complaints of numbness in his upper and lower extremities would be neuro-anatomically impossible. *Id.*, at 23. She also questioned Petitioner's complaints in regard to alleged long-term memory issues since concussions do not affect long-term memory. *Id.*, at 24. Dr. Kessler noted Petitioner's report that he was having problems with depression, but that he would be "cheered up by money." *Id.*, at 26. Petitioner also informed Dr. Kessler that he had been hearing voices since sustaining his concussion injury on February 18, 2017, but she maintained that concussions do not cause auditory hallucinations. *Id.*, at 27-28. Dr. Kessler had Petitioner go through a battery of validity testing on October 17, 2017, and she testified that he

failed all such tests. *Id.*, at 32-37. According to Dr. Kessler, Petitioner is at MMI and he does not require any work or activity restrictions. *Id.*, at 60-61.

Additional Information

Regarding his current condition of ill-being, Petitioner testified that he still has headaches, high anxiety, and hears sounds like something is going "shhhhhh," or a bird or something whistling behind him. He also continues to have a very stiff neck. Petitioner's vision also remains affected in that he will stare at an object for a long period of time and it changes shapes and is blurry. Petitioner also testified that he has trouble following objects and he is very depressed. He explained that he has not had any income since October and he wants to get back to work. Petitioner testified that he has a family to support and his life has changed. He previously worked seven days a week and now, 14 months later, his whole life is just like a nightmare.

Petitioner testified that he does not believe that he could return to work as a spotter in his current condition because it would place his life or someone else's in jeopardy. He added that he just wants his mind to go back to normal.

Petitioner testified that he understands that Dr. Ericson is recommending pain management, psychiatric treatment and some kind of "work ability" where he would receive training to get his mind back into the work groove.

On cross-examination, Petitioner testified that he is on two medications: one for headaches and one for high anxiety. Petitioner testified that he sometimes hears sounds, like voices, whistles and he feels like he's "losing [his] marbles[.]" He testified that he shared these symptoms with Dr. Ericson and he believed that he told Dr. Ghode, but he could not recall whether he shared these concerns with Dr. Ro.

On cross-examination, Petitioner testified that he continues to have a stiff neck. He testified that when he was in therapy they gave him "dry needles" in the back of his neck and they loosened his neck up, but it stiffens up. Petitioner explained that he does not know if he's sleeping on it wrong or what, but it gets stiff and it is not normal, and he does not know if it is the cold weather, but his neck is not what it used to be.

On cross-examination, Petitioner testified that he never had anxiety prior to his accident and he never had depression such as he experiences now. He explained that he did have depression prior to his accident because he was working all of the time, but he had no time to think about anything like this. Petitioner further testified that his anxiety and depression has a lot to do with his accident and directed his response to Dr. Ericson who told him that "this injury has a lot to do with -- That comes out afterwards, the aftereffects."

ISSUES AND CONCLUSIONS

The Arbitrator hereby incorporates by reference the Findings of Fact delineated above and the Arbitrator's and parties' exhibits are made a part of the Commission's file. After reviewing the evidence and due deliberation, the Arbitrator finds on the issues presented at the hearing as follows:

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

Based on the totality of the evidence, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injury sustained at work on February 18, 2017 to the extent opined by Respondent's Section 12 examiners, Dr. McManus and Dr. Kessler.

Petitioner sustained an undisputed accident at work in which he was forcefully hit in the back of the head with a metal object while cranking a dolly for a trailer. The blow to the head caused bleeding and the need for emergency treatment. Of note, the evidence establishes that Petitioner was asymptomatic and had not sustained any injury to the claimed body parts prior to this undisputed accident at work on February 18, 2017. No evidence was submitted to the contrary.

Notwithstanding, the medical records reflect objective testing that undermine Petitioner's subjective reports of symptomatology. The medical records also reflect Petitioner's contemporaneous symptom complaints, which inexplicably worsened over time. Notably, Petitioner reported no loss of consciousness, but as his medical treatment progressed he was either unsure of whether he became unconscious at the time of the accident or he reported that he did lose consciousness.

Additionally, three physicians provided opinions regarding the relatedness, if any, of Petitioner's head, neck, and psychological conditions of ill-being to the accident at work; Dr. Ericson, Petitioner's treating physician, and Dr. McManus and Dr. Kessler, Respondent's Section 12 examiners. Dr. Ericson relied primarily on Petitioner's subjectively reported complaints without objective evidence to support his conclusions. During cross-examination at his deposition, Dr. Ericson repeatedly acknowledged the subjective reports of Petitioner on which he relied in reaching his medical conclusions as well as the lack of any pathology noted in diagnostic tests since the date of accident. Conversely, Dr. McManus and Dr. Kessler both based their opinions primarily on objective diagnostic test results (i.e., MRI, CT scans, etc.) reflected in the medical records and Petitioner's test results during their psychological and neurological examinations, which have internal objective components intended to determine the validity of the test results.

In light of the totality of this record, the Arbitrator finds the opinions of Dr. Ericson are unpersuasive compared to those of Dr. McManus and Dr. Kessler in this case who base their opinions on primarily objective medical evidence. Thus, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work on February 18, 2017 to the extent opined by Dr. McManus and Dr. Kessler.

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

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that

administered care after his accident at work. As explained above, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work on February 18, 2017 to the extent opined by Dr. McManus and Dr. Kessler. Thus, the Arbitrator finds that the treatment rendered to Petitioner is reflective of reasonable and necessary medical treatment to diagnose and treat Petitioner from the effects of his accident at work as opined by Dr. McManus and Dr. Kessler. Respondent shall be given a credit of for any medical benefits that have been paid, if any, as agreed by the parties, 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.

In support of the Arbitrator's decision relating to Issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

As explained above, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work on February 18, 2017 to the extent opined by Dr. McManus and Dr. Kessler. Based on the totality of the record, the Arbitrator finds that the only recommended medical treatment necessary to alleviate Petitioner from the effects of his injury at work is that indicated by Dr. McManus or Dr. Kessler and awards such recommended medical care.

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

Petitioner claims that he is entitled to temporary total disability benefits from February 19, 2017 through May 22, 2018.

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990. The dispositive test is whether the claimant's condition has stabilized, i.e., reached MMI. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at *28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003. To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, *but also that he was unable to work. Gallentine*, 201 Ill. App. 3d at 887 (*emphasis* added); *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996.

As explained more fully above, the Arbitrator finds that Petitioner has established a causal connection between his current condition of ill-being and accident at work on February 18, 2017 to the extent opined by Dr. McManus and Dr. Kessler. Respondent required Petitioner to submit to an examination pursuant to Section 12 with Dr. McManus and then Dr. Kessler, who completed her report on October 30, 2017. Thus, the Arbitrator finds that Petitioner has established his entitlement to temporary total disability benefits from February 18, 2017 through October 30, 2017.

In support of the Arbitrator's decision relating to Issue (M), whether penalties or fees should be imposed upon Respondent, the Arbitrator finds the following:

Considering the analyses explained above, the Arbitrator turns to Petitioner's claim that he is entitled to penalties pursuant to Sections 16, 19(k) or 19(l) of the Act. Based on the totality of the record, the Arbitrator finds that Respondent is not liable for additional compensation pursuant to Sections 19(l), 19(k) or 16 of the

Act. Section 19(k) of the Act provides in pertinent part:

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

820 ILCS 305/19(k) (Lexis 2011). Section 19(l) provides in pertinent part:

> If the employee has made written demand for payment of benefits under Section 8(a) [820 ILCS 305/8] 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) [820 ILCS 305/8.2]. 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.

820 ILCS 305/19(l) (Lexis 2011).

Section 16 of the Act provides for an award of attorney fees where an employer, its 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." 820 ILCS 305/16 (Lexis 2011).

The employer has the burden to show that any delay in paying benefits is reasonable. *Electro-Motive Division v. Industrial Comm.*, 250 Ill. App. 3d 432, 436, 621 N.E.2d 145 (1993); *Cook County v. Industrial Comm.*, 160 Ill. App. 3d 825, 830, 513 N.E.2d 870 (1987). It is insufficient for an employer to merely assert its belief that "the employee's claim is invalid or that his award is not supported by the evidence; the employer's belief is 'honest' only if the facts which a reasonable person in the employer's position would have would justify it." *Cook County*, 160 Ill. App. 3d at 830 (*citation omitted*).

Respondent had a reasonable dispute as to Petitioner's claims and promptly required Petitioner to submit to two Section 12 examinations to this effect. Petitioner's claim for penalties and fees under Sections 19(k), 19(l) or 16 of the Act 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

RICHARD ROSARIO,

Petitioner,

vs. NO: 15 WC 13298

CITY OF CHICAGO,

Respondent.

19IWCC0671

DECISION AND OPINION ON REVIEW

Respondent timely filed a Petition for Review of the Arbitrator's April 1, 2019 corrected decision. Therein, the Arbitrator found Petitioner's current lumbar condition of ill-being is causally related to his work injury on March 27, 2015. The Arbitrator awarded $3,476.00 in medical expenses, 116 3/7 weeks of stipulated Temporary Total Disability benefits, and 17 3/7 weeks of maintenance benefits; the Arbitrator rejected Respondent's §19(d) argument and found Petitioner permanently and totally disabled under §8(f) as of October 24, 2017. The matter was assigned an August 16, 2019 Return Date on Review. The authenticated transcript was not filed by the Return Date, and a Rule to Show Cause hearing was held before Commissioner Coppoletti on September 25, 2019. At that time, Petitioner's Counsel refused to sign the transcript, arguing Respondent's appeal should be dismissed due to its failure to timely file the transcript. Petitioner renewed its Motion to Dismiss in its Response Brief.

Notice given to all parties, the Commission, after considering the issues of Petitioner's Motion to Dismiss, temporary disability, and permanent disability, and being advised of the facts and law, denies Petitioner's Motion to Dismiss as set forth below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Petitioner's Motion to Dismiss is predicated on Respondent's failure to file the transcript on or before the Return Date on Review. The process governing Commission review of arbitration decisions set forth in Section 19(b) is well known: review is initiated by the filing of a

Petition for Review, after which the reviewing party must file either an agreed statement of facts or transcript of evidence authenticated by the parties. *820 ILCS 305/19(b).* To be clear, the statutory time periods for filling of the authenticated agreed statement of facts or transcript do not rise to the level of subject matter jurisdiction. See *Ingrassi Interior Elements v. Illinois Workers' Compensation Commission* 2012 IL App (2d) 110670WC, ¶ 11 ("However, as our supreme court explained in *Pocahontas Mining Co. v. Industrial Comm'n*, 301 Ill 462, 470-78, 134 N.E. 160 (1922), the type of jurisdiction at issue is not truly subject matter jurisdiction...In other words, parties may waive objections to this sort of jurisdictional defect."). At the time of the initial arbitration, both parties agreed to the stenographic stipulation. As such, Petitioner waived his right to object to any jurisdictional defect regarding the filing of the transcript.

The Act further requires the transcript of evidence "be authenticated by the signatures of the parties or their attorneys, and in the event they do not agree as to the correctness of the transcript of evidence it shall be authenticated by the signature of the Arbitrator designated by the Commission." *820 ILCS 305/19(b).* Here, although Petitioner's Counsel refused to sign the transcript, he did agree on the record that the transcript was true and accurate. Sept. 25, 2019 Transcript, p. 13. The Commission incorporates Petitioner's Counsel's statement as an oral authentication satisfying Section 19(b).

As stated above, the Commission affirms and adopts the Arbitrator's decision. However, we write separately to briefly address the arguments made before us. In challenging the finding of odd-lot permanent total disability, Respondent argues the vocational rehabilitation expert was lax and rather than pursue vocational aptitude testing, Ms. Stafseth simply "guessed" Petitioner has no access to a stable labor market. We find Respondent's argument is without merit. As Petitioner rightly emphasizes, Respondent selected the vocational rehabilitation provider. Moreover, while Ms. Stafseth agreed there were recommendations for vocational testing in her report, she explained those are standard recommendations included for all clients they meet face-to-face. She further testified she did not continue to endorse that boilerplate statement and repeatedly opined such testing would do nothing to advance Petitioner's employability. Ms. Stafseth analyzed the situational factors herein and concluded no viable stable labor market exists for Petitioner:

- a now 66-year-old man whose spine is fused from L1 to S1;
- who has significant permanent physical restrictions limiting him to Sedentary PDL;
- whose employment history is limited to unskilled labor positions;
- whose highest education is a GED;
- who has no computer skills whatsoever; and
- who remains on prescription Norco.

The Commission finds Ms. Stafseth's conclusions credible and highly persuasive, and Respondent has provided no evidence to refute the conclusions of its chosen expert. We affirm the finding that Petitioner established odd-lot permanent total disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Motion to Dismiss Respondent's Review is denied.

19IWCC0671

IT IS FURTHER ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed April 1, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $915.11 per week for a period of 116 3/7 weeks, representing April 1, 2015 through June 23, 2017, that being the stipulated 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 maintenance benefits under §8(a) in the sum of $915.11 per week for a period of 17 3/7 weeks representing June 24, 2017 through October 23, 2017.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent's §19(d) argument fails as Respondent did not prove Petitioner refused to submit to a medical procedure reasonably essential to promote his recovery.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay $3,476.00 in reasonable and necessary medical expenses pursuant to §8(a) and subject to §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $915.11 per week for life, commencing on October 24, 2017, as provided in §8(f) of the Act. Commencing on the second July 15 after the entry of this award, Petitioner may become eligible for 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 shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

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: DEC 11 2019

L. Elizabeth Coppoletti

LEC/mck

D: 11/13/19

Stephen Mathis

43

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

ROSARIO, RICHARD
Employee/Petitioner

Case# **15WC013298**

CITY OF CHICAGO
Employer/Respondent

19IWCC0671

On 4/1/2019, 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:

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

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**

Richard Rosario
Employee/Petitioner
v.

City of Chicago
Employer/Respondent

Case # **15** WC **13298**

Consolidated cases: **n/a**

19IWCC0671

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **March 23, 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: **Whether Petitioner declined to submit to medical treatment reasonably essential to promote his recovery pursuant to §19(d)?**

FINDINGS

On **March 27, 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 $**71,381.44**; the average weekly wage was $**1,372.66**.

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

Respondent shall be given a credit of $**143,155.61** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**143,155.61**.

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

ORDER

Respondent shall pay to Petitioner reasonable and necessary medical services of Advanced Orthopedic & Spine Care for a total of $3,476.00, pursuant to §8(a) of the Act and adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$915.11/week** for **116 & 3/7 weeks, commencing April 1, 2015 through June 23, 2017**, as provided in §8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of **$915.11/week** for **17 & 3/7 weeks, commencing June 24, 2017 through October 23, 2017**, as provided in §8(a) of the Act.

Respondent failed to prove that Petitioner unreasonable declined submit to a medical procedure reasonable essential to promote recovery from his injuries.

Respondent shall pay Petitioner permanent and total disability benefits of **$915.11/week** for life, **commencing October 24, 2017**, as provided in §8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8 (g) 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

March 29, 2019
Date

APR 1 - 2019

Richard Rosario v. City of Chicago
15 WC 13298

INTRODUCTION

This matter proceeded to hearing before Arbitrator Steven Fruth. The disputed issues were: ***C:*** Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?; ***F:*** Is Petitioner's current condition of ill-being causally related to 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? Maintenance; ***L:*** What is the nature and extent of the injury?; ***O:*** Whether Petitioner declined to submit to medical treatment reasonably essential to promote his recovery?

FINDINGS OF FACT

Petitioner Rick Rosario was a Motor Truck Driver for Respondent City of Chicago. He began working for Respondent in 1990. His duties involved lifting up to 35-pounds, driving trucks to collect garbage from various yards, and dumping the garbage at various dump sites. He would enter and exit his vehicle about 25-30 times a night. He had to step up 2 steps to enter the truck cab. The floor of the cab was approximately 4 feet from the ground. He used a grab bar to help himself get in and out of the cab.

On March 27, 2015, Petitioner was driving a dump garbage truck. He was exiting a lot in the dark with no street lights on in the area. He went over a speed bump that he did not see. He hit his head on the ceiling of the cab and then came down and hit his back. He felt "horrible" low back pain.

Petitioner was transported by ambulance to Presence Saint Mary of Nazareth Hospital Emergency Department on March 27, 2015 (PX #1). He reported hitting a speed bump too hard and developing a sudden onset of lower back pain. There was no radiating pain or lower extremity numbness or weakness. No paresthesia was noted. Lumbar X-rays showed diffuse multilevel degenerative changes, which had progressed since 2001. There was a wedging of L2, suggestive of a fracture. Petitioner expressed concern about a possible fracture due to his history of fusion/laminectomy in the 1970s. Petitioner was given injections of morphine and Toradol. He was discharged with a diagnosis of lumbar sprain, prescriptions for Norco, ibuprofen, and to continue Metformin (for diabetes). He was directed to follow up with Dr. Warren Robinson.

Petitioner also saw Dr. Scott Martin of U.S. Healthworks on March 27 (PX #2). Petitioner gave a history of hitting the speed bump and hitting his head on the roof of the cab and hitting his low back on his seat. He had immediate 10/10 pain. He was taken by ambulance to St. Mary's Hospital where lumbar X-rays were done and were "within normal limits." On exam Dr. Martin noted a bruise to the parietal regions his head. Petitioner had tenderness and spasm to the right lumbar paravertebral musculature. There was no restricted range of motion of the back. There was no weakness in the lower extremities. Straight-leg test was normal. Petitioner was neurologically intact. Dr. Martin diagnosed a head contusion and lumbar strain. Petitioner was released to return to work with no restrictions. Dr. Martin did not anticipate any permanent disability.

Petitioner's Report of Occupational Injury or Illness was incorporated in the US Healthworks chart. Petitioner described his driving of a dump truck which went over East be bump he could not see in the dark which caused him to jolt his back.

Petitioner returned to U.S. Healthworks on April 1, 2015, complaining of sciatica. It was noted at that time that the head contusion had resolved. Petitioner was given work restrictions of no lifting, pushing/pulling, or operating or driving machinery. Petitioner was prescribed hydrocodone and physical therapy. Petitioner underwent physical therapy at U.S. Healthworks from April 6 through April 17, 2015. Petitioner's work restrictions were continued on April 1, as they were on April 8, April 15, and April 24, 2015.

On May 1, 2015, Petitioner was examined by a Physician Assistant Laura Thometz at US Healthworks. Petitioner was still complaining of low back pain. He had an antalgic gait. He also complained of numbness in the right posterior thigh. PA Thometz discharged Petitioner to follow up with a specialist for his back. He was given the same work restrictions.

On May 9, 2015 Petitioner saw orthopedist Dr. Daniel Troy Advanced Orthopedic & Spine Care, on a referral from Dr. Warren Robinson. Dr. Troy had treated Petitioner before. Dr. Troy noted that Petitioner's lumbar symptoms had not improved but that he had no lower extremity radiculopathy. Petitioner had thoracolumbar and lumbosacral pain with significant paraspinal spasm and pain upon palpation of spinous processes. He diagnosed an acute exacerbation of the lumbar spine with secondary muscular spasms and an L2 fracture. Dr. Troy referred Petitioner for an MRI to assess his compression fracture and indicated that PT should be started once the MRI had been completed. He prescribed Norco and Valium and took Petitioner off work (PX #4).

The May 26, 2015 lumbar MRI at Hawthorne Works Medical Imaging (PX #4) revealed an acute to subacute mild compression fracture of L2 superior endplate without retropulsion, suggestive of a benign compression fracture; post-surgical changes at L4-5; multilevel lumbar spondylosis, moderate to severe at L3-4 disc level and mild to moderate at the remaining lumbar levels; mild disc bulge at T12-L1; mild to moderate diffuse disc bulge with a superimposed small right paracentral disc protrusion at L1-2; moderate diffuse disc bulge asymmetric to the left at L2-3; mild to moderate diffuse disc bulge and mild posterior endplate spurring at L3-4; minimal disc bulge and minimal posterior endplate spurring at L4-5; mild asymmetric disc bulge to the left and minimal posterior endplate spurring at L5-S1; mild to moderate multilevel facet arthrosis; moderate spinal stenosis and moderate bilateral neural foraminal narrowing at L1-2 and L2-3; borderline/mild spinal stenosis and moderate left and mild to moderate right neural foraminal narrowing at L3-4; mild narrowing of the inferior aspects of bilateral neural foramina at L4-5; and mild left neural foraminal narrowing at L5-S1.

Petitioner saw Dr. Troy again on June 3, 2015, who reviewed the MRI and recommended that Petitioner undergo another course of physical therapy. Petitioner began a course of physical therapy with Advanced Orthopedic & Spine Care on June 16.

On July 8, 2015, Dr. Troy opined that Petitioner had suffered a "work-comp" injury while driving a garbage truck, including an axial loading of the spine leading to an L2 compression fracture. Dr. Troy diagnosed Petitioner with multilevel degenerative disease extending from L1 through L4 with secondary spinal and foraminal stenosis. He recommended a kyphoplasty, an injection of cement into the vertebral body.

Petitioner followed up with Dr. Troy August 7, 2015, who noted that the kyphoplasty had not been authorized. He recommended Petitioner continue with physical therapy, have an updated lumbar MRI, and a lumbosacral brace. On August 22, 2015, Dr. Troy again recommended an MRI and physical therapy, as authorization for treatment was denied.

On September 11, 2015, Petitioner reported significant pain in his lumbar spine, going down his right leg. Dr. Troy again recommended therapy and an updated MRI. He also discussed a possible epidural steroid injection (ESI).

On October 13, 2015, Petitioner underwent another lumbar MRI, which revealed a re-demonstrated L2 superior endplate compression fracture; multilevel degenerative spondylosis with spinal and neural foraminal stenosis;

degenerative findings greatest at L1-2, L2-3, and L3-4; postop changes at L4-5, L5-S1; paraspinal muscle atrophy; mild splenomegaly; suspected left upper pole kidney lesion measuring 1.1 cm (PX #4).

On October 21, 2015, Dr. Troy reviewed the updated MRI and reexamined Petitioner, noting limited range of motion, moderate tenderness to palpation and positive straight leg raise. Dr. Troy recommended bilateral ESIs at L2-L3 and further physical therapy.

On November 17, 2015, Dr. Troy again recommended ESIs, which had not yet been approved. He also discussed the possibility of a lumbar decompression and fusion procedure to stop a posterior laminectomy kyphosis.

On December 2, 2015, Dr. Troy performed bilateral L2-3 ESIs and an epidurogram.

On December 18, 2015, Petitioner saw Dr. Troy again, reporting that the injections helped for a week, but that pain had recurred. Dr. Troy recommended a lumbar decompression and fusion with instrumentation, which was likely limiting him from ever returning to work full duty.

On January 16, 2016, Petitioner was considering surgery, but Dr. Troy discussed trying to treatment with a non-operative fashion, pending the results of an IME. Petitioner was to continue using a brace, doing physical therapy, and remain off work.

Orthopedic surgeon Dr. Jesse Butler performed a §12 IME of Petitioner January 25, 2016 (PX #3 & RX #3). Dr. Butler reviewed Petitioner's medical records from Dr. Troy, as well as records from physical therapy and various radiology studies including a May 26, 2015 MRI and an October 13, 2015 MRI. Dr. Butler noted Petitioner's history of a two-level laminectomy at L4–5 in 1972. Petitioner gave a history of driving a garbage truck over a speed bump and being thrown from the seat. He had severe low back pain. Initial lumbar X-rays demonstrated an L2 compression fracture which appeared to be old, secondary to superior plate stenosis, as well as multilevel degenerative disc disease. There was also an autofusion process at L3-4.

The May 26 MRI demonstrated a mild compression fracture of L2, which Dr. Butler noted was benign. There were post-surgical changes at L4 and L5. There was grade 1 retrolisthesis of L1 on L2 and L2 on L3. There was also disc bulging at T12-L1, L1-2, L2-3, and L3-4, L4-5, and L5-S1, along with endplate spurring. In addition, there was stenosis and neural foraminal narrowing through the lumbar spine.

Dr. Butler noted Petitioner's course of care with Dr. Troy and the course of physical therapy. Petitioner had continuing low back pain and right-sided radiculopathy. Dr. Troy recommended a kyophoplasty, which had not yet been approved. The October 13, 2015 MRI was essentially unchanged from the May 26 study.

On examination Dr. Butler noted Petitioner's reported 3/10 pain. Petitioner had normal muscle strength in the lower extremities. He had no difficulty walking. There were no neurological deficits. Petitioner had limited range of lumbar motion. Waddell's were negative.

Dr. Butler diagnosed lumbar stenosis and lumbar degenerative disc disease. He noted Petitioner's status was that of mechanical lower back pain with bilateral radiculopathy. Dr. Butler further diagnosed lumbar kyphosis with central osteophyte at L1–2, producing severe spinal canal stenosis. He further found severe degenerative disc disease at L2–3 and L3–4. Dr. Butler opined that Petitioner's current condition was related to the work accident wherein he sustained an aggravation of an underlying degenerative condition in addition to an acute L2 compression fracture.

Dr. Butler discussed Petitioner's options. One was to forgo surgery and either return to work at regular duty or obtain an FCE to determine permanent restrictions. The second option was to consider surgery involving an interbody fusion. Dr. Butler added that Petitioner was capable of sedentary work at that time. Petitioner could lift to 10 pounds and sit and stand as tolerated. He should avoid prolonged bending and released Petitioner to modified duty with restrictions. Finally, Dr. Butler, upon review of the job description, noted that Petitioner could not perform his regular job duties. He opined that Petitioner was at MMI if he chose to forgo surgery; otherwise Petitioner would reach MMI approximately 9 months postoperatively.

Petitioner followed up with Dr. Troy February 5, 2016, who agreed that Petitioner's work injury is causally connected to his work accident. Dr. Troy again discussed surgery, but Petitioner wanted to try and live with his symptoms.

On February 22, 2016, Petitioner underwent a lumbar CT scan at Advocate Christ Medical Center, which revealed an L2 compression fracture deformity and degenerative changes, worst at L1-2 to L3-4 levels with no apparent significant spinal stenosis at L4-5 to L5-S1 levels.

On March 4, 2016, Dr. Troy reviewed the CT scan and reexamined

Petitioner, noting that he had failed conservative intervention. He again recommended an L1-L4 posterior spinal fusion.

On April 15, 2016 Dr. Troy performed a posterior spinal fusion at L1-4 with posterior pedicle screw instrumentation; autograft and allograft in the posterolateral gutter L1-4; expiration of L4-S1 fusion; bone marrow aspirate from right iliac crest taken to back table for stem cell preparation; L1-2, and L3-4 bilateral laminotomies; L1-2, L2-3,and L3-4 partial facetectomies; L1-2, L2-3, and L3-4 bilateral foraminotomies with bilateral laminotomy (PX #4).

On April 23, 2016, Petitioner followed up with Dr. Troy on April 23, 2016. He still significant pain and using a wheelchair. A CT scan showed a stable fusion. On April 29, 2016 Petitioner was using a walker and getting home nursing care. Dr. Troy recommended that he try to ambulate as much as possible and remain off work. On June 22, 2016, Dr. Troy noted that Petitioner was ambulating independently with the use of a back brace and recommended that he begin a new course of physical therapy.

On June 29, 2016, Petitioner began another course of physical therapy at Advanced Orthopedic and Spine Care on June 29, 2016 (PX #4).

On July 20, 2016, Dr. Troy noted a slight decrease in Petitioner's radiculopathy and recommended continued therapy. On August 17, 2016, Petitioner saw Dr. Troy again, reporting continued low back pain going down into his legs. He also had hip pain. Petitioner declined an injection for his hip and was to continue with therapy for his back.

On September 14, 2016, Dr. Troy noted that Petitioner continued to progress slowly with therapy and still had low back pain. X-rays did not show any loosening of the screws. He was to continue with therapy and use of his back brace. On October 26, 2016, Petitioner saw Dr. Troy, reporting that he was plateauing in therapy and his pain was significantly worse while standing for any period. He was wearing his back brace at all times. Dr. Troy recommended a CT scan and MRI of the lumbar spine to rule out any infection.

On November 1, 2016, Petitioner had another CT scan of his lumbar spine at Chicago Ridge Imaging, which revealed loss of normal lumbar lordosis; bilateral laminectomy with spinal fusion at L1 through L4 with no hardware failure or loosening; mild broad-based disc bulge abutting the thecal sac at L1-2; moderate broad-based disc bulge abutting the thecal sac at L2-3, causing moderate compression of right neural foramen and mild compression of left neural foramen and facet joint hypertrophy; and mild board-based disc bulge abutting the thecal sac and mildly compressing bilateral neural foramina with

facet joint hypertrophy at L3-4 (PX #4).

On November 2, 2016, Dr. Troy reviewed the CT scan with Petitioner, who reported bilateral arm radicular symptomatology and questionable myelopathic symptoms in addition to low back pain. Dr. Troy recommended urgent cervical and thoracic MRIs to evaluate for possible cord compression.

On November 22, 2016, Petitioner underwent a cervical spine MRI at Hawthorne Works Medical Imaging, which showed multilevel cervical spondylosis; disc degeneration and facet arthrosis; minimal to mild C2-3 and C3-4 and borderline C6-7 spinal canal narrowing due to disc bulge; and mild disc bulges at C4-5, 5-6, 7-T1, and T1-2. Petitioner also underwent a thoracic spine MRI, which revealed multilevel thoracic spondylosis with disc desiccation and facet arthrosis; minimal to mild T10-11 and T11-12 spinal canal narrowing due to disc bulges; mild disc bulges at T1-2, T3-4, T5-6, T7-8, and T12-L1; mild encroachment upon the right T2-3, T3-4, and T12-L1 neural foramina; mild to moderate fatty atrophy of the paraspinous musculature; multilevel cervical spondylosis and disc disease (PX #4).

On December 2, 2016, Dr. Troy reviewed the new imaging with Petitioner and noted that the lumbar fusion was successful. The diagnoses were status post lumbar fusion and continued bilateral lower extremity radiculopathy and chronic low back pain. Dr. Troy offered Petitioner to possibly proceed forward with implantation of a spinal cord stimulator. He explained that the risks associated with such treatment including infection, the rare risk of possible paraplegia and paraparesis, and the patient not getting the appropriate pain relief. Petitioner indicated that he wanted to think about it and hold off on seeing any other doctors at that time. Dr. Troy prescribed Lyrica and Norco for pain relief.

On January 13, 2017, Petitioner reported continued chronic pain and did not feel like he was better than before the surgery. Petitioner questioned whether he should have gotten the surgery and was apprehensive about a spinal cord stimulator. Dr. Troy recommended another course of physical therapy and an evaluation with Dr. Nicholas Angelopoulos for a spinal cord stimulator. Dr. Troy stated that Petitioner is unable to return to work as a garbage man/city worker and that he should strongly consider applying for disability.

March 17, 2017 was Petitioner's last session of physical therapy at Advanced Orthopedic and Spine Care (PX #4).

On March 17, 2017, Petitioner told Dr. Troy he did not want to get a spinal cord stimulator after talking with friends. He reported continued pain that was helped some by physical therapy. Dr. Troy recommended physical therapy and

an evaluation for a spinal cord stimulator. He suggested these were the only remaining treatment options.

On May 12, 2017, Dr. Troy indicated that the spinal cord stimulator evaluation had not been approved yet. He recommended an FCE.

On June 1, 2017, Petitioner underwent an FCE at ATI Physical Therapy. The FCE was valid. Petitioner demonstrated physical capabilities at the Sedentary to Light Physical Demand Level, which fall below the level stated by the job description provided by Respondent. He demonstrated the capacity to stand up to one hour in 5-minute durations; to walk one to two hours occasionally for short distances; sit for eight hours; lift 10.4-pounds above the shoulder occasionally; lift 23.6-pounds from desk to chair occasionally; lift 14.8 pounds from chair to floor occasionally; and carry 7-pounds with either arm occasionally. He displayed poor lifting capabilities, commonly reported back pain during the assessment, and frequently sat down upon completion of each exercise (PX #5).

On June 23, 2017, Dr. Troy examined Petitioner and reviewed the results of the FCE. He noted that Petitioner was not significantly improved and had diffuse low back pain with chronic hyperesthesia into the lower legs. Dr. Troy opined that Petitioner had reached MMI, had not met the requirements to return to his original job, and had permanent restrictions pursuant to the FCE. Dr. Troy renewed Petitioner's prescriptions for Lyrica and Norco. Dr. Troy advised Petitioner that taking Norco could affect his cognitive skills and driving capability, and that he should wait at least 12 hours from the last does of medication prior to operating a moving vehicle or any type of equipment.

Petitioner met with vocational rehabilitation counselor Kari Stafseth from Vocamotive on August 17, 2017. He testified that she interviewed him regarding his job history, medical treatment, and education.

Petitioner testified that since June 23, 2017, he returned to see Dr. Troy to renew his prescription medications. On December 29, 2017, he told Dr. Troy he continued to have low back pain. He still did not want to proceed with a stimulator. Dr. Troy prescribed Lyrica, Norco and Flexeril and further physical therapy (RX #8). On March 18, 2018, Petitioner saw Dr. Troy again and reported that his pain had overall plateaued. "Workers' Comp" was not approving physical therapy. Dr. Troy again noted that Petitioner was at MMI and recommended therapy and an increase in Lyrica (RX #9 & RX #10).

Petitioner testified that the latest physical therapy was never authorized, and that his only planned treatment is to continue getting his prescriptions

renewed with Dr. Troy.

Petitioner testified that, prior to the accident on March 27, 2015, he was not having any problems with his back and was working full duty. He did have a prior lumbar fusion in 1973. He currently feels like his back is always hunched over, especially when he tries to walk. He cannot walk like he used to and often takes a walker with him to rest upon when he and his wife go on walks. He can walk for 5-10 minutes before he has to stop or sit due to increased pain. He can stand in one place for about 10 minutes at a time before his back starts to feel like it is on fire. He lives with his wife and does fewer chores than he did before the accident. He occasionally does the dishes, but his back pain flares up.

Petitioner used play softball, but his pain prevents him from throwing hard anymore. He has trouble sleeping and gets about 3-4 hours per night now, whereas he would get about 7-8 hours prior to the accident. His back pain also increases with changes in the weather. He wears a back brace every day to help take away from the pain. Petitioner takes Lyrica and Norco for pain, prescribed by Dr. Troy. He also takes over-the-counter Advil when he has pain. He only takes Norco when he is in severe pain, which is usually about once per week at night, but sometimes more often. He does not want to get "hooked" on pain medications, so he usually tries to control his pain with Advil and the back brace.

Petitioner only attended about 2 weeks of high school and did not graduate (PX #7). He did obtain a GED. Before working for Respondent, Petitioner worked as a laborer for Cook County Forestry Department and for several factory jobs. He did some work as an "alley mechanic" in the 1970s, which involved jacking up cars and changing tires if his uncle asked him to. He was never actually hired as a mechanic.

Petitioner does not have any military experience. He has a current CDL, which he obtained in 1985. He has no computer skills or typing skills. He does not use email and has never sent an email.

Petitioner testified that the City could not accommodate his permanent restrictions and never asked him to return to work or to look for other employment. Petitioner contacted his union about returning to another position within his restrictions, but he never got a response and was never asked to work at a different position. After his interview with Ms. Stafseth, Petitioner was never contacted by her again. Neither Respondent nor Ms. Stafseth ever asked Petitioner to undergo any further rehabilitative testing, training, or counseling. He was never given instruction to apply for other employment.

Evidence Deposition of Kari Stafseth, January 26, 2018 (PX #9)

Petitioner was evaluated by Kari Stafseth on August 17, 2017. Petitioner offered Ms. Stafseth's October 23, 2017 narrative report in evidence as Petitioner's Exhibit #8. The offer was rejected on Respondent's hearsay objection.

Ms. Stafseth has been a Certified Rehabilitation Counselor since 2009. She has worked for Vocamotive, Inc. since 2008. Her job duties include evaluating the vocational prospects of injured workers. One of the services Vocamotive provides is to help all people find employment, including older people, people on social security, people changing careers, and people coming off extended absences from the workforce. She was retained by Respondent to evaluate Petitioner in this case. She has been hired by Respondent on numerous cases.

Ms. Stafseth refreshed her memory with her October 23, 2017 narrative report as well as records she had reviewed.

In this particular case, Ms. Stafseth had several communications with Respondent between the time she conducted her interview of Petitioner and the time she issued her report. She wanted to make sure Respondent was aware of the issues present with moving forward with any type of rehabilitation services or successful placement of Petitioner in a job.

Ms. Stafseth identified Petitioner's Deposition Exhibits 2 & 3 as accurate copies of the subpoenaed records from Vocamotive's file and the report she authored on October 23, 2017. In completing her evaluation, Ms. Stafseth also reviewed the FCE from ATI, as well as the chart note and permanent restrictions by Dr. Troy on June 23, 2017.

Ms. Stafseth also interviewed Petitioner regarding: his medications, including Norco, Metformin, Lisinopril, Amlodipine, Lyrica, and Advil; his use of equipment, including a walker with wheels, occasional use of a motorized scooter while shopping, and use of a back brace; his difficulty with daily activities, including cooking, doing laundry, and sleeping; his increased pain with sitting for more than 10-15 minutes and standing more than 10-15 minutes. She noted that Petitioner possessed a valid driver's license and Class A Commercial Driver's License (CDL), and that he could drive for about two hours with his wife but was advised by Dr. Troy not to drive while using Norco. Ms. Stafseth also interviewed Petitioner regarding his age, his education history, his employment history, and his computer experience.

Ms. Stafseth opined that Petitioner's advanced age was a negative factor in placing him in employment, that he has a history of low-skilled employment, that he has no transferrable skills, and that his Norco intake could impact his ability to operate a vehicle She further opined that Petitioner had lost access to his usual and customary line of employment, and that Petitioner does not have access to any viable, stable labor market. This opinion was based on situational factors, including: that Petitioner's age would make it difficult to compete for employment amongst those considerably younger than him, that he had no transferable skills to apply to new work, and that he is physically limited to sedentary work which typically requires a higher skill level. Even if Petitioner were to obtain computer skills through training, Petitioner would still not have access to a stable labor market because of the other situational factors.

Ms. Stafseth did recommend vocational testing in her report but testified that was standard protocol for clients she continues to interface with. She does not continue to interface with Petitioner. She clarified that she did not make any recommendations to Respondent that Petitioner undergo vocational testing because it was not warranted in this case. When she does refer people for testing, it is for an assessment of aptitudes, skills, and work temperament. She did not perform any testing of Petitioner's reading or math skills. She did not complete a labor market survey in this case because there were no positions to consider given his work history, skill set, and physical restrictions. She was not recommending any further vocational rehabilitation services in this case. Even if Petitioner were to undergo vocational testing, he would not obtain any additional skills that would make him employable, and he would still not have access to a stable labor market.

Ms. Stafseth testified that that all her opinions were rendered to a reasonable degree of certainty and consistent with guidelines articulated in the *National Tea* case and based on her analysis of the situational factors present in this case, along with her experience as a vocational counselor and expert. She reiterated that vocational testing was not warranted due to Petitioner's age, work history, lack of transferable skills and work restrictions. It was her opinion that there was no viable, stable labor market available to Petitioner.

Respondent's Exhibit #4, a Utilization Review dated July 16, 2015, by Dr. Christopher Zarro was admitted in evidence. Dr. Zarro found the proposed kyphoplasty was not medically necessary. Respondent's Exhibit #5, a Utilization Review dated July 23, 2015, by Dr. Lawrence Koss was admitted in evidence. Dr. Koss found the proposed lumbosacral brace was not medically necessary. Respondent's Exhibit #6, a Utilization Review dated July 23, 2015, by Dr. Vinson DiSanto, DO was admitted in evidence. Dr. DiSanto found a repeat MRI of the

lumbar spine was not medically necessary.

Respondent's Exhibit #10 is Dr. Troy's May 8, 2018 Work Status Form, which notes Petitioner's discharge at MMI and return to work within the FCE restrictions.

Corrected CONCLUSIONS OF LAW

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

Respondent placed Accident in dispute on the Request for Hearing Form entered as Arbitrator's Exhibit #1. However, during the proceeding Respondent's counsel withdrew that issue from dispute on the record. Petitioner's testimony regarding the accident on March 27, 2015 was not rebutted. Correspondingly, the Arbitrator finds that Petitioner proved that he was injured in an accident that arose out of and in the course of his employment by Respondent.

F: Is Petitioner's current condition of ill-being causally related to the accident?

The Arbitrator finds that Petitioner proved that his current condition of ill-being is causally related to his accident that arose out of and in the course of his employment.

Petitioner testified that he was not having problems with his lumbar spine and was working full duty and without restrictions prior to the work accident of March 27, 2015. Immediately after his accident he had pain in his lower back and had to call for EMTs to take him to take him to the hospital in an ambulance. That same date, he was diagnosed with a lumbar strain by Dr. Scott Martin at US Healthworks. Orthopedic surgeon Dr. Daniel Troy diagnosed Petitioner with a "work-comp" injury involving an axial loading of the spine causing an L2 compression fracture. On January 25, 2016 orthopedic surgeon Dr. Jesse Butler, Respondent's §12 examiner, diagnosed Petitioner with an acute compression fracture of the L2 vertebra and an aggravation of an underlying degenerative condition in the lumbar spine. On February 5, 2016 Dr. Troy reaffirmed that Petitioner's condition was causally connected to his work injury and recommended a lumbar fusion, which was performed April 15, 2016.

The Arbitrator also finds that Petitioner failed to prove there was a causal connection between the Accident and the conditions relating to the cervical or

thoracic spine. There was no evidence suggesting that these conditions were causally related to Petitioner's accident.

No evidence rebutting causal connection was offered.

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 finding that Petitioner's condition of ill-being is causally connected to his work accident on March 27, 2015, the Arbitrator finds that Petitioner proved that the medical care and services he received were reasonable and necessary to cure or relieve the effects of his work-related injury. Correspondingly, the Arbitrator finds that the charges for the necessary medical care and services were likewise reasonable.

The Arbitrator takes particular note of the findings and opinions of Dr. Butler, Respondent's §12 examiner, that Petitioner's medical care was necessary to treat his work injuries.

Respondent shall pay all outstanding unpaid balances for medical care, including $3,476.00 to Advanced Orthopedics & Spine Care, in accord with §8(a) of the Act and adjusted in accord with the Medical Fee Schedule provided in §8.2 of the Act.

K: What temporary benefits are in dispute? Maintenance

The Parties stipulated that Petitioner is entitled to TTD benefits from April 1, 2015 through June 23, 2017. Petitioner claims that he is entitled to Maintenance benefits from June 24 through October 23, 2017, which Respondent disputes.

On June 23, 2017, Dr. Troy placed Petitioner at MMI with permanent restrictions pursuant to the valid FCE on June 1, 2017. Dr. Troy opined that Petitioner could not return to his previous position with Respondent. Petitioner's unrebutted testimony is that Respondent would not accommodate his restrictions and that he was never contacted to return to work or to apply for any other position.

Petitioner submitted in evidence his Exhibit # 10, copies of his Motions pursuant to §19(b), requesting authorization for vocational rehabilitation filed June 29, 2017 and August 3, 2017 respectively.

Vocational counselor Kari Stafseth testified that Petitioner did not have access to a viable, stable labor market. She did not recommend any further vocational testing, counseling, or rehabilitation. Without specifically stating so, Ms. Stafseth essentially found Petitioner unemployable due to his age, work history, lack of transferable skills and work restrictions.

The Arbitrator finds that Petitioner proved that he is entitled to Maintenance benefits from June 24, 2017 through October 23, 2017. In making this determination, the Arbitrator relies on Petitioner's unrebutted testimony and the opinions of vocational counselor Kari Stafseth.

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

Petitioner argues that he is permanently and totally disabled, whereas Respondent argues that Petitioner is only permanently partially disabled.

It is clear from the evidence that Petitioner had a significant medical history including prior lumbar surgery and a significantly degenerative spine. Moreover, he was diagnosed with a compression fraction of the L2 vertebra as a result of his work accident. Petitioner went through unsuccessful conservative care. He then had a fusion from L1 through L4. Despite surgical intervention and post-operative rehabilitative therapy petitioner remained symptomatic. He was ultimately discharged from orthopedic care with permanent restrictions that did not allow him to return to his previous employment. Vocational counselling found no stable labor market given his age, work history, lack of transferable skills and work restrictions.

An injured worker need not be reduced to total physical incapacity for a permanent total disability award to be granted. A person may be found to be totally disabled if he cannot perform any services except those for which no reasonably stable labor market exists. The burden is on the claimant to establish the unavailability of employment to a person in his circumstances, but once he has established that he falls in this "odd-lot" category. Then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to claimant. In order to substantiate a claim for an odd-lot permanent total disability claim, it is incumbent upon Petitioner to show that, considering his present condition considering his age, experience, training and education, that he is permanently and totally disabled.

The Arbitrator finds that Petitioner proved that he falls into the odd-lot category. As a result of his work injury on March 27, 2015, Petitioner received medical treatment for his back pain through June 23, 2017, including a lumbar

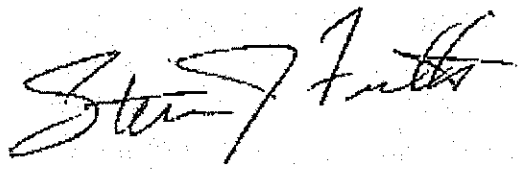
O: Whether Petitioner declined to submit to medical treatment reasonably essential to promote his recovery pursuant to §19(d)?

This issue is in the nature of an affirmative defense, for which Respondent has the burden of proof.

This disputed issue arises from Dr. Troy's referral for evaluation for implantation of a spinal cord stimulator. Implantation of a spinal cord stimulator is an invasive surgical procedure. As in any surgical procedure there are risks which, depending on underlying medical conditions, may be significant. Any surgical procedure requires some degree of anesthesia. Implantation of a spinal cord stimulator in some case requires general anesthesia, which is never free of risks. Infection and failure of the procedure are also known risks.

It is not unreasonable that, given his history of failed medical intervention and the risks of the procedure, Petitioner declined the offer of the spinal cord stimulator. There was no guarantee of success, particularly given the history of care up to now. The evidence clearly showed that Petitioner weighed the benefits and risks of the procedure and made a reasonable choice not to proceed.

The Arbitrator finds that Respondent failed to prove that Petitioner unreasonably declined to submit to medical treatment reasonably essential to promote his recovery in accord with §19(d) of the Act.



March 29, 2019

Steven J. Fruth, Arbitrator

fusion surgery on April 15, 2016. Petitioner's surgeon, Dr. Troy, opined that Petitioner would likely be limited from ever returning to work full duty. Dr. Butler, Respondent's §12 examiner did not know whether Petitioner would ever return to a full-duty capacity even with the fusion.

Petitioner still experiences back pain and disability that significantly limits his ability to perform activities of daily living. Dr. Troy released Petitioner with permanent work restrictions, pursuant to an FCE, that allow for standing up to one hour in 5-minute durations; walking one to two hours occasionally for short distances; sitting for eight hours; lifting 10.4-pounds above shoulder occasionally; lifting 23.6-pounds from desk to chair occasionally; lifting 14.8 pounds from chair to floor occasionally; and carrying 7-pounds with either arm occasionally. Petitioner was unable to return to his position as a Motor Truck Driver and his medical disability clearly significantly limits his employability. Although Petitioner obtained a GED, he never graduated from high school. Petitioner is 66 years old. He has no computer skills and restrictions prevent anything more than occasional lifting, standing, or walking.

In finding Petitioner is permanently and totally disabled, the Arbitrator relies on the vocational opinions of Kari Stafseth that Petitioner has lost access to his usual and customary line of employment, that he is not a candidate for vocational rehabilitation, and that he does not have access to any gainful or stable labor market. Ms. Stafseth further opined that further vocational testing, counseling, or computer courses would not make Petitioner employable in a stable labor market.

Ms. Stafseth believes Petitioner is not a candidate for vocational rehabilitation or job placement. She believes there is no job in a stable labor market that Petitioner would be able to access. The Arbitrator finds Ms. Stafseth's opinions are credible and persuasive and notes that hers are the only vocational expert opinions provided in this case. Respondent offered no other opinion to rebut Ms. Stafseth's opinions. Respondent offered no evidence that Petitioner has access to any employment or that a stable labor market exists. Respondent has not met its burden of persuasion.

After considering the totality of the evidence, the Arbitrator finds that Petitioner is permanently and totally disabled.

Respondent shall pay Petitioner permanent and total disability benefits of $915.11/week for life, commencing October 24, 2017, as provided in §8(f) of the Act. Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost of living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

BEFORE THE ILLINOIS
WORKERS' COMPENSATION COMMISSION

Ronald Swintek,
Petitioner,

vs.

No. 17 WC 31986

Cook County Sheriff's Department,
Respondent.

ORDER

This matter came before the Commission on the Commission's own motion for a Rule to Show Cause why Petitioner's Petition for Review should not be dismissed for failure to perfect the Review. Subsequently, Petitioner filed a motion to extend time to file the authenticated transcript and statement of exceptions and motion for leave to file the authenticated transcript *instanter*. The transcript of Arbitration was not submitted and/or authenticated in accordance with the Notice of Return Date on Review, March 22, 2019. In consideration of the record as a whole, the Commission finds that Petitioner's late filing does not warrant dismissal of his appeal and grants Petitioner's Motion for Leave to File the Transcript Instanter with a briefing schedule for the substantive appeal to follow.

The Commission file reflects that the Arbitrator issued her decision on September 17, 2018, denying Petitioner's claim for failure to prove accident and causal connection. Petitioner was represented at the hearing by Attorney Celso Fuentes, Jr. On October 16, 2018, Petitioner filed a timely Petition for Review of Arbitration Decision, signed by Petitioner himself.

On January 24, 2019, the Commission sent a notice of Return Date on Review specifying the due date for filing of the authenticated transcript as March 22, 2019 to Attorney Fuentes, Petitioner's attorney of record at the time. No transcript was filed by March 22, 2019. On March 25, 2019, the Commission, on its own motion, sent a Notice of Hearing on Rule to Show Cause why Petitioner's Petition for Review should not be dismissed for failure to perfect by filing an authenticated transcript. The hearing was set for April 30, 2019 at the Commission in Chicago.

On the assigned date, a Commissioner sitting in Commissioner Parker's stead, both attorneys of record, and Petitioner were present. A hearing on the Commission's Rule to Show Cause did not proceed. Attorney Fuentes presented a motion to withdraw as Petitioner's attorney, which was granted. The Rule to Show Cause hearing was then continued to June 11, 2019.

Petitioner then obtained new counsel and, on June 6, 2019, he filed his appearance and a motion to extend time to file the transcript and statement of exceptions. Shortly thereafter, he filed a motion for leave to file the transcript *instanter*. Respondent objected to Petitioner's motions at the June 11, 2019 hearing. However, no hearing was held on the Rule to Show Cause or Petitioner's motions and the matter was continued to a date when Commissioner Parker could be present.

The hearing was continued to July 17, 2019 at which time Respondent's counsel again objected to Petitioner's motions. Commissioner Parker set a briefing schedule for the parties to address the issues raised in the Rule to Show Cause as well as Petitioner's motions. Both parties timely filed briefs. The hearing on the Rule to Show Cause and Petitioner's motions proceeded before Commissioner Parker on October 16, 2019. A record was taken.

Respondent contends that §19(b) of the Act requires the timely filing of the authenticated transcript or agreed statement of facts within 35 days of the appealing party's receipt of the decision. It argues the Commission is empowered to extend the time for filing the transcript 30 days beyond the Return date of Review upon request of the appealing party. It argues that because the transcript was not filed on or prior to April 22, 2019, the Commission no longer has jurisdiction of the matter.

The Commission is cognizant of the requirements of §19(b) for timely filing of the authenticated hearing transcript but disagrees with Respondent's assertion that untimely filing of the transcript divests the Commission of jurisdiction.

In *Illinois Midland Coal Co. v. Industrial Board of Illinois*, 277 Ill. 333, 334, 115 N.E. 527 (1917), the Illinois Supreme Court, addressing §19(b) of the Act, stated:

> The filing of a properly authenticated stenographic report within the time fixed in the statute was not essential in order to give the Industrial Board jurisdiction to review the proceedings of the arbitration committee. If at any time before the hearing a properly authenticated stenographic report is filed with the Industrial Board this is all that is required by the statute. The date fixed by the statute as to the filing of such report is directory, --not mandatory,-- and is not jurisdictional.

Moreover, the stenographic stipulation on the Commission's Request for Hearing form provides that neither party will raise the failure to timely file the transcript if the court reporter fails to provide the transcript within the time set by law. If the timely filing of the transcript were jurisdictional, it could not be waived by the parties. The Commission finds that it has jurisdiction.

Additionally, it is within the Commission's discretion to allow a late filing of the hearing transcript. *Derosier v. Maron Electric*, 2007 Ill. Wrk. Comp. LEXIS 473. In *Derosier*, the transcript was not filed by the return date on review. The Commission issued a Rule to Show Cause why the petition for review should not be dismissed and set it for hearing. The Commission allowed the late filing of the transcript, over Respondent's objection, approximately two months after the return date. The Commission noted that it did not encourage the filing of late transcripts, but there was no evidence of gross negligence on the part of Petitioner's counsel or that Respondent was prejudiced by the delay. The Commission found it was within the Commission's discretion to allow the late filing, "especially when the law favors a resolution on the merits." *Id.*

In this case, Petitioner has exercised due diligence. He filed his own Petition for Review and appeared at the initial Rule to Show Cause hearing which was continued after his prior counsel was granted leave to withdraw from the matter. Petitioner's new attorney entered his appearance and immediately filed a motion for extension of time to file the transcript, then a motion for leave to file the transcript *instanter*. Petitioner and/or his attorney of record have been present at every scheduled hearing, indicating a diligent effort to proceed with this appeal. The delay, while several months, has not been the result of gross negligence and the Commission finds no prejudice to Respondent as a result of the belated filing. Under these circumstances and given that the law favors a resolution on the merits, the Commission finds that Petitioner's late filing does not warrant dismissal of his appeal.

Therefore, the Commission grants Petitioner's Motion for Leave to File the Transcript Instanter and will provide the parties with a briefing schedule for the substantive appeal.

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

DATED: DEC 13 2019

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp/dak
r-10/16/19
068

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

Frederick Adams,
Petitioner,

vs. No. 18 WC 14844

Hayes Mechanical Contractors,
Respondent.

19IWCC0672

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 accident, temporary total disability, medical expenses, prospective medical expenses, wages and benefit rate, 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 February 19, 2019, 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.

19IWCC0672

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.

Bond for 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: DEC 13 2019

Marc Parker

Barbara N. Flores

mp-wj
o-12/05/19
68

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ADAMS, FREDERICK
Employee/Petitioner

Case# **18WC014844**

HAYES MECHANICAL CONTRACTORS
Employer/Respondent

19IWCC0672

On 2/19/2019, 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:

0384 NELSON & NELSON
REED C NELSON
420 N HIGH PO BOX Y
BELLEVILLE, IL 62220

1109 GAROFALO SCHREIBER STORM
JAMES CLUNE
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

Frederick Adams
Employee/Petitioner

v.

Hayes Mechanical Contractors
Employer/Respondent

Case # 18 WC 014844

Consolidated cases: _____

19IWCC0672

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 **12/05/18**. 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. ☒ 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**

FINDINGS

On **04/23/18**, 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 **$5,490.00**; the average weekly wage was **$2,745.00**.

On the date of accident, Petitioner was **66** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

ORDER

Respondent shall pay medical bills identified in Petitioner's Exhibit #6, as provided in Sections 8(a) and 8.2 of the Act, subject to the medical fee schedule; of $2,781.00 to Belleville Diagnostic Center, $582.00 to Midwest Emergency Sparta, Inc., $362.00 to Signature Medical Group – Dr. Lawrence Kriegshauser, $849.75 to Sparta Community Hospital, $36.00 to Dugan Radiology Associates and $32.00 to Prairie Cardiovascular Consultants.

Respondent shall pay reasonable and necessary medical services of treatment as ordered by Dr. Lawrence Kriegshauser as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $906.66/week for 27 2/7ths weeks, commencing 04/23/18 through 10/31/18, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $1,463.00/week for 3 4/7 weeks, commencing 11/01/18 through 12/5/18, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner no penalties as provided in Section 19(k) nor as provided in Section 19(l) 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

2/12/19
Date

FEB 19 2019

Frederick Adams v. Hayes Mechanical Contractors: Case No. 18 WC 014844

FINDINGS OF FACT AND CONCLUSION OF LAW

The Petitioner, Frederick "Bucky" Adams, worked for the Respondent as a millwright. (Transcript 9). He was assigned to work at Prairie State Generating Company in Washington County, Illinois. (T. 11). His job there was mostly to help supply tools and materials needed throughout the power plant. (T. 63). He began work for Hayes Mechanical on April 9, 2018 working 60 hours per week. (T. 18). From the time that he was hired until the time that he was injured, he earned between $37.25 and $39.35 per hour. (T. 19, Petitioner's Exhibit 7 – Pre-Injury Paystubs). Petitioner testified that he liked his job. (T. 18).

On April 23, 2018, Petitioner and a coworker were pushing a large crate loaded with industrial-sized springs. (T.12). Petitioner's knee was bent, and as he pushed, he felt a pop and immediate onset of pain in his left knee. (T. 12). Petitioner testified that the activity that he and his coworker were involved in was the kind of work that millwrights did. (T. 12). Mr. Adams had never felt pain like that in his knee before. (T. 13). Mr. Adams reported the injury immediately to his foreman and was taken to the ER that same day by the safety director at the job site. (T. 14, PX 2 – Medical Records Sparta Community Hospital). At the emergency room, he gave an accurate history of the injury and complained of pain. (PX 2). He told the emergency room that he was pushing a pallet when he "felt a pop with immediate pain following." (PX 2). X-rays performed at the ER indicated no fracture but did show "mild arthritic narrowing with a possible small effusion." (PX 2). He was prescribed hydrocodone and an immobilizing knee brace. (PX 2).

Petitioner underwent an MRI on May 2, 2018. (T. 15, PX 1- Medical Records; Belleville Diagnostic Center, LLC). The MRI report indicated, among other diagnoses, a grade I sprain of the medial collateral ligament, grade II sprain of the anterior cruciate ligament, and a complex grade III tear in the body and posterior horn of the medial meniscus. (PX 1). Eventually, Petitioner came under the care of Dr. Lawrence Kriegshauser, orthopedic surgeon, on 5/17/18. (T. 16, PX 3 – Medical Records Dr. Kriegshauser, Signature Medical Group). After obtaining a history of the injury, performing an examination and reviewing relevant medical records and imaging studies, Dr. Kriegshauser opined Petitioner had an "acute tear [of the] medial meniscus left knee with preexisting osteoarthritis of the left knee." (PX – 3). Dr. Kriegshauser recommended an arthroscopic repair of the torn meniscus in Petitioner's left knee of May 17, 2018. (PX 3, T. 16). Regarding the arthritis, Dr. Kriegshauser noted that before the injury, the arthritis was "asymptomatic" and that "torn cartilage can sometimes be a triggering event, causing the preexisting arthritis to become symptomatic." (PX 3). He stated that it may be impossible "to get him back to an entirely asymptomatic status like he was reportedly before the injury." (PX 3). Dr. Kriegshauser noted that he was then working light duty and recommended that he work only sit-down duty until surgery was approved. (PX 3). Dr. Kriegshauser stated that he would attempt to schedule surgery "ASAP." (PX 3). Petitioner underwent cardiovascular testing in preparation for the anticipated surgery and those results were sent to Dr. Kriegshauser. (PX 3).

Petitioner testified that as a result of the light duty restrictions, there was not enough work for him at Hayes Mechanical to maintain the hours he had preceding the injury. (T. 21). If not for the injury, he would have continued to work 60 hours per week. (T. 21). His hours were reduced from 60 hours per week to 40 hours per week following the injury and due to the restrictions. (T. 21, PX 8 – Post Injury Paystubs).

Petitioner followed up with Dr. Kriegshauser on June 7, 2018. Dr. Kriegshauser opined that the current condition of ill-being was causally related to the injury, stating, "I do feel that this torn medial meniscus is directly related to his work injury." (PX 3).

At the Respondent's request, Petitioner attended a Section 12 examination with Dr. Nogalski on July 25, 2018. (PX 4 – Medical Records: Dr. Michael Nogalski). Petitioner testified that he liked Dr. Nogalski. (T. 17). Dr. Nogalski's report indicated that he was in agreement with Dr. Kriegshauser's opinions regarding diagnosis, treatment and causation. (PX 4). He noted an accurate history of the accident preceding the injury and noted that the "history appears to be consistent with ...the medical records." (PX 4). He further noted that prior to this problem, Mr. Adams had no complaints with regard to the left knee. (PX 4). Dr. Nogalski diagnosed a "traumatic torn medial meniscus left knee" and recommended arthroscopy of the knee with partial medial meniscectomy and possible chondroplasty." (PX 4). Regarding causation, Dr. Nogalski, the Section 12 examiner hired by the Respondent, opined that "I believe his claimed injury caused the condition of ill-being with respect to the meniscal tissue." (PX 4). He further recommended work restrictions of no lifting more than 20#, no squatting and no climbing. (PX 4). Dr. Nogalski's report is dated July 26, 2018 and was sent to Respondent's insurer and Respondent's attorney that same day. (PX 4). Respondent's attorney sent an email to Petitioner's attorney on August 8, indicating that the report had arrived only the day before, and that he had not yet sent it to his client. (PX 10). The report indicates that Respondent's attorney had received the information weeks before and the same had already been sent to his client. (PX 4). Petitioner's attorney requested authorization on August 16, 2018. (PX 10).

Petitioner continued to work light duty with the Respondent while on restrictions from Drs. Kriegshauser and Nogalski. (T. 21). On October 31, 2018 Petitioner became ill with the flu. (T. 27). He called Dan Woods, his immediate supervisor and told him that he was ill. (T. 21, 78). Both Petitioner and his direct supervisor, Dan Wood, testified that Petitioner spoke with Mr. Wood on that day and relayed that he was ill. (T. 21, 78). The next day, Petitioner was still sick. (T. 27). Mr. Adams called a coworker, Salvador Larios, and asked the coworker to relay to Dan Woods that he was ill and unable to make it in to work. (T. 28-29, 50, 83). Dan Woods testified that the Mr. Larios told him on that day that Petitioner was ill and unable to come into work. (T. 83). However, later on the same day, November 1, 2018, Larry Grief called Petitioner and notified him that he was terminated for "failure to report for light duty on 10-31 and 11-1-18." (T. 91). The same was memorialized in Respondent's Exhibit 3.

On November 2, 2018, one day after his termination, Petitioner went to an urgent care facility as a result of his flu-like symptoms. (T. 30, PX 5). He was then taken by ambulance from the urgent care facility to St. Elizabeth's Hospital nearby. (T. 30, PX 5). St. Elizabeth's records indicate that Petitioner was indeed sick. He was running a 102.3-degree fever and complained of a cough with wheezing. (PX 5). Bloodwork indicated that his labs were "abnormal." (PX 5). Caretakers administered an IV. (PX 5). He was given Tylenol and eventually diagnosed with acute bronchitis and a viral infection. (PX 5).

Despite his termination by the Respondent, Petitioner testified that he liked his job and would have continued working it if he could. (T. 32).

The Arbitrator Concludes:

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

The Arbitrator finds that the Petitioner did sustain an injury that arose out of and in the course of his employment. Several of Respondent's witnesses testified as to Petitioner's job duties. Respondent is critical of Petitioner for not enlisting the help of a fork lift in order to move the crate which he was pushing. However, it has not identified any rule that Petitioner violated. Further, it did not attempt to discipline Petitioner for his

decision to push the crate, although it has provided evidence of disciplining Petitioner for "insubordination" and for missing work due to illness. If in fact Petitioner had used judgment such that Respondent felt violated a rule, they would have likely disciplined him in a similar fashion. However, they did not. Even if Petitioner had undertaken some task that he was not authorized to perform, because the action was clearly part of his duties and in furtherance of the Respondent's business, he will not be denied benefits. Fondulac Nursing Home v. Industrial Commission, 460 N.E.2d 751 (1984), Sisbro, Inc. v. Industrial Commission, 797 N.E.2d (2003).

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

The Arbitrator concludes that the Petitioner's current condition of ill-being is causally related to the 09/23/16 date of injury. In support of this conclusion the Arbitrator notes that the only medical opinions in this case, those of Drs. Kriegshauser and Nogalski, support a finding of causation.

The Arbitrator considers the Petitioner's demeanor and finds his testimony credible. The Petitioner testified believably and in a straight forward manner that he had not experienced similar pain in his knee prior to the accident. He further gave an accurate history of the accident throughout his treatment.

Issue G. What were Petitioner's earnings?

Petitioner was hired on April 9, 2018 and was injured on April 23, 2018. The relevant period of time therefore is the two-week period between those two dates. The Petitioner testified that he worked 60 hours per week and that those hours were mandatory. His paystubs support that testimony. The Respondent did not challenge the mandatory hours, nor did it put forward any evidence tending to show what other similarly situated employees earn. Petitioner worked 9.5 hours at a rate of $37.35 and 130.5 hours at a rate of $39.35. His earnings over this period were $5,490.00. His AWW is $2,745.

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

The Arbitrator concludes that all the medical treatment provided to the Petitioner was reasonable and necessary and Respondent is responsible for the medical bills incurred as a result thereof. Respondent is to pay the medical bills identified in Petitioner's Exhibit #6 as provided in 8(a) and 8.2 of the Act, subject to the fee schedule: $2,781.00 to Belleville Diagnostic Center, $582.00 to Midwest Emergency Sparta, Inc., $362.00 to Signature Medical Group – Dr. Lawrence Kriegshauser, $849.75 to Sparta Community Hospital, $36.00 to Dugan Radiology Associates and $32.00 to Prairie Cardiovascular Consultants.

Issue K. What temporary benefits are in dispute (TPD & TTD)?

The Arbitrator concludes that Respondent owes Petitioner TPD benefits from 04/23/18 to 10/31/18 (27 2/7ths weeks). The Arbitrator finds the period is consistent with the Petitioner's treating doctor's reports and the report of the Section 12 Examiner, Dr. Nogalski marked as (PX 3, PX 4). Over this period of time, Petitioner earned $37,809.41. However, had he earned his AWW ($2,745.00) over that same period, he would have earned $74,899.29, a difference of $37,089.88. Two-thirds of that difference is $24,738.95. The same is respondent's obligation to Petitioner with regard to TPD.

The Arbitrator concludes that Respondent owes Petitioner TTD benefits from 11/01/18 through the date of hearing. As of 1/10/18, this is a period of 3 4/7 weeks. Petitioner is at the max TTD rate which is $1,463.80, resulting in the total owed to Petitioner as of 12/5/18 of $6,265.06

The Illinois Workers' Compensation Act is a remedial statute designed to provide financial protection to injured workers until they can return to the work force. Flynn v. Industrial Commission, 813 N.E.2d 119, 126 (2004), Interstate Scaffolding v. Industrial Commission, 923 N.E.2d 266, 274 (2010). The Supreme Court in Interstate Scaffolding further stated that, "It is a well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the ... claimant has reached [MMI]." *Id* at 271. Stated another way, "when an employee who is entitled to receive workers' compensation benefits as a result of a work-related injury is later terminated for conduct unrelated to the injury, the employer's obligation to pay TTD workers' compensation benefits continues until the employee's medical condition has stabilized." Matuszczak v. IWCC, 22 N.E.3d 341 at 345 (Ill. App 2nd 2014). In Interstate Scaffolding, the Petitioner was terminated for cause after drawing graffiti on the Respondent's property. The Respondent thereafter terminated benefits. The Court noted that if the Petitioner has not reached MMI, TTD benefits may be only be suspended if the Petitioner 1) refuses to submit to medical treatment essential to his or recovery, 2) fails to cooperate in good faith with rehabilitation efforts, or 3) refuses work falling within the physical restrictions prescribed by his doctor. Interstate Scaffolding at 274.

Here the Respondent has argued that because the Petitioner was ill and missed two days of work, he had abandoned his light duty assignment. However, it is clear from the record that Petitioner called his supervisor on the first day that he was ill to advise that he was sick and would at least have difficulty coming to work. The next day, he relayed the same information to his supervisor, albeit not in the Respondent's preferred method of communication. However, the Petitioner, Mr. Larios and the Respondent's own witnesses testified that the message had made it to the Respondent. Regardless of its own policies, the Respondent knew that Mr. Adams was still ill and not coming to work on Thursday, November 1, 2018. The Petitioner's condition at that time is supported by the hospital records from November 2, 2018. Respondent's exhibit demonstrating Petitioner's "insubordination" sheds light on the Respondent's motive for terminating his employment. Petitioner was terminated for either insubordination or failing to follow the Respondent's preferred method of calling off work, but he certainly had not abandoned his light duty assignment. Both parties are in agreement that he successfully alerted his employer to the fact that he was ill and unable to come to work. Petitioner testified credibly that he would have preferred to continue to work the light duty assignment and continue working for the respondent.

For the reasons above, the Respondent shall pay Petitioner TTD from the date of his termination.

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

The Respondent shall not pay to Petitioner Section 19l and 19k penalties or fees, because the Respondent believed they had an accident defense. Their belief may have been mistaken, but the Arbitrator finds that it was not unreasonable and/or vexatious. Accordingly, the Arbitrator does not award penalties or fees.

Issue O. Other, Prospective Medical

The Arbitrator finds that the Respondent shall pay prospective medical in the form of the treatment recommended by Dr. Kriegshauser.

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

Arthur Whitham,
Petitioner,

vs. No. 18 WC 12789

Kelly General Construction,
Respondent.

19IWCC0673

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 accident, temporary total disability, and medical expenses 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 12, 2019, 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.

19IWCC0673

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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 13,100.00. 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: DEC 13 2019

Marc Parker

Deborah L. Simpson

Barbara N. Flores

mp-wj
o-12/05/19
68

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

WHITHAM, ARTHUR
Employee/Petitioner

Case# **18WC012789**

KELLY GENERAL CONSTRUCTION
Employer/Respondent

19IWCC0673

On 3/12/2019, 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:

5912 FOSSIER LAW
DAN FOSSIER
M2-301 N NEIL ST SUITE 400
CHAMPAIGN, IL 61820

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT E MACIOROWSKI
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)
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
19(b)

ARTHUR WHITHAM
Employee/Petitioner

v.

KELLY GENERAL CONSTRUCTION
Employer/Respondent

Case # **18** WC **12789**

Consolidated cases: _____

19IWCC0673

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 **Urbana**, on **January 18, 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, **November 13, 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 **$48,653.80**; the average weekly wage was **$935.65**.

On the date of accident, Petitioner was **45** 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

As explained in the Arbitration Decision, Petitioner sustained an accident which arose out of and in the course of his employment with Respondent on November 13, 2017. His current condition of ill-being with regard to his bilateral carpal tunnel syndrome is causally related to the accident. Petitioner has not reached maximum medical improvement and Respondent is liable for ongoing medical care, including surgery on his right hand/wrist.

Respondent shall pay reasonable and necessary medical services totaling **$8,619.00**, as set forth in Petitioner's Exhibit 2 and itemized in the Arbitration Decision, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act and subject to any prior payments by Respondent.

Respondent shall pay temporary total disability benefits of **$623.77 per week** for **7 weeks**, for the period of **September 11, 2018, through October 29, 2018**, as provided in Section 8(b) of the Act, for a total of **$4,366.39**.

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

March 7, 2019
Date

ICArbDec19(b)

MAR 12 2019

STATE OF ILLINOIS)
) SS
COUNTY OF CHAMPAIGN)

19IWCC0673

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ARTHUR WHITHAM
Employee/Petitioner

v. Case #: **18 WC 12789**

KELLY GENERAL CONSTRUCTION
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

This cause came before the Arbitrator on Petitioner's Section 19(b) Petitioner. The parties placed into dispute the issues of accident, notice, causal connection, past medical treatment, prospective medical treatment, and temporary total disability. Respondent agreed with the period alleged by Petitioner for TTD, but denied liability for benefits. Respondent stipulated that, should the Arbitrator find for Petitioner on the issues of accident and causal connection, the reasonableness and necessity of treatment was not in dispute. The parties stipulated that at the time of the alleged accident, Petitioner was 45 years old, married, had no dependent children, and had an average weekly wage of $935.65.

Petitioner's Testimony

Petitioner testified that on November 13, 2017, he was employed by Respondent as a non-union pipefitter welder and had been so employed for about ten years. He completed welding school in 1998 and has been continuously employed as a pipefitter welder since that time. Following school, he worked for A-Lert for three months, and then for All Tri-R. For the past nine years, he has worked for Respondent at the Tate & Lyle facility in Decatur. He has lived in Lincoln, Illinois for the past twenty years and commutes to Decatur for work. His normal hours are 6 a.m. to 4:30 p.m.. His work duties with Respondent include pipe welding, running grinders, running hammer drills, moving heavy pipes, and turning wrenches. He uses vibratory tools such as a grinder to prep pipe for work, a hammer drill to drill into concrete, and a chop saw to cut metal pipe. He testified that he runs a six-inch grinder most of the day and that "it vibrates like crazy".

Petitioner testified that his primary care physician has always been at Memorial Physician Services, formerly known as Family Medical Center. His doctor in the past was Dr. Zwilling, but when he retired about four years ago, he began seeing Dr. Wahab. Petitioner testified that he went to the doctor in 2000 for complaints related to his hands and wrists, which he believed was hand fatigue from being a new welder. He was working for All Tri-R at the time. Between that time and when he began working for Respondent on December 23, 2008, he worked in various locations doing pipefitting and welding, was not experiencing any problems with his hands and wrists, and did not seek treatment for his hands and wrists. Since 2008, he has worked for Respondent on a continuous basis.

Petitioner testified that he first sought treatment for his hands in November 2017, when he went to Dr. Wahab. He had noticed at work that he was dropping tools, had a weak grip on his tools, and his hands would often go numb. He was also having trouble sleeping because his hands would tingle and go numb, which woke him up every night. Dr. Wahab referred him to Dr. Narla for testing, which was done in December 2017. He testified that he had previously had testing done by Dr. Narla in September 2016, but that was regarding numbness in his legs due to a nerve issue in his hips, and was not related to his hands and wrists. The testing in 2017 was performed and revealed that he had severe carpal tunnel in both hands.

Petitioner testified that around the time he saw Dr. Wahab in November 2017, he reported to his supervisor Bob Trent that he was having problems and was seeking medical care. Paperwork was completed at that time. He advised Mr. Trent of the diagnosis of carpal tunnel syndrome after testing was done.

Petitioner was asked about a note in Dr. Wahab's records from April 2018 addressed to "To Whom it May Concern". He testified that he asked Dr. Wahab to write a note because after he submitted his claim to Respondent and had given a phone interview with the insurance company, he received a denial letter. Since Dr. Wahab was his primary doctor, he asked him to write a note. He did not tell him what to write in the note. After he received Dr. Wahab's note, he believes he took it to Bob Trent.

Petitioner testified that following the testing by Dr. Narla, he tried using anti-vibration gloves, which did not help. He was referred by Dr. Wahab to a surgeon, Dr. Sinha, who recommended bilateral carpal tunnel surgery. Petitioner underwent left carpal tunnel surgery on September 11, 2018. On the day of, and immediately after his outpatient surgery, he went to the plant and spoke in person with Mike Spinner, his general foreman, regarding his time off work. He testified that he worked up to the date of surgery, and then was off until his return to work on October 29, 2018. He had a post-operative wound infection, which slowed recovery a bit. He was not paid for his time off work.

Petitioner testified that he has continued to work his normal duties since returning on October 29, 2018, and in fact has been working twelve-hour days, seven days a week for the past five weeks. He was off only for Christmas Eve, Christmas Day, and New Year's Day. He testified that his left hand is doing great now, but his right hand continues to hurt quite a bit. He noted he is right-hand dominant. He testified that he intends to have surgery on the right hand by

Dr. Sinha and had previously had it scheduled for October 2018. He postponed it at that time, as he had no income coming in. He would like to have the surgery done.

Petitioner testified that he was examined by Dr. Fletcher in October 2018. As part of that process, he completed paperwork and noted that he was a smoker. He testified that over the past 20 years or so, he has quit a couple of times and currently smokes about five cigarettes a day. He acknowledged that doctors have always encouraged him not to smoke, but he testified that neither Dr. Wahab nor Dr. Sinha told him that smoking would cause worsening of his carpal tunnel syndrome. Petitioner acknowledged that he has put on weight in the past 20 years. He testified that he does not really have hobbies or home activities that involve the use of vibratory tools. He noted he does not do a lot of work in the garage, but does mow his own five-acre lawn and rides his motorcycle on the weekends when the weather is nice. He testified that he has ridden a motorcycle most of his life as a hobby, but does not use it as his primary vehicle. He drives his truck back and forth to work. None of his doctors have told him to stop riding a motorcycle because of the carpal tunnel syndrome.

Petitioner testified that when he started with Respondent ten years ago, he had not been told by any medical provider that he had carpal tunnel syndrome. He was not experiencing any symptoms, such as tingling or numbness, at that time, nor was he experiencing the symptoms in the first few years he worked there. When he first sought treatment in November 2017, he had been having symptoms for about a year and had tolerated it for as long as he could. He decided to finally seek treatment when his symptoms caused him to wake up and he was losing sleep.

On cross-examination, Petitioner testified that from the time he became a welder in 1998 until the present, his job has basically been the same—pipefitting, welding, and millwright work—and the tools have been the same. Some days he will use the grinder all day and some days he will weld all day, it varies depending on the job. Petitioner was asked to review the Memorial medical record from March 27, 2000, which stated he complained of bilateral wrist pain for five years with some swelling, numbness, and tingling. He testified that the symptoms never completely went away after that, but they were never severe enough to wake him up at night and he continued to work his normal job. He reiterated that he has ridden motorcycles and dirt bikes for twenty years, but does not drive his motorcycle to work or take long trips on it. Petitioner acknowledged that he had gained weight, going from 262 pounds on May 19, 2015, to 299 pounds on November 13, 2017.

On re-direct examination, Petitioner testified that between March 2000 and November 2017, he had no treatment, testing, or surgery for carpal tunnel syndrome or numbness or tingling in his hands or wrist. He took no medications or wore splints for his hands or wrists. With regard to the medical bill submitted by Petitioner (PX2), he agreed that the statement was for a ten-year period and included charges related to other unrelated health issues. Specifically, he noted that there were two entries on December 18, 2017, one from Dr. Narla and one from Nurse Practitioner Donna Hoss-Green. The second entry was for care unrelated to his hands and wrists.

Medical Records

Subpoenaed records from Memorial Physician's Services were entered into evidence and cover treatment from February 10, 1999, through April 2, 2018. The records document treatment for a variety of health issues. The Arbitrator notes the number of clinic visits each year below.

1999	1	2007	1	2014	4
2000	1	2008	1	2015	4
2003	1	2010	1	2016	2
2005	3	2011	3	2017	2
2006	2	2013	2	2018	3

In all of these records, only two visits reference complaints with regard to the wrists and/or hands. The Arbitrator addresses only those two visits. RX1.

On March 27, 2000, Petitioner presented with complaints of bilateral wrist pain. (The Arbitrator notes this is a handwritten treatment record and difficult to decipher in areas.) He reported that he had had wrist pain on and off for five to six years, and that he was moving a pipe weighing over 100 pounds at work and his wrists hurt so bad that he fell while still holding the pipe. He noted swelling, on and off numbness and tingling in the digits, and dropping of things. On examination, grip was weak bilaterally and there was slight pain with range of motion. Assessment was bilateral wrist pain, "?carpal tunnel". Petitioner was prescribed bilateral splints, Celebrex, and B Vitamins, and was encouraged to quit smoking. The note also indicates that an EMG was recommended and that the office would call him with the results. He was to return for a recheck in two weeks. The Arbitrator notes that the next treatment record is April 23, 2003, more than three years later, and that there is no record of an EMG having been completed. RX1.

On November 13, 2017, Petitioner was evaluated by Dr. Wahab for two complaints, one of which is unrelated and not relevant to this case. He reported numbness and pain in both hands and arms and recent dropping of things. He noted that he had had this for some time, but that in the last couple of months it had become worse. He had been to a chiropractor with no relief. (The Arbitrator notes that no chiropractor records were proffered at trial.) On examination, there was a positive Tinel's sign in the left wrist and diminished grip strength in the left hand. Assessment was paresthesias of both hands. An EMG was ordered, and Petitioner was instructed to wear bilateral cockup splints nightly. RX1.

Dr. Amir John Wahab testified by way of deposition on December 12, 2018. He is Board Certified in family practice. He testified consistent with his treating records, and noted that he became Petitioner's primary care physician in July 2016. Prior to that time, Petitioner treated with Dr. Zwilling in the same clinic until his retirement. Dr. Wahab testified that when he first saw Petitioner in July 2016 it was for complaints of nasal congestion and pain in his feet and he made no complaints regarding his hands or wrists. At that time, he was referred to Dr. Narla for an EMG/NCS of the lower extremities. Dr. Wahab reviewed Deposition Exhibit 5 and identified it as Dr. Narla's report following the EMG/NCS conducted on Petitioner's lower limbs on September 19, 2016. PX1.

Dr. Wahab testified that Petitioner first made complaints about his hands and wrists on November 13, 2017. His assessment at that time was paresthesias (numbness and tingling) of

both hands, either metabolic or carpal tunnel syndrome. He testified that carpal tunnel syndrome was the compression of the median nerve at the wrist and that the usual cause for the condition was repetitive use. He referred Petitioner to Dr. Narla for an EMG and nerve conduction test, which was conducted on December 18, 2017, and which showed severe carpal tunnel compression of the median nerve on the left and moderate to severe compression of the median nerve on the right. Based on the test results, Dr. Wahab referred Petitioner to Dr. Raj Sinha for surgery. Petitioner underwent surgery on the left wrist, but not yet on the right. PX1.

Dr. Wahab reviewed Deposition Exhibit 6 and identified it as a letter he had written and signed on April 2, 2018, at Petitioner's request. In the letter he stated that Petitioner had undergone nerve conduction testing showing severe bilateral carpal tunnel which he felt "has been caused by his work conditions". Dr. Wahab was asked to review a job description for a pipefitter/welder. (The Arbitrator notes this job description was attached to the deposition transcript of Dr. David Fletcher, discussed below, and marked as Respondent's Deposition Exhibit 3 at that time.) Dr. Wahab noted that the job description showed that Petitioner's job does have repetitive motions involving the hands, with gripping and turning, and that those things could exacerbate carpal tunnel syndrome. He testified that Petitioner's carpal tunnel syndrome was caused by his work activities, as detailed in the job description and as he understood Petitioner's job duties to be. He testified that even if Petitioner had carpal tunnel syndrome prior to the time he became Petitioner's primary care physician, his work activities would have aggravated the condition. PX1.

Dr. Wahab testified that he was not aware of any non-work-related factors that could also be a cause of Petitioner's condition. He was unaware of any medical literature that supported the theory that smoking was a cause of carpal tunnel syndrome. He noted that the record showed Petitioner to be a former smoker as of July 7, 2016, but he did not know when he had quit smoking. He would counsel Petitioner to quit smoking for his overall health, but stated there would be no specific concern about smoking as it relates to carpal tunnel syndrome. PX1.

Dr. Wahab testified that he was not aware of medical literature that correlates carpal tunnel syndrome to obesity or weight gain, as opposed to people who are thin or have a normal BMI. He noted that the record showed Petitioner had a BMI of 43.05, which puts him in the morbidly obese category. He would counsel Petitioner to lose weight for his overall health, but stated there would be no specific concern about his weight as it relates to carpal tunnel syndrome. PX1.

With regard to causation overall, Dr. Wahab testified that the literature he has reviewed indicated that carpal tunnel syndrome is associated with repetitive use and motion, as opposed to smoking or obesity. PX1.

Dr. Wahab testified that he referred Petitioner to Dr. Sinha for the carpal tunnel syndrome, who took over the care for that condition. Dr. Wahab has seen Petitioner since that time, but only for other unrelated health issues. PX1.

On cross-examination, Dr. Wahab confirmed that the last time he saw Petitioner for numbness and tingling of the hands was on November 13, 2017. He testified that the causation

letter he wrote on April 2, 2018, was at Petitioner's request, and agreed that the letter did not impose any work restrictions. Dr. Wahab acknowledged that he is not certified to do utilization review, does not perform AMA ratings, is not certified in occupational medicine or preventative medicine and public health, and has not personally been to Petitioner's work site to view his work activities. PX1.

On July 24, 2018, Petitioner was evaluated by Dr. David Fletcher of SafeWorks Illinois, Respondent's Section 12 examiner. Dr. Fletcher testified by way of deposition on November 1, 2018. He is Board Certified in preventive medicine and in occupational medicine. He testified that much of his practice is focused on upper extremity conditions like carpal tunnel and cubital tunnel syndrome and he makes assessments as to causation. RX2.

Dr. Fletcher testified that he reviewed medical records provided, took a history from Petitioner, both verbally and via written questionnaires, and performed a physical examination. His resulting assessment was that Petitioner had severe bilateral carpal tunnel syndrome that was very advanced. He noted that he was aware in the records that Petitioner "had a diagnosis of carpal tunnel syndrome going back to 2000", and that Petitioner reported that his symptoms had gotten worse over the last couple of years. He further noted that he had reviewed medical records from 2016 indicating that electrical studies had been done by Dr. Narla, which showed "extremely advanced, severe bilateral carpal tunnel syndrome with evidence of some axonal nerve cell body involvement". RX2. The Arbitrator notes that this testimony clearly contradicts the record and Petitioner's testimony, in that the studies in 2016 were performed on the lower extremities, not the upper extremities.

Dr. Fletcher testified that, outside of work, Petitioner had several risk factors in the development of carpal tunnel syndrome. Those risk factors were his age, morbid obesity, smoking, and operating a motorcycle. He opined that Petitioner's condition first developed in March 2000, that he was a surgical candidate back in 2000, and that his condition was not caused by the work activities he was performing in 2017. Dr. Fletcher noted that Petitioner had gained almost 75 pounds since 2000, and opined that this weight gain explained why his condition has progressively gotten worse, along with the other contributing risk factors. RX2.

Dr. Fletcher opined that, with regard to additional treatment, Petitioner needed bilateral carpal tunnel surgery. He further opined that Petitioner could continue to work his regular duties until surgery was performed. RX2.

On cross-examination, Dr. Fletcher testified that carpal tunnel syndrome is caused by compression of the median nerve through the carpal tunnel, which runs through the wrist into the hand. He acknowledged that the condition can be caused by repetitive use. RX2.

During the course of cross-examination, it came to light that there were two alternative versions of Dr. Fletcher's IME report following his examination of Petitioner. The first report, dated July 31, 2018, was marked as Petitioner's Deposition Exhibit 1 and had previously been tendered to Petitioner's counsel. The second report, dated July 24, 2018, was marked as Respondent's Deposition Exhibit 2 and was slightly different. Dr. Fletcher testified that the report dated July 31 was a "rough draft" report contained within his file. It was printed on the

day of the deposition, November 1, and the date auto-filled to November 1, so he had his assistant re-print the report with the date of examination, which was July 24, 2018. He reiterated that it was a rough draft and that the final report was the one dated July 31, and was completed after the receipt of Dr. Sinha's report. He acknowledged, however, that Petitioner's counsel saw the draft report and that they spoke within a short time of the examination. RX2.

Both versions of Dr. Fletcher's written report were consistent in concurring with the treating physicians that Petitioner had severe bilateral carpal tunnel syndrome, that his treatment thus far had been reasonable and necessary, and that he needed surgery. In addition, Dr. Fletcher answered the following questions that had been posed by Respondent:

Q: Is there any evidence to suggest that the Petitioner's current condition of ill-being is caused or aggravated by his employment?
A: Yes, his occupation as a pipefitter exposes him to vibratory tools, including grinders. His job duties would expose him to ergonomic factors that NIOSH has recognized as contributory to the development of carpal tunnel syndrome.
Q: Does the Petitioner have any co-morbidities?
A: Obesity (BMI 41), smoker.
Q: Is the Petitioner in need of any work restrictions? If so, what restrictions are necessary and how long would they be applicable?
A: I would restrict exposure to vibratory tools until he has surgery or require him to wear anti-vibration gloves.
Q: Is the Petitioner at maximum medical improvement? If not, when do you expect the Petitioner to be at MMI?
A: No, I would expect MMI 8-12 weeks following the last operated wrist. Recovery will be slower due to the severity of the condition. RX2.

Continuing on cross-examination, Dr. Fletcher was asked if his opinion was that Petitioner's condition was caused or aggravated by his employment as a pipefitter and the fact that he uses vibratory tools in that job. He replied, "I stand behind what I wrote." The following exchange then took place:

Q: So, in Petitioner's Exhibit 1 your answer was, yes, he is a pipe fitter and uses vibratory tools. You stand behind that statement as affirming that Mr. Whitham's employment has caused or aggravated his carpal tunnel syndrome. Correct?
A: Well, I said the potential exists as we expose him to those ergonomic factors that are recognized as contributory to carpal tunnel syndrome. RX2.

Dr. Fletcher opined that Petitioner had carpal tunnel syndrome in 2000, based on the medical record of March 27, 2000. He further opined that the condition became severe when Petitioner started gaining weight in the last couple years "and he presented for his original electrical studies done in 2016, gained more weight, continued to smoke, and by the time he saw Dr. Narla again he was further advanced". RX2. The Arbitrator notes, and the record is clear, that the electrical studies performed in 2016 were to Petitioner's ***lower*** extremities, not his upper extremities. It would appear that Dr. Fletcher did not actually review these studies, nor the treatment records surrounding the need for the studies.

Dr. Fletcher disagreed that his causation opinion changed, as between his report and his testimony. He testified, "I obviously stated that the work activities that he has done can be contributory to the development of carpal tunnel syndrome. My opinion is that carpal tunnel syndrome started in the year 2000 when he worked at all Tri-R and he's continuously had that condition for the last 18 years." He was later asked if the work activities Petitioner had been doing for Respondent for the past 10 years aggravated the condition. He replied, "I don't believe the work activities aggravated his condition. My opinion is that his weight gain and his smoking aspects have aggravated his pre-existing condition." When asked if that opinion was stated in his written report, he replied, "I'm here giving testimony." RX2. The Arbitrator notes that nowhere in his report did Dr. Fletcher opine that Petitioner's carpal tunnel syndrome was caused by or aggravated by his weight gain and his smoking. That opinion was first expressed during his deposition.

On re-cross, in response to a question regarding causation, Dr. Fletcher testified that he answered the second interrogatory in his report by taking into account the totality of Petitioner's entire work life. He went on to testify, however, "I'm saying unequivocally there's a causal relationship doing his employment at the Kelly Group and the development of his carpal tunnel syndrome." RX2.

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 his claim that he sustained an accident which 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*, 244 Ill.App.3d 204, 211 (1st Dist. 1993). An employee who suffers a repetitive trauma injury is still required to meet the same standard of proof as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n*, 224 Ill.2d 52, 64 (2006). A work-related 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.

Dunteman v. Illinois Workers' Compensation Comm'n, 2016 IL App (4th) 150543WC, citing *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003).

In this case, the Arbitrator finds that Petitioner met his burden of proof in establishing that he sustained an accident which arose out of and in the course of his employment. In so concluding, the Arbitrator finds significant the uncontested fact that Petitioner's regular work duties as a pipefitter/welder are labor-intensive, requiring the repetitive use of his upper extremities and the daily use of vibratory power tools.

Both Dr. Wahab and Dr. Fletcher testified that Petitioner's job duties caused or contributed to the development of his carpal tunnel syndrome. When asked whether Petitioner's condition was caused or aggravated by his employment, Dr. Fletcher stated in his report,

> "*Yes, his occupation as a pipefitter exposes him to vibratory tools, including grinders. His job duties would expose him to ergonomic factors that NIOSH has recognized as contributory to the development of carpal tunnel syndrome.*"

Respondent attempted to show that Petitioner's condition pre-dated his employment with Respondent and was diagnosed in 2000. Factually, this is inaccurate. While the record does show that Petitioner presented to his family medicine clinic in 2000, there was no definitive diagnosis made at that time. Rather, there was only an indication of "?carpal tunnel", meaning the possibility. Even if, *arguendo*, such a diagnosis was definitively made at that time, the fact is that Petitioner sought no further treatment and continued to perform the same work duties for 17 more years before again seeking treatment for his symptoms on November 13, 2017. By that time, he had been working for Respondent for almost nine years, performing the same duties that Dr. Fletcher opined contributed to the development of the condition.

Respondent also attempted to show that Petitioner's condition became worse and required treatment due his weight gain and, to some degree, his smoking, rather than his job activities. Although Dr. Fletcher noted in his report that Petitioner had co-morbidities of obesity and smoking, and testified that his weight gain is what caused the condition to get worse in recent years, he testified on re-cross-examination,

> "*I'm saying unequivocally there's a causal relationship doing [sic] his employment at the Kelly Group and the development of his carpal tunnel syndrome.*"

Even if, *arguendo*, Petitioner's weight gain was *a* cause of the progression of his condition, there is no dispute that his job duties were also *a* cause.

In addition to the above medical evidence, the Arbitrator found Petitioner to be exceptionally credible and forthright in his testimony.

Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner met his burden of proof on the issue of accident. The Arbitrator further finds that the date of accident is November 13, 2017, that being the date that he sought treatment for his symptoms.

In support of the Arbitrator's decision relation to issue (E), whether timely notice of the accident was given to Respondent, the Arbitrator finds the following:

The Arbitrator finds that Petitioner provided timely notice to Respondent. In so concluding, the Arbitrator notes that Petitioner testified he reported the accident to his supervisor Bob Trent around the same time that he sought treatment in November 2017, and that paperwork was completed at that time. He followed up with Mr. Trent following the EMG/NCS in December 2017. The Arbitrator finds significant that Respondent made no effort to rebut Petitioner's testimony and assertions with regard to his reporting of the accident.

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

A claimant has the burden of proving by a preponderance of the credible evidence all elements of the claim, including that any alleged state of ill-being was caused by a workplace accident. *Parro v. Industrial Comm'n*, 260 Ill.App.3d 551, 553 (1st Dist. 1994).

In light of the Arbitrator's findings above with respect to issue (C), and for the reasons stated therein, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to his work accident of November 13, 2017.

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

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 463, 470 (4th Dist. 2011).

In light of the Arbitrator's findings with respect to issues (C) and (F), the Arbitrator finds that medical services rendered to date were reasonable and necessary in Petitioner's care and treatment relative to his accident of November 13, 2017. Further, Respondent stipulated that, should the Arbitrator find for Petitioner on the issues of accident and causal connection, the reasonableness and necessity of treatment was not in dispute.

The Arbitrator finds that Respondent is liable for the outstanding medical bill as set forth in Petitioner's Exhibit 2, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act, and subject to any prior payments. Petitioner testified that the bill provided by Springfield Clinic (PX2) was a statement for ten years of service, which included charges for unrelated medical care. In reviewing the statement and considering Petitioner's testimony, the Arbitrator finds that Respondent is liable for the following charges:

1. Dr. Koteswara Narla, 12/18/17	$1,172.00
2. Dr. Raj Sinha, 7/23/18	$ 284.00
3. Dr. Raj Sinha, 9/11/18	$3,193.00
4. Ambulatory Surgery Center, 9/11/18	$3,484.00

5. Dr. Jeff Thompson, 9/11/18	$ 486.00
TOTAL	**$8,619.00**

In support of the Arbitrator's decision relating to issue (K), Petitioner's entitlement to prospective medical care, the Arbitrator finds the following:

Upon establishing the causal connection and the reasonableness and necessity of recommended medical treatment, employers are responsible for necessary medical care required by their employees. Specific medical procedures or treatment that have been prescribed by a medical service provider have been "incurred" within the meaning of the statute, even if they have not yet been paid for. *Plantation Mfg. Co. v. Industrial Comm'n*, 294 Ill.App.3d 705, 710 (2nd Dist. 1997).

It is undisputed that Petitioner has severe bilateral carpal tunnel syndrome which requires surgery. He has already undergone surgery on the left side, but testified that he has been unable to proceed on the right side because of the denial of his claim.

In light of the Arbitrator's findings with respect to issues (C) and (F), the Arbitrator finds that Petitioner is not currently at maximum medical improvement and that Respondent is liable for prospective medical care, including surgery on the right hand/wrist.

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

In order to be eligible for temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill.App.3d 1087, 1090 (5th Dist. 1996). The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, i.e., until the condition has stabilized. *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 887 (2nd Dist. 1990).

Petitioner alleges he was temporarily and totally disabled from September 11, 2018, through October 29, 2018, a period of 7 weeks. Respondent agreed with the period alleged by Petitioner for TTD, but denied liability for benefits, due to its denial of the claim as a whole.

In light of the Arbitrator's findings with respect to issues (C), (F), and (K), the Arbitrator finds that Petitioner was temporarily and totally disabled from September 11, 2018, through October 29, 2018. Further, Petitioner will be entitled to temporary total disability benefits following surgery on his right hand/wrist until such time as he is released to full duty or Respondent provides him with light duty work within any restrictions allowed by his treating physician or he reaches maximum medical improvement, whichever occurs earliest.

The parties stipulated that Petitioner's average weekly wage was $935.65. The Arbitrator finds that his temporary total disability rate is $623.77. The Arbitrator finds that Respondent is liable for 7 weeks of temporary total disability benefits of $4,366.39

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 ST. CLAIR)	☒ Reverse Accident, Causation	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID BARTLETT,

Petitioner,

vs. NO: 15 WC 6898

ILLINOIS DEPARTMENT OF TRANSPORTATION,

Respondent.

19IWCC0674

DECISION AND OPINION ON REVIEW

Petitioner timely filed a Petition for Review of the Decision of the Arbitrator. Therein, the Arbitrator found Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment and further failed to provide timely notice. Notice having been given to all parties, the Commission, after considering the issues of accident, notice, causation, medical expenses, temporary disability, and permanent disability, and being advised of the facts and law, reverses the Decision of the Arbitrator. The Commission finds Petitioner sustained a repetitive trauma injury manifesting on February 24, 2015, provided timely notice, and his condition of ill-being is causally related to that work injury.

CONCLUSIONS OF LAW:

I. Accident/Causation

"There is no requirement that a certain percentage of time be spent on a task in order for the [claimant's work] duties to meet a legal definition of 'repetitive.'" *Edward Hines Precision Components v. Industrial Commission*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (1987). The Commission is allowed to consider evidence, or the lack thereof, of the repetitive manner and method of a claimant's job duties. *Id.* Here, Petitioner provided extensive testimony regarding his job duties as a full-time highway maintainer under the bridge crew, and the impact those activities have on his knees.

Petitioner and his crew inspect, maintain, and repair all bridges in a territory covering a geographic area of nine counties with over 1100 bridges. T. 11-12. When the crew does not have a bridge to repair, Petitioner has other duties such as equipment maintenance, inspections, traffic control, cutting brush and trees underneath bridges, metal repair, and plowing snow. T. 13-14.

The activity Petitioner performs the most on a daily basis is deck patching. T. 25. This involves jackhammering, finishing concrete, as well as shoveling broken concrete. T. 25. These tasks require bending, squatting, and lifting weights ranging from 20 pounds worth of rock in a shovel to 90- to 100-pound jackhammers. T. 25-26. Petitioner explained the mechanics of jackhammering a deck patch:

> When you start out you are jackhammering what we call the cap which is a more vertical jackhammering. While you're doing that you also shovel and scrape all of what you've jackhammered out. Typically what we do a lot of times, depending, every bridge is different, but to get underneath the rebar so the concrete holds and takes bind we'll go underneath the top quarter rebar which is usually three, four inches below the surface, where to get under that you have to get angles and get underneath it so the concrete can flow underneath...Typically you're jacking the knife on your thighs and knees, depending on the angle you need. T. 15-16.

The amount of jackhammering Petitioner does in a day varies: "Every day's different, every bridge is different. It may be an hour and a half, two hours one day and all day the next day... On average I would say probably three hours." T. 17.

Petitioner testified his work activities require that he routinely be on his hands and knees. This occurs when he is finishing concrete ("The top finish after you screed it off you're on your hands and knees using a Mag-Float." T. 17); tying rebar, which requires him to crawl across the rebar grid on his hands and knees (T. 18); and tying plywood forms to rebar (T. 19). Petitioner further stated these activities require prolonged crouching or squatting. T. 20.

Petitioner further described regular climbing activities. He climbs in and out of dump trucks many times per day; he also climbs in and out of heavy equipment: "I mean, typically the biggest piece of equipment used on a daily basis is the Bobcat and that's climbing over the bucket and climbing into the cab. The loaders, climbing straight up and down." T. 21-22. Petitioner also climbs ladders for inspections, although this is done less frequently. T. 21.

An employee who alleges injury based on repetitive trauma must "show [ ] that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987). In such cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 477, 510 N.E.2d 502 (1987). A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Commission*, 207 Ill. 2d 193, 205, 797 N.E.2d 665 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show his employment played

a role in aggravating or accelerating the preexisting condition. *Id* at 204-5. Resolution of the causation dispute requires the Commission to weigh the competing opinions of Dr. L'Hommedieu and Dr. Nogalski.

Dr. Nogalski concluded Petitioner's condition is not causally related to his job activities. In his report prepared pursuant to Section 12 of the Act, Dr. Nogalski indicated Petitioner's weight and varus alignment predisposed him to accelerated arthritis:

> Mr. Bartlett had osteoarthritis and pain. It is reasonable that he would experience pain, more likely than not, with varus alignment and obesity. It is normal to see some narrowing of the joint after meniscal resection. His weight and varus knee condition would reasonably predispose him to accelerated arthritis irrespective of his occupation. His job activities appear to be low-impact. They do involve some strain to the knee but they do not place him at a risk for what would reasonably be symptomatic osteoarthritis. It would be reasonable he would experience symptoms from his osteoarthritic condition with activities he describes. RX3.

Dr. Nogalski testified consistent with this opinion during his deposition. RX4, p. 27. He reiterated his belief that Petitioner's work duties were low-impact. RX4, p. 27. Significantly, Dr. Nogalski denied that jackhammering with a 90- to 100-pound jackhammer resting on one's knees would be high-impact. RX4, p. 28. He agreed the work activities Petitioner described could cause stress on the knee joints, and "high levels of stress or higher frequency impact activities would - - or could lead to symptoms of osteoarthritis. I do not believe though that they could exclusively be linked to osteoarthritis itself." RX4, p. 28-29. He further explained:

> And at the end of the day sitting here creates some stress on your needs. Standing up and moving creates some stress on your knees. It really has to be quantitated. And stress in and of itself is not particularly a bad thing for joints. And, in fact, as an example, the American Arthritis Association recommends regular, vigorous walking as a treatment for osteoarthritis to optimize it. So we really have to drill down I guess to what type of stress or what undo [SIC] force you want to posit at this point in time to probe the issue further. RX4, p. 29-30.

The record demonstrates Dr. Nogalski discussed Petitioner's job duties with him during his examination. However, the Commission observes Dr. Nogalski testified his understanding of the frequency Petitioner performed various jobs was rather generalized: as to how often Petitioner has to do the more physically demanding activities, Dr. Nogalski stated, "I didn't indicate in my report that we specifically tried to quantitate his time at each job. I think we all have some relative familiarity with road crews and how activities would work and need for transportation to jobs, so at least I have some sense of his work activities." RX4, p. 35. See, *e.g.*, *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶36, 14 N.E.3d 16 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.) Dr. Nogalski agreed Petitioner's job duties combined with his weight and varus alignment could place him at a greater risk of aggravating osteoarthritis, but he denied those same factors placed Petitioner at a greater risk of accelerating his osteoarthritis leading to the need for treatment: "When you factor in his job duties, I do not believe that that would be a feature of that aggravation

issue from a permanent or a causative standpoint." RX4, p. 31.

In contrast, Dr. L'Hommedieu concluded Petitioner's work activities were a causative factor in Petitioner's left knee condition. Dr. L'Hommedieu testified such activities cause stress on the knee joints, and stress on the knee joints can lead to the development of osteoarthritis, the aggravation of osteoarthritis, and the acceleration of osteoarthritis. PX1, p. 22-23. Dr. L'Hommedieu thusly concluded this progression is what transpired relative to Petitioner. PX1, p. 23. Dr. L'Hommedieu explained the effect of Petitioner's job duties on his post-meniscectomy knee:

> I think that he has a job that is in the category of moderate to heavy labor. I think using a jackhammer at all or any other activities that he does typically leads to increased stress on the knee. I think that in recent studies within the past few months have shown that patients who do this type of work are at a significantly higher risk, 100 to 200 percent higher risk of degenerative changes in their hips and knees. And I think that data's been out there for quite some time. And I think that his work injury in 2007 specifically led to progression of his arthritis, and that his work duties in general from that time on and certainly before that led to arthritis in any and all of his lower extremity joints, but certainly would have hastened arthritis in his operative knee. There's certainly no guarantee that he didn't do some other activities outside of the workplace that would have also led to arthritis. But as it relates specifically to his work, I think his work duties in general put him at a higher risk of arthritis than the normal population. PX1, p. 26-27.

The Commission notes Dr. L'Hommedieu had a thorough understanding of Petitioner's job duties. In addition to discussing Petitioner's specific job activities with him, Dr. L'Hommedieu received and reviewed a letter detailing Petitioner's job duties as follows:

> Number one is jackhammering below foot level or his hammer rests on knees the entire time; number two, finishing concrete on hands and knees; number three, tying rebar on hands and knees; number four, tying wood forms to rebar while on hands and knees or laying prone position; and number five, bridge inspections in a squatting position from an under-bridge snooper truck; number six, climbing in and out of dump trucks multiple times daily; number seven, climbing ladders for inspections; number eight, climbing in and out of heavy equipment such as a front loader, backhoe and bobcat; number nine, setting traffic control, carrying four-by-four metal signs while running across multiple lanes of traffic; and ten, fix and repair aerial and nautical navigation lights promoted ladders. PX1, p. 19-20.

Further, during his deposition, Dr. L'Hommedieu was presented with the following hypothetical containing additional details of the frequency of Petitioner's activities:

> Q. On a daily basis he said he did everything described in Mr. Isabel's letter except the aerial lights and nautical navigation lights which are done less frequently and only on scheduled days. He told me that much of his job involves a demolition and finishing of concrete. He estimates he spends [two] to [three]

hours a day jackhammering, and that jackhammer rests on his knees and thighs, and then he directs the jackhammer with his legs. When he is not jackhammering then he says he, the majority of his job is shoveling out concrete. And he also does other things described in the letter on a daily basis. If those facts are true as I told you, would that change your opinion in any respect?

A. No.

Q. Does it help support your opinion?

A. It does.

Q. Okay. And as far as the questions about activities being a symptom generator versus a causative factor, is it your opinion that the job activities he does as described are a causative factor?

A. Yes. PX1, p. 36-37.

The Commission finds Dr. L'Hommedieu's opinions are highly credible. The record uniformly reflects Petitioner's job requires him to perform activities which place significant stress on his surgically-repaired knee: jackhammering an average of two to three hours per day, crawling on his hands and knees to finish concrete and tie rebar, as well as climbing in and out of equipment and up and down inclines. Dr. L'Hommedieu had a detailed awareness of Petitioner's job duties and his conclusion that those activities were a causative factor in Petitioner's condition of ill-being is persuasive.

The Commission finds Petitioner sustained a repetitive trauma injury to his left knee. The final step in our analysis is determining whether Petitioner's alleged manifestation date is supported by the evidence. It is well-settled the date of manifestation of a repetitive trauma injury is subject to a "flexible standard" that "ensures a fair result for both the faithful employee and the employer's insurance carrier." *Three 'D' Discount Store v. Industrial Commission*, 198 Ill. App. 3d 43, 49, 556 N.E.2d 261 (1989). Our courts typically uphold various factors which set the manifestation date as "either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities." *Durand v. Industrial Commission*, 224 Ill. 2d 53, 72, 862 N.E.2d 918 (2006). Here, Petitioner identified February 24, 2015 as the manifestation date. This is the date he first sought treatment for his worsening symptoms. While it is true Petitioner testified his symptoms first developed approximately two years after his meniscectomy, he also testified this was limited to swelling; thereafter, his symptoms progressed, and he eventually developed pain, instability, and weakness. When his knee reached the point "where it felt like every step there was gravel in my knee," he sought treatment and consulted with Dr. L'Hommedieu on February 24, 2015 . T. 30. The Commission finds Petitioner's repetitive trauma injury manifested on February 24, 2015.

As stated in *Edward Hines,* the Appellate Court explained the origin of the term repetitive trauma. "The phrase 'repetitive trauma' was developed in order to establish a date of accidental

injury for purposes of determining when limitations statutes, and notice requirements, begin to run." *Edward Hines Precision Components* at 194. The Court further stated that the term is a characterization of an injury which develops over time as opposed to those arising from a single identifiable event. The Court added, "There is no requirement that a certain percentage of time be spent on a task in order for the duties to meet a legal definition of 'repetitive.' The issue at hand is causation. The question before the Commission was whether the job activity was repeated sufficiently to cause the injury." *Id.* In its finding on compensability, the Court simply relied upon the opinions of the treating doctor over those of the examiner. Here, the Commission does that as well. It explains in detail why Dr. L'Hommedieu's causation opinions are more credible than those of Dr. Nogalski.

II. Notice

Petitioner provided written notice of his injury on February 25, 2015. RX1. As to how the injury allegedly occurred, Petitioner indicated "repetitive trauma performing my job duties as a highway maintainer (bridge crew) since returning to work subsequent to my left knee meniscus surgery." RX1. Given our conclusion Petitioner sustained a repetitive trauma injury manifesting on February 24, 2015, notice was timely provided.

III. Temporary Disability

On the Request for Hearing, Petitioner alleged he was temporarily and totally disabled from March 30, 2015 through May 17, 2015. ArbX1. The Commission observes this corresponds to the period Petitioner was authorized off work by Dr. L'Hommedieu (PX2), and as such we find Petitioner proved entitlement to Temporary Total Disability benefits. The parties stipulated Petitioner's average weekly wage is $1,497.78. ArbX1. This yields a TTD rate of $998.52. Therefore, the Commission finds Petitioner entitled to TTD benefits of $998.52 per week for a period of 7 weeks.

IV. Medical

Petitioner's Exhibit 6 contains medical bills incurred for treatment of Petitioner's left knee. The Commission finds these charges are related to Petitioner's work injury and are reasonable and necessary as provided in Section 8(a).

V. Permanent Disability

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).*

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Section 8.1b(b)(i) – §8.1b(a) impairment report

Neither party submitted a §8.1b(a) impairment report. As an impairment report is not a prerequisite to an award of permanent partial disability benefits (*Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150311WC, ¶47, 56 N.E.3d 1101), the Commission will assess Petitioner's permanent disability based upon the remaining enumerated factors.

Section 8.1b(b)(ii) – occupation of the injured employee

Petitioner returned to his pre-injury job as a highway maintainer. The Commission finds Petitioner's successful return to unrestricted work is significant and indicative of reduced permanent disability.

Section 8.1b(b)(iii) – age of the employee at the time of the injury

Petitioner was 45 years old on the date of his accidental injury. Petitioner is a relatively young man and will, therefore, live with his residual complaints for a longer period. The Commission finds this factor weighs in favor of increased permanent disability.

Section 8.1b(b)(iv) - future earning capacity

No evidence was offered to suggest the injury had an adverse impact on Petitioner's future earning capacity. The Commission finds this indicative of reduced permanent disability.

Section 8.1b(b)(v) – evidence of disability corroborated by treating medical records

Petitioner underwent a left total knee arthroplasty followed by approximately two months of physical therapy. At the final medical visit, Petitioner reported occasional popping of his knee which "agitates" him but denied pain; examination was normal with the exception of clicking with varus and valgus stressing. PX2. The Commission finds these facts evidence a positive outcome and are indicative of reduced permanent disability.

Based on the above, the Commission finds Petitioner sustained permanent partial disability to the extent of 40% loss of use of the left leg under Section 8(e)12. This award is subject to a §8(e)17 credit for Petitioner's prior claim, 07 WC 28076, settled for 27.5% loss of use of the left leg (RX5), yielding a net permanent partial disability of 12.5% loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner sustained a repetitive trauma injury to his left knee manifesting on February 24, 2015, and timely notice was provided to Respondent.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $998.52 per week for a period of 7 weeks, representing March 30, 2015 through May 17, 2015, that being the period of temporary total incapacity for work under §8(b) of the Act.

19IWCC0674

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses incurred in the care and treatment of Petitioner's left knee injury as detailed in Petitioner's Exhibit 6, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $735.37 per week for a period of 26.875 weeks, as provided in §8(e)12 of the Act. This reflects a 40% loss of use of the left leg minus the §8(e)17 credit for the prior 27.5% loss of use of the left leg, yielding a 12.5% loss of use of the left leg (215 weeks x 12.5% = 26.875 weeks).

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.

Pursuant to Section 19(f)(1), this decision is not subject to judicial review.

DATED: DEC 13 2019

D. Douglas McCarthy

DDM/tdm

D: 10/29/19

Stephen Mathis

43

SPECIAL CONCURRENCE

I concur with the result reached by the majority. I write separately because while I agree, in this case, the method and manner of Petitioner's job duties were sufficiently repetitive to establish a compensable claim, I do not believe the majority applied the correct legal standard regarding a repetitive trauma claim.

The question whether a claimant's work activities are sufficiently repetitive to establish a compensable accident under a repetitive trauma theory must be decided on a case by case basis upon the particular facts presented in each case. *Williams v. Industrial Commission*, 244 Ill. App. 3d 204, 210-11, 614 N.E.2d 177 (1993). As the majority correctly noted, "There is no requirement that a certain percentage of time be spent on a task in order for the [claimant's work] duties to meet a legal definition of 'repetitive.'" *Edward Hines Precision Components v. Industrial Commission*, 356 Ill. App. 3d 186, 194, 825 N.E.2d 773 (1987). *Supra*, ¶ 2. The majority, though, mistakenly believes that a claimant's job duties need not be repetitive to establish a compensable accident under a repetitive trauma theory of recovery but, merely, that "'The phrase 'repetitive trauma' was developed in order to establish a date of accidental injury for purposes of determining when limitations statutes, and notice requirements, begin to run.'

Edward Hines Precision Components at 194." *Supra*, ¶ 16. Under the majority's analysis, a claimant need not prove any aspect of her job duties are repetitive but only that "'An employee who alleges injury based on repetitive trauma must "'show [ ] that the injury is work related and not the result of a normal degenerative aging process.' *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987)." *Supra*, ¶ 7.

The majority's analysis confuses the date of manifestation with the theory of recovery based upon repetitive trauma. Moreover, in arriving at this conclusion, the majority mistakenly believes the only relevant inquiry is causation. In their estimation, as long as sufficient medical evidence exists, there need not be proof of an accidental injury. This analysis, though, completely ignores the Supreme Court's dictate that "an employee who alleges injury based upon repetitive trauma must still meet the same standard of proof as other claimants alleging an accidental injury." *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026 (1987).

To succeed under a theory of repetitive trauma, a claimant must present evidence that her work duties are sufficiently repetitive in nature and occurrence. *Williams* at 211. To determine such, the Commission is tasked at examining the method and manner of claimant's job duties. *Id.* "Furthermore, in cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and the claimant's disability. [citations omitted]." *Nunn v. Industrial Commission*, 157 Ill. App. 3d 470, 477, 510 N.E.2d 502 (1987).

In the present matter, Petitioner established his job activities are sufficiently repetitive as outlined in the majority's decision, p. 2. Petitioner further established his job duties were a causative factor in the development of his current condition of ill-being in his left leg as testified to by Dr. L'Hommendieu and outlined in p. 4-5 of the majority's decision.

As Petitioner met his burden of proof regarding both accident and causation, I concur with the result reached by the majority.

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

LEC/mck

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BARTLETT, DAVID
Employee/Petitioner

Case# **15WC006898**

IL DEPT OF TRANSPORTATION
Employer/Respondent

19IWCC0674

On 6/25/2018, 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:

4599 SCHUCHAT COOK & WERNER
CLARE R BEHRLE
1221 LOCUST ST 2ND FL
ST LOUIS, MO 63103

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

1430 CMS BUREAU OF RISK MANAGEMENT
WORKERS' COMPENSATION MANGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JUN 25 2018

DEBRALH A HARDA, Acting Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF St. Clair)

☐ 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

David Bartlett
Employee/Petitioner

v.

Illinois Department of Transportation
Employer/Respondent

Case # **15** WC **06898**

Consolidated cases: _____

19IWCC0674

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 **Collinsville**, on **3/26/2018**. 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 **Credit pursuant to Section 8(e)17**

FINDINGS

On **2/24/2015**, 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 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 **$77,884.70**; the average weekly wage was **$1,497.78**.

On the date of accident, Petitioner was **45** 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

Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on February 24, 2015 and failed to give timely notice. 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

6/20/18
Date

JUN 25 2018

STATE OF ILLINOIS)
)SS
COUNTY OF ST. CLAIR)

19IWCC0674

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

DAVID BARTLETT,
Employee/Petitioner

v. Case # 15 WC 06898

STATE OF ILLINOIS – DEPARTMENT OF TRANSPORTATION,
Employer/Respondent

FINDING OF FACTS

Petitioner is employed as a highway maintainer- bridge inspector for Illinois Department of Transportation. Petitioner alleges on February 24, 2015 he suffered repetitive trauma to his left knee due to his job duties. This case was tried before Arbitrator Lee at the Collinsville docket on March 26, 2018. The issues in dispute are accident, notice, causal connection, medical bills, TTD, nature and extent, and credit pursuant to Section 8(e)17 of the Illinois Workers' Compensation Act.

On February 25, 2015, Petitioner filled out a Workers' Compensation Employee's Notice of Injury form. (RX1). Petitioner indicated that repetitive trauma performing his job duties as a highway maintainer since returning to work since his prior left knee surgery caused injury to his left knee. (RX1). Petitioner indicated he reported this injury to his supervisor, Todd Reilson, on February 25, 2015. (RX1).

On February 24, 2015, Petitioner presented to Dr. L'Hommedieu for evaluation of his left knee. (PX2). Petitioner complained of eight months of pain. (PX2). Symptoms were worse with exercise, walking, and stair climbing. (PX2). Petitioner indicated he had no recent acute trauma, but had a prior meniscal arthroscopy in 2007. (PX2). Petitioner also had a previous right hip replacement in 2010 due to arthritis. (PX2). X-rays of Petitioner's left knee showed severe medial osteoarthritis with complete loss of the medial joint space and moderate degenerative changes of the patellofemoral joint. (PX2). Petitioner was diagnosed with severe osteoarthritis of the left knee with varus malalignment. (PX2). Petitioner was given a cortisone injection. (PX2).

Petitioner specifically asked Dr. L'Hommedieu if his prior meniscal tear and subsequent surgery was the cause of his arthritis. (PX2). Dr. L'Hommedieu stated the data suggests that meniscectomy puts patients at significantly increased risks for post-meniscectomy arthritis and that it certainly may be the cause of his symptoms, particularly since he has no significant degenerative changes clinically or radiographically in his right knee. (PX2).

On March 3, 2015, Petitioner followed up with Dr. L'Hommedieu. (PX2). Petitioner indicated the injection did not help and he wanted to discuss a total knee replacement as he was frustrated over the failure of conservative care. (PX2). Petitioner indicated he wished to proceed with the total knee replacement and he was put on the surgical schedule. (PX2).

On March 25, 2015, Dr. L'Hommedieu authored a letter in response to Petitioner's attorney's letter regarding Petitioner's left knee and his job duties. (PX2). Dr. L'Hommedieu reviewed a job description from Petitioner's attorney, not the Illinois Department of Transportation, and Petitioner's 2007 operative report. (PX2). In it, Dr. L'Hommedieu opined Petitioner's work activities were a significant causative factor in the progressive injury to his left knee. (PX2). Dr. L'Hommedieu, however, indicated he could not say that had Petitioner performed some other work duties that he would not still require knee replacement at this time. (PX2).

On March 30, 2015, Petitioner underwent a left total knee arthroplasty by Dr. L'Hommedieu. (PX3).

Petitioner's Exhibit 5 are records from St. Louis Home Health Care. (PX5). A nurse performed seven home care visits between April 3, 2015 and April 21, 2015 checking Petitioner's incision site and helping with Petitioner's home exercise program. (PX5).

On April 22, 2015, Dr. L'Hommedieu ordered physical therapy three times a week for one month for Petitioner. (PX2).

On May 1, 2015, Petitioner followed up with Dr. L'Hommedieu after his left total knee replacement. (PX2). Petitioner indicated he had no complaints and was progressing well in physical therapy. (PX2). X-rays showed satisfactory implant position and alignment without periprosthetic fracture or lysis about the component. (PX2). Petitioner was to continue physical therapy and begin an aggressive home exercise program. (PX2). Petitioner was given a note to return to work without restriction n May 18, 2015. (PX2).

On July 31, 2015, Petitioner returned to Dr. L'Hommedieu. (PX3). He was three months out from his total left knee replacement. (PX3). Petitioner had no complaints and was not using any pain medications. (PX2). Petitioner indicated he just returned from Disney World and had no problem walking around or enjoying his activities. (PX2). On physical therapy, Petitioner had full extension, normal strength, and his patella was tracking well. (PX2). It was noted Petitioner was doing extremely well and had worked hard in physical therapy to regain motion and his strength looked quite good. (PX2).

On October 29, 2015, Petitioner followed up with Dr. L'Hommedieu. (PX2). Petitioner indicated he had no complaints and was back to work. (PX2). Petitioner indicated he did notice occasional swelling, but denies discomfort or giving way. (PX2). On physical examination, Petitioner had full flexion and extension, there was no signs of effusion or swelling. (PX2). Petitioner ambulated without an antalgic gait. (PX2).

On April 26, 2016, Petitioner returned with Dr. L'Hommedieu for his one year follow up of his left total knee replacement. (PX2). Petitioner indicated he had occasional popping of his knee, but denied pain. (PX2). X-rays showed good implant positioning. (PX2). Petitioner asked about playing softball, but Dr. L'Hommedieu recommended against this activity at this time. (PX2). Petitioner was to return annually for routine checkup, or sooner if he had any problems. (PX2).

Petitioner's Exhibit 4 is physical therapy records from Phoenix Physical Therapy. (PX4). Petitioner underwent physical therapy from April 27, 2015 through June 10, 2015. (PX4). On June 30, 2015, Petitioner was discharged from physical therapy because he did not return and could not be contacted. (PX4).

On November 28, 2016, Petitioner underwent a Section 12 examination by Dr. Michael Nogalski. (RX3). Petitioner indicated he did not have a distinct injury to his knee, but progressive pain in his left knee for several years following meniscectomy surgery in 2007. (RX3). Petitioner described his job as a bridge inspector involving climbing up and down embankments, shoveling, pouring concrete, climbing around on his hands and knees, and kneeling to do concrete finishing work. (RX3). Petitioner indicated he believed he had a lot of repetitive trauma from his job. (RX3).

Petitioner indicated he started having problems after his surgery where a part of his meniscus was removed. (RX3). He would have problems if he did too much. (RX3). He began to have difficulty with climbing and walking on slopes. (RX3). He started having pain in his left knee every day two and a half years prior. (RX3). Petitioner told Dr. Nogalski his job is very physically demanding and includes climbing up ladders and trucks, jackhammering, crawling on his hands and knees, climbing on beams and rails to inspect bridges, digging and patching holes, getting into a squatting position, and climbing in and out of trucks repetitively. (RX3).

Dr. Nogalski performed a physical examination that showed full knee extension, flexion to 125 degrees, intact ligament stability, normal strength, no effusion, and normal gait. (RX3). Dr. Nogalski also reviewed Petitioner's medical records. (RX3). X-rays showed Petitioner's total knee replacement in good position. (RX3). Petitioner's subjective complaints were minimal and he seemed to have a successful total knee replacement. (RX3).

Dr. Nogalski opined there is no causal relationship between Petitioner's left knee condition and his job duties. (RX3). He explained it is reasonable for Petitioner would experience pain with varus alignment and obesity with his arthritis and that it is normal for some narrowing of the joint after a meniscal resection. (RX3). His weight and varus knee condition would predispose him to accelerated arthritis irrespective of his occupation. (RX3). While Petitioner's job activities do involve some strain, they do not place him at risk for symptomatic osteoarthritis. (RX3). Dr. Nogalski further indicated it would be reasonable for Petitioner to experience symptoms from his osteoarthritic condition while performing the activities e described. (RX3).

Dr. Nogalski indicated Petitioner's prognosis was good and he could work full duty without restrictions and was at MMI. (RX3).

Dr. Coles E. L'Hommedieu testified via evidence deposition on October 20, 2017. (PX1). Dr. L'Hommedieu testified he is an orthopedic surgeon who focuses mainly on the lower extremity. (PX1, tr. 5). He began treating Petitioner on February 24, 2015. (PX1, tr. 8). Petitioner complained of left knee pain, popping, locking, and giving way. (PX1, tr. 9). Petitioner did not indicate any specific trauma, but did say he had a previous meniscus tear that he underwent surgery for in 2007. (PX1, tr. 9). Dr. L'Hommedieu testified he performed a physical examination and ordered x-rays of Petitioner's left knee which showed severe osteoarthritis with complete loss of the medial joint space. (PX1, tr. 11). Dr. L'Hommedieu diagnosed Petitioner with severe left knee osteoarthritis, varus malalignment, and history of left knee meniscectomy. (PX1, tr. 12). He discussed both conservative and surgical treatment options with Petitioner and gave Petitioner an injection in his left knee. (PX1, tr. 12-13). Petitioner did not have much improvement from the injection and was then scheduled for total knee replacement surgery. (PX1, tr. 13).

Dr. L'Hommedieu testified Petitioner did well following his total knee replacement. (PX1, tr. 14-15). Petitioner was taken off of work on March 30, 2015 and returned to work without restrictions on May 18, 2015. (PX1, tr. 15). Dr. L'Hommedieu testified Petitioner has not returned with any problems and his prognosis is excellent. (PX1, tr. 16). Dr. L'Hommedieu testified Petitioner will need yearly follow ups just for surveillance. (PX1, tr. 17).

Dr. L'Hommedieu testified he received a letter from Petitioner's former attorney outlining Petitioner's job duties for Respondent and included medical records regarding Petitioner's prior left knee surgery. (PX1, tr. 17-20). Dr. L'Hommedieu testified he also discussed Petitioner's job duties with Petitioner. (PX1, tr. 20). Dr. L'Hommedieu opined he believed Petitioner's job duties contributed to damaging Petitioner's left knee to the point where he required surgery. (PX1, tr. 20-21). Dr. L'Hommedieu testified an injury to the meniscus can both cause arthritic symptoms and leave the knee exposed to easier injury in the future. (PX1, tr. 22). He agreed Petitioner's job duties could cause stress on the knee joints, and stress on the knee joints can lead to the development of osteoarthritis. (PX1, tr. 22-23). He opined Petitioner's medical treatment was causally related to his alleged work injury. (PX1, tr. 24).

On cross examination, Dr. L'Hommedieu admitted that he could not state that had Petitioner performed some other line of work, he would not still require knee replacement. (PX1, tr. 25). He did not know if there was some other cause that caused his symptoms. (PX1, tr. 25). Dr. L'Hommedieu testified Petitioner's meniscectomy in 2007 specifically led to progression in his arthritis, and his work duties in general hastened arthritis in his operative knee. (PX1, tr. 26-27). He testified he felt Petitioner's job activities put him at a higher risk of arthritis than the normal population. (PX1, tr. 27). Dr. L'Hommedieu admitted he did not know how often Petitioner performed any individual task in the course of his duties. (PX1, tr. 27). He did not know the duration Petitioner performed any of his job duties or the intensity of any of his work duties. (PX1, tr. 27-28). Dr. L'Hommedieu testified he agreed that some degree of physical activity with the knees is actually a positive factor in terms of mitigation symptoms. (PX1, tr. 28).

Dr. L'Hommedieu testified there was a causal nexus between Petitioner's prior surgery and the development of arthritis and that it was particularly significant to note that Petitioner did

not have any degenerative changes in his right knee. (PX1, tr. 30). Dr. L'Hommedieu assumed Petitioner was performing the same work duties with both his left and right knees. (PX1, tr. 30-31).

Dr. L'Hommedieu testified he did not believe Petitioner's weight played a significant role in the development of his arthritis. (PX1, tr. 31). Petitioner's BMI was 32.8, so it may have some impact, but assuming the right knee is the control, then it did not cause significant problems there. (PX1, tr. 31-32). Dr. L'Hommedieu agreed there are activities that can be symptoms generators that do not aggravate or worsen arthritis. (PX1, tr. 33).

Dr. Michael Nogalski testified via evidence deposition on May 22, 2017. (RX4). Dr. Nogalski is a board certified orthopedic surgeon. (RX4, tr. 4-5). Dr. Nogalski testified he performed an independent medical examination of Petitioner, including reviewing medical records and performing a physical examination. (RX4, tr. 7-8). Dr. Nogalski testified he took a history from Petitioner, which included a prior left knee surgery in 2007. (RX4, tr. 9). Petitioner gave an injury date of February 24, 2015, but did not describe a distinct injury, but instead claimed repetitive trauma due to his work duties. (RX4, tr. 9-10). Petitioner gave Dr. Nogalski a description of his job duties. (RX4, tr. 10). Dr. Nogalski testified he reviewed x-rays of Petitioner's left knee which showed varus alignment with complete medial joint space narrowing and lateral subluxation of the tibia on the femur. (RX4, tr. 11). This develops over many years because of the changes in the joint surfaces and the mechanics of the knee. (RX4, tr. 12).

Dr. Nogalski testified he diagnosed Petitioner with status post left total knee replacement for osteoarthritis. (RX4, tr. 13). He testified arthritis typically occurs over many years. (RX4, tr. 13). It is a metabolic condition of the joint surface cartilage that involves a change in the chemical and mechanical makeup of the joint surface cartilage. (RX4, tr. 13). A metabolic condition is basically something that is inherent to the chemistry or the body's own tissue qualities. (RX4, tr. 14). Dr. Nogalski testified osteoarthritis is associated with aging and there is some inherent genetic predisposition. (RX4, tr. 14). Weight can also be associated with higher levels of symptoms of osteoarthritis and weight will enhance or increase osteoarthritis. (RX4, tr. 14-15).

Dr. Nogalski testified he reviewed the operative report from Petitioner's total knee replacement. (RX4, tr. 15). This surgery was done to treat Petitioner's osteoarthritis and Dr. L'Hommedieu did not provide any descriptors in the operative report indicating anything unusual. (RX4, tr. 15-16).

Dr. Nogalski testified there is no causal relationship between Petitioner's left knee condition and his job duties. (RX4, tr. 16). His opinion was based on Petitioner's description of his job duties and the lack of any specific distinct trauma. (RX4, tr. 16). Petitioner gave Dr. Nogalski an in depth description of what his job duties entails. (RX4, tr. 17). These job duties could cause Petitioner to experience symptoms, but would not cause or aggravate Petitioner's osteoarthritic condition. (RX4, tr. 18). Dr. Nogalski opined Petitioner's weight and varus knee condition strongly support that he had a progressive osteoarthritic knee that became more symptomatic over time due to the inherent age, weight, and alignment factors. (RX4, tr. 16).

Dr. Nogalski testified Petitioner will need routine surveillance of his knee replacement, but his prognosis is good. (RX4, tr. 18). Petitioner was at MMI and could return to work full duty without restrictions. (RX4, tr. 18-19).

On cross-examination, Dr. Nogalski testified his opinion could change if there was additional information he had not reviewed, but given the records he did have and the history from Petitioner himself, he did not think his opinions would change for the most part in this matter. (RX4, tr. 21). Dr. Nogalski testified the treatment Petitioner received for his osteoarthritis, including the total knee replacement, was reasonable and necessary to treat his condition. (RX4, tr. 22).

Dr. Nogalski testified Petitioner told him he underwent a meniscus surgery in 2007 which he did well from. (RX4, tr. 22-23). Petitioner did indicate he had some problems with his left knee between 2007 and 2015, but did not recall seeing a doctor for his condition during that time period. (RX4, tr. 23). Dr. Nogalski testified Petitioner told him his left knee began to hurt every day two and a half years prior. (RX4, tr. 25).

Dr. Nogalski testified he agreed Petitioner's job was physically demanding, and there would be periods of repetitive activities, but disagreed that this type of work would be considered repetitive trauma. (RX4, tr. 26). Walking, standing, climbing, and kneeling are all low impact activities. (RX4, tr. 27-28). Dr. Nogalski testified jackhammering, while resting the jackhammer against the knees, would not be a high impact activity because it would not cause an axial load to the knee itself. (RX4, tr. 27-28). Dr. Nogalski testified the activities of standing, walking, kneeling, climbing, and jackhammering could cause stress on the knee joints; however, stress itself is not particularly a bad thing for joints and must be quantitated. (RX4, tr. 28-29). Only higher frequency impact activities could lead to contributing to osteoarthritis, and Petitioner's duties did not raise to that level. (RX4, tr. 28-29). Dr. Nogalski continued the American Arthritis Association recommends regular, vigorous walking as treatment for osteoarthritis. (RX4, tr. 29-30).

Dr. Nogalski testified he thought Petitioner's job duties could cause symptoms of his osteoarthritis, but would not cause or aggravate his knee condition. (RX4, tr. 30). His job duties would not accelerate Petitioner's osteoarthritis leading to the need for treatment. (RX4, tr. 31).

Respondent entered into evidence Illinois Workers' Compensation Commission Settlement Contract between Petitioner and Respondent for case 07 WC 28076. (RX5). The nature of the injury was a torn lateral and medial meniscus of the left knee that required surgery. (RX5). Petitioner and Respondent agreed to settle this claim for 27.5% of loss of use of the left leg. (RX5). The contract stated "A further issue exists whether Petitioner may require or be entitled to further medical, surgical, and hospital services under Section 8(a) of the Act and Petitioner hereby waives any such rights."

At Arbitration, Petitioner testified that he has been employed with the Illinois Department of Transportation for almost 16 years. He is a highway maintainer under the bridge crew and has been in this position at least part time for almost 13 years. He is currently working full time and has been working full time since 2010.

Petitioner testified his crew covers a large geographical area including nine counties and over 1,100 bridges, all in Illinois. His duties include inspecting, maintaining, and repairing the bridges. Petitioner testified he works a 40 hour work week, but sometimes works overtime. Eight months a years he works five days a week, eight hours a day. During the main season of May to September he works four days a week, 10 hours a day. Occasionally he has to work overtime on the weekends. When he is not maintaining bridges, he maintains and inspects equipment, cuts brush and trees, and other tasks. The majority of his work is bridge maintenance though. In the winter, he does snow removal/plowing. He considers his job to be very physical.

Petitioner testified his job duties include jackhammering while repairing deck patches. In order to get underneath the rebar, the jackhammer has to be held at an angled position and they will hold the jackhammer on their thighs or knees. Petitioner testified the amount of jackhammering in a day can vary, there are some days where it is one or two hours in the day; sometimes it is all day, depending on the condition of the bridge.

Petitioner testified another job duty is finishing concrete. He is on his hands and knees when doing this. He testified he is typically on his hands and knees finishing concrete for 30 minutes a day. Petitioner testified that if a bridge is in bad enough condition, he will have to crawl across the grid in order to tie rebar. Petitioner testified that there are knee pads available for protection, but he typically only wears one on his right knee. He does not kneel on his left knee anymore. Petitioner testified he ties wood forms to rebar. This is done on hands and knees or in the prone position. Petitioner testified a lot of his job duties requiring crouching or squatting.

Petitioner testified that he performs bridge inspections. How many inspections he does each year depends on the year as there is a rotation. During this, he typically operates the snooper truck which goes underneath the bridge. Petitioner testified that he climbs in and out of trucks multiple times on a daily basis. He also operates heavy equipment.

Petitioner testified to setting work zone signs; taking them out of the truck, carrying the sign across the highway, and setting it up. Petitioner testified he used to do this, but now runs the tool truck. His crew covers nine counties, so he spends some time driving in trucks getting from one location to the next.

Petitioner testified he spent the most time daily deck patching which includes jackhammering, finishing concrete, and shoveling concrete. Petitioner testified he lifts 20 pounds of rock in a shovel and sometimes pieces can be 90 to 100 pounds. Petitioner testified he also cleans out brush and plows snow.

Petitioner testified he had a prior workers' compensation claim for his left knee in 2007. He underwent a surgical meniscal repair for this incident. Petitioner was released to return to work full duty and settled his claim. Petitioner testified he did relatively well after that surgery, but about two years later it started giving him issues again and swelling. These issues progressed to where it felt like it was giving out and that he had gravel in his knee. Petitioner testified these issues started a couple years after the meniscal surgery and progressed from there. It got to the

point where everything aggravated his knee. Petitioner testified it got to the point where he could not kneel on his left knee.

Petitioner testified he told his supervisor, Todd Reilson, that he was having pain in swelling in his left knee. He filled out paperwork for his employer and sought medical treatment with Dr. L'Hommedieu. Petitioner testified he ultimately underwent a left knee total knee replacement. Petitioner testified he underwent physical therapy and was eventually released to return to work full duty on May 18, 2015.

Petitioner testified he was off work for his left knee from March 30, 2015 until May 18, 2015. He was not paid workers' compensation benefits for that time, nor were his bills paid by workers' compensation insurance. There are still some outstanding bills.

Petitioner testified he currently has pain in his left knee a couple days a week. Kneeling makes his pain worse. Petitioner testified walking uphill is difficult and can cause pain and discomfort. His range of motion is reduced with squatting and bending. Walking too much or standing still too long can aggravate his left knee. The only time he has difficulty driving is when he has to snow plow for 12 hours because sitting in position for too long bothers him. Petitioner testified he no longer bowls, golfs, or plays softball, but does see a trainer and go to the gym regularly. Petitioner testified he does not take pain medication on a regular basis and will occasionally ice his knee.

On cross-examination, Petitioner testified that he told his doctor when he first saw him that he had been experiencing pain in his left knee for approximately eight months. He did not have any complaints with his right knee. The radiographs of his right knee did not show any damage.

Petitioner testified his busy season is May to September when he works four 10 hour days a week. During the winter, he does snow plowing, where he is driving a plow, not shoveling snow. Petitioner testified his main duty is deck repair. Petitioner testified when he is jackhammering at an angle, the jackhammer rests on both of his thighs, not just one. While finishing concrete, use to be on both knees, not just one. Now, he puts his weight on his right knee. The same holds true for when he ties rebar. He use to kneel on both knees, now only his right. Petitioner testified prior to February 24, 2015, he wore knee pads on both knees.

Petitioner testified his crew covers a large area and there are days that he has over an hour drive one way to get to a work site. Petitioner testified part of his job is putting up traffic signs. This entails taking a sign and putting it in the stand. He has been operating the tool truck now for about three years. Petitioner testified other highway maintainers will help to lift heavy items. Petitioner testified there are nine workers on his crew and at a minimum five people will be on a job. Each person performs different tasks, so there are opportunities for intermittent rest between activities and he is able to swap out with other employees.

Petitioner testified when he first saw his doctor he told him his job activities aggravated his knee. He told his supervisor that he was experiencing symptoms in the same knee that had the meniscal repair. Petitioner testified he was paid through sick time, vacation time, and non-

occupational leave while he was off for his surgery. His medical bills were paid through his group insurance.

Petitioner testified he saw his doctor for a six month checkup and year checkup for his knee. His doctor told him to return outside of his annual checkup if he had any additional problems, and he has not had to do that. He is not undergoing physical therapy or taking prescription or over the counter medication for his left knee. He is not required to wear any brace or type of protective device for his left knee. He is currently working full duty with no restrictions. Petitioner testified he is able to perform his job duties satisfactorily and has not had any complaints from his supervisors. He has had a performance evaluation since his return to work and it was good.

Petitioner testified he had a previous workers' compensation case for his left knee in which he settled his claim for 27.5 percent loss of use of the left leg. That was for his left knee meniscal tear.

CONCLUSION OF LAW

Issue (D): What was the date of the accident?

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

Under 820 ILCS 305/6(c), an injured employee must give notice to the employer as soon as practicable but not later than 45 days after sustaining an accident injury arising from the employment. Petitioner filled out an Employee's Notice of Injury on February 25, 2015, alleging an accident due to repetitive trauma with an accident date of February 24, 2015. On February 24, 2015, Petitioner was seen by Dr. L'Hommedieu complaining of left knee pain for the previous eight months. Petitioner told Dr. Nogalski his left knee began to hurt every day two and a half years prior. Petitioner's own testimony indicated he began experiencing symptoms in his left knee two years after his meniscal surgery, which would be 2009. When he initially saw Dr. L'Hommedieu, he asked whether his condition was due to his prior surgery and that he felt his job duties aggravated his condition. This indicates that Petitioner began experiencing symptoms prior to the alleged accident date of February 24, 2015 and believed that his condition was related to work. As such, Petitioner gave notice later than 45 days when he reported his alleged work injury to on February 24, 2015.

Petitioner testified he talked to his supervisor and indicated he was experiencing symptoms in the knee that he undergone surgery on. The Arbitrator is not persuade that this constitutes proper notice. Petitioner did not give any dates for which he had these alleged conversations with his supervisor. Further, Petitioner did not testify that he informed his supervisor that he believed these symptoms were related to his job duties or an alleged work injury. He merely indicated he was experiencing symptoms in his left knee.

Based upon the foregoing, the Arbitrator finds that Petitioner did not give timely notice. As such, Petitioner's claims for benefits are denied and all other issues are moot.

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?

A claimant in a workers' compensation claim who suffers a repetitive trauma must meet the same standard of proof as a claimant who suffers a sudden injury. *Durand v. Industrial Commission*, 224 Ill.2d 53, 64 (2006). As such, an employee who alleges injury due to repetitive trauma bears the burden of showing, by a preponderance of the evidence, that he suffered an injury that arises out of and in the course of his employment. *Sisbro v. Industrial Commission*, 207 Ill.2d 193, 203 (2003). Simply performing work over a period of years is not legally sufficient to prove that work is repetitive enough to cause an increased risk to the petitioner. *Robert Barton v. State of Il/Dept. Of Corrections*, 11 WC 015935. In a repetitive trauma case, the issues of accident and causation are intertwined and a review of the evidence allows both issues to be resolved together. *Id.*

The only medical opinion offered supporting accident and causal connection regarding Petitioner's left knee was from Dr. L'Hommedieu. However, Dr. L'Hommedieu admitted he did not know how often Petitioner performed any individual task in the course of his duties. He did not know the duration Petitioner performed any of his job duties or the intensity of any of his work duties. This information is imperative in order to make an informed causal connection opinion. The Commission has held a claimant fails to prove causation from repetitive trauma when the treating physician testified repetitive motions caused the injuries, but failed to detail what repetitive motions the petitioner engaged in and the frequency of the motions. *Gambrel v. Mulay Plastics*, 97 IIC 238. Further, Dr. L'Hommedieu admitted that he could not state that had Petitioner performed some other line of work, he would not still require knee replacement.

The Arbitrator instead finds the testimony of the Section 12 examiner, Dr. Nogalski, more persuasive. Dr. Nogalski opined there is no causal relationship between Petitioner's left knee condition and his job duties. Petitioner gave Dr. Nogalski an in depth description of what his job duties entail. Dr. Nogalski testified these job duties could cause Petitioner to experience symptoms, but would not cause or aggravate Petitioner's osteoarthritic condition. Petitioner's weight and varus knee condition strongly support that he had a progressive osteoarthritic knee that became more symptomatic over time due to the inherent age, weight, and alignment factors.

Dr. Nogalski agreed Petitioner's job was physically demanding, and there would be periods of repetitive activities, but disagreed that this type of work would be considered a repetitive trauma. Walking, standing, climbing, and kneeling are all low impact activities the knees are meant to perform. Dr. Nogalski testified jackhammering, even while resting the jackhammer against the knees, would not be a high impact activity because it would not cause an axial load to the knee itself. Only higher frequency impact activities could lead to contributing to osteoarthritis, and Petitioner's duties did not raise to that level. While Petitioner's job duties could cause symptoms of his osteoarthritis, it would not cause or aggravate his knee condition or accelerate his need for treatment. The Arbitrator finds Dr. Nogalski's testimony compelling.

Further, the Arbitrator is not persuaded by Dr. L'Hommedieu's assertion that Petitioner's job duties accelerated the condition in his left knee because Petitioner has had no complaints or problems with his right knee. Dr. L'Hommedieu assumed Petitioner was performing the same

work duties with both his left and right knees and Petitioner testified he performed all job duties with both of his knees. Dr. L'Hommedieu testified he felt Petitioner's job activities put him at a higher risk of arthritis than the normal population. However, the Arbitrator takes note that Petitioner has not undergone any treatment, nor has he been diagnosed with arthritis for his right knee. Even in light of Petitioner now performing all of his kneeling duties on his right knee, he still has no pain complaints. Dr. L'Hommedieu himself pointed out there was a causal nexus between Petitioner's prior surgery and the development of arthritis and that it was particularly significant to note that Petitioner did not have any degenerative changes in his right knee. This is consistent with Dr. Nogalski's testimony. This strongly implies that Petitioner's problems with his left knee stem from his meniscal surgery, not from his job duties. If his job duties were a contributing factor to the development and aggravation of his arthritis, Petitioner would have begun experiencing symptoms in his right knee, as well. The Arbitrator finds it very telling that Petitioner's complaints have been strictly limited to his left knee.

Petitioner testified he began experiencing symptoms in his left knee approximately two years after he underwent a meniscal repair surgery in 2007 and continued to progress. Both Dr. Nogalski and Dr. L'Hommedieu testified that Petitioner's prior surgery could lead to the development of arthritis in Petitioner's left knee. When Petitioner first saw Dr. L'Hommedieu, Petitioner specifically asked him if his prior meniscal tear and subsequent surgery was the cause of his arthritis. Dr. L'Hommedieu stated the data suggests that meniscectomy puts patients at significantly increased risks for post-meniscectomy arthritis and that it certainly may be the cause of his symptoms, particularly since he has no significant degenerative changes clinically or radiographically in his right knee.

As such, the Arbitrator finds Petitioner's current condition is due to his prior surgery, not his work duties. Petitioner previously filed a workers' compensation case for the surgery and settled his claim for 27.5% loss of use of his left leg. In his settlement, Petitioner acknowledged there was an issue of whether he may require or be entitled to further medical, surgical, and hospital services under Section 8(a) of the Act and Petitioner waived any rights to same. Petitioner cannot now file a new claim and try to use a backdoor to benefits he expressly waived his rights to.

Based upon the foregoing, the Arbitrator finds that Petitioner did not prove his injury arose out of and in the course of his employment and his current condition of ill-being is causally related to the alleged injury. As such, Petitioner's claims for benefits are denied and all other issues are moot.

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?

Based on the foregoing, the Arbitrator finds that Petitioner did not prove his injury arose out of and in the course of his employment and his current condition of ill-being is causally related to the alleged injury. As such, Respondent is not liable to pay any medical services for Petitioner. Petitioner's claims for benefits are denied.

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

Based on the foregoing, the Arbitrator finds that Petitioner did not prove his injury arose out of and in the course of his employment and his current condition of ill-being is causally related to the alleged injury. As such, Petitioner is not entitled to any TTD benefits.

ISSUE (O): Is Respondent entitled to a credit pursuant to Section 8(e)17 of the Act?

In the alternative, should the Arbitrator find causation in favor of Petitioner, Respondent is entitled to a credit of 27.5% loss of use of the left leg pursuant to Section 8(e)17 of the Act.

Petitioner has a previous workers' compensation case, 07 WC 28076, which was settled between Petitioner and Respondent for 27.5% loss of use of the left leg. Respondent entered the Settlement Contract of 07 WC 28076 into evidence as Respondent's Exhibit 5 with no objection from Petitioner. As such, Respondent shall be given a credit of 27.5% loss of use of the left leg, based on Section 8(e)17 of the Illinois Workers' Compensation 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 McLEAN	)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
			☐ PTD/Fatal denied
		☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Lisa L. Armagast,
Petitioner,

vs. No: 15 WC 11018

19IWCC0676

State of Illinois,
Pontiac Correctional Center
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, temporary total disability and permanent partial disability, medical expenses 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 17, 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.

19IWCC0676

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: DEC 13 2019

Marc Parker

Barbara N. Flores

Deborah L. Simpson

mp-wj
o-12/05/19
68

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ARMAGAST, LISA L
Employee/Petitioner

Case# **15WC011018**

SOI PONTIAC CORRECTIONAL CENTER
Employer/Respondent

19IWCC0676

On 7/17/2018, 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 2.14% 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:

0190 PETER F FERRACUTI LAW OFFICES
ALEXIS P FERRACUTI
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

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

0988 ASSISTANT ATTORNEY GENERAL
JORDAN HOMER
500 S SECOND ST
SPRINGFIELD, IL 62706

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

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

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

JUL 17 2018

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

19IWCC0676

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

- [ ] 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

Lisa L. Armagast
Employee/Petitioner

v.

State of Illinois, Pontiac Correctional Center
Employer/Respondent

Case # **15** WC **11018**

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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Bloomington**, on **June 22, 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. [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. [ ] 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 _____

FINDINGS

On **March 24, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *N/A* 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 $**88,400.00**; the average weekly wage was $**1,700.00**.

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

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

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

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

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

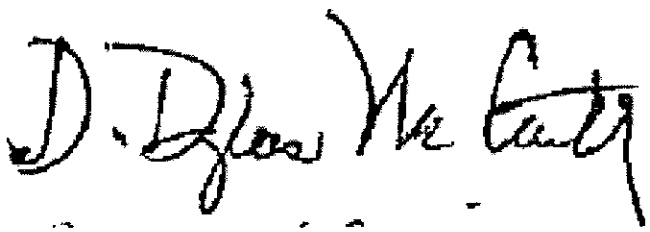
ORDER

Petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury causally related to her employment with the Respondent.

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.



July 10, 2018

JUL 17 2018

Signature of Arbitrator

Date

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Lisa Armagast, filed an Application for Adjustment of Claim on April 2, 2015, alleging injuries to her right hand due to an alleged repetitive trauma which manifested on March 24, 2015. (AX 2)

THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner testified she is a right-handed, retired former corrections clerk. (TX p. 14, 43) She worked for the Illinois Department of Corrections, specifically Pontiac Correctional Center, from November 2, 1981, through November 2013, at which point she retired from the State of Illinois. (TX p. 14, 27) During her tenure with the Department of Corrections, Petitioner was a stenographer for three years, and executive secretary for 10 years, and a clerk for 19 years. (TX pp. 13-14) At the time of her retirement in 2013, Petitioner's job title was a Corrections Clerk III. (TX p. 14) Petitioner worked 8:00-4:00, Monday through Friday, with a half hour break for lunch and a 15 minute break in the morning and in the afternoon. (TX p. 54)

Petitioner testified her job duties primarily revolved around assisting the warden or the assistant warden. (TX p. 14) Specifically, this involved maintaining records of incidents occurring at the prison on any day, involving incident reports, statistics regarding assaults, and information regarding medical issues, as well as filing. (Id) Petitioner testified that processing incident reports was her "major duty." (TX p. 20) The job required the Petitioner to go to the warden's office every morning to pick up the reports, read the reports, organize the reports by physically moving the paper, sometimes removing staples with a staple remover or pulling the pages apart, and mark each report for filing. (TX pp. 21-22, 44-45) The process only involved typing if it was what Petitioner described as an "unusual incident," which was a minority of the reports. (TX p. 22) The unusual reports, those that required typing, would involve narrative typing and would take approximately 20 minutes to write and type. (TX p. 47) They were two pages in length, at most. (Id) Petitioner also had to use a "giant stapler." (TX p. 37)

Petitioner was also tasked with compiling statistics for a monthly report. (TX p. 48) In doing so, Petitioner would read information contained in a logbook and elsewhere, write down the statistics, and then type those numbers into an Excel spreadsheet. (TX pp. 48-49) The other major task for Petitioner's job was filing. (TX p. 16) Petitioner testified that the file cabinet drawers did not open or close easily and that she opened and closed the drawers dozens of times each day, for about an hour cumulatively each day. (TX p. 16, 40).

Overall, Petitioner testified that she typed intermittently, with the typing often interrupted by the phone, filing, hand writing, and picking up various forms or other pieces of paper. (TX p. 49) Petitioner testified that cumulatively, she typed between five and six hours each day. (TX p. 16)

Petitioner testified that at the time of her retirement, her work station consisted of a corner desk with a keyboard tray and space to work on the left and the right of the desk. (TX p. 17) The work station was set up like that for approximately eight to ten years. (Id) Prior, the keyboard was about waist high and Petitioner had to twist her body to type. (Tx p. 18) In approximately 2008, Petitioner made a request to the ADA department for a wrist pad for both her keyboard and mouse. (Id at 58-59)

At the time of trial, Petitioner testified that she works in a real estate office as a receptionist. (TX p. 55) She is currently receiving retirement benefits from the State, and her salary as a receptionist is less than she earned in her capacity as a corrections clerk with the State. (Id)

Petitioner testified she began to experience symptoms she associated with carpal tunnel syndrome while working for the State. (TX p. 26) She testified she experienced tingling, pain, and a weakening ability to grip items. (Id) She testified that the symptoms started mildly and gradually worsened. (Id) Petitioner testified that, while she did not recall exactly when, but in approximately 2008, she requested gel mouse and keyboard pads to alleviate symptoms she related to carpal tunnel syndrome. (TX pp. 58-59). Petitioner testified she did not seek treatment until January 2015 because she presumed the symptoms would get better after retirement. (TX p. 26) However, the medical records show that Petitioner did present to Dr. Satler on June 19, 2008, with "intermittent mild carpal tunnel type symptoms" which were not long lasting, and for which Dr. Satler wrote a note for a wrist support at work. (PX 3, p. 3) When the symptoms did not improve after retirement, Petitioner presented to Dr. Salter on January 2, 2015. (TX p. 26-27).

At that visit, Petitioner reported numbness and tingling in her right hand, which woke her at night, and with some weakness in the right hand. (PX 3, p. 2) Petitioner reported that she worked at Pontiac Correctional Center for 30 years, first using a typewriter and then a computer. (Id) She also reporting helping her husband build a new house. (Id) On exam, Petitioner's hand grips were equal, there was an equivocal Phalen's sign, and a positive Tinel's sign on the right. (Id) Dr. Satler diagnosed probable carpal tunnel syndrome and referred Petitioner to Dr. Edward Pegg for an EMG. (Id)

The EMG was performed by Dr. Pegg on March 24, 2015, and showed moderate to moderate severe right medial nerve entrapment at the wrist. (PX 2, p. 7)

Petitioner then presented to Dr. Lawrence Li on March 27, 2015. (PX 2, p. 20) In presenting to Dr. Li, Petitioner reported a six year history of numbness and tingling in her right wrist. (Id) She reported that "she did a lot of typing and filing which was not ergonomic for her and she retired in 2013." (Id) Petitioner further stated "she thought the pain, numbness, and tingling would resolve after she stopped working but it did not." (Id) On exam, Dr. Li noted a positive Tinel's, Phalen's, and direct compression test on the right hand/wrist. (Id at 23) Based on the exam, Petitioner's complaints, and Dr. Pegg's EMG, Dr. Li diagnosed Petitioner with right carpal tunnel syndrome and recommended a right carpal tunnel release. (Id at 24)

Dr. Li performed the right carpal tunnel release on April 10, 2015. (PX 4, PX 5) The procedure was performed without incident. (PX 4) On April 21, Petitioner followed up with Dr. Li for suture removal. (Id) At which time, there was mild swelling and the ROM and strength were limited as expected. (Id) Petitioner presented to Dr. Li for the final time on May 19. (Id) Petitioner reported that the numbness and tingling had resolved, there was no swelling, and Petitioner's range of motion was normal. (Id) Dr. Li diagnosed Petitioner with post right carpal tunnel release – doing well, and released Petitioner from his care. (Id) Petitioner testified she has not sought additional treatment since. (TX p. 32)

On August 3, 2017, at the request of Respondent, Petitioner presented to Dr. John Fernandez for a Section 12 Examination. (RX 3) Dr. Fernandez reviewed Dr. Satler, Dr. Pegg, and Dr. Li's treatment notes from January 2, 2015, through March 30, 2016. (Id at p. 1) Petitioner reported no significant residual complaints, and rated her symptoms at 0/10. (Id) Dr. Fernandez did not have a formal job description or job analysis to review, but discussed with Petitioner her job duties. (Id at p. 2) Petitioner reported engaging in keyboarding 70% of the time, filing 20% of the time, and 10% handwriting. (Id) She demonstrated how she held her hands while typing. (Id) She reported hobbies of scrapbooking, water skiing, tubing, and swimming. (Id)

On exam, Dr. Fernanzez noted a well-healed surgical scar in the right palm, no subjective complaints of parethesias, numbness, or dysesthesias in the hand or fingers. (Id at p. 3) There was no significant irritability of the nerves of the forearm, wrist, or hand, and no subjective complaints of numbness, tingling, dysesthesias or parethesias in the hand, fingers, or arm bilaterally. (Id) Petitioner had full symmetric wrist and hand motions to extension. (Id)

In conjunction with the Section 12 Examination, Dr. Fernandez was asked for his opinion regarding causation. (RX 3) Dr. Fernandez opined "there is no good scientific evidence ... which would create a causal relationship or link even as an aggravation effect between [Petitioner's] diagnosis of right carpal tunnel syndrome and her work exposure, specifically keyboarding, writing over the years." (Id at 4)

The evidence of Dr. Lawrence Li was taken on March 16, 2017, and entered into evidence as Petitioner's Exhibit 6. Dr. Li is a board certified orthopedic and hand surgeon. (PX 6, p. 4). Dr. Li testified regarding his treatment of Petitioner. Dr. Li testified, that a significant amount of typing for several years in a non-ergonomic position would cause bilateral carpal tunnel syndrome. (Id at p. 15) Specific to Petitioner, he was of the opinion that her right carpal tunnel syndrome was caused by the fact that she typed a significant amount, in a non-ergonomic position, for several years. (Id) It was not the typing, he opined, that caused Petitioner's carpal tunnel syndrome, but that she typed in a non-ergonomic position, which he defined as a position in which the wrist is either flexed or extended beyond 40 degrees. (Id at 15-16).

On cross examination, Dr. Li testified he was not certain what the Petitioner's work station looked like, nor was he certain as to how she held her wrists. He said that he assumed she typed in a non-ergonomic position because that is what she told him. He did not testify as to asking her to demonstrate her hand position. (Id at p. 24) He further stated that he did not know the percentage of her work day she spent typing and what she spent filing. (Id at 17-18) He stated he understood that Petitioner sent 90% of her day typing and 10% filing. (Id at 18)

The evidence deposition of Dr. John Fernandez was taken on January 19, 2018, and entered into evidence as Respondent's Exhibit 4. During his testimony, Dr. Fernandez reiterated his opinion that Petitioner's job duties did not cause or significantly aggravate Petitioner's right carpal tunnel syndrome. (RX p. 10) His opinion was based on his understanding of Petitioner's job duties as she described them as well as Petitioner's medical history and his exam of her. (Id) Dr. Fernandez testified Petitioner described her work station as an L-shaped desk with a work station that was lower down and to the left. (Id at 8) Dr. Fernandez further testified that Petitioner demonstrated the position of her hands, which included an extension of approximately 10 degrees at

the wrist. (Id) He also had her demonstrate the hand position after the ergonomic changes were made to her work station, and he said that her wrists were then flexed by about 10 degrees. (Id at 9) Specifically regarding the alleged non-ergonomic positioning of Petitioner's hands and whether that caused Petitioner's carpal tunnel syndrome, Dr. Fernandez testified that ergonomics do not have any bearing on reducing muscle stress. (Id at 15) Specifically, he stated that the terminology as it is commonly used does not decrease muscle stress or strain, calling that claim "a little bit made up," and stating the term primarily dealt with a person's overall comfort. (Id at 15-16)

THE ARBITRATOR MAKES THE FOLLOWING CONCLUSIONS OF LAW:

ISSUES (C) & (F): DID PETITIONER SUSTAIN AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH RESPONDENT & IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE ACCIDENT?

Petitioner bears the burden of proof on the issues of accident and causal connection. It is axiomatic that in a repetitive trauma case, the unique facts of each case must be closely scrutinized and the Arbitrator has done so carefully considering the exhibits of Petitioner and Respondent as well as Petitioner's testimony. Repetitive trauma cases are compensable as accidental injuries under the Illinois Workers' Compensation Act. In *Peoria County Belwood Nursing Home v. Industrial Commission*, the Illinois Supreme Court held that "the purpose behind Workers' Compensation Act is best serviced by allowing compensation in a case...where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction." 115 Ill.2d 524, 529, 505 N.E.2d 1026, 1028 (Ill. 1987). In these repetitive trauma cases, it is imperative that the employee place into evidence specific and detailed information concerning the petitioner's work activities, including the frequency, duration, and manner of performing these activities. It is also important that the medical experts have a detailed and accurate understanding of the petitioner's work activities.

The Arbitrator notes that Dr. Li's causation opinion is based on a Petitioner's claims that her work station was non-ergonomic, but he did not know what Petitioner's work station looked like. Indeed, Dr. Li testified that "the typing had nothing to do with it," and rather the cause was a non-ergonomic set up would be one which required an extension or flexion above 40 degrees. Dr. Li did not have Petitioner demonstrate how she held her hands nor did he have any other knowledge of the degree to which Petitioner's wrists were extended. However, Dr. Fernandez did, and upon demonstration, Petitioner held her hands at 10 degrees, a position which does not meet Dr. Li's definition of non-ergonomic.

Further, while Petitioner's testimony and iteration of her job duties to Dr. Li made her job duties seem very heavy in typing and data entry, the whole of Petitioner's testimony indicates that Petitioner's positions were not as data entry intensive as Petitioner claimed. It appears that Petitioner had a wide variety of job duties, and her job consisted much more than typing and data entry. Indeed, those duties which Petitioner described as her "major functions" involved very little typing. The Arbitrator finds that Petitioner's job duties

were not highly repetitive in nature, as Petitioner had a variety of job duties in addition to typing, which included other activities like filing, reading, writing, and carrying files.

Dr. Li's testimony showed that he did not know the specifics of Petitioner's job duties nor her work station, and that his only impression was that she typed quite a bit, about 90% of the day. On the other hand, Dr. Fernandez's testimony and record shows that he not only discussed her job duties with Petitioner, but that he also had her demonstrate her hand placement while typing and had her describe her work station to him. The causation and aggravation opinion provided by Dr. Li was based on incomplete and inaccurate information concerning Petitioner's job duties for Respondent. Overall, Dr. Li lacked a complete, thorough, and accurate understanding of Petitioner's job duties for Respondent. Accordingly, the arbitrator finds Dr. Li's opinions non-persuasive. Dr. Fernandez, in contrast, did speak with Petitioner about her job and found no causal connection.

For the above reasons, Petitioner's claim for compensation is denied. All other issues are rendered moot.

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
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARTIC PRYOR,

Petitioner,

vs. NO: 12 WC 30215

STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS - STATEVILLE,

19IWCC0675

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 causation 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, with the following correction:

The Commission observes the awarded period of temporary total disability encompasses 176 4/7 weeks, and the decision is corrected to so reflect.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 22, 2019, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary and causally related medical expenses submitted into evidence in Petitioner's Exhibit 8, pursuant to Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any medical expenses already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $768.30 per week for a period of 176 4/7 weeks, representing December 17, 2014 through May 5, 2018, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $768.30 per week for life, commencing on May 6, 2018, as provided in §8(f) of the Act. Commencing on the second July 15 after the entry of this award, Petitioner may become eligible for 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 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: DEC 13 2019

L. Elizabeth Coppoletti

LEC/mck

D: 12/10/19

43

L. Elizabeth Coppoletti

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PRYOR, ARTIC
Employee/Petitioner

Case# **12WC030215**

SOI DEPT OF CORRECTIONS-STATEVILLE
Employer/Respondent

19IWCC0675

On 5/22/2019, 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 2.34% 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:

2333 WOODRUFF JOHNSON & EVANS
CASEY WOODRUFF
4234 MERIDIAN PKWY SUITE 134
AURORA, IL 60504

6197 ASSISTANT ATTORNEY GENERAL
PATRICIA N JJEMBA
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1350 CENTRAL MANAGEMENT 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

MAY 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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

Artic Pryor
Employee/Petitioner

v.

State of Illinois Department of Corrections - Statesville
Employer/Respondent

Case # 12 WC 30215

Consolidated cases: _____

19IWCC0675

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **New Lenox, Illinois**, on **April 5, 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 _____

FINDINGS

On **7/5/12**, 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 $**59,927.92**; the average weekly wage was $**1,152.46**.

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 $**135,330.56** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**135,330.56**.

Respondent is entitled to a credit for any benefits paid under Section 8(j) of the Act. Respondent shall further keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him.

ORDER

Respondent shall pay all reasonable, necessary and related medical bills submitted into evidence in Petitioner's exhibit #8, as provided in Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any medical bills already paid.

Respondent shall pay Petitioner temporary total disability benefits of $768.30/week for 176-2/7 weeks, commencing December 17, 2014 through May 5, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of $768.30/week for life, commencing May 6, 2018, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the *Rate Adjustment Fund*, as provided in Section 8(g) 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

5/21/19
Date

ICArbDec p. 2

MAY 22 2019

FINDINGS OF FACT:

Procedural History

Petitioner Artic Pryor ("Petitioner") suffered an injury to his left knee on July 5, 2012 while working for the State of Illinois Department of Corrections, Statesville Correctional Center ("Respondent"). (Arbitrator's Exhibit ["AX"] 3)

This matter was previously tried on December 17, 2014, on Petitioner's 19(b) Petition for Immediate Hearing. (AX3) The issues in dispute were whether Petitioner's left knee condition was causally related to the July 5, 2012 injury, whether Petitioner's medical treatment was reasonable and necessary, whether Petitioner was entitled to temporary total disability benefits, and whether Respondent was liable for prospective medical treatment, including the left total knee replacement recommended by Dr. Silver. (AX3)

At the 2014 hearing, Petitioner testified he injured his left knee during a physical altercation with an inmate. On July 30, 2012, Dr. Robert Semba ("Dr. Semba") performed surgery for the complete tear of the patellar tendon and the small tear of the medial meniscus of Petitioner's left knee. Following surgery, Petitioner continued to experience significant pain and range of motion limitations in his left knee. Dr. Semba recommended a second surgery. (AX3)

Petitioner thereafter sought a second opinion with Dr. Ronald Silver ("Dr. Silver"). (AX3) Dr. Silver agreed that a second surgery was warranted. On November 16, 2013, Dr. Silver performed a left knee partial lateral meniscectomy, tricompartmental synovectomy, abrasion arthroplasty, lysis of adhesions, and debridement. (AX3) Following the second surgery, Petitioner continued to suffer limited range of motion, severe quadriceps atrophy, and "catching" of the patellofemoral articulation. Dr. Silver opined that Petitioner had exhausted conservative care for his left knee, and thus recommended a left total knee replacement. Dr. Silver also stated that the need for the total knee replacement was caused by Petitioner's original work injury. (AX3)

At the request of Respondent, Petitioner attended a Section 12 examination with Dr. Gregory Primus ("Dr. Primus"). Dr. Primus opined that the degenerative joint disease in Petitioner's left knee was not related to the injury of July 5, 2012. He recommended work restrictions of limited stair negotiation and deep knee bending throughout the day. (AX3) Petitioner attempted to work within Dr. Primus's restrictions but was unable. (AX3) Based on Dr. Primus's report, Respondent did not authorize the left total knee replacement recommended by Dr. Silver.

In his January 27, 2015 Arbitration Decision, Arbitrator Gerald Granada ("Arbitrator Granada") found persuasive Dr. Silver's opinions regarding causation. Arbitrator Granada found that a causal connection existed between Petitioner's left knee condition and the July 5, 2012 injury, and that Petitioner's medical treatment to date was reasonable and necessary. Arbitrator Granada ordered Respondent to authorize the left total knee replacement recommended by Dr. Silver. Arbitrator Granada also awarded temporary total disability through the hearing date and payment of the medical expenses submitted into evidence. (AX3) Neither party appealed the decision.

Petitioner's Testimony

Petitioner testified that he worked as a prison guard for Respondent at the Statesville Correctional Center. He provided that Statesville is a maximum-security prison that incarcerates the worst criminals in Illinois. Petitioner testified that he had never had a sedentary or sit-down job.

Petitioner testified that following the 19(b) hearing on December 17, 2014, he was notified that his left knee replacement surgery was authorized and he underwent the arthroplasty on March 23, 2015. Petitioner testified that during the course of his treatment on his left leg, he favored his right leg, as it was stronger. Petitioner specifically testified, "...the right knee was strong so I favored it to compensate the pain that was on the left knee...but it started to weaken. As I used it for compensation to bear the pain of the left knee and finally it blew out and I had to get a surgery done to the right knee."

Petitioner testified that he is unable to bear weight on his left leg without pain. He described several incidences of falling. He described waking in the night and being unable to move his left leg, causing him to panic. Petitioner also testified he continues to use a cane.

Petitioner described his arthroplasty hardware as not fitting correctly and moving inside his knee. During the hearing, Petitioner demonstrated for the Arbitrator the movement that causes the noise he referenced in his left knee. The Arbitrator notes that Petitioner while in a sitting position, Petitioner moved his left knee from side to side. During said movement there was an obvious crunching or audible sound emanating from his left knee as he moved it from left to right.

Medical Treatment

On March 23, 2015, Dr. Silver performed a left total knee replacement with a left tibial bone graft. (Petitioner's Exhibit ["PX"] 1, p.173)

On May 13, 2015, Petitioner presented to Dr. Silver, who noted he was post-operative following the left total knee replacement. Dr. Silver prescribed topical medication for scar reduction and wound healing. Dr. Silver ordered outpatient therapy and prescribed Meloxicam, Protonix, Hydrocodone, and Ultram. (PX1, p. 28)

On June 24, 2015, an examination of Petitioner's left knee revealed significant soft tissue swelling. Petitioner had 95 degrees to 100 degrees of flexion with full extension. Dr. Silver prescribed a topical anti-inflammatory to address the swelling and inflammation. Dr. Silver ordered additional physical therapy for mobilization and strengthening. Dr. Silver again prescribed Meloxicam, Protonix, Hydrocodone, and Ultram. (PX1, p. 27)

On July 31, 2015, Dr. Silver noted that Petitioner still experienced severe pain in his left knee and required a crutch for ambulation. Dr. Silver ordered continued physical therapy and again prescribed Meloxicam, Protonix, Hydrocodone, and Ultram. By September 11, 2015, Dr. Silver noted that Petitioner had made improvements with hydrotherapy. Flexion was at 105 degrees with full extension. Dr. Silver recommended continuing physical therapy and aqua therapy. Petitioner remained unable to work. (PX1, pp. 26-27)

On October 23, 2015, Dr. Silver noted improvement with hydrotherapy. Examination of the left knee revealed flexion was at 110 degrees. Petitioner also had significant quadriceps atrophy. Dr. Silver recommended continued physical therapy and hydrotherapy, and continued Petitioner's prior medications. (PX1, p. 24)

On December 19, 2015, Petitioner returned to Dr. Silver. The doctor noted "[Petitioner's] right knee gave way as he has been overcompensating on the right knee for such a long time since his original injury of July 7, 2012." Dr. Silver ordered an MRI of the right knee and noted his left knee was improving with hydrotherapy, though atrophy remained. He ordered continued physical therapy and the prior medications. (PX1, p. 22)

An MRI of Petitioner's right knee was performed at Advantage MRI on December 28, 2015. The MRI demonstrated 1.) Sprain of collateral ligaments; 2.) ACL sprain and patellar tendinopathy; 3.) Degenerative changes of the patellofemoral complex and changes of patellar chondromalacia; and 4.) Predominately degenerative type signal within the posterior horn of the medial meniscus and with some signal abnormally which approximates articular surfaces making small superimposed tear difficult to exclude. (PX1, p.40)

On January 20, 2016, Dr. Silver reviewed with Petitioner his right knee MRI results. According to Dr. Silver, the MRI revealed tearing of the medial meniscus as well as deterioration of the articular cartilage in the patellofemoral compartment. Dr. Silver wrote that "[t]his the cartilage damage is due to his overcompensation since his original work injury to his left knee on July 7, 2012. This caused overcompensation subsequently and has continued to this day due to the more painful nature of his left knee replacement. He will require arthroscopic surgery of his right knee causally connected to the aforementioned work injury." (PX1, p. 21)

On February 5, 2016, Dr. Silver noted medial joint line tenderness, mild effusion, and patellofemoral crepitation involving Petitioner's right knee. Examination of Petitioner's left knee revealed quadriceps atrophy. His left knee flexion was at 102 degrees. Dr. Silver noted that Petitioner's right knee injury resulted from "a combination of overcompensation as well as giving way of his right knee. The overcompensation has been occurring since the original work injury to the left knee [.]" Dr. Silver additionally noted that, due to the severe pain Petitioner experienced daily, Petitioner still required the use of narcotic pain medication. (PX1, p. 20)

On March 18, 2016, Dr. Silver noted approval for right knee arthroscopic surgery was still pending. Dr. Silver opined the medial meniscus tear and articular cartilage damage of the patella demonstrated on the MRI resulted from overcompensation of the right knee as well as the incident in which Petitioner's right knee gave out. Dr. Silver stated this occurred as a result of "...the excess stress he was putting on his right knee as he has been recovering in therapy from his left total knee replacement." Examination of the right knee revealed medial joint line tenderness, mild effusion, patellofemoral crepitation, and a positive McMurray test. His right knee flexion was 120 degrees with 1.0 cm of quadriceps atrophy. Petitioner rated his right knee pain at 8/10, which could be reduced to 6-7/10 while utilizing pain medication. Dr. Silver ordered continued physical therapy and pain medication. (PX1, pp. 18-19)

On April 29, 2016, Dr. Silver noted that Petitioner's left total knee replacement continued to cause significant pain, swelling, and stiffness. Also noted was that Petitioner required a cane to ambulate. Dr. Silver additionally noted that Petitioner experienced pain in his right knee due to overcompensating using the right leg following the left knee work injury. Examination of Petitioner's right knee revealed medial joint line tenderness, mild effusion, patellofemoral crepitation, and a positive McMurray test. Petitioner again rated his right knee pain at 8/10 generally, which may be reduced to 6/10 while utilizing pain medication. Dr. Silver recommended continuing physical therapy. (PX1, p. 17)

Petitioner continued with Dr. Silver. On July 22, 2016, Dr. Silver opined that Petitioner continued to do poorly following his left knee total replacement. Examination revealed limited range of motion in the left knee and pain scores of 6/10 with medication to 8/10 without. Dr. Silver stated: "As we have noted due to overcompensation of his right knee, his right knee is painful and demonstrates anterior and medial joint line tenderness, mild effusion, patellofemoral crepitation and positive McMurray test. His MRI demonstrates torn medial meniscus. He requires arthroscopic surgery of his right knee due to the overcompensation of that knee ever since his work injury in 2012. The overcompensation occurred over four years resulting in damage to the cartilage in his right

knee and torn medial meniscus." Dr. Silver also expressed his opinion that Petitioner was permanently unable to return to work as a prison guard. (PX1, pp.12-13)

Ultimately, Dr. Silver performed surgery on Petitioner's right knee at Elmwood Park Same Day Surgery Center. On October 10, 2016, the doctor performed 1.) extensive arthroscopic debridement; 2.) arthroscopic tricompartmental synovectomy; and 3.) arthroscopic removal of multiple loose bodies greater than 0.5 cm. The postoperative diagnoses included 1.) articular cartilage fragmentation in the patellofemoral and medial compartments; 2) tricompartmental synovitis; and 3.) multiple loose bodies greater than 0.5 cm in the lateral gutter. (PX1, p.174)

On October 14, 2016, Dr. Silver noted Petitioner's left total knee replacement continued to cause him significant pain. Dr. Silver noted Petitioner utilized a cane to ambulate. Dr. Silver again stated that Petitioner was permanently unable to work as a prison guard. Dr. Silver continued his physical therapy and prescribed Meloxicam, Protonix, Hydrocodone, Ultram, Terocin patches, and Hydrocodone. Dr. Silver also examined Petitioner's right knee on October 14, 2016. After examination, Dr. Silver stated: "[Petitioner] is doing reasonably well one week after arthroscopic surgery of his right knee for cartilage damage due to the overcompensation he placed on the right knee from his work injury to his left knee that required left total knee replacement." Dr. Silver opined that four years of overcompensating with use of the right leg resulted in deterioration of the cartilage. Dr. Silver additionally stated that Petitioner was disabled. (PX1, pp. 8-9)

Petitioner continued treating post-operatively with Dr. Silver through the end of 2016 and throughout 2017. The doctor notes show Petitioner consistently complained of severe pain involving his left total knee replacement. Petitioner continued with soft tissue swelling and quadriceps atrophy. Petitioner required use of a cane to ambulate short distances. Dr. Silver ordered topical Voltaren for inflammation and Lidocaine for pain. The doctor also ordered continued physical therapy and reiterated his opinion that Petitioner was "permanently unable to work as a prison guard." (PX1, pp. 182 – 189, 229)

On January 5, 2018, Dr. Silver noted that Petitioner's left knee was doing poorly. Petitioner continued to experience significant pain and swelling. Dr. Silver noted Petitioner had difficulty walking or standing for any length of time. Petitioner required the assistance of a cane when ambulating. Examination revealed soft tissue swelling and quadriceps atrophy. Dr. Silver recommended continued physical therapy. Dr. Silver stated that Petitioner remained "permanently disabled from his ability to work in any manner." (PX1, p. 227)

On March 9, 2018, Dr. Silver noted that Petitioner's left knee pain was increasing with clicking and popping. Petitioner had difficulty walking, standing or sitting for any length of time. Petitioner quadriceps atrophy and soft tissue swelling persisted. The doctor contemplated arthroscopic examination of the left knee and stated Petitioner was "...completely disabled from his ability to work in any manner." (PX1, p. 225)

On May 4, 2018, Petitioner complained of left knee pain with severe clicking, popping, and giving way. Petitioner reported only being able to walk short distances. Examination revealed soft tissue swelling and quadriceps atrophy. Dr. Silver stated, "he is permanently disabled from his ability to work [sic] in any manner as he cannot sit, stand or walk for any length of time." Dr. Silver prescribed Norco for pain. (PX1, p. 223)

Testimony of Dr. Ronald Silver

Dr. Silver testified via evidence deposition on May 25, 2018. (PX2) Dr. Silver is a board-certified orthopedic surgeon who limits his practice to treatment of shoulder and knee injuries. (PX2, p. 5) Dr. Silver performed Petitioner's left total knee replacement on January 24, 2015. (PX2, pp. 7-8) Dr. Silver explained that as a result of Petitioner's antalgic gait following the arthroplasty, Petitioner's right knee experienced greater stress due to increased loadbearing. (PX2, pp. 12-14.) Over time, this resulted in deterioration of the right knee articular

cartilage. (PX2, pp. 12-14) During the October 5, 2016 right knee surgery, Dr. Silver found extensive articular cartilage damage on the kneecap and on the surface of the femur. (PX2, p. 15) Dr. Silver also found multiple loose pieces of cartilage floating in the joint and extensive inflammation. (PX2, p. 16) Dr. Silver causally related these findings to the overcompensation of Petitioner's right leg following his left knee injury. (PX2, p. 16)

Dr. Silver testified that while the right knee improved following surgery, the left knee did not. (PX2, pp. 21-22.) Dr. Silver testified that Petitioner suffered from pain, atrophy, swelling, and stiffness in his left knee. Dr. Silver explained that Petitioner is "having different noises emanating from the knee in terms of clicking, popping, crunching. He still is – his functional abilities have diminished even more. I'm concerned that he may have grown excessive amounts of scar tissue within the knee replacement..." (PX2, p. 24) Dr. Silver explained the noise emanating from Petitioner's left knee resulted from the scar tissue rubbing or catching on the hardware from Petitioner's left knee surgery. (PX2, p. 24) Dr. Silver indicated another surgery to the left knee could possibly remove some of the bothersome the scar tissue, but he was hesitant to recommend it given that a positive outcome was not guaranteed. (PX2, p. 26) Dr. Silver opined that further physical therapy and pain medication could be a treatment option in the future if Petitioner decided to forgo additional surgical intervention. (PX2, p. 28)

Dr. Silver explained that while patients typically undergo physical therapy for six months following a knee arthroplasty, Petitioner was not a typical patient with a normal knee replacement. (PX2, p. 28) The intent of completing extensive physical therapy was not to allow Petitioner to return to work, but rather to assist with his ability to perform activities of daily living. (PX2, pp. 28, 34) Because Petitioner suffered a previous quadriceps rupture and two surgeries prior to the arthroplasty involving his left leg, his muscle weakness and scar tissue resulted in a poor recovery, requiring additional therapy beyond that required by the typical patient. (PX2, p. 28)

Dr. Silver testified that as a result of the injury and ongoing severe pain in his left knee, Petitioner is unable to work. (PX2, p. 31) Dr. Silver corroborated the objective findings of atrophy and swelling to support Petitioner's pain complaints. (PX2, p. 31) Dr. Silver noted that Petitioner is unable to sit or stand for any length of time. (PX2, p. 35) Dr. Silver also felt a functional capacity evaluation would not be of value. (PX2, pp. 29, 39)

Respondent's Section 12 Reports

On May 2, 2016, Petitioner was examined by Dr. Nikhil Verma ("Dr. Verma") at the request of Respondent. (Respondent's Exhibit ["RX"] 4) According to Dr. Verma, Petitioner reported that he sustained a left knee injury on July 5, 2012 while working as a prison guard. The injury required multiple surgeries culminating in a total replacement. Thereafter, Petitioner began experiencing an onset of right knee symptoms in January 2016 due to overcompensation. Dr. Verma noted in his report that he examined Petitioner's right knee but only had the opportunity to review the December 28, 2015 MRI of the right knee. The doctor felt the MRI demonstrated a small effusion. He noted patella chondromalacia was present and there was intrasubstance signal within the medial and lateral meniscus. The doctor indicated this appeared primarily degenerative in nature with no evidence of an acute tear. Dr. Verma stated that he required additional medical records to evaluate further treatment recommendations as well as causally. However, Dr. Verma indicated that based on the history provided, he did not feel there was a causal relationship between the work injury and Petitioner's right knee condition. (RX4)

On May 26, 2016, Dr. Verma issued an addendum report after reviewing Petitioner's medical records. Dr. Verma maintained his prior opinion that Petitioner's right knee condition was not related to his injury of July 5, 2012. Dr. Verma diagnosed right knee patella chondromalacia with degenerative changes. The doctor indicated that Petitioner's right knee condition was degenerative in nature. Dr. Verma saw no basis for right knee surgery based on his review of the MRI. (RX5)

On August 23, 2017, Dr. Verma conducted another examination of Petitioner at the request of Respondent. This examination focused on Petitioner left knee. Dr. Verma noted Petitioner had an antalgic gait on the left side. Dr. Verma found Petitioner's medical treatment to be reasonable in part, though he needed further records regarding the treatment to determine the necessity of surgical care. Dr. Verma opined that topical creams or patches are not indicated for treatment of total knee arthroplasty. He also believed that 2.5 years of physical therapy is grossly excessive for Petitioner's condition, and that a typical patient would plateau at 6-8 months. Dr. Verma opined that Petitioner's prognosis was poor. Dr. Verma stated that Petitioner had reached maximum medical improvement. Regarding work restrictions, Dr. Verma stated that, "[c]urrently working light capabilities would be sedentary duty at a minimum, but an FCE should be obtained by an independent facility to determine current functional capacity." (RX6)

On December 5, 2018, Petitioner was again seen by Dr. Verma at the request of Respondent for his left knee. Dr. Verma did not feel work hardening was appropriate stating that "[Petitioner's] current functional limitations are pain mediated only. I do not believe that work hardening would result in meaningful improvement in his condition as there is no evidence of structural weakness or other deficiency in knee range of motion." Dr. Verma again recommended an FCE to be completed by an independent facility. He felt Petitioner had subjective complaints out of proportion to the timeframe after surgery and objective findings of unclear etiology. (RX10)

Testimony of Dr. Nikhil Verma

Dr. Verma testified via evidence deposition on May 30, 2018. (RX7.) Dr. Verma's testimony was consistent with his prior Section 12 reports. (RX7) Dr. Verma clarified his recommendation regarding work restriction from his August 23, 2017 report as allowing Petitioner to work a job lifting less than five pounds. (RX7, p. 31)

Testimony of Susan Entenberg

Susan Entenberg ("Ms. Entenberg") testified via evidence deposition on February 9, 2018. (PX5) Ms. Entenberg has been a certified rehabilitation counselor since 1978. (PX5, p. 7) Ms. Entenberg met with Petitioner on March 1, 2017 and issued a vocational report on March 7, 2017. (PX5, p. 18) Ms. Entenberg opined that Petitioner was not a good candidate for vocational rehabilitation and that no labor market existed for him. (PX5, p. 30) Ms. Entenberg noted that Petitioner's limitations restricted him to sedentary job duties, but that he lacked the transferable skills necessary to successfully perform a sedentary position, such as computer or clerical skills. (PX5, p. 30)

Testimony of Tracy Peterlin

Respondent requested that Petitioner meet with its vocational rehabilitation specialist Tracy Peterlin from Creative Case Management, Inc. (RX 9) Ms. Peterlin testified that Petitioner declined to meet with her, and she therefore authored a Blind Vocational Evaluation/Labor Market Survey report on May 21, 2018. (RX9, p. 9) Ms. Peterlin determined that Petitioner possessed some transferrable skills, including critical thinking, knowledge of building and construction, public safety, and security. According to the report, Ms. Peterlin identified 45 employers "...as potentially hiring for medically appropriate positions" for Petitioner. Ms. Peterlin noted that it was unknown if the employers noted were willing to hire Petitioner and that the potential job opportunities most likely would require some type of reasonable accommodation. Ms. Peterlin's wrote, "[i]t is of note that a position which uses [Petitioner's] skills and experience while accommodating his restrictions may require a focused job search with networking and traditional methods. Reasonable accommodations according to guidelines of the Americans with Disabilities Act may need to be requested should a position be offered. The ability to provide a reasonable accommodation for his disability and restrictions can vary from one employer to the next..." (RX9, Dep. Ex 1) Ms. Peterlin testified that some employers will not provide an ADA

accommodation and some employers will be "turned off" by a job seeker who is requesting an accommodation. (RX9, p. 39)

Ms. Peterlin noted that most sedentary jobs require the use of computers and are considered office-type positions. (RX9 p. 18) She further testified that for individuals to be competitive in sedentary, office-type positions, some level of computer knowledge, skill, or proficiency is required. (RX9. p. 19) Ms. Peterlin testified that, though not impossible, it is more difficult to find employment for individuals who have been out of the work force for some time. (RX9, p. 33)

Ms. Peterlin believed that even with a diligent job, there may not be a successful placement for Petitioner. She identified multiple impediments that would hinder Petitioner's ability to find employment, including Dr. Silver's opinion that Petitioner could not work, Dr. Verma's guarded diagnosis, records documenting high levels of pain, and lack of computer skills. Ms. Peterlin opined that a successful vocational outcome in Petitioner's situation was extremely guarded. (RX9, pp. 44-45, Dep. Ex. 1)

Ms. Peterlin testified and her report identified three types of positions that she believed may be appropriate for Petitioner with or without a reasonable accommodation. The positions identified were surveillance system monitor, security manager, and customer service. (RX9 p. 16, Dep. Ex. 1) Ms. Peterlin was unaware of any of the details of the potential positions, aside from the fact that each would require computer skills. (RX9, p. 54-69)

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

The Arbitrator notes that Arbitrator Granada's January 27, 2015 decision determined that a causal connection existed between Petitioner's work injury and Petitioner's left knee condition and the need for the left total knee replacement. That decision was not appealed by either party. Therefore, no dispute exists regarding causal connection and Petitioner's left knee injury.

The Arbitrator notes that, following the left total knee replacement, Petitioner developed pain and complaints in his right knee. The records reflect that Dr. Silver repeatedly documented in his records that Petitioner was placing excess stress on his right knee to compensate for the injury to his left knee. Dr. Silver repeatedly requested authorization from Respondent to treat Petitioner's right knee injury. Petitioner finally underwent surgery with Dr. Silver for the right knee cartilage damage on October 10, 2016.

The Arbitrator finds Dr. Silver's causation opinion persuasive and credible. The Arbitrator notes that it is not uncommon for a claimant to sustain an injury to one side of the body, and then, "during the course of treatment sees overuse in favoring that injured member, and suffers a deteriorating condition on the contralateral side." *Tellis Williams v. State of Illinois Department of Corrections, Statesville*, 2017 I.W.C.C. 0337 (finding causal connection between claimant's left knee injury and subsequent right hip condition where claimant overcompensated with right leg while recovering from left knee injury); *see, e.g., Eric Lenington v. Menards, Inc.*, 2017 I.W.C.C. 0567 (finding causal connection where, after suffering right knee injury, claimant's altered gait and limping required claimant to put more force on left leg, resulting in left hip condition); *Charles Adelsberger v. State of Illinois/Vienna Correction Center*, 2017 I.W.C.C. 0236 (finding causal connection where right knee became symptomatic following a left knee work injury as a result of claimant overloading on the right leg to reduce stress on injured left knee); *Patricia Vargas v. Lifetouch Portrait Studios, Inc.*, 2018 I.W.C.C. 0028 (finding causal connection for right hip injury where claimant relying on right leg while awaiting approval for treatment of work-related left hip injury). In this matter, Petitioner credibly testified that he favored his left knee, resulting in increased stress and load bearing on the right leg, following his left knee

injury. The Arbitrator notes that the medical records submitted into evidence present a clear history of the onset of symptoms in Petitioner's right knee following his left knee injury. The Arbitrator finds that, absent Petitioner's work-related left knee injury, Petitioner would not have been required to overload on his right leg, which then caused the right knee condition for which Dr. Silver performed arthroscopic surgery.

Therefore, the Arbitrator finds Petitioner's right knee condition of ill-being is causally related to the initial accident of July 5, 2012.

In support of the Arbitrator's decision relating to "J," whether the medical services provided to Petitioner were reasonable and necessary, the Arbitrator finds the following:

The Arbitrator's findings and conclusions relating to the issue causal connection are incorporated herein.

Petitioner claims entitlement to payment of reasonable and necessary medical bills from medical providers that administered care after his accident at work. The medical bills submitted into evidence relate to hospital services, diagnostic testing, physicians' services, and physical therapy prescribed as a direct result of his injury at work. Based on a thorough review of the medical records and bills submitted into evidence, in conjunction with Petitioner's testimony at trial, the Arbitrator finds that Petitioner's medical bills are for reasonable and necessary medical care to alleviate him of the effects of his injury at work and the sequalae thereof. Based on the foregoing, the Arbitrator awards the outstanding medical bills admitted into evidence and orders Respondent to pay these bills pursuant to Section 8(a) and Section 8.2 of the Act.

In support of the Arbitrator's decision relating to "K," whether Petitioner is entitled to temporary benefits, the Arbitrator finds the following:

The Arbitrator's findings and conclusions relating to the issue of causal connection are incorporated herein.

Respondent's dispute regarding the period of temporary total disability stems from its position that Petitioner's right knee condition of ill-being is not related to the accident herein. Having reconciled in favor of Petitioner on the issue of causation, the Arbitrator finds Petitioner was temporarily and totally disabled through May 5, 2018, the date Dr. Silver placed Petitioner at maximum medical improvement. Therefore, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from December 17, 2014 through May 5, 2018.

In support of the Arbitrator's decision relating to "L," the nature and extent of the injury, the Arbitrator finds the following:

In *Valley Mould & Iron Co. v. Industrial Comm'n*, the Illinois Supreme Court laid out the three ways by which an injured employee can establish that they are permanently and totally disabled. 84 Ill.2d 538 (1981); *ABB C-E Servs v. Industrial Comm'n*, 316 Ill.App. 745 3d (2000). Permanent total disability can be demonstrated by: (1) medical evidence showing that the injured worker's medical condition makes him or her obviously unemployable; (2) showing of a diligent but unsuccessful job search; or (3) demonstrating that because of their age, training, education, experience, and condition, no stable labor market exists. *ABB C-E Servs.* at 750. The second and third prongs are known as "odd-lot" permanent total disability. *Courier v. Industrial Comm'n*, 282 Ill.App.3d 1 (1996); *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill.2d. 482 (1979).

The Arbitrator finds that Petitioner has met his burden of establishing that he is permanently and totally disabled through both medical evidence and, as a result of his age, training, education, experience, and medical condition, no stable labor market exists.

Regarding medical permanent total disability, the Arbitrator notes that Petitioner has undergone three surgeries to his left leg, including a total knee replacement which causes him debilitating pain. Petitioner testified at trial that he is unable to bear weight on his left leg without pain. Petitioner also testified that he has fallen on multiple occasions. Petitioner wakes up in the night unable to move his leg, causing panic attacks. The Arbitrator finds Petitioner's testimony to be credible. The Arbitrator also notes that Petitioner's left knee makes an audible "crunching" sound.

The Arbitrator finds that the medical evidence corroborates Petitioner's testimony and establishes that he is permanently and totally disabled on the basis of the medical evidence submitted at trial. Petitioner presented unequivocal medical evidence that he is permanently and totally disabled. Dr. Silver's medical records are replete with documentation of Petitioner's failed left total knee replacement and permanent total disability. On May 4, 2018, Dr. Silver's records note that Petitioner's "left knee pain persists with severe clicking and popping and giving way. He can only walk for short periods of time…[q]uadriceps atrophy persists...[s]oft tissue swelling persists…[h]e is permanently disabled from his ability to work in any manner as he cannot sit, stand or walk for any length of time…"

The Arbitrator finds persuasive the opinions of Dr. Silver. The Arbitrator notes Dr. Silver has treated Petitioner since May of 2013, including performing three surgeries on Petitioner. The Arbitrator also finds Dr. Silver's deposition testimony to be credible. Dr. Silver testified that Petitioner is unable to work because he is unable to sit, stand, or walk for any length of time and is in severe pain. Dr. Silver also explained that Petitioner's poor recovery from his left knee arthroplasty resulted from his prior quadriceps rupture and the scar tissue from multiple surgeries. The Arbitrator notes that this is corroborated by Respondent's Section 12 examiner, Dr. Verma, who described Petitioner's prognosis as "poor" and recommended a work restriction of lifting less than five pounds. Dr. Silver explained the noise emanating from Petitioner's left knee, which the Arbitrator witnessed at trial, resulted from the scar tissue rubbing on the hardware inside the knee.

In addition to establishing medical evidence of permanent total disability, the Arbitrator also finds that Petitioner has met the third prong of the test laid out in *Valley Mould Iron & Co.* and *ABB C-E Servs.* Specifically, the Arbitrator finds that Petitioner's medical condition, combined with his age, training, education, and experience, prevent him from performing any services except those for which no stable labor market exists.

The Arbitrator notes Petitioner's failed left total knee replacement and his limitations described above. The Arbitrator also notes that Petitioner is a 56 year old male who worked at Statesville Prison as a corrections officer from 1994 to 2012. Prior to working at Statesville, Petitioner worked as a brick-layer and at Toys R' Us. Petitioner has no computer or clerical skills and testified he has never worked a sedentary or sit-down job.

The Arbitrator finds the vocational report and testimony from Ms. Entenberg persuasive. Ms. Entenberg opined that Petitioner was not a candidate for vocational rehabilitation and no stable labor market exists for him. Ms. Entenberg explained a combination of factors that would be an obstacle to Petitioner finding employment. These included his medical condition, his pain complaints, his age, his time out of the workforce, and his lack of clerical or computer skills. Ms. Entenberg noted that these restrictions would significantly hinder Petitioner from being able to perform most, if not all, sedentary jobs.

In concluding that Petitioner also falls into the "odd-lot" category of permanent total disability, the Arbitrator also relies on the vocational report and testimony of Ms. Peterlin, Respondent's vocational expert, The Arbitrator notes that Ms. Peterlin felt that Petitioner's medical limitations would likely require an accommodation under the Americans with Disabilities Act. Ms. Peterlin testified that a successful vocational outcome for Petitioner was extremely guarded and even after a diligent job search, there may not be a successful placement.

Based on all the above, the Arbitrator finds that commencing May 6, 2018, Petitioner is permanently and totally disabled pursuant to Section 8(f) 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

DENNIS BILLINGS,

Petitioner,

vs. NO: 17 WC 24540

FREIGHT CAR SERVICES,

Respondent.

19IWCC0677

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 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 June 27, 2019 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $539.13 per week for a period of 15.2 weeks, as provided in §8(e)6 of the Act, for the reason that the injuries sustained caused a 40% loss of use of the right great toe.

IT IS FURTHER ORDERED BY THE COMMISSION that there exists a Temporary Total Disability underpayment of $119.57 for which Respondent remains liable.

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

19IWCC0677

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 the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,400.00. 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: DEC 13 2019

L. Elizabeth Coppoletti

LEC/mck

D: 12/10/19

43

Stephen Mathis

D. Douglas McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BILLINGS, DENNIS
Employee/Petitioner

Case# **17WC024540**

FREIGHT CAR SERVICES
Employer/Respondent

19IWCC0677

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.

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

0293 KATZ FRIEDMAN EAGLE ET AL
RICHARD K JOHNSON
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602

1872 SPIEGEL & CAHILL PC
MARTIN T SPIEGEL
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

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

☐ 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
NATURE AND EXTENT ONLY

Dennis Billings
Employee/Petitioner

v.

Freight Car Services
Employer/Respondent

Case # **17** WC **24540**

Consolidated cases: **N/A**

19IWCC0677

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 **Michael Nowak**, Arbitrator of the Commission, in the city of **Urbana**, on **6/28/18**. By stipulation, the parties agree:

On the date of accident, **7/1/16**, 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 $**46,724.60**, and the average weekly wage was $**898.55**.

At the time of injury, Petitioner was **48** years of age, ***single*** with **no** dependent children.

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

There exists a temporary total disability underpayment of $119.57 for which Respondent remains liable.

Respondent shall be given a credit of $**6,044.56** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,044.56**.

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

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner permanent partial disability benefits of $539.13/week for 15.2 weeks, because the injuries sustained caused the 40% loss of the right great toe, as provided in Section 8(e) of the Act.

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.

Michael K. Nowak, Arbitrator

1/17/19
Date

ICArbDecN&E p.2

JUN 27 2019

FINDINGS OF FACT

Petitioner was employed by Respondent on and prior to July 1, 2016 as a maintenance supervisor. On that date, a steel rail fell onto his right foot. Petitioner was wearing steel toed boots at the time.

The petitioner was diagnosed with a displaced fracture of the proximal first phalange of the right great toe and was referred to Dr. Plattner. Surgery was required and was performed on July 21, 2016 which included an open reduction and internal fixation of the right proximal phalanx of a great toe fracture.

Petitioner was off work from July 8, 2016 through September 18, 2016. He was released to return to work with activities as tolerated but no ladder climbing.

On December 19, 2016, Dr. Plattner indicated that he was able to do his usual and customary occupation and that he had some residual stiffness and could have some permanent limitation of motion and could develop arthritis as well as problems with the hardware down the line. Petitioner was last seen by Dr. Plattner on May 22, 2017. He complained of numbness and stiffness in the big toe. X-ray showed some signs of avascular necrosis and a visible fracture line was still present.

Petitioner worked his usual and customary duties, without restriction, from December 20, 2016 through March 2017 when the plant closed.

He testified that the only injury that he received was to his right great toe.

CONCLUSIONS

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (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. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. 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 Petitioner was employed as a maintenance supervisor at the time of the accident and that he was able to return to work in his prior capacity following the injury. The Arbitrator further notes that Petitioner performed his usual and customary duties without restriction until the plant closed. The Arbitrator therefore gives *some* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner 48 years old at the time of the accident. 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 there is no direct evidence of reduced earning capacity contained in the record. 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 the Petitioner was a credible witness. Dr. Plattner indicated on May 22, 2017 that the fracture line was still visible, but it had healed more from the previous x-ray. There were some degenerative changes and the distal phalanx showed some signs of avascular necrosis. Petitioner also complained of some numbness and stiffness in the toe. Because of the complaints and findings at his last visit with Dr. Plattner, 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 Petitioner sustained permanent partial disability to the extent of 40% loss of use of the right great toe pursuant to §8(e) of the Act.

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

DAN POLLOCK,

Petitioner,

vs. NO: 18 WC 16657

STATE OF ILLINOIS,
SOUTHERN ILLINOIS UNIVERSITY
EDWARDSVILLE,

19IWCC0678

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 accident, causal connection, and temporary total 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 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).

The Arbitrator provided a thorough analysis of the three types of risks that an employee may be exposed to and was of the opinion that Petitioner's accident represented an employment-related risk. The Commission, however, is of the opinion that the accident represented a neutral risk, not an employment-related risk, and adopts the Arbitrator's neutral risk analysis. Therefore, the Commission affirms and adopts the Arbitrator's ultimate decision, but modifies the Arbitrator's Decision by striking the employment-related risk analysis.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 22, 2019, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $855.68 per week for a period of 20-6/7 weeks (July 27, 2018 through December 20, 2018), that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $36,735.00 for medical expenses under §8(a) of the Act and subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall approve and pay for continuing right shoulder treatment.

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 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: DEC 13 2019

D Douglas McCarthy

Douglas McCarthy

DDM/tdm
O: 12/10/19
052

Stephen J. Mathis

Stephen Mathis

L Elizabeth Coppoletti

L. Elizabeth Coppoletti

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

POLLOCK, DAN
Employee/Petitioner

Case# **18WC016657**

SIUE
Employer/Respondent

19IWCC0678

On 1/22/2019, 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 2.46% 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:

1580 BECKER SCHROADER & CHAPMAN
MATTHEW R CHAPMAN
3673 HWY 111 PO BOX 488
GRANITE CITY, IL 62040

6137 ASSISTANT ATTORNEY GENERAL
CORI STEWART
201 W POINTE DR SUITE 7
SWANSEA, IL 62226

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

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

JAN 22 2019

Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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)

DANIEL POLLOCK
Employee/Petitioner

v.

SIUE
Employer/Respondent

Case # **18** WC **016657**

Consolidated cases: **Collinsville**

19IWCC0678

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 **Collinsville**, on **December 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. ☒ 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 _____

19IWCC0678

FINDINGS

On the date of accident, 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 **$66,809.60**; the average weekly wage was $**1284.80**.

On the date of accident, Petitioner was **50** years of age, **married** with **2** children under 18.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $855.68./week for 20 and 6/7 weeks, commencing July 27, 2018 through December 20, 2018, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule (Section 8(a) and 8.2 of the Act) as follows:

Premier Care	**$20,074.00**
Old Tesson Surgery Center	**7,550.00**
ApexNetwork Physical Therapy	**9.111.00**
TOTAL	**$ 36,735.00**

Respondent shall approve and pay for continuing right shoulder treatment.

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

11/19/19
Date

ICArbDec19(b)

JAN 22 2019

Pollock v. SIUE
18WC016657

FINDINGS OF FACT

The issue in this case is whether Petitioner's right shoulder injury that occurred while he patrolled a stairwell arises out of his employment as a patrol officer with Respondent. Respondent stipulated that Petitioner's current condition of ill-being is causally related to the injury and further stipulated that all the medical treatment to date was reasonable and necessary to treat the injury. Respondent disputes liability for the medical treatment due to the dispute on the accident issue.

On November 7, 2017, Petitioner was employed as a patrol officer for Respondent at the Southern Illinois University – Edwardsville (SIUE), East St. Louis, IL campus. SIUE has three campuses: Alton, Edwardsville, and East St. Louis. Patrol officers rotate among the campuses ever two weeks. Petitioner had been employed in this capacity for three and a half years. Petitioner testified regarding the layout of the East St. Louis campus. There are six buildings, labeled Building A through F. The accident occurred in Building D, which is a two-story building, housing health clinics on the second floor and a first floor day care. Building A is two stories and houses a charter school. Building A is connected to Building B with a skywalk. Building B is a two-story building that houses the cafeteria and offices. Building C is one story and houses career training offices and the police department. Building E is one story with administration offices and Building F is a maintenance shed.

Petitioner worked 12-hour shifts, from 6 a.m. to 6 p.m. Petitioner testified regarding his typical workday, which was consistent with Petitioner's Exhibit 13, which sets forth the expectations for patrol officers. The exhibit further states, "Throughout the day officers will conduct foot/vehicle patrols of all buildings, parking lots and general grounds. Perform extra foot patrols in the charter school hallway and the SWIC hallway … Officers will be visible!! Make contact with the staff in these areas to insure they see you. Time in the office will be limited. When in the office insure the cameras are on the monitor to enable you to continue observing these areas." The exhibit further states: "Ensure all activity is called into the TC for proper coding. Minimum of 10-foot patrol/building checks per 12-hour shift."

Petitioner testified that he spent approximately 25% of his time on foot patrols or three hours per day. The foot patrols would take place in each building and would require Petitioner to traverse the stairs. Petitioner testified that traversing stairs was a mandatory requirement of his job. He was instructed to be visible on campus, which means he would not take the elevator while on foot patrol. On an average day, Petitioner would traverse the stairs in Building D four or five times per day and traverse stairs throughout campus 20 to 25 times per day. Although the Building D stairs were open to the public, Petitioner testified that the public rarely, if ever, used the stairs. Instead, the public would use the elevator located just inside the entrance to the building.

Petitioner testified that he was required to wear a uniform, bullet-proof vest, a duty belt, and boots. Photographs of Petitioner's equipment were admitted into evidence as Petitioner's Exhibit 14. Petitioner explained that the equipment that he carried on his person weighed approximately 25 lbs. He knows this because, when he was a rookie, he weighed himself without clothes on and then weighed himself with his uniform, vest, and duty belt. Petitioner testified that the vest acts like a "turtle-shell," as it restricted his side to side movement and his ability to see downward. In other words, when Petitioner would look down, he would see his vest, instead of his boots. So, with the vest, he would have to bend forward at the waist to see downward over the vest. Petitioner testified that he typically walked down stairs with his view in front of him, rather than down at his feet. If he had wanted to look at each step as he went down

the stairs, he would have to bend forward at the waist, which would be an awkward position. Petitioner explained that the equipment made him top heavy.

Petitioner's accident occurred during the day shift. On that day, Petitioner was performing a foot patrol on the south stairwell of Building D. He was near the top of the stairwell – two or three steps down, walking in middle of the stairs. He mis-stepped with his right foot, with his foot landing on the edge of the stair. His foot slipped, he started falling forward, and he reached out with his right hand for the rail to stop his fall. Petitioner testified that the upper half of his body started falling forward, down the stairs. Since he was walking in the middle of the stairwell, his right arm was outstretched as he grabbed the rail. He was able to stop his weight from falling down the stairs, but his shoulder was pushed to the back and right, which immediately caused pain in the front and back of his right shoulder. Petitioner's testimony is consistent with the November 16, 2017 Notice of Injury and the November 8, 2017 Supervisor's Report of Injury. (PX12)

The next time Petitioner used his shoulder was later that day when he pushed an office chair. He felt a sharp pain that ran from his shoulder down his arm.

Petitioner sought care at the Veterans Administration Medical Center at Jefferson Barracks in St. Louis, MO. (PX 1) On April 19, 2018, Dr. Gary A. Miller, an orthopedic staff physician, noted that Petitioner had complaints of pain shooting down the arm and pain with movement. Petitioner had been taking Aleve and Tylenol. The pain radiated to the forearm with numbness and tingling. Petitioner described it as "nerve" pain. Petitioner reported having difficulty fastening his bulletproof vest. He had one physical therapy visit at the VA. (PX1, 7). Dr. Miller recommended physical therapy and an MRI of the neck and shoulder.

On April 27, 2018, the shoulder MRI revealed a partial-thickness undersurface tear of the infraspinatus tendon, slightly greater than 50%. The MRI also showed mild supraspinatus tendinopathy. MRI also showed an abnormal labral shape and signal superiorly suspicious for labral tear. (PX1, 5) On May 24, 2018, Petitioner underwent a steroid injection into his right shoulder. (PX1, 2)

After receiving the results of the MRI, Petitioner sought the care of Dr. Dennis Dusek, an orthopedic surgeon. (PX5) Dr. Dusek took a detailed history of Petitioner's right shoulder complaints and history of injury. Petitioner reported that, after his foot slipped on the steps, he grabbed the railing on the right with his right hand as he fell forward and felt a loud pop in his right shoulder. About an hour later, he pushed a chair and felt a second pop and has continued experiencing increasing pain since then. Petitioner has taken Meloxicam 15.0 mg daily.

On physical exam, Dr. Dusek noted active forward flexion to 135 degrees with pain, external rotation is 60 degrees. Dr. Dusek noted that Petitioner had a "Popeye sign" on the right indicative of rupture of the long head of the biceps tendon. There was a palpable cleft above the long head of the biceps on the right that was not palpable on the left. X-rays were taken and reviewed. (PX5, 4)

Dr. Dusek concluded that Petitioner apparently had a previous adhesive capsulitis that had essentially resolved. Petitioner also had a new finding of the long head biceps tendon rupture and partial thickness tear of the infraspinatus muscle. Dr. Dusek wanted a repeat MRI for a second opinion with respect to Petitioner's shoulder pathology. Dr. Dusek noted that he would not repair the long head biceps rupture. Finally, Dr. Dusek noted that: "[i]t is reasonable that a fall down the stairs with a sudden jerk on the arm would have caused both the long head biceps rupture and a partial thickness infraspinatus tendon rupture." (PX5, 4)

On July 9, 2018, the MRI revealed a large labral tear involving the superior, anterior and inferior margins with fraying; no full thickness rotator cuff tear, although there was an undersurface partial tear of the supraspinatus tendon; and probable long standing complete or high-grade partial tear of the long head of the biceps. (PX6)

On July 10, 2018, Dr. Dusek noted that the right shoulder MR arthrogram confirmed the long head biceps rupture to the right shoulder. Dr. Dusek recommended arthroscopic surgery, which would include a debridement of the labrum tear and very likely a PASTA rotator cuff repair of the supraspinatus tendon with subacromial decompression. Dr. Dusek noted that Petitioner may also require a debridement of the biceps tendon stump. Dr. Dusek concluded by noting: "[t]he causation issue appears to implicate this fall at his place of employment."

On July 27, 2018, Petitioner underwent surgery, consisting of a right shoulder arthroscopic shaving of the glenal labrum, subacromial decompression, and shaving of the calcium deposit of the rotator cuff. (PX8) Dr. Dusek noted that he found a type III labral tear superiorly, which was a small bucket handle variety. The biceps that had ruptured during Petitioner's work injury was not visible at all. In fact, it had ruptured right off at the labrum itself, causing the labral tear. After examining the undersurface of the supraspinatus tendon insertion, Dr. Dusek did not see a significant rotator cuff tear.

On August 3, 2018, Dr. Dusek noted that Petitioner was up to 120 degrees on the CPM machine and his pain level was generally down to what it had been preop. Petitioner exhibited some bruising over the front of the shoulder consistent with his arthroscopic surgery. Dr. Dusek recommended that he begin physical therapy and restricted him from all work, as he was taking narcotics for his pain. Petitioner performed his physical therapy at Apex Network Physical Therapy. (PX9)

On September 5, 2018, Dr. Dusek noted that Petitioner's shoulder remained pretty sore and he feels sparks of pain shooting down to his forearm, elbow, hand and wrist at times, which is not unusual for a resolving shoulder surgery. Dr. Dusek prescribed a refill for Percocet due to Petitioner's continued pain complaints. Dr. Dusek further altered his work restrictions to allow Petitioner to work with one arm duty, if available. Dr. Dusek also recommended continued physical therapy.

Dr. Dusek testified on behalf of Petitioner via evidence deposition. (PX10) Dr. Dusek explained that the long head biceps tendon rupture was something he identified himself on clinical exam and therefore, he wanted Petitioner to obtain the second opinion MRI. (PX10, 11) Dr. Dusek opined that the pop that Petitioner described at the time of the accident was the rupture of the biceps tendon. (PX10, 15) Dr. Dusek opined that the superior labral tear found during surgery was part of the rupture of the biceps. (PX10, 20) "In my opinion, that was clearly caused by the fall down the stairs." (PX10, 20) As for the bursitis, Dr. Dusek opined that "it was materially aggravated by the fall down the stairs." (PX10, 20) In other words, the bursitis was a condition that may have been preexisting, but the workplace injury was a factor in aggravating the condition, causing it to be symptomatic. (PX10, 21)

Dr. Dusek further testified regarding his last visit with Petitioner on October 19, 2018. (PX10, 22) Dr. Dusek noted that, as of this last visit, Petitioner was only a little bit better than before surgery. He was still taking Meloxicam, which had been prescribed to reduce the post-operative inflammation. The physical therapy notes and his physical exam both showed that Petitioner could flex only to about 120 degrees. Dr. Dusek gave Petitioner a cortisone injection to his subacromial space to help calm down the shoulder. Dr. Dusek also prescribed Restoril to help with his sleep at night and refilled his Percocet prescription. Dr. Dusek continued the one arm duty restrictions, with no lifting more than 15 pounds with both arms, no overhead work, and no vigorous training exercises. The next appointment was to be in six weeks. (PX10, 23) Dr. Dusek further testified that all the treatment that he performed was

reasonable and necessary to treat the conditions caused by the accident and that all of his bills for services were reasonable and customary in amount. (PX10, 25)

Petitioner testified regarding his current condition, which was consistent with Dr. Dusek's medical chart. Respondent did not present any witnesses or arbitration exhibits.

CONCLUSIONS OF LAW

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

The Arbitrator concludes that Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent. In this case, the disputed issue is whether Petitioner's injury "arose out of" his employment. A claimant's injury arises out of his or her employment if the origin of the injury "is in some risk connected with or incident to the employment, so that there is a causal connection between the employment and the accidental injury." *Saunders v. Industrial Comm'n*, 727 N.E.2d 247, 250 (Ill. 2000). "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling" the employee's duties. *Orsini v. Industrial Comm'n*, 509 N.E.2d 1005, 1008 (Ill. 1987). Put another way, for an injury to arise out of the employment, "the risk of injury must be a risk peculiar to the work." *Id.* at 1009.

There are three general types of risks to which an employee may be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Metropolitan Water Reclamation Dist. Of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 944 N.E.2d 800, 804 (1st Dist. 2011).

In this case, Petitioner's injury arose out of an employment-related risk and is compensable. Petitioner was injured while performing his job duties, i.e., traversing stairs on patrol while wearing 25 lbs. of equipment. The record unequivocally shows that Petitioner was performing an act that the Respondent not only reasonably expected him to perform, but also was a mandatory requirement of his job. As such, this case is like *Young v. Illinois Workers' Compensation Comm'n*, 13 N.E.3d 1251 (4th Dist. 2014). In that case, the claimant was injured while performing his job duties, i.e., inspecting parts that were contained within a box. The claimant had to "bend over into the box" and "reach down deep into it to retrieve" the last item for inspection. As the claimant reached into the box, he felt a "pop" in his left shoulder. The Commission denied benefits, finding that the mere act of reaching down for an item was not a risk beyond what he would experience as a normal activity of living. The Appellate Court reversed, noting as follows:

> [W]hen a claimant is injured due to an employment-related risk – a risk distinctly associated with his or her employment – it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. A neutral risk has no employment-related characteristics. Where a risk is distinctly associated with a claimant's employment, it is not a neutral risk. Under the facts presented, the risk to which claimant was exposed had employment-related characteristics.

Id. at 1258.

Like in *Young*, the risk of Petitioner mis-stepping and losing his balance while wearing his equipment had employment-related characteristics and, therefore, is compensable.

Knox County YMCA v. Industrial Commission, 725 N.E.2d 759 (3d Dist. 2000), is also instructive. In *Knox*, the worker fell on stairs while leaving a mandatory CPR class. The worker was carrying a soft drink in one hand and a purse in the other, both of which she would not have had absent the mandatory CPR class. The court found that these items increased the risk to claimant, since she was unable to grab onto the stairwell's railing. Respondent, however, argued that there was no evidence that the presence of the soft drink or purse increased the risk of accident. The Court rejected this argument, noting that reasonable inferences from the record may be made, including the inference that the presence of the items blocked the worker's view or caused the worker to lose her balance. *Id.* at 763.

Like in *Knox*, Petitioner was performing a mandatory requirement of his job while wearing mandated equipment that could easily have obstructed his view of the steps or caused him to lose his balance once he missed the step. In addition, Petitioner's right shoulder bore the weight of his body and the extra equipment, which directly led to the traumatic injury in this case.

This result does not change under a neutral risk analysis. Courts have held that falling while traversing stairs is a neutral risk for some workers. *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 3 N.E.3d 885, 890 (2d Dist. 2013). "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the act only where the employee was exposed to the risk to a greater degree than the general public." *Metropolitan Water*, 944 N.E.2d at 804. The increased risk in question "may be either qualitative, such as some aspect of the employment which contributed to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Id.*

In this case, for the reasons set forth above, Petitioner was exposed to a qualitative increased risk, since some aspect of his employment - the added weight, limited mobility, and restricted vision caused by his duty belt and vest - contributed to the risk of mis-stepping while walking down the stairwell.

Petitioner was also exposed to a quantitative increased risk. If a worker is exposed to a common risk more frequently than the general public, the injury arises out of the employment and is compensable. *Rund v. Illinois Workers' Compensation Comm'n*, 2018 IL App(4th) 170054 WCU (January 26, 2018), 16. In *Rund*, for example, a nurse suffered injuries after falling downstairs. She testified that, on an average day, she would traverse the stairs "probably 10-15 times." *Id.* at 5. The Court found that there was no basis in the record, or in common sense, for the proposition that members of the general public traversed the stairs 10-15 times per day, noting as follows:

> To the contrary, there's only one reasonable inference to be drawn from the undisputed facts relevant to the claimant's quantitative – increased risk argument: the claimant was exposed to a common risk . . . more frequently than the general public, and therefore her injury arose out of her employment and was compensable. Whether there was a defect in the stairs "is irrelevant to the issue where the claimant was exposed to a common risk – that of falling while engaging in the everyday activity of traversing stairs – more *frequently* than the general public…"

Id. at 16. (emphasis added, italics in original)

In this case, Petitioner was exposed to the risk of mis-stepping on stairs while on foot patrol double the amount found significant in *Rund*.

This case is also similar to *Village of Villa Park*, where a village community services officer fell walking down a stairwell to the locker room. 3 N.E.3d at 887. The officer reported that his right knee "gave out." The evidence established that the officer was required to traverse the stairs in the police

station a minimum of six times per day. As such, "the frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis from that to which the general public is exposed." *Id.* at 891. In the case at hand, Petitioner was required to traverse stairs at a greater rate than in *Villa Park* and, in addition, there is evidence that the equipment on his person increased the risk of injury.

In summary, Petitioner's injury is compensable for the following reasons: (1) Petitioner's injury arose out of an employment-related risk; (2) Petitioner was exposed to a qualitative increased risk; and (3) Petitioner was exposed to a quantitative increased risk.

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?**

There is no dispute regarding the medical treatment in this case. Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule (Section 8(a) and 8.2 of the Act) as follows:

Premier Care	$ 20,074.00
Old Tesson Surgery Center	7,550.00
ApexNetwork Physical Therapy	9,111.00
TOTAL	**$ 36,735.00**

Issue K: **Is Petitioner entitled to prospective care?**

There is no dispute as to medical causation. Petitioner is still under treatment for his right shoulder. Respondent shall approve and pay for this treatment.

Issue L: **What temporary benefits are in dispute?**

Respondent only disputed liability for TTD on the grounds of accident. Given the Arbitrator's conclusion on accident, Respondent shall pay temporary total disability benefits at the rate of $855.68 per week for the period July 27, 2018 to December 20, 2018, representing 20 6/7 weeks, as provided in Section 8(b) of the Act.

Arbitrator Edward Lee

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

Hugo Guzman,

Petitioner,

vs. No. 15 WC 14097

Valle's Produce,

19IWCC0679

Respondent.

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on Respondent's and Petitioner's Petitions for Review of the Corrected Arbitration Decision issued on March 2, 2018. Notice was given to all parties, briefs were filed and Oral Arguments were heard on October 17, 2019. For the reasons stated below, the Commission vacates the Arbitrator's March 2, 2018 Corrected Decision; finds it has no jurisdiction to review the Arbitrator's initial decision of February 7, 2018, and dismisses the parties' Petitions for Review.

Petitioner filed a timely Application for Adjustment of Claim which alleged a March 31, 2015 work accident. The claim was tried before the Arbitrator on October 24, 2017 and November 27, 2017. On February 7, 2018, the Arbitrator issued his initial Arbitration Decision, in which he expressly concluded that Petitioner's spontaneous *(sic)* pneumothorax, "was caused by the lifting of the forty pound boxes of meat while at work on 3/21/15." The Arbitrator adopted Dr. Joob's opinion that Petitioner's condition was caused by his lifting boxes at work, and found Dr. Joob's opinion more persuasive than the opposite opinion of Respondent's Section 12 expert. The Arbitrator ordered Respondent to pay Petitioner 11-4/7 weeks of temporary total disability benefits at a rate of $220.00/week, and $46,561.00 for reasonable and necessary medical services and bills. No permanency was awarded.

Of note, the Arbitrator's February 7, 2018 decision contained two clerical errors. The Arbitrator indicated Petitioner *did not* sustain an accident which arose out of and in the course of his employment, and, that Petitioner's current condition of ill-being *was not* causally related to his accident. A reading of the entire decision consisting of the Order and Addendum, however, makes clear that the Arbitrator's intention was to find that Petitioner proved both that he sustained an injury which arose out of and in the course of a work accident on March 31, 2017, and that his condition of ill-being – a pneumothorax – was caused by that accident.

The parties, at oral arguments, indicated that they spoke to the Arbitrator about the errors shortly after receiving the February 7, 2018 decision. However, neither party filed a Section 19(f) motion to correct a clerical error. The Arbitrator issued a belated Corrected Decision on March 2, 2018. In it, he corrected his findings to reflect that Petitioner *did* sustain an accident which arose out of and in the course of his employment, and that Petitioner's current condition of ill-being *was* causally related to his work accident. The Arbitrator did not alter his previous awards of temporary total disability and medical expenses as reflected in the Addendum nor did he award any permanency for Petitioner's injury.

The parties filed Cross-Petitions for Review of the Arbitrator's March 2, 2018 Corrected Decision. Respondent filed its Petition on March 26, 2018, and Petitioner filed his on March 27, 2018.

Section 19(f) of the Act states, in pertinent part,

> "the Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision. Where such correction is made the time for review herein specified shall begin to run from the date of the receipt of the corrected award or decision."

Because neither party filed a motion to correct the Arbitrator's February 7, 2018 decision and the Arbitrator did not recall it or issue the Corrected Decision within 15 days as prescribed by Section 19(f), the March 2, 2018 Corrected Decision is void.

Furthermore, Section 19(b) of the Act requires a party seeking review of an Arbitrator's decision to file a Petition for Review within 30 days of their receipt of the decision. In this case, the parties filed their Petitions for Review more than 30 days after receipt of the Arbitrator's February 7, 2018 decision. Therefore, the February 7, 2018 Arbitration Decision – from which neither party filed a timely review – is now a final order that orders Respondent pay Petitioner 11-4/7 weeks of temporary total disability benefits and $46,561.00 for medical expenses. The Commission does not have jurisdiction to consider the Parties' Petitions for Review.

19IWCC0679

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator issued on March 2, 2018 is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that the parties' Petitions for Review filed in this matter are dismissed.

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.

DEC 13 2019

DATED:
o-10-17-19
MP/mcp
68

Marc Parker

Deborah L. Simpson

Barbara N. Flores

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

GUZMAN, HUGO
Employee/Petitioner

Case# **15WC014097**

VALLE'S PRODUCE
Employer/Respondent

19IWCC0679

On 3/2/2018, 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 1.83% 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:

2675 COVEN LAW GROUP
MARK J SCHECTHER
180 N LASALLE ST SUITE 3650
CHICAGO, IL 60601

0507 RUSIN & MACIOROWSKI LTD
EVAN KLUG
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

HUGO GUZMAN
Employee/Petitioner

v.

VALLE'S PRODUCE
Employer/Respondent

Case # **15** WC **14097**

Consolidated cases: _____

19IWCC0679

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 **11/27/2017**. 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 **3/31/2015**, 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 $**1,072.50**; the average weekly wage was $**268.12**.

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

Respondent shall pay the Petitioner and his attorney permanent partial disability in the sum of zero weeks as the Petitioner sustained no permanent partial disability. The AMA evaluation is adopted herein.

Respondent shall pay the Petitioner and his attorney temporary total disability benefits of $220.00 week for 11& 4/7th weeks , commencing 4/2/15 thru 6/21/15, as provided in section 8b of the Act, as amended. Respondent shall pay Petitioner and his attorney the TTD that have accrued from 3/31/15 thru current date, and shall pay the remainder of the award , if any , in weekly payments. No credits for any TTD paid.

Respondent shall pay to the Petitioner and his attorney the sum of $46,561.00, as shown under section 8.2 as provided in Section 8a of the Act. The reasonable and necessary services and bills to be paid to Petitioner and his attorney per the medical fee schedule are $45,430.00 for for Advocate Trinity bills, $758.00 for bills of Dr. Patrick Malik, and $373.00 for bills of Dr.Gregorio R.Aglipay as per 8a and 8.2 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 **AMENDED 03/02/2018**

MAR 2 - 2018

HUGO GUZMAN V. VALLES' PRODUCE
IWCC NO: 15 WC 14097

STATEMENT OF FACTS

Petitioner testified through an interpreter that on 3/31/15 he was employed by Respondent Valles' Produce. Petitioner testified that he worked in the meat department. He testified that he worked forty hours per week, plus some overtime. He testified that his hours were generally from one in the afternoon until nine at night. He testified that his duties included handling and preparing the meat for sale to customers. Petitioner testified that on 3/31/15 an order of meat weighing about forty pounds in two boxes was received. Petitioner testified that he was lifting the boxes of meat with the intention of placing them in the back of the butcher shop. Petitioner testified that as he lifted the boxes he felt a "pop" and pain on the right side of his chest. He testified that his face became warm and he felt like passing out. He testified that he dropped the boxes and while doing so they struck the right side of his chest as they fell to the floor. Petitioner testified that he fell to the floor, experiencing pain to his right chest and shortness of breath. He testified that he was assisted by his supervisor named "Chuy", who called an ambulance. Petitioner testified that he had never injured his right chest or lungs before or since the accident, nor was he a smoker.

Petitioner testified that he was taken by ambulance to Advocate Trinity Hospital, but went home because he had no money or insurance to pay for the hospital bill. Petitioner testified that he went home, still experiencing pain to his right chest and shortness of breath.

Petitioner testified that he remained off work. As his pain and breathing worsened, he returned to Trinity Hospital. (Pet. Ex. #1). Petitioner testified that he was admitted to the hospital on 4/7/15 with complaints of flank and rib pain. According to the emergency room documentation: "patient states lifting boxes at work last week, heard a pop now pain to the right flank area. Pain increased with pain upon respiration". Examination revealed a right-sided spontaneous pneumothorax. A chest tube was inserted into the right side of his chest. Petitioner testified that he remained in the hospital. According to hospital records, Petitioner was discharged on 4/18/15 following removal of the chest tube.

Petitioner testified that he received a bill from Advocate Trinity Hospital for $45,430.00 (Pet. Ex. #2) for the above treatment and that the bill remained unpaid. He also testified to receiving bills

from Dr. Patrick Malik in the amount of $758.00 (Pet. Ex. #6) and from Dr. Gregorio Aglipay in the amount of $373.00, respectively, both of which remain unpaid.

Petitioner testified that he received follow-up treatment at Chicago Family Health Center (Pet. Ex. #3) on 4/23/15, with complaints of pneumothorax and shortness of breath. Petitioner stated that he felt better but still had right rib pain and shortness of breath. The note stated that the accident occurred on 3/21/15 at work at which time he fractured a right rib and also sustained pneumothorax. The report also listed his name as Hugo Bustos. Petitioner testified that both were in error and that he attempted to get them corrected. The examination noted tender right lateral ribs and a healing chest tube scar. He described his pain as being 4/10. Ibuprofen 800 was prescribed for pain.

Petitioner returned to Chicago Family Health Center on 5/7/17 with continued complaints of rib pain and inability to sleep due to the pain. The ibuprofen was not helping. He described his pain as 6/10. Petitioner's medication was changed to acetaminophen and 300 mg codeine. The report noted clarification of an accident date of 3/31/15, not 3/21.

Petitioner's final visit was on 5/21/15. Petitioner's pain scale remained at 6/10. He was instructed to continue taking pain medication and to remain off work one more month. Petitioner was released to return to work on 6/21/15

Petitioner testified that he never returned to work for Respondent because they did not want him back. Petitioner found work as an electrician.

Petitioner testified that he still experiences pain in his right chest as a result of the placement of the breathing tube. He also complains of breathing problems while working, especially in cold weather. Petitioner testified that played soccer before the accident in question but is no longer able to do so due to shortness of breath. Petitioner testified that he is no longer able to jog as a result of the accident due to shortness of breath.

At Respondent's request, Petitioner was examined by Liana Gavrilov Palacci 9/29/15 (Resp. Ex. #1). Dr. Palacci opined the Petitioner sustained a spontaneous pneumothorax that could not have occurred from the mechanism as described by Petitioner and that it had no relationship with a work-related injury.

At the request of Petitioner, Petitioner's medical records were reviewed by Dr. Axel Joob. Dr. Joob opined that there was a correlation between the pneumothorax and lifting and that there

was immediate pain associated with the lifting with a subsequent finding of pneumothorax. Dr. Joob believed that there was no question that the pneumothorax occurred at the time of Petitioner lifting, exactly at the same time he developed symptoms consistent with pneumothorax which includes chest wall pain and shortness of breath. Dr. Joob went on to state that while pneumothorax from lifting was unusual, it was not unheard of.

CONCLUSIONS OF LAW

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

In determining whether Petitioner sustained an accident injury while in the course of his employment, the Arbitrator takes into consideration Petitioner's testimony and supporting medical evidence. Notice was not in dispute.

Petitioner testified through a translator on 3/31/15 he was working as an employee of Respondent, Valles' meat department. He testified that his duties consisted of handling and preparing meat for customers. Petitioner's unrebutted testimony was that prior to 3/31/15 Petitioner had no health issues of any kind and was able to work until the time of the accident. Petitioner testified that he had no physical problems with his lungs or chest prior to the accident. On that date, he was lifting two boxes of meat at work that weighed a total of approximately forty pounds, onto a shelf, when he felt a pop on the right side of his chest. He immediately dropped the boxes, which struck him on his chest as they dropped to the ground. Petitioner testified that he fell to the ground, experiencing pain to the right side of his chest and difficulty breathing. Petitioner testified that he notified his immediate supervisor, "Chuy", who called an ambulance. Petitioner testified that he was taken by ambulance to Advocate Trinity Hospital but decided to leave, concerned that he would have no money to pay for treatment. He testified that he went home. He testified that he returned to the hospital approximately seven days later when the pain in his right chest worsened. This is corroborated by the Advocate Trinity records, (Pet. Ex. #1). Thereafter he went to Chicago Family Health Center and was treated for pneumothorax, (Pet. Ex. #3). Evidently the right-sided chest pain from the boxes striking Petitioner's chest and the subsequent placing of a chest tube was mistaken for fractured ribs.

Upon cross-examination of Petitioner, Respondent inquired as to the inconsistences in the accident dates in the medical records from Chicago Family Health Center, which initially listed

the accident date on 3/21/15, not 3/31/15 and that his last name was listed as Bustos, not Guzman. Petitioner testified that those were errors that he brought to the attention of the heath center, which were ultimately corrected. With respect to the conflicting accident dates, the Arbitrator takes notice of his inability to speak English, which could have contributed to the confusion, along with the fact that there was no proof of any kind showing that Petitioner exhibited any of the symptoms of someone with a lung related injury prior to the 3/31/15 accident date.

The Arbitrator takes note of other inconsistencies in the records from Chicago Family Health center, namely that Petitioner sustained rib fractures, even though no diagnostics in the record corroborating that diagnosis, along with the statement in those records indicating that Petitioner spoke fluent English, such as the statements in the that Petitioner sustaining rib fractures, where no x-rays were taken showing fractures. The Arbitrator finds that the inconsistencies were inconsequential thus non -determinative of the issue -especially since Petitioner spoke little English and required an interpreter, in establishing accident, since the records from Advocate Trinity Hospital were replete with statements from Petitioner that he sustained an injury while lifting boxes weighing forty pounds when the accident occurred.

The Arbitrator also takes note of the fact that Respondent did not dispute notice, conceding that something occurred to Petitioner while at work on 3/31/15, nor did Respondent produce any witnesses, including Petitioner's supervisor on the date of accident. Whether or not "that something" occurred was caused by his work-related activities, is addressed below.

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

The Arbitrator finds that Petitioner's condition of ill-being consisted of a spontaneous pneumothorax caused by the lifting of the forty pound boxes of meat while at work on 3/31/15. In support thereof, the Arbitrator finds that the opinions of Dr. Axel Joob (Pet. Ex's 3,4) are more persuasive than those of Liana Gavrilov Palacci, D.O. (Res. Ex. #1). The Arbitrator notes that Petitioner's medical evidence, along with Petitioner's testimony show that Petitioner had no preexisting problems with his lungs, and predisposition for a spontaneous pneumothorax.

Upon review of the medical evidence presented, including the opinions of Liana and Dr. Axel Joob, (Pet. Ex's #3,4) the Arbitrator find the opinions of Dr. Joob to be more persuasive and adopted in the case at bar.

In her 9/29/15 report, Dr. Palacci, a specialist in internal medical opined that there was no causal connection between his spontaneous pneumothorax and his 3/31/15 work activities. While acknowledging that Petitioner had no history or radiological studies to suggest any underlying lung disease, his spontaneous pneumothorax "was likely an isolated event with no relationship to exertion". She based her opinions, for the most part, upon medical articles, rather than as a specialist engaged in the practice of pulmonary medicine. based her opinion on several articles suggesting that spontaneous pneumothorax suggested that it had no relationship to muscle effort and that for the majority of patients "it was an isolated event and was neither familial nor fatal and most commonly occurred in the absence of a history of exertion or of clinical evidence of concurrent respiratory disease". Another article relied upon by Dr. Palacci was *UptoDate*, noted that a primary pneumothorax is a pneumothorax that occurs without a precipitation event in one who has no clinical evidence of any lung disease and that it occurs in individuals, usually at rested are typically in their twenties.

On the other hand, Dr. Joob, a specialist in thoracic surgery, particularly in diseases of the chest or mediastinum, testified that he has treated approximately twenty to thirty pneumothorax cases per year over the last twenty-eight years. (Pet. Ex. #4, p.14). In his 2/24/16 report, (Pet. Ex. #5, p. 2), Dr. Joob believed that there was no question that the pneumothorax occurred as a result of Petitioner lifting those boxes, exactly at the same time he developed symptoms consistent with pneumothorax, which included chest wall pain and shortness of breath. Dr. Joob went on to state that while pneumothorax from lifting was unusual, it was not unheard of. According to Dr. Joob: "In conclusion as there are no other symptoms or history which would suggest an etiology of this pneumothorax it must be associated with the lifting of boxes", (Pet. Ex. #5, p.2). opined that Petitioner's pneumothorax was causally related to the 3/31/15 lifting event at work. Dr. Joob described a pneumothorax as "basically air that escapes into the chest cavity of some cause". (Pet. Ex. #4, p.10). It was Dr. Joob's opinion that, while rare, lifting can be a cause of the pneumothorax that Petitioner developed, (Pet. Ex. #4, p. 26). It was also his opinion that the popping sound that Petitioner noticed at the time of the event was "something in his costal cartilage" (Pet. Ex. 4, p. 26), akin to breaking one's knuckles.

In response to other opinions that the onset of Petitioner's pneumothorax was purely coincidental, Dr. Joob replied what while it's possible, "...the only logical explanation is that

something happened when he lifted, and then we found that he had something that could explain his right-sided chest pain and that it was this pneumothorax", (Pet. Ex. 4, pp. 27, 28).

With respect to Petitioner's waiting seven days to seek treatment, Dr. Joob believed that a moderate, or 30% pneumothorax, and were otherwise healthy, one could tolerate a pneumothorax of that size. (Pet. Ex. #4, p.15). Taking pain medication like ibuprofen, Aleve and Tylenol that Petitioner took during the first seven days would help to deal with the pain. (Pet. Ex. #4, p. 16). It is clear that as Petitioner's conditioned worsened, he required emergency care and the insertion of a chest tube.

(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 the medical treatment provided to Petitioner at Advocate Trinity Hospital and the medical expenses associated with that treatment in the amount of $45,430.00 are reasonable and necessary. Petitioner testified that he received bills from Advocate Trinity Hospital totaling approximately $45,000.00, which were verified by his identification of the bills he received from Trinity Advocate in the total amount of $45,430.00, as contained in Petitioner's Exhibit #2. Petitioner testified that to the best of his knowledge the bills remained unpaid

The bills are corroborated by the Advocate Trinity Hospital records (Pet. Ex. #1) along with Petitioner 's testimony that he went to Advocate Trinity when his chest pain and breathing worsened, ultimately requiring emergency medical attention at the hospital. According to the records from Advocate Trinity Hospital, Petitioner was admitted on 4/7/15 for spontaneous pneumothorax and remained there through 4/18/15. A chest tube was inserted on the right side of his chest to re-inflate the right lung. He remained in the hospital until his condition stabilized and the chest tube was removed.

The Arbitrator finds the bill from Dr. Patrick Malik in the amount of $758.00, (Pet. Ex. # 6) for medical care while Petitioner was at Advocate Trinity Hospital, to be reasonable and necessary and is supported by the Advocate Trinity Hospital Medical records.

The Arbitrator finds the bill from Dr. Gregorio R. Aglipay in the amount of $373.00 for initial hospital care, (Pet. Ex. #7) is reasonable and necessary and supported by the Advocate

Trinity Hospital records, (Pet. Ex. #1) which show that Dr. Aglipay provided care to Petitioner while he was at the at the hospital.

(G) What were Petitioner's earnings?

Petitioner testified that he worked for Respondent forty hours a week at $8.50/hr. Petitioner worked for Respondent for four weeks. Respondent's records reveal that Petitioner earned a total of $1,072.50 over a four week period, giving him an average weekly wage of $268.12.

(K) What temporary benefits are in dispute?

The Arbitrator find that Petitioner is entitled to temporary total disability from 4/2/15 through 6/21/15. In support thereof, the Arbitrator finds the following:

Petitioner testified that he returned to work for Respondent for a couple of days, until his right-sided pain and shortness of breath increased. On 5/7/15 Petitioner was admitted to Advocate Trinity Hospital and remained there through 4/18/15. He was thereafter seen at Chicago Family Health Center, (Pet. Ex. #3), by Dr. Barry T. Daughtry with complaints of right-sided chest pain and shortness of breath. Petitioner continued to see Dr. Daughtry until 6/21/15 when he was released to return to work. Petitioner testified that he did not return to work for Respondent upon his release to return to work.

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

In determining permanent partial disability, the Arbitrator takes into consideration the five factors set forth in Section 8.1b of the Act:

With regard to subsection (i) of Section 8.1b, the Arbitrator notes the impairment rating of Dr. Liana Gavrilov Palacci (Resp. Ex. #1) of a whole person impairment of 0%. Dr. Palacci noted that there is no specific rating for the category of pneumothorax in the *AMA Guides to the Evaluation of Permanent Impairment Sixth Edition Guides*.

As a result of the foregoing, Dr. Palacci used the Criteria for Rating Permanent Impairment due to Pulmonary Dysfunction to rate a general pulmonary condition. Given the overall findings of the treating doctors plus the rating for a general pulmonary condition with the petitioner working

at the time of testimony, the Arbitrator gives this factor the greatest, primary weight in this particular case at bar.

With respect to subsection (ii) of Section 8.1b, the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a stock clerk for Respondent and was able to return to work in that capacity, however he testified that Respondent refused to take him back. Petitioner testified that he is currently working as an electrician. Because Petitioner is currently working, the Arbitrator therefore gives no weight to this factor.

With respect to subsection (iii) of Section 8.1b, the Arbitrator notes that Petitioner was 19 years old at the time of the accident. Petitioner has a long work-life ahead of him perhaps as an electrician, the records contain no other injury related condition impacting the short term lung collapse.no weight to this factor.

With respect to subsection (iv) of Section 8.1b, Petitioner's future earning capacity, no evidence was submitted indicating a diminution of Petitioner's earning capacity, the Arbitrator gives no weight to this factor.

With respect to subsection (v) of Section 8.1b, evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner sustained a pneumothorax to his right lung as a result of the 3/31/15 accident. He received emergency care at Advocate Trinity Hospital, consisting of the placement and repositioning of a chest tube to inflate his right lung. Thereafter Petitioner continues to experience pain to the right side of his chest, along with shortness of breath. Petitioner testified that he still experiences shortness of breath, especially in cold weather, affecting his ability to work outdoors. Petitioner's continued right-sided chest pain in corroborated by the testimony of Dr. Axel Joob, who opined that the pain comes from the chest tube and the manipulations of the tube. Dr. Joob also stated that in his years of practice he observed that some patients would develop an intercostal neuralgia-pain from the nerve associated with the rib just from having a chest tube. The Arbitrator finds this opinion speculative on any future disability established in the evidence. No weight is given to this factor.

Based on the totality of the evidence, the Arbitrator finds that Petitioner sustained a loss of zero per cent disability under 8(d-2) of the Act. The Arbitrator adopts the AMA rating herein.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☒ 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

ANDREA TYLER,

Petitioner,

vs. NO: 16 WC 38528

AUREUS MEDICAL GROUP,

Respondent.

19IWCC0680

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 jurisdiction, maintenance and vocational rehabilitation 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 June 4, 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.

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: DEC 16 2019
KAD/mav
O: 10/22/10
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

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

TYLER, ANDREA
Employee/Petitioner

Case# **16WC038528**

AUREUS MEDICAL GROUP
Employer/Respondent

19IWCC0680

On 6/4/2018, 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 2.03% 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:

0924 BLOCK KLUKAS & MANZELLA PC
MICHAEL D BLOCK
19 W JEFFERSON ST
JOLIET, IL 60432

1505 SLAVIN & SLAVIN LLC
ZARTOSHT KHODAVANDI
100 N LASALLE ST SUITE 2500
CHICAGO, IL 60602

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
19(b)

ANDREA TYLER
Employee/Petitioner

v.

AUREUS MEDICAL GROUP
Employer/Respondent

Case # **16** WC **38528**

Consolidated cases: _____

19IWCC0680

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 **Gregory Dollison**, Arbitrator of the Commission, in the city of **Ottawa, Illinois**, on **March 22, 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 **PETITION FOR VOCATIONAL REHABILITATION**

FINDINGS

On the date of accident, **02/23/16**, 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 $**72,800.00**; the average weekly wage was $**1,400.00**.

On the date of accident, Petitioner was **62** years of age, ***single*** 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 $**41,460.35** for TTD, $ for TPD, $ for maintenance, and $**15,000.00** for other benefits, for a total credit of $**56,460.35, per stipulation**.

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

ORDER

Respondent shall pay Petitioner maintenance benefits of $933.33/week for 56 weeks, commencing 2/24/17 through 3/22/18, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $933.33/week for 51.143 weeks, commencing 2/23/16 through 3/9/16 and 3/19/16 through 2/23/17, as provided in Section 8(b) 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.

Signature of Arbitrator

5/31/18
Date

ICArbDec19(b)

JUN 4 - 2018

Findings of Fact

Petitioner testified that on February 22, 2016 she appeared for work with no physical disabilities. On February 22, 2016, Petitioner was wearing scrubs as required by her employment position as a nurse. Petitioner testified that the pant legs of her scrubs got tangled up in a rolling chair wheel causing her to fall face first onto the ground. Petitioner testified that she immediately felt pain in her right shoulder and right knee as a result of her fall. Petitioner further testified that prior to her fall she had no right knee or right shoulder pain or problems. Petitioner received treatment at Memorial Hospital for a diagnosis of right shoulder pain and right knee strain. She was prescribed medication, placed in a knee immobilizer, instructed to remain non-weightbearing and referred to Dr. Thomas Akre, an orthopedic doctor. (PX 2)

Petitioner presented to Dr. Thomas Akre at Allied Bone and Joint on February 23, 2016. Dr. Akre's differential diagnosis was impingement syndrome; rotator cuff tear and right knee MCL sprain. The doctor recommended a right knee and right shoulder MRI. Petitioner was also placed on sedentary work status, walking or standing occasionally, and lifting 10 lbs. (PX 3)

Petitioner underwent the recommended right knee and right shoulder MRI on March 3, 3016. The right knee MRI revealed a grade 3 sprain (rupture) of the proximal MCL. The right shoulder MRI revealed a full thickness, large, retracted tear of the supraspinatus tendon. (PX 4)

Petitioner returned to Dr. Akre on March 8, 2016 with continuing right knee and shoulder complaints. The doctor assessed 1.) complete rotator cuff tear of the right shoulder and 2.) sprain of the medial collateral ligament of the right knee. Surgery was discussed consisting of right shoulder arthroscopic rotator cuff repair and biceps tenodesis vs superior capsular reconstruction. Dr. Akre released Petitioner to light/medium duty work consisting of 35 lb. maximum lifting, frequent lifting or carry up to 20lbs, no walking or standing to a significant degree, or sitting most of the time for six hour shifts. (PX 3) Petitioner testified that she attempted to work for Respondent from March 9, 2016 to March 18, 2016 but continued to have pain. On March 23, 2016, Dr. Akre scheduled surgery and authorized Petitioner off work. (PX 3)

On May 12, 2016, Petitioner came under the care of Dr. Sunil Dedhia of Orthopaedic Specialists of Northwest Indiana. Dr. Dedhia's impression was right shoulder rotator cuff tear and recommended Petitioner undergo surgical intervention. On June 3, 2016, Petitioner underwent surgery to repair her right shoulder rotator cuff tear. (PX 5A, PX 6, PX 6(a))

Petitioner continued to follow with Dr. Dedhia throughout the remainder of 2016 and the beginning of 2017. In addition to her treatment with Dr. Dedhia, Petitioner underwent continuous physical therapy for the remainder of 2016. On February 23, 2017, Dr. Dedhia opined that Petitioner was at maximum medical improvement. The doctor ordered permanent restrictions consisting of no lifting over 15 lbs., no repetitive pushing, pulling, grasping, and no use above shoulder level. (PX 5A; PX 5B; PX 7; PX 7A) Petitioner testified that she received temporary total disability benefits through February 23, 2017.

Upon the request of Petitioner's counsel, Petitioner underwent a Section 12 examination with Dr. Anthony Romero of Midwest Orthopaedics at Rush on April 5, 2017. Dr. Romero opined that Petitioner's right shoulder condition of ill-being and need for surgical intervention was directly related to the work-related injury Petitioner suffered on February 22, 2016. Dr. Romero also agreed with Dr. Dedhia that Petitioner had reached maximum medical improvement and that the recommended permanent restrictions were appropriate. (PX 9)

Petitioner testified that she was unable to return to work and does not know of any operating room nurse position that would be able to accommodate her restrictions as operating room nurses are required to lift and maneuver patients; lift instrument trays weighing 15 pounds; lift patient tables; push and pull; and hang bags of saline overhead. Petitioner testified that she maintains minimal computer skills such as surfing the internet and checking her emails. Petitioner testified that when typing, she needs to look at the keyboard and "pecks" at the keyboard when typing.

On March 14, 2017, Petitioner notified Respondent of her request for vocational rehabilitation (PX 13A) Nothing thereafter happened until August 8, 2017, when a Labor Market Survey was prepared for Respondent by Mandeep Mudhar, a certified rehabilitation counselor. In his report, Mudhar noted that Petitioner had been a Staff/Charger nurse for the past 40 years. He documented Dr. Dedhia's restrictions of no lifting over 15 pounds, and no repetitive pushing, pulling or grasping and no use above the shoulder. Mr. Mudhar opined that based on Petitioner's work history, she would qualify for numerous occupations which would utilize her transferable skills as well as entry level opportunities available to persons with her background. Mr. Mudhar identified vocational goals that he opined were appropriate for Petitioner which included nurse consultant, Utilization Review Consultant, Order Control Clerk Blood Bank, Telephone Sales Representative, Customer Service clerk, Administrative Assistant, Medical Secretary, Medical Billing Clerk and Claims Adjuster. According to Mr. Mudhar, he identified eleven (11) employers with openings for positions identified as potential alternate employment for Petitioner. The wage range identified was approximately $23.17 - $44.98 and all the potential employers had openings within Petitioner's restrictions. (RX 7)

Petitioner testified that she was not aware that a Labor Market Survey was conducted until a couple of months later, when it was sent to her. She indicated that prior to receiving the Survey, she contacted and/or applied for approximately fifty (50) positions. (PX 14) None of the employers offered her employment. Petitioner testified that she did come close to obtaining one job, but the prospective employer hired from within. Petitioner also testified that she called all the potential employers on the survey without successfully obtaining employment.

At trial, Petitioner introduced the vocational report of Steven Blumenthal. (PX 12) Mr. Blumenthal performed a vocational rehabilitation assessment of Petitioner at the request of Petitioner's counsel. In documenting his report, Mr. Blumenthal interviewed Petitioner regarding her education, work history, and transferrable skills in addition to reviewing the work release from Dr. Dedhia, the Section 12 report of Dr. Romero, the June 3, 3016 operative report, and a labor market survey performed by Encore Unlimited. The work history obtained by Mr. Blumenthal bears out that Petitioner for most of her career was an operating room nurse or surgical nurse. In his summary, he noted that she was a 64 year old traveling operating room nurse unable to return to work status post right shoulder surgery with significant restrictions, including that Dr. Romeo limited her to the same restrictions as Dr. Dedhia, in sedentary work only. Mr. Blumenthal noted that Petitioner had not obtained any case management certifications, does not have work history in case management, and does not have any work experience or certification in utilization review noting she was not aware of what ICD or CPT meant (International Classification of Disease and Current Procedural Terminology), which is used in coding, claims, billing and related medical review positions. Nor does she have any formal work in quality assurance with any hospital. Mr. Blumenthal noted that although she had an Illinois license for 19 years, she let it lapse as she did not know she could continue working in the nursing field. However, she had kept up her continuing education units and would be able to have her RN license reissued by sending a letter with documentation of these credits and the money. Mr. Blumenthal opined that Petitioner was an excellent candidate for vocational rehabilitation services and clearly requires vocational rehabilitation counsel to develop a viable program to assist her to return to work. Specifically, in order to address more sedentary type work, he found she would require computer skills to upgrade her skills, including keyboarding, data entry, and use of Microsoft Office Word, Excel and Outlook. He noted Petitioner was motivated to complete this training. Mr. Blumenthal opined that after completion of computer skills updated training, she would benefit from job

readiness training and job placement assistance to obtain employment using her past work experience in an office-based setting. He noted that the program would take six to ten months at a projected cost of $18,000.00 to $25,000.00, depending on her post training skill levels, and the degree to which her age is negatively perceived by prospective employers. Her actual earning capacity would be determined by job placement services. Mr. Blumenthal was critical of the Labor Market Survey of Encore Unlimited, in pages 7 and 8 of his Report. Specifically, Mr. Blumenthal wrote, "This counselor reviewed the Labor Market Survey...and noted the following assumptions being made prior to the survey being completed on a blind basis (not meeting with Ms. Tyler and obtaining specific work history factual information including certifications held, actual job duties performed, and knowledge base)..."Mr. Blumenthal noted the analysis made assumptions that Petitioner was currently qualified to perform the vocational goals noted above. Mr. Blumenthal noted that Transferable Skills and Aptitude software programs only make comparisons of an individual's physical abilities based on accurate entering of work restrictions. He noted the software does not have the ability to enter information on not performing work overhead, the ability to address no repetitive pushing/pulling or restrictions on overhead lifting. He also felt it critical that the program only matches the individual's aptitude profile to different occupations having similar aptitude profiles but do not document that the individual has the appropriate training, work experience, certifications, licenses required by employers, or computer literacy skills. Mr. Blumenthal prepared an Illinois Workers' Compensation Commission Rehabilitation Plan, Petitioner's Exhibit 12(a), and noted his opinions were given within a reasonable vocational rehabilitation certainty, taking into account the tenets of the National Tea Case and his 38 years of experience. (PX 12) Petitioner testified that following this interview, she did follow Mr. Blumenthal's instructions and sent in for her license, but as of mid-March, the time of the trial, she was advised by the State that they were about three months behind and were working on the mid December applications for reinstatement.

On March 20, 2018, Mr. Mudhar authored a response to the comments proffered by My. Blumenthal. Mr. Mudhar provided "...the software program does generate a number of results which are then reviewed by the counselor. When identifying available employment opportunities, the counselor does not solely rely on program results. There are detailed work activities and the counselor uses his/her professional opinion when listing the vocational alternatives as an option for the IW. The counselor also uses professional judgment whe assessing training and education. It is also important to note the software program does consider past work experience..." Mr. Mudhar noted that he contacted prospective employers and discussed the requirements and qualifications of available positions. He added that the survey was developed with Petitioner's licensure in mind, indicating she had an active State of Indiana Nursing license which would allow her to attain a nursing position in Indiana. He further added that Petitioner could renew her RN licensure in Illinois with minimal effort. Lastly, Mr. Mudhar stated that work as a nurse in Illinois is available with the restrictions identified by her treating physician. (RX 8)

Petitioner testified that her right shoulder still irritate her and cause discomfort. Petitioner testified that she can no longer lift her grandson, who weighs approximately 20-25 lbs., or lift a gallon of water. She also provided that the shoulder freezes at inopportune times, indicating "you can't predict from hour to hour." Petitioner further testified that she was forced to apply early for social security disability and is receiving approximately $1,400.00 a month from social security.

In Support of the Arbitrator's Decision regarding "A", (whether the Respondent was operating under and subject to the Illinois Workers' Compensation Act), the Arbitrator finds the following:

On February 22, 2016, Petitioner was a 62-year-old operating room nurse, who was a "traveler." She would have her resume posted on line and receive calls from recruiters from staffing companies seeking to place her in specific job assignments. At all relevant times she was a resident of Lockport, Illinois. In addition, she paid income taxes and real estate taxes in Illinois and had previously worked as a traveler in Wisconsin, and in Zion and Springfield in Illinois. In January, 2016, she received a call from a man named Ben, who was a

recruiter for Respondent herein, which was located in Omaha Nebraska. He offered her an opportunity to work at Memorial Hospital in South Bend, Indiana, which she was inclined to accept. Following a competency test, Petitioner was passed from Ben, who was described as being in the "sales" department, to Aubrey Baker, who was one of 85 persons who worked for Respondent as an account manager. She handled Illinois and Indiana, and her duties entailed qualifying candidates to fit the needs of hospital requirements, as well recruiting nurses and techs to work for Aureus either on contract, short-term or even permanently, for a hospital (RX 9, p. 7) Petitioner then interviewed from her home by phone with Memorial Hospital. Thereafter, Ms. Baker sent Petitioner an employment contract by e-mail, which Petitioner accepted and signed electronically in Lockport, Illinois. (PX 1) With the exception of doing a criminal background check in Hammond, Indiana, everything Petitioner did as a prerequisite to reporting for work was done in Illinois. The last acts prerequisite to qualifying for the assignment were to have her bachelor's degree transcript e-mailed to the licensing authority, to sign a contract extension electronically from Lockport, (RX 9, p. 62), and then, upon issuance of the license, to e-mail Respondent to give notice she was licensed, which she did from Lockport, so Aureus could effect the assignment. (Id. pp. 61 – 62) Petitioner and Ms. Baker were the only two witnesses to testify in the case. Other than an attempt of Ms. Baker to interpret the Employment Contract (PX 1) as only an application for employment, the express language notwithstanding, their testimony was substantially consistent.

With respect to Ms. Baker, she testified it is not uncommon that as a national recruiting company for nurses that you (Aureus) hire a nurse in one State and give her an assignment in another State with enough time in-between so that she can do the things she needs to do, including the administerial things to get a license in the State of the assignment. (RX 9, p. 71) Likewise, she conceded that Petitioner's Exhibit 1, the "Conditions of Employment", an offer of employment, was presented to her in Illinois. (Id. P. 72) Similarly, she agreed that the language of the Contract was that of Aureus, which is electronically signed pursuant to a previous e-signature authorization. (Id. P. 46, RX 1) They can simply type out their name and hit submit, and the signature in electronic form has the legal effect as a handwritten signature (Id. p. 46). Ms. Baker cannot change any verbiage of the Contract except with respect to the assignment. (Id. pp. 47 – 48) At the time Petitioner signed the Contract, she had already been interviewed with the hospital and the hospital had decided to hire her through Aureus, which is what generated the document. (Id. p. 48)

Ms. Baker acknowledged that the very first line of the Contract, which was Exhibit 2 of the Deposition (PX 1 date of January 28, 2016), under Conditions and Terms of Employment starts by saying: "I understand that I am employee of Aureus Nursing, LLC, whose offices are located at 13609 California Street, Omaha, Nebraska, 68154 herein called Aureus." The next line reads "she (Petitioner) agrees to abide by the following terms and conditions." It was the witness' understanding that that agreement binds the signator to the assignment in question to Memorial South Bend. (RX 9, pp. 50 – 51)

There was language later in the Contract reaffirming that Petitioner was "an employee of Aureus working on temporary assignments, whether the assignments are for 4 hours up to 13 weeks or longer, or an indefinite time frame. I am not an employee of Aureus's client." (Id. p. 51) The language continued, "that at the time I (Petitioner) report for assignment at the client company, I will be prepared to produce evidence of my identity and the original credentials required for my assignment, i.e. State License, Certifications, Registration, etc." (Id. p. 52) As far as getting a License, it's an administrative matter, as long they don't have any "hits." (Id. p. 53) Had Petitioner not obtained an Indiana License, the witness could have placed her as an OR nurse in Illinois if there was an opening and she went through the interviewing and qualifying that candidates do (Id. p. 55)

The Contract also provided that for a period of one year after the end of the assignment, the nurse would be unable to accept a contract employment opportunity at this facility location other than through Aureus. Aureus will not refuse consent to such a contract employment opportunity so long as payment of a reasonable

conversion fee is made by the client company (Id. p. 55) Ms. Baker also testified that it was Aureus's language and that she was going to work under that document at that assignment (Id. p. 59)

Petitioner had also signed a modification, (Ex. 2A to the Baker deposition, RX 2), that reincorporated the original contract, but changed the assignment date from February 1st to February 15th, 2016, since Petitioner was not licensed by the original start date. On February 11, 2016, at 10:28 a.m., in referring to an Exhibit, Ms. Baker admitted that Petitioner sent her an e-mail that she (Petitioner) had talked to the Indiana Board and she was licensed in Indiana and that's what gave her the knowledge that Petitioner was able to go to the assignment, that Ms. Baker knew she had the last of the credentials to get her started, which was a day or two after she had signed digitally in Illinois the extension.

Petitioner's testimony was that she signed both PX 1, the original Employment Contract, and RX 2 or Baker Dep. Ex. 2A, the modification which moved the assignment date 15 days, from the public library in Lockport, Illinois, as her home had no Internet. The document incorporated the original contract. She also testified that the last act preliminary to obtaining the license was going to Lewis University in Romeoville and having them e-mail her bachelor's Degree records or transcript to Indiana, and that the last act to be able to go to the assignment was her e-mailing to Ms. Baker, that she was licensed in Indiana, so that she would have the knowledge necessary to allow her to start.

On Saturday, February 13th, Petitioner arranged for housing, having indicated in PX 1, that her permanent residence remained Lockport, Illinois, and drove to South Bend the next day, and started at Memorial Hospital February 15th. She initially did orientation for a week, and was paid as an employee starting then.

Section 1b of the Act allows for jurisdiction of the Illinois Workers' Compensation Commission three ways, one of which is if the employee is in the service of another "under any contract of hire expressed or implied, oral or written, including persons whose employment is outside of the State of Illinois where the Contract of Hire is made within the State of Illinois."

In *Mahoney v. Industrial Comm.*, 218 Ill. 2d 358 (2006) the Illinois Supreme Court overturned Appellate cases holding that the site of contract of hire was only one factor to determine Illinois jurisdiction. It held that the site of the Contract for Hire is the exclusive test for determining the applicability of the Illinois Workers' Compensation Act to an employment injury sustained outside the State. As long as the employment contract was made in Illinois and remained in force, a Claimant injured while working in another State is covered under the Act. In *Chicago Bridge and Iron v. Industrial Comm.*, 248 Ill. App. 3rd 687 (1993), the Appellate Court held that a Contract of hire was made in Illinois where the employee accepted the job offer while on the phone in Illinois, where the caller was from another State. The case is instructive in the case at bar, since Petitioner herein similarly accepted the job by electronically writing her name and hitting the send button while in Lockport. Similarly, the Commission in *Fernandez v. Cornerstone Properties,* 11 I.W.C.C. 0459, found that employment contracts made in Illinois are normally to be interpreted as including an agreement by the parties to be bound by the Act even where the contemplated employment is exclusively in another State, citing an Appellate case. The *Fernandez* case, and all cases on the subject, are uniform that the last act necessary for entry into the employment contract is the site of the contract, and *Fernandez* as well held that a telephone call made to Petitioner in Illinois, at which time he was offered and accepted the job to work in Missouri, was the last act, since there was a meeting of the minds during the course of the telephone call.

Thus, the questions for the Arbitrator herein is, whether Petitioner's Exhibit 1 and Respondent's Exhibit 2, the extension also identified as Deposition Exhibit 2A, constitute a contract of hire, and if so, what was the site where contract was entered into. Also, Respondent apparently argues there is significance to Petitioner having to perform other prerequisites to actually work at the assignment, and further claims that showing up at

work is necessary to constitute a contract of hire. "Hire" itself is commonly understood as meaning available for use or service in return for payment. *Merriam-Webster.com.*

> In *Masterson v. Aetna Coding's,* 09 IWCC 0452, citing several Appellate cases incorporated herein by reference, the Commission set forth the applicable rules as follows:
>
> In determining whether an employment contract has been formed, it is appropriate to give consideration to principles of contract law. The contract for hire is made when the last act necessary for the formation of the contract occurred (Citations). An offer of a contract is effective upon acceptance (Citation). To be valid, an acceptance must be objectively manifested, for otherwise no meeting of the minds would occur (Citation). The place of acceptance is the place of Contract (Citation).

Similar to here, the Commission found that when Respondent's foreman tendered the offer and Petitioner voiced his acceptance while on the phone at his home in Olive Branch, Illinois the contract for hire has been made. As noted in the Statute, the contract may be oral or in writing.

Whereas here, the Contract is in writing, rules of contractual interpretation apply. In *Saddler v. National Bank of Bloomington*, 403 Ill. 218 (1949), the Supreme Court held that the intentions or understanding of the parties for a written contract must be determined not from what the parties thought but from the language of the contract itself. An agreement reduced to writing must be presumed to speak the intention of the parties who signed it and their intention must be determined from the language used. Commonly called the Parole Evidence Rule, *Rakowski v. Lucente,* 104 Ill. 2d 317 (1984), a written agreement is not to be changed by extrinsic evidence as to how it was understood or what was intended. Applying these holdings to the facts of the case at bar, Petitioner expressed a parole evidence rule objection to Ms. Baker attempting to offer extrinsic evidence as to the meaning of Petitioner's Exhibit 1 and Respondent's 2, and that objection is sustained. Both documents were in language of the employer, and since it was prepared by the employer it must be construed most strongly against it. *Saddler,* supra, 403 Ill.@ 229. The very first paragraph of the document is entitled "Conditions of Employment", and clearly makes Petitioner an employee of Respondent as of the date of the agreement. Further, she had to acknowledge that as an employee of Aureus's she agreed to "abide by the following terms and conditions, and that all terms in the agreement applied to her employment with Aureus and are not exclusive to the assignment this contract is associated with." It required that she maintain regular contact with her account manager for future assignments, as set forth in the 4th paragraph of page 1. The 5th paragraph again reiterated that she was an employee of Aureus working on temporary assignments, and that the entire United States was her labor market. (PX 1, p. 1) It was the contract that she worked under at the time of her injury.

Further, by becoming an employee of Aureus and accepting an assignment, it kicked in a provision in Paragraph 3 of the documents that Aureus would be entitled to reasonable conversion fees. The agreement could not be clearer, and contained all material terms, including the name and place of her assignment, the hourly wage, other compensation, the hours she was to work, the fact that she was to be on call, housing, and what she was required to do. Further, it is clear that these were the only documents Petitioner worked under at her assignment of Memorial Hospital in South Bend.

Accordingly, the Arbitrator finds that said documents constitute a contract of hire, which was entered into January 28, 2016 when accepted at Lockport, Illinois when Petitioner typed in her name and hit the button to send her acceptance.

A case on point with regard to what is the site of a written contract of hire is *Benford v. Blue Stream Professionals Services*, 16 I.W.C.C. 0023, where Illinois Jurisdiction was not found, but for the reason that Petitioner signed his contract in Georgia. Here, of course, Petitioner signed her contract in Illinois. Also

controlling is *Hunter Corp. v. Industrial Commission,* 268 Ill. App. 3d 1079, (1st Dist., 1994) where the out of state employer called the Illinois union, who was acting as agent for the employer, which in turn called Petitioner to work. The Court held that even though the employer could reject the employee for lack of qualifications, the contract had already been made. There, as here, the employee could qualify between the time of hire and the time to begin the assignment.

As indicated earlier, the contract of hire in this case required that Petitioner also do some ministerial things, such as a drug test, background check, TB test, and obtaining an Indiana License, which included furnishing transcripts from Lewis University, all of which she did in Illinois except for the finger print test. In *Hoffman v. Advanced Mechanical Systems,* 17 I.W.C.C. 0298, Petitioner also had to pass a drug test, presumably outside of Illinois, and appear at the job site. Petitioner did pass the drug test but did not appear at the job site due to an accident. Citing an Appellate and Supreme Court case, the Commission held that these acts were incidental to his already obtained employment and in furtherance of Respondent's interest, which is true here. Under the contract with Respondent, Petitioner was already an employee. There were conditions precedent, passing the competency test and the hospital interview, which led to the written contract. The acts after the contract was accepted were conditions subsequent to qualify for the assignment. As a staffing company, Aureus held an interest in qualifying Petitioner to physically work at the hospital in Indiana, which required these conditions subsequent to be done.

Another case which is helpful, although reaching the opposite result, is *Cowger v. Industrial Commission,* 313 Ill.App. 3d 364 (5th Dist. 2000) where it was claimant who offered his services. Respondent was in Indiana when it accepted the claimant's offer of employment either by acceptance on the phone in Indiana or passing a drug test in Indiana prior to hire. Citing *Larson* on workers' compensation and other Illinois cases, the Court held: "The place of acceptance is the place of contract." 313 Ill.App. 3d @ 371. In the case at bar, as stated earlier, acceptance was to the written contract of hire which occurred when claimant signed her name and hit the key to accept in Illinois. Simply put, the contract of hire Petitioner's Exhibit 1, was accepted January 28, 2016 in Lockport, Illinois, as Ms. Baker admitted. Petitioner even turned down other job opportunities since she had been hired by Aureus.

If the last acts done preliminary to qualify for the assignment have any relevance they were either Petitioner having her transcript e-mailed from Lewis University to Indiana's Licensing Agency, which was done in Illinois, or Petitioner calling and notifying Ms. Baker at Aureus to advise that she was licensed in Indiana so she could go to her assignment, which likewise was done in Illinois. Respondent attempts to place great weight on where the license issued, but this is only relevant to the assignment, not the place of the contract of hire. Nor was it the last act even for the assignment, as Respondent needed to know the existence of the license, which notice was sent from Illinois. As to Respondent's apparent claim that showing up at the job site was the last act for a contract of hire, that argument was recently rejected by the Commission in *Gilmartin v. Kipin Industries*, 17 I.W.C.C. 0660. There, Petitioner testified he first worked for his company in Chicago, yet the Commission ruled that fact irrelevant to the place of contract of hire, to the extent they would not even make an inference that the contract of hire was in Illinois. Rather what was required was testimony as to the hiring process. To the contrary herein, the testimony of both witnesses is clear and consistent as to the hiring process and that Petitioner never left Illinois except for a background check, which was after the written contract of hire was accepted, and not the last act under any theory.

Accordingly, the Arbitrator finds that on January 28, 2016, a written contract of hire was entered into in the State of Illinois, under which Petitioner worked to the time she was injured, vesting jurisdiction with the Illinois Workers' Compensation Commission.

In support of the Arbitrator's Decisions regarding "0", Petition for Vocational Rehabilitation and 'L", TTD and Maintenance, the Arbitrator finds the following:

The parties stipulate that all medical bills were paid, and if Illinois jurisdiction was found, that there was an underpayment of TTD of $6,272.95. Further, the total TTD owed for this claim is $47,733.30. Additionally, with Petitioner having been unpaid since February 23, 2017, Respondent did make advances in a total of $15,000.00 prior to hearing. Accordingly, the Arbitrator awards the stipulation contained in the Addendum to Request for Hearing, specifically that there is due representing the underpayment of TTD to Petitioner the sum of $6,272.95, but after deducting the credit for $15,000.00, there is a credit to Respondent of $8,727.05 towards the additional maintenance award herein or towards any permanency award, whichever is paid first.

Turning to the issue of vocational rehabilitation and maintenance, Petitioner reached maximum medical improvement and temporary total disability was stopped February 23, 2017. On March 14, 2017, Petitioner's counsel emailed counsel for Respondent a request for vocational rehabilitation (PX 13A) It appears nothing thereafter happened until August 8, 2017, when a Labor Market Survey was prepared for Respondent by Mandeep Mudhar, a certified rehabilitation counselor. The reports set forth Dr. Dedhia's restrictions of no lifting over 15 pounds, no repetitive pushing, pulling or grasping and no use above the shoulder. There is no evidence as to whether Mr. Mudhar requested an interview with Petitioner. The testimony of Petitioner was that she was not aware of such a Labor Market Survey until a couple of months later, when it was sent to her. According to Petitioner she called all the potential employers on the survey without successfully obtaining employment. The report states Petitioner was a Staff/Charger Nurse, yet by her testimony, supported by the Aureus documents, it is clear she was an operating or surgical room nurse, except for short periods of time when she was a floor nurse. All her duties required patient handling, lifting of 35 to 50 pounds and overhead use. The medical evidence, including Dr. Dedhia's restrictions and a subsequent Section 12 examination obtained by Petitioner by Dr. Anthony Romeo April 5, 2017 confirmed that Petitioner had a severe shoulder injury which ultimately required surgery and significant restrictions. Dr. Romeo agreed with Dr. Dedhia's restrictions. (Petitioner testified that Respondent had her examined by Dr. William Heller on June 22, 2017. His report was not offered into evidence by Respondent.) Further, Mr. Mudhar did not deny that Petitioner would no longer be able to work as an operating room nurse, only finding on the last page of his report that Petitioner had transferable skills to work in numerous occupations and that she should be able to find employment within her restrictions, thus contesting the right to vocational rehabilitation.

At Petitioner's request, on February 4, 2018, following an interview, a Report was prepared by Steven M. Blumenthal, also a CRC. The work history obtained by Mr. Blumenthal bears out that Petitioner for most of her career was an operating room nurse or surgical nurse. In his summary, he noted that she was a 64 year old traveling operating room nurse unable to return to work status post right shoulder surgery with significant restrictions, including that Dr. Romeo limited her to the same restrictions as Dr. Dedhia, in sedentary work only. Mr. Blumenthal noted that Petitioner had not obtained any case management certifications, does not have work history in case management, and does not have any work experience or certification in utilization review, and was not even aware of what ICD or CPT meant (International Classification of Disease and Current Procedural Terminology), which is used in coding, claims, billing and related medical review positions. Nor does she have any formal work in quality assurance with any hospital. These are the types of jobs Mr. Blumenthal identified for her. Mr. Blumenthal also noted, as Petitioner testified, that due to limited funds, that although she had an Illinois license for 19 years, she let it lapse as she did not know she could continue working in the nursing field. However, she had kept up her continuing education units and would be able to have her RN license reissued by sending a letter with documentation of these credits and the money. Following this interview, Petitioner did follow Mr. Blumenthal's instructions and sent in for her license, but as of mid-March, the time of the trial, she was advised by the State that they were about three months behind and were working on the mid December applications for reinstatement. The Appellate Court has recognized that operating room nurse is a different field than other forms of nursing. *First Assist, Inc. v. I.C.*, 371 Ill App. 3d 488 (4th Dist. 2007).

In that regard, Mr. Blumenthal opined that Petitioner was an excellent candidate for vocational rehabilitation services and clearly requires vocational rehabilitation counsel to develop a viable program to assist her to return to work. Specifically, in order to address more sedentary type work, he found she would require computer skills to upgrade her skills, including keyboarding, data entry, and use of Microsoft Office Word, Excel and Outlook. He noted Petitioner was motivated to complete this training. Mr. Blumenthal then opined that after completion of computer skills updated training, she would benefit from job readiness training and job placement assistance to obtain employment using her past work experience in an office-based setting. He noted that the program would take six to ten months at a projected cost of $18,000.00 to $25,000.00, depending on her post training skill levels, and the degree to which her age is negatively perceived by prospective employers. Her actual earning capacity would be determined by job placement services. Mr. Blumenthal prepared an Illinois Workers' Compensation Commission Rehabilitation Plan, Petitioner's Exhibit 12(a), and noted his opinions were given within a reasonable vocational rehabilitation certainty, taking into account the tenets of the National Tea Case and his 38 years of experience. Petitioner's Exhibit 14 is Petitioner's notes from her attempted job search following MMI. Petitioner actually did come close to obtaining one job, but the prospective employer hired from within, and beyond that she never came close. While these job search documents are not ideal, they actually further evidence that Petitioner is in need of vocational rehabilitation. The Arbitrator finds the findings, opinions and conclusions of Mr. Blumenthal more persuasive, and accordingly awards Petitioner the Plan as set forth by Mr. Blumenthal. Mr. Blumenthal was highly critical of the Labor Market Survey of Encore Unlimited, in pages 7 and 8 of his Report, which criticisms are persuasive. The Arbitrator notes that the other vocational counselor did write a short rebuttal note which was admitted as Respondent's Exhibit 8 and has been considered by the Arbitrator. Without even considering the opinions of the vocational counselors, however, Petitioner is a nurse in her 60's who had a highly specialized and limited skill set in the operating room, who can no longer do that work as it requires patient handling, lifting and above shoulder work, all contrary to the restrictions, who has experienced difficulty in how to look for work and finding work. It is clear that vocational rehabilitation is appropriate. The only plan offered is the plan completed by Mr. Blumenthal. It appears quite reasonable and is adopted and awarded by the Arbitrator.

Based on all the above, maintenance is awarded for 56 weeks, from the first date following MMI of February 24, 2017, to the date of hearing of March 22, 2018. See also *Rapp v. State of Illinois,* 10 I.W.C.C. 0015, awarding maintenance from the MMI date when Respondent, as here, did not comply with then rule 7110.10, (now rule 9110.10) as Petitioner is not required to make a formal request for vocational rehab., although one was made a month later. See also *Roper Contracting v. I.C.*, 349 Ill. App. 3d 500 (2004).

The Arbitrator notes the parties stipulated that in the event vocational rehabilitation and maintenance were denied, the Arbitrator could determine permanency, as the evidence would be exactly the same. In light of maintenance and vocational rehabilitation being awarded, this issue is not ripe and is therefore reserved for a later hearing.

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVE MONTGOMERY,

Petitioner,

vs. NO: 17 WC 034302

CITY OF CHICAGO,

19IWCC0681

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 issue of permanent partial disability and being advised of the facts and law, modifies the Decision of the Arbitrator to reduce the permanent partial disability award and to correct scrivener's errors as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Permanent Disability

The Arbitrator awarded Petitioner permanent partial disability benefits of 20% loss of use the left foot and 40% loss of use of the left leg. The Commission reduces the Arbitrator's award to 15% loss of use of the left foot and 30% loss of use of the left leg based on the factors enumerated below.

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 AMA guidelines;
(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.

The Commission, in considering the degree to which Petitioner is permanently partially disabled, weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) No AMA impairment rating was submitted by either party so this factor is given no weight.

(ii) Petitioner was employed as a Sanitation Laborer at the time of the accident which requires walking long distances through streets and alleys, frequent squatting, lifting heavy garbage cans, and climbing in and out of garbage truck cabs. The Commission assigns greater weight to this factor.

(iii) Petitioner was 42 years old at the time of the accident and has a statistical life expectancy of approximately 37 years. The Commission assigns moderate weight to this factor.

(iv) Petitioner received a union wage increase on July 1, 2018, and he is earning more now than he was at the time of the accident. Therefore, the Commission assigns no weight to this factor.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of September 7, 2017, Petitioner sustained injuries to his left ankle and left leg. X-rays revealed an avulsion fracture at the tip of the lateral malleolus and a suggestion of a hairline, nondisplaced fracture in the lateral malleolus of the left ankle. (PX1, PX3) Petitioner's injury to his ankle was treated non-surgically with use of a CAM walker and physical therapy.

An MRI of Petitioner's left knee performed September 25, 2017, revealed a rupture of his left quadriceps tendon which was treated surgically. (PX3) Petitioner completed a course of physical therapy and work conditioning. (PX4) Petitioner was released to return to work full duty on April 12, 2018. On May 17, 2018, Petitioner reached MMI and was discharged from medical care.

Petitioner testified to experiencing shooting pain up his leg when riding on the back of sanitation trucks and to constant numbness in his leg when it is kept in one position for too long. (T, pp. 13-14, 16) He testified to taking Aleve maybe three times a week and also to elevating his leg and icing his knee when the pain gets too bad. (T, pp. 18, 15) He further testified it was difficult for him to walk long distances. (T, p. 13) He also claimed to needing breaks when walking from alley to alley. (T, p. 14) He indicated he had difficulty negotiating stairs, kneeling and some difficulty with getting up and down from the sanitation truck. (T, pp. 13, 16-17) He testified, with regard to his left quadricep specifically, everything is difficult for him since the surgery. (T, p. 15)

The medical records dated March 29, 2018, indicate that at that time Petitioner had no

complaints other than tightness when sitting for prolonged periods of time. It was noted on that date that he requires "no pain medications". (PX3) On April 16, 2018, Petitioner was discharged from work conditioning at Athletico Physical Therapy and reported having 0/10 pain and demonstrated full 5/5 strength in his ankle as well as the ability to walk five blocks to simulate the walking he performs as part of his job duties. (PX4) He further met his lifting goal of 75 pounds for all required tasks. (PX4)

At Petitioner's final office visit on May 17, 2018, Petitioner advised he is doing well, and the only issue was pain when riding on the side of the truck due to bouncing. (PX3) If that occurs, per the medical records, he goes into the truck and has no issues. (PX3) The physical examination revealed the quadricep muscles were fully intact, strength was at 5/5 and there was no evidence of calf tenderness. (PX3) He again denied use of any pain medication and was advised to follow up on an as-needed basis. (PX3)

We note that, despite Petitioner's testimony of complaints of pain and difficulty performing activities, he had not returned for medical treatment after he was discharged on May 17, 2018. Moreover, Petitioner's treating records do not corroborate Petitioner's testimony. He advised his treating physician he was doing well and did not require pain medication. He has resumed his very physical job without any restrictions or need for further medical treatment. The Commission finds the medical records to be a more reliable assessment of his permanent partial disability than his testimony. The Commission gives moderate weight to this factor.

Based on the above factors, and the record taken as a whole, Petitioner's permanent partial disability awards are reduced to 15% loss of use of the left foot and 30% loss of use of the left leg.

Scrivener's Errors

The Commissioner corrects the scrivener's errors found on page 2, paragraph (iii), so that it reads, "He has a statistical life expectancy of approximately 37 years." (Decision of the Arbitrator, p. 2.)

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 25.05 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 15% loss of use of the left foot.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 64.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 30% loss of use of the left leg.

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

Pursuant to §19(f)(2) of the Act, no bond shall be required for removal of this cause to the

19IWCC0681

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: DEC 16 2019
KAD/mav
11/5/19
42

Kathryn A. Doerries

Thomas J. Tyrrell

Stephen J. Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MONTGOMERY, STEVE
Employee/Petitioner

Case# **17WC034302**

CITY OF CHICAGO
Employer/Respondent

19IWCC0681

On 2/19/2019, 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:

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

0113 CITY OF CHICAGO
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
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Steve Montgomery
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **17** WC **34302**

Consolidated cases: _____

19IWCC0681

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 **Steven Fruth**, Arbitrator of the Commission, in the city of **Chicago**, on **July 26, 2018**. By stipulation, the parties agree:

FINDINGS

On the date of accident, **September 7, 2017**, 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 $**74,823.18**, and the average weekly wage was $**1,438.91**.

At the time of injury, Petitioner was **42** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**29,615.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**29,615.15**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury in accord with §8.1b of the Act:

(i) No permanent AMA impairment rating was submitted into evidence. The Arbitrator cannot give weight to this factor.

(ii) Petitioner was employed as a Sanitation Laborer at the time of the accident. Petitioner's job requires walking long distances through streets and alleys, frequent squatting and lifting heavy garbage cans and refuse, as well as frequent climbing in and out of garbage truck cabs. Petitioner has returned to work but with continuing pain and discomfort and limitation. The Arbitrator gives great weight to this factor.

(iii) Petitioner was 42 years old at the time of the accident. He had a statistical life expectancy of approximately 37. Petitioner will live and work with his pain and limitations for a longer period than older workers. The Arbitrator gives great weight to this factor.

(iv) Petitioner received a union wage increase on July 1, 2018. He is earning more now than he was at the time of his accident. The Arbitrator gives no weight to this factor.

(v) Petitioner sustained an evulsion fracture from the tip of the lateral malleolus and suggestion of a hairline, nondisplaced fracture in the lateral malleolus in his left ankle (PX #1& PX #3). He was placed in a CAM Walker and underwent a course of physical therapy for the foot and ankle. A September 25, 2017 MRI of the left knee revealed a left quadriceps tendon rupture. Petitioner underwent an open surgical to the left quadriceps, performed by Dr Joseph L. D'Silva, on October 3, 2017 (PX #3). Following surgery, Petitioner completed 37 sessions of physical therapy and 20 sessions of work conditioning (PX #4). Petitioner returned to full duty work full April 12, 2018 and was released by Dr D'Silva at MMI May 17, 2018 (PX #3). Because the evidence of the disability is corroborated by the treating medical records, the Arbitrator therefore gives great weight to this factor.

ORDER

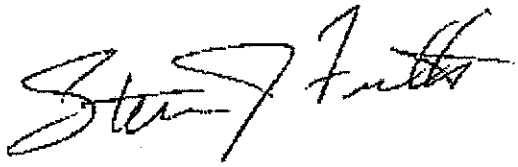
Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of **20% loss of use of the left foot** and **40% loss of use of the left leg** pursuant to §8(e) of the Act.

Respondent shall pay Petitioner the sum of **$790.64**/week for a further period of **119.4** weeks, because the injuries sustained caused **20% loss of use of the left foot (33.4 weeks) and 40% loss of use of the left leg (86 weeks)**.

Respondent shall pay Petitioner compensation that has accrued from **September 7, 2017** through **July 26, 2018**, 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

February 19, 2019
Date

ICArbDecN&E p.2

FEB 19 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☒ 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

PRICE TERRY TEEL,

Petitioner,

vs. NO. 16 WC002787

AREA DISPOSAL SERVICES,

19IWCC0682

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 permanent disability and mileage, 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 20, 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.

19IWCC0682

No bond 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: DEC 17 2019

Stephen J. Mathis

SJM/sj
o-12/10/2019
44

L. Elizabeth Coppoletti

Douglas D. McCarthy

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TEEL, PRICE TERRY
Employee/Petitioner

Case# **16WC002787**

AREA DISPOSAL SERVICES INC
Employer/Respondent

19IWCC0682

On 2/20/2018, 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 1.78% 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:

0564 WILLIAMS & SWEE LTD
STEVEN R WILLIAMS
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

2674 BRADY CONNOLLY & MASUDA PC
JULIA McCARTHY
211 LANDMARK DR SUITE 2
NORMAL, IL 61761

19IWCC0682

STATE OF ILLINOIS)
)SS.
COUNTY OF McLean)

☐ 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

Price Terry Teel
Employee/Petitioner

v.

Area Disposal Services, Inc.
Employer/Respondent

Case # **16** WC **2787**

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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 29, 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 **Mileage**

FINDINGS 19IWCC0682

On **September 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.

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

In the year preceding the injury, Petitioner earned **$55,731.06**; the average weekly wage was **$1,071.75**.

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

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

Respondent shall be given a credit of **$11,840.32** for TTD, **$753.19** for TPD, **$0** for maintenance, **$0** in non-occupational indemnity disability benefits and **$0** for other benefits, for a total credit of **$12,593.51.**

Respondent is entitled to a credit for any bills paid under its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner the sum of **$643.05/week** for a further period of **48.375 weeks**, as provided in **Section 8(e)** of the Act, because the injuries sustained caused **22.5% loss of use of the left leg.**

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.

Melinda M. Price-Sullivan
Signature of Arbitrator

2/15/18
Date

FEB 20 2018

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Price Terry Teel
Employee/Petitioner

Case # **16** WC **2787**

v.

Consolidated cases: **N/A**

Area Disposal Services
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on September 25, 2015, he was employed by Respondent as a driver and has worked there for 25 years. He testified that his duties include driving a roll-off truck from various job sites to the landfill. He testified that prior to the accident, he had not undergone any prior surgery and had not undergone any physical therapy or injections, nor had he lost any time from work related to his left knee.

Petitioner testified that on the date of accident, he backed up his truck inside of a garage and jumped off the fender, hurting his left knee. He testified that the fender was about three feet off the ground and that after he jumped down, he had excruciating pain and lost strength. He testified that he went for treatment at IWIN, where he was sent by dispatch. He testified that he was examined, given medications and recommended to undergo an MRI. He testified that he was subsequently referred to an orthopedic surgeon who recommended surgery,which was performed on November 6, 2015. He testified that following surgery, he underwent physical therapy.

Petitioner testified that he is currently 56 and continues to work as a driver. He testified that his left leg is still sore and is not as strong as his right leg and that he favors his right leg more than he used to. He testified that when he climbs ladders, his leg is weak and that the pain comes and goes. He testified that when he stands stand for long periods of time, he is ready to sit down after 15-20 minutes. He testified that when he walks, if he steps wrong the inside of his kneecap experiences a pinch.

Petitioner testified that during his treatment with Dr. Hanson, he had approximately 35 physical therapy visits and at least 4-5 visits with Dr. Hanson. He testified that the distance between his home and Dr. Hanson's office was 19 miles one way.

On cross examination, Petitioner agreed that Dr. Hanson released him to full duty with no restrictions. He agreed that he was continuing to do the same job. He agreed that he has not returned to Dr. Hanson since March 9, 2016.

The October 26, 2017 Letter of Dr. Mark Hanson was entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The letter noted that Petitioner's surgery took place on November 6, 2015 and that his injury led to a medial meniscus tear, ACL tear and need for surgery. (PX1).

The September 28, 2015 MRI Interpretive Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The report reflects that an MRI of Petitioner's left knee was performed

on that date, which was interpreted as revealing (1) displaced bucket-handle tear of the medial meniscus; tiny popliteal cyst; (2) anterior cruciate ligament tear near femoral attachment site; medial collateral ligamentous sprain or partial tear; mild marrow edema at posterior lateral aspect of the lateral tibial condyle; (3) large joint effusion. (PX2).

The November 6, 2015 Operative Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. The report reflects that Petitioner underwent left knee arthroscopy, arthroscopic ACL reconstruction using patellar tendon allograft and partial medial meniscectomy on that date by Dr. Mark Hanson. (PX3).

The medical records of IWIN were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on September 25, 2015, at which time it was noted that he stated that he was injured on September 25, 2015 at 0645 hours, that he jumped down off the back of his work truck and that he felt immediate pain in his knee. It was noted that Petitioner stated that he tried to move his knee afterwards and felt a "pop" in his knee and that he described throbbing pain on the inside of his left kneecap. It was also noted that Petitioner reported that he jumped off the bumper of his work truck landing on the left knee, that he stated that he twisted or hyperextended the knee at that time, that he was really unsure what happened and that he was walking behind the truck when he felt a "pop" in the medial knee. The assessment was noted to be that of left knee strain, mechanism of injury and physical exam suspicious for a medial meniscus tear, MRI to assess. Petitioner was dispensed medications, was given a knee brace and was given a ThermalSoft gel cold pack and was also recommended to undergo an MRI. Petitioner was also issued work restrictions of sedentary duty and no commercial driving. (PX4).

The records of IWIN reflect that Petitioner was seen on September 29, 2015, at which time it was noted that he stated that his symptoms had had minimal improvement. It was noted that Petitioner stated that he was still having increased pain with weight bearing, that he stated that he had been using crutches so that he did not have to bear weight on the left knee and that he stated that he was able to walk without the use of crutches and was using them to help alleviate the pain associated with weight bearing on his left knee. The assessment was noted to be that of (1) left knee medial meniscus tear; (2) left knee ACL tear. Petitioner was instructed to continue Meloxicam, continue use of the knee brace and consult orthopedic surgery. Petitioner was also issued work restrictions of sedentary duty and no commercial driving, crutches as needed for comfort. (PX4).

The medical records of McLean County Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 5. The records reflect that Petitioner was seen on March 9, 2016, at which time it was noted that he was seen for a post-operative visit. It was noted that Petitioner stated that since his last visit he had had significant improvement in his left knee pain, that he admitted weakness present in the left lower extremity but that his range of motion was intact, that he would get minor pains in the medial knee with walking and an associated catch and that he was back to work with no restrictions and seemed to be able to perform all duties. It was noted that Petitioner admitted to some pulling pains in the knee while pressing down on the clutch and that he denied the need to use ice or take any pain medications. It was noted that Petitioner was to continue full duty, that if there was no improvement in residual pain he could consider an injection and that he was to return as needed. (PX5).

The records of McLean County Orthopedics reflect that Petitioner was seen on February 9, 2016, at which time it was noted that he related that he was improving but that stairs continued to be a struggle. It was noted that Petitioner was tight in his posterior knee which prevented him from flexing like he needed to and that he was going to therapy but weakness was still noticed. Petitioner was allowed to return to work on February 29, 2016 with restrictions of no kneeling, squatting or climbing until February 29th and was also instructed to continue physical therapy. At the time of the January 7, 2016 visit, it was noted that Petitioner related that he was improving since his last visit but still had pain. It was noted that at times

Petitioner could get calf cramping but that it did not happen often and that he was taking his pain medications before bed only. It was noted that physical therapy was going well, that his range of motion was progressing, and that his ambulation was a normal gait, but that he could get fatigued with walking or standing long periods of time. Petitioner was instructed to remain off work for one month and to continue physical therapy. At the time of the December 10, 2015 visit, it was noted that Petitioner stated that he had been doing great until that date, that he stood up out of a chair, that he had been having sharp posterior left knee pain that radiated down to his ankle and that his range of motion was not limited since the incident. It was noted that swelling was present and that he had been taking his pain medications once every 12 hours. Petitioner was instructed to remain off work and to continue physical therapy. (PX5).

The records of McLean County Orthopedics reflect that Petitioner was seen on November 12, 2015, at which time it was noted that he stated that he was doing very well, that he had very mild stabbing pain when there was pressure on the knee and that there was significant bruising in the thigh and calf. It was noted that Petitioner was taking his Hydrocodone but had gone from 4 to 6 times per day. It was also noted that Petitioner was ambulating with crutches. Petitioner was instructed to begin physical therapy/home exercise program for range of motion, that he was to step down Norco and Mobic and that he was to transition to one crutch then no assistive devices with a brace. At the time of the October 7, 2015 visit, it was noted that Petitioner's pain began two weeks ago when he stepped out of a truck while working and had a pop in the knee and that he stated that the pain was medial with no swelling, radiating pain or associated numbness or tingling. It was noted that Petitioner stated that his pain had slightly subsided due to the injury being two weeks old and that he had no previous surgery or injections on the knee. The assessment was noted to be that of (1) tear of the medical meniscus of the left knee; (2) complete tear of the anterior cruciate ligament of the left knee; (3) pain in the left knee. A discussion was had regarding ACL reconstruction surgery. (PX5).

The Physical Therapy Discharge Note dated February 26, 2016 from McLean County Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 6. The record reflects that Petitioner reported occasional pain in the VMO area with walking that came and went, that he was back to full duty work the next Monday and that overall he was very pleased with the results of his knee. It was noted that Petitioner's current pain was noted to be 0/10, that his best pain was 0/10 and that his worst pain was 2/10. It was noted that Petitioner had mild swelling only, that he had done excellent with minimal to no pain, full active range of motion, equal strength on the hamstrings and 95% on quad with leg press test, that he was functioning normally in his activities of daily living and that he was ready to be released to a home program. (PX6).

The physical therapy records of McLean County Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 7. The records reflect that at the time of the Initial Evaluation on November 12, 2015, it was noted that Petitioner reported left knee pain when he jumped down off his work truck on September 25, 2015, that he had initial pain, that he was seen by Dr. Hanson, that an MRI revealed an ACL tear and medial meniscus tear and that he had surgery on November 6, 2015 for meniscectomy and ACLR using patellar tendon allograft. It was noted that Petitioner was doing excellent with range of motion, pain control, gait-free of crutches and quad control and that the therapist's concern was that Petitioner would do too much too quickly. (PX7).

Additional physical therapy records of McLean County Orthopedics were entered into evidence at the time of arbitration as Petitioner's Exhibit 8. The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 9.

The IWIN record of September 29, 2015 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The exhibit was duplicative of that as contained in Petitioner's Exhibit 4. (RX1; PX4).

The IWIRC records of February 29, 2016 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The records reflect that Petitioner was seen on February 29, 2016, at which time it was noted that he was seen for a fitness for duty evaluation regarding his left knee ACL reconstruction and partial medial meniscectomy. It was noted that Petitioner was no longer taking any medications, that he felt ready to return to work and that he had a follow-up with his orthopedic physician on March 9, 2016 to see he how he did back at work full duty. The assessment was noted to be that of post-op left knee arthroscopic ACL reconstruction and partial medial meniscectomy. It was noted that Petitioner passed his fitness for duty physical examination and functional test and that he was able to return to work without restrictions. (RX2).

The IME Report of Dr. Lieber dated December 15, 2016 was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The report reflects that Petitioner was seen on December 15, 2016 and that he gave a history of an alleged work event on September 25, 2015 working for Area Disposal as a driver. It was noted that Petitioner stated that he was standing on the fender in the back of a truck and that he went to jump down, and that he sustained pain and discomfort in the left knee. It was noted that Petitioner complained of occasional weakness in his left knee with swelling, that he complained of stiffness in his knee and popping, that he complained of no giving way and that he had occasional difficulty going up and down stairs but no night pain. The impression was noted to be that of status post arthroscopy, ACL reconstruction and partial medial meniscectomy. The report further reflects that Dr. Lieber opined that the diagnosis that was in association with the alleged September 25, 2015 event was that of ACL and medial meniscus tear, left knee, that Dr. Lieber opined Petitioner had reached maximum medical improvement as it related to the alleged September 2015 event, and that an impairment rating of 3% impairment of the left lower extremity was issued. (RX3).

The Letter Dated August 25, 2016 was entered into evidence at the time of arbitration as Respondent's Exhibit 4.

The case of *Monty Sullivan v. Continental Tire North America*, 05 WC 24675, 07 IWCC 1370 was entered into evidence at the time of arbitration as Respondent's Exhibit 5. In the Decision and Opinion on Review, the Commission modified the Decision of the Arbitrator by eliminating the award of treatment-related mileage expenses, noting that the evidence in the case did not support an award of mileage expenses given that the city in which Petitioner treated (*i.e.*, Herrin) was only "about twenty miles" from the town in which Petitioner resided, which was that of Creal Springs. (RX5).

CONCLUSIONS OF LAW

The parties stipulated at the time of arbitration Petitioner sustained an accident on September 25, 2015 that arose out of and in the course of his employment with Respondent. (AX1).

With respect to disputed issue (F) pertaining to the issue of causation, the Arbitrator finds that Petitioner's condition of ill-being is causally related to the work accident of September 25, 2015. In so concluding, the Arbitrator notes that "[a] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 63-64 (1982). The preponderance of the evidence in this case indicates that Petitioner's complaints began immediately after his work accident. Respondent presented no evidence

to suggest that Petitioner had any left knee complaints or treatment prior to September 25, 2015. Following the accident, however, Petitioner consistently complained of pain in his left knee, he was restricted from work due to his left knee complaints, his left knee condition necessitated surgical repair and he testified that he continues to experience difficulties in his left knee. Based upon the foregoing and the record in its entirety, the Arbitrator finds that Petitioner's current condition of ill-being is casually related to the work accident of September 25, 2015.

With respect to disputed issue (L) pertaining to the nature and extent of Petitioner's injury, and consistent with 820 ILCS 305/8.1b, permanent partial disability shall be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of Section 8.1b of the Act; (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. 820 ILCS 305/8.1b. No single enumerated factor shall be the sole determinant of disability. *Id.*

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that Respondent submitted an AMA rating from Dr. Lieber of 3% of the left lower extremity. (RX3). The Arbitrator places some weight on this factor when making the permanency determination.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he continues to work for Respondent as a driver. The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 53 years old on his date of accident. Given the age of Petitioner and the fact that his treating physicians have placed him under no restrictions, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that, following his work injury, Petitioner returned to his pre-accident employment with Respondent. As there was no definitive evidence of reduced earning capacity contained in the record, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that his left knee was still sore, that it was not as strong as the right leg, that he favored his right leg more than he used to, that when he climbs ladders his leg is weak and that the pain comes and goes. Petitioner testified that when he stands for long periods of time, he is ready to sit down after 15-20 minutes. Petitioner testified that when he walks, if he steps wrong on the inside of his kneecap he feels a pinch. At the time of the March 9, 2016 visit with Dr. Hanson, it was noted that Petitioner stated that since his last visit he had had significant improvement in his left knee pain, that he admitted weakness present in the left lower extremity but that his range of motion was intact, that he would get minor pains in the medial knee with walking and an associated catch and that he was back to work with no restrictions and seemed to be able to perform all duties. It was noted that Petitioner admitted to some pulling pains in the knee while pressing down on the clutch and that he denied the need to use ice or take any pain medications. It was noted that Petitioner was to continue full duty, that if there was no improvement in residual pain he could consider an injection and that he was to return as needed. (PX5). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration, namely his continued complaints and limitations, were somewhat corroborated by his treating records at the conclusion of his treatment with Dr. Hanson. The Arbitrator accordingly places lesser weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the

Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of **22.5% loss of use of the left leg** as provided in Section 8(e) of the Act.

With respect to disputed issue (O) pertaining to the issue of mileage, the Arbitrator denies Petitioner's request for mileage reimbursement for travel to and from his medical appointments.

The Arbitrator finds Petitioner's claim for mileage is not warranted and in support thereof relies upon Respondent's Exhibit 5, *Sullivan vs. Continental Tire*, 05 WC 24675, 07 IWCC 1370, wherein the Commission found that the evidence did not support an award for mileage expense. The Arbitrator notes that the travel by the petitioner from Creal Springs to Herrin, Illinois, in the *Sullivan* case was approximately 20 miles. The Arbitrator notes that Petitioner testified that the distance between his home and Dr. Hanson's office was 19 miles one way, which is similar to that in the *Sullivan* case. As a result thereof, the Arbitrator denies Petitioner's request for mileage reimbursement for travel to and from his medical appointments.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Marilyn Powell,

Petitioner,

vs. NO: 17 WC 22614

19IWCC0683

Illinois Veterans Home,

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 accident, medical expenses, temporary total disability, permanent partial disability, §8(j) 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.

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 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.

DATED: DEC 17 2019
TJT:yl
o 11/5/19
51

Thomas J. Tyrrell

Maria Elena Portela

Maria E. Portela

DISSENT 19IWCC0683

I agree with the majority and affirm and adopt the Arbitrator's Decision, with the exception of the award of permanent partial disability.

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 AMA guidelines;
(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.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, I weigh the five factors in Section 8.1b(b) of the Act as follows:

(i) No AMA impairment rating was submitted by either party, so this factor is given no weight.

(ii) Petitioner was employed as a Certified Nursing Assistant and she returned to work in her prior capacity. She is required to be on her feet throughout the workday. Thus, this factor is assigned greater weight.

(iii) Petitioner was 45 years old at the time of the accident and has approximately 20 years of work life remaining until retirement. This factor is assigned some weight.

(iv) There is no evidence of reduced future earning capacity in the record thus this factor is assigned no weight.

(v) Regarding evidence of disability corroborated by the treating medical records, as a result of the work-related accident of July 21, 2017, Petitioner was diagnosed with a tiny avulsion fracture of the lateral process of the talus, an old appearing avulsion fracture at the medial malleolar tip and a possible tiny avulsion fracture at the lateral cuboid. (PX2, PX3) She was prescribed crutches and referred to a podiatrist who prescribed a walking cast and later performed an injection. Petitioner was off work 8-1/2 weeks, from July 22, 2017, through September 19, 2017, at which time she returned to work full duty as a Certified Nursing Assistant for Respondent.

Petitioner testified at Arbitration she experiences instability and pain with weather changes. However, the medical records are devoid of reference to Petitioner complaining of instability or pain with weather changes. Moreover, Petitioner sustained a closed avulsion fracture of the talus of the right foot requiring a walking cast and boot and minimal treatment lasting approximately 2 months. On September 7, 2017, Petitioner underwent a follow-up x-ray which, it was noted, "the small avulsion fracture

not visualized on the current study". There was substantial decrease in soft tissue swelling and no significant arthropathy. In the final office visit, September 19, 2017, it was noted "Pt is done wearing her CAM boot" and has no complaints of pain. (PX3) She was prescribed a speed brace during her final visit but testified she wears it only when she has pain in her ankle which is once or twice per month. Based on the treating medical records, this factor is assigned moderate weight.

Based on the foregoing factors, I would reduce the permanency award to 7-1/2% loss of use of a right foot. For these reasons, I respectfully dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

POWELL, MARILYN
Employee/Petitioner

Case# **17WC022614**

ILLINOIS VETERANS HOME
Employer/Respondent

19IWCC0683

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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON ST 20TH FL
CHICAGO, IL 60602-2983

0499 CMS RISK MANAGEMENT
801 S SEVENTH ST 8M
PO BOX 19208
SPRINGFIELD, IL 62794-9208

4138 ASSISTANT ATTORNEY GENERAL
WARREN A WILKE
500 S SECOND ST
SPRINGFIELD, IL 62706

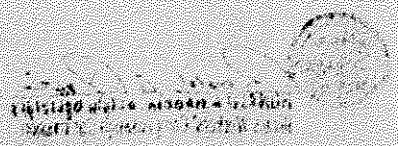
0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

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

SEP 4 - 2018

Brendan A. Hamilton, Secretary
Illinois Workers' Compensation Commission



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

☐ 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

Marilyn Powell
Employee/Petitioner

v.

Illinois Veterans Home
Employer/Respondent

Case # **17** WC **22614**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Michael Nowak**, Arbitrator of the Commission, in the city of **Quincy**, on **4/4/18**. 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. ☐ 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 _____

19IWCC0683

FINDINGS

On **7/21/17**, 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 $**63,356.87**; the average weekly wage was $**1,218.40**.

On the date of accident, Petitioner was **45** years of age, ***married*** 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 $**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 $**336.85**, as set forth in Petitioner's exhibit 11, 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 pay Petitioner temporary total disability benefits of $**812.27**/week for **8 3/7** weeks, commencing **7/22/17** through **9/19/17**, as provided in Section 8(b) of the Act.

Based on the factors enumerated in §8.1b of the Act, which the Arbitrator addressed in the attached findings of fact and conclusions of law, and the record taken as a whole, Respondent shall pay Petitioner the sum of $**731.04**/week for a further period of **20.875** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **12.5% loss of use of the right foot**.

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

8/29/18
Date

SEP 4 - 2018

19IWCC0683

FINDINGS OF FACT

Petitioner, Marilyn Powell, testified that she worked for Respondent, Illinois Veterans Home, for 12 years. At the time of the incident, Petitioner was 45 years of age. Petitioner testified she worked as a Certified Nursing Assistant/Veterans Nursing Assistant Certified which included general care for the residents. Petitioner testified that her job duties required a significant amount of walking throughout the workday.

On July 21, 2017, Petitioner testified that she worked from 3:00 a.m. to 7:00 a.m. at the Schapers Building. This was considered an overtime shift and her regular shift on that day began at 7:00 a.m. to 3:00 p.m. at the Elmore Building. Petitioner testified that the Schapers Building was approximately 100 yards from the Elmore Building. Petitioner testified that she was required to wait for her replacement to arrive at Schapers before she could leave and move to the Elmore location. Her replacement came at approximately 7:00 a.m. and Petitioner testified she drove to the Elmore parking lot located adjacent to the Elmore Building. She testified that she was hurried because it was after 7 o'clock and she exited her vehicle in a rushed manner for it was after her starting time. She walked in front of her vehicle, carrying a lunch box and purse, and testified that she was walking briskly when her right foot stepped on a walnut. She twisted her right ankle and fell into the hood of the vehicle parked next to her car. At the time, she was on the sidewalk located in front of the Elmore parking lot which leads to the side entrance of the Elmore Building. Petitioner testified that she entered through the side entrance with a limp because of right ankle pain. She notified her supervisor and her charge nurse.

Petitioner testified that the walnut was green and quite large, approximately the size of a baseball. Petitioner testified there were walnuts scattered all over the grass, sidewalk and parking lot that morning. Petitioner indicated that there are several walnut trees on the Respondent's grounds. Petitioner offered a number of photographs into evidence. The Photos, which depict the general area of the injury were taken in early 2018. Petitioner credibly testified that during the summer months, when she was injured, there were hundreds more walnuts laying on the lawn, sidewalks and parking lot of Respondent's premises as the tree near the Elmore building hung over the sidewalk and into the parking lot. Petitioner testified she did not recall Respondent ever cleaning the Elmore sidewalk nor the Elmore parking lot from walnuts or debris.

Petitioner testified that the entrance closest to the parking lot, where she entered, was only open to visitors/public from 10:00 a.m. to 8:00 p.m. and at the time of her incident was limited to only employees. Petitioner offered a picture of the side entrance which had a sign "VISITORS ARE WELCOME 10:00AM TO 8:00PM". (PX8). Elmore had a main entrance towards the center of the building which permitted visitors at all hours.

Petitioner testified that as the day progressed her ankle pain increased and she was unable to finish her shift. At approximately 2:30 p.m. she was told by her supervisor to leave and report to Blessing Hospital. Petitioner testified she completed numerous forms concerning the incident. There was an Illinois Form 45 Employer's First Report of Injury completed which indicated that the employee was walking and stepped on a walnut and rolled her right ankle and fell against a parked car. (RX1). Employee was having pain and tingling down her right ankle into her foot and toes. (RX1). This form is dated July 21, 2017. (RX1). An initial Workers' Compensation Report/TriStar report completed by the Blessing Walk-In Clinic noted patient fell, turning ankle while walking into work at 7:00 a.m. this morning. (RX1). An Illinois Department of Veterans

Home incident report, completed the same day, indicated that Petitioner had completed overtime at Schapers and pulled into the Elmore parking lot. (PX1, RX1). She got out of her car and waswalking on the sidewalk to come into work at which time she stepped on a walnut shell and rolled her ankle and fell into a parked car. (RX1, PX1). A Supervisor's Report of Illness and Injury also completed on July 21, 2017, by the supervisor, indicated that while walking towards Elmore Building, Petitioner stepped on a walnut and "rolled" her ankle. (PX1, RX1). For the description of the injury, it indicated that Petitioner's ankle was swollen and painful. (PX1, RX1). Where it describes any unsafe acts or conditions which contributed to the accident – cause of accident – it indicated walnuts and walnut shells on sidewalk; was the condition above corrected (how)? – It noted sidewalk swept. (PX1, RX1).

Petitioner testified that she was diagnosed with avulsion fractures and the Blessing Hospital records revealed that she had tiny avulsion fractures of the lateral process of the talus, an old appearing avulsion fracture at the medial malleolar tip and a possible tiny avulsion fracture at the lateral cuboid. (PX2, RX3). Petitioner testified that she was prescribed crutches and was referred to a podiatrist, Dr. Swanson.

According to Dr. Swanson's records, Petitioner sustained an avulsion fracture of her talus and prescribed a walking cast, later performed an injection (on September 7, 2017), and recommended during her last appointment on September 19, 2017 that she wear an ASL speed brace. (PX3, RX4).

From July 22, 2017, through September 19, 2017, Petitioner testified she was off work with off work slips and light duty notes and she was told by Respondent she could return to work only when she was able to work full duty. Petitioner testified that she returned to work on September 20, 2017 with no restrictions. Petitioner testified that she did not receive TTD benefits nor any group disability payments but utilized her sick, holiday and vacation bank for 8-3/7 weeks. (PX4). Petitioner testified she returned to work as a CNA.

Concerning the Respondent's property, Petitioner testified that although there was none at the time of accident, there is currently a security guard station with a guard at the one entrance for entering onto the Respondent's grounds. (PX5). Petitioner noted the guard questions each individual driver as to the purpose for entering the grounds. Petitioner testified that Respondent owns and maintains the grounds which includes plowing, repairing potholes, and contracts out mowing. Ms. Tamara Oberling, a temporary supervisor in the Elmore Building, testified on behalf of Respondent. Oberling agreed that the property was owned and maintained by Respondent. Respondent offered a map of the grounds including the parking lot assignments. (RX6, RX7). Petitioner and Ms. Oberling both testified that there are designated visitors/guests parking spots located on the grounds labeled "VISITOR PARKING ONLY". (PX9, PX10). According to Respondent's parking lot assignments, visitors are permitted to Parking Lot A, Lot E, Lot G, Lot N, and Lot S. These visitors/guests parking areas are labeled with the visitor sign. Petitioner and Ms. Oberling both testified that Lot O, next to the Elmore Building, is where Petitioner parked her vehicle. They both testified that this parking lot was <u>not</u> marked as a designated visitors/guests parking area. Petitioner testified that guests should park in the visitors/guests marked areas while Ms. Oberling indicated that guests were not prohibited from parking anywhere on the grounds notwithstanding the visitors/guests parking signs. According to Respondent's parking lot assignments, Lot O parking stalls are for "...Elmore employees, activities, truck garage, pharmacy, switchboard, housekeeping, security, social surfaces, medical records and library." (RX6). According to the visitor parking rules, visitors are permitted to park in visitor parking spaces where marked and also in parking

lots where space is available. (RX8). The visitor parking rules also indicate that employees are prohibited from parking in the visitor parking areas. (RX8).

In the year preceding the accident, Petitioner testified that she worked a significant amount of overtime and was assigned primarily to work at Elmore. Petitioner testified that she would traverse the parking lot, and sidewalk area in front of the parking lot, leading to the side entrance, 45 to 50 times per months while entering and exiting the building. Petitioner testified that Parking Lot O was the typical parking lot for employees to use while working in the Elmore Building and the nearest entrance was the side entrance for ingress and egress. (PX8). Ms. Oberling agreed that the side entrance where Petitioner entered the building on July 21, 2017 does indicate that visitor hours for that entrance are from 10:00 a.m. to 8:00 p.m., and at 7:05 a.m. was only for employees. (PX8).

At arbitration, Petitioner testified that she returned to work as a CNA. Petitioner testified that she notices pain in her right ankle which becomes severe after approximately six to seven hours of work and takes Ibuprofen twice a day, each day, on a regular basis to treat her symptomatology. Petitioner testified that she notices additional pain with weather changes, and that her right ankle is not as stable as her left ankle. She continues to work overtime.

CONCLUSIONS

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

Respondent disputes accident, specifically that the accident arose out of the employment. It is Respondent's position that Petitioner's injury resulted from a street risk faced by the general public at large. The Arbitrator disagrees.

The unrefuted testimony of the Petitioner indicates that at the time of her accident there were hundreds of walnuts lying in the grass on the sidewalks and in the parking lot of Respondent's premises. Petitioner testified that she had never seen Respondent remove walnuts or debris from its sidewalks and parking lots. The Arbitrator finds that by allowing the accumulation of hundreds of walnuts on its sidewalks and parking lot it created a defect which resulted in Petitioner's injury. Further, Respondent's own Supervisors Report of Illness and Injury indicates that the unsafe condition which contributed to the accident was walnuts and walnut shells on side walk and that the unsafe condition was corrected by sweeping the sidewalk after Petitioner was injured. For that reason, the Arbitrator concludes it is not necessary to reach the neutral risk analysis.

Even if one were to apply the neutral risk analysis the same result would follow. This was not a situation where an employee stepped off a non-defective curb similar to the curbs in any city, to which the general public at large is exposed. Although the location of the accident was one which visitors with an appropriate purpose to be on the premises would be allowed to traverse, this is distinguishable from a public sidewalk where any member of the general public traveling anywhere for any purpose may be found. The only people visiting this area would presumably only be those visiting family or friends who were residents of the Home or employees. Further, and most significantly Petitioner was required to traverse this particular area much more frequently than any individual visitor would and at the time she was injured she was carrying her

purse and lunch and was in a hurry because her relief at the position she had worked prior to reporting for her own shift arrived late. The Arbitrator concludes that Petitioner was exposed to a greater risk than the general public. Petitioner was exposed to the risks of tripping on a walnut to a greater extent based upon her schedule working five days a week, and overtime, and traversing the sidewalk and parking lot far more frequently than guests (and in a hurried fashion at the time of the accident).

Based upon the foregoing, and the record taken as a whole, the Arbitrator finds Petitioner met her burden of establishing that she sustained an accident which arose out of and in the course of her 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?

Respondent denied the medical expenses based upon liability. Based upon the Arbitrator's conclusions above, the Arbitrator awards Petitioner $336.85 in medical expenses as set forth in PX 11. Respondent shall receive a credit for the remaining bills paid by Respondent's group carrier pursuant to Section 8(j) of the Act and agrees to hold Petitioner safe and harmless up to the amount of such credit.

Issue (K): What temporary benefits are in dispute?
Issue (N): Is Respondent due any credit?

Respondent disputed temporary total disability benefits based upon liability. Based upon the Arbitrator's conclusions above, the Arbitrator awards 8-3/7 weeks of TTD benefits. Respondent claims a credit for Petitioner's sick, holiday and vacation days from her accrued bank. After reviewing Section 8(j) of the Act, as well as *Tee-Pak, Inc. v. Illinois Industrial Commission*, 141 Ill.App3d 520 (1986) and *Elgin Board of Education District U-46 v. Illinois Industrial Commission*, 409 Ill.App3d 943/2011, the Arbitrator concludes Respondent is not entitled to such a credit. The Arbitrator finds that Petitioner used her earned, accrued sick, holiday and vacation days which does not qualify as an 8(j) credit. Petitioner testified that none of this pay was pursuant to any group disability plan and that she could use her days at any time without any rule prohibiting the use of such earned benefits as long as there was prior authorization. This testimony is unrebutted. There is nothing in the Workers' Compensation Act that would allow for such a credit under these circumstances. The Arbitrator finds that these benefits are distinguished from the Appellate Court Decision, *Elgin Board of Education District U-46* referenced above. Therefore, the Arbitrator concludes Respondent is not entitled to a credit for the sick, holiday and vacation days Petitioner used from her own accrued bank. Therefore, Petitioner is awarded TTD benefits from July 22, 2017 through September 19, 2017. Respondent's claim for credit is denied.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 is to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of §8.1b of the Act; (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. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party submitted an impairment rating. 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 Petitioner was employed as a Certified Nursing Assistant at the time of the accident and she returned to work in her prior capacity. The Arbitrator notes that Petitioner is required to work on her feet throughout the workday with a limited amount of breaks to sit and rest her ankle/feet. The Arbitrator therefore gives *greater* weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 45 years old at the time of the accident. Because Petitioner has approximately 20 years of work life remaining until retirement, the Arbitrator gives *some* weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes there is no direct evidence of reduced earning capacity contained in the record. 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 Petitioner sustained a closed avulsion fracture(s) in her right ankle. Petitioner testified that she continues to notice pain, soreness and instability in her right ankle especially during weather changes. Petitioner takes Ibuprofen on a daily basis to treat her symptomatology. The Arbitrator notes that Petitioner testified in a credible and believable fashion consistent with the medical records. 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 Petitioner sustained permanent partial disability to the extent of 12.5% loss of use of her right foot pursuant to §8(e) of the Act.

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

Marvin Tuchman,

Petitioner,

vs. NO: 13 WC 16020

19IWCC0684

Hi-Five Sports Camp,

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, medical expenses, temporary total disability, permanent partial disability, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 25, 2017, 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.

19IWCC0684

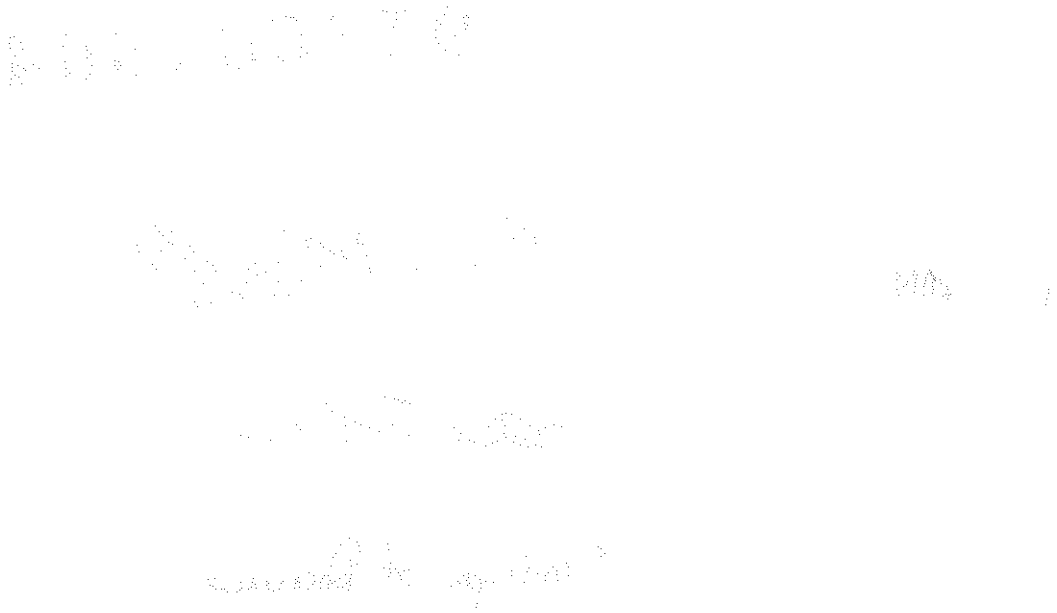
The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: DEC 17 2019
TJT:yl
o 12/10/19
51

Thomas J. Tyrrell

Barbara N. Flores

Kathryn A. Doerries



ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TUCHMAN, MARVIN
Employee/Petitioner

Case# **13WC016020**

HI FIVE SPORTS CAMP
Employer/Respondent

19IWCC0684

On 8/25/2017, 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 1.11% 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:

2194 STROM & ASSOCIATES
NEAL B STROM
180 N LASALL E ST SUITE 2510
CHICAGO, IL 60601

0532 HOLECEK & ASSOCIATES
JEFF GOLDBERG
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

19IWCC0684

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

Marvin Tuchman
Employee/Petitioner

v.

Hi-Five Sports Camp
Employer/Respondent

Case # **13** WC **16020**

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 **Brian T. Cronin**, Arbitrator of the Commission, in the city of **Chicago**, on **August 23, 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. [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. [ ] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [ ] 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 _____

FINDINGS

On **3/8/13**, 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 $**208,000.00**; the average weekly wage was $**4,000.00**.

On the date of accident, Petitioner was **66** years of age, ***married*** with **0** dependent children.

Respondent is entitled to a credit of $**13,238.37** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**13,238.37**.

ORDER

BASED ON HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE ISSUE OF ACCIDENT, THE ARBITRATOR HEREBY DENIES COMPENSATION. ALL OTHER DISPUTED ISSUES HAVE BEEN RENDERED MOOT. RESPONDENT SHALL BE GIVEN A CREDIT OF $13,238.37 FOR TTD BENEFITS 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

8/25/2017
Date

AUG 25 2017

19IWCC0684

FINDINGS OF FACT:

On May 15, 2013, Petitioner filed an Application for Adjustment of Claim in which he alleged that on "4/8/2013" he injured his "Left hip," that the accident occurred "While working," and that the nature of the injury was "To be determined." Petitioner and his attorney signed an Attorney Representation Agreement on that date.

On June 5, 2013, Petitioner filed an Amended Application for Adjustment of Claim in which he alleged that on "3/8/13" he injured his "Left hip," that the accident occurred "While working," and that the nature of the injury was "To be determined."

Petitioner testified that on the date of accident, he parked his car in front of his Northbrook office, opened the car door, his legs came out from under him, and he fell on his left side. Tr. 38-40. Petitioner testified that after he fell, he noticed that the initial shock on the pavement hurt him, and that he felt a little bruised. But what began to happen, Petitioner continued, was that as he would walk, he would notice a loud clicking coming from his hip. Tr. 51. Petitioner testified that the clicking got louder and louder to the point where he would walk down the street or into an office, and they knew he was coming. Tr. 51. Petitioner further testified that the pain started to increase at that time. Petitioner testified that he thought nothing of the fall at all until that started to happen. Tr. 51.

Petitioner testified that he initially sought medical treatment with Dr. Haskell, who is an associate of Dr. Silver's. Petitioner testified that the reason he went there was because Dr. Silver did his first hip replacement. Petitioner believed that Dr. Haskell sent him to Dr. Silver, whom he first saw on March 19, 2013. Petitioner testified that he told Dr. Silver what had happened, that Dr. Silver said he needed a revision and referred Petitioner to Dr. Alexander Gordon. Petitioner first saw Alexander Gordon, M.D., on March 26, 2013. Dr. Gordon performed the revision surgery, specifically, "LEFT TOTAL HIP ARTHRO-PLASTY REVISION, ACETABULAR COMPONENT AND FEMORAL HEAD," on April 11, 2013. Tr. 51-53, Pet. Exh. 16. Post-operatively, Petitioner underwent physical therapy and a home exercise program.

In a letter dated March 19, 2013, and addressed to Alexander Gordon, M.D., Dr. Silver wrote:

"Dear Alex,

I am writing with regard to my friend and patient Marvin Tuckman (sic). Marvin underwent left total hip replacement with Depuy J and J Summit pinnacle in December 2006. Three weeks ago he had a twisting injury and a fall on his left hip and since that time has noted squeaking in the hip.

His x-rays show significant wear of the polyethylene and x-rays prior to this time up until last year show absolutely no wear.

I am referring him to you for possible revision in terms of liner exchange and/or head exchange of his present total hip replacement.

I appreciate your anticipated care.

Warmest Regards,

Ronald L. Silver, M.D. Pet. Exh. 10, Pet. Exh. 16.

When Petitioner first saw Dr. Gordon on March 26, 2013, he completed, signed and dated the MEDICAL HISTORY FORM. Pet. Exh. 16. In such form, Petitioner handwrote, in pertinent part, the following:

"**HISTORY OF PRESENT ILLNESS**

Reason for today's visit: Hip

• If your visit is related to an injury, circle the appropriate response in the box below. If it is not related to an injury, skip this box.

The injury is due to: car accident / work injury / sports injury / fall / other ?
The injury occurred at: home / work / school / other
Are you off work due to this injury? Yes / No If yes, last day worked
If no, any restrictions
Is legal action / litigation pending due to this injury? Yes / No

DATE of onset / injury / ? / **SYMPTOMS** SQUEAKING + PAIN

LOCATION of symptoms: Left Hip ☐ Right ☐ Left ☐ both ☐ NA

*****

Have you had any problem with this area before? ☐ Yes ☐ No If yes, describe problem and prior treatment: Replaced hip 6 yrs" Pet. Exh. 16.

In the **PRESENT HISTORY** section of the **PROGRESS NOTE** for a March 26, 2013 date of service, Dr. Gordon wrote the following:

"A patient who had a left total hip arthroplasty 5 years ago. This was uncomplicated up until a fall about a month ago, when he started having increasing pain and squeaking in the left hip joint. He has seen Dr. Haskell, who had noted a mechanical complication and has referred him to me for an evaluation." Pet. Exh. 16.

At the time of the accident, Petitioner testified, he was employed as owner/director of Respondent, Hi-Five Sports Camp. Respondent operates youth sports camps on the North Shore and in Chicago. Tr. 17, 56-57. Petitioner testified that they have multiple locations - - probably 6-8 locations - - gyms that they use in Northfield and in Chicago. Tr. 17. Mr. Tuchman testified that the nature of his business, that is, operating these programs for children, necessitated that he travel to the other facilities that Respondent ran. Tr. 47. Petitioner testified that the purpose of traveling to these other facilities was to check on the programs, to make sure the programs were properly staffed and that the facilities were in proper condition. Tr. 18. From time to time, he would meet with the owners of the facilities or schools in which the facilities are located. Additionally, he was always looking for opportunities. Tr. 18-19. Petitioner testified that he visited the facilities daily and traveled there by in a car that Respondent provided and used gasoline that Respondent paid for. Tr. 47-48. Petitioner could not recall what car he had then. Tr. 47. Petitioner testified that he "always usually" went to the office first. Tr. 48.

Petitioner testified that in March of 2013 in the Northbrook office for Respondent, there were 6-8 employees. Tr. 73-74. Petitioner agreed with Respondent's Counsel that this office was the "nerve center" of Hi-Five Sports Camp. Tr. 74. The employees in the Northbrook office fielded calls from prospective customers, along with other duties. Tr. 74-75. Petitioner testified that none of the other Hi-Five facilities had an administrative office. Tr. 75. Petitioner testified that the purpose of his trip on March 8, 2013, before he fell, was, in part, to go to the Northbrook administrative office. Tr. 74-75. Petitioner testified that he went to his office and then went to other places in the course of his day. Tr. 118.

Petitioner's office is reached by entering a private driveway. Tr. 20, Pet. Exh. 1.

Petitioner's Exhibit 1 depicts a road.

At the head of the private driveway at the point where one turns left, there is a sign which states "Private Property, No Trespassing, and Violators Will Be Prosecuted." Tr. 23-24, 25. Located to the left of the sign is a parking lot for the public. Tr. 25-26. There is also a fieldhouse. Tr. 26. Petitioner's office was located approximately 3 to 4 football fields, maybe more, past the sign. Tr. 26. A driver, after turning west, would drive adjacent to the fieldhouse, on the left, the south side of the road, and park at the parking spaces which are perpendicular to the fieldhouse, located to the right of a westward driver. Tr. 27, Pet. Exh. 8.

Parking spaces were located perpendicular to Petitioner's office door. Tr. 27.

The fieldhouse has downspouts which deposit water on the private road which would freeze over the parking lot. Tr. 29-30, Pet. Exh. 4. The water would freeze near a sewer, the location where Petitioner fell. Tr. 32-33, Pet. Exh. 5.

On the day of accident, Petitioner parked his car but was unable to park in a parking space due to snow. Tr. 36, Pet. Exh. 7.

Petitioner testified that across from Respondent's office was a snow bank that precluded him from parking because the snow took the parking space. Tr. 68.

Petitioner's Exhibit 7 depicts a pile of snow that was apparently deposited in one of two adjacent, handicapped parking spaces.

There is no evidence that Petitioner was handicapped before he entered the office on the morning of March 8, 2013

Petitioner then parked as close as he could to the front door. Tr. 36. Petitioner parked at the curb facing west, the driver's side south, at the curb across his office. Tr. 38. Petitioner testified that Petitioner's Exhibit 6, in whole or in part, truly and accurately portrays the conditions on or around the date of accident. Pet. Exh. 6, Tr. 39.

Petitioner exited his car, stepped out, and his legs came out from under him. Tr. 39. Petitioner testified that the general public does not have access to this area. Tr. 40. He further testified that people would need to schedule specific times when they would participate in the programs that Respondent runs. Tr. 45. According to Petitioner, the programs in which the children participated were not by his office, but in a different area. Tr. 45.

Petitioner testified that people, such as parents and kids, would park far from his office in a parking lot at the beginning of the road that leads "down," and they would park "on the side in some cases." Tr. 46.

Petitioner testified that there was never anybody parking by his office that were in the activities because there was no parking. Tr. 46. The only people that had access were the people who worked in the office. Tr. 46.

Petitioner testified that there was no reason for customers to come to the administrative office, but on occasion they did. Tr. 77.

Petitioner later testified that he did not know where these customers would have parked. Tr. 117.

Customers would go to Respondent's facility for kids which was located approximately 100 plus yards from the office at approximately where the Hi-Five "sign" is depicted on the Google aerial Map. Tr. 78-79, Pet. Exh. 8. At the point that is states on the Google Map "Hi-Five Sports Camp", the customers would play soccer inside the building. Tr. 80, Pet. Exh. 8.

Diamond Instincts Baseball was on the road that runs adjacent and north and upon which Petitioner had his accident. Tr. 63, Pet. Exh. 8. The end of the road is where TC Boost is located. Tr. 64, Pet. Exh. 8.

Petitioner testified that his office was located where Diamond Instincts Baseball is located and further clarified that his office is no longer located at the fieldhouse, but toward the office where Diamond Instincts Baseball is at the date and time of the accident. Tr. 67, Pet. Exh. 8. According to Petitioner, Hi-Five Sports Camp was located where Diamond Instincts Baseball is located now. Tr. 68, Pet. Exh. 8.

The Google Maps aerial view photograph depicts parking spaces that are perpendicular to the building. Tr. 69, Pet. Exh. 8. Respondent did not own the parking lot area where Petitioner parked his car, nor did it own the building where the office was located and where the kids played soccer. Tr. 80-81.

Petitioner testified that he did not "think" there were other businesses near and next to Respondent's office which was located at office number 105. Tr. 81-82. Petitioner then testified that

there "may have been one at the far west - - far west end, but that was actually part of our business." Such business was a screen printing operation. The woman who worked there worked for Respondent. Tr. 82. The screen printing operation was a separate business. Tr. 82.

Petitioner was a partner of the screen printing business but did not have 100% ownership. Tr. 82. The screen printing business did work for other people. Tr. 83-84, 85.

The screen printing business was a "100, 200 feet, a hundred yards" from the Hi-Five office door. Tr. 85. The screen printing business was located at the very end of the building. Tr. 85. Petitioner testified that "other customers could use that printing company business and service." Tr. 85. There were no other businesses between the screen printing business and Respondent's administrative office. Tr. 85. TSO was the name of the screen printing business and its entrance was approximately 100 feet from Respondent's entrance. Tr. 87. TSO shared "a common wall that we could walk in and out of." Tr. 87.

Each and every parking space was not marked with a sign stating what the parking was for. Tr. 88.

Petitioner testified that he did not think Hi-Five had their own spaces. Tr. 88. He stated: "We knew it was for us." Tr. 89.

There was limited parking opposite to the screen printing business and Respondent's offices. Tr. 88. According to Petitioner, each business had two spaces. Tr. 88.

On redirect examination, Petitioner testified that "there four or five spaces only there for us." Tr. 119.

Petitioner also testified that the parking was restricted to the people who were there, such that signs would say "no parking or something like that." Tr. 88. Petitioner testified that, "everything would have said no parking." Tr. 89. The general public would not be able to park near and around where Petitioner parked on the day of the accident. Tr. 89-90.

A photograph of the west end of the building that contained the Hi-Five office, depicted the TSO screen printing business. The photograph depicts parked cars and a wooden fence opposite the TSO office. Tr. 92, Resp. Exh. 1. The parking spaces were for both TSO and Hi-Five. Tr. 93.

Petitioner acknowledged that there were signs on only two of the sections but that one "section" was for "ambulatory" and would have been marked on the ground, and the other space should have had a sign like those indicating no parking. Tr. 92-93, Resp. Exh. 1.

Petitioner elaborated by stating he believed such signage would have said something like: "No Parking, for authorized (sic) vehicle, Violators will be, you know, like a standard sign." Tr. 94.

Another photograph depicts a close-up of a sign that states: "Private Parking, TC Boost, Unauthorized Vehicles Will Be Towed at Owner's Expense and Risk." Tr. 94, Resp. Exh. 2.

TC Boost parking would have been far east of the Hi-Five office, but, regardless, Petitioner testified that the sign verbiage "might certainly have been what was down by us." Tr. pg. 95, Resp. Exh. 2.

Petitioner testified that there never were any spaces for customers and therefore they would have to park "all the way down" where there was a small parking lot. Tr. 99.

The office due east of the Hi-Five office was a hockey business, although the business may not have been present at the time of petitioner's accident. Tr. 100.

In regard to the Hi-Five facility where the children would play, this was located at the point depicted on the aerial Google Map that states "Hi-Five Sports Camp Northbrook." Tr. 102, 103-104, Pet. Exh. 8.

Petitioner then testified that parking could be available alongside and adjacent to the building of the access route. Tr. 106.

Petitioner then clarified that customers, people who sign up for programs, are not "the general public" does not mean customers, the people who sign up for the programs. Tr. 110-111.

The sign which states: "Private Property, Violators Will Be Prosecuted" would have been posted possibly right after the Lax Center, which is where the gym is. Tr. 113-115, Pet. Exh. 8, Pet. Ex. 2.

Petitioner testified that the public did not park across from his office and could not drive down to where his office was. Tr. 118.

Petitioner then testified that every parking space had a sign that stated "unauthorized vehicles will be towed at the owner's expense and risk." Tr. 120-121.

Petitioner testified that the Google Maps aerial view photo shows a parking lot [a gray rectangle] that was built under duress. The parking lot is due north of the TSO and former Hi-Five offices, and is entered by first traveling to the furthest west end of the road and turning north to enter it. Tr. 106, Pet. Exh. 8.

Petitioner testified that he cut back on his activities at the facilities in "big part" due to his age. Tr. 50. He had people who were in charge of "hands on stuff." Tr. 50.

On July 2, 2013, his last examination of Petitioner in evidence, Dr. Gordon wrote the following PROGRESS NOTE:

> "**PRESENT HISTORY:** The patient presents to the office today approximately 3 months status post acetabular revision of left total hip arthroplasty. Overall doing well. Still having some complaints of some buttocks pain after extended use but otherwise doing well. Walks without assistive devices. He has finished all of his physical therapy. No other complaints today.
>
> **PHYSICAL EXAMINATION:** The patient today is walking without a limp. In regards to the hip, the surgical incision is well healed. No signs of infection. He has painless range of motion of his hip. Thigh and calf are soft, nontender to palpation. Negative Homans sign. Neurovascular examination is within normal limits.
>
> **X-RAYS:** Two views of the left hip demonstrate a well-positioned left total hip arthroplasty.

IMPRESSION: He is 3 months status post acetabular revision of left total hip arthroplasty. **PLAN:** The patient will continue activity as tolerated. We did give him a prescription refill of Norco, as well as a prescription for tramadol. We discussed and advised weaning off the Norco and transitioning to tramadol. He will follow up with us at the 1-year anniversary of his surgery." Pet. Exh. 16.

Despite the fact that Dr. Gordon performed the acetabular revision of left total hip arthroplasty on Petitioner, Petitioner engaged the services of Richard S. Sherman, M.D., to examine him and to provide a causation opinion. In his November 25, 2014 report, Dr. Sherman concluded:

"Mr. Tuchman had undergone left hip replacement surgery in 2006 and was doing well with no limitation of function and no complaints of pain until his slip and fall accident on ice in front of his workplace on March 8, 2013. As a result of this fall, he sustained a dissociation of the polyethylene component. This necessitated revision surgery of the acetabular component and of the modular femoral head component of his left total hip implant. Since the time of the surgery, Mr. Tuchman has had buttock pain and left hip stiffness. This is related to the revision hip surgery. Having to undergo another surgical violation of the soft tissues around the left hip has resulted in a degree of scar tissue formation that is permanent and has resulted in left buttock discomfort and left hip stiffness in conjunction with residual left hip girdle weakness that is permanent. He will need to have ongoing follow up of his revision surgery in the form of serial x-rays and examinations on a yearly basis. Revision hip surgery carries with it an increased risk of post-op muscle weakness and instability. Mr. Tuchman will need to restrict activities of bending and internally rotating his left hip on a permanent basis." Pet. Exh. 13.

There is no evidence that Petitioner was examined by a Section 12 physician at the behest of Respondent. Respondent has offered no causation opinion to the contrary.

However, in his March 26, 2013, PROGRESS NOTE, Dr. Gordon wrote: "there is metal debris degenerated." Thereafter, a pathologist found "failed hardware left hip."

Petitioner is not claiming that he sustained a repetitive trauma injury.

Petitioner testified with regard to his activities of life now. He testified that he wished he had the vertical leap that he used to have. He further testified that he is having lateral issue with his other hip. With regard to his left hip, he testified that this is his second hip replacement. This time, the recovery was better, but the pain and limitations are greater than the first time. He testified that, currently, he cannot run or bike. When he has tried to play basketball, his hip begins to hurt after 2-3 minutes. Additionally, he is concerned about the chance or reinjury. He takes Aleve for the pain. Tr. 59-60. Petitioner was 66 years old on March 8, 2013. His first left hip arthroplasty was 6 years earlier.

CONCLUSIONS OF LAW

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

An injury is accidental within the meaning of the Act when it is traceable to a definite time, place, and cause and occurs in the course of the employment, unexpectedly and without affirmative act or design of the employee. *Mathiessen & Hageler Zinc Co. v. Industrial Board*, 284 Ill. 378, 120 N.E.249 (1918)

The Arbitrator finds, by a preponderance of the evidence, that Petitioner failed to prove that he sustained a slip-an-fall accident in the parking lot in front of Respondent's Northbrook office on March 8, 2013. The bases for such decision are as follows:

1. Although Petitioner first treated for his left hip with Dr. Haskell, he did not offer Dr. Haskell's medical records into evidence. The Arbitrator draws the reasonable inference that Dr. Haskell's records would have been unfavorable to Petitioner.

2. In a letter dated March 19, 2013, Dr. Silver, a friend and treating physician of Petitioner's, wrote that Petitioner experienced a twisting injury and fall on his left hip 3 weeks ago. The Arbitrator notes that 3 weeks prior to March 19, 2013 would have been February 26, 2013.

3. There is no evidence that Dr. Silver conducted a physical examination of Petitioner on March 19, 2013, and therefore, no evidence of, for example, erythema or ecchymosis of the left hip.

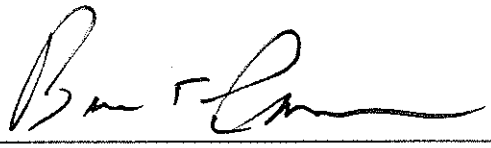
4. Petitioner originally claimed an accident date of April 8, 2013 for this single, traumatic injury, but later amended his Application to reflect an accident date of March 8, 2013, which was *one month earlier*. In both the original and the amended Application, Petitioner was vague about how he injured himself and merely stated "While working."

5. Despite the fact that 6-8 people work in his office, Petitioner did not offer any corroborating testimony of a slip-and-fall injury in the parking lot in front of Respondent's office on March 8, 2013, or on any other date. Petitioner testified that he was headed for the office that morning and was getting out of his car in the parking lot when his feet went out under him and he fell on his left side. Although he "felt a little bruised," Petitioner did not seek medical care at that time but continued to work.

6. In this same PROGRESS NOTE, Dr. Gordon referred to a fall that occurred about a month ago, which would have been February 26, 2013.

7. Of great significance to the Arbitrator are the responses Petitioner wrote down on Dr. Gordon's MEDICAL HISTORY FORM on March 26, 2013. Petitioner had the opportunity to affirmatively indicate that he had experienced a fall, that he sustained an injury at work, and that the date of onset was on or soon after the alleged fall. Petitioner did not take such opportunity, but instead handwrote 2 question marks in the fields provided.

Compensation is hereby denied. All other disputed issues have been rendered moot. Respondent is entitled to a credit in the amount of $13,238.37 for TTD benefits that they paid Petitioner.



8-25-2017

Brian T. Cronin

Date

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

Daniel Larson,

Petitioner,

vs.

NO: 18 WC 2292

19IWCC0685

Village of Schaumburg,

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 the nature and extent of Petitioner's disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 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.

19IWCC0685

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: DEC 17 2019
TJT:yl
o 12/10/19
51

Thomas J. Tyrrell

Maria E. Portela

DISSENT

I respectfully dissent from the majority opinion affirming and adopting the Arbitrator's Decision finding the Petitioner sustained a permanent partial disability to the extent of 15% loss of use of a person as a whole under Section 8(d)2 of the Act. The evidence shows Petitioner sustained permanent partial disability of 10% loss of use of a person as a whole under Section 8(d)(2).

According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, 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 AMA guidelines;
(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.

In considering the degree to which Petitioner is permanently partially disabled, I would weigh the five factors in Section 8.1b(b) of the Act as follows:

(i) *The reported level of impairment*:

Neither side presented evidence of an AMA rating and therefore no weight is given to this factor.

(ii) *The occupation of the injured employee*:

Petitioner is employed as a Maintenance I Worker, a highly physical position, and returned to work in this capacity without any restrictions. Great weight is given to this factor.

(iii) *The age of the employee at the time of the injury*:

Petitioner was 55 year of at the time of the accident and, therefore, Petitioner has a shorter work life. Moderate weight is given to this factor.

(iv) *The employee's future earning capacity*:

Petitioner returned to his regular job and is performing his regular work duties. No evidence suggests Petitioner's future earning capacity will be adversely affected by this accident. This factor should be given moderate weight.

(v) *Evidence of disability corroborated by the treating medical records*:

Petitioner sustained injuries to his left shoulder as a result of his work-related accident. An MRI of Petitioner's left shoulder performed by Dr. Aaron Bare on November 22, 2017, revealed (1) a moderate infraspinatus tendinosis with diffuse thickening and focal insertional footplate interstitial fluid, likely a small component of interstitial tear; no full-thickness tear; (2) Mild supraspinatus tendinosis with minimal focal interstitial fraying; (3) Moderate to severe a.c. joint arthrosis with a chronic sprain of the of the acromioclavicular ligaments and degenerative changes with suggestion of subacromial impingement and subacromial bursitis; (4) Mild intracapsular biceps tendinosis with degenerative posterior extension SLAP type tear suspected; (5) Small joint effusion, synovitis suspected within the glenohumeral joint, most pronounced in the sub coracoid recess. (PX4) Following several cortisone injections and several weeks of physical therapy, Petitioner underwent surgical intervention upon his left shoulder on February 20, 2018, that included an arthroscopic rotator cuff debridement, a labral tear debridement, a subacromial decompression and a distal clavicle excision. (PX4)

After meeting all the short-term and long-term goals during his course of physical therapy, Petitioner was discharged on May 21, 2018. (PX4) His physical therapist noted an improved Quick Dash score and increased cervical and shoulder range of motion to within functional limits. Petitioner reported 0/10 on the pain scale and felt work conditioning was not needed. (PX4)

On May 23, 2018, Petitioner followed up with Dr. Bare and reported having minimal pain and improved function. (PX4) The examination of Petitioner's left shoulder demonstrated range of motion findings of 150° of forward flexion, 100° of abduction, 50° of external rotation and internal rotation to L1 and strength findings of 5/5 with flexion and 5/5 with abduction. (PX4). Dr. Bare's examination of Petitioner's cervical spine revealed normal range of motion and no tenderness to palpation. (PX4) Dr. Bare stated Petitioner was at maximum medical improvement, discharged him from care with instructions to return as needed and released Petitioner to return to work at full duty, effective May 29, 2018. (PX4)

Petitioner testified at Arbitration he returned to work in the same capacity as before the accident. (T, p. 18) He testified that he needs help performing his work activities. (T, pp. 19-20) He testified he needs to take breaks while snowplowing because he drives the snowplow with his left shoulder and works the snowplow's controls with his right arm. (T, pp20-21)

Petitioner testified that he experiences a constant ache at the top of his shoulder and uses Ibuprofen and ice a lot. (T, p. 19) He stated he always has pain, but the level of the pain changes. (T, p. 23) He testified he will take Ibuprofen if the pain is overbearing but always ices his shoulder. (T, pp. 23-24)

However, the medical records introduced into evidence do not corroborate Petitioner's testimony. The Northwestern Medicine Outpatient Physical Therapy Daily Note, dated May 17, 2018, indicates, "Patient states this is the first time I could say I have no pain." (PX4). In the discharge note, it was recorded, "Patient states I don't feel I need work conditioning, I am feeling much better and stronger." In a progress note dated May 23, 2018, it was noted, "Patient reports minimal pain and pain medication usage has ceased." (PX4). Although the medical records indicate that patient was reminded to avoid activities that could stress the rotator cuff, Dr. Bare released Petitioner to return to work at his physical job with ***no*** restrictions on his activities. Based on the foregoing, this factor is given significant weight.

Therefore, I would find Petitioner sustained an injury to his left shoulder that resulted in permanently partially disability of 10% loss of use of the person as a whole. Based on the foregoing, I respectfully dissent.

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LARSON, DANIEL
Employee/Petitioner

Case# **18WC002292**

VILLAGE OF SCHAUMBURG
Employer/Respondent

19IWCC0685

On 6/26/2019, 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 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:

5625 GRAUER & KRIEGEL LLC
KARINA B MEJIA
1300 E WOODFIELD RD SUITE 205
SCHAUMBURG, IL 60173

0481 MACIOROWSKI SACKMANN & ULRICH
ROBERT ULRICH
105 W ADAMS ST SUITE 2200
CHICAGO, IL 60603

19IWCC0685

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 Larson
Employee/Petitioner

v.

Village of Schaumburg
Employer/Respondent

Case # **18** WC **2292**

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 **Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **June 17, 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. [ ] 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 **August 11, 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 $**69,410.12**; the average weekly wage was $**1,334.81**.

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

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

By stipulation all temporary total disability benefits have been paid. ARB EX 1.

ORDER

Respondent shall pay Petitioner $790.64 per week for 75 weeks as Petitioner sustained permanent partial disability to the extent of 15% loss of use of a person as a whole under 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.

Carolyn M. Doherty

Signature of Arbitrator

6/24/19

Date

JUN 26 2019

FINDINGS OF FACT

The disputed issues at trial included causal connection and nature and extent of Petitioner's injuries. ARB EX 1.

Petitioner testified that he has worked 21 years for the Respondent. At the time of this undisputed accident on 8/11/17, Petitioner worked for Respondent as a Maintenance 1 Worker performing general labor work. Petitioner testified that at the time of the accident he was assigned to the storm sewer division but that he worked in all of the other divisions when necessary. Petitioner testified that on 8/11/17 his duties included lifting, pushing, pulling, climbing, digging and using an assortment of hand tools including shovels and sledge hammers. He also testified that because he was in the storm sewer division, he would also occasionally move and lift manhole covers, clear debris from creeks and occasionally load sand. The sand buckets could weigh up to 100 pounds. Petitioner performed underground excavation to replace storm sewers or repair water main brakes. He testified that he would start the required digging using a machine and then finish by hand using a shovel so as to avoid breaking pipes. In addition to his job as a Maintenance 1 Worker, he also drove a snowplow for the Village in the winter to clear snow.

Petitioner testified, and it is undisputed, that on 8/11/17, he injured his left shoulder while loading a 100-pound bucket of sand onto the back of a truck. The back of the truck was slightly above Petitioner's waist level. Petitioner testified that he immediately felt a sharp pain along the top of his left shoulder and shortly thereafter reported the accident to his supervisor.

Petitioner initially reported to Northwest Community Healthcare and Dr. Perumal on 8/25/17. He reported injuring his left shoulder lifting a 100 pound bucket of sand at work two weeks earlier. PX 3. On exam, Petitioner exhibited tenderness. He was diagnosed with a left shoulder strain and given medication. Petitioner returned for follow up on 9/1/17 and reported that his shoulder had improved and that he was "ready to go back to full duty." PX 3. Petitioner's medication was discontinued and he was returned to work without restrictions. Exam of his left upper arm was normal. He was to return as needed. PX 3.

On 10/11/17 Petitioner sought treatment at Northwestern Medicine and Dr. Bare. He complained of left shoulder continued pain which was sharp and intermittent and aggravated by reaching, lifting at work above shoulder level, and driving. Dr. Bare examined Petitioner and found left shoulder tenderness in the acromion and a normal range of motion and strength. Because he also found a positive Hawkins test and a positive impingement test, Dr. Bare recommended a subacromial cortisone injection for both diagnostic as well as therapeutic purposes. Dr. Bare also recommended physical therapy. After he administered the injection, Dr. Bare released Petitioner to return to work full duty. PX 4.

Petitioner underwent the recommended physical therapy, but his pain increased. As of November 8, 2017 Petitioner was reporting minimal improvement from the earlier cortisone injection and had stopped physical therapy. On 11/8/17, Petitioner was re-examined by Dr. Bare and the exam revealed a positive impingement test and a positive Hawkins test. Dr. Bare recommended an MRI scan to further diagnose Petitioner's condition and to evaluate the integrity of the rotator cuff. Full duty was continued with activities as tolerated pending the MRI results. PX 4.

On November 22, 2017, Petitioner had the recommended MRI scan which showed moderate infraspinatus tendinosis, no full-thickness tear, moderate to severe acromioclavicular joint arthrosis and a suspected SLAP tear. On December 4, 2017 Petitioner returned to Dr. Bare who reviewed the MRI scan and recommended and

administered another cortisone injection which Petitioner had that day. On December 27, 2017 Dr. Bare re-examined Petitioner. Because the second injection had not helped, Dr. Bare recommended surgery in the form of left shoulder arthroscopy with debridement, subacromial decompression, and distal clavicle excision. PX 4.

On February 28, 2018 Petitioner had an arthroscopic debridement of the rotator cuff, a type 1 superior labral tear repair, a left shoulder arthroscopic subacromial decompression and distal clavicle excision.

According to the February 28, 2018 Operative Report:

> Intraoperative findings included a partial thickness undersurface tear of the supraspinatis tendon, fraying of the coracoacromial ligament with a downsloping acromion as well as degenerative changes of the distal clavicle. ... In summary, the procedure performed was arthroscopic debridement of superior labrum and articular side rotator cuff tear, subacromial decompression and arthroscopic distal clavicle excision. He tolerated this procedure very well.

After the surgery Petitioner received physical therapy at Northwestern Medicine. On May 21, 2018, Petitioner underwent a physical therapy examination and assessment. Petitioner was noted as having decreased range of motion of the left shoulder, namely, 164 degrees out of 180° for flexion and 175 degrees out of 180° for abduction. PX 4. That same day, Petitioner was discharged from physical therapy and a functional capacity evaluation was recommended, but Petitioner never underwent the evaluation. On that date, Petitioner reported "I don't feel I need work conditioning, I am feeling much better and stronger." Petitioner reported 0/10 pain on 5/21/17, the date of discharge from PT. PX 4.

At his last visit with Dr. Bare on 5/23/18, Dr. Bare noted that Petitioner "reported minimal pain and improved function. The pain medication usage had ceased. Patient has continued in physical therapy. Operative convalescence has continued to be normal up to this point. Patient did not return to light duty work after last appointment as there was no light duty available. Denies any new injuries. No new concerns today. ... Patient is now cleared to return to full duty work. Patient was reminded to avoid activities that could stress the rotator cuff. Follow up as needed." Petitioner returned to work without any restrictions on May 29, 2018. Petitioner testified that he has been working since May 29, 2018, performing his regular job.

Petitioner testified that he has a "constant" ache on the top of his left shoulder. At work, Petitioner is no longer able to lift 100 pound bags of concrete or sewers covers without assistance from a co-worker. While working, he experiences left shoulder pain which he manages by taking Ibuprofen and by applying ice to his left shoulder at home after work. He also testified that he must take frequent breaks while driving the snowplow during an 8 to 16 hours shift as he drives with his left arm and shifts the controls with his right arm. Petitioner also testified that he now takes "a little longer" to do certain tasks. He is no longer able to play golf, basketball or swim and has a hard time sleeping on his left side. Petitioner is still able to perform yard work and tree trimming at home but testified that he is slower and more careful while performing these tasks and takes frequent breaks. He testified that his pain is constant but the level of pain varies during the day.

Petitioner testified that he has not returned for any treatment since May 2018 and that he was released to full duty work without restrictions from Dr. Bare.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

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

Based on the medical records and the sequence of events, the Arbitrator finds a causal connection between Petitioner's undisputed accident of 8/11/17 and Petitioner's left shoulder treatment and subsequent condition of ill-being.

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

According to Section 8.1(b) of the Act, 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 Arbitrator/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(a), the Arbitrator notes that neither side presented evidence of an AMA rating and therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 55 years of age at the time of the accident, and therefore, because of Petitioner's age Petitioner has a somewhat shorter work life. The Arbitrator gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has returned to his regular job and is performing full duties. There is no evidence suggesting that

Petitioner's future earnings capacity will be adversely affected by this accident and therefore, the Arbitrator gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner is a Maintenance 1 Worker for the Respondent, which is a highly physical position. Petitioner has been released to return to work without any restrictions and has returned to his normal job. Petitioner performs the job with occasional assistance lifting heavier objects. He takes frequent breaks while driving the snow plow during long shifts. The Arbitrator gives great weight to this factor.

With regard to subsection (v) evidence of disability corroborated by the treating medical records, the Arbitrator notes that following failure of conservative care, Petitioner underwent surgical repair of his left shoulder followed by physical therapy. Petitioner exhibited some limitations on his discharge from PT but reported no pain and no need for work conditioning given his noted improvement. On his last visit to Dr. Bare, he noted that Petitioner "reported minimal pain and improved function. The pain medication usage had ceased. Patient has continued in physical therapy. Operative convalescence has continued to be normal up to this point. Patient did not return to light duty work after last appointment as there was no light duty available. Denies any new injuries. No new concerns today. ... Patient is now cleared to return to full duty work. Patient was reminded to avoid activities that could stress the rotator cuff.

At trial, Petitioner credibly testified that as a result of his injury, he uses caution at work and asks for assistance to perform heavier functions to avoid re-injury. He testified that he takes frequent breaks driving a snow plow with his left arm. At home, he takes frequent breaks while performing outdoor work. Petitioner testified that his left shoulder injury prevents him from swimming, golfing or playing basketball as he did before the accident. The Arbitrator notes that although these specific limitations are not reflected in the last treatment record from Dr. Bare, Dr. Bare did caution Petitioner to avoid activities that could stress the rotator cuff. The Arbitrator gives great weight to this factor.

Based on these factors and on the record in its entirety, the Arbitrator finds that Petitioner sustained 15% loss of use of the person as a whole pursuant to Section 8(d)(2) of the Act.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEPHANIE ESTILL,

Petitioner,

vs. NO: 17 WC 10722

BALL-CHATHAM CUSD #5,

Respondent.

19IWCC0686

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, causal connection, medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Arbitrator's Decision, which is attached hereto and made a part hereof. The Commission only writes to clarify its analysis on the issues of accident and causation, as well as address the issue of penalties and attorney's fees as marked on the Request for Hearing form.

So that the record is clear, and there is no mistake as to the intentions or actions of the Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties. The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Indus. Comm'n,* 51 Ill. 2d 533, 536-37 (1972).

In his Decision, the Arbitrator considered the three types of risks to which an employee might be exposed and found that Petitioner's act of reaching to buckle the seatbelt was a neutral risk. The Arbitrator stated that Petitioner's injury was compensable if the design and positioning of the seatbelt placed Petitioner at a greater risk of injury, either qualitatively or quantitatively, than the general public. The Arbitrator found that Petitioner was exposed to a qualitatively greater risk of injury than the general public. "Specifically, the design and positioning of the seatbelt was particular to Petitioner's employment and differed from the design of a seatbelt the general public would be exposed to while driving personal vehicles."

In referring to the photographs comprising Petitioner's Exhibit 10, the Arbitrator noted that the seatbelt on the bus was mounted significantly higher than a seatbelt in a personal vehicle. There was also a greater distance between the driver's seat and inner wall of a bus – "further increasing the distance a driver would need to reach in order to buckle the seatbelt." The Arbitrator found credible Petitioner's testimony, wherein Petitioner explained that in order to buckle herself in the bus, she would use her right arm to reach approximately two feet above her left shoulder, and that this act differed from buckling her seatbelt in her personal car. The Arbitrator therefore found that the design and positioning of the seatbelt exposed Petitioner to a qualitatively greater risk of injury.

The Commission notes that while the Arbitrator found Petitioner's injury compensable under a neutral risk theory, the Arbitrator did mention in passing that the act of "buckling her seatbelt was incident to Petitioner's assigned duties as a bus driver, and that Respondent could reasonably expect her [to] reach to buckle her seatbelt." Our Appellate Court recently clarified how we analyze the "arising out of" element when determining the issue of Accident. The Appellate Court stated, "we simply hold that an 'arising out of' determination requires an analysis of the claimant's employment and the work duties he or she was required or expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis." *McAllister v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶73.

The Commission finds that the Arbitrator's ultimate conclusion was correct – that Petitioner sustained an accident that arose out of and in the course of Petitioner's employment by Respondent. However, the analysis should have first considered whether Petitioner was exposed to an employment-related risk; in this instance, Petitioner was. Petitioner was injured in the process of buckling her seatbelt in preparation for her afternoon bus route.

> Risks are distinctly associated with employment when, at the time of injury, '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. *McAllister v. Ill. Workers' Comp. Comm'n*, 2019 IL App (1st) 162747WC, ¶27.

The Arbitrator acknowledged and the Commission agrees that Petitioner's act of buckling her seatbelt on the bus was a function that Petitioner, in her role as a bus driver, was expected to perform incident to her assigned duties. In fact, as a school bus driver, buckling one's seatbelt is

not an act that Petitioner "might" have been reasonably expected to perform incident to her assigned duties, but was in fact a common law or statutory duty that Petitioner was required to perform. Petitioner's Exhibit 2 is a copy of the job description for a bus driver working for Respondent; part of the responsibilities included "Must pass test covering knowledge of bus driving rules, regulations and laws." This includes buckling your seatbelt.

Further, the seatbelt, the risk herein encountered, was specific to the employment; this risk was also connected with what Petitioner had to do in fulfilling her duties. Based on the testimony of Respondent's witnesses and by Respondent's Brief, the bus seatbelt was attached to the vehicle slightly higher and further forward than on most personal vehicles. Thus, in considering Respondent's argument that we are all required to buckle our seatbelts, while true, Petitioner herein faced a risk distinctly associated with her employment as a school bus driver. The seatbelt was specific to the school bus, and Petitioner was injured while engaged in an activity that she was instructed to perform, which she had a common law or statutory duty to perform, and which she was expected to perform.

The Commission therefore affirms the Arbitrator's ultimate conclusion, but finds that a neutral risk analysis, although well-reasoned and supported by the record, was not necessary in this situation as Petitioner's injury was compensable under an employment-related risk theory.

The Commission also affirms the Arbitrator's conclusion that Petitioner's right shoulder condition was causally related to the February 22, 2017 accident. The Commission notes that Respondent did not provide evidence or testimony to rebut Dr. Brett Wolters' opinion on causal connection. Dr. Wolters had testified at his deposition that he agreed that the mechanism of injury on February 22, 2017 could cause a rotator cuff tear. Respondent on the other hand presented the evidence deposition of Dr. Lawrence Li who performed an AMA impairment rating on behalf of Respondent on January 25, 2018. However, Dr. Li offered no testimony to rebut Dr. Wolters' causation opinion. The Commission therefore weighs the evidence in favor of Petitioner on the issue of causal connection. Accordingly, the Commission affirms the Arbitrator's Decision in this regard.

With respect to the issue of penalties and attorney's fees, Petitioner's counsel advised the Commission during oral argument that they were waiving the issue of penalties and attorney's fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed March 12, 2019, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the reasonable and necessary medical services as set forth in Petitioner's Exhibit 9, pursuant to Section 8(a) of the Act and to be adjusted in accord with the medical fee schedule provided in Section 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $518.23 per week for 26 2/7 weeks, commencing

March 14, 2017 through September 14, 2017, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $3,183.41 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $466.41 per week for a period of 50 weeks, as provided in Section 8(d)2 of the Act, for the reason that the injuries sustained caused ten percent (10%) 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 other 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 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 the Circuit Court.

DATED: DEC 17 2019

D. Douglas McCarthy

Stephen J. Mathis

L. Elizabeth Coppoletti

DDM/pm
O: 12-10-19
052

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ESTILL,STEPHANIE
Employee/Petitioner

Case# **17WC010722**

BALL-CHATHAM CUSD #5
Employer/Respondent

19IWCC0686

On 3/12/2019, 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:

2217 SHAY & ASSOCIATES
TIMOTHY M SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

0771 FEATHERSTUN GAUMER STOCKS ETAL
DANIEL GAUMER
225 E WATER ST SUITE 200
DECATUR, IL 62523

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

☐ 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

Stephanie Estill
Employee/Petitioner

v.

Ball-Chatham CUSD #5
Employer/Respondent

Case # 17 WC 10722

Consolidated cases: _____

19IWCC0686

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 **Springfield**, on **October 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. ☒ 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 22, 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 **$40,422.38**; the average weekly wage was **$777.35**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$3,183.41** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**. All TTD paid.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 9, directly to the providers, according to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Temporary Total Disability

Respondent is ordered to pay Petitioner $518.23 per week for a period of 26 and 2/7 weeks, representing temporary total disability benefits from March 14, 2017 through September 14, 2017. Respondent shall be given a credit of $3,183.41.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $466.41/week for 50 weeks, because the Petitioner sustained injuries to her right shoulder causing a 10% loss of use of the person as a whole under 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

March 4, 2019
Date

MAR 12 2019

FINDINGS OF FACT

Petitioner testified she is currently employed with Respondent, where she has worked since 1997. TR, p. 10. She testified she graduated from high school in 1984 and attended one year of community college at Lincoln Land in Springfield. TR, p. 11. She did not complete the program and holds no certification associated with any college. TR, p. 11-12. She testified she began working for Respondent as a playground supervisor, but that she is currently a bus driver. TR, p. 12. She began driving a bus for Respondent in 1998. TR, p. 12. She testified she has held a CDL, SBP Class B driver's license in order to drive school buses for approximately 20 years. TR, p. 12-13. She participates in a refresher course and renews her license yearly. TR, p. 13-14.

Petitioner reviewed a series of photographs entered into evidence as Petitioner's Exhibit 10 and testified they depicted the school bus she was driving in February 2017, and that they depicted the type of bus she had been driving for the past 20 years. TR, p. 12, PX 10. She testified she took the photographs. TR, p. 14. She testified the second photograph depicted the seat she sat in, and that the third photograph was a close up of the seatbelt. TR, p. 15. She testified that in order to buckle herself in, she would use her right arm to reach approximately two feet above her left shoulder, then she would bring the belt down with her right arm to buckle it. TR, p. 15-16. She testified this involved one motion, all with the right arm. TR, p. 16. She testified that buckling this seatbelt differed from buckling the seatbelt in her car because the seatbelt is right over her shoulder and is not very high in her car. TR, p. 16. She testified buckling her seatbelt in the bus takes greater force than in her car due to the height of the seatbelt and the distance to the buckle. TR, p. 18. She testified she had to reach from a foot or more above her left shoulder, then down to her right hip. TR, p. 18.

Petitioner testified that, on February 22, 2017, she was getting ready for her afternoon route and reached up with her right arm to pull down the seatbelt, and that as she pulled the belt down approximately midway across her body when the seatbelt locked up. TR, p. 16-17. She testified she felt a pop which went up to her neck and down to her bicep. TR, p. 16-17. She testified it felt like something was ripping in her right shoulder. TR, p. 21.

Petitioner testified she had a similar incident the previous October, but there was only a little bit of pain which had subsided by the next day. TR, p. 19. She testified she completed workers' compensation papers and gave them to one of the assistants for Jim Lovelace that day, but that she let it go because there was no pain the next day. TR, p. 19-20. She testified she never received any treatment for this injury. TR, p. 20. She testified she had never received any treatment for her right shoulder, nor had she ever had shoulder problems, prior to February 22, 2017. TR, p. 21.

Petitioner testified she completed her shift, and then reported the incident. TR, p. 21-22. She reviewed a Report of Injury, entered into evidence as Petitioner's Exhibit 1, and testified she filled out the form that day. TR, p. 22. The Report of Incident asked Petitioner to "Describe How Illness or Injury Occurred," to which she responded "Seat belt locked up when putting on before route." PX 1. She noted that the injury was to her shoulder and possibly her neck. PX 1. Petitioner's supervisor, Jim Lovelace, also described the incident in the Supervisor's Report of Accident, which was completed the following day. PX 1. Jim Lovelace wrote "PM route went to pull seat belt down & belt locked up & when belt locked up shoulder popped." PX 1.

Petitioner reviewed a job description entered into evidence as Petitioner's Exhibit 2 and agreed the physical requirements included reaching and exerting 20-50 pounds of force frequently. TR, p. 24-25, PX 2.

Petitioner presented to the Memorial Medical Center Emergency Department on February 23, 2017 complaining of right shoulder pain, which she described as constant, worsening, and sharp. PX 3. She also noted

radiating pain to the right side of her neck. PX 3. She was evaluated by Physician Assistant Eric Carrier, who assessed her with a right shoulder strain, prescribed pain medication and a muscle relaxer, and discharged her home with instructions to follow up with her primary care physician. PX 3.

On March 6, 2017, Petitioner present to Memorial Physician Services for a follow up with her primary care physician, Dr. Michael Sheedy. PX 4. She was evaluated by Nurse Practitioner Kristina Waggoner, who noted Petitioner had been taking the medication as prescribed without improvement. PX 4. NP Waggoner noted additional symptoms of localized weakness, numbness in the right hand, and decreased range of motion in the shoulder. PX 4. NP Waggoner ordered an x-ray of the right shoulder, to be followed by an MRI. PX 4. An x-ray taken that day was negative. PX 3. On March 14, 2017, NP Waggoner placed Petitioner on work restrictions and referred her to an orthopedic specialist with Springfield Clinic. PX 8.

Petitioner presented to Springfield MRI & Imaging Center on March 10, 2017 for an MRI of her right shoulder. PX 5. The MRI revealed a full-thickness tear of the supraspinatus tendon, a partial-thickness tear of the infraspinatus tendon, and mild AC joint arthritis. PX 5.

On March 17, 2017, Petitioner presented to Springfield Clinic for an evaluation by orthopedic surgeon Dr. Brett Wolters. PX 6. She was evaluated by Nurse Practitioner Elizabeth Cheney, who reviewed the results of the MRI and assessed Petitioner with right shoulder impingement with rotator cuff tears. PX 6. NP Cheney recommended conservative treatment consisting of physical therapy and injections. PX 6. An injection was administered at that time. PX 6.

Petitioner presented to Advance Physical Therapy & Sports Medicine on March 22, 2017 for an initial physical therapy evaluation. PX 16. She again reported that she had been reaching for her seatbelt when in locked up and she felt a pop, followed by pain. PX 16. She reported that she had been in pain since the incident. PX 16. She was evaluated by Physical Therapist Brian McNeil, who recommended a course of physical therapy in conjunction with a home exercise program. PX 16.

Petitioner returned to Springfield Clinic on April 7, 2017 and was evaluated by Dr. Wolters, who noted a history of a right shoulder rotator cuff tear related to s seatbelt incident. PX 6. Petitioner reported that she had not been improving with physical therapy, and Dr. Wolters recommended an arthroscopic rotator cuff repair followed by physical therapy. PX 6. Petitioner was cleared for surgery on April 14, 2017. PX 4.

On May 1, 2017, Petitioner presented to Springfield Clinic for right shoulder arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle excision procedures, which were performed by Dr. Wolters. PX 7. Following the procedure, Petitioner continued to follow up post-operatively at Springfield Clinic and resumed physical therapy. PX 6, 16.

Petitioner presented to Springfield Clinic on September 13, 2017 for a follow up with Dr. Wolters regarding her right shoulder and to be evaluated to return to work. PX 6. Dr. Wolters noted Petitioner's physical therapy records showed excellent improvement, though Petitioner also complained of some stiffness in her right shoulder. PX 6. Dr. Wolters released her to work without restrictions, though he did not place her at maximum medical improvement. PX 6. Petitioner testified she returned to work on September 15, 2017. TR, p. 33.

On November 10, 2017, Petitioner returned to Springfield Clinic and reported that her pain was gone, though she still felt that she needed some strengthening. PX 6. She also reported some occasional achy soreness.

PX 6. NP Cheney recommended she continued home strengthening exercises and placed her at maximum medical improvement and stated that she could return on an as needed basis. PX 6.

Petitioner testified that in mid-January 2018 she woke up one morning with bad shoulder pain. TR, p. 34. She returned to Springfield Clinic on January 24, 2018 and reported that she had been doing well until recently, but was experiencing discomfort in her right shoulder. PX 6. She complained of pain at night, which radiated down to her deltoid, as well as some radiating pain to her neck. PX 6. Dr. Wolters recommended she return to formal therapy and follow up in six weeks. PX 6. Petitioner returned to Advance Physical Therapy & Sports Medicine on February 6, 2018. PX 16.

On January 25, 2018, Petitioner presented to orthopedic surgeon Dr. Lawrence Li for an AMA impairment rating at Respondent's request. RX 1, ex. 2. Petitioner testified that Dr. Li spent maybe 15 minutes with her during the examination. TR, p. 33. Dr. Li opined that her final upper extremity impairment was 2%, and that her whole person impairment was 1%. RX 1, ex. 2.

Dr. Li also testified via his March 22, 2018 deposition, entered into evidence as Respondent's Exhibit 1. Dr. Li testified that Petitioner told him she had woken up with shoulder pain without a new injury in early January 2018, and that she had returned to Dr. Wolters the day before his AMA examination. RX 1, p. 8-9. He testified that having an intermittent bout of an inflammatory process after being placed at maximum was not unexpected. RX 1, p. 15-16. He testified he considered Petitioner's inflammatory process to be residual from her injury and surgery, though he did not have an opinion regarding whether it was legally causally related. RX 1, p. 16.

Dr. Li testified he used *The 6th Edition Guides* from the AMA in his examination. RX 1, p. 10. Dr. Li was asked about the requirement, found on page 385 under 15.1, Principals of Assessment, that the impairment rating and report should include a comprehensive accurate medical history and a review and summary of all pertinent records. RX 1, p. 16-17. He testified that he did not provide a specific summary, but that he combined his review of the records with Petitioner's history. RX 1, p. 18-19. Dr. Li testified he did not review the films from Petitioner's x-ray of MRI. RX 1, p. 19.

Dr. Li confirmed that the AMA guidelines state that the "examiner should also clarify to the extent possible causation and apportionment; that is, document the mechanism of injury for the condition being evaluated." RX 1, p. 24. Dr. Li was asked if, consistent with 15.1(a), whether Petitioner's description of the accident was sufficient to cause her rotator cuff injury. RX 1, p. 26. He testified he was unable to render an opinion regarding causation. RX 1, p. 27. He testified he could not offer an opinion without speaking with Petitioner and asking further questions. RX 1, p. 27. He confirmed he was asked by counsel for Respondent not to render a causal connection opinion. RX 1, p. 32.

Dr. Li testified there was a temporal relationship between the history provided by Petitioner of pulling the seatbelt and the onset of pain continuing through her discharge from Dr. Wolters. RX 1, p. 35. He testified that, assuming the report from immediately after Petitioner's accident was consistent with what happened, the incident described could be consistent with a rotator cuff tear. RX 1, p. 37-38. He agreed the temporal relationship of pain can be consistent with a lot of conditions, including a rotator cuff tear. RX 1, p. 39. Dr. Li also testified that, if Petitioner had a pre-existing condition it could have been asymptomatic, and that the incident could have then incited her pain. RX 1, p. 39-40. He also testified he would not operate on a patient with Petitioner's imaging findings if they were asymptomatic. RX 1, p. 41.

Regarding the *Quick*DASH scores from his report, Dr. Li agreed that, with respect to question number 6, recreational activities in which you take some force of impact through your arm, Petitioner indicated 3 with moderate activity. RX 1, p. 43. He testified these were her symptoms the day of the examination, and that she was at MMI at that time. RX 1, p. 43-44. He opined that Petitioner would not continue to have these complaints indefinitely, but that they would wax and wane. RX 1, p. 44-45.

Petitioner followed up with Springfield Clinic on March 9, 2018, at which time NP Cheney recommended an additional injection, and physical therapy was placed on hold to see how she responded. PX 6. She had last attended physical therapy on March 7, 2018, and had attended a total of 64 therapy sessions throughout the course of he treatment. PX 16.

Petitioner last presented to Springfield Clinic on April 6, 2018, at which time Dr. Wolters opined that continued achy pain following surgery was common, and that it could be due to the screws resolving. PX 6. He placed her at maximum medical improvement and advised her to follow up on an as needed basis. PX 6.

Dr. Wolters also testified via his July 13, 2018 deposition entered into evidence as Petitioner's Exhibit 19. Dr. Wolters testified Petitioner had undergone conservative treatment, including physical therapy, injections and medications prior to his surgical recommendation, and that he recommended surgery due to her persistent pain and weakness. PX 19, p. 7. He testified the surgery was reasonable and necessary given her MRI results, and that his surgical findings were consistent with the MRI. PX 19, p. 8-9. He testified Petitioner also has some AC joint arthritis, which predated the accident. PX 19, p. 9. He testified a patient can have AC joint arthritis without symptoms, and that a trauma can cause the arthritis to become symptomatic. PX 19, p. 10.

Dr. Wolters testified he only saw the supraspinatus tear during surgery, so the infraspinatus is likely tendinopathy. PX 19, p.11. While he testified patients of Petitioner's age can have tendinopathy, it can also be asymptomatic, only to become symptomatic following a trauma. PX 19, p. 11. He testified Petitioner had a one to two-centimeter rotator cuff tear, and that the mechanism of injury described by Petitioner could cause a rotator cuff tear. PX 19, p. 12. Dr. Wolters was shown photographs of the seatbelt at issue, and testified that the trauma was sufficient to cause Petitioner's shoulder pathology and/or pain related to the underlying shoulder pathology. PX 19, p. 12-13. He testified that when she pulled down on the seatbelt she either tore her rotator cuff or aggravated a preexisting tear or tendinopathy, which set off inflammatory changes within the shoulder to cause pain, and prevented her from using her shoulder properly. PX 19, p. 14. She had signs and symptoms of arthritis through the distal clavicle or AC joint because of her abnormal shoulder motions. PX 19, p. 14.

Dr. Wolters testified there was nothing presented to him which caused him to question Petitioner's reliability. PX 19, p. 37. He testified she provided a history that her symptoms began immediately following the trauma, and that this indicates to him that it could have caused or aggravated the tear. PX 19, p. 37-38.

Dr. Wolters testified the pulling motion of the seatbelt shown to him activates small muscles within the shoulder, including the rotator cuff. PX 19, p. 39. When the seatbelt stops and you still try to pull, there is activation of the supraspinatus and infraspinatus tendons, so it is certainly possible to tear those tendons with that eccentric motion. PX 19, p. 39.

Petitioner testified she continues to suffer from achiness in her right shoulder, and that heavy lifting, such a lifting a case of Pepsi, causes pain. TR, p. 36. She testified she has some achiness every day, and that it is exacerbated by the weather. TR, p. 36. She testified she takes Ibuprofen for the achiness. TR, p. 36. She testified she is still participating in a home exercise program to get her strength back. TR, p. 37.

Petitioner testified she has returned to her job as a bus driver, but that she has changed how she pulls down the seatbelt. TR, p. 37.

Steve Surber, head mechanic for Respondent, also testified in this matter. TR, p. 69-70. He testified he was informed of the reported incident the next day, and that he went out to the bus and operated the seatbelt, and that he did not find anything wrong with it. TR, p. 73. He was not aware of any prior reports of similar issues. TR, p. 73. He testified the school bus seatbelts can catch as they are pulled without there being a mechanical issue. TR, p. 83-84. He testified he has no reason to dispute Petitioner's testimony that the seatbelt caught as she pulled it. TR, p. 84.

Surber testified the photographs in Petitioner's Exhibit 10 fairly and accurately depict the seatbelt of the school bus driven by Petitioner. TR, p. 85. He testified the design of that particular seatbelt is unique to a school bus. TR, p. 86. He agreed the seatbelt was in a different location than in an everyday vehicle, and that the distance from the apex to the locking mechanism is longer. TR, p. 86.

Michael Blankenship, a bus driver for Respondent, also provided testimony. TR, p. 92. He testified he drove the same bus as Petitioner, while she was off work, and that he never had any issues with the seatbelt. TR, p. 93. He testified the seatbelt was no more difficult to operate than those in his personal vehicles. TR, p. 94.

Blankenship testified he had two or three conversations with his boss, Jim Lovelace, before testifying, and that he had a couple conversations with counsel for Respondent. TR, p. 95-96.

Blankenship confirmed the photographs in Petitioner's Exhibit 10 looks that same as when he would have operated the seatbelt, and agreed the seatbelt is longer and in a different location than in his personal vehicles. TR, p. 96. He testified that he would grab the seatbelt with his left hand, and then switched to his right to buckle it. TR, p. 97. He testified he did not know how Petitioner operated the seatbelt. TR, p. 97.

Jim Lovelace, Director of Transportation for Respondent also testified. TR, p. 100. He testified he operated the seatbelt as part of his investigation into Petitioner's claim, and that he was unable to get it to lock. TR, p. 100-101. He testified he was unable to find paperwork regarding a prior workers' compensation claim involving the seatbelt. TR, p. 104-105. He testified it is not harder for him to operate the school bus seatbelt than to operate the seatbelt in his own vehicle. TR, p. 112-113.

Lovelace testified the seatbelts in his personal vehicles lack characteristics of the school bus seatbelt. TR, p. 114. He testified he filled out a supervisor's report of accident as he was talking to Petitioner. TR, p. 115-116. He confirmed the report states "Preexisting conditions; Stephanie said it happened before," though he testified he does not know what that applies to. TR, p. 117. He testified he is not aware of any way Petitioner may have injured her shoulder other than as reported, and that he has no reason to doubt her account. TR, p. 119-120.

Petitioner testified that she has never had any other shoulder problems, and that, with respect to the supervisor's report, she was referring to an incident in the past where the seatbelt locked. TR, p. 123.

CONCLUSIONS OF LAW

Issues C and F: Did an Accident occur that arose out of and in the course of Petitioner's employment by

Respondent and is Petitioner's current condition of ill-being causally related to the injury?

Illinois courts have recognized three general types of risks to which an employee might be exposed: (1) risks that are distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that do not have any particular employment or personal characteristics. *Metro. Water Reclamation Dist. of Greater Chicago v. Illinois Workers' Compen. Commn.*, 944 N.E.2d 800, 804 (Ill. App. 1st Dist. 2011). Injuries resulting from a neutral risk are compensable under the Act where the employee was exposed to the risk to a greater degree than the general public. *Id.*, at 804. An increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative. *Id.*

Further, there is no requirement under Illinois law that the seatbelt in question be defective in order for Petitioner's injury to be compensable. *See Tinley Park Hotel and Conv. Ctr. v. Indus. Commn.*, 826 N.E.2d 1043, (Ill. App. 1st Dist. 2005). In *Tinley Park*, the petitioner presented evidence that she sustained a fall as a result of friction between the rubber soled shoes she wore as part of her job and newly installed carpet at her place of employment. *Id.*, at 1049–50. The employer presented evidence there was no defect in the condition of the carpet and that there had been no prior reports of complaints about the carpeting. *Id.*, at 1050. The court held that the "question of whether claimant did or did not catch her foot in newly installed carpeting that posed an increased risk of fall is a question of fact that rested upon the credibility of claimant and the evidence she used to support her testimony." *Id.* As such, whether the design and positioning of the seatbelt at issue in this case posed an increased risk of injury is a question of fact to be resolved by the Arbitrator based on the testimony and evidence presented in this case.

Illinois law is also clear that "reaching" does not constitute an activity of a personal nature when the employee reasonably be expected to perform the activity incident to her assigned duties. *Accolade v. Illinois Workers' Compen. Commn.*, 990 N.E.2d 901, 908 (Ill. App. 3d Dist. 2013). In this case, there is no question that buckling her seatbelt was incident to Petitioner's assigned duties as a bus driver, and that Respondent could reasonably expect her reach to buckle her seatbelt.

The Arbitrator finds that reaching to buckle the seatbelt in this case constitutes a neutral risk, and Petitioner's injury is compensable if the design and positioning of the seatbelt place Petitioner at a greater risk of injury, either qualitatively or qualitatively, than the general public. Based on the evidence and testimony presented in this case, the Arbitrator finds Petitioner was exposed to a qualitatively greater risk of injury than the general public. Specifically, the design and positioning of the seatbelt was particular to Petitioner's employment and differed from the design of a seatbelt the general public would be exposed to while driving personal vehicles.

Photographs entered into evidence as Petitioner's Exhibit 10 demonstrate that the seatbelt at issue is mounted significantly higher, compared to a driver's left shoulder, than in a personal vehicle. The photographs also depict a greater distance between the drivers' seat and inner wall of the bus than is typical in a personal vehicle, further increasing the distance a driver would need to reach in order to buckle the seatbelt. Additionally, Petitioner testified that, in order to buckle herself in, she would use her right arm to reach approximately two feet above her left shoulder, then she would bring the belt down with her right arm to buckle it. TR, p. 15-16. She testified that buckling this seatbelt differed from buckling the seatbelt in her car because the seatbelt is right over her shoulder and is not very high in her car. TR, p. 16.

While both Blankenship and Lovelace testified the school bus seatbelt was no more difficult to operate than the seatbelt in their personal vehicles, Blankenship testified to operating the seatbelt in a different manner than did Petitioner, and Lovelace was only able to testify that the seatbelt was not more difficult for him to operate.

He was unable to testify as to whether it would have been more difficult for Petitioner, or anyone else, to operate. Petitioner testified, however, and that bucking the seatbelt required additional force due to the increased distance. TR, p. 18.

Additionally, Surber testified the seatbelt was in a different location than in an everyday vehicle, and he agreed that the design of that particular seatbelt is unique to a school bus. TR, p. 86. Blankenship also testified that the seatbelt is longer and in a different location, and Lovelace agreed the seatbelts in his personal vehicles lack characteristics of the school bus seatbelt. TR, p. 96, 114. The Arbitrator therefore finds that the design and positioning of the seatbelt exposed Petitioner to a qualitatively greater risk of injury.

Finally, Petitioner testified she had a similar incident the previous October, and that she filled out paperwork with Lovelace. TR, p. 19-20. While Lovelace testified that he was unable to locate such paperwork, he confirmed that his incident report from the accident at issue stated "Preexisting conditions; Stephanie said it happened before." TR, p. 117. Petitioner testified that she has never had any other shoulder problems, and that, with respect to the supervisor's report, she was referring to an incident in the past where the seatbelt locked. TR, p. 123.

The Arbitrator further finds Petitioner sustained an accident which arose out of and in the course of her employment on February 22, 2017. In rendering his decision, the Arbitrator relies primarily on the testimony of Petitioner and Dr. Wolters.

Petitioner testified she was getting ready for her afternoon route and reached up with her right arm to pull down the seatbelt, and that as she pulled the belt down approximately midway across her body when the seatbelt locked up. TR, p. 16-17. She testified she felt a pop which went up to her neck and down to her bicep. TR, p. 16-17. She testified it felt like something was ripping in her right shoulder. TR, p. 21. Petitioner also filled out a timely Report of Incident, in which she noted that she injured her neck and shoulder when her seatbelt locked up. TR, p. 21-22, PX 1.

Dr. Wolters reviewed photographs of the seatbelt and testified that the mechanism of injury described by Petitioner could cause a rotator cuff tear. PX 19, p. 12. He testified that when she pulled down on the seatbelt she either tore her rotator cuff or aggravated a preexisting tear or tendinopathy, which set off inflammatory changes within the shoulder to cause pain, and prevented her from using her shoulder properly. PX 19, p. 14. She had signs and symptoms of arthritis through the distal clavicle or AC joint because of her abnormal shoulder motions. PX 19, p. 14. He further testified Petitioner provided a history that her symptoms began immediately following the trauma, and that this indicates to him that it could have caused or aggravated the tear. PX 19, p. 37-38.

Dr. Wolters testified the pulling motion of the seatbelt shown to him activates small muscles within the shoulder, including the rotator cuff. PX 19, p. 39. When the seatbelt stops and you still try to pull, there is activation of the supraspinatus and infraspinatus tendons, so it is certainly possible to tear those tendons with that eccentric motion. PX 19, p. 39.

Respondent has provided not evidence or testimony disputing Dr. Wolters' causation opinion. Respondent's Section 12 examiner, Dr. Li, testified he was specifically asked not to render a causation opinion as part of his AMA examination. RX 1, p. 32. Further, he was asked numerous times during his evidence deposition to render a causation opinion and was unable to do so. He did testify, however, that there was a temporal relationship between the history provided by Petitioner of pulling the seatbelt and the onset of pain continuing through her discharge from Dr. Wolters. RX 1, p. 35. He further testified that the incident described

in the Report of Incident could be consistent with a rotator cuff tear. RX 1, p. 37-38. Dr. Li also agreed the temporal relationship of pain can be consistent with a lot of conditions, including a rotator cuff tear. RX 1, p. 39.

Additionally, while Surber, Blankenship and Lovelace each testified they were unaware of any defects of the seatbelt, and were unaware of prior incidents with the seatbelt, they each also stated they had no reason to dispute Petitioner's account of the incident. Further, Surber agreed that the seatbelt could catch even in the absence of a mechanical issue. TR, p. 83-84. As such, the testimony of Respondent's witnesses fails to rebut Petitioner's description of the incident or the causation opinion of Dr. Wolters.

Finally, Respondent has presented no evidence which disputes that the current condition of Petitioner's right shoulder is causally related to the accident. The Arbitrator finds that Petitioner's duties exposed her to a qualitatively greater risk of injury from operating her seatbelt, that Petitioner sustained a right shoulder injury which arose out of and in the course of her employment. The Arbitrator further finds that Petitioner's 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 and has the Respondent paid all appropriate charges for all reasonable and necessary medical services?

Respondent disputes Petitioner's medical treatment was causally related to and arising out of and in the course of Petitioner's employment by Respondent, and therefore disputes liability for Petitioner's medical bills. Respondent does not dispute that any of Petitioner's treatment was reasonable and necessary. For the reasons set forth above, Petitioner sustained a right shoulder injury which arose out of and in the course of her employment.

Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 9, directly to the providers, according to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

Issue K: Is the Petitioner entitled to temporary total disability benefits?

Respondent does not dispute that Petitioner was restricted from work for a period of 26 and 2/7 weeks, from March 14, 2017, through September 14, 2017, but rather disputes liability for temporary total disability benefits during that period. For the reasons set forth above, Petitioner sustained a right shoulder injury which arose out of and in the course of her employment Petitioner is therefore entitled to temporary total disability benefits from March 14, 2017, through September 14, 2017.

Respondent is ordered to pay Petitioner $518.23 per week for a period of 26 and 2/7 weeks, representing temporary total disability benefits from March 14, 2017 through September 14, 2017. Petitioner agrees Respondent is due a credit in the amount of $3,183.41.

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

For accidents occurring after September 1, 2011, the Arbitrator must look to the five-factor test in determining permanent partial disability. In this case, an AMA impairment examination was conducted by Dr. Li on January 25, 2018, and Dr. Li opined that her final upper extremity impairment was 2%, and that her whole person impairment was 1%. RX 1, ex. 2. However, Dr. Li also testified to numerous discrepancies between his examination and the 6th Edition AMA guidelines. The Arbitrator therefore gives this factor less weight.

As to the second factor, nature of the employment, Petitioner testified she has returned to her prior position with Respondent, and therefore continues to be exposed to the same increased risk which caused her injury. The Arbitrator therefore gives this factor some weight.

With regards to the third factor, age, Petitioner was 47 years old on the date of her accident. Petitioner will likely live for a number of years and continue to suffer ongoing limitations, as set forth in factor five, during that period. As such, the Arbitrator gives this factor some weight.

With regards to the fourth factor, future earning capacity, Petitioner has returned to her prior position with Respondent. The Arbitrator therefore gives this factor little weight.

Finally, with regards to the fifth factor, evidence of disability corroborated by treatment records, Petitioner underwent an MRI of her right shoulder on March 10, 2017, which revealed a full-thickness tear of the supraspinatus tendon, a partial-thickness tear of the infraspinatus tendon, and mild ac joint arthritis. PX 5. Dr. Wolters testified Petitioner had undergone conservative treatment, including physical therapy, injections and medications prior to his surgical recommendation, and that he recommended surgery due to her persistent pain and weakness. PX 19, p. 7.

On May 1, 2017, Petitioner presented to Springfield Clinic for right shoulder arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle excision procedures, which were performed by Dr. Wolters. PX 7. Dr. Wolters testified he saw the supraspinatus tear during surgery, and the infraspinatus tear noted in the MRI was likely tendinopathy. PX 19, p.11. He testified Petitioner had a one to two-centimeter rotator cuff tear. PX 19, p. 12.

Following the procedure, Petitioner continued to follow up post-operatively at Springfield Clinic and resumed physical therapy. PX 6, 16. Petitioner returned to Springfield Clinic on January 24, 2018 and reported that she had been doing well until recently, but was experiencing discomfort in her right shoulder. PX 6. Dr. Wolters recommended she return to formal therapy and follow up in six weeks. PX 6. Petitioner returned to Advance Physical Therapy & Sports Medicine on February 6, 2018. PX 16. She continued to attend physical therapy through March 7, 2018, and last followed up at Springfield Clinic on April 6, 2018. PX 6, 16. Dr. Li testified that having an intermittent bout of an inflammatory process after being placed at maximum was not unexpected, and he considered Petitioner's inflammatory process to be residual from her injury and surgery. RX 1, p. 15-16.

Dr. Li also testified Petitioner had complaints the day of his examination, at which point she was at maximum medical improvement, and that her complaints may continue to wax and wane. RX 1, p. 43-45.

Petitioner testified she continues to suffer from achiness in her right shoulder, and that heavy lifting, such a lifting a case of Pepsi, causes pain. TR, p. 36. She testified she has some achiness every day, and that it is exacerbated by the weather. TR, p. 36. She testified she takes Ibuprofen for the achiness. TR, p. 36. She testified she is still participating in a home exercise program to get her strength back. TR, p. 37.

The Arbitrator gives this fifth factor greater weight. Taking the evidence in its entirety and the five factors into consideration, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 10%

loss of use of the person as a whole as a result of her right shoulder injury. Respondent is ordered to pay Petitioner $466.41 per week for a period of 50 weeks, representing a 10% loss of the person as a whole under section 8(d)(2) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria Ojeda,

Petitioner,

vs.

NO: 16 WC 1511

19IWCC0687

Arway Confections, Inc.,

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, causation, medical expenses, temporary total disability, prospective medical treatment, and/or nature and extent, 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.

The Commission corrects the record by admitting the Request for Hearing form at Arb.Ex.#1 and the Application for Adjustment of Claim at Arb.Ex.#2. The Commission notes the Arbitrator neglected to officially admit these documents into evidence even though it was clearly the intention of the parties to do so, given the discussion on the record and the fact that said documents were marked as such and contained in the file.

Furthermore, the Commission corrects the spelling of the name of Dr. Biafora throughout the Arbitrator's decision, noted at various points as "Biaforia" and "Biafara."

All else is otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed 5/8/18, with corrections, is hereby affirmed and adopted.

19IWCC0687

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: DEC 18 2019
o: 11/19/19
TJT/pmo
51

Thomas J. Tyrrell

Maria E. Portela

Kathryn A. Doerries

NOTICE OF 19(b) ARBITRATOR DECISION

OJEDA, MARIA
Employee/Petitioner

Case# **16WC001511**

ARWAY CONFECTIONS INC
Employer/Respondent

19IWCC0687

On 5/8/2018, 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 2.00% 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:

2512 THE ROMAKER LAW FIRM
JASON BRISKI
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

0210 GANAN & SHAPIRO PC
ELAINE NEWQUIST
120 N LASALLE ST SUITE 1750
CHICAGO, IL 60602

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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)

Maria Ojeda,
Employee/Petitioner

v.

Arway Confections, Inc,.
Employer/Respondent

Case # **16WC 01511** _____

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 **Robert M. Harris**, Arbitrator of the Commission, in the city of **Chicago**, on **3/28/18**. 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] 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. [x] Other **permanent partial disability as an alternative to prospective medical**

FINDINGS

On the date of accident, **12/4/2015**, 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 alleged 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 $**20,502.56**; the average weekly wage was $**394.28**

On the date of accident, Petitioner was **46** years of age, ***married*** with **1** 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

Petitioner failed to prove she sustained accidental injuries arising out of and in the course of her employment with Respondent on December 4, 2015; 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

May 8, 2018

Date

ICArbDec19(b)

MAY 8 - 2018

Maria Ojeda v. Arway Confections, Inc.
16 WC 1511
Hearing Under Section 19(b) of the Act

19IWCC0687

Statement of Facts

Petitioner was hired by Respondent as a seasonal production worker on October 13, 2015, to be laid off in mid-December, 2015. (T.31) Petitioner filled small containers using an 8" in diameter metal bowl to scoop items like nuts and candy. (T.11 – 12, 59) Petitioner worked eight hour shifts Monday through Friday, from 6:30 a.m. to 3:30 p.m., with a one hour break for lunch. (T.10) Petitioner had been offered Saturday shifts but admitted she rejected those, advising Respondent she worked weekends cleaning houses. (T.31) At trial, Petitioner testified to prior employment at a city hall, and cleaning a nursing home for about two years. (T.32) Petitioner admitted to cleaning at least one private home, although she was not specific as to when or where she performed that work. (T.34) Petitioner denied any prior problems with her right hand or arm, and testified using the scoop to fill various containers between October 13 and December 3, 2015 caused her no problems. (T.36)

On December 4, 2015 Petitioner was placed on the "doodle" line filing small boxes with buttered popcorn. (T.36) Petitioner testified that rapidly filling the boxes using the small metal bowl in her right hand throughout her shift that day caused a burning sensation in her right hand, and that after she left work she began feeling pain up to her right elbow. (T.14 – 17) **Petitioner described the scooping activity (using the small aluminum bowl) as constant throughout the work day, and testified it was *that specific activity* which caused her right hand and arm pain. (T.36)**

Respondent's vice president, Rick Johnson, testified Petitioner worked the "doodle" line on a single day, December 4, 2015. (T.61) Johnson described a team of eight employees at a waist high table. (T.56, 60) One employee brought 40 lb. boxes of popcorn to the table and opened the box, one placed a plastic bag into a small cardboard box, five employees including Petitioner used a small metal bowl to scoop the popcorn from the large box into the small box, about two to three bowls full of popcorn per box,

while others then x rayed the box, sealed and labeled it. (T.60 – 61) Johnson reviewed a production log for the doodle line for December 4, 2015. (T.62) It showed Petitioner had been placed on that line about 10:00 a.m. that day after reporting some sort of hand problem working a nut line that morning. (T.61, 68) Petitioner had denied having any problems before being on the doodle line, at trial.

Johnson testified the total production for the doodle line that day showed 750 small boxes filled, thus about 94 boxes per hour over an eight hour period, or 150 boxes per hour if the entire production was for five hours starting at 10:00 a.m. (T.62 – 63) Each of the five employees doing the filling task therefore filled between 19 and 30 boxes per hour over an eight or a five hour period, respectively. (T.63) Under either scenario, Petitioner would have been scooping and filling a small box every two to three minutes, thus scooping a bowl of popcorn about one to two times per minute. (T.64)

Petitioner testified she came into work on Saturday, December 5, 2015 to report her pain to her supervisor, and was sent to Physicians Immediate Care for treatment. (T.18 – 19) There, Petitioner reported pain on a 9/10 scale related to packing boxes at a rate she was not accustomed to at work the day before. Petitioner reported pain and swelling in the right hand but no other symptoms. Petitioner demonstrated no hand deformity, tenderness, or instability, had full range of motion in the hand, fingers, elbow and shoulder. Reflexes were normal. Petitioner was diagnosed with a strain, told to return to work but avoid gripping or lifting over 10 lbs., and to return to the clinic December 12, 2015. (Pet.Ex.#1)

Petitioner testified she was placed with Respondent within those restrictions, the following Monday. (T.20 – 21) Petitioner worked on a pretzel line, and testified she used her left hand only. (T.41 – 42)

Petitioner returned to Physicians Immediate Care December 12, 2015, reporting no improvement and now pain into her right thumb. Tenosynovitis was suspected. She was given a splint and a 2 lb. lifting restriction was imposed. (Id.) Petitioner testified she was provided light duty until December 14, when Respondent advised her they could no

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longer provide her one-handed work. (T.20 – 21) Petitioner acknowledged she knew she would have been laid off after December 14, 2015, anyway. (T.42 – 43)

Petitioner returned to Physicians Immediate Care December 22, 2015, reporting no improvement. Work restrictions were continued. Petitioner was seen again December 29, 2015, now reporting pain into her right index and middle fingers as well as the thumb. A MRI of the right wrist was ordered. (Id.)

Petitioner testified she did not return there for further care. (T.44) Petitioner sought legal representation in January, 2016 and was referred by her attorney to Dr. Poepping, first seeing him January 20, 2016. (T.45) Dr. Poepping took a history of right wrist and now elbow pain, related by Petitioner to lifting 40 lb. boxes all day. Petitioner made no mention of the scooping activity. She now had tenderness over the right wrist and elbow. Dr. Poepping diagnosed tenosynovitis and epicondylitis, ordered therapy and a brace. Dr. Poepping continued work restrictions. Therapy offered her no reported improvement, so a MRI was ordered February 22, 2016. This was reviewed as showing lateral and medial epicondylitis; Dr. Poepping injected the right elbow March 7, 2016 but this was reported to do nothing for her March 21, 2016. At that time Dr. Poepping noted Petitioner's pain complaints "rather diffuse," that as she received no improvement from the injection "I do not feel that surgery on her elbow would much benefit her at all." Dr. Poepping recommended a cervical MRI to assess that as the source of her complaints. Petitioner did not follow up with the doctor after that date. (Pet.Ex.#2)

Petitioner did undergo a cervical MRI March 24, 2016, read as showing bulging discs at C5-7. (Pet.Ex.#5) Dr. Sharma read that testing as "essentially normal" April 6, 2016. (Pet.Ex.#8)

On referral from her attorney, Petitioner sought care with Dr. Primus March 29, 2016. (T.45) Petitioner reported the development of right elbow pain after repetitively lifting 40 lb. boxes of popcorn over a five hour period at work on December 4, 2015, along with scooping popcorn. Petitioner reported her prior care including therapy, a brace and an injection to the right elbow which made her pain worse. Petitioner demonstrated a "bogginess" about the lateral epicondyle, mild pain with motion testing,

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and exquisite tenderness. Dr. Primus recommended a wrist brace and injection to the tendon sheath. Dr. Primus injected the right elbow May 16, 2016. Petitioner was placed in therapy. Dr. Primus also reviewed a right shoulder MRI performed April 25, 2016 as showing impingement he felt compensatory to favoring the right elbow. Petitioner reported no improvement with any treatment modality and Dr. Primus ordered an open lateral epicondyle debridement August 8, 2016. This was reiterated November 7, 2016. (Pet.Ex.#8)

Petitioner testified Dr. Primus retired and she sought further medical care with Dr. Markarian, commencing March 8, 2017. (T.46) Petitioner reported right hand and elbow injuries from working on an assembly line, scooping popcorn from big boxes to small boxes and moving and stacking 40 lb. boxes. Dr. Markarian understood "this occurs throughout the day" and "is a very rapid thing that she does." It does not appear Petitioner advised Dr. Markarian she only performed the scooping task, not lifting or stacking, and only for a matter of hours on a single day. Dr. Markarian ordered surgery for the right elbow and an EMG to assess the right wrist. Dr. Markarian reviewed the EMG March 22, 2017 as normal. Dr. Markarian has seen Petitioner on 13 subsequent occasions April 12, 2017 through March 7, 2018, making the same findings and reiterating the same prescription for a right elbow release on each occasion. (Pet.Ex.#12)

Petitioner has received prescriptions for Terocin from Dr. Primus, (Pet.Ex.#11), and multiple prescriptions from Dr. Markarian including Tramadol, Diclofenac, Lidocaine ointment, Meloxicam and Pantoprazole, (Pet.Ex.#14), none reported to have offered her any relief. Petitioner testified she has not worked or looked for work since lay off from Respondent December 14, 2015, (T.46 – 47) and has had absolutely no improvement in her symptoms while simply sitting home. (T.49, 51)

At trial, the Arbitrator observed Petitioner moving her right hand and arm freely while she repeatedly demonstrated the scooping maneuver.

Petitioner testified she still wants to undergo the right elbow surgery and claims it has not been performed as not approved by insurance (T.51 – 52) although the Arbitrator notes lack of insurance approval apparently has not prevented Petitioner from treating

with four different doctors, seeing Dr. Poepping four times, Dr. Primus seven times, Dr. Markarian monthly since March, 2017, receiving therapy at New Life, undergoing MRI's of the right wrist, elbow and cervical spine, two EMG's, and an elbow injection.

Petitioner was examined by Dr. Biafora at Respondent's request pursuant to Section 12 of the Act. (Resp. Ex. No. 2, Deposition transcript, taken April 19, 2017, and attached IME report dated January 10, 2017, Ex. No. 2). Petitioner reported to Dr. Biafora an onset of right upper extremity complaints, first a hot feeling and then pain and swelling, beginning December 4, 2015. Petitioner related this to scooping popcorn as well as lifting 40 lb. boxes. Dr. Biafora noted Petitioner's limited employment with Respondent between October 13 and December 14, 2015. Dr. Biafara testified Petitioner's overall limited work history for Respondent "was not a significant amount. . . that would typically cause any type of so-called repetitive forceful use trauma."

Petitioner had described scooping popcorn to Dr. Biafora, which he understood to have been done "eight hours per day, five days per week" and not on a single day. Dr. Biafara concluded that while Petitioner did have lateral epicondylitis and possibly radial tunnel syndrome, "using a small bowl to scoop popcorn for four weeks . . . would not be anywhere near the amount of force or strenuous activity to cause this condition." Even when asked to assume Petitioner performed a scooping maneuver 15 times per minute, 7,000 per day every day for three to four weeks, Dr. Biafora testified: "it's going to require some force . . . it doesn't take a lot of force to put a bowl through . . . a box of popcorn. There's no force applied to it. It doesn't matter how many times you're doing it a minute. No, it doesn't matter how frequently she does it over a 3 to 4 week span regardless of how long she was doing it. If she was doing it for longer than that, it still wouldn't cause this condition. It wouldn't aggravate it. It wouldn't matter." (Resp.Ex.#2)

Dr. Biafora did note Petitioner's history she had not worked at all for about 13 months before his exam on January 5, 2017, anticipating she would have had some improvement simply from resting the arm, yet that she had reported none. (Id.)

Dr. Biafora made no findings in the right wrist or right shoulder. He noted inconsistent complaints of pain in both the wrist and elbow. She exaggerated pain reports in the right elbow and when distracted "she really wouldn't note any pain at all." (Id.)

Dr. Biafora stated lateral epicondylitis is a "very common" condition and "most commonly occurs idiopathically." (Id.)

Conclusions of Law

Regarding the disputed issue C) Did an accidental injury arise out of and in the course of Petitioner's employment with Respondent, the Arbitrator finds and concludes the following:

Petitioner bears the burden of establishing entitlement to benefits by a preponderance of the evidence; *Rodin v. Industrial Commission,* 316 Ill.App.3d 1224, (2000). 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. Accidental injuries sustained on an employer's premises within a reasonable time before and after work are generally deemed to arise in the course of the employment. 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.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill

and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d 587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

The Arbitrator notes and emphasizes that this is a claim based on a repetitive trauma theory. As such, specific case law applies that is not necessarily required in other types of claims (that is, specific-acute trauma claims). This specific applicable case law adds an additional burden on a claimant.

Gradual injuries stemming from repetitive trauma clearly are compensable under the Act as long as the employee proves the injury is work related and not the result of the normal degenerative processes; *Zion-Benton Township High School Distric 126 v. Industrial Commission,* 242 Ill.App.3d 609 (1993). A claimant must produce competent evidence of objective conditions or symptoms to show that her job duties caused her condition and present disability; *Nunn v. Industrial Commission,* 157 Ill.App.3d 470 (1987). While medical testimony as to causation is not necessarily required, **where the question is within the knowledge of experts only, expert testimony is needed to show that the claimant's work activities caused the complained of condition;** *Id.* **Cases involving repetitive trauma primarily concern medical questions and the claimant generally relies on medical testimony to establish a causal connection between the work performed and her disability; Id.** The Arbitrator finds and concludes that the specific facts presented in this case, the types of injuries and conditions involved and the question of the disputed mechanism(s) of injury alleged, **make this a claim that concerns questions within the knowledge of medical experts only.** The Arbitrator does not hold himself out to be qualified to render medical opinions on competent mechanisms of injury or causation; **therefore, this case requires reliance on expert**

medical testimony. However, as will be discussed below, the only competent expert medical opinions presented in this case were offered by Respondent's Section 12 examiner Dr. Biaforia – which opinions the Arbitrator finds credible and relies upon them and which were never challenged. Petitioner offered no expert medical opinion evidence (although there are arguably "accident-causation" opinions embedded in several treating medical records, as discussed below).

In the instant case Petitioner has claimed the alleged repetitive activity of scooping popcorn on a single date, December 4, 2015, resulted in injuries to her right wrist and elbow. The Arbitrator notes Petitioner's history of these activities was disputed (being presented in various forms to various providers), questioned and perhaps exaggerated, as provided to her treating physicians and during her trial testimony. However, even if taken and interpreted in the best possible light, and assuming no contradictions and inconsistencies, and assuming Petitioner's trial testimony to be accurate and her histories told to her treating physicians and others as accurate, Petitioner still would be unable to prove her claim; that is because Petitioner has failed to provide required expert medical testimony.

Petitioner testified to have scooped 25 – 30 times per minute over an eight-hour shift. Assuming each small box required three scoops to fill, that would have been 10 boxes filled per minute, 600 per hour, and 4800 boxes filled by Petitioner on her own over her eight hour shift. Respondent's production log showed a total of 750 boxes filled by five employees for the entire day, with Petitioner only on that line from 10 a.m. until 3:30 p.m. with a one hour lunch break. At most, Petitioner would have been scooping about one time to two times per minute. There are obvious questions and disputes regarding the facts of her physical work activities and the alleged mechanism of injury. Petitioner offered no medical opinion explaining and reconciling these facts. **But again, what defeats this claim is the absence of expert medical opinions supporting Petitioner's claims and opinions rebutting Dr. Biafara.**

The Arbitrator emphasizes Dr. Biafora is a board certified orthopedic surgeon with a Fellowship in hand and upper extremity microvascular surgery. The Arbitrator notes Dr. Biafora's obvious qualifications and credentials. Dr. Biafora offered medical opinions in this claim that went unchallenged and therefore unrebutted. The Arbitrator places great significance and reliance on this fact. The Arbitrator further finds and concludes that Dr. Biafora's deposition testimony was very credible and well-reasoned. . Accordingly, the Arbitrator adopts and relies upon Dr. Biafora's unrebutted, credible opinions.

Petitioner was examined by Dr. Biafora at Respondent's request pursuant to Section 12 of the Act. (Resp. Ex. No. 2, Deposition transcript, taken April 19, 2017, and attached IME report dated January 10, 2017, Ex. No. 2). Petitioner reported to Dr. Biafora an onset of right upper extremity complaints, first a hot feeling and then pain and swelling, beginning December 4, 2015. Petitioner related this to scooping popcorn as well as lifting 40 lb. boxes. Dr. Biafora noted Petitioner's limited employment with Respondent between October 13 and December 14, 2015. Dr. Biafora testified Petitioner's overall limited work history for Respondent "was not a significant amount .. . that would typically cause any type of so-called repetitive forceful use trauma."

Petitioner had described scooping popcorn to Dr. Biafora, which he understood to have been done "eight hours per day, five days per week" and not on a single day. He concluded that while Petitioner did have lateral epicondylitis and possibly radial tunnel syndrome, "using a small bowl to scoop popcorn for four weeks . . . would not be anywhere near the amount of force or strenuous activity to cause this condition." Even when asked to assume Petitioner performed a scooping maneuver 15 times per minute, 7,000 per day every day for three to four weeks, Dr. Biafora testified: "it's going to require some force . . . it doesn't take a lot of force to put a bowl through . . . a box of popcorn. There's no force applied to it. It doesn't matter how many times you're doing it a minute. No, it doesn't matter how frequently she does it over a 3 to 4 week span regardless of how long she was doing it. If she was doing it for longer than that, it still wouldn't cause this condition. It wouldn't aggravate it. It wouldn't matter." (Resp.Ex.#2, p. 39-40)

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Dr. Biafora did note Petitioner's history she had not worked at all for about 13 months before his exam on January 5, 2017, anticipating she would have had some improvement simply from resting the arm, yet that she had reported none. (Id.)

Dr. Biafora made no findings in the right wrist or right shoulder. He noted inconsistent complaints of pain in both the wrist and elbow. She exaggerated pain reports in the right elbow and when distracted "she really wouldn't note any pain at all." (Id.)

Dr. Biafora stated lateral epicondylitis is a "very common" condition and "most commonly occurs idiopathically." (Id.)

No treating physician testified in this matter. No treating physician provided a separate, specific narrative accident-causal connection opinion. Significantly, no treating physician expressly related Petitioner's right wrist and elbow conditions to the specific activity of scooping doodles with a bowl into small boxes on a single work day. All treating physicians were advised of either greater production rate (Dr. Ramsey at Physicians Immediate Care), or to activities she did not do (lifting 40 lb. boxes all day to Dr. Poepping and Dr. Primus, to moving and stacking 40 lb. boxes as well as rapidly scooping popcorn on a daily basis to Dr. Markarian).

Putting aside the exaggerated and/or various histories of work duties, Petitioner failed to provide any medical opinion establishing that the scooping activity specifically testified to at trial – or any other activity - was the competent mechanism of injury and caused or contributed to her condition of ill-being. Petitioner failed to offer any expert opinions to rebut Dr. Biafara's. These failures are fatal to Petitioner's case.

Petitioner related her complaints to **"packing boxes at a rate she is not accustomed to all day yesterday",** to Physicians Immediate Care. (Pet.Ex.#1) The records only indicate that it was Petitioner who related her complaints to her work – there is no entry by the provider who took her history and examined her (Jack Enter, PA-C) that her symptoms were work-related. Further, this history does not mention scooping popcorn, the specific and sole history regarding which Petitioner testified at trial is the cause of her injuries.

Similar entries were repeated on Petitioner's next visit on December 12, 2015, by Dr. Kristin Baier, M.D. In fact, Dr. Baier noted symptoms had a "sudden onset", which would directly contradict Petitioner's claim of repetitive trauma. Dr. Baier offered no causation opinion.

Similar entries were repeated on Petitioner's next visit on December 22, 2015, when Dr. Tatiana Magana, M.D., examined Petitioner. Dr. Magana offered no causation opinion. In fact, Dr. Magana noted that "She is in the middle of a dispute and review by company, to have case under worker's compensation." Dr. Magana offered no comment on this.

Similar entries were repeated on Petitioner's next visit on December 29, 2015, when Sara Elizabeth Wolschlag, PA-C, examined Petitioner. Wolschlag offered no causation opinion. No causation opinions are noted in the records from Petitioner's January 5, 2017 visit.

Petitioner saw Dr. Poepping at G & T Orthopedics and Sports Medicine on January 20, 2016. (Pet. Ex. No. 2). In the history, Petitioner related her symptoms to lifting 40 lb. boxes all day and doing a lot of repetitive fast movements. This is not an accurate history and does not match her trial testimony. Further, it is significant to note that Petitioner failed to mention the scooping activity. Dr. Poepping likewise rendered no opinion that Petitioner's condition was work related. Dr. Poepping's records from February 22, 2016 and March 21, 2016 also offer no causation opinion.

The Arbitrator does note that Dr. Poepping did present an apparently unsolicited causation opinion in his treatment notes from March 7, 2016 (a date after which Petitioner had filed her Application). In his "Plan" section, he wrote, "I do believe this is a work related injury that was causally related to her lifting heavy boxes repeatedly at work and resulting in overuse of the right elbow and wrist." However, this entry in treating records presents problems. Even assuming tis was not an entry produced in anticipation of litigation, Dr. Poepping bases his opinion on disputed - and inaccurate - facts regarding the understood mechanism of injury. There is no mention of popcorn

scooping. Therefore, even if it is considered an opinion, it has no value as it is based solely on incorrect facts regarding the mechanism of injury.

Even assuming a doctor's recitation on his treating record office visit notes of what a Petitioner claims she does at work somehow constitutes a causation opinion, case law holds that opinions based on incomplete or inaccurate job duties are not credible and will not be given weight by the Commission; *Clark Powell v. Toenjes Brick*, 16 IWCC 269, 2016 Ill.Wrk.Comp. LEXIS 299 (2016). The Arbitrator finds and concludes that this entry from Dr. Poepping, even if considered a causation opinion, lacks weight and credibility because it is based mostly on his understanding that Petitioner was injured **"lifting heavy boxes repeatedly at work" which the Arbitrator finds is not how Petitioner claims she was injured in her testimony at the hearing**; Petitioner's testimony on direct was that **she was injured scooping up popcorn with an aluminum bowl from a 40-pound box (** T. 14). Petitioner agreed that on December 4, 2015, the only date she claims as the date of her injury, she was scooping popcorn with the aluminum bowl "from when she started work that day until the end of the day." (T. 16). Further, on cross-examination, Petitioner repeated that she injured her right wrist and elbow on December 4, 2015 due to the specific activity of packing popcorn in the boxes (T. 36;38, "Putting the popcorn that I was getting from the 40-pound box of popcorn"). And Petitioner agreed that the extent of her activity was to take the aluminum bowl and scoop loose popcorn up from the 40-pound box and dump it into the plastic bag, T. 39). Lifting heavy boxes repeatedly at work was not part of the equation concerning her mechanism of injury.

Additionally, the same analysis as applied to Dr. Poepping applies equally to chiropractor Dariusz Bialon's reports and opinions in his records from the New Life Medical Center (Pet. Ex. No. 4). These records concern physical therapy treatment. Petitioner saw Dr. Bialon on January 26, 2016. These records indicate that the patients' self- described mechanism of injury was **"lifting some boxes (up to 40 lbs) when she felt a sharp pain in her roght wrist/hand."** Dr. Bialon then wrote under a heading entitled "Causation", "Ms. Ojeda's symptoms appear to have come on as a result of a

work related accident consistent with the one described in this report." That is, an accident based on "lifting boxes." **There is no mention of scooping popcorn.** Again, in her trial testimony, Petitioner did not claim she was injured lifting heavy boxes repeatedly at work; rather, it was scooping popcorn all day. Therefore, while Dr. Bialon offers a causation opinion, the Arbitrator finds and concludes that it has essentially no value or credibility, as the opinion is based on a fundamental misunderstanding of the mechanism of injury.

Further, the same analysis that applies to Dr. Poepping and Dr. Bialon equally applies to Dr. Primus at the Chicago Pain and Orthopedic Institute (Pet Ex. No. 8). Petitioner saw Dr. primus for a consultation on March 29, 2016. Dr. Primus opined that Petitioner's condition and presentation was "related to a work injury on December 4, 2015." This opinion was based solely on Petitioner's history – which history, again, was incorrect and inaccurate, again indicating a fundamental misunderstanding of the mechanism of injury. Dr. Primus recorded this history: **"...working at a factory, where she was doing repetitive lifting of a 40-lb box of popcorn." There is no mention of scooping popcorn.** Again, in her trial testimony, Petitioner did not claim she was injured lifting heavy boxes repeatedly at work; rather, it was scooping popcorn all day. Therefore, while Dr. Primus offers a causation opinion, the Arbitrator finds and concludes that it has essentially no value or credibility, as the opinion is based on a fundamental misunderstanding of the mechanism of injury.

Petitioner related her symptoms to both scooping and moving and stacking 40 lb. boxes "throughout the day" and rapidly, to Dr. Markarian at Orthopedic Associates of Naperville, on March 8, 2017. (Pet Ex. No. 12). In the "Subjective Transcription" section, Dr. Markarian wrote, "...injured herself at work on December 4, 2015. She injured her right elbow and right wrist doing repetitive movements typically on an assembly line. She scoops popcorn from big boxes to small boxes in a repetitive fashion, rapidly. Then she moves 40 pound boxes so that she can stack the boxes to accomplish this task. This occurs throughout the day. It is a very rapid thing that she does." The detailed history (most detailed of all treating records) at this late date raises suspicions

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that this was prepared in anticipation of litigation. It is difficult to discern with certainty whether this is Dr. Markarian's "opinion" or merely a recording of Petitioner's own symptoms and history. However, the Arbitrator finds and concludes that if this an "opinion", Dr. Biafara fully rebutted it.

Dr. Biafora, even working under the impression Petitioner was both lifting 40 lb. boxes and scooping popcorn five days per week, eight hours per day for a four week period, with rates perhaps as great as 7,000 per day per the hypothetical posed by Petitioner's counsel, testified Petitioner's condition was not caused or aggravated by her work activities. Dr. Biafora concluded those activities lacked the requisite force to cause injury, even at a greater repetition than Petitioner actually performed. Dr. Biafora did opine the cause of a majority of lateral epicondylitis conditions are idiopathic in nature. The Arbitrator adopts and relies on these opinions and finds them very credible, well-reasoned and supported by the record.

But most significant is the fact that no medical expert ever offered any opinions or testimony to rebut Dr. Biafara's opinions. Dr. Biafara's credible and supported opinions, were, in fact left completely unchallenged and therefore unrebutted.

For the reasons set forth above, and after a comprehensive review of the entire record, the Arbitrator finds and concludes that Petitioner has failed to establish she sustained accidental injuries arising out of and in the course of her employment with Respondent. Therefore, Petitioner's claim for compensation is denied.

Robert M. Harris

Robert M. Harris, Arbitrator May 8, 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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Heath Weatherspoon,

Petitioner,

vs. NO: 14 WC 9511

19IWCC0688

Metropolitan Water Reclamation District,

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 causation, medical expenses, prospective medical treatment and penalties, 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 reverses the Arbitrator's decision as to penalties and finds that Respondent's conduct in the defense of this matter was neither unreasonable nor vexatious so as to warrant additional compensation pursuant to §19(k) and/or attorneys' fees pursuant to §16 of the Act. More to the point, the evidence shows that Respondent paid all TTD that was due and owing in a timely manner prior to arbitration, and that it reasonably relied upon the opinion of its §12 medical examiner, Dr. Marra, in contesting the need for ongoing treatment and its relation to the original work injury. Furthermore, the Act does not provide for penalties for the failure or refusal to pay or authorize prospective medical treatment. See *Hollywood Casino-Aurora, Inc. v. Ill, Workers' Compensation Commission*, 967 N.E.2d 848, 359 Ill. Dec. 818 (2nd Dist. 2012). Accordingly, the Arbitrator's award along these lines is hereby vacated.

The Commission also vacates the Arbitrator's award of "... any Temporary or Partial Disability benefits during the recovery period" following the surgery recommended by Dr. Primus. (Arb.Dec. [Addendum], p.6). The Commission notes that this amounts to what is

essentially a prospective award of TTD and/or TPD benefits which, in addition to being premature, is not provided for under the Act, and is therefore not appropriate.

All else otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 4/30/18 is modified as stated herein and is otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner reasonable and necessary medical expenses of $40,399.39 pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the treatment prescribed by Dr. Gregory Primus, including right shoulder surgery, pursuant to §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of additional compensation pursuant to §19(k) in the amount of $20,199.69 and attorneys' fees in the amount of $8,079.87 pursuant to §16 of the Act is hereby vacated.

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: DEC 18 2019
o:5/7/19
TJT/pmo
51

Maria Elena Portela

Maria E. Portela

Kathryn A. Doerries

Kathryn A. Doerries

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DISSENT

I believe that the Arbitrator's award of penalties in this matter was entirely warranted under the circumstances and should have been affirmed.

The Arbitrator's imposition of penalties was not based on Respondent's failure or refusal to pay for or authorize the future medical treatment proposed by Dr. Primus. It was based on Respondent's complete and utter failure, without any explanation or justification, to pay for the medical expenses incurred as a result of the initial injury and ensuing surgery, the need for which and its relation to the original accident has, for all intents and purposes, never been in dispute.

For that reason, I vehemently dissent, and would have affirmed the Arbitrator's award of additional compensation and attorneys' fees pursuant to §§19(k) and 16, respectively.

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

WEATHERSPOON, HEATH
Employee/Petitioner

Case# **14WC009511**

METROPOLITAN WATER RECLAMATION DISTRICT
Employer/Respondent

19IWCC0688

On 4/30/2018, 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 1.98% 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:

2739 SMOLER LAW OFFICE PC
ROBERT J SMOLER
205 W RANDOLPH ST SUITE 1750
CHICAGO, IL 60654

1139 NOBLE & ASSOCIATES PC
MICHAEL T CHALCRAFT
387 SHUMAN BLVD SUITE 210E
NAPERVILLE, IL 60563-8450

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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)

Heath Weatherspoon
Employee/Petitioner

v.

Metropolitan Water Reclamation District
Employer/Respondent

Case # 14 WC 9511

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 **Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **February 13, 2018 & March 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. ☒ 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 15, 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 $**73,794.12**; the average weekly wage was $**1,419.12**.

On the date of accident, Petitioner was 43 years of age, ***married*** with **3** 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**. TTD is paid in full and not in dispute.

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

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of **$ 40,399.39**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary *prospective* medical services for the surgery prescribed by Dr. Gregory Primus for the Petitioner's right shoulder, as provided in Sections 8(a) and 8.2 of the Act.

Penalties

Respondent shall pay to Petitioner penalties of $ **8,079.87**, as provided in Section 16 of the Act; $ **20,199.69**, as provided in Section 19(k) of the Act; and $ **0.00**, as provided in Section 19(l) 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.

Signature of Arbitrator

04-20-18
Date

APR 30 2018

State of Illinois)
) SS:
County of COOK)

Before Illinois Worker's Compensation Commission

HEATH WEATHERSPOON,

Petitioner,

v.) No. 14 WC 9511

METROPOLITAN WATER RECLAMATION DISTRICT,

Respondent.

ARBITRATOR'S 19(b) & 8(a) DECISION

In support of the Arbitrator's decision, the Arbitrator finds the following facts:

The Petitioner was employed since March of 2003 for the Respondent. His position with his employer has been that of a police officer. His physical duties require him to drive, make arrests, write tickets and patrol and use his weapon.

On March 15, 2014 he was driving his squad car and was t-boned by a vehicle that ran a stop sign. It was a heavy impact. He locked his arms and hit his head on the window. He noticed pain in his neck and back and limitation in moving his right arm. He is right handed. He left in an ambulance and was treated in the emergency department of McNeal Hospital.

Petitioner initially treated with Dr. Joseph Laluya of Excel Clinic and then came under the care of his orthopedic surgeon, Dr. Gregory Primus. He underwent an MR Arthrogram of his right shoulder on June 12, 2014. He was diagnosed with a rotator cuff tear in his right shoulder. He was sent for an IME with Dr. Brian Cole who recommended an injection. Dr. Primus was not in favor of the injection, but he did eventually perform it on May 12, 2015. He was seen for

another IME by Dr. Guido Marra on July 16, 2015. Dr. Primus performed right shoulder rotator cuff tear repair on September 10, 2015. His post-surgical course was notable for reaching a plateau in physical therapy. Dr. Primus prescribed a second surgery. He was sent for further IME with Dr. Marra who opined the need for the surgery was unrelated to his original job injury as it was a new injury related to a pre-existing, degenerative condition.

Petitioner is currently working. He continues to complain about pain, fatigue, trouble sleeping. He is seeking the authority for the second surgery. He has had no other injuries or accidents since this accident.

Dr. Gregory L. Primus

Dr. Gregory L. Primus testified in accordance with his narrative report he authored. (Px 5, Primus Dep Ex. No. 2). He is the Petitioner's treating surgeon and he provided a medical history consistent with the accident. He testified that he disagreed with the IME physician's opinions to inject the Petitioner's shoulder in advance of a surgical procedure. However, since surgery was not being authorized he relented and injected the shoulder. The Petitioner's complaints were not relieved with the injection and he again recommended surgery.

Dr. Primus performed surgery on the right shoulder on September 10, 2015. The Petitioner got worse during physical therapy and a second surgery was recommended. Dr. Primus testified that he intended surgically reinforce the progression of the posterior partial rotator cuff tear that was demonstrated in the post-surgical MRI scan. He further testified that the added force on that part of the tendon may have occurred when the Petitioner returned to work in a full duty capacity sooner than what Primus recommended. He added that the added forces during physical therapy, as well as the fact Petitioner had a steroid injection to the

shoulder may all have contributed to a weakening of that remaining cuff tissue. He opined the need for the second surgery is directly related to the original accident.

Dr. Guido Marra

Dr. Guido Marra testified in accordance with his IME examinations and IME narrative reports he authored. (Rx 1, Dep Ex. 2). He agreed that the first surgery to the rotator cuff was necessary and related the job accident. Further, he agreed that with the second surgery, but it to be unrelated to the accident stated that it's due to a pre-existing degenerative condition or new accident. He testified the second tear is in a different location and absent the history of a new injury it is most likely due to osteoarthritis which is a degenerative condition. Under cross-examination he testified that he did find positive Neer's and Hawkins test and positive painful arc continuing even after the first surgery. He also maintains his opinion that the second tear is unrelated even though it was found within six months of the first surgery. Further, he admitted that the second tear is located *one centimeter* from the original tear.

The Arbitrator finds in relationship to (C) whether an accident occurred that arose out of and in the course of the Petitioner's employment by Respondent:

The Arbitrator had the opportunity to observe the Petitioner on this matter when he testified. The Arbitrator concludes that the Petitioner was a very credible witness, except in the matter of his prior right arm workers' compensation claim.

The Petitioner testified to being injured on March 15, 2014 while on patrol for the Respondent as a police officer in his squad car. He was injured and underwent immediate

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treatment and eventually a right shoulder surgical repair of his rotator cuff. The medical records corroborate his testimony about the accident.

The Respondent produced no evidence by way of documents or witnesses to dispute the Petitioner's testimony and the clear and convincing evidence of an accident arising out of and in the course of his employment for the Respondent. In fact, it appears that the accident is not denied nor disputed as the Respondent is claiming their benefits under Section 5 (b) of the Act.

Therefore, the Arbitrator finds that the Petitioner established that he sustained a compensable accident on March 15, 2014 which arose out of and in the course of his employment with the Respondent and is entitled to benefits under the Act.

The Arbitrator finds in relationship to (F) whether the Petitioner's present condition of ill-being is causally related to the injuries:

The Petitioner's present condition of ill-being is related to his injury. The Petitioner testified, without contradiction, that after his first surgery his condition never resolved as he eventually plateaued. He testified he was pushed into physical therapy and full duty return to work, all of which aggravated and delayed his recovery. The Petitioner obtained constant and ongoing medical care after the surgery which confirmed he never did recover fully. Further, there are no prior nor subsequent nor intervening injuries to the right shoulder that interfere with the finding of causal connection between accident, the injury, the first surgery and the recommendation for the second surgery. No evidence was ever produced at arbitration as to any intervening injuries or accidents separate from the job injury by way of impeachment, documents or testimony that would account for the need for the second surgery. "Proof of the state of health of an employee prior to and down to the time of the injury, and the change

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immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury." Kress Corp. v. Industrial Commission, 190 Ill. App. 3d. 72, 82 (1989).

Based on the evidence presented, the Arbitrator finds that the Petitioner established that his present condition of ill-being with regard to his right shoulder, head and neck is causally related to his accident of March 15, 2014.

The Arbitrator finds in relationship to (J) whether the medical services that were provided to the Petitioner were reasonable and necessary:

The Petitioner submitted the following medical expenses at arbitration as Px 6-10:

1. Petitioner's medical bill from Advantage MRI-South Holland in the amount of $4,169.00 for dates of service 06/27/2016.
2. Petitioner's medical bill from Illinois Orthopedic Network for dates of service 03/18/2014 to 06/06/2017 in the sum of $20,841.85.
3. Petitioner's medical bill from IWP for date of service 02/13/2017 to 11/28/2017 in the amount of $5,596.62.
4. Petitioner's medical bill from Dr. Gregory Primus for date of service 08/05/2016 in the sum of $3,740.24.
5. Petitioner's medical bill from Metro Health in the sum of $14,389.68.00 for dates of service from 04/30/2014 to 08/24/2016.

These medical expenses, totaling $40339.39, were supported by the testimony of the Petitioner and the treating doctors and their treating medical records. These medical expenses are found to be reasonable and necessary medical expenses.

Since the Arbitrator has concluded that the Petitioner did sustain a compensable accident, and that his present condition is causally related to that injury, the Respondent is hereby found liable for these bills. The Respondent shall, therefore, pay the appropriate amount to the Petitioner concerning these medical bills submitted into evidence, which are allowed pursuant to the medical fee schedule in Section 8.2 of the Act.

The Arbitrator finds in relationship to (K) Is Petitioner entitled to any prospective medical care:

The Arbitrator finds the testimony of the Respondent's IME physician, Dr. Guido Marra, is less credible than Dr. Primus. The Arbitrator finds the testimony of the Petitioner was consistent and credible that his condition with respect his right shoulder never resolved after the first surgery and that there were no intervening accidents. The Arbitrator finds the testimony of the treating surgeon, Dr. Gregory Primus, to be most persuasive. The Petitioner is awarded prospective medical care to cure or relieve his right shoulder injury as prescribed and to be ordered by Dr. Primus for a second repair to the right shoulder and the necessary and reasonable treatment to recover from the surgery as well as any Temporary or Partial Disability benefits during the recovery period.

The Arbitrator finds in relationship to (M) whether penalties or fees should be imposed upon the Respondent:

The Respondent failed to provide medical benefits pursuant to the Act. The Respondent disputed the accident at arbitration even though they admittedly are claiming their Section 5 (b)

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benefits and they produced no evidence to support their dispute of accident. The Respondent's actions consisted of instituting proceedings which do not present a real controversy but are frivolous or merely for delay in payment of benefits and as such are vexatious. Although the Arbitrator finds the Respondent presented a defense to the Petitioner's claim for the second surgery, the Respondent had the opportunity after the testimony of the medical doctors to assess the compensability of the claim and failed to do so and instead allowed the matter to proceed to arbitration hoping to gain a windfall. Their position has been found untenable based upon the preponderance of the evidence that the Petitioner clearly never recovered from his injury after the first surgery and relied upon their IME doctor's testimony even after Dr. Marra testified the location for the second surgery was one centimeter away from the first tear and he had no evidence of any intervening accidents and the finding was within six months of the first surgery. The Respondent's position that this was degenerative is untenable.

Dr. Marra's stated under oath, "It's degenerative. So you have a rotator cuff tear, what you do is stitch the tissues together, that puts strain on the surrounding tissues and you can have failure if the tissue is not healthy and so that will result in a spontaneous tear as a result of the degenerative properties of the tissue." (RX #1 p.38)

The above stated phenomena is an unfortunate risk of surgery and any repeat surgery has always been compensable under the Illinois Workers' Compensation Act. The "strain on the surrounding tissues" is a consequence of the surgery that was necessitated by the work accident. This Arbitrator will not adopt Dr. Marra's opinion despite his excellent credentials and reputation. To do so would be to materially change Illinois Workers' Compensation law.

As a result, Petitioner is entitled to Penalties pursuant to 19K in the amount of 50% of the total disputed benefits awarded herein, of medical of $40,399.39 x 50%, which is $20,199.69.

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The Petitioner is entitled to Attorney's Fees in the amount of 20% of the benefits awarded herein, $40,399.39 x 20%, which is $8,079.87.

Arbitrator Kurt Carlson

04-20-18
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 Accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALEXIS SMITH,

Petitioner,

vs. NO: 15 WC 25078

CHICAGO TRANSIT AUTHORITY,

19IWCC0689

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice provided to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, and permanent partial disability, being advised of the facts and law, reverses the Decision of the Arbitrator, which is attached hereto, as stated below.

The Arbitrator found Petitioner proved by a preponderance of the evidence she sustained accidental injuries arising out of and in the course of her employment with Respondent on June 23, 2015, and further proved by a preponderance of the evidence that her condition of ill-being was causally connected to her employment and is entitled to temporary total disability benefits, medical benefits, and permanent partial disability benefits for the left hand.

The Commission, after hearing oral arguments, reviewing the record on appeal and being advised of the applicable law, hereby reverses the Decision of the Arbitrator and finds that the Petitioner failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on June 23, 2015, and further failed to prove by a preponderance of the evidence that her condition of ill-being is causally connected to her employment.

Petitioner was employed by Respondent as a bus operator on June 23, 2015. She had been working in this capacity since 2013. (T. p. 23) At that time, she was working 40 hours per week.

(T. p. 12) Petitioner testified to various activities using her hands and arms in the performance of her job duties. Petitioner's daily routine began with a pre-trip inspection of the assigned bus. (T. pp. 12-13) Petitioner would examine the exterior of the bus for defects such as scratches and nicks and also checked the outside of the bus to ensure the hatches were securely locked, the windshield wipers were operational, and the fuel tank was locked. (T. pp. 13-14) She adjusted the exterior mirror that may not have been readjusted after the buses were washed. (T. pp. 16-17) Petitioner testified that sometimes the mirror sticks so either she would try to readjust it or she would call one of the men who works in the garage to reset it. (T. p.18)

After inspecting the exterior of the bus, Petitioner inspected the interior of the bus. To enter the bus, she pulled the door open. (T. p. 15) She walked down the aisle and shook the rails and pulled on the straps that hung from the rails to ensure both were secure. (T. pp. 15-16) She pulled on the cord that notified the bus driver when a passenger wanted to exit to ensure it was in proper working order. She pushed the rear door to ensure the door would open if the mechanism to open it fails. (T. p. 19) She lifted the seats in the area designated for passengers in wheelchairs to ensure they folded as intended. (T. pp. 21-22) The number of times she performed a pre-trip inspection depended on the number of times she changed buses over the course of her work day. (T. p. 76) Petitioner testified she changed buses between one and four times a day, depending on the day. (T. p. 77)

Petitioner testified when she drove the bus she held the steering wheel with her hands at 2 o'clock and 9 o'clock. (T. p. 24) Her hands were kept in that position unless the bus had to make a turn. (T. pp. 25-26) She indicated the amount of force needed to turn the wheel depended on the turning ratio of the bus that was being driven. (T. p. 27) Those buses with poor turning ratios required that more force be applied. (T. p. 27) Petitioner testified some of Respondent's buses have good turning ratios and some of their buses have poor turning ratios. (T. p. 27) She said it was hard to say how often she drove a bus with a poor turning ratio versus driving a bus with a good turning ratio. (T. pp. 27-28)

During the course of her shift, Petitioner also pressed keys on the fare box. (T. pp. 28-29) She pressed those keys with her right hand and, while she did this, she held onto the steering wheel with her left hand, sometimes pinching the steering wheel with her fingers. (T. pp. 29-30) She later testified the buttons are pushed when the passengers pay with cash. (T. p. 80). She acknowledged that when a passenger uses a Ventra card, she "didn't have to hit anything because [the bus fare] registered automatically." (T. p. 80.) When she was asked how many times she pressed buttons on the fare box over the course of the work day, she stated that the buttons were pressed when they have multi rides, defined as a group of passengers comprised of both adults and children. This requires a key to be pushed for each passenger. (T. p. 29)

Three gears are used to operate the bus, reverse, drive and neutral. (T. pp. 30-31) Petitioner only adjusts the gears to put the bus in reverse, drive and neutral. (T. 31) To secure the bus and prevent it from rolling, she applied the parking brake using her left hand. (T. p. 31) To secure the bus while it is in neutral, she had to pull up on the air brake shift. (T. p. 31) Petitioner testified it definitely requires a degree of force to engage the air brake shift. (T. p. 31)

Petitioner testified she would manually deploy a 75-pound ramp for handicapped passengers if

the button that would mechanically deploy the ramp malfunctions. (T. pp. 20-21) This activity would be performed only when a handicapped passenger that required the ramp was boarding and the button to deploy the ramp failed; she did not testify as to how often this occurred.

On August 12, 2015, Petitioner sought treatment from Dr. Schlenker who noted Petitioner is a 63-year-old female who works for CTA as a bus operator for one year part time and two years full time. (PX 1) He noted Petitioner has signs and symptoms of carpal tunnel compression. She notices the symptoms at work and at night. He diagnosed Petitioner's condition as bilateral carpal tunnel syndrome, more symptomatic on the left side, arthrosis in the trapeziometacarpal joints, which was pre-existing, and a possible tear of the scapholunate ligament. He recommended an EMG and a cortisone injection into the left carpal tunnel. (PX 1) He stated he believed her carpal tunnel syndrome was aggravated by her work as a bus driver and should be considered work related. (PX 1)

Petitioner was examined at Respondent's request by Dr. Fernandez on November 10, 2015. (RX 1) Dr. Fernandez noted the history presented by Petitioner, the medical records, and the four-page job description. (RX 1) A physical examination revealed Petitioner stood 5'9" and weighed 288 pounds. (RX 1) He reviewed the treatment notes from Dr. Schlenker dated August 12, 2015, and the EMG from September 9, 2015. Dr. Fernandez noted the Occupational History which stated Petitioner was employed as a bus operator for CTA for almost three years. He noted her description of her job duties was compatible with the written job description. He noted she operates a lever when opening the front doors and has to press various buttons during the charging and locking of the fare box. (RX 1) He noted Petitioner demonstrated some of those motions and positions of her hands and arms when engaged in those activities. (RX 1) Dr. Fernandez found none of the motions or the positions of the hands and arms to involve significant hyperextension and or hyperflexion across the wrist beyond 20 or 30 degrees. (RX 1) He noted she does not engage in any maintenance or cleaning on the bus. He diagnosed Petitioner with bilateral carpal tunnel syndrome, bilateral thumb basilar joint degeneration and bilateral wrist scapholunate ligament abnormalities. Dr. Fernandez did not causally relate Petitioner's conditions to her work activities either as a cause or as an aggravating factor of her condition. (RX 1) He stated these conditions can and do have an idiopathic origin with other various risk factors including her gender, age, and body mass index, particularly with regards to the carpal tunnel syndrome. (RX 1) He also noted that conditions such as carpal tunnel syndrome can be associated with and/or aggravated by and caused by basilar joint and/or wrist abnormalities. (RX 1)

Petitioner returned to Dr. Schlenker on May 17, 2016. He stated her work is repetitive in nature and further stated, "...and also, ***which I did not realize*** (emphasis added), involves forceful pinching between her thumb and index finger on a frequent basis..." He then listed the various activities she performs as a bus operator noting some activities are more forceful than others. (PX 3) He recommended Petitioner undergo an endoscopic carpal tunnel release on the left at the present time and a right carpal tunnel release at a later time. (PX 3)

The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all the elements of his claim. *O'Dette v. Industrial Comm'n.*, 79 Ill.2d 249, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980). 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. Included within that burden of proof is that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n.*, 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill.Dec 70 (2003). A claimant who alleges injury based on repetitive trauma must show that the injury is work related and not the result of the normal degenerative aging process. *Peoria County Belwood Nursing Home v. Industrial Comm'n.*, 115 Ill.2d 524, 530, 505 N.E.2d 1026, 106 Ill.Dec. 235 (1987). To prevail under a repetitive trauma theory, the claimant must establish that she performed "the same task in a repetitive fashion" "regularly or on a daily basis." *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 211, 614 N.E.2d 177, 181, 185 Ill. Dec. 43, 47 (1st Dist. 1993). A claimant who seeks an award of benefits under a repetitive trauma theory is held to the same standard of proof as a claimant seeking benefits for a sudden, traumatic injury. *Durand v. Indus. Comm'n.*, 224 Ill.2d 53, 64 (2006). In repetitive trauma cases, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability. *Nunn v. Industrial Comm'n.,* 157 Ill.App.3d 470, 477, 510 N.E.2d 502, 109 Ill.Dec 634 (1987).

In this case, Petitioner testified to a variety of job activities she performed as a bus operator which she claims caused or aggravated her bilateral carpal tunnel syndrome. Petitioner relies on the opinion of Dr. Schlenker who stated the bilateral carpal tunnel syndrome was aggravated by her work as a bus driver.

Respondent offered the medical opinion of Dr. Fernandez who examined Petitioner, reviewed the written job description and Petitioner's compatible verbal description of her job activities, and observed Petitioner's demonstration of her job activities. He found that none of the motions or the positions of her hands and arms involved significant hyperextension and or hyperflexion. He noted these conditions can and do have idiopathic origins and he cited gender, age and body mass index. He further noted this condition can be caused or aggravated by basilar joint or wrist abnormalities. He therefore found her condition was neither caused nor aggravated by her work activities.

It is within the purview of the Commission "to resolve disputed questions of fact, including those of causal connection, to draw permissible inferences and to decide which of conflicting medical views is to be accepted." *Material Service Corp. v. Industrial Com.*, 97 Ill. 2d 382, 387, 454 N.E.2d 655, 73 Ill. Dec 558 (1983), quoting *Proctor Community Hospital v. Industrial Com. (1969)*, 41 Ill. 2d 537, 541. Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill, and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Comm'n.*, 309 Ill. 91, 138 N.E.2d 211 (1923). If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill App. 3d 599, 791 N.E.2d 80, (87), 274 Ill. Dec. 284 (2003).

The Commission finds Petitioner has failed to prove her job activities were sufficiently repetitive in nature to establish a compensable claim under a repetitive trauma theory. She testified to myriad activities she performed, many of which were performed once per day at the start of her shift. In addition, the Commission finds the opinion of Dr. Fernandez more persuasive than the

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opinion of Dr. Schlenker on the issue of causation. Dr. Fernandez reviewed the four-page written job description and the job duties as described by Petitioner during the examination. His report includes a detailed history of her job duties. He also noted the risk factors including gender, age and body mass index as possible causes of carpal tunnel syndrome as well as basilar joint arthritis and/or wrist abnormalities as possible causes. Dr. Fernandez reviewed the motions and position of Petitioner's hands and arms when engaging in her work activities and found no causal connection between her work activities and her condition of ill-being.

Dr. Schlenker, on the other hand, rendered his initial causation opinion on the basis Petitioner was employed as a bus driver. In the first opinion, there is no detail or description as to the actual job activities Petitioner performed. In his supplemental causation opinion, after Dr. Fernandez's opinion was elicited, he stated, "Her work is repetitive in nature and also, which I did not realize, involves forceful pinching between her thumb and index finger on a frequent basis…", and proceeds to list the litany of job activities she performs. (PX 3) Dr. Fernandez performed a comprehensive analysis when he reviewed the four-page job description, Petitioner's description of her job activities, and observed a physical demonstration of the employment tasks for a thorough understanding of the demands of the job. Thus, the Commission finds Dr. Fernandez's causation opinion more persuasive.

Based on the record as a whole, The Commission finds that Petitioner has failed to prove by a preponderance of the evidence that she sustained accidental injuries arising out of and in the course of her employment with Respondent on June 23, 2015, and further failed to prove by a preponderance of the evidence that her condition of ill-being is causally connected to her employment with Respondent.

IT IS THEREFORE ORDERED BY THE COMMISSION that Decision of the Arbitrator, dated April 2, 2018, is reversed and compensation denied.

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 Section 19(f)(2) of the Act, no bond is required as the Commission rendered no award for payment. 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: DEC 18 2019
KAD/mav
O:10/22/19
42

Kathryn A. Doerries

Maria E. Portela

DISSENT

I respectfully dissent.

I believe the Arbitrator was 100% correct in finding Petitioner sustained her burden of proving by a preponderance of the credible evidence that she sustained accidental, repetitive-trauma type injuries, in the form of bilateral carpal tunnel syndrome, arising out of and in the course of her employment with a manifestation date of 6/23/15.

As the Arbitrator points out, this is the date on which Petitioner was initially provided with wrist splints by primary care physician Dr. Chen, per the history of Dr. Schlenker, after having started noticing symptoms of numbness and tingling in the fingers of both hands in approximately May of 2015. In addition, there appears to be no evidence that Petitioner lost any time from work or sought medical treatment for her hands and/or wrists during the two years leading up to the date of the accident. Furthermore, like the Arbitrator, I found Petitioner to be highly credible, particularly with respect to her need to frequently use her hands in the performance of her work duties. Along these lines, Petitioner convincingly described the extensive "pre-trip" procedures she would engage in as well as the activities associated with her driving duties, including having to maneuver an 18" to 20" wide steering wheel with both hands throughout the course of her shift. Finally, I likewise found the causation opinion of board certified hand surgeon Dr. Schlenker – to the effect that Petitioner's work as a bus driver at the very least aggravated her condition of bilateral carpal tunnel syndrome -- to be considerably more persuasive than that offered by Respondent's hired gun, Dr. Fernandez, given that the latter only saw Petitioner one time and did not seem to have a complete understanding of Petitioner's job duties and the extent of the repetitive activities she engaged in as a bus driver for Respondent.

As a result, I would have affirmed and adopted the Arbitrator's well-reasoned decision in its entirety.

Thomas J. Tyrrell

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

SMITH, ALEXIS
Employee/Petitioner

Case# **15WC025078**

17WC000144

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

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On 4/2/2018, 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 1.89% 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:

1071 VASILATOS LAW
ELINA KHOTIMLYANSKY
555 W JACKSON BLVD SUITE 70
CHICAGO, IL 60661

0515 CHICAGO TRANSIT AUTHORITY
ANDREW ZASUWA
567 W LAKE ST 6TH FL
CHICAGO, IL 60661

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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)

Alexis Smith
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # **15** WC **25078**

Consolidated cases: **17 WC 00144**

19IWCC0689

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 **3/13/18**. 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. ☒ 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 **PPD for the left hand injury**

FINDINGS

On the date of accident, **June 23, 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.

For the reasons set forth in the attached decision, the Arbitrator finds Petitioner sustained bilateral carpal tunnel injuries secondary to repetitive trauma manifesting on June 23, 2015.

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 $**39,711.20**; the average weekly wage was $**992.78**.

On the date of accident, Petitioner was **63** 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 $ for TTD, $ for TPD, $ for maintenance, and

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$661.85/week for 19 5/7** weeks, from **July 8, 2016 through November 22, 2016**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $**10,705.00 (Dr. Schlenker, PX 1) and $2,136.00 (Suburban PainCare Center, PX 4)**, pursuant to the fee schedule, as provided in Section 8(a) of the Act.

The Arbitrator, having found Petitioner to be at maximum medical improvement ONLY with respect to her left hand injury, finds that Petitioner sustained permanent partial disability to the extent of **12** % loss of use of **left hand ($595.67/week for 24.60 weeks)** pursuant to **§8(e)** of the Act. The Arbitrator defers the issue of permanency with respect to the right hand because Petitioner re-injured that hand in the subsequent accident of December 2, 2016 and was still under active treatment as of the hearing. See decision in 17 WC 144.

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.

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Molly C Mason

Signature of Arbitrator

4/2/18
Date

ICArbDec19(b)

APR 2 - 2018

Alexis Smith v. Chicago Transit Authority
15 WC 25078 and 17 WC 144 (consolidated)

Summary of Disputed Issues

Petitioner, a bus operator, claims bilateral carpal tunnel syndrome secondary to repetitive trauma in 15 WC 25078 and a specific right wrist injury and emotional trauma in 17 WC 144. The disputed issues in 15 WC 25078 include accident, causation, medical expenses, temporary total disability and permanency. The disputed issues in 17 WC 144 include causation, medical expenses, temporary total disability and prospective surgery and psychological care. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she began working as a bus operator for Respondent in 2013. She worked part-time for one year and then began working full-time. She drives both conventional and articulated "double" buses along assigned routes.

Petitioner testified she is required to perform a "pre-trip" bus inspection each time she changes buses. She performs between 1 and 4 such inspections each workday, depending on the day. She begins the inspection by pulling open the driver's side window, reaching inside the bus and starting the ignition. She walks around the bus, checking the exterior, and then pushes a handle to open the door. After she goes inside the bus, she checks the hatches. She checks the rear exit door by pulling on the red "cherry" to make sure the door is functioning properly. She pulls on the window wipers to make sure they are working. She goes to the back of the bus and pulls on upper and lower doors to make sure they are locked. She also checks other locked compartments. She uses her hands to set the mirrors, which can become dislodged overnight, when the buses are washed. She testified she does not have to apply much force to pull the "cherry" but does have to apply force to move the mirrors.

Petitioner testified she also uses her hands while driving her route. The steering wheel is 18 to 20 inches wide. She places her left hand at the 9 PM position and her right hand at the 2 PM position while driving. She has to make turns during certain routes, including the 29th and State Street bus. It is more difficult to turn a "double" bus than a conventional one. Some buses have good "turn ratios" while others require force to turn. On one occasion, the employee who operated a bus before she started her shift failed to alert her to a mechanical problem. She discovered the problem after starting her route and had to struggle to operate the bus to "nurse" it back to the garage. She has to use force to activate a button near the gear shift that deploys the disabled passenger ramp. The gear shift is in front of her and to the right. On some occasions, this button does not work. On those occasions, she has to get out of the driver's seat and manually pull the ramp out. The ramp is made of metal and weighs 75 pounds. When unloading passengers, at Navy Pier for example, she has to use her left hand to forcefully pull a knob that locks the bus in place. When "multi-ride" and cash-paying passengers get on the bus, she has to press keys on the fare box. A "multi-ride" passenger could be an adult accompanied by another adult and children. She has to push a button for each individual in the group. If a passenger in a wheelchair gets on the bus, via the ramp, she has to manually lift seats in the front of the bus, help the passenger get situated and lock the wheelchair into place. She has to help certain disabled passengers maneuver around the fare box to access a seat.

Petitioner testified she is right-handed. In approximately May 2015, she began noticing numbness and tingling in the fingers of both hands. She also noticed she was having difficulty grasping

items. She would pick up an object, such as a glass of water, only to have it fall out of her hands. At the beginning, she had more problems with her right hand than her left. She also began having unbearable pain in her hands at night, while she was trying to sleep. She started taking Aleve.

Petitioner testified she initially consulted her primary care physician, Dr. Chen, and relayed her hand symptoms. Dr. Chen referred her to Dr. Schlenker. [Dr. Chen's records are not in evidence.]

On July 16, 2015, Petitioner filed an Application for Adjustment of Claim alleging June 23, 2015 injuries to both arms secondary to bus operation.

Records in PX 1 reflect Petitioner first saw Dr. Schlenker on August 12, 2015. The doctor noted a three-month history of pain in the hands and wrists, numbness and tingling in the fingers, weak grip strength and difficulty sleeping and turning knobs. He also noted that Petitioner had worked as a bus operator, initially part-time, for three years. He indicated that Petitioner was currently working 43.5 hours per week. He noted the referral from Dr. Chen and indicated that, on June 23, 2015, this doctor had provided Petitioner with splints, which Petitioner was now wearing at work as well as at night.

On initial examination, Dr. Schlenker noted positive Tinel's signs bilaterally, positive Phalen's on the left only, mild weakness of the abductor pollicis brevis on the right only, positive cubital tunnel testing bilaterally, but with the paresthesias extending into the median rather than ulnar nerve distribution, positive Tinel's over the pronator region bilaterally, negative Spurling's, no tenderness over the radial tunnel and positive grind testing of the thumbs, worse on right.

Dr. Schlenker obtained bilateral wrist X-rays. He interpreted the films as showing arthrosis of the trapeziometacarpal joint, more than on the left than right, and "increased separation between the scaphoid and lunate suggesting a rupture of the scapholunate ligament."

Dr. Schlenker described two-point discrimination as abnormal, especially in the left hand.

Dr. Schlenker indicated that Petitioner appeared to have bilateral carpal tunnel syndrome, worse on the left, arthrosis of the trapeziometacarpal joint, worse on the right, and a possible tear of the scapholunate ligament bilaterally. He recommended EMG/NCV testing, a cortisone injection into the more symptomatic left carpal tunnel, thumb splinting and injections, bilateral MRI scans to check for ligament instability and Celebrex. He saw no contraindication to Petitioner continuing to work as a bus driver but indicated this would "tend to aggravate her condition over time."

Dr. Schlenker opined that Petitioner's work as a bus driver aggravated her carpal tunnel syndrome and might have aggravated her pre-existing arthrosis, albeit in a minor way. He did not believe that the bus driving caused any ligament disturbance. He indicated this would have resulted from trauma, such as a fall, which Petitioner denied. PX 1.

Dr. Khanna performed the EMG/NCV testing on September 9, 2015. He described Petitioner as complaining of pain, numbness and paresthesias in both upper limbs secondary to using a steering wheel at work as a bus driver. He described Petitioner's left-sided symptoms as worse than the right. He indicated that Petitioner reported deriving only brief relief from the left-sided injection Dr. Schlenker administered.

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Dr. Khanna interpreted the EMG/NCV results as "consistent with bilateral median neuropathies at the wrist/carpal tunnel syndrome of mild to moderate intensity bilaterally." PX 1.

At Respondent's request, Petitioner saw Dr. Fernandez for purposes of a Section 12 examination on November 10, 2015. In his report of that date, Dr. Fernandez indicated he reviewed a four-page job description as well as Dr. Schlenker's initial note and the EMG/NCV report. He noted that Petitioner attributed her symptoms, which were now worse on the right, as stemming from driving a bus. He also noted that Petitioner was continuing to perform full duty. He described Petitioner as having quit smoking in 2000. He indicated that Petitioner's verbal description of her job duties was consistent with the written job description, with Petitioner indicating she had to operate a lever to open the doors and press various buttons during the charging and locking of the fare box. He described Petitioner as physically demonstrating to him the motions she would make with her hands at work. He stated that none of the demonstrated positions appeared to involve significant hyperextension or hyperflexion across the wrist beyond 20 or 30 degrees. He described Petitioner as 5 feet, 9 inches tall and weighing 288 pounds.

On examination, Dr. Fernandez noted subjective paresthesias in both hands, right greater than left, definite irritability of the median nerve, with positive Tinel's, Phalen's and median nerve compression testing bilaterally, right greater than left, subjective weakness without atrophy, prominence at the base of the thumbs, consistent with basilar joint arthritis, and pain to direct palpation along the basilar joint. He obtained multiple hand and wrist X-rays. He interpreted the films as showing "widening of the scaphoid interval with what appears to be significant flexion of the scaphoid with possible early degeneration of the radiocarpal joint" and "moderate or advanced degeneration of the carpometacarpal joint."

Dr. Fernandez diagnosed bilateral carpal tunnel syndrome, bilateral thumb basilar joint degeneration and bilateral wrist scapholunate ligament abnormalities on X-ray. He was not able to causally relate any of these conditions to Petitioner's work activities, "either as a cause or aggravating factor." He went on to state that the conditions "can and do have an idiopathic origin with other various risk factors including [Petitioner's] gender, age and body mass index, particularly with regards to the carpal tunnel syndrome." He indicated that carpal tunnel syndrome can be associated with and/or aggravated by basilar joint arthritis and/or wrist abnormalities. Regardless of causation, he recommended that Petitioner undergo carpal tunnel releases. He recommended simple observation of the thumb and wrist symptoms. He did not recommend an MRI at that time. He found Petitioner capable of continuing full duty and stated she was not yet at maximum medical improvement. RX 1.

Petitioner returned to Dr. Schlenker on May 17, 2016 and complained of pain in both hands, wrists and forearms and numbness/tingling in her fingers extending up both arms to the shoulders. She also reported having undergone an independent medical examination. On re-examination, Dr. Schlenker noted positive Tinel's and Phalen's bilaterally. He noted that Petitioner's job duties included checking the hatches, pulling the back door open, setting the mirrors, testing the straps, poles, seats and cords, pushing the key pad on the fare box and opening windows to adjust mirrors. He indicated that Petitioner wanted to proceed with surgery. He scheduled a left-sided carpal tunnel release. PX 1.

Dr. Schlenker sent a letter to Sedgwick on May 17, 2016, responding to Dr. Fernandez's report and outlining his own opinions as to causation and treatment needs:

I have reviewed [Petitioner's] job and I feel there is adequate

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> cause to feel her work at least contributed significantly to the development of carpal tunnel syndrome and also aggravated her arthrosis in the trapeziometacarpal joints. Her work is repetitive in nature and also, which I did not realize, involves forceful pinching between her thumb and index finger on a frequent basis. She has to deploy the bicycle rack and also has to check hatches in the back of the bus. She also has to pull open the back door to make sure it is working properly. She also has to pull on safety straps and on the vertical poles within the bus and check cords. She has to push a kneeler switch. She has to force open the window to the left side of the driver so she can reach the outside mirror to adjust. In addition, she has multiple switches in the bus that have to be operated on a frequent basis. She enumerated many things which she has to do. Some are more forceful than others, which I believe could contribute not only to carpal tunnel syndrome but also the arthrosis of the trapeziometacarpal joint."

He again recommended carpal tunnel releases, to be performed on the left hand first. He did not see any contraindication to Petitioner continuing to drive a bus while awaiting surgery, although he indicated this would further aggravate had condition over time. PX 3.

Petitioner testified her right-sided symptoms increased while she was awaiting approval of the recommended surgery. Her group carrier denied the surgery.

Dr. Schlenker performed a left endoscopic carpal tunnel release on July 8, 2016 and a right endoscopic carpal tunnel release on August 26, 2016. The doctor's records reflect Petitioner underwent occupational therapy at Athletico after each surgery. PX 1. Petitioner testified the therapy consisted of massages and performing exercises, such as squeezing a ball.

On October 20, 2016, Petitioner complained to Dr. Schlenker of pain shooting from her right wrist to her fingers and tightness of the right hand. She indicated she was taking Aleve. The doctor released her to light duty with no lifting over 3 pounds with the right hand and no bus driving. PX 1.

At the next visit, on November 17, 2016, Dr. Schlenker noted that Petitioner was "doing better" and felt she could return to work. He released her to full duty as of November 22, 2016. PX 1.

Petitioner testified she saw a company doctor and obtained her DOT card before she actually resumed bus operation. She resumed driving on November 29, 2016. Her routes had been picked for her. She felt fine at that point. Both hands had improved and she "had a new outlook."

Petitioner testified that, on December 2, 2016, she drove a route that was new to her. At some point, a young man got on the bus and asked her what the fare was. After she answered his question, she looked up and observed a "pull out time" of 10:10 PM. The young man sat down. She pulled out, turned at 103rd and Michigan and picked up a passenger at Wentworth. She then heard the bell go off, indicating someone was requesting a stop. She felt uneasy. She heard someone tap the shield around her seat. She looked around and saw a man wearing a white mask. She could see the man's eyes staring at her. The man swung his arm around the shield. She lifted her right arm, with her fist

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clenched, to protect herself. The man hit the back of her right hand with his fist. He struck the area between the knuckles and the wrist. When he struck her, her fingers spread apart involuntarily. The man struck her again, in the same area. The second blow caused her to feel pain in her entire right arm, radiating up to her ear. His fist "felt like a brick." He then jumped off the bus. She called control. A supervisor arrived and drove her to the garage. She completed paperwork concerning the assault and then went to the Emergency Room at Little Company of Mary Hospital, where she underwent right hand X-rays and was placed in a splint.

Petitioner testified she then called Dr. Schlenker's office to set up an appointment.

Petitioner returned to Dr. Schlenker on December 5, 2016 and provided a history of the assault. The doctor noted that the assailant, a disgruntled passenger, "struck her with considerable force in the hand and then in the wrist," with the second blow causing pain radiating up to her shoulder. He also noted that Petitioner was still recovering from the right carpal tunnel release at the time of this assault. He indicated that right hand X-rays taken at the Emergency Room did not show any fracture or dislocation.

On examination, Dr. Schlenker noted mild ecchymosis in the right palm, swelling and tenderness in the right wrist and pain with rotation of the wrist. He diagnosed contusions and prescribed an MRI scan, to check for ligament damage. He applied a Velcro splint to Petitioner's right hand and wrist. He released Petitioner to one-handed work and directed her to return in two weeks.

Petitioner testified she provided the doctor's restrictions to Ms. Hernandez at work. Ms. Hernandez then gave her a questionnaire and asked her to have Dr. Schlenker complete it. After Dr. Schlenker responded to the questionnaire, Respondent assigned her work as a "relief" person for the 29th Street route. The "relief" position did not involve driving. It consisted of getting on various buses at a certain location to afford breaks to drivers. Petitioner testified she performed the "relief" job for a few days. During this time, she began feeling fearful and "closed in." A man tried to greet her at some point and this scared her. She entered a nearby bus shelter and began to cry uncontrollably. She felt unable to get back on the bus. She called "control" and then returned to the garage. She decided she needed help and contacted Silvia Avila, MA, LCPC, a psychologist.

Petitioner first saw Avila on December 20, 2016. In her note of that date, Avila indicated that Petitioner was experiencing a "moderate degree of emotional distress and difficulty dealing with daily life functioning after an assault she suffered on 12/2/16 while she was at work." She described Petitioner as "moderately depressed and moderately anxious." She indicated Petitioner's mental state included a "post-traumatic reaction and symptoms such as lack of appetite and excessive crying outbursts." She recommended ongoing care. Petitioner continued seeing Avila on a weekly basis thereafter. PX 5.

Petitioner returned to Dr. Schlenker on December 21, 2016 and complained of ongoing pain and difficulty sleeping. Petitioner indicated she was taking Ibuprofen prescribed at the Emergency Room. She informed the doctor that she had not yet undergone the MRI because authorization was "still pending with workman's comp." The doctor directed her to continue wearing the splint. He again released her to one-handed work. PX 1.

On January 11, 2017, Dr. Schlenker noted that Petitioner was still waiting for the MRI to be authorized. PX 1.

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On January 17, 2017, Avila indicated that Petitioner's presentation suggested "some serious emotional and psychological difficulties and quite serious impairment in relational, work and/or school functioning." She described Petitioner as "panicky, over-stimulated and uncontained" and trying to deal with physical pain and return-to-work issues. She also noted that Petitioner was "re-exposed to traumatic event at workplace." PX 5.

Petitioner underwent the right wrist MRI on February 15, 2017. The interpreting radiologist noted a complete tear of the scapholunate ligament with 6 millimeters of diastasis of the scapholunate joint, proximal subluxation of the capitate consistent with SLAC [scapholunate advanced collapse], a 3.6 millimeter ulnar variance, a small to moderate effusion of the distal radioulnar joint, fluid at the ulnar attachments of the TFCC, possibly secondary to a tear, ulnar subluxation of the extensor carpi ulnaris tendon, extensor tenosynovitis of the second, fourth and sixth extensor compartments, tenosynovitis of the flexor carpi radialis and flexor pollicis longus, post-operative changes of the carpal tunnel with thickening of the flexor retinaculum, a ganglion cyst of the volar aspect of the trapezoid, severe atrophy of the opponens pollicis muscle and first palmar interosseous muscle, large pisotriquetral joint and radiocarpal joint effusions and osteoarthritis of the wrist, most marked at the scapho-trapezio-trapezoid joint and first carpometacarpal joint. PX 1.

On February 21, 2017, Dr. Schlenker reviewed the MRI results with Petitioner and noted ongoing symptoms in the wrist and fingers. He recommended a right wrist arthroscopy to repair the TFCC tear and determine the severity of the scapholunate ligament tear. He indicated the latter might require reconstructive surgery or a partial wrist fusion. PX 1.

Records in PX 1 reflect the recommended surgery was tentatively scheduled for April 17, 2017 but cancelled three days earlier. PX 1.

At Respondent's request, Dr. Fernandez re-examined Petitioner on June 29, 2017. In his report of that date, Dr. Fernandez noted he reviewed a job description, Dr. Schlenker's records, the EMG and operative reports, the MRI report and images and various X-rays.

Dr. Fernandez interpreted the MRI images as showing "evidence of an LT [lunotriquetral] joint coalition with degeneration, as described in the [MRI] report." He saw "no significant findings indicative of significant or acute tear of the lunotriquetral ligament or instability of the distal radioulnar joint." He noted that Dr. Schlenker had recommended MRI imaging at Petitioner's initial visit in 2015, based on his examination findings.

Dr. Fernandez noted that Petitioner did not have any significant left-sided complaints. On right wrist examination, he noted tenderness to direct palpation along the wrist dorsally at the scapholunate interval, no significant tenderness at the ulnar fovea along the TFCC, pain and tenderness also dorsally of the lunotriquetral ligament, significant pain with crepitus and "clunk" with Watson maneuver and no instability of the ECU or distal radioulnar joint. He also noted palpable tenderness at the base of both thumbs, right greater than left, with some associated crepitus.

Dr. Fernandez obtained bilateral hand and wrist X-rays. He compared these films with the X-rays taken in November 2015. He indicated both sets of films showed widening of the scapholunate interval "with what appears to be lunotriquetral joint coalition with significant rotary abnormality of the

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scaphoid and lunate." He also noted significant degenerative changes at the scaphotrapeziotrapezoid joint and "more severely at the carpometacarpal joint of the thumb," present bilaterally.

With respect to the left upper extremity, Dr. Fernandez found that Petitioner "has recovered from left wrist carpal tunnel release surgery, which was performed about a year ago." With respect to the right wrist, he diagnosed "scapholunate advanced collapse with lunotriquetral coalition with significant pre-existing degenerative findings on X-ray and MRI." He saw no significant evidence of a right TFCC injury. He addressed causation as follows:

> "It should be noted that the mechanism of injury of a direct impact to the dorsal wrist or hand would not be sufficient to cause or even aggravate to a reasonable degree a scapholunate ligament tear or triangular fibrocartilage ligament tear. This would be a more significant energy injury such as a fall or indirect significant twisting or torqueing injury across the wrist."

Dr. Fernandez characterized the treatment to date as reasonable and necessary. Regardless of causation, he felt Petitioner needed more care. He indicated that the proposed arthroscopy was one option but he felt this had a "high likelihood of failure." He recommended a "more definitive procedure such as proximal row carpectomy or scaphoid excision with four-bone fusion," to be performed after a CT scan "to further prognosticate the level of arthritis that [Petitioner] has." He also indicated that various conservative measures, including splinting, restrictions and cortisone injections, could help. He found Petitioner incapable of resuming her regular job, even after surgery. He recommended a "sedentary light duty restriction" with no expectation of pushing, pulling, grasping or twisting, "particularly of more repeated nature."

Dr. Fernandez viewed Petitioner as at maximum medical improvement with respect to the work injury but in need of care "regarding the underlying disease process of the arthritis that she has as this is active and ongoing." He added that Petitioner appeared to be at maximum medical improvement insofar as her bilateral carpal tunnel syndrome was concerned. RX 2.

Petitioner testified she received temporary total disability benefits until July 7, 2017. She began receiving short-term disability benefits thereafter.

The last note in evidence from Avila is dated August 22, 2017. In that note, Avila described Petitioner's "affective and emotional state" as appearing "rather distressed, moderately anxious and frustrated." She indicated that Petitioner's mental state "included a post-traumatic reaction." She recommended ongoing care. PX 5.

On September 9, 2017, Dr. Schlenker issued a report to Petitioner's counsel, responding to Dr. Fernandez's findings. He acknowledged he recommended a right wrist MRI at Petitioner's initial visit, in August 2015, but noted it was not authorized. He also noted that carpal tunnel syndrome was the primary concern at that time. He indicated the February 2017 MRI confirmed the scapholunate tearing he suspected at the initial visit, based on the X-rays he obtained at that time. He addressed causation as follows:

> "It is possible that the tear in the ligament following her assault was more severe than the tear noted in 2015. It is known that

> the interosseous ligament between the scaphoid and the lunate has more than one component. It is possible that the tear in the scapholunate ligament became more severe as a result of her injury in 2017. It is known that patients can have subclinical or minimal clinical signs to go along with a particular anatomic abnormality and the patient can become symptomatic from an additional injury and plain X-rays may show no worsening of the anatomic defect. Nevertheless, the patient becomes symptomatic as a result of the additional injury.
>
> I disagree with Dr. Fernandez in that I believe the assault on this patient could well have aggravated her condition and rendered it symptomatic. In addition, there is evidence on the MRI performed on 2/15/17 that she has a tear in the triangular fibrocartilage complex, which could also contribute to her symptoms."

He again recommended a right wrist arthroscopy to confirm the findings shown on the MRI and to obtain additional information regarding the possibility of early scapholunate advance collapse. PX 2.

Petitioner denied any trauma, such as a fall, involving her right wrist prior to December 2, 2016.

Petitioner testified that Respondent denied the surgery Dr. Schlenker recommended. She wants to undergo this surgery. Dr. Schlenker is still recommending surgery. She has not returned to Respondent since July 7, 2017.

Petitioner testified her right hand and wrist remain symptomatic. She continues to wear a brace. She feels as if there is a lit match under the brace, especially at night. She continues to see Avila for her psychological condition. She has not ridden a CTA bus or train since the assault. She continues to experience a fearful reaction to buses and El trains but feels she has improved.

Under cross-examination, Petitioner testified she was truthful with Dr. Fernandez when he examined her in 2015 and 2017. She explained her job duties to both Dr. Schlenker and Dr. Fernandez. With respect to Dr. Schlenker, she made a list of all of the tasks she performs during pre-trip checks and while driving. She cannot recall the exact days she performed light duty in December 2016, after the assault. She is required to push the fare-related buttons only when loading passengers.

On redirect, Petitioner testified she performed light duty for two weeks or less.

No witnesses testified on behalf of Respondent.

Arbitrator's Credibility Assessment

Petitioner was highly credible. Her testimony concerning her job duties and the December 2, 2016 assault was detailed and believable. She did not exaggerate her complaints. Neither Dr. Schlenker nor Respondent's examiner, Dr. Fernandez, noted any symptom magnification. PX 1, RX 1-2. Dr. Fernandez described Petitioner as "very pleasant and cooperative." RX 1. In his second report, he indicated he "completely believes" Petitioner has symptoms and disability. The treating psychologist, Silvia Avila, did not question the legitimacy of Petitioner's presentation. PX 5.

Arbitrator's Conclusions of Law Concerning Both Cases

Did Petitioner establish injuries secondary to repetitive trauma and causal connection in 15 WC 25078?

In 15 WC 25078, the Arbitrator finds that Petitioner established bilateral carpal tunnel syndrome manifesting on June 23, 2015, secondary to repetitive trauma. The Arbitrator views June 23, 2015 as an appropriate manifestation date based on Dr. Schlenker's initial history, which reflects Dr. Chen provided splints to Petitioner on that date. PX 1. The Arbitrator further finds that Petitioner established causation as to the need for the bilateral carpal tunnel releases Dr. Schlenker performed as well as to her current post-operative condition. In so finding, the Arbitrator relies on the following: 1) the fact Petitioner was able to successfully work as a bus driver for Respondent for approximately two years before June 23, 2015; 2) Petitioner's credible and detailed testimony concerning her "pre-trip" and driving duties; 3) the causation-related opinions voiced by Dr. Schlenker, Petitioner's treating hand surgeon; and 4) Dr. Fernandez's opinion that Petitioner required bilateral carpal tunnel releases (RX 1).

Overall, the Arbitrator finds Dr. Schlenker's causation-related opinions more persuasive than those of Respondent's examiner, Dr. Fernandez. Dr. Schlenker treated Petitioner over a period of time and made an effort to secure detailed information from Petitioner as to her various duties. Dr. Fernandez saw Petitioner only once in connection with the carpal tunnel condition. While he had some understanding of Petitioner's job, and indicated Petitioner demonstrated some hand motions to him, he did not express any awareness that Petitioner had to use her hands to pull on various objects and hatches inside and outside each bus she drove.

Is Petitioner entitled to reasonable and necessary medical expenses in 15 WC 25078?

In 15 WC 25078, Petitioner claims unpaid medical expenses from Dr. Schlenker, her hand surgeon (PX 1), and Suburban PainCare Center, the facility where she underwent EMG/NCV testing (PX 4).

The Arbitrator has previously found that Petitioner established repetitive trauma injuries and causal connection. The Arbitrator finds the treatment rendered by Dr. Schlenker and Suburban PainCare Center to be reasonable and necessary. Petitioner testified she obtained relief from the carpal tunnel releases. Respondent's Section 12 examiner, Dr. Fernandez, did not find causation but he recommended that Petitioner undergo carpal tunnel surgery. RX 1. In his second report, Dr. Fernandez described Petitioner's left carpal tunnel syndrome as resolved. RX 2.

The Arbitrator awards Petitioner reasonable and necessary medical expenses in the amounts of $11,005.00 (Dr. Schlenker's charges for treatment rendered between August 12, 2015 and November 17, 2016) and $2,136.00 (Suburban PainCare Center), per the fee schedule.

Is Petitioner entitled to temporary total disability benefits in 15 WC 25078?

Petitioner claims she was temporarily totally disabled from July 8, 2016 through November 22, 2016. Respondent claims Petitioner is not entitled to temporary total disability benefits, based on its defenses as to accident and causal connection. Arb Exh 1.

The Arbitrator has previously found that Petitioner established repetitive trauma injuries. The Arbitrator has also found that Petitioner established causation as to the need for the carpal tunnel releases Dr. Schlenker performed in July and August 2016. Respondent's examiner, Dr. Fernandez, agreed with the need for these surgeries, although he did not find causation. RX 1.

The Arbitrator finds that Petitioner was temporarily totally disabled from July 8, 2016 (the date of the first carpal tunnel release) through November 22, 2016 (the date Dr. Schlenker released Petitioner to return to work). This is a period of 19 5/7 weeks.

Is Petitioner entitled to permanency in 15 WC 25078?

The Arbitrator has already found in Petitioner's favor on the issues of accident and causation. The Arbitrator finds that Petitioner is at maximum medical improvement only with respect to her left hand. Petitioner's right hand condition was still unstable as of the hearing, due to the injury she sustained on December 2, 2016.

Because the accident in 15 WC 25078 occurred after September 1, 2011, the Arbitrator looks to Section 8.1b of the Act for guidance in determining permanency as to Petitioner's left hand. That section sets forth five factors to be considered in assessing nature and extent, with no single factor to be assigned greater weight than any other. The Arbitrator assigns no weight to the first enumerated factor, i.e., any AMA Guides impairment rating, since neither party offered such a rating into evidence. The Arbitrator assigns some weight to the second factor, Petitioner's occupation. Petitioner is a bus operator who credibly testified to using her hands to perform many work-related tasks. The medical evidence shows she made a good recovery from the left-sided carpal tunnel release but she only briefly resumed full duty before the second accident of December 2, 2016. In other words, her left hand condition has not yet been tested, work-wise. The Arbitrator also assigns some weight to the third factor, Petitioner's age. Petitioner was 63 years old as of the June 23, 2015 manifestation date. She is an older worker who is rapidly approaching retirement. The Arbitrator assigns no weight to the fourth factor, i.e., future earning capacity. Dr. Schlenker released Petitioner to full duty as of November 22, 2016. Petitioner does not claim any impairment of earnings secondary to her left hand condition. As for the fifth and final factor, "evidence of disability corroborated by the treating medical records," the Arbitrator notes Dr. Schlenker's operative report of July 8, 2016 and his full duty release of November 22, 2016. The Arbitrator also notes that Petitioner is right-handed and that Dr. Schlenker did not document any left hand complaints in the records he generated after the subsequent accident of December 2, 2016.

Having considered the foregoing, the Arbitrator finds that Petitioner is permanently partially disabled to the extent of 12% loss of use of her left hand, equivalent to 24.6 weeks of benefits under Section 8(e) of the Act.

In 17 WC 144, did Petitioner establish a causal connection between the undisputed accident of December 2, 2016 and her current right wrist and psychological conditions of ill-being? Did Petitioner establish causal connection as to the need for the recommended right wrist surgery and ongoing psychological care?

The Arbitrator finds the undisputed accident of December 2, 2016 was a cause of Petitioner's current right wrist condition of ill-being and contributed to the need for the surgery recommended by Dr. Schlenker. While Dr. Schlenker noted bilateral wrist abnormalities on X-ray, more than a year before

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the December 2, 2016 accident, and ordered MRIs, as Dr. Fernandez correctly noted in his re-examination report (RX 2), those abnormalities did not prevent Petitioner from resuming full duty as a bus driver following her bilateral carpal tunnel releases. When a right wrist MRI was finally performed, about two months after the December 2, 2016 assault, it showed a TFCC tear, according to both the interpreting radiologist and Dr. Schlenker. PX 1. Dr. Fernandez did not see such a tear but he agreed with the need for right wrist surgery and significant work restrictions. Dr. Schlenker went on to opine that the assault could have rendered Petitioner's underlying right wrist condition symptomatic.

In finding causation as to the right wrist, the Arbitrator also notes that the wrist abnormalities demonstrated on X-ray on August 12 and November 10, 2015, were bilateral yet Petitioner's current wrist complaints are right-sided. This circumstance supports Dr. Schlenker's opinion that the December 2, 2016 accident, in which an assailant twice struck Petitioner's right wrist, rendered the underlying right wrist condition symptomatic. In Illinois, it has long been held that a worker seeking benefits under the Act need only show that his injury was a cause of his condition. He is not required to show that the injury was the sole, or even a significant, cause. Sisbro, Inc. v. Industrial Commission, 207 Ill.2d 193, 205 (2003).

Is Petitioner entitled to reasonable and necessary medical expenses in 17 WC 144?

In 17 WC 144, Petitioner claims medical expenses relating to the care rendered by Dr. Schlenker (PX 1) along with the expenses associated with the psychological care rendered by Silvia Avila, MA (PX 5).

The Arbitrator has previously found in Petitioner's favor on the issue of causation. Respondent stipulated to the accident, which consisted of a physical assault by a passenger. Respondent did not offer any opinion from a psychologist criticizing Avila's care. The Arbitrator views this care as reasonable and necessary. Petitioner sustained psychological as well as physical injuries secondary to the assault. She started treatment with Avila within 2 ½ weeks of the assault. She did not exaggerate her psychological complaints and credibly testified to making progress with Avila's help. The Arbitrator awards Petitioner the $3,675.00 in charges reflected in Avila's billing for the period December 20, 2016 through June 6, 2017 (PX 5), subject to the fee schedule. The Arbitrator also awards Petitioner Dr. Schlenker's expenses in the amount of $3,131.00 for the visits from December 5, 2016 through February 21, 2017 (PX 1), subject to the fee schedule.

Is Petitioner entitled to temporary total disability benefits in 17 WC 144?

In 17 WC 144, Respondent paid $20,748.15 in temporary total disability benefits but disputes Petitioner's entitlement to benefits after July 6, 2017, based on Dr. Fernandez's causation opinion, rendered June 29, 2017 (RX 2). Petitioner claims she remained disabled from July 7, 2017 through the hearing of March 13, 2018. Arb Exh 1. While Dr. Fernandez did not find causation, he agreed with the need for treatment and significant work restrictions. He went so far as to say Petitioner would not be able to resume bus driving even if she underwent surgery. RX 2. Respondent offered no evidence indicating it has offered Petitioner work within the restrictions outlined by Dr. Fernandez. The Arbitrator views Petitioner's causally related right hand and wrist condition as unstable as of the hearing. Interstate Scaffolding v. IWCC, 236 Ill.2d 132 (2010). The Arbitrator finds that Petitioner was temporarily totally disabled from July 7, 2017 through March 13, 2018, a period of 35 5/7 weeks.

Is Petitioner entitled to prospective care in 17 WC 144?

The Arbitrator has previously found that Petitioner established causation as to her current right wrist and psychological conditions of ill-being. As noted previously, Respondent's examiner, Dr. Fernandez, agreed that Petitioner is a surgical candidate. At the hearing, Petitioner testified she continues to undergo counseling with Avila.

The Arbitrator awards prospective care in the form of the right wrist arthroscopy recommended by Dr. Schlenker and additional psychological counseling with Avila.

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

ALEXIS SMITH,

Petitioner,

vs. NO: 17 WC 000144

CHICAGO TRANSIT AUTHORITY,

Respondent.

19IWCC0690

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 medical expenses, temporary total disability and prospective medical, 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 April 2, 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.

Pursuant to §19(f)(2) of the Act, no bond shall be required for 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: DEC 18 2019
KAD/mav
O:10/22/10
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Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SMITH, ALEX
Employee/Petitioner

Case# **17WC000144**
15WC025078

CHICAGO TRANSIT AUTHORITY
Employer/Respondent

19IWCC0690

On 4/2/2018, 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 1.89% 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:

1071 VASILATOS LAW
ELINA KHOTIMLYANSKY
555 W JACKSON BLVD SUITE 70
CHICAGO, IL 60661

0515 CHICAGO TRANSIT AUTHORITY
ANDREW ZASUWA
567 W LAKE ST 6TH FL
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alexis Smith
Employee/Petitioner

v.

Chicago Transit Authority
Employer/Respondent

Case # 17 WC 0144

Consolidated cases: 15 WC 25078

19IWCC0690

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 **3/13/2018**. 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. [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 accident, **December 2, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**34,092**; the average weekly wage was $**852.30**.

On the date of accident, Petitioner was **65** 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 credit of $**20,748.15** for TTD, $**0** for TPD, $**0** for maintenance, and $**5,980.00 in non-occupational benefits (STD)** for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$568.20/week for 35 5/7** weeks, from **July 7, 2017 to March 13, 2018**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services already incurred of **$3,131.00 (Dr. Schlenker, PX 1) and $3,675.00 (Silvia Avila – Garden of Reflection, PX 5)** pursuant to the fee schedule, as provided in Section 8(a) of the Act.

Respondent shall authorize and pay for prospective care in the form of the right wrist surgery prescribed by Dr. Schlenker and further psychological counseling, as recommended by Silvia Avila, pursuant to Section 8(a) 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.

Molly C Mason

Signature of Arbitrator

4/2/18
Date

APR 2 - 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 LAKE)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARTIN J. STUMPF,

Petitioner,

vs. NO: 11 WC 026015

CITY OF HIGHLAND PARK,

Respondent.

19IWCC0691

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to the March 12, 2014, Order from the Circuit Court of Lake County instructing the Commission to clarify its Decision as to whether Petitioner's current condition of ill-being is causally related to the injury.

On April 23, 2013, the Commission affirmed and adopted the Decision of the Arbitrator. In the Decision of the Arbitrator, dated September 12, 2012, the ***Findings*** section states, "Petitioner's current condition of ill-being is not causally related to the accident." However, in the ***Addendum to the Memorandum of Decision of the Arbitrator***, in support of the Arbitrator's Decision relating to (F) Whether Petitioner's Present Condition of Ill-Being is Causally Related to the Injury, and (L), What is the Nature and Extent of the Injury, the Decision states: "Accordingly, the Arbitrator finds that the accident caused an aggravation of a pre-existing condition and based upon the treating records and the Petitioner's complaints finds the Petitioner sustained a loss of use of 30% loss of use of the right leg."

Based on the foregoing finding that Petitioner sustained an aggravation of a pre-existing condition and the award of permanent partial disability, the Commission finds the causal relationship finding in the ***Findings*** section of the Decision of the Arbitrator to be a scrivener's error. Accordingly, the ***Findings*** section of the Decision of the Arbitrator is corrected to read, "Petitioner's current condition of ill-being is causally related to the accident."

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner's current condition

19IWCC0691

of ill-being is causally related to the June 25, 2010 accident that arose out of and in the course of his employment with Respondent.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $664.72 per week for a period of 64.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 30% loss of use of the right leg.

Pursuant to §19(f)(2) of the Act, no bond shall be required for 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: DEC 18 2019
KAD/mav
O: 11/5/19
42

Kathryn A. Doerries

Thomas J. Tyrrell

Maria E. Portela

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 down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

HEATHER A. PATE,

Petitioner,

19IWCC0692

vs.

NO: 14 WC 21461

WARREN G. MURRAY DEVELOPMENTAL CENTER,

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 causation, medical expenses, prospective medical treatment, benefit rate, temporary total disability and nature and extent, 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 finds that the Petitioner has proven that her injuries arose out of and in the course of her employment, and affirms the Arbitrator's decision as to causation, medical expenses, temporary total disability and the denial of credit to Respondent against permanent partial disability, as well as the award of 5% loss of use of the right arm for the injuries that Petitioner sustained to her right elbow. However, the Commission modifies the award of the average weekly wage from $887.67 to $829.83. Further, the Commission modifies the award as to the cervical spine from 32.5% loss of use of a person as a whole to 20% loss of use of a person as a whole.

The Commission finds that Petitioner has proven the right elbow and cervical spine conditions are causally related to the work accident of March 20, 2013. Petitioner's treating physician, Dr. Gornet, was more persuasive than Respondent's Section 12 examiner, Dr. Petkovich, regarding his interpretation of the cervical MRI's performed on October 21, 2013 and

July 28, 2014. Moreover, Dr. Petkovich's opinions were inconsistent in that at the time he conducted his Section 12 exam of the Petitioner on April 24, 2014, he diagnosed a cervical strain which should have resolved after six weeks, yet at the time of the exam, he also declared Petitioner not to be at maximum medical improvement and indicated a further round of physical therapy was appropriate for her cervical spine injury.

Petitioner had no reported problems with either her right shoulder or cervical spine prior to the March 20, 2013, accident but had significant problems with both body parts following same. No evidence of an intervening accident or any other contributing event was presented that might have caused either condition and Dr. Petkovich's theory that Petitioner's cervical condition was degenerative in nature, particularly given her young age of 31, was simply not credible.

Regarding the issue of Petitioner's average weekly wage, the Commission finds that overtime pay was incorrectly included in calculating same. Therefore, the Commission modifies the Arbitrator's award to reflect the correct calculation. While Petitioner's payroll records reflect she worked some overtime, it is not clear from the evidence presented which of those overtime hours may have been mandatory rather than voluntary. Additionally, the amount of overtime hours worked was not consistent. Under *Airborne Express, Inc. v. Illinois Workers' Comp. Comm'n*, 372 Ill.App.3d 549, 555 (1st Dist. 2007), overtime earnings are only to be included in the calculation of average weekly wage when the overtime is performed as a condition of employment or when the overtime hours are part of the claimant's regular schedule. In the Commission's view, Petitioner failed to establish that her overtime earnings should be factored into her wage calculation. The Commission therefore modifies the average weekly wage from $887.67 to $829.83.

Although Petitioner did prove accident and causation, the Commission finds an award of 20% of loss of use of the person as a whole regarding the cervical injury to be more consistent with the evidence presented at trial. The Commission agrees with the award of the 5% loss of use of the right arm as a result of the elbow injuries.

The Commission weighs the following factors in making a determination of nature and extent pursuant to §8.1(b) regarding the cervical injury:

i) Neither side had an impairment rating performed for either injury. This factor is given no weight.

ii) Petitioner worked as a mental health technician II prior to the injury and was able to return full duty to her job. This factor is given some weight.

iii) Petitioner was 31 years old at the time of the injury. This factor is given significant weight.

iv) It is unclear to what extent Petitioner's future earning capacity was impacted. Petitioner was able to return to the same job she held prior to the accident but with a permanent restriction of no work in excess of 40 hours per week or 8 hours per

day. Petitioner claimed this impacted her ability to earn overtime and submitted earning records regarding two other individuals in the same job classification who were able to earn substantially more than Petitioner in the year prior to trial. (Px11)

Based on Px10 and Rx7, Petitioner worked a 37.5 hour week –leaving 2.5 hours per week for overtime. Petitioner only worked 77 hours of overtime in the year preceding her accident. It is unclear if Petitioner believes she is prohibited from working overtime, or if no overtime is offered in that limited window of time per week. Presumably, in a union position for the State, Petitioner will continue to get steps and cost of living increases, as well as have the opportunity to apply for other jobs within the state. There is insufficient evidence either way as to the actual impact Petitioner's work injury has on her ability for future earnings, so this factor is given little weight.

v) Petitioner's disability is corroborated by the treating medical records. Petitioner initially complained of an elbow injury and shortly thereafter, complained of cervical problems including significant headaches. Petitioner underwent extensive conservative care regarding her elbow before being released at maximum medical improvement in January of 2015.

Petitioner underwent conservative treatment and ultimately underwent cervical spine surgery as a result of her injury. Petitioner complains of ongoing headaches and problems with range of motion. She also feels like her activities of daily life have been impacted as a result of her injury. (T. 37-38) This factor is given significant weight.

Based on the evidence, duration of disability and current condition, the Arbitrator's award of 5% loss of use of the right arm as a result of the elbow injury is affirmed and adopted.

Although Petitioner's neck injury was long in duration and ultimately required surgery, based on the evidence, the Commission finds that the 32.5% loss of use of a person as a whole awarded by the Arbitrator was excessive and modifies the award down to 20% loss of use of a person as a whole.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $553.22 per week for a period of 15 1/7 weeks, from June 12, 2015 through October 25, 2015, that being the period of temporary total incapacity for work. Respondent is not entitled to a credit against permanent partial disability of $8,377.33, as provided under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $497.90 per week for a period of 12.65 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 5% loss of use of the right arm.

19IWCC0692

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $497.90 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 20% loss of use of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical services as identified in Petitioner's Exhibit 12, for medical expenses under §8(a) of the Act, subject to the fee schedule in §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.

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: DEC 18 2019

Maria Elena Portela
Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries
Kathryn A. Doerries

MEP/dmm
O:110519
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PATE, HEATHER A
Employee/Petitioner

Case# **14WC021461**

19IWCC0692

WARREN G MURRAY DEVELOPMENTAL CENTER
Employer/Respondent

On 7/11/2018, 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 2.10% 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:

0299 KEEFE & DePAULI PC
JAMES K KEEFE
#2 EXECUTIVE DR
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

1745 DEPT OF HUMAN 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

JUL 11 2018

Brendan O'Rourke
Illinois Workers' Compensation Commission

19IWCC0692

19IWCC0692

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

Heather A. Pate
Employee/Petitioner

v.

Warren G. Murray Developmental Center
Employer/Respondent

Case # 14 WC 21461

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 William R. Gallagher, Arbitrator of the Commission, in the city of Mt. Vernon, on June 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 _____

19IWCC0692

FINDINGS

On March 20, 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.

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

In the year preceding the injury, Petitioner earned $46,158.82; the average weekly wage was $887.67.

On the date of accident, Petitioner was 31 years of age, married with 1 dependent child(ren).

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 $8,377.33 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $8,377.33. The parties stipulated Respondent paid Petitioner full salary and/or TTD through June 11, 2015.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 12, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid 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 pay Petitioner additional temporary total disability benefits of $591.78 per week for 15 1/7 weeks commencing June 12, 2015, through October 25, 2015, and Respondent is not entitled to a credit against permanent partial disability of $8,377.33, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $532.60 per week for 12.65 weeks because the injuries sustained caused the five percent (5%) loss of use of the right arm, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $532.60 per week for 162.5 weeks because the injuries sustained caused the 32 1/2 % loss of use 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.

William R. Gallagher, Arbitrator

July 7, 2018
Date

ICArbDec p. 2

JUL 11 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 20, 2013. According to the Application, Petitioner was working with a combative patient and sustained an injury to her neck and right upper extremity (Arbitrator's Exhibit 2). It was stipulated that Petitioner sustained a work-related injury on March 20, 2013; however, Respondent disputed liability on the basis of causal relationship (Arbitrator's Exhibit 1).

There was also a dispute in regard to the computation of Petitioner's average weekly wage. Petitioner alleged she was required to work overtime hours and that her average weekly wage was $887.67. Respondent alleged that Petitioner was not required to work overtime hours and that her average weekly wage was $829.83 (Arbitrator's Exhibit 1).

In regard to Petitioner's time off from work following the accident, Petitioner and Respondent stipulated that Petitioner was paid her full regular salary and/or temporary total disability benefits for various periods of time subsequent to the accident. The only period of time in which there was a dispute was from June 12, 2015, through October 25, 2015, a period of 15 1/7 weeks, $8,377.33. Respondent claimed this was an overpayment of temporary total disability benefits and it was entitled to a credit against permanent partial disability in that amount (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a Mental Health Technician. Petitioner's job duties consisted primarily of caring for adult patients with physical and mental disabilities. Petitioner had to assist patients with changing their clothing, going to the toilet, transferring patients to/from wheelchairs/beds, etc. Petitioner's job was physically demanding and there were occasions in which patients would become combative.

Petitioner testified that on March 20, 2013, she and a coworker were in the process of moving a patient from a bed to a wheelchair. Petitioner said the patient was a man who was in his 50s, 6 feet tall, and weighed approximately 250 pounds. Petitioner stated that the patient became combative, put his right hand and arm around her and caused her to fall on her right elbow.

Petitioner said she experienced pain in her right elbow at the time of the accident. On the day of the accident, Petitioner prepared and signed a Notice of Injury in which she described the accident and that she had severe pain in her right elbow. There was nothing in this Notice of Petitioner having injured her neck (Respondent's Exhibit 1).

A Supervisor's Report of Injury or Illness was also prepared on March 20, 2013. The information contained therein was consistent with the Notice of Injury that was prepared by Petitioner (Respondent's Exhibit 2).

Petitioner was initially seen at St. Mary's Hospital and the Work Safety Institute (WSI). Petitioner was treated by Dr. Kendra Bowen who opined Petitioner had sustained a right elbow sprain. Dr. Bowen prescribed medication and a sling to immobilize Petitioner's right arm. When

Dr. Bowen saw Petitioner on March 26, 2013, she noted Petitioner continued to have right elbow pain. She ordered physical therapy (Petitioner's Exhibit 1).

Petitioner was seen by Roger Young, a Nurse Practitioner/Physical Therapist on April 4, 2013. At that time, Petitioner continued to complain of right elbow pain primarily on the lateral side. Petitioner also stated that in the preceding two to three days she had noted some pain in her neck and right shoulder. On April 9, 2013, Petitioner again complained of neck and right shoulder pain (Petitioner's Exhibit 1).

On April 19, 2013, Petitioner was evaluated by Dr. Rejina Tebbe, a chiropractor. At that time, Petitioner informed Dr. Tebbe she sustained an injury on March 20 when dealing with a difficult patient. At first her elbow hurt, but then her neck and shoulder also became sore. Dr. Tebbe diagnosed Petitioner with a neck sprain and provided chiropractic care through May 17, 2013 (Petitioner's Exhibit 9).

WSI referred Petitioner to Dr. Michael Hughes, an orthopedic surgeon, for her right elbow condition. Dr. Hughes saw Petitioner on April 29, 2013, and opined her symptoms were consistent with right lateral epicondylitis. He suspected there might be an osteochondral loose body and ordered an MRI arthrogram (Petitioner's Exhibit 2).

The MRI arthrogram was performed on June 13, 2013. According to the radiologist, it revealed a tear of the radial collateral ligament and a partial tear of the common extensor tendon (Petitioner's Exhibit 2).

Dr. Hughes saw Petitioner on June 27, 2013, and reviewed the MRI arthrogram (which he noted took two months to get approved). Dr. Hughes prescribed medication and ordered physical therapy (Petitioner's Exhibit 2).

Petitioner received physical therapy from August 14, 2013, through September 25, 2013 (Petitioner's Exhibit 3). Petitioner testified that Respondent delayed approving the physical therapy. She also stated that her right elbow condition improved, but she continued to have neck pain.

The WSI record of May 30, 2013, noted that Petitioner was to be referred to Dr. Kovalsky for her neck. However, Petitioner testified that Respondent did not approve that referral. Accordingly, Petitioner sought medical treatment from Dr. Matthew Gornet, an orthopedic surgeon.

Dr. Gornet initially evaluated Petitioner on October 21, 2013. At that time, Petitioner complained of pain referable to the neck, both trapezius, upper back and right elbow as well as headaches. She informed Dr. Gornet of the circumstances of the accident of March 20, 2013. Dr. Gornet ordered an MRI of the cervical spine which was performed that same day. Dr. Gornet opined that the MRI revealed a small focal herniation at C6-C7 more to the right which was consistent with Petitioner's symptoms. Dr. Gornet opined Petitioner's symptoms were related to the accident and he referred her to Dr. Kaylea Boutwell for injections (Petitioner's Exhibit 5; Deposition Exhibit 2).

Dr. Boutwell saw Petitioner on November 20, 2013, and administered trigger point injections to the trapezius and paraspinal muscles. Petitioner saw Dr. Gornet on February 3, 2014, and advised her symptoms had not improved. She returned to Dr. Boutwell who performed epidural steroid injections at C6-C7 on February 10 and February 26, 2014 (Petitioner's Exhibit 5; Deposition Exhibit 2; Petitioner's Exhibit 6).

At the direction of Respondent, Petitioner was examined by Dr. Frank Petkovich, an orthopedic surgeon, on May 2, 2014. In connection with his examination of Petitioner, Dr. Petkovich reviewed medical records and diagnostic studies provided to him by Respondent. In his review of the MRI of Petitioner's cervical spine, Dr. Petkovich opined that it revealed mild degenerative changes at C6-C7, but no acute findings. Dr. Petkovich opined Petitioner sustained a cervical strain/sprain and right elbow lateral epicondylitis as a result of the accident of March 20, 2013. However, he also opined that the accident did not cause an aggravation of the degenerative changes he noted in the MRI of Petitioner's cervical spine. He stated that Petitioner's complaints in regard to her cervical spine were out of proportion to objective physical findings, but that she was not at MMI. He recommended additional physical therapy. In regard to Petitioner's right elbow, Dr. Petkovich recommended referral to an orthopedic surgeon with expertise in treating individuals with upper extremity conditions (Respondent's Exhibit 4).

Petitioner was subsequently seen by Dr. Gornet on June 16, July 28 and October 27, 2014. Dr. Gornet ordered another MRI of Petitioner's cervical spine which was performed on July 28, 2014. He opined that it revealed a small central herniation at C6-C7. He recommended Petitioner undergo disc replacement surgery at that level. When Dr. Gornet saw Petitioner on October 27, 2014, he reviewed Dr. Petkovich's report and noted that Dr. Petkovich had recommended an additional period of physical therapy. Dr. Gornet agreed that this was a reasonable recommendation and ordered Petitioner to proceed with the additional physical therapy (Petitioner's Exhibit 5; Deposition Exhibit 2).

Petitioner received physical therapy for her neck symptoms from October 30 through November 24, 2014 (Petitioner's Exhibit 8). Petitioner testified that therapy did not relieve her neck symptoms.

While Petitioner was receiving physical therapy for her neck, Dr. Gornet referred her to Dr. David Brown, an orthopedic surgeon, for her right elbow condition. Dr. Brown saw Petitioner on September 24, 2014, and diagnosed Petitioner with right lateral epicondylitis. He administered an injection and provided Petitioner with a band to wear over her forearm. He recommended Petitioner perform some home exercises (Petitioner's Exhibit 4).

Dr. Brown saw Petitioner on October 27, 2014. At that time, Petitioner continued to complain of severe right elbow pain. Dr. Brown ordered an MRI scan of Petitioner's right elbow and recommended she continue to use the band and perform home exercises (Petitioner's Exhibit 4).

An MRI was performed on November 19, 2014, and Petitioner was seen by Dr. Brown the following day. The MRI revealed an abnormal signal at the common extensor tendon origin at the lateral epicondyle. Dr. Brown reaffirmed his diagnosis of lateral epicondylitis and recommended Petitioner continue to use the band and perform home exercises. He opined

Petitioner could return to work without restrictions in regard to her right elbow while continuing to use the band (Petitioner's Exhibit 4).

Petitioner was subsequently seen by Dr. Brown on February 18, 2015. Petitioner continued to complain of right elbow pain. Dr. Brown recommended Petitioner continue conservative measures and again opined Petitioner could return to work without restrictions using the band (Petitioner's Exhibit 4).

On April 24, 2015, Dr. Gornet performed surgery which consisted of disc replacement at C6-C7. Following surgery, Dr. Gornet saw Petitioner on May 18, 2015, and authorized Petitioner to remain off work through June 11, 2015. Dr. Gornet's record of that date indicated he would see Petitioner in about three weeks (Petitioner's Exhibit 5; Deposition Exhibit 2).

Petitioner did not see Dr. Gornet again until October 22, 2015. At trial, Petitioner testified that she missed an appointment in June, 2015, because she went the day before it was scheduled and had to wait three months before she could get another appointment. When Dr. Gornet saw Petitioner on October 22, 2015, he described it as a normal follow-up visit six months after surgery. Dr. Gornet ordered a CT scan of the cervical spine which was performed that same day. It revealed that the disc replacement was in satisfactory position. Dr. Gornet authorized Petitioner to return to work, but with the restrictions of working no more than 40 hours a week/8 hours a day. He indicated he would see Petitioner in two to three months time (Petitioner's Exhibit 5; Deposition Exhibit 2).

Petitioner was again seen by Dr. Gornet on April 25, 2016. Petitioner stated she was doing well so long as she stayed within her restrictions. Dr. Gornet ordered a CT scan of the cervical spine which was performed that same day. It revealed that the disc replacement was in satisfactory position. Dr. Gornet opined that the work restrictions he previously imposed were permanent (Petitioner's Exhibit 5; Deposition Exhibit 2).

At the direction of Respondent, Petitioner was again examined by Dr. Petkovich on November 20, 2016. In connection with his examination of Petitioner, Dr. Petkovich reviewed medical records for treatment Petitioner had received subsequent to his prior examination. He diagnosed Petitioner with a cervical strain and post cervical disc replacement at C6-C7. Dr. Petkovich opined that the disc replacement surgery was unrelated to the accident of March 20, 2013, Petitioner was at MMI and that she could return to work without restrictions (Respondent's Exhibit 5).

Dr. Petkovich was deposed on March 20, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Petkovich's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. He testified that, as a result of the accident of March 20, 2013, Petitioner sustained a cervical strain and right elbow lateral epicondylitis. As of the time of his initial examination of April 24, 2014, he stated Petitioner was not at MMI in regard to either condition. In regard to the cervical spine, he recommended an additional period of physical therapy and, for the right elbow injury, that Petitioner be evaluated by an upper extremity specialist (Respondent's Exhibit 6; pp 17-19).

Dr. Petkovich testified that the cervical disc replacement surgery at C6-C7 was not related to the accident. He also stated that Petitioner's soft tissue cervical strain should have resolved in six to eight weeks following the accident of March 20, 2013 (Respondent's Exhibit 6; pp 22-23).

On cross-examination, Dr. Petkovich agreed that he recommended further physical therapy when he saw Petitioner in April, 2014, which was approximately 13 months after the accident even though he opined the soft tissue strain would have resolved in about six weeks. Dr. Petkovich stated he recommended additional physical therapy to give Petitioner the benefit of the doubt and that the physical therapy Petitioner previously received may not have been aggressive enough (Petitioner's Exhibit 6; pp 36-37).

Dr. Gornet was deposed on October 16, 2017, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Gornet testified Petitioner had a C6-C7 disc herniation which explained her neck, right shoulder and back complaints. He reaffirmed his opinion that the accident of March 20, 2013, placed force on the cervical spine which ultimately caused the disc injury (Petitioner's Exhibit 5; pp 10-12).

Dr. Gornet testified he performed the disc replacement surgery on April 24, 2015, and that the procedure was reasonable and necessary and causally related to the accident. When he last saw Petitioner on April 25, 2016, he noted Petitioner continued to have neck complaints, but was able to return to work at full duty, but with the 40 hour a week restriction. He again noted that this was a permanent restriction (Petitioner's Exhibit 5; pp 21-22).

On cross-examination, Dr. Gornet agreed he could not specifically determine the exact date herniation occurred. However, based on the information he had, he stated that the only thing he could relate the disc herniation to was the accident. In regard to Petitioner's not keeping the appointment in June, 2015, Dr. Gornet agreed that Petitioner's returning to work six months following a one level disc replacement surgery was at the end of what would be considered a normal recovery time (Petitioner's Exhibit 5; pp 24-27).

At trial, Petitioner testified she was able to return to work to her regular job for Respondent; but, because of Dr. Gornet's restrictions, she has not worked any overtime hours. Petitioner stated she still has some restriction of motion in her neck and it gets sore whenever she engages in any physical activities. Petitioner does not feel that she is as strong as she was prior to the accident and is very careful whenever she has to work with the patients. Petitioner no longer participates in softball or aerobic exercise and stated she is not able to carry her seven-year-old son. In regard to her right elbow, Petitioner stated she experiences pain on active use of it, in particular, when she has to feed a patient or write for an extended period of time.

In regard to Petitioner's average weekly wage, Petitioner testified that the overtime hours she worked during the year preceding the date of accident were mandatory. Respondent tendered into evidence a wage statement for Petitioner's earnings for the year preceding the date of accident. According to it, Petitioner's regular earnings were $41,151.25 and her overtime earnings were $4,510.65 (Respondent's Exhibit 7).

Petitioner tendered into evidence her salary earnings statement for 2017, which noted Petitioner earned $47,331.69 for that year. It did not include any overtime earnings. Petitioner stated she was a step seven Mental Health Tech II. Petitioner tendered into evidence salary earnings statements for two other step seven Mental Health Tech II employees, Monica Klein and Mary Kampwerth. During the same calendar year (2017), Klein and Kampwerth earned $74,600.00 and $98,600.00, respectively. Petitioner also tendered into evidence a salary earnings statement for Brenda Rose, a step five Mental Health Tech II, for the same calendar year. Rose earned $65,400.00 for that period of time (Petitioner's Exhibit 11).

Jeanette Hodge testified on behalf of Respondent when this case was tried. Hodge testified that some of the overtime hours for Mental Health Tech II employees are voluntary and some are mandatory. Hodge explained that employees are initially offered the overtime hours and their decision to accept or reject them is entirely voluntary. However, if there are an insufficient number of employees willing to take the overtime hours, then they are mandatory. However, Hodge could not state whether Petitioner's overtime hours in 2012 (Petitioner worked no overtime at all in 2013) were voluntary or mandatory. She also noted Petitioner only worked 77 overtime hours in 2012.

In regard to the earnings of Klein, Hodge testified that Klein volunteers to accept overtime and, for that reason, included a lot of overtime. In regard to the earnings of Kampwerth, Hodge stated that she worked in a different building than Petitioner, and the way overtime hours are allocated in that area is different than the way they are in the area where Petitioner works.

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 is causally related to the accident of March 20, 2013.

In support of this conclusion the Arbitrator notes the following:

There was no dispute that Petitioner sustained a work-related accident on March 20, 2013, in which she injured her neck and right elbow.

In regard to Petitioner's right elbow, Petitioner was initially diagnosed with a right elbow sprain. Petitioner was subsequently diagnosed with a right lateral epicondylitis and MRIs revealed one or more tears of ligaments/tendons in the right elbow.

The first time Petitioner complained of neck symptoms was when she was evaluated on April 4, 2013, when she stated she had neck and right shoulder pain for the preceding two to three days. While this would have been approximately 12 days after the accident, there was no medical opinion that Petitioner did not sustain an injury to her neck as a result of the accident of March 20, 2013. Respondent's Section 12 examiner, Dr. Petkovich, opined Petitioner had sustained a cervical strain/sprain.

Petitioner's primary treating physician, Dr. Gornet, testified that the MRIs performed on Petitioner's cervical spine revealed a disc herniation at C6-C7 and that this was consistent with Petitioner's symptoms.

Respondent's Section 12 examiner, Dr. Petkovich, testified that the MRI he reviewed showed degenerative changes at C6-C7, but no evidence of any acute injury.

When Dr. Petkovich examined Petitioner on April 24, 2014 (approximately 13 months post accident) he opined Petitioner was not at MMI and that a further period of physical therapy was indicated for her cervical spine injury. However, at the same time, Dr. Petkovich opined Petitioner had sustained a cervical strain which would have resolved in about six weeks. The Arbitrator notes this inconsistency in Dr. Petkovich's opinions in regard to Petitioner's cervical spine condition.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. Petkovich in regard to causality.

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

The Arbitrator concludes Petitioner had an average weekly wage of $887.67.

In support of this conclusion the Arbitrator notes the following:

Petitioner testified that her overtime hours for the year preceding the date of accident were mandatory.

Respondent's witness, Jeanette Hodge, testified that overtime for individuals in Petitioner's job classification could be either voluntary or mandatory. While she briefly explain the way overtime is initially voluntary, but then can then become mandatory, Hodge could not state whether Petitioner's overtime hours were either voluntary or mandatory.

Further, the fact that Petitioner's overtime hours in 2012 were only 77 hours, suggests that they were, in fact, mandatory.

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

The Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and that Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 12, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid 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.

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

The Arbitrator concludes Petitioner is entitled to an additional period of temporary total disability benefits of 15 1/7 weeks commencing June 12, 2015, through October 25, 2015, and Respondent is not entitled to a credit against permanent partial disability of $8,377.33.

In support of this conclusion the Arbitrator notes the following:

As noted herein, Petitioner and Respondent stipulated that Petitioner was paid regular salary and temporary total disability benefits subsequent to the accident and the only period of disputed temporary total disability was June 12, 2015, through October 25, 2015, a period of 15 1/7 weeks.

While Petitioner missed an appointment with Dr. Gornet on or about June 11, 2015, there was no evidence that Dr. Gornet would have, in fact, released her to return to work at that time.

Dr. Gornet agreed that when he did release Petitioner to return to work in October, 2015, approximately six months post surgery, it was at the end of a normal recovery time.

In arriving at this conclusion, the Arbitrator also considered the physical demands of Petitioner's job and the fact that when Dr. Gornet released her, he restricted her from working any overtime.

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 five percent (5%) loss of use of the right arm and 32 1/2% loss of use of the person as a whole.

In support of this conclusion the Arbitrator notes the following:

Neither Petitioner nor Respondent tendered an AMA impairment rating. The Arbitrator gives this factor no weight.

Petitioner worked as a Mental Health Technician and her job was physically demanding, especially when she had to move or assist patients. Further, as the circumstances of this accident clearly indicated, patients could become combative and difficult to handle. The Arbitrator gives this factor significant weight.

Petitioner was 31 years old at the time she sustained the accident and 36 years old at the time the case was tried. Petitioner will probably work at least another 30 years. The Arbitrator gives this factor significant weight.

There was no question that the injury will have an effect on Petitioner's future earning capacity because she has been permanently restricted from working any overtime. Determination of how much of an effect there will be is problematic, because Petitioner only worked 77 overtime hours in the year preceding the date of accident.

Even though two other employees in Petitioner's same job classification earned substantially more in 2017 because of overtime, it does not mean that Petitioner would have also worked the same or similar amount of overtime.

For the Arbitrator to conclude Petitioner would have earned amounts similar to those of two other employees would be based, to a large extent, on speculation. The Arbitrator gives this factor moderate weight.

Petitioner was diagnosed with a right lateral epicondylitis and had pathology in either or both a ligaments/tendons in her right elbow. Petitioner's complaints were consistent with the injury she sustained.

Petitioner sustained a herniation to the C6-C7 disc and disc replacement surgery was ultimately required. Dr. Gornet testified Petitioner's symptoms were consistent with his diagnosis. Petitioner continues to have neck pain associated with various activities and while she was released to return to work to her regular job, she has been permanently restricted from working overtime. Petitioner's complaints were consistent with the injury she sustained. The Arbitrator gives this factor moderate weight.

William R. Gallagher, 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

Aretha Edwards,

Petitioner,

19IWCC0693

vs.

NO: 13 WC 003008

Chicago Youth Centers,

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, medical expenses, notice, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 26, 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.

19IWCC0693

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: DEC 18 2019
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MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

EDWARDS, ARETHA
Employee/Petitioner

Case# **13WC003008**

19IWCC0693

CHICAGO YOUTH CENTERS
Employer/Respondent

On 11/26/2018, 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:

1920 BRISKMAN BRISKMAN & GREENBERG
RICHARD VICTOR
351 W HUBBARD ST SUITE 810
CHICAGO, IL 60654

2965 KEEFE CAMPBELL BIERY & ASSOC
LINDSAY R VANDERFORD
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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Aretha Edwards
Employee/Petitioner

Case # **13** WC **03008**

Chicago Youth Centers
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 **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, 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. [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?
   [ ] 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 **August 15, 2011**, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 **$19,767.18**; the average weekly wage was **$581.39**.

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.**

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 August 15, 2011 and Petitioner failed to prove a causal connection between any such injury and her current condition of ill-being.

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

November 26, 2018
Date

ICArbDec p. 2

NOV 26 2018

FINDINGS OF FACT

Petitioner testified that in August of 2011 she was employed by Respondent as an Administrative Assistant. She had been so employed for 15 years, the last 10 years at the Rebecca K. Crown Center. Her job involved clerical work for the head start program and the afterschool program. She worked at a desk.

In the middle of August of 2011, Petitioner was working in a makeshift office in the computer lab because there was an ongoing construction project in the front office. The computer lab had three doors. One door was on the outside wall to enter and exit the building. Another door was to an adjacent office and the third door was to the hallway. The construction was being done outside the computer lab. The construction area was separated from the Petitioner's work area by heavy plastic "flaps" (sheets, or curtains that ran from floor to ceiling). The flaps were moveable, so that people could walk through them. They were like hanging blinds. Employees walked through the construction area to turn on the phones or to get items needed for work. Petitioner testified that the construction began sometime in the middle of August (12, 15 or 11). She worked every day until August 28, 2011. The door was sometimes closed and sometimes open. Petitioner testified that she did not see any dust in the computer lab during the construction. She did not see any dust particles in the air and did appreciate any dust or dust particles via her sense of smell. Earlier, Petitioner had testified that there was a lot of dust. She later said that there was dust coming off the construction.

Petitioner testified that she had received treatment for lung problems before August of 2011. She had treatment in 2002 and again in 2009, when she had a lung CT. She had been diagnosed with sarcoidosis (a disease of unknown etiology, in which nodules are formed in the lymph nodes, lungs and bones). She had not been diagnosed with asthma before August of 2011. She had not been treated with inhalers prior to August of 2011. In the days and weeks prior to the middle of August of 2011, she was feeling great and able to work her job with no problems. She was not receiving any medical treatment for lung related issues at that time.

Petitioner testified that she woke up one day and was congested and had a cough. This was in the second week of the construction project. Her last day worked was August 28, 2011. She testified that she saw her PCP (Dr. Davis) and was treated at Mercy Hospital E.R. on August 29, 2011. Petitioner testified that she called both Respondent's H.R. Director, Nichelle Pore and her supervisor, Eddie Wilson, around this time and advised each of them that her doctor had diagnosed an upper respiratory infection and suggested that she not return to work due to the construction. Petitioner testified that she advised that she thought that some of her symptoms were related to the construction at work at that time. Petitioner said that she gave Pore and Wilson off work notes at that time.

The records of Dr. Davis contain no chart note or billing entry regarding treatment rendered to Petitioner in August of 2011. Petitioner was seen in May of 2011 and then in January of 2012. (PX 2)

The records of Mercy Medical Center do show that Petitioner was seen in the ER on Monday, August 29, 2011 with complaints of congestion and back pain. It was noted that she had a cough and congestion since Friday, cough and cold symptoms for 3 to 4 days. The physical exam noted bilateral wheezes and coarse sounds on respiration. The diagnosis was bronchitis. Albuterol and Azithromycin were prescribed. There was no history of any exposure to construction dust at work. (PX 1)

Petitioner testified that she was off work from 8/29/2011 to 9/11/2011 and from 2/14/2012 to 2/20/2012. Dr. Sarma (associated with Dr. Davis) issued Petitioner an off work slip on September 6, 2011, excusing her from

work from 8/29/2011 to 9/11/2011. (PX 2) When Petitioner returned to work after the construction was finished, there was no more exposure to construction dust.

Petitioner presented to Mercy Hospital ER on September 11, 2011 with complaints of back and flank pain. She thought that her pain was similar to the pain she previously experienced when she had kidney stones. A CT scan of the abdomen and pelvis was performed and was compared to a study from 9/17/2009. The radiologist noted possible chronic small airways disease in the bilateral lung bases with redemonstrations of mild bronchiectasis. The nurses notes document back pain for 3 days, denies any trauma or injury, was seen in ED 8/29 for bronchitis. The respiratory/lungs exam was benign. The discharge diagnosis was back pain. There was no mention of any exposure to construction dust at work. (PX 1)

Petitioner was next seen at Mercy ER for URI complaints (cough for 10 days) on February 10, 2012. The respiratory/lung exam was positive for coarse breath sounds and cough. There was no wheezing and the exam was otherwise benign. The differential diagnosis was: bronchitis; pneumonia; URI; viral illness. The chest x-ray showed coarse interstitial markings in the lungs, rising from the hila, grossly unchanged from 8/29/2011, upper halves slightly more conspicuous since 3/3/2009. The patient reported progress with Albuterol nebs and was discharged home to follow up with her PMD. The discharge diagnosis was URI. (PX 1)

Petitioner followed up with Dr. Davis on February 14, 2012. The assessment was Bronchitis/URI, improved. Petitioner was released to return to work, effective February 20, 2012. (PX 2, RX 5)

Petitioner's employment by Respondent was terminated August 22, 2012. The reason for the termination was fraud and falsifying her income on a company document given to the IRS. Petitioner's claim for unemployment compensation was denied on the basis of employee misconduct/dishonest and fraudulent behavior connected with her employment. (RX 11) Petitioner agreed that she was fired, but did not agree that the reasons given for her discharge were true. She has not worked anywhere since being fired.

Petitioner claimed additional TTD from August 29, 2012 to the date of trial. Petitioner applied for SSDI and started receiving benefits in January of 2015. Her date of disability was September of 2012.

Petitioner was admitted to Little Company of Mary Hospital (LCMH) on three occasions, beginning September 23, 2012. At the first visit, she had shortness of breath. She was discharged on September 26, 2012 with a diagnosis of: 1. Bronchiectasis; 2. Allergic asthma; and 3. COPD. At this visit, Petitioner gave a history of an exposure at work a year prior (Asbestos?). Petitioner was seen in consult by Dr. Sunbuli, who noted a history of recurrent URI's for the last 1-2 years, "recently she also reported exposure to asbestos at work in September." Dr. Sunbuli's primary assessment was Bronchiectasis with acute exacerbation, probably secondary to infection. Dr. Sinbuli later confirmed allergic bronchopulmonary aspergillosis (ABPA). (PX 3)

The second admit at LCMH was from December 12, 2012 to December 17, 2012. The presenting complaints were shortness of breath and productive cough. Petitioner said that she had these symptoms every 6 months or so after an exposure to "asbestosis" at work. She had been told that she had pneumonia. The discharge diagnosis was bilateral bronchiectasis. She was instructed to follow-up with pulmonary in a week. (PX 3)

The third admit at LCMH was on October 20, 2013. Petitioner was seen for shortness of breath, with a known history of asbestos exposure. Petitioner was discharged on October 22, 2013. She was instructed to follow up with her PCP and the pulmonary doctor. The discharge diagnosis appears to be exacerbation interstitial lung disease, bronchiectasis. It does not appear that Petitioner was taken off work by the physicians at LCMH. (PX 3)

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Petitioner followed up with Dr. Davis on February 28, 2013. She felt well after d/c from LCMH. The assessment was: Bronchial asthma with bronchiectasis; hypertension; hypercholesterolemia; and angioneurotic edema, secondary to Ace Inhibitors. Dr. Davis did not take Petitioner off work. (PX 2)

Petitioner received treatment from Drs. Misaedi, Schraufnagel, Jo, and Manalo at Pulmonary Consultants and Access Community Health Network for pulmonary issues. The records from 2013 at Pulmonary Consultants do not contain a history of an exposure to construction dust at work in August of 2011. There are no off work slips in the records. The record from 6/1/2015 states that the patient stated that her symptoms started in August of 2011when she was exposed to construction dust at work. The assessment was: 1. Bronchiectasis, secondary to sarcoidosis; 2. Pneumothorax (recently hospitalized at UIC); 3. ABPA; and 4. Sarcoidosis. (PX 4, PX 5)

Petitioner was admitted to University of Illinois Hospital from December 24, 2014 to February 4, 2015. She presented with rapidly progressive worsening shortness of breath since Sunday (12/21). "She was diagnosed with bronchiectasis in 2011 after experiencing respiratory symptoms during extensive construction at work. She was told that the cause of her bronchiectasis was ABPA by her pulmonologist in 2014." The discharge diagnosis was pneumothorax, influenza infection. (PX 9)

Petitioner started treatment with Dr. Singla on July 8, 2015. She treated with him through December 2, 2016. Dr. Singla has diagnosed Petitioner with ABPA.

Presently, Petitioner takes medications daily. She uses an inhaler 2 times a day and nasal spray. She takes Claritin. She has respiratory complaints off and on. Allergy shots help. She is cautious in going into different environments and her symptoms are not as severe. She has had 2 episodes of waking up congested with a cough and her chest full of mucous in the last year. She has not been hospitalized since being discharged from U of I Hospital in February of 2005.

On cross-examination, Petitioner testified that she did not see accumulated dust in the computer lab when she was working in there. Petitioner testified that she knew that she should report an injury at work to a supervisor. She never reported any injury to Wilson or Pore and did not ask to fill out an accident/injury report. Petitioner thought that she gave an off work slip to Wilson, or Annette Anthony, another supervisor.

Crystal Collins testified at the request of Petitioner. She was subpoenaed to testify. She does not work for Respondent any more. She worked with Petitioner at Respondent on August 15, 2011. They were working in the computer lab during construction. Collins described the area, including the "flaps" masking off the construction area. Collins said that the atmosphere was extremely dusty, with residue from the walls. You could see the dust on the desk. You could smell it. Collins experienced coughing, difficulty breathing and shortness of breath during the construction. She sought medical treatment. Collins did not fill out an accident report and did not file a Workers' Compensation case.

Nichelle Peck-Glispi testified at Respondent's request. She was formerly known as Nichelle Pore. She was Director of Human Resources for Respondent in August of 2011. She is currently employed by Respondent. She knew Petitioner as a former employee of Respondent. Peck-Glispi learned about Petitioner's claim when she received the Application for Adjustment of Claim in February of 2013. She prepared RX 1, the Form 45. Petitioner did not complain of respiratory problems in August of 2011. There were no complaints by any other employees. There were no other Workers' Compensation cases filed asserting that the construction was the cause for the claim. Petitioner was terminated per RX 11 and she lost her unemployment claim. On cross-

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examination, Peck-Glispi said that she did not recall that Petitioner saw a doctor on 8/29/2011 and was taken off work. She did not recall Petitioner denying the allegations set forth in RX 11.

Jerry Torry testified at the request of Respondent. He worked at Respondent in August of 2011 and did not recall the construction creating a dusty environment. He was on friendly terms with Petitioner at that time. Petitioner did not complain of any breathing problems to Terry at that time, or ever. Terry agreed that it was possible to walk through the plastic sheeting.

Eddie Wilson testified at the request of Respondent. He was Petitioner's supervisor in August of 2011. Wilson said that no debris or dust went into the building parts that were not under construction. Petitioner never complained of breathing or respiratory problems during her employment. She did not give Wilson any off work slip. No other employees complained of breathing issues at that time. He was not aware that Petitioner had gone to the ER on August 29, 2011. Wilson authored RX 14, an email response from February of 2013 regarding Petitioner's claim of an injury on 8/15/2011, being exposed to construction dust and debris. Wilson wrote that he did not recall Petitioner mentioning a respiratory infection or any issues during the renovation. (RX 14)

Petitioner submitted the Evidence Deposition of Dr. Sunit Singla, MD. (PX 11) Dr. Singla has specialty certification in pulmonary medicine, critical care medicine and general internal medicine. He is the Fellowship Program Director for the Division of Pulmonary and Critical Care Medicine at the U of I Medical Center. Dr. Singla provided treatment for Petitioner from July 8, 2015 to November 23, 2016. Petitioner had been treated in the outpatient clinic for at least 2, if not 3, pulmonary conditions. She had been diagnosed with ABPA. Petitioner had given a history of being exposed to construction related dust at her work place. The patient thought that the exposure led to exacerbation of ABPA (because it was temporally related). Dr. Singla wrote a letter on July 8, 2015, stating that it was biologically plausible that such an exposure could lead to an exacerbation of the ABPA condition. If Petitioner's statements were true, then it is possible that the ABPA was exacerbated. Dr. Singla agreed with Respondent's expert (Dr. Conibear) that if bronchiectasis was present before August of 2011, the construction dust is not the primary event that triggered ABPA in the patient. Dr. Singla would have advised the patient to avoid construction dust. It is highly likely that the exposure further exacerbated the ABPA. He could not state this opinion with absolute certainty. Dr. Singla hedged his opinions, stating that he was relying on Petitioner's truthfulness in the history that she gave in rendering his opinions. He knew of no testing at the Respondent's facility, such that he was unable to conclude with a reasonable degree of medical certainty that such an exposure occurred. The closest opinion that Dr. Singla stated to a reasonable degree of medical certainty was that if there had been the possibility of exposure due to construction dust, and if Petitioner was exposed to something at the construction site, and if what she was exposed to was at dense levels (enough to be scientifically shown to have caused exposure significant enough to exacerbate her symptoms-similar to those in literature he referred to), then there could be a link to an exacerbation of her ABPA. Dr. Singla testified that if the exposure occurred at certain densities, and objective scientific findings confirmed the same, and if Petitioner's symptoms worsened following the alleged exposure, then he could say to a reasonable degree of medical certainty that an exacerbation could be linked to the exposure. Dr. Singla agreed that there were no objective findings indicating excessive exposure or that an exposure occurred. He relied upon the history given by Petitioner. (PX 11)

On cross-examination, Dr. Singla advised that he had not reviewed any prior medical records, other than Dr. Conibear's report. The sarcoidosis condition was not relevant in this case. ABPA is an allergic condition. Aspergillus is ubiquitous in nature. One site should not necessarily trigger someone with ABPA. ABPA can be exacerbated anywhere. There certainly can be a predilection for particular sites for both inciting the disease and

exacerbating it. The exacerbation would require high density exposure relative to that which is present in the environment. (PX 11)

Dr. Singla testified on re-direct examination that his causal connection opinion is based on if the exposure actually occurred. If there was an exposure, and if the symptoms increased, then it is likely that the 2 things are linked. (PX 11)

Respondent submitted the Evidence Deposition of Dr. Shirley Conibear, MD. Dr. Conibear was Board Certified in Family Medicine (expired 1994) and is Board Certified in Occupational Medicine. She testified consistently with her report, essentially testifying that none of Petitioner's conditions were caused by or accelerated by any alleged exposure while working. Bronchiectasis is inflammation and mucous that plugs up the bronchials and causes deformity and fibrosis to form in the lungs. ABPA can cause bronchiectasis, as can sarcoidosis or any chronic inflammation of the lung. ABPA is a hypersensitivity reaction to the mold, Aspergillus. Dr. Conibear testified regarding the nature of Petitioner's conditions and how those conditions present themselves in a patient. Petitioner's prior treatment documented that the comparison imaging studies which showed no change in Petitioner's lung condition compared before and after her alleged work exposure. Petitioner's ABPA would not be caused by or accelerated by an exposure to larger amounts of aspergillus mold, as the substance was ubiquitous and existed on basically every surface with which one comes into contact. Dr. Conibear explained that Petitioner's condition was not an external problem but instead was an internal problem whereupon the aspergillus mold grows on the inner lining of a person's lungs and is not affected by any external factor. Dr. Conibear confirmed the ABPA and sarcoidosis were permanent conditions, and they become permanent on the days they are diagnosed (or more accurately, the days they first developed) which was clearly documented to be prior to the alleged date of loss in August 2011. Dr. Conibear testified Petitioner's conditions were in no way created by, caused by or accelerated by any incidental construction dust exposure at work. The lack of change on the radiographic studies supports her opinion. (RX 2)

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

A claimant has the burden of proving, by a preponderance of credible evidence, all elements of the claim, which includes an alleged injury arising out of and in the course of employment. Orsini v. Industrial Comm'n, 117 Ill. 2d 38, 44-45 (1987)

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 (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT AND ISSUE (F), IS PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY,, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner failed to prove that she sustained accidental injuries that arose out of and in the course of her employment by Respondent on August 15, 2011. Petitioner also failed to prove that her current condition of ill-being is causally related to the injury.

Petitioner's claimed date of accident is August 15, 2011. This was a Monday and it may have been the first day of the renovation project at Respondent's facility. Otherwise, August 15, 2011 is of no significance to this case. There was no evidence of any dramatic event or exposure to dust on that day. There was no evidence that Petitioner or anyone else experienced any symptoms on that date. There was no evidence of any definite time place and circumstance of any event or exposure that led to Petitioner's lung issues. The evidence does not support a finding that the renovation project caused any increased risk of injury to Petitioner such that an accident arising out of her employment can be found to have occurred. Furthermore, if an accident/event/exposure cannot be supported, the claim fails on in the course of as well, as Petitioner experienced her symptoms (congested and coughing) after waking up at home.

Petitioner's testimony was that she couldn't see dust during the construction. She didn't notice it. She did not sense dust by her sense of smell. Petitioner then said that there was dust coming of the construction. On cross-examination, she testified that she could not see any accumulated dust. Collins testified that there was dust in the computer lab during the renovation and that she experienced coughing and difficulty breathing. Torry and Wilson saw no dust. None of Respondent's witnesses knew of any employees who had experienced respiratory problems during the renovation. The extent of construction dust is found to be minimal.

No environmental studies were performed at Respondent's building. There is no evidence of the quantity of the dust and of any quantity of the dust that can lead the Arbitrator to conclude that Petitioner sustained accidental injuries arising out of and in the course of her employment by Respondent on August 15, 2011.

The Arbitrator's conclusion on the issue of accident is supported by the testimony of the experts, Drs. Conibear and Singla, which also support the Arbitrator's finding on the issue of causation.

Of course, if the is no accident, there can be no causal connection.

The Arbitrator finds the opinions of Dr. Conibear to be persuasive. There was no evidence of any exposure/accident. Aspergillus spores are present everywhere and people are exposed to them constantly. There was no increase in pathology shown on the radiographs, such that it is likely that no aggravation or exacerbation occurred.

Dr. Singla's opinion was predicated on Petitioner having been exposed to construction dust of a nature that would hold aspergillus spores at dense levels (enough to be significant enough to exacerbate her symptoms); this could biologically plausibly lead to sensitization or exacerbation. No such exposure was shown, so Dr. Singla's opinion is unsupported and not persuasive.

As there has been a failed of proof on the issues of accident and causation, the claim for compensation is DENIED.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds in favor of Petitioner on the issue of notice. Petitioner testified that she told Pore and Wilson that she was off work due to a URI. Wilson and Pore denied this, but Petitioner was obviously off work for several days and she returned to work, Respondent had to know that something was wrong with Petitioner. Further, Petitioner testified that she gave an off-work slip to Annette Anthony and Wilson. Respondent did not submit any testimony from Anthony to rebut Petitioner's testimony. Notice was proven.

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, ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As the Arbitrator has found that Petitioner failed to prove that she sustained accidental injuries which arose out of and in the course of her employment by Respondent on August 15, 2011 and failed to prove a causal connection between the injury and her current condition of ill-being, the Arbitrator needs not decide theses issues.

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

DELIA HERNANDEZ DE RUIZ,

Petitioner,

19IWCC0694

vs. NO: 16 WC 16674

KIK CUSTOM PRODUCTS,

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 accident, causation, medical expenses, and temporary total 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 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).

Regarding the admissibility of Dr. Cohen's written reports, we find that they should have been admitted into evidence. The Arbitrator wrote, "the most important opinions Dr. Cohen could offer were not offered and were not admitted into evidence. Dr. Cohen's deposition testimony was therefore weak, unsupported and incomplete. See below for more details." *Dec. at 18.* The Arbitrator found that the opinions of Petitioner's Dr. Rhode "were better informed and therefore better reasoned than those of Dr. Cohen." *Id. at 22.* The Arbitrator wrote:

> The Arbitrator further notes that several of Dr. Cohen's opinions covering significant issues (such as causation) were truncated and restricted, if not absent, due to the fact that he deferred to his two IME "reports" (Deposition Exhibits 2 and 3) which were not admitted into evidence. Therefore, whatever opinions are found in those reports are not available to this Arbitrator to consider. **This lack of availability directly and negatively affects the strength and credibility of Dr. Cohen's opinions**. *Dec. at 22 (Emphasis in original).*

The Arbitrator further added:

> The Arbitrator emphasizes the great significance the fact that Dr. Cohen failed to offer a causation opinion – the very crux of these two claims. Question: "What, if anything, did you feel as far as whether her physical condition was related to her occupational activities?" **Answer: "All of those opinions are outlined in my original letter."** *Respondent's Exhibit #1, p.16.* However, that "original letter" was not admitted into evidence; therefore, Dr. Cohen has no causation opinion in evidence. Dr. Cohen did, however, offer that "...her electrical evidence for carpal tunnel syndrome could be associated with her work activities if they fit those work criteria." *Respondent's Exhibit #1, p.17.*

Dec. at 23 (Emphasis in original).

Significantly, the Arbitrator stated multiple times that Dr. Cohen's reports were not "admitted" into evidence but did not explain the circumstances surrounding the admission or rejection of these reports. The Arbitrator stated that the reports were not available to him. However, Respondent's attorney did offer them into evidence but they were not admitted by the Arbitrator. At Dr. Cohen's deposition, the following exchange took place:

Respondent's attorney:	... I don't have anything further subject to cross-examination. If – Respondent would just offer to enter Exhibits 2 and 3 into the record.
Petitioner's attorney:	Let's hold off until I finish cross. Okay? Good afternoon, Doctor. ... *Rx1 at 19.*

On page 3 of the deposition, the Arbitrator made a handwritten note: "Exs 2 + 3 not admitted into evidence – Robert M. Harris".

Respondent argues that it *did* offer the reports into evidence and no objection was raised by Petitioner's attorney to their admission. *Respondent's brief at 15.* The Commission finds that the request by Petitioner's attorney that the parties "hold off" until cross-examination was concluded is not a valid objection. We note the transcript does not indicate that Respondent's attorney ever agreed to the request to "hold off." Interestingly, it seems that Petitioner is aware that no valid objection was made at the deposition to the admission of the reports. Instead of making arguments that support the Arbitrator's decision to exclude them, Petitioner wrote:

> Respondent addresses Arbitrator Harris' decision to exclude the [sic] Cohen's written reports at length. Whether the reports were properly excluded by the Arbitrator or not is irrelevant. *Petitioner's brief at 17.*

Furthermore, Petitioner's own brief directly references the content of Dr. Cohen's addendum report. *Id. at 13.*

Although Dr. Cohen's reports were *objectionable* as hearsay, a proper objection to them was not made at the deposition. Therefore, we find they should have been admitted and hereby modify the Arbitrator's decision on this issue. However, based on all the evidence, including a review of Dr. Cohen's reports, we find the causation opinion of Dr. Rhode to be more persuasive than that of Dr. Cohen.

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The Arbitrator awarded temporary total disability (TTD) benefits through January 30, 2018, which was the first hearing date in this case. However, there were three hearing dates with the last one being on March 8, 2018. There is a record in evidence from Dr. Rhode, dated February 19, 2018, continuing Petitioner off work. Based on our decision regarding accident and causation, we hereby modify Petitioner's entitlement to TTD and extend the award through March 8, 2018.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $383.33 per week for a period of 86 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $30,634.46 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act, with Respondent receiving a credit of $10,153.20 for medical benefits previously paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for the surgery recommended by Dr. Rhode and psychological treatment as recommended by Dr. Lai for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $53,600.00. 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.

DEC 18 2019

DATED:

Maria Elena Portela

Maria E. Portela

Thomas J. Tyrrell

Thomas J. Tyrrell

Kathryn A. Doerries

Kathryn A. Doerries

SE/
O: 11/19/19
49

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

HERNANDEZ de RUIZ, DELIA
Employee/Petitioner

Case# **16WC016674**

16WC016675

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KIK CUSTOM PRODUCTS
Employer/Respondent

On 5/14/2018, 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 2.00% 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:

5669 ALEKSY BELCHER
MATT WALKER
350 N LASALLE ST SUITE 750
CHICAGO, IL 60654

4696 POULOS & DiBENEDETTO LAW PC
ADAM WILHELM
850 W JACKSON BLVD SUITE 405
CHICAGO, IL 60607

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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)

Delia Hernandez de Ruiz,
Employee/Petitioner

v.

Kik Custom Products,
Employer/Respondent

Case # **16** WC **16674**

Consolidated cases: **16 WC 16675**

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 **1/30/18, 2/21/18 & 3/8/18**. 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. [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. [ ] 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. [x] Is Respondent due any credit?
O. [x] Other **Maximum Medical Improvement / Permanent Partial Disability Award**

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FINDINGS:

On the date of accident, **1/12/16**, 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 $**29,900.00**; the average weekly wage was $**575.00**.

On the date of accident, Petitioner was **40** years of age, ***married*** with **2** 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 $**10,153.20** for other benefits, for a total credit of $**10,153.20**.

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

ORDER:

Respondent shall pay Petitioner temporary total disability benefits of $383.33 per week for a period of 81-5/7 weeks for the following periods: 5/11/16 thru 5/17/16; 6/29/16 thru 8/23/16; 9/16/16 thru 1/30/18.

Respondent shall pay reasonable and necessary medical services of $30,634.46, as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit of $10,153.20 for medical benefits previously paid. Respondent's fee schedule calculations shall accompany payment when sent to Petitioner.

Respondent shall authorize surgery as recommended by Dr. Blair Rhode. Respondent shall authorize psychological treatment as recommended by Dr. Lai.

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

May 11, 2018
Date

ICArbDec19(b)

MAY 14 2018

16 WC 16674 (D/A: 1-12-16)(consolidated with 16 WC 16675)

MEMORANDUM OF DECISION OF ARBITRATOR

Statement of Facts

Petitioner, Delia Hernandez de Ruiz, is a 42 year old married mother of 3 children. *Transcript, 1-30-18,* p.18 (hereinafter, "T"). As of the date of the hearing, Petitioner had not been employed since being suspended by Respondent on May 11, 2016. Petitioner was subsequently terminated as of July 21, 2016.

Petitioner began working for Respondent in 2000. *T, 1-30-18,* p.19. Respondent has undergone name changes in the past 18 years, being formerly known as *Signos* and *Marietta Corporation. T, 1-30-18 at* p.91. When Petitioner began working for Respondent, she worked in "quality control", which required her to measure the weight of bottles, check the torque of the caps on the bottles, and make sure bottles did not leak. *T, 1-30-18,* p.20. Petitioner testified that at that time, she would be in charge of a line composed of 13 production workers. *Id.* In addition to her supervisory duties, Petitioner would be called upon to perform the same jobs performed by production workers on the line. *T, 1-30-18,* p. 31. Petitioner described the job duties of the production workers, noting that they would lay bottles on the line, tighten caps on the bottles, and pack the bottles into boxes. *T, 1-30-18,* p.20. When asked how many times per day she would have to put caps on bottles when working the production line, she testified, "I don't know because there are too many." *T, 2-21-18,* p. 22. When asked by Respondent's counsel as to whether the cap on the bottle only had to be twisted "a little bit", Petitioner's response was as follows:

> *Q. Well, would you agree that you only have to twist the cap on a little bit in order for it to be ready for the torqueing machine?*
>
> *A. Not a little. I mean enough for it to make it through the torque machine. T, 2-21-18, p.33.*

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When Respondent changed names, Petitioner's job title changed from "quality control" to "machine operator", and finally to "line lead". Petitioner's duties, however, remained essentially the same. *T, 1-30-18,* p.22. Petitioner did spend a short time supervising and working in the laboratory before again returning back to work as a line lead. *T, 1-30-18,* p. 27. When Petitioner returned to her work as a line lead, there were fewer production workers on the line, which made the work more burdensome. *T, 1-30-18,* p.28. Petitioner was still required as part of her job duties to jump in and perform the same work as the production workers on the line when required. *T, 1-30-18,* p.31. One of the jobs performed by production workers as dumping lids/caps [hereinafter "caps"]. The caps being referenced are the pink caps that are twisted onto the top of the blue bottle which is marked as Respondent's Exhibit #8.

Petitioner described the act of "dumping caps" as follows:

> *"I would walk and grab a box. I would go up a ladder, and I would dump the box into the bin. They call it a bin. And some other times we would only dump it into a box because not all of the lines have that bin." T, 1-30-18,* p.33

Petitioner testified that in her estimation, the boxes weighed between 7-10 pounds. *T, 1-30-18* p.33. It was determined during the hearing that the boxes actually weighed 14 pounds each. *T, 2-21-18*, pp .241-242.

Work Accident of January 12, 2016

On January 12, 2016, Petitioner was not restricted by any doctors and she was working full duty. *T, 1-30-18,* p.45. Petitioner was dumping caps into the bin. She repeatedly performed this activity, testifying she dumped lids between 30 to 40 times on that day. *Id.* Petitioner explained how she dumped the boxes: "When I would grab them [boxes], I would support it [box] on my palm. And with this hand, I would empty the cap box, and then I would bring it down. I would come down the ladder. I would undo the box and put it on a pallet." *T, 1-30-18* pp. 46-47.

The record explains the activity as follows: "Your Honor, just say – let the record reflect that her left hand – her left wrist is extended back, supporting the weight of the box. Her right hand is

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above her head holding the top right corner of the box. And she would push the box forward with her left hand, holding it with her right and dumping the lids." *T, 1-30-18,* p.47.

Petitioner's left hand began to hurt from the palm down into the forearm underneath her wrist. *T, 1-30-18,* p.46. The pain started around 2:00 p.m. Petitioner reported the incident to her supervisor, Carlos Aguilar. *T, 1-30-18,* p.49. After meeting with Carlos, Petitioner left work. *T, 1-30-18,* p.55. Petitioner testified that her left hand was hurting, and that she took Tylenol for the pain. She had trouble sleeping that night due to pain in her left hand. The description of the location of the pain was as follows:

> *Q. Can you explain for us where on your hand you were having pain that evening?*
>
> *A. Here, on my palm going down. (Indicating.)*
>
> *Mr. Walker: And your honor, may the record indicate that she held up her left upper extremity identifying her left palm down to her left wrist – just as her left wrist.*
>
> *The Arbitrator: So noted. You can actually call that – that's where you would have a carpal tunnel release, right over the canal there.*
>
> *Mr. Walker: All right. So canal –*
>
> *The Arbitrator: There.*
>
> *Mr. Walker: Carpal canal.*
>
> *The Arbitrator: Right. T, 1-30-18,* p.56.

The next day, Petitioner met with Esmerelda Ruiz, a human resources representative for the Respondent. *T, 1-30-18,* p.58. During that conversation, Petitioner told Esmerelda Ruiz (HR) and Carlos Aguilar (supervisor) how she had injured herself. Petitioner explained: "How I had injured myself, that I grabbed the box, I would carry it up. I would go up the ladder. I would dump the caps. I would go down the ladder, and I would lay the box on the pallet." *T, from 1-30-18,* p.60. Esmerelda asked Petitioner if she wanted to go to the doctor. *T, 1-30-18,* p.61. Petitioner said

yes and Respondent sent her to Ingalls Occupational Medical Clinic on January 14, 2016. *T, 1-30-18,* p.61.

Medical Treatment

The notes from January 14, 2016 at Ingalls Occupational Clinic describe the accident as follows: While at work carrying boxes, repetitive motion of putting cups in bin states felt pain in left hand and forearm numbness feeling. *Petitioner's Exhibit #1*, p.3. The chief complaint was "left forearm pain, left wrist pain". Under the "History of Present Illness Section" the chart note states that "[Petitioner's] problem is pain located in the left forearm. She describes it as sore. She considers it to be moderate. The problem began on January 12, 2016. Delia says that it seems to be constant. She has noticed that it is made worse by moving it, lifting, and carrying objects. It is improved with rest, heat patch, and ibuprofen. She also notes that it's accompanied by tingling, weakness. She feels it is getting a little worse. Her pain level is 9. Patient states she was emptying boxes of cups weighing about 15-20 pounds and lifting it overhead when she felt a pain in her left forearm as she was readjusting the box. She took Ibuprofen for the pain which has been helping and applied a heat patch. The injury occurred 2 days ago and her pain has been worsening and she is having tingling down to her fingers. She also feels some weakness in the left hand. *Petitioner's Exhibit #1*, p.4.

Delia's secondary problem is pain located in the left wrist. She describes it as sore. She considers it to be moderate. The problem began on 1/12/16. Delia says that it seems to be constant. She has noticed that it is made worse by moving it. It is improved with rest, ibuprofen. She also notes that it is accompanied by tingling. She feels it is getting a little worse. Her pain level is 9. No previous injury to body part. *Id.*

The diagnoses on January 14, 2016 were pain in the left forearm and pain in the left wrist. *Id. at* pp.4-5. Petitioner was placed on restricted duty. It was noted that "the cause of this problem is related to work activities." *Id. at p.*5.

Petitioner continued to follow up at the company clinic. Restrictions were continued. On January 27, 2016, Petitioner was allowed a "full duty trial x 1 week with splint" by the company clinic.

Petitioner's Exhibit #1, pp. 22-24. Full duty resulted in a recurrence of symptoms. *Id. at* p.28. Petitioner was referred to an orthopedic specialist and was placed back on restrictions. *Id.*

On February 3, 2016, the occupational therapist recorded the following: "I am having no pain. When I saw the doctor he told me to go back to work regular duty but wear my splint. Tomorrow is my first day back." *Petitioner's Exhibit #2*, p.12. In the assessment section, the therapist clarified that Petitioner had very little pain, but reported fatigue in the left arm. *Id.*

Petitioner returned to the company clinic on **February 11, 2016.** Restrictions were again imposed, consisting of no lifting with the left upper extremity in excess of 5 pounds, no carrying with the left upper extremity in excess of 5 pounds, minimal use of left hand, minimal use of left arm, no overhead work with the left upper extremity, no repetitive work with the left hand, and only minimal pushing / pulling not to exceed 5 pounds. *See Petitioner's Exhibit #2*, p.36.

On that same day, February 11, 2016, Petitioner sustained a second work injury that is the subject of adjudicated companion claim 16 WC 1667 and is addressed in the companion decision. This second work injury relates to the right upper extremity. The report of injury is identified in the record as Petitioner's Exhibit #12.

Petitioner's first visit with Dr. Neal Labana took place on February 17, 2016. The Respondent's clinic referred Petitioner to Dr. Labana. *T,* p. 71. Dr. Labana noted a 40 year old female with left forearm and wrist pain. The chart note indicates that tenderness was present on the anterior left wrist. The right wrist and hand exam was normal. *Petitioner's Exhibit #3*, p.6. The diagnosis was synovitis and tenosynovitis of the left forearm. An injection was administered for a left side trigger finger. Restrictions of no lifting over 5 pounds and no repetitive grasping were imposed, and Petitioner was instructed to use a brace as needed. *Petitioner's Exhibit #3*, p.8.

On February 24, 2016, Dr. Labana noted complaints of left forearm and wrist pain, and included a new date of injury (01/12/16) referring to complaints of right hand pain after overusing due to previous left upper extremity problems. *Petitioner's Exhibit #3,* p.10. The diagnosis was bilateral wrist and forearm tendinitis. *Petitioner's Exhibit #3*, p.12. Therapy was prescribed for bilateral forearm and wrist flexor tendinitis, along with a brace. *Petitioner's Exhibit* #3, p.11.

On March 1, 2016, the therapist recorded, "I injured my right hand and I have an order for my right hand." On March 9, 2016, the therapist notes that Petitioner "was never placed on light duty for her left hand so she continued to do her regular job however because of left hand pain she overused her right hand packing bottles and developed right thumb pain." *Petitioner's Exhibit #2,* p.6.

On March 16, 2016, Dr. Labana continued work restrictions of no lifting in excess of 5 pounds. *Petitioner's Exhibit #3,* p.16. On April 6, 2016, Dr. Labana recorded that "right symptoms started when she went back to work with restrictions on left side but she states these restrictions were not followed by her boss for 1st 8 days, she states that is when she was overusing right to compensate for left, I think based on this her right side should be covered under WC on a limited basis. I think she will require 2 weeks of therapy and then should be able to return to full duty based on this description." *Petitioner's Exhibit #3,* p.18. Restrictions were continued. *Petitioner's Exhibit #3,* p.19.

On May 11, 2016, Petitioner was suspended from work pending an investigation for alleged insubordination. This was the last day she worked for Respondent.

On May 18, 2016, Dr. Labana recommended an EMG. Phalen's test was negative on the right, positive on the left. Tinel's test was negative on the right wrist, positive on the left wrist. Order EMG. Return to work with no restrictions on 5-18-16. *See Petitioner's Exhibit #3,* pp.25-28.

Petitioner was seen by her primary care physician, Dr. Lai, on May 20, 2016. Dr. Lai charted difficulty sleeping due to anxiety and stress. Dr. Lai noted that Petitioner had an injury doing packing, moving items at work which resulted in carpal tunnel syndrome. Dr. Lai recorded the reason for visit related to anxiety and injuries to the bilateral wrists. Dr. Lai wrote that Petitioner complained of bilateral hand tingling and numbness, mostly on left. Dr. Lai diagnosed Petitioner with insomnia due to stress, carpal tunnel syndrome of left wrist, stress at work, and depression. A referral was made for psychological counseling. *See Petitioner's Exhibit #4,* pp. 2-4.

Dr. Kenneth Holmes performed the EMG-NCV conduction study test on June 8, 2016. *Petitioner's Exhibit #3,* pp.29-33. The results of the EMG-NCV study were:

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1. *Carpal tunnel syndrome, left upper limb;*

2. *Pain in left fingers;*

3. *Paresthesia of skin.*

NCV and EMG Report Summary:

#1. There is electrical evidence consistent with a moderate left median neuropathy with conduction slowing seen across the palm and wrist which in the appropriate clinical setting is consistent with a moderate left carpal tunnel syndrome. The right was not done for comparison because of the specific order from Zurich Services to "only" study the left upper extremity.

#2. There is NO electrical evidence of any active left ulnar neuropathy or left cervical radiculopathy seen at the present time.

On June 24, 2016, Petitioner followed up with Dr. Lai. Dr. Lai noted that Petitioner "did not go for psychological counseling due to language barrier of Spanish speaking. Would like to have her provider who can speak Spanish. She has been taking sertraline with improvement for anxiety, depression. She still has pain on the bilateral wrist, is going to follow with occupational medicine for that." Dr. Lai referred Petitioner to DMG psychology counseling service. *Petitioner's Exhibit #4*, p.7.

On June 29, 2016, Dr. Labana injected the carpal tunnel on the left side and returned Petitioner to work with restrictions. *Petitioner's Exhibit #3,* pp.34-36. Petitioner was fired on July 21, 2016. On July 27, 2016, Dr. Labana continued restrictions. *Petitioner's Exhibit #3*, pp. 37-39.

On August 5, 2016, Dr. Lai referred Petitioner to Dr. John Fernandez at Midwest Orthopedics at Rush for another opinion regarding he ongoing complaints related to left carpal tunnel syndrome. *Petitioner's Exhibit #4*, p.14. This referral was outside of her primary care physician's practice group. *Id.*

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On August 24, 2016, the final visit with Dr. Labana took place. At that time, Dr. Labana recorded Phalen's was negative bilaterally, Spurlings maneuver was negative, Tinel's test was negative bilaterally upper extremities. *Petitioner's Exhibit #3*, p.41. The chart note indicates that Petitioner requested release, but this was disputed by Petitioner at the hearing. *T, 2-21-18,* p.22. Dr. Labana released Petitioner to full duty work.

Dr. Mark Cohen performed an examination pursuant to Section 12 at Respondent's request on August 31, 2016. Following the Section 12 exam, Petitioner began treating with Dr. Blair Rhode. Petitioner testified that she had been provided with several names by her lawyer and opted to see Dr. Rhode. *T, 2-21-18*, pp. 36-37.

The first visit with Dr. Rhode took place on September 16, 2016. Dr. Rhode recorded a history as follows:

> *The patient presents for a second opinion for evaluation of a work-related bilateral wrist injury. She states that she developed her left wrist symptomatology in January 2016. She describes it as palmar wrist pain with numbness and tingling to the thumb index and long finger. She also developed right thumb pain in February 2016. She describes it as primarily as pain in the MCP joint. See Petitioner's Exhibit #5*, p.5.

Dr. Rhode also recorded his understanding of Petitioner's job duties as follows:

> *She states that she works as a line lead. She is required to check weights for bottles and work on packing lines. She puts bottles on the line and subsequently puts the bottles [sic]. She describes this is a highly repetitive position. She has been performing these duties for 16 years. Id.*

Dr. Rhode explained his plan:

> *The patient demonstrates evidence of work-related left wrist carpal tunnel syndrome and right thumb MCP pain. The patient describes a 16 year exposure as a line lead. She describes a highly repetitive position managing bottles packing*

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line. She has underwent [sic] conservative management in the form of bracing (she is wearing a left wrist brace today) activity modifications, over-the-counter medications and injections. She continues to experience nocturnal symptoms. At this point, the patient wises to proceed with surgical intervention on the left wrist. I recommend proceeding with a left carpal tunnel release. The patient is off duty as she is not being accommodated by her employer. She will follow up 7 – 10 days postoperative. Petitioner's Exhibit #5, p.6.

On October 26, 2016 Dr. Rhode suspected that Petitioner might be suffering with gamekeeper's thumb and recommended an MRI. *Petitioner's Exhibit #5*, p.16. The MRI revealed chronic Grade I sprains but no tears of the ulnar collateral ligament and radial collateral ligament. The remainder of the study was unremarkable. *Petitioner's Exhibit* #5, p.19. From October 26, 2016 through the date of the hearing, Dr. Rhode has continued to keep Petitioner off work pending a left carpal tunnel release.

Petitioner underwent therapy at ATI Physical Therapy from January 20, 2017 through February 28, 2017. *Petitioner's Exhibit #6.* The initial evaluation assessment was as follows:

Delia Hernandez De Ruiz is a 41 y/o female who presents to Occupational Therapy with signs and symptoms consistent with physician's diagnosis of right collateral ligament strain of the thumb. Patient presents today with decreased ROM, Strength and increased Edema, Pain. Patient demonstrates a need for HEP education. These deficits limit the patient's ability to perform these tasks: Holding steering wheel, lifting from floor, lifting overhead, opening wrappers. Petitioner's Exhibit #6, p.11.

In the "Nature of Injury" section, the therapist recorded:

Patient had carpal tunnel on the left from lifting boxes she was then put on a different job that required her to put bottles on the conveyor belt and pack 120 oz. bottles which caused her to sustain a right thumb injury. Patient reports she had 2 injections in the right thumb. Id.

The Discharge Summary from ATI dated February 28, 2017 reveals that Petitioner continued to complain of pain in the thumb MP joint and that she was still limited in her ability to perform tasks as listed above. *See Petitioner's Exhibit #6*, p.41. Petitioner continued to report tingling in her hands at night. *Id.*

Petitioner testified about her current condition. *T, 2-21-18,* p. 121. Petitioner has difficulty holding on to dishes. *Id.* at p. 122. They often fall and break when she washes them. *Id.* Her husband helps her mop and her daughter has taken over the task of washing the dishes. *Id.* Petitioner currently takes Meloxicam, Hydrocodone and Aciphex. *T, 2-21-18,* pp. 118-119. She is no longer able to play volleyball. *T, 1-30-18, p. 123.* She requires assistance when washing her back. *Id.* Petitioner is depressed because she is unable to sleep at night due to the pain in her hands, and because she no longer has a job. *T, 1-30-18,* at pp. 123-24. She is no longer able to hold her 3 year old. *T, 1-30-18,* p. 124. She has to re-arrange her hands on the steering wheel when driving because they go numb. *Id.* at pp. 124-25. Petitioner confirmed that she wants to have the carpal tunnel release surgery as recommended by Dr. Rhode. *Id.* at 121.

Testimony of Manuel Perea

Manuel Perea is Respondent's operations manager. *T, 2-21-18,* p. 128. Perea began working for Respondent in 2014 when the company was still called Marietta Corporation. *Id.* Perea was familiar with Petitioner. *T, 2-21-18,* p. 129. Perea confirmed that Petitioner was employed as a line lead, and that she sustained injuries to her left hand in January of 2016. *Id at p.* 132.

Perea described the duties of a line lead as consisting of supervising employees on the line and making sure that the product made on the line meets quality specifications. *T, 2-21-18,* p. 133. Perea also described the jobs production workers performed on the line. *T, 2-21-18,* pp. 134-35.

Q. And are you familiar with line 2?

A. Yes.

Q. Can you describe what happens on line 2?

A. Bottles get to the line, empty bottles. There's a person that dumps the empty bottles into a big bin. There's a person getting the bottles from that bin and putting them on the conveyor, on the line. The bottles run through the conveyor. They go to a filler. They get filled with product. They come out of filler and we have a couple of employees putting – placing the caps on the bottle. We have a line lead that is supervising the line.

We have between two to three other employees packing bottles that are full and capped, and labels on the bottles. They pack them in cases, and then the cases get sealed. The cases travel through a power conveyor to the palletizing area, where we have a couple of employees palletizing full cases of product.

The Arbitrator: Palletizing, like on a pallet?

A. Yes, they're put on a pallet.

Perea estimated that a line would be called to work as a production worker about 20% of the time. *Transcript, 2-21-18,* pp. 138 & 183. Perea described the production jobs as follows:

A. There's a heavy lifter position dumping bottles. There's a regular position where a male or female can do the job as putting bottles on the line. There's another regular position where employees put – place caps on the bottles. There's another position where any employee can pack bottles into a case.

The Arbitrator: Okay.

A. And there is another position for heavy lifters to put the cases on a pallet.

Transcript, 2-21-18, pp. 140-41.

Perea went on to explain that the production jobs would rotate between the heavy lifting positions (bottle dumpers and palletizers) and the non-heavy lifting positions (placing bottles on the line, capping bottles, and packing bottles). *Transcript, 2-21-18,* pp. 141-42.

Perea testified that he was familiar with the job Petitioner was performing when she was injured on January 12, 2016. *Transcript, 2-21-18,* p.151 & 178. Perea testified that those boxes would be lifted 30-35 times per day, and that this job was performed by production workers. Perea was unsure of exactly how many times a line lead might be required to lift and dump the boxes of caps into the hopper. *Transcript, 2-21-18,* p.152. Perea estimated that a production worker would lift and dump the boxes of caps between 10-12 times per day. *Transcript, 2-21-18,* p.154.

Perea has never worked as a line lead or a production worker for the Respondent. *Transcript, 2-21-18,* pp. 177-78. Perea acknowledged that at the beginning of the shift, line leads are assigned to lines and any line leads not assigned to supervise lines are assigned to work as production workers. *Transcript, 2-21-18,* p.179 & 187. Perea acknowledged that although men usually work in the heavy lifting positions of bottle dumper and palletizer, women will sometimes dump bottles and may assist with palletizing by "lifting one or two cases". *Transcript, 2-21-18,* p.182. Perea spends about 30% of his time on the floor. During that time, he watches the lines, oversees the plant and runs around from department to department to make sure everything is in order. *Transcript, 2-21-18,* p.186.

Perea testified that turnover for line workers was about 20%-30% and that when there is an influx of new workers he relies on his line leads and experienced workers to assist in the production jobs. *Transcript, 2-21-18,* p. 190. Perea acknowledged that Petitioner should never have been on the line when she sustained her second injury, and that her restrictions would have precluded her from safely working as a packer. *Transcript, 2-21-18,* p.196.

Perea testified that over 10 hours, a manual line will put out 21,600 bottles over a 10 hour period at 100% efficiency. *Transcript, 2-21-18,* p.202. Perea clarified that lines usually run at 50% - 55% efficiency, which means that actual production would run between 10,800 and 11,880 bottles per 10 hour day, or between 1,080 and 1,188 bottles per hour. *Transcript, 2-21-18,* p.206.

Testimony of Galo Espinosa

Galo Espinosa works for Respondent as a warehouse logistics manager. *Transcript, 3-8-18,* p.6. Espinosa testified as to Petitioner's light duty activities while working in the warehouse.

Transcript, 3-8-18, p.8. Espinosa testified that when Petitioner was tasked to use the floor scrubber, she (Petitioner) would complain. *Transcript, 3-8-18,* p.15. Espinosa testified that Petitioner informed him that the vibration associated with use of the floor scrubber was "hurting her hands". *Transcript, 3-8-18,* p.17. Espinosa had never had any problems with the Petitioner prior to her complaining about pain in her hands while using the scrubber. *Transcript, 3-8-18,* p.29.

Testimony of Kathy Mueller re: Video and Job Analysis

Kathleen Mueller was retained as Respondent's vocational expert. Mueller is a vocational consultant, and performs vocational assessments, provides expert testimony, job analyses, and assists with job placement. Mueller has neither a degree, nor any training in ergonomics. *Transcript, 2-21-18,* at p. 220. Mueller previously worked as a return to work specialist for Sedgwick Insurance Company. *Id.*

Mueller prepared a job analysis at Respondent's request. *Transcript, 2-21-18,* at p. 209. Mueller visited Respondent's facility in December of 2014. *Id.* Mueller prepared a report with the assistance of David Patsavas (another vocational expert). *Transcript, 2-21-18,* at p. 226. The report was not signed. *Id.* The job analysis was limited to the "line lead" position. *Transcript, 2-21-18,* at p. 210.

Mueller described her understanding of the job requirements associated with the position of "line lead" on pages 211-215 of the Transcript. Mueller testified that she operated the camera which produced the video that was shown at the time of the hearing. *Transcript, 2-21-18,* at p. 218.

Mueller was on site at Respondent's premises for approximately 3 hours. *Transcript, 2-21-18,* at p. 225. Mueller testified the work day for a line lead or production worker at Respondent's facility is 8.5 hours. Mueller did not speak directly with any employees performing the "line lead" job, nor did she speak to any of the production workers. *Transcript, 2-21-18,* at p. 231. All of the information was obtained from management, and the job description contained in her report was cut and pasted from the documents provided to her by Respondent. *Transcript, 2-21-18, at*

p. 228. The job analysis video did not depict the job duties Petitioner performed when she injured her left hand on January 12, 2016. The video did show packing and other production jobs Petitioner performed. Mueller did not reference the production line job duties in her job analysis report although the video she produced did show a line lead performing production worker jobs, specifically packing. *Transcript, 2-21-18,* at p.232. Mueller was not aware that she had filmed line leads doing production work. *Id.*

Testimony of the Treating Surgeon, Dr. Blair Rhode

Dr. Blair Rhode is Petitioner's treating surgeon. Dr. Rhode testified in his deposition on March 10, 2017. *Petitioner's Exhibit #8.* Dr. Rhode testified that when looking at occupational risk factors for carpal tunnel syndrome, one must look at what the worker is doing, how repetitive it is, how forceful it is, and then ultimately come to a conclusion if you feel that meets your level of causation. *Petitioner's Exhibit* #8, pp.8-9.

Petitioner presented on September 16, 2016 to Dr. Rhode as a second opinion for evaluation of work-related bilateral wrist injury. Petitioner had stated she developed her left wrist symptomatology in approximately January of 2016 describing it as palmar wrist pain with numbness and tingling to the thumb, index and long finger. Petitioner also stated that she developed right thumb pain in February of 2016, and that that pain was primarily described as occurring at the joint at the base of the thumb. *Petitioner's Exhibit* #8, p. 12.

Dr. Rhode testified as follows as to his understanding of Petitioner's job duties:

"She then described her job duties working as a line lead where she was required to check weights for bottles, essentially working on a packing line in a repetitive fashion. She puts bottles on the line, and I don't know if it's a top on a bottle. It may be a typo there from the voice dictation. She described her job exposure as highly repetitive. She had been performing these duties for a total of 16 years." Petitioner's Exhibit #8, at p. 13.

Dr. Rhode testified that the findings on the EMG were consistent with a person suffering from left sided carpal tunnel syndrome. *Id. at p. 15.*

The hypothetical provided to Dr. Rhode was as follows:

Q. So Ms. Hernandez has shared with me the fact that on January 12th of 2016, she was working as a lead operator in her 16th year of employment, and on that occasion actually for two days up to that point she was working shifts of 10 hours each, and she was required to put a ladder up, because they were shorthanded, and she was required to take boxes of lids – the boxes weighed in her estimation 15 pounds. She would climb this ladder up, stretch out her hands because she's five foot four, and then dump the lids in, and the purpose of that activity is to get production rolling at a regular pace, but primarily she was required – and these boxes would come by the skid to climb down the ladder, go to the skid, lift the box, go up the stairs, and the quantity that could be loaded into this hopper or device was somewhere between six and eight boxes of these things, and according to what she will testify to is she did that all day long for two days, and by the end of the second day her hand, her left hand and forearm were in pain, and she reported that two days later because she had continuing problems that wouldn't dissipate, and she was sent to Ingalls Memorial Hospital the Ahmed [sic] clinic there were - -

When Dr. Rhode was asked his opinion as to whether the sequence events leading up to Petitioner's pain complaints might or could have been a causative factor in the development of Petitioner's left carpal tunnel syndrome, Dr. Rhode's answer was as follows:

"Yes, and again, I think it goes beyond that with the patient's exposure dose. This is a person that's been in this job position my understanding is for an extended period of time. Patient reported to me that it had been 16 years. So looking at that she has performed a significantly repetitive – which she described as a highly repetitive position over the course of those years with what I would consider mild to moderate force, again, that's a positional thing on top of just how much things weigh."

*"And also I think you take into account the fact that the patient doesn't have, you know, a litany of pre-existing wrist factors. She is a female. She's not a European female, which is a known risk factor. She doesn't have a history of diabetes or thyroid dysfunction. She recently had not been pregnant. I do not believe she meets a BMI criteria of greater than 30. Based upon that she essentially has no risk factors other than being born a female." Petitioner's Exhibit #8, p.*33.

"And the other thing I would state too is that this is a patient that reported - - you know, we talk about exposure dose, when she stopped doing activities so much, her symptoms improved a bit. So that's important as well." Petitioner's Exhibit #8, p.33.

"You know, again, I think even that even the IME physician in his report had said she had a work-related condition. He just couldn't pin the diagnosis." Petitioner's Exhibit #8, p.33.

*"If you have someone who is working at the extremes of wrist flexion and extension doing a highly repetitive position like that, that gets thrown into the causation factoring as well." Petitioner's Exhibit #8, p.*44.

"This is an instance – again, looking at this patient, it's my opinion she had an appropriate job exposure. The exposure dose was appropriate. She doesn't have a ton of risk factors. She had positive responses when you intervened, including activity modifications, cock-up wrist splinting, injections, all of this supports the fact that hey, she's doing something in her life, you know, which to me, nothing's been posed to me that, you know, after work she runs and starts pounding stakes at a railroad or something, that would meet more so my level of causation. So I believe it's related to this job exposure." Petitioner's Exhibit #8, p.55.

Testimony of Respondent's Section 12 examining physician, Dr. Mark Cohen

Dr. Cohen was retained as Respondent's Section 12 examining physician. Dr. Cohen testified on July 17, 2017. *Respondent's Exhibit #1.* Dr. Cohen examined Petitioner on August 31, 2016. Respondent's Exhibit #1, p.7. The examination focused on Petitioner's left wrist and forearm. Respondent's Exhibit #1 pp. 8 & 11. Dr. Cohen testified that he reviewed a job description but did not have the job description available for review at the time of the evidence deposition. Respondent's Exhibit #1, p. 10. Dr. Cohen testified that "I believe the job description suggested that this fell into the light physical demand level as defined by the U.S. Department of Labor with up to 20 pounds of force occasionally and up to 10 pounds of force frequently."

Dr. Cohen's testified as to his knowledge of the job Petitioner performed as follows:

"Set up and adjust machines, use hand tools, assemble products, light physical demand level up to 20 pounds of force, occasionally , up to 10 pounds of force frequently. That is all I have." *Respondent's Exhibit #1*, p.22.

Dr. Cohen testified he did not "have specifics other than the information provided to me by the job description and by the patient." *Respondent's Exhibit #1*, p.18.

Dr. Cohen opined that "[b]ased on her electrical test, I felt that she might have carpal tunnel syndrome on the left side. The problem was that her complaints and physical findings did not match the electrical tests of carpal tunnel syndrome. I did not have any other specific diagnoses in which to account for her entire symptom complex and physical findings as noted in my report." *Respondent's Exhibit #1,* p.13.

Dr. Cohen testified he did not see any contraindication with Petitioner returning to her old job without restrictions. *Respondent's Exhibit #1, p.*14.

Dr. Cohen opined that Petitioner should be involved in a home program for motion, stretching, and strengthening. Dr. Cohen also noted that if she had tingling in the distribution of her median nerve, and this was a significant problem for her, he did not have any problem for her to be treated for carpal tunnel syndrome. *Respondent's Exhibit #1 p.*14-15.

Dr. Cohen's Section 12 report and his addendum report were not admitted into evidence at the deposition or at the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Regarding the disputed issue (C), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

The Arbitrator finds and concludes that Petitioner proved by a preponderance of the evidence that she did sustain an accidental injury that arose out of and in the course of her employment with Respondent on January 12, 2016. The Arbitrator first finds and concludes that Petitioner was a credible witness. The Arbitrator next finds and concludes that the preponderane of the

evidence clearly demonstrates that Petitioner's daily and continuous job duties – performed over the course of years - were demonstrably repetitive in nature and further finds and concludes that she sustained injuries as a direct result of engaging in and performing these repetitive job duties over a prolonged period. "The repetitious nature of the tasks performed by claimant is relevant only to the question whether the tasks caused the claimant's condition." *Fierke v. Industrial Comm'n*, 309 Ill. App. 3d 1037, 1040 (2000).

Although it is apparent that some of the mechanical and numerical specifics regarding these job duties were either vague or not available, nonetheless, the Arbitrator finds and concludes there was sufficient overall evidence in the record to support the finding that Petitioner's job duties were repetitive and these repetitive job duties directly caused her condition of ill-being (e.g., Dr. Rhode's opinions, Petitioner's credible testimony and other evidence).

In support thereof, the Arbitrator notes "**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.**" *Edward Hines Precision Components v. Industrial Comm'n,* (2004).

The Arbitrator finds and concludes that the opinions of the treating physician, Dr. Rhode, are overall more credible and more informed than those of Respondent's examining expert Dr. Cohen and further finds that Dr. Rhode's opinions outweigh the opinions of Dr. Cohen – especially considering that Dr. Cohen failed to express (let alone explain) several fundamental, foundational opinions in his deposition testimony, preferring to defer to his prior opinions as found only in his two IME "reports" (which reports were not admitted into evidence). Therefore, the most important opinions Dr. Cohen could offer were not offered and were not admitted into evidence. Dr. Cohen's deposition testimony was therefore weak, unsupported and incomplete. See below for more details.

"To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [she] has suffered a disabling injury which arose out of and in the course of [her] employment." *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 203 (2003). The "in the course of employment" phrase "refers to the time, place and circumstances surrounding the injury" and, to be compensable, an injury "generally must occur within the time

and space boundaries of the employment." *Id.* "The 'arising out of' component is primarily concerned with causal connection" and is satisfied by showing "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." *Id.*

There is no question Petitioner has satisfied the "in the course of employment" phrase. Petitioner was working at Respondent's production location and was performing the duties associated with that employment at the time she complained of injury to her left upper extremity. "In the course" of is not in dispute. Rather, the "arising out of" component is at issue.

The Arbitrator finds and concludes Petitioner has satisfied the "arising out of" component in that there is considerable credible medical (and other) evidence in the record leading to the conclusion that Petitioner did sustain injury to the left upper extremity as a result of the repetitive work duties she performed. In support thereof, and very significantly, the Arbitrator notes and highlights that Respondent's own company clinic recorded in their first chart note that Petitioner had injured her left upper extremity **"[w]hile at work carrying boxes, repetitive motion of putting cups in bin...."** *Petitioner's Exhibit #1,* p.3. **This type of favorable medical opinion evidence from a Respondent's medical clinic is very persuasive. The Arbitrator notes that Dr. Cohen did not comment on, let alone try to refute or rebut, this specific opinion.**

Therefore, Petitioner has proven the disputed issue of accident by a preponderance of the evidence.

Regarding the disputed issue (D), What was the date of the accident?

"When the accident is a discrete event, the date of the accident is easy to determine: it is, obviously, the date that the employee was injured. When the accident is not a discrete event, this date is harder to specify. An employee who suffers a repetitive-trauma injury still may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury." *Durand v. Industrial Commission*, 224 Ill.2d 53, 64 (2006).

The Arbitrator finds and concludes that the date of the accident at issue in this claim is January 12, 2016. Petitioner testified that on January 12, 2016, she dumped caps into the bin between

30-40 times. T, p. 45. Petitioner testified her left hand began hurting at around 2 p.m. T, p. 48. Petitioner reported the accident to her supervisor, Carlos Aguilar. T, p. 51.

Regarding the disputed issue (E), Was timely notice of the accident given to Respondent?

The Arbitrator finds timely notice pursuant to Section 6(C) of the accident was given to Respondent.

Because the legislature has mandated a liberal construction on the issue of notice if some notice has been given, although inaccurate or defective, then the employer must show that he has been unduly prejudiced. *See, Gano Elec. Contracting v. Industrial Commission,* 260 Ill. App. 3d 92, 96 (1994).

The Supreme Court has held that the giving of the notice within 45 days of the accident is jurisdictional and a prerequisite of the right to maintain a proceeding under the Act. *See, Ristow v. Industrial Commission* 39 Ill.2d 410, 413 (1968). Where some notice is given but a defect or inaccuracy exists, the employer must prove he is unduly prejudiced. See, *McLean Trucking Co. v. Industrial Commission*, 72 Ill.2d 350, 354-55 (1978).

As indicated above, Petitioner testified that she gave notice to her supervisor, Carlos Aguilar, on the date of the accident. T, p.51. The day following the accident, notice was provided to Esmeralda Ruiz, a Human Resources representative for the company. *T,* p. 58. **Even Respondent's witness, Manuel Perea, who served as Respondent's operations manager, testified that he was aware of the Petitioner's January work accident. *T*, p. 178.**

Despite disputing notice on the Request for Hearing form, Respondent offered no evidence to rebut Petitioner's testimony, nor did Respondent make any attempt to impeach their witness, Manuel Perea as to the issue of notice.

Regarding the disputed issue (F), Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds and concludes that Petitioner has proven by more than a preponderance of the credible evidence that her current condition of ill-being as relates to her left upper extremity is causally related to the accidental injuries sustained on January 12, 2016.

"A causal connection between an accident and a claimant's condition may be established by a chain of events including the claimant's ability to perform manual duties before an accident, a decreased ability to so perform immediately after an accident, and other circumstantial evidence." *Pulliam Masonry v. Industrial Commission,* 77 Ill.2d 469, 471-72 (1979). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Commission*, 93 Ill.2d 59, 63-64 (1982). "[I]n the cases relying on the repetitive trauma concept, the claimant generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." Nunn v. Industrial Commission, 157 Ill. App. 470, 477 (1987).

As discussed in-depth above, Petitioner testified at length regarding her job duties as a line lead for Respondent. Petitioner testified credibly that in addition to the job duties specific to the line lead position, she was called upon at least 20% of the time to perform work on the production line. This was supported by the testimony of both Respondent's operating manager Manuel Perea and the video job analysis presented at the time of the hearing.

Petitioner testified that discomfort and pain was felt at the location of the carpal canal of the left wrist while performing the job duties of dumping boxes of lids.

"It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence." *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999).

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"The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion." *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th), 960 N.E.2d 587, 355 Ill. Dec. 705. "If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them." *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). The Arbitrator is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts.

"Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of the treating physician." *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill.2d 1, 31 Ill.Dec. 789, 394 N.E.2d 1166 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 168 Ill. Dec. 756, 590 N.E. 2d 78 (1992).

Therefore, based upon a careful review and analysis of the two competing and conflicting evidence depositions taken in this matter, the Arbitrator finds and concludes that Dr. Rhode had a better grasp of Petitioner's overall job requirements than Dr. Cohen. The Arbitrator also finds and concludes Dr. Rhode's opinions were better reasoned than Dr. Cohen's. Therefore, the Arbitrator finds and concludes that Dr. Rhode's opinions regarding Petitioner's work duties and its relation to causation were better informed and therefore better reasoned than those of Dr. Cohen; the Arbitrator accordingly agrees with, accepts and adopts the opinions of Dr. Rhode rather than those of Dr. Cohen. The Arbitrator further notes that several of Dr. Cohen's opinions covering significant issues (such as causation) were truncated and restricted, if not absent, due to the fact that he deferred to his two IME "reports" (Deposition Exhibits 2 and 3) which were not admitted into evidence. Therefore, whatever opinions are found in those reports are not available to this Arbitrator to consider. **This lack of availability directly and negatively affects the strength and credibility of Dr. Cohen's opinions.**

Dr. Cohen testified as follows:

"The only information I have about the job description are my own notes which suggests — and I will read my notes to you. Set up and adjust machines, use hand tools, assemble products, light

physical demand level up to 20 pounds of force, occasionally, up to 10 pounds of force frequently. That is all I have." Respondent's Exhibit #1, p. 22.

Dr. Cohen went on to explain that "[a]ll I have is my job description. So any additional questions, my answer would be no." *Respondent's Exhibit #1,* pp. 22-23.

The Arbitrator also notes and highlights that Dr. Cohen's deposition testimony (or lack thereof) indicates he was **not** provided Mueller's job analysis (or at the very least he did not discuss it in his deposition testimony) **nor** was Dr. Cohen shown the video produced by Mueller and Patsavas (again, he did not discuss this in his deposition testsimny). This is significant and further weakens Dr. Cohen's credibility and the foundation of his opinions and indicates his lack of knowledge of Petitioner's job duties.

The Arbitrator emphasizes the great significance the fact that Dr. Cohen failed to offer a causation opinion – the very crux of these two claims. Question: "What, if anything, did you feel as far as whether her physical condition was related to her occupational activities?" Answer: **"All of those opinions are outlined in my original letter."** *Respondent's Exhibit #1,* p.16. However, that "original letter" was not admitted into evidence; therefore, Dr. Cohen has no causation opinion in evidence. Dr. Cohen did, however, offer that "...her electrical evidence for carpal tunnel syndrome could be associated with her work activities if they fit those work criteria." *Respondent's Exhibit #1,* p.17.

Significantly, Dr. Cohen was unaware that Petitioner sustained a second injury on February 11, 2016 aftyer she had been released to return to work with restrictions. *Respondent's Exhibit #1,* p.20. That was an important historical fact regarding which Dr. Cohen was unaware.

In contrast to Dr. Cohen's degree of understanding of Petitioner's job duties, Dr. Rhode's understanding was more complete, and he testified as to Petitioner's job duties as follows:

"She the described her job duties working as a line lead where she was required to check weights for bottles, essentially working on a packing line in a repetitive fashion. She puts bottles on the line, and I don't know if it's a top on a bottle. It may be a typo there from the voice dictation. She

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described her job exposure as highly repetitive. She has been performing these duties for a total of 16 years." Petitioner's Exhibit #8, p. 13.

In addition, Dr. Rhode was provided with the following details:

"On January 12th of 2016, she was working as a lead operator in her 16th year of employment, and on that occasion actually for two days up to that point she was working shifts of ten hours each, and she was required to put a ladder up, because they were short handed, and she was required to take a box of lids — the boxes weighed in her estimation 15 pounds. She would climb this ladder up, stretch out her hands because she's five foot four, and then dump the lids in, and the purpose of that activity is to get production rolling at a regular pace, but primarily she was required — and these boxes would come by the skid, to climb down the ladder, go to the skid, lift the box, go up the stairs, and the quantity that could be loaded into this hopper or device was somewhere between six and eight boxes of these things, and according to what she will testify to is that she did that all day long for two days, and by the end of the second day her hand, her left hand and forearm were in pain...."Id. at 20-21.

Dr. Rhode opined that, "[i]f you have someone who is working at the extremes of wrist flexion and extension doing a highly repetitive position like that, that goes thrown into the causation factoring as well." *Id. at* p.44.

Dr. Rhode's opined that, "it was the one exposure dose of greater than a decade, and I think it's the highly repetitive nature [of the job]." *Id.* at p. 53.

Petitioner testified that on January 12, 2016, she dumped 30-40 boxes of lids. As Petitioner demonstrated at the hearing, this activity resulted in her left wrist flexing and extending under the 14 pound load of the box being dumped. In addition, Petitioner has had problems with the left wrist due to what was identified specifically as "repetitive job activity" in the accident reported in March of 2014, received into evidence at the time of the hearing. *Petitioner's Exhibit #13.* The evidence indicates that those same repetitive job duties which resulted in Petitioner's upper left extremity complaints in March of 2014 continued through Petitioner's date of injury on January 12, 2016.

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"Furthermore, it is well established that prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident." *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Additionally, the Arbitrator notes and highlights Petitioner was working full duty without restrictions prior to her complaints on January 12, 2016. *T, 1-30-18,* p.45. Petitioner testified credibly that on that date, she was performing repetitive work that required extension and flexion of her left wrist while under load. Subsequently, she complained of left upper extremity pain, and was seen by the company clinic.

Further, the Arbitrator notes and highlights with great significance that **Respondent's clinic charted that Petitioner's condition was work-related.** *Petitioner's Exhibit #1,* p.5. Dr. Labana, the orthopedic surgeon to whom the company clinic referred Petitioner, noted in his chart that **Petitioner's complaints arose while performing "repetitive grasping".** *Petitioner's Exhibit #3,* p. 5. **Further, Dr. Labana opined that Petitioner's upper extremity complaints were work related.** *Petitioner's Exhibit #3,* p.18. The Arbitrator finds and concludes that Dr. Labana's causation opinions are very credible and clearly support a holding in favor of Petitioner on the issue of causation.

Based on the above, and after a comprehensive review of the entire record, the Arbitrator finds and concludes Petitioner has proven a causal connection exists between her current condition of ill-being and the accidental injuries sustained on January 12, 2016.

Regarding the disputed 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?

Dr. Cohen, Respondent's Section 12 examining physician, testified that Petitioner's conservative medical treatment was reasonable. *Respondent's Exhibit #2,* p.15. **That opinion alone is sufficient to resolve the issue.** Cohen also opined that if Petitioner experienced tingling in the distribution of her median nerve, and this was a significant problem for her, he did not have a

problem with her being treated for carpal tunnel syndrome. *Id.* at pp.14-15. Dr. Rhode, Petitioner's treating surgeon also opined that the treatment he has rendered and/or recommended has been reasonable, necessary and causally related to Petitioner's occupational injuries. *Petitioner's Exhibit No. 8, pp.26-27, 30.* Further, those opinions also prove the issue. No Utilization Review pursuant to Section 8.7 was offered to challenge proposed or provided health care services (no retrospective, current or prospective review). Respondent has not paid for all reasonable medical services.

Therefore, the Arbitrator finds and concludes that the medical services that were provided to Petitioner were proven to be reasonable and necessary.

The Arbitrator awards the following medical bills to be paid directly to Petitioner pursuant to compliance with the Illinois Workers' Compensation Act fee schedule:

ATI Physical Therapy: $3,659.65

Dr. Blair Rhode: $9,739.80

Illinois Premier Orthopedic and Hand Center: $3,688.00

Infinite Strategic Innovations: $37.11

Ingalls Memorial Hospital: $10,874.00

Ingalls Occupational Medicine Clinic: $377.89

Neurology Consultants: $900.00

Pronger Smith Medical Associates: $471.00

RX Development Associates: $887.02

When paying this award, Respondent shall calculate the amount owed pursuant to the fee schedule and shall provide those calculations to Petitioner at the time that payment is made. Credits shall be applied as presented below.

Regarding the disputed issue (K), Is Petitioner entitled to any prospective medical care?

The Arbitrator finds that Petitioner is entitled to prospective medical care in the form of a left carpal tunnel release as recommended by Dr. Rhode, along with psychological treatment as recommended by Dr. Lai.

"Specific medical procedures or treatments that have been prescribed by a medical service provider have been 'incurred' within the meaning of the statute, even if they have not yet been paid for." *Plantation Mfg. Co. v. Industrial Commission*, 294 Ill.App.3d 70, 710 (1997).

Dr. Cohen testified that if Petitioner experienced tingling in the distribution of her median nerve, and this was a significant problem for her, he did not have a problem with her being treated for carpal tunnel syndrome. *Respondent's Exhibit #2,* pp.14-15. The Arbitrator notes and highlights Respondent did not offer any medical evidence to contradict the opinions of Dr. Lai that Petitioner requires some level of psychological treatment as a result of her work-related injuries.

Regarding the disputed issue (L), What temporary benefits are in dispute?

"Temporary total disability is awarded for the period from the date on which the employee is incapacitated by injury to the date that [her] condition stabilizes or [she] has recovered as far as the character of the injury will permit." *Whitney Productions, Inc. v. Industrial Commission*, 274 Ill. App. 3d 28, 30 (1995). "To be entitled to TTD benefits, the claimant must prove not only that [she] did not work but that [she] was unable to work." *City of Granite City v. Industrial Commission*, 279 Ill. App. 3d at 1090 (1996). Section 8(b), which governs TTD awards, provides that weekly compensation shall be paid "as long as the total temporary incapacity lasts." 820 ILCS 305/ 8(b).

As supported by the medical records and by Petitioner's testimony at the hearing, the Arbitrator finds and concludes that the following TTD is awarded:

Respondent shall pay Petitioner TTD benefits in the amount of $383.33 per week for a total period of 81-5/7 weeks, as follows:

5/11/16 through 5/17/16;

6/29/16 through 8/23/16;

9/16/16 through 1/30/18.

Regarding the disputed issue (N), Is Respondent due any credit?

Respondent shall receive a credit in the amount of $10,153.20 for medical bills it paid on behalf of Petitioner. Respondent shall also receive further credit for all additional amounts paid to or on behalf of Petitioner to avoid any issues of actual double-payment of compensation.

Regarding the disputed issue (O), Has Petitioner reached maximum medical improvement? If so, has Petitioner incurred permanency as a result of her injuries?

The Arbitrator finds and concludes that Petitioner has not yet reached maximum medical improvement for her left upper extremity condition, nor has Petitioner reached maximum medical improvement for her psychological injuries. Petitioner's conditions of ill-being have not yet stabilized. The Arbitrator finds that Petitioner is entitled to prospective medical care in the form of a left carpal tunnel release as recommended by Dr. Rhode.

"Among the factors to be considered in determining whether a claimant has reached maximum medical improvement 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." *Beuse v. Industrial Commission,* 299 Ill. App.3d 180, 183 (1998).

Robert M. Harris

Robert M. Harris, Arbitrator

May 14, 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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Jevitz,

Petitioner,

19IWCC0695

vs.

NO: 14 WC 31424

Family Dollar,

Respondent.

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 medical expenses and prospective medical care, temporary total disability, permanent partial disability, penalties and fees 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 May 24, 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.

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: DEC 18 2019
o111919
MEP/ypv
049

Maria Elena Portela
Maria Portela

Deborah L. Simpson
Deborah Simpson

DISSENT

I believe that Petitioner proved by a preponderance of the credible evidence that a causal relationship exists between the undisputed 5/23/14 work accident and his current condition of ill-being relative to his diagnosed CRPS/RSD, in addition to the distal fibula fracture and Lisfranc injury of his left foot, based on the opinions of Drs. Burgess, Overpeck and Patel over those of Respondent's hired gun, Dr. Toolan.

The record clearly shows that Petitioner sustained a serious and undisputed work accident on 5/23/14 when the metal part of a cart weighing approximately 1,000 pounds went across his left foot. He testified that he immediately sought medical treatment at Concentra on the date of the accident and was subsequently diagnosed with and treated for a non-displaced talofibular fracture and Lisfranc injury around the first metatarsal cuneiform joint. He eventually underwent surgery which included stress examination of the left midfoot and ankle under general anesthesia, left ankle extensive arthroscopic debridement, an open reduction with internal fixation of the left first, second and third metatarsal cuneiform joints and a primary arthrodesis of the first, second and third metatarsal cuneiform joints. However, Petitioner continued to complain of burning pain

and swelling in his foot as well as significant sensitivity to even light touch – hallmark symptoms of CRPS. Almost five months post-surgery he visited pain management physician Dr. Patel who confirmed that he met the criteria for CRPS/RSD, and this diagnosis and Petitioner's ongoing problems in this regard were later confirmed by Drs. Burgess and Overpeck. Dr. Toolan's opinion to the contrary flies in the face of these physicians' well-reasoned and fully substantiated opinions, not to mention reason, and as such should be accorded less, not more, weight.

Based upon the opinions of these three treating/consulting physicians, and the chain of events outlined above, I would have reversed the Arbitrator and found that Petitioner more than sustained his burden of proving that he suffers from CRPS/RSD and that a causal relationship exists between said condition and Petitioner's current condition of ill-being. Accordingly, I would have modified the award to include reasonable and necessary medical expenses associated with Petitioner's CRPS/RSD treatment as well as prospective medical treatment relative to same pursuant to §§8(a) and 8.2 of the Act. However, I would affirm the Arbitrator's denial of treatment for Petitioner's bilateral knee and lower back conditions, given the paucity of evidence in this regard, and would likewise find that Petitioner failed to prove that he is entitled to vocational rehabilitation and/or maintenance benefits based on a lack of medical support for same as well as his failure to show that he is currently unable to perform his prior work duties.

Thomas J. Tyrrell

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

JEVITZ, TIMOTHY
Employee/Petitioner

Case# **14WC031424**

19IWCC0695

FAMILY DOLLAR
Employer/Respondent

On 5/24/2018, 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 2.08% 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:

4595 WHITESIDE & GOLDBERG LTD
JASON M WHITESIDE
155 N MICHIGAN AVE SUITE 540
CHICAGO, IL 60601

0560 WIEDNER & McAULIFFE LTD
KAREN E COON
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0695

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

19IWCC0695

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

TIMOTHY JEVITZ
Employee/Petitioner

v.

FAMILY DOLLAR
Employer/Respondent

Case # **14** WC **31424**

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 **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **JUNE 5, 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. ☐ 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: **VOCATIONAL REHABILITATION & FORMER ATTORNEY'S FEES**

FINDINGS

On the date of accident, **MAY 23, 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 not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$65,000.00**; the average weekly wage was **$1,250.00**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** 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 **$69,167.22** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$69,167.22**.

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

ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law*:

1) The Petitioner's requests for vocational rehabilitation and maintenance benefits are denied;

2) The Respondent shall pay those medical services incurred through October 12, 2015, and the FCE bills from ATI. However, the Respondent shall not be responsible for the remaining medical services incurred by the Petitioner;

3) The Respondent shall pay those TTD benefits incurred from June 15, 2014, through January 16, 2016. The Respondent shall have a credit for those TTD benefits previously paid to the Petitioner;

4) The Petitioner's Petition for Penalties and Attorney's Fees is denied; and,

5) The referenced former attorney's fees petition, if any, is not ripe for resolution.

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

MAY 24, 2018
Date

ICArbDec19(b)

MAY 24 2018

TIMOTHY JEVITZ v. FAMILY DOLLAR

14 WC 31424

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried on the Petitioner's Section 19(b) Petition before Arbitrator Steffenson on June 5, 2017. (*Transcript* at 6). The issues in dispute were causal connection, medical bills, TTD and maintenance benefits, penalties and attorney's fees, vocational rehabilitation, and a petition for fees by a former attorney. (*Arbitrator's Exhibit* 1). The parties requested a written decision pursuant to Section 19(b) and agreed to receipt of this Arbitration Decision via e-mail. (*Arbitrator's Exhibit* (hereinafter, *AX)* 1).

FINDINGS OF FACT

The Petitioner testified that he has been employed as an operational manager for Family Dollar since December 2013. (*Transcript* (hereinafter, *T.*). at 18). On May 23, 2014, a device known as a "U-boat" containing totes full of merchandise began to tip and the metal part of the cart which the Petitioner estimated weighed approximately 1000 lbs. went across his left foot. The Petitioner fell backward and heard a pop. (*T.* at 21-22). The Petitioner testified he was seen at Concentra in Hammond, Indiana, on the day of the accident, although no records of this visit were introduced into evidence.

The Petitioner then was seen at Concentra in Darien, Illinois, on May 28, 2017. (*Petitioner's Exhibit* 2 at 1). He reported that heavy totes fell on his left ankle causing a contusion to the area and causing the ankle to twist. On examination, he had tenderness to the anterior talofibular ligament and lateral malleolus, with limited range of motion in all directions. Preliminary reviews of X-rays were negative for any abnormality. He was diagnosed with a sprain/strain of the ankle and prescribed physical therapy. He was also given work restrictions which included to remain sitting 80% of the time, and directed use crutches and an orthopedic shoe. Physical therapy began at Concentra that day.

An MRI, performed on June 12, 2014, showed extensive tenosynovitis of the peroneal tendons. There was radial lucency along the distal tip of the fibula without associated bone marrow edema. It was felt this could represent a subtle nondisplaced fracture or an accessory ossification center.

As the Petitioner failed to improve in physical therapy, he was seen by an orthopedist, Dr. Tu, on June 24, 2014. (*Petitioner's Exhibit* (hereinafter, *PX*) 2 at 25). Dr. Tu reviewed the MRI which he felt demonstrated a non-displaced talofibular fracture. On exam, he had tenderness over the distal fibula and anterior talofibular ligament with mild tenderness medially. There was no ligamentous laxity and normal distal sensation. The Petitioner was placed in a CAM walker boot and directed to limit weight bearing activities. When he was seen in follow up by Dr. Tu on July 22, 2014, he still had limited range of motion, but improved tenderness over the distal fibula.

When the Petitioner was seen by Dr. Tu at Concentra on August 26, 2014, it was noted that he had nearly completed his course of physical therapy for the left distal fibula fracture. He still had pain localize to the dorsum of his foot but his ankle pain had improved. The Petitioner was directed to progress into a home exercise program. He was released to return to full duty work activities on September 1, 2014. (*PX* 2 at 53).

The Petitioner was seen at Hinsdale Orthopaedics on September 24, 2014 by a podiatrist, Dr. Brian Burgess. (*PX* 3 at 1). X-rays taken suggested a Lisfranc injury around the first metatarsal cuniform joint. There was medial subluxation of the first TMT joint with significant widening around the first interspace. Dr. Burges felt he had a Lisfranc injury and recommended a CT scan. He was given a CAM boot and crutches and was directed to remain non-weight bearing and off work.

The CT scan performed on September 26, 2014 showed osteoarthritis at the first metatarsal head at its articulation with the sesamoid bones. There was no abnormal diastasis at the Lisfranc joint. All the tarsometatarsal joints were intact and otherwise unremarkable. Px. 3, pg. 5. In follow up on October 1, 2014, Dr. Burgess reviewed the Petitioner's CT scan which he noted was essentially negative, but the doctor had ongoing concerns that there was a Lisfranc type injury and prescribed an MRI. (*PX* 3 at 10).

The MRI of the left foot on November 11, 2014 indicated periligamentous edema adjacent to the plantar aspect of the listfranc ligament. The dorsal and interosseous components of the ligament were intact and that there were no diastases. The findings were consistent with at least a high-grade sprain or partial tear of the plantar Lisfranc ligament. (*PX* 3 at 11).

Following the MRI of the left foot, the Petitioner returned to Dr. Burgess on November 17, 2014. While the Petitioner described his pain as being three out of ten, he reported that he could barely walk. As the Petitioner had failed to respond to six months of conservative treatment, the doctor recommended a surgery to include a stress exam of the left mid-foot under anesthesia and a possible ORIF versus primary arthrodesis of the left mid-foot. (*PX* 3).

A Section 12 examination was performed by Dr. Brian Toolan on December 15, 2014. (*Respondent's Exhibit* 1). Dr. Toolan agreed with surgery to include a realignment and fusion of his first, second and third tarsometatarsal joints to treat the chronic subluxation and post-traumatic arthritis. It was felt the Petitioner may also need to have reconstruction of his syndesmosis with reduction osteotomy and stabilization of the syndesmosis with internal fixation. Dr. Toolan agreed that the Petitioner's condition and need for surgery was causally related to the work accident. Dr. Burgess reviewed the Section 12 report on January 20, 2015 and agreed to proceed with surgery.

The Petitioner underwent surgery February 3, 2015. This included a stress examination of the left midfoot and ankle under general anesthesia, left ankle extensive arthroscopic debridement, an open reduction with internal fixation of the left first, second and third metatarsal cuneiform joints and a primary arthrodesis of the first, second and third metatarsal cuneiform joints. The postoperative diagnosis was a left tibiofibular syndesmontic ligament sprain, left ankle pain and chronic left lisfranc dislocation with degenerative arthritis. (*PX* 3 at 21).

The Petitioner followed up with Dr. Burgess on February 16, 2015 and reported being happy with his progress. X-rays of the left foot and ankle showed changes consistent with arthrodesis of the first second and third tarsometatarsal joints, good positioning of the hardware with no loss of correction or fixation. The Petitioner was to remain non-weight bearing.

On March 16, 2015, the Petitioner complained of burning pain up to the top of his foot and swelling. His x-rays showed increased consolidation at the operated joints and no loss of correction or fixation. He was diagnosed with neuritis of the left foot and ankle and prescribed gabapentin. At a follow up on March 30, 2015, the Petitioner complained of shortness of breath and described increased swelling in his toes. The neuritic symptoms appeared to be improving due to the Gabapentin. The Petitioner was directed to reduce his Gabapentin dosage to half.

The Petitioner followed up on April 20, 2015 reporting significant improvements. He had x-rays which demonstrated complete consolidation around the arthrodesis sites of the first, second and third metatarsocuneioform joint with no loss of correction or fixation, no hardware failure and good position of the mid foot. Dr. Burgess planned physical therapy and directed the Petitioner to remain off work for two months.

On April 20, 2015, the Petitioner reported significant improvement in his symptoms. He was now standing and walking around the house with his CAM boot on. He had pain in his shin and forefoot, but overall had less swelling and pain. X-rays continued to demonstrate healing. The doctor felt the Petitioner was doing well and his neuritic symptoms were improving.

The Athletico records reflect that the Petitioner underwent physical therapy from April 28, 2015 through October 14, 2015. (*PX* 4). The intake form indicates pre-existing arthritis, including rheumatoid, osteo and sedimentary arthritis. (*PX* 4 at 4).

The Petitioner followed up on May 18, 2015 complaining of shooting pain. At this time, x-rays demonstrated complete consolidation around the arthrodesis sites of the first, second and third metatarsocuneioform joint with no loss of correction or fixation, no hardware failure and good position of the mid foot. The Petitioner was told to continue physical therapy and pain medication.

By June 17, 2015, the Petitioner reported he was walking in regular gym shoes and making progress in therapy. He continued to have some neuritic symptoms around the foot and ankle. Additional physical therapy was ordered and he was directed to increase his activity level as tolerated. He was referred to Dr. Patel for his pain and neuritic symptoms.

The Petitioner saw Dr. Patel on June 30, 2015 for evaluation of chronic regional pain syndrome. The Petitioner was noted to have continuing pain which was disproportionate to any inciting event as any pain from the surgery should have resolved. It was noted that the Petitioner had a prior right ankle surgery ligament repair in 2007 as well as a micro-laminectomy at L4-L5 in 1988. His past medical history included osteoarthritis and rheumatoid arthritis. The doctor felt the Petitioner's symptoms met the criteria for chronic regional pain syndrome/RSD. The doctor refilled his Gabapentin and provided a topical pain medication. The primary diagnosis was listed as osteoarthritis of the ankle and foot, ankle pain and tingling sensation.

The Petitioner returned on July 14, 2015 to Dr. Patel reporting some itching with the Gabapentin so he had stopped that medication. He was diagnosed with ankle pain, osteoarthritis of the ankle and foot and a tingling sensation for which he was prescribed Cymbalta.

The Petitioner was seen again by Dr. Burgess on July 15, 2015, over five months after his surgery date. The Petitioner was noted to be full weight bearing. Physical therapy and custom orthotics were ordered. The Petitioner then was seen again by Dr. Patel on July 31, 2015. (*PX* 5 at 9). He reported the Cymbalta had not provided much relief and resulted in slight sedation.

His medication was therefore changed to Topamax. The diagnosis continued to be listed as Ankle pain, Osteoarthritis of ankle and foot and Tingling sensation. (*PX* 5 at 11).

An MRI of the lumber spine was performed August 12, 2015, which showed multilevel degenerative changes at L3-L4, L4-L5 and L5-S1. The Petitioner also was evaluated by Dr. Burgess on August 12, 2015. Examination showed no erythema, drainage or signs of infection although the Petitioner described some persistent neuritic symptoms around the forefoot. He also had sensitivity to light touch. Dr. Burgess noted that from his standpoint the mid-foot and arthrodesis sites were doing well. The Petitioner's remaining problem was chronic pain for which he was seeing Dr. Patel. It was noted that the Petitioner had some right knee pain for which he was referred to Dr. Puppala.

The Petitioner was seen in follow up on August 14, 2015. The doctor recommended they begin interventional treatment including a left lumbar sympathetic block. The doctor suggested a series of three if the first injection helps. If there was no improvement, he would hold off after the first injection.

On August 21, 2015 Dr. Patel performed a lumbar sympathetic block. The Petitioner reported a post-procedure 25% decrease in pain. On September 2, 2015, it was noted that his symptoms were unchanged following that procedure. An EMG was ordered to determine if there were specific nerve pathologies that would explain his symptoms.

The EMG performed on September 8, 2015 showed electrodiagnostic evidence of neuropathic change in the extensor digitorum brevis left muscle. It was felt that the changes were due to deep peroneal nerve injury in the distal third of the left foot related to the trauma itself or to the surgery. The doctor discussed the EMG with the Petitioner at a visit on September 28, 2015. He recommended the Petitioner return to Dr. Burgess for insight. He suggested a diagnostic deep peroneal nerve block to see if that would relieve his symptoms. Aside from that, Dr. Patel felt that he would have to live with medication management versus a spinal cord stimulator trial. The doctor continued his topical medications and Norco.

The Petitioner saw Dr. Puppala on September 15, 2015 for bilateral knee pain, right greater than left. X-rays suggested mild medial compartment narrowing and moderate patellofemoral compartment narrowing of the left knee and similar findings in the right knee. Dr. Puppala performed injections of cortisone into each knee.

The Petitioner then attended a Section 12 examination with Dr. Brian Toolan on October 12, 2015. (*Respondent's Exhibit* (hereinafter, *RX*). 2). After evaluating the Petitioner and reviewing medical records since his last Section 12 examination, Dr. Toolan felt the Petitioner had subjective complaints of pain, hypersensitivity and dysesthesias in his left foot which he felt were limiting his daily activities. Dr. Toolan did not find any signs of reflex sympathetic

dystrophy or chronic regional pain syndrome. There were no skin temperature changes, rubor or pallor or significant swelling. The mild discoloration and swelling were felt to be post-surgical change from the arthrodesis. There was no osteopenia of the bones appreciated on the x-rays. Dr. Toolan felt the Petitioner was at maximum medical improvement (MMI) for the work injury. He recommended he transition back to work doing full duty work starting with half-days for two weeks, followed by alternating three half days and two full days, for the next two weeks and then to full day, full duty work without restrictions.

On October 14, 2015, the Petitioner was discharged from physical therapy as his functional progress had plateaued and he continued to have moderate to severe CRPS nerve pain. (*PX* 4). The left ankle mobility and gait had been restored, but the nerve pain remained severely limiting with prolonged weight bearing activities of daily living and pressure on the skin of his left lower extremity. He was now independent with a home exercise program that was safe to continue mobility and strength exercises on his own at the local gym.

The Petitioner returned to Dr. Patel on October 19, 2015. (*PX* 5). Dr. Patel again suggested a spinal cord stimulator or lumbar sympathetic block. He also requested an opportunity to review the Section 12 report, which he did on November 2, 2015. It was noted the Petitioner did not meet the criteria for CRPS at the time of the Section 12 examination. Dr. Patel felt that although the Petitioner was not a severe case, that he met the medical criteria for diagnosis of chronic regional pain syndrome based on Budapest criteria. Unless there was another diagnosis from a surgical standpoint or a neurological standpoint, the doctor felt his only option was to consider a spinal cord stimulator trial. He also suggested referring him to neurology for neuropathic pain.

On January 8, 2016, the Petitioner was sent a letter from the Respondent, offering to allow the Petitioner to return to work in a gradual fashion in accordance with the recommendations of Dr. Toolan. (*RX* 4). As the Petitioner was off work for almost two years, his prior position was not available but an alternate store manager position was offered. The Petitioner did not respond to this offer.

When the Petitioner returned to Dr. Patel on January 19, 2016, it was noted that he was going to go to Rush Neurology on February 2. The Petitioner returned to obtain an opinion on functionality and as to what he could perform at work. Dr. Patel told him it would depend on Dr. Burgess' recommendations, however, as details on the exact number of hours and pounds was required by his job, the doctor recommended sending him for a functional capacity evaluation. The Petitioner was seen again on February 16, 2016 by Dr. Patel. He was to return in four weeks and was provided a referral for a neuro-psych evaluation.

The Petitioner was seen by Dr. Burgess on March 8, 2016. The Petitioner reported the ankle was doing great, but complained of painful toes on the left foot. Dr. Burgess found he had neuritic symptoms around the forefoot. He agreed he should see the neuropsychologist and undergo a functional capacity evaluation (FCE). He recommended the patient remain in a gym shoe and recommended the Petitioner use the foot and de-sensitize.

The Petitioner was seen again by Dr. Burgess on May 9, 2016. (*PX* 3). The Petitioner reported that the pain had changed. It was now constant and he could not stand on his foot for long. He reported the injections from Dr. Patel provided no relief. In addition, Norco and topical creams did not provide relief. He reported that he had seen his rheumatologist who ordered an MRI of the back. On examination, the Petitioner had no pain over the hardware, intact motor function and neurovascular status was intact. While the patient had persistent neuritic symptoms, Dr. Burgess had nothing further to offer him. He opined the Petitioner's foot to be at MMI. He recommended sedentary work and suggested the Petitioner go for an FCE.

The FCE was performed initially on June 1, 2016. (*PX* 6 at 2). At that time, the Petitioner reporting his job entailed frequent standing/walking with occasional lifting of less than 20 lbs. The DOT level for regional operations manager was noted to be light. The evaluation was only conditionally valid and as such they could not comment on his capabilities. As there were validity issues, a second FCE was performed June 23, 2016. (*PX* 6 at 16). At this evaluation, the Petitioner reported having to lift to 50 pounds at work, but the DOT level for his job was still listed as Light. The Petitioner demonstrated the ability to perform in the light to medium job level and that the Petitioner's capabilities met the DOT level for his pre- injury job (*PX* 6 at 16).

Dr. Burgess saw the Petitioner a final time on July 25, 2016 following the FCE. The doctor agreed he should return to work within the restrictions per the FCE. It was noted he was doing well with acupuncture.

The subpoenaed medical records from Elite Rehabilitation Institute / Pirie Chiropractic Center, document that the Petitioner was referred there by Dr. Burgess for acupuncture once or twice a week for eight weeks as of June 22, 2016 to address the chronic left foot pain. The Petitioner underwent what appears to be chiropractic or physical therapy services and treatment through October 17, 2016.

When the Petitioner returned on September 8, 2016 to Dr. Patel he had undergone a functional capacity evaluation and it was ordered that he continue with medications prescribed by his rheumatologist. The doctor again gave him options to live with the limitations provided by the FCE or consider a spinal cord stimulator trial. The doctor reviewed neurology's note

which stated that CRPS remained a possibility. Treatment options included a sympathetic nerve block or stimulator trial, but it was noted that the prior block had been unsuccessful.

The Petitioner saw Dr. Overpeck on October 3, 2016 for an evaluation. (*PX* 8). Dr. Overpeck diagnosed CRPS with a possible peripheral component and indicated there was likely at least a tractional component on the nerve and that this may have been the inciting event for the pain cascade. (*PX* 8 at 3). The doctor suggested a possible peripheral nerve block. It was noted his pain management doctor wanted to perform a trial spinal cord stimulator instead. The patient was to consider his options and return if he wanted to do the peripheral blocks.

The Petitioner was seen again by Dr. Patel on October 6, 2016 following the evaluation by Dr. Overpeck. Dr. Overpeck had recommended acupuncture as well as an injection on the inside of the left foot of the upper lateral portion of the lower leg. The doctor could not guarantee any significant long-term relief from these procedures. The Petitioner was to return on an as needed basis. He had one final evaluation on December 16, 2016 with Dr. Patel. The Petitioner returned for increasing symptoms and a refill of his medications. The doctor refilled his topical medication.

A final Section 12 addendum was issued by. Dr. Toolan at the University of Chicago on May 6, 2017 addressing the functional capacity evaluations, records of Dr. Burgess, Dr. Patel and the chiropractor at Pirie Chiropractic. (*RX* 3). Dr. Toolan continued to believe the Petitioner would work full duty, full time without restrictions.

The Petitioner was evaluated by Edward Pagella, a vocational expert, at the request of his attorney on October 20, 2016. Mr. Pagella has opined that the Petitioner can return to work but requires vocational assistance. Mr. Pagella has not provided any indication of anticipated wages upon his return to work either in his reports or in his deposition and no labor market survey has been undertaken.

Mr. Pagella met with the Petitioner on February 16, 2017, April 20, 2017 and May 19, 2017 for vocational placement. As of the first vocational report, it was noted that the Petitioner had already obtained three interviews: Wal-Mart on January 16, NovaSpect, Inc. on February 2, and National Tire & Battery on February 6. (*PX* 9 at 7a). It was noted that the Petitioner continued to look for positions in management, operations manager, sales manager, and district manager positions. Mr. Pagella testified consistent with his reports that the Petitioner can return to work but requires vocational assistance. (*PX* 12).

In his report of April 20, 2017, it was reported that the Petitioner had obtained a job with Menards in Crest Hill and was awaiting his official start date and pay range. (*PX* 9 at 20). The next report, however, indicates that he had not heard from Menards and as such, the

Petitioner now felt that he did not get the job. (*PX* 9 at 28). The Petitioner had also had interviews with Mariano's and another interview for a distribution manager though Millennium Executive Search Group. The Petitioner introduced job search documentation to support his job searching activities. (*PX* 12).

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below.

Issue F: *Causal connection*

The parties stipulated the Petitioner sustained accidental injuries to his left foot on May 23, 2014, that arose out of and in the course of his employment. (*AX* 1). The Petitioner initially was diagnosed with a distal fibula fracture and then a Lisfranc injury. His treating physician, Dr. Burgess, and the Section 12 physician, Dr. Toolan, agreed the Petitioner's condition required surgery to include a realignment and fusion of his first, second and third tarsometatarsal joints to treat the chronic subluxation and post-traumatic arthritis.

At issue is whether the Petitioner's RSD/chronic regional pain syndrome is present as there is a dispute among the medical experts. The Arbitrator first observes Dr. Toolan is the only orthopedic opinion contained in the record. In contrast, Dr. Burgess, the Petitioner's primary physician, is a podiatrist, and Dr. Patel's medical practice is in pain management. While Dr. Toolan opined the Petitioner did not have RSD/CRPS, Dr. Patel reported that, although not a severe case, the Petitioner met the medical criteria for the diagnosis under the Budapest Criteria. (*PX* 5 at 16). His opinion then observes the Petitioner must have at least one symptom in each of the four categories, including: Sensory, Vasomotor, Sudomotor/Edema, and Motor/Trophic. Although Dr. Patel states the Petitioner meets these criteria, the actual medical documents contained in the record frequently fail to find these symptoms consistently present on examination. The Arbitrator also finds it important that the lumbar sympathetic block provided to the Petitioner was unsuccessful. Although there is no determinative test for CRPS, a lumbar sympathetic block can be diagnostic. The Arbitrator weighs the opinions of Dr. Toolan in conjunction with the findings in the medical records and finds them to be persuasive on this issue.

The Arbitrator also finds insufficient evidence in the record that any condition of ill-being with respect to the Petitioner's knees is causally related to his work accident. While there

is a suggestion the Petitioner developed right knee problems due to an altered gait from his work injury, the Petitioner was evaluated by Dr. Puppala on September 15, 2015, complaining of bilateral knee pain. The doctor also performed bilateral injections, and x-rays showed osteoarthritic changes. His diagnosis was bilateral knee osteoarthritis. (*PX* 3 at 51). This was the only visit for his knees and there is no opinion causally connecting the bilateral osteoarthritis to the work accident.

Based upon the foregoing, the Arbitrator finds the Petitioner's current condition of ill-being only regarding his distal fibula fracture and Lisfranc injury is causally connected to his May 23, 2014, injury. However, the Arbitrator does not find causal connection for the Petitioner's RSD/CRPS diagnosis, his bilateral knee diagnosis, and other current symptoms.

Issue J: *Medical bills*

The Petitioner claimed outstanding related medical bills as follows:

Pain and Spine Institute - $1,8650.00;

ATI physical Therapy - $4,378.86;

Elite Rehabilitation - $9,000.00.

The records reveal the Petitioner was referred to Elite Rehabilitation for *acupuncture* by Dr. Burgess. However, the Elite Rehabilitation's records indicate it instead took it upon itself to perform physical and chiropractic therapies for the Petitioner. The Arbitrator finds these unreasonable and unnecessary as they were not prescribed by Petitioner's treating physician. Furthermore, the Arbitrator finds the listed bills were for treatment after the Petitioner reached MMI.

However, the Arbitrator awards only the ATI bills, which were for his functional capacity evaluations (FCE). While these examinations occurred after he achieved MMI, the Arbitrator finds them to be reasonable to determine the Petitioner's then-present functional capabilities. These ATI bills should be paid directly to the facility, according to Section 8(a) and the fee schedule under Section 8.2.

Issue L: *Temporary benefits*

The parties stipulated the Petitioner was entitled to TTD benefits from June 15, 2014, to January 16, 2016, and those benefits were paid prior to trial. (*AX* 1). The TTD period in dispute

runs from January 17, 2016 to July 5, 2016. The Arbitrator finds the Petitioner reached MMI as of the October 12, 2015, Section 12 examination by Dr. Toolan. Dr. Toolan, however, also opined the Petitioner should transition back to work, gradually over a four-week period. The Arbitrator finds the Respondent's obligation to pay TTD ceased once it tendered a return to work offer in January of 2016, and the Petitioner rejected the offer. An FCE performed several months later confirmed the Petitioner could return to work at full-duty in his prior capacity.

Accordingly, the Arbitrator finds the Petitioner to be temporarily totally disabled from June 15, 2014 to January 16, 2016.

Issue M: *Penalties and attorney's fees*

The Respondent's dispute as to any owed benefits was based upon its qualified and credible Section 12 examination. As such, the Petitioner's penalties and attorney's fees petition is denied.

Issue O: *Vocational Rehabilitation*

The Arbitrator finds the Petitioner has not successfully established that he has permanent restrictions related to his work accident, or that these restrictions preclude him from performing his prior occupation as an operations manager with the Respondent. The Petitioner testified his job duties included: "You are in charge of buildings/facilities in a district; and you support the management team of each building, and you try to drive profits through loss, through shrink, through sales, and help them with their inventory." (*T.* at 19). He reported he was responsible for approximately ten store locations and the Respondent offered his job description into evidence. (*T.* at 19 and *RX* 5). The Petitioner confirmed the job description fairly and accurately described his job duties with the Respondent. (*T.* at 49-50). A review of the Petitioner's testimony and the documentary evidence contained within the record fails to locate credible information that the Petitioner is unable to work in his prior capacity for the Respondent. In fact, the Petitioner's own job search logs and vocational reports indicate he is pursuing employment in positions that are similar, if not identical, to his prior position as an operations manager for the Respondent. It is clear both the Petitioner and his vocational counsellor are looking at job opportunities that re in line with the Petitioner's prior employment with the Respondent. These job search records also reveal the Petitioner, who is seeking a similar job to his prior position, can return to work in his prior capacity for the Respondent.

The Petitioner offered no testimony or evidence to support his position that his prior occupation requires that he lift loads in excess of the lifting restrictions imposed by the FCE, or that his prior position as an operations or performance manager required him to perform any activities that would fall outside of his demonstrated activity tolerances from the FCE. His job description does not include any specific activities that would require lifting or physical exertion outside of the FCE parameters. (*RX* 5). The Petitioner also did not testify as to any of his lifting or physical requirements, and offered no testimony that he could not return to work in his prior position either with the Respondent or another employer.

Instead, the FCE found the Petitioner could return to his pre-injury job with the Respondent. The Occupational Physical Demand level for the Petitioner's position is "Light" and the Petitioner was found to have the ability to work in the "Light to Medium" level. The June 23, 2016, FCA Summary Report states: "The client's capabilities meet the DOT level, however, falls below the client's self-stated level." (*PX* 6 at 16). Despite the reference to the client's self-stated level of having to lift 50 pounds, there remains in the record no evidence or testimony to support the position the Petitioner's job with the Respondent included any physical requirements that fell outside of his demonstrated capabilities on the FCE. The references to hearsay statements mentioned in the FCE report are insufficient to establish some alternate level of job requirements, particularly where the Petitioner had the opportunity to testify at trial. In addition, during the initial FCE evaluation on June 1, 2016, the Petitioner indicated he needed to lift only 20 pounds occasionally. (*RX* 6 at 2).

The Arbitrator further notes even if it were shown the Petitioner did have permanent restrictions, he failed to establish that these restrictions are due to his May 23, 2014, work injury. The Petitioner testified he was on disability from 2009 until he was hired by the Respondent in December of 2013. He also testified he had never undergone an FCE before. The FCE itself did not demonstrate any specific deficits related to the Petitioner's left ankle. As such, it is unclear whether any limitations on the FCE are due to the instant work accident. Although the Petitioner was released to work within the parameters of the FCE, it is not clear that the need for these restrictions is related to the work accident.

The Petitioner's claim for maintenance and vocational rehabilitation also fails as he has not shown that there is any potential impairment in earning capacity as a result of the work accident, nor has he demonstrated that rehabilitation will increase his earning capacity. Neither the Petitioner nor Mr. Pagella, his vocational expert, provided evidence that there is any potential associated decrease in earnings associated with the alleged restrictions. As noted above, the combination of the Petitioner's restrictions, his testimony concerning his job duties with the Respondent, and his written job description demonstrate he could return to work in his prior capacity. Furthermore, his testimony and job search logs reveal he has sought

employment in positions that are similar to his prior employment position with the Respondent. Mr. Pagella offered no testimony as to any reduced earning capacity or as to what he expected the Petitioner would be able to earn. Lastly, the Petitioner also did not testify to any earnings impairment or to any wage range related to the positions to which he has applied.

Employers must compensate injured employees for training that is necessary for their vocational rehabilitation. *National Tea Co. v. Industrial Com'n*, 97 Ill.2d 424 (Ill. 1983). Generally, to show that training is "necessary," the employee must demonstrate that there has been a reduction in their earning capacity and that vocational rehabilitation will increase their earning capacity. *Madonna v. Industrial Com'n*, 171 Ill. App.3d 301, 304 (Ill. App. Ct. 1988).

Illinois courts have enumerated many factors to be used in evaluating whether vocational rehabilitation is appropriate. For example, in *National Tea Co.*, the Illinois Supreme Court explained the following will be considered in connection with a request for vocational rehabilitation:

> "Related factors concern a claimant's potential loss of job security due to a compensable injury, and the likelihood that he will be able to obtain employment upon completion of his training. In contrast, rehabilitation awards have been deemed inappropriate where the claimant unsuccessfully underwent similar treatment in the past; where he received training under a prior rehabilitation program which would enable him to resume employment; where he is not 'trainable' due to age, education, training and occupation; and where claimant has sufficient skills to obtain employment without further training or education." *National Tea Co*, 97 Ill. 2d at 432-433.

In this matter, no testimony was introduced as to any impairment of earnings because of any work restrictions. Even if the Petitioner was, for some reason, unable to return to work in his prior capacity as an operations manager for the Respondent, no evidence was introduced to support that he also has an impairment of earnings. The case law explains that, in order to be entitled to retraining, the employee must demonstrate that there has been a reduction in earning capacity and that vocational rehabilitation will increase their earning capacity. (See also: *Madonna v. Indus. Comm'n.*, 171 Ill.App.3d 301 (1988)).

In *Borak v. Assoc. Glaciers*, 09 WC 36999, the petitioner worked as a glazier, a position that involved installing metalwork and glass, as well as bending, squatting, and lifting up to 65 pounds. He suffered an ACL tear during a work accident and underwent multiple surgeries. The petitioner did not attempt to return to work as the respondent had closed its doors and he was

still in pain. An FCE was performed that revealed he could not lift the 65 pounds required for his previous job, but that he was employable with work restrictions. The petitioner testified he had conducted a job search since reaching MMI, and he had worked some odd jobs, but still was looking for a permanent job. The Commission held the petitioner had failed to prove entitlement to vocational rehabilitation and, therefore, also failed to prove an entitlement to maintenance benefits. The Commission noted the petitioner had the burden of proof which he failed to meet due to his failure to present evidence that vocational assistance would increase his earning capacity or that vocational assistance was required to secure work.

In the case at hand, the Petitioner did not demonstrate he could not return to work for the Respondent nor did he successfully establish that he tried to return to work. The Respondent offered to let Petitioner transition back into his prior position, but he did not sign and return the job offer letter. He testified and introduced emails purportedly showing that he had emailed a "Chaunel Johnson" about his position, but Ms. Johnson was no longer employed by the Respondent at that time, and he took no other steps to contact anyone else with the Respondent about his position. The Arbitrator does not find it credible that the Petitioner could communicate with the Respondent, as his position as a manager over approximately ten stores certainly would afford him with numerous contacts and store locations. Instead, these facts serve to demonstrate the Petitioner was not interested in returning to his prior employment with the Respondent.

Based on the foregoing, the Arbitrator finds the Petitioner has failed to establish an entitlement to maintenance and vocational services, and same are denied.

Issue O: *Former Attorney's Fees*

The parties reported a petition for attorney's fees by a former attorney was pending at the time of this June 5, 2017, hearing. (*AX* 1). However, no such petition or testimony in support of such a petition was offered into evidence, no filed petition for attorney's fees was found in the IWCC file for 14 WC 31424, and no reference to such a petition could be located in the IWCC electronic file for 14 WC 31424. Furthermore, this hearing only proceeded on the Petitioner's Section 19(b) Petition, and the Petitioner's current attorney understood the attorney's fees petition in question was continued to the disposition of this claim. (*T.* at 6-8). As this case has yet to reach disposition, and no evidence of any such petition is found in the record, the issue of a petition for attorney's fees by a former attorney for the Petitioner is not ripe for resolution at this time and will not be addressed in this Arbitration Decision.

Finally, 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, or attorney's fees, if any.

Signature of Arbitrator

MAY 24, 2018
Date

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Adam Barker,

Petitioner,

19IWCC0696

vs.

NO: 11 WC 32259

Wal-Mart,

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 accident, causation, medical expenses, notice, temporary total disability, permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 13, 2017 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 $3,500.00. 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: DEC 18 2019
O111919
MEP/ypv
49

Maria Portela

Thomas J. Tyrrell

DISSENT

I respectfully dissent from the decision of the majority, which affirmed and adopted the Decision of the Arbitrator. The Arbitrator/Commission found that Petitioner proved the current condition of ill-being of his left hand/wrist was caused by work-related repetitive trauma. I would have reversed the Decision of the Arbitrator, found that Petitioner did not sustain his burden of proving that the current condition of ill-being of his left hand/wrist was causally related to work-related activities, and denied compensation.

Petitioner had a prior workers' compensation claim, 07 WC 29614, after a forklift accident in 2006 which resulted in the amputation of a finger on his left hand. At a hearing pursuant to Sections 8(a)/19(h) in that previous claim, Petitioner attempted to get increased compensation for the conditions of ill-being litigated in this claim, ulnocarpal abutment syndrome, TFCC tear, and alleged complex regional pain syndrome ("CRPS")/sympathetic mediated pain syndrome, claiming they were caused by that accident. There, Petitioner's claim for prospective medical treatment and increased permanent partial disability were denied. Thereafter, Petitioner filed the instant claim in which he alleged the condition of ill-being of his left hand/wrist was caused by repetitive trauma rather than the 2006 forklift accident.

On November 9, 2011, Dr. Brown performed left-wrist arthroscopic surgery on Petitioner with wafer procedure for ulnar abutment syndrome. Dr. Brown did not offer a causation opinion in his treatment notes. However, in a response to a query from Petitioner's lawyer, Dr. Brown noted that "because ulnar abutment syndrome is mostly related to a congenital discrepancy in the length of the 2 forearm bone, I cannot say that his work caused this problem, especially without a given history of a direct injury to that area." Petitioner did not depose Dr. Brown.

Petitioner began treating with Dr. Oakley. On July 16, 2012, Dr. Oakley noted in his treatment records, that Petitioner "had a forklift injury to his left hand resulting in amputation in 2007. He reports being pinned behind the forklift. Very likely given his lack of preoperative symptomology that he did have the TFCC tear and potentially even traumatic ulnar carpal abutment from this. *** I do believe this is causally connected to that injury." Later, both Dr. Oakley and Dr. Nauor, a pain management specialist practicing in Dr. Oakley's group, opined that Petitioner's repetitive activities as an overnight stocker aggravated his pre-existing conditions of ulnar abutment syndrome and TFCC tear. However, Dr. Oakley also testified that ordinary activities of daily living could aggravate those conditions as well. Both doctors also expressed limited knowledge about exactly what Petitioner's job activities entailed.

Respondent had Dr. Beyer perform a records review, including a detailed description of Petitioner's job activities. He agreed with Dr. Oakley that Petitioner had ulnar abutment syndrome, but characterized it as "anatomical" in nature. He knew of no medical literature that linked job activities to development of the condition. He opined that Petitioner's conditions of ill-being were not causally related to his work activities. Respondent also sent Petitioner to a Section 12 examination with Dr. Dunteman. He found that Petitioner was exaggerating his symptoms and opined that Petitioner actually did not have CRPS. He noted that in 2011, Dr. Brown ordered a triple phase bone scan to ensure there was no evidence of CRPS, and the test was negative.

The Arbitrator relied on the opinions of Dr. Oakley and Dr. Nauor. In my opinion the opinion testimony of Dr. Dunteman and Dr. Beyer are more persuasive than those of Dr. Oakley and Dr. Nauor. Drs. Dunteman and Beyer had a better understanding of Petitioner's exact job activities, Dr. Oakley appeared to change his opinion based on the current theory of causation Petitioner presented at the time, and the opinions of Drs. Dunteman and Beyer appear to closely mirror those of Dr. Brown, Petitioner's surgeon.

For the reasons stated above, I would have reversed the Decision of the Arbitrator, found that Petitioner did not sustain his burden of proving that the current condition of ill-being of his left hand/wrist was causally related to work-related activities, and denied compensation. Therefore, I respectfully dissent from the decision of the majority.

DLS/dw
O-10/17/19

Deborah L. Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

BARKER, ADAM
Employee/Petitioner

Case# **11WC032259**

19IWCC0696

WALMART & ASSOCIATES INC
Employer/Respondent

On 11/13/2017, 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 1.30% 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:

0333 SHAY & ASSOCIATES
STEPHANIE SHAY-WILLIAMS
1030 S DURKIN DR
SPRINGFIELD, IL 62704

0560 WIEDNER & McAULIFFE LTD
MATTHEW J ROKUSEK
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

19IWCC0696

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

☐ 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 Barker
Employee/Petitioner

v.

Walmart Associates, Inc.
Employer/Respondent

Case # **11** WC **32259**

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 **Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield**, on **October 20, 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 **Motion to Dismiss- Res Judicata**

FINDINGS

On **August 22, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**25,357.47**; the average weekly wage was $**487.64**.

On the date of accident, Petitioner was **28** 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 $11,329.59 under Section 8(j) of the Act.

ORDER

The Respondent shall pay the medical bills, as set forth in Petitioner's Exhibit 12, directly to the medical providers pursuant to the Medical Fee Schedule set forth in Section 8(a) of the Act, hold him harmless for any subrogation claims asserted by his health insurer, Blue Cross Blue Shield, and reimburse Petitioner $1,940.28 for his out- of- pocket expenses paid.

The Respondent shall pay $325.09 per week for a period of November 9, 2011 through January 30, 2012, totaling 11 6/7 weeks, representing the temporary total disability owed to Petitioner, as provided in Section 8(b) of the Act.

The Petitioner sustained a permanent partial disability to the extent of 25 % loss of the left hand pursuant to §8(e) of the Act. After subtracting its credit of 10 % of the left hand pursuant to the award in 07 WC 29614, Respondent shall pay Petitioner permanent partial disability benefits of $292.58/ week for 30.75 weeks as provided in Section 8(e) of the Act.

The Arbitrator denies the Defendant's Motion to Dismiss.

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.

D. Glenn McCarty

Signature of Arbitrator

11/6/2017
Date

19IWCC0696

ADDENDUM

As a preliminary matter, Respondent exhibits 1 and 2 are admitted into evidence. Petitioner objected at arbitration based upon relevancy. The Arbitrator has now read the exhibits and considers them relevant to the issues in the case.

The contested issues in this case are whether the claim is barred based upon the doctrine of Res Judicata, accident/causation, date of accident/notice and nature and extent.

CONCLUSIONS OF LAW AND FACT

With regard to issue (O), Res Judicata, the Arbitrator finds:

Under the doctrine of *res judicata,* "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." *J & R Carrozza Plumbing Co. v. Industrial Comm'n,* 307 Ill.App.3d 220, 223, 240 Ill.Dec. 345, 717 N.E.2d 438 (1999). To establish *res judicata,* a party must show: (1) that the former adjudication resulted in a final judgment on the merits; (2) that the former and current adjudications were between the same parties; (3) that the former adjudication involved the same cause of action and same subject matter of the later case; and (4) that a court or administrative agency of competent jurisdiction rendered the first judgment. *Hannigan v. Hoffmeister,* 240 Ill.App.3d 1065, 1075–76, 181 Ill.Dec. 323, 608 N.E.2d 396 (1992); *City of Chicago v. Illinois Workers' Comp. Comm'n,* 2014 IL App (1st) 121507WC, ¶ 48, 4 N.E.3d 158, 170.

The earlier case was based upon a specific trauma involving the Petitioner's left hand which occurred on May 23, 2007. Following arbitration, then Arbitrator Mathis issued a decision awarding the Petitioner 100 % of the left index finger and 10 % of the left hand. The decision, dated October 8, 2008, was based on the fact that the Petitioner suffered an amputation of the index finger and later was experiencing some hand pain and discoloration when working in the freezer. The case was not appealed by either party. Approximately five and one half years later, the Petitioner filed a petition with the Commission to review the case under Section 19 (h) and 8 (a), claiming his disability had increased and that he had obtained additional medical treatment for which he was seeking payment. A hearing was held on May 28, 2015, after which time oral arguments were delivered. On May 24, 2016, the Commission denied the 19 (h) petition, on the grounds that it was not filed in a timely manner. It also denied the petition under 8 (a) on the grounds that the Petitioner had failed to prove a causal connection between his accident of May 23, 2007 and the various conditions for which he had been treating. The evidence presented showed that the Petitioner had extensive treatment involving symptoms over the ulnar aspect of his left hand. The evidence did contain many of the same medical reports and testimony which have been presented in the instant case. However, the decision was properly limited to the issue of whether the treatment was causally related to the specific trauma.

The case now before the Arbitrator involves a claimed accident occurring in 2011 under the theory of repetitive trauma. The work alleged to have caused the Petitioner's injuries was that

he performed in the four year period after his finger amputation. Respondent argues that since both cases involve the same parties and operative facts, the current case should be barred. Respondent's argument is not well founded. The instant case involves a repetitive trauma which occurred while the Petitioner worked after his return from treatment following his specific injury. The prior case, as well as the review, only involved the specific trauma. While some of the exhibits used in the review hearing are the same exhibits now presented, the operative facts upon which the claim is based are entirely different. In the Commission hearing, the repetitive trauma claim was not, nor could not, have been addressed.

As the former adjudication did not involve the same cause of action, the request to apply res judicata to this claim is denied.

With regard to issue (C), Accident and (F), Causal Connection, the Arbitrator finds:

In repetitive trauma claims, the issues of accident and causation are considered as one. This is true because the Petitioner, in order to succeed, must establish a manifestation date. The Courts have established that the manifestation date is the date on which both the fact of the injury and its relationship to one's employment, i.e. causation, would have become plainly apparent to a reasonable person.

The Petitioner was employed by the Respondent since 2004 as an overnight stocker of frozen foods. He was required to work in a cold environment. As part of his stocking job, he would grab a pallet jack and help unload the freight truck. He would then individually stack boxes of items by hand from a pallet onto an L cart. Petitioner testified he would have to lift boxes onto an L cart, open and break down the boxes, and stock approximately 240 boxes per shift. The boxes contained various meat, deli, and frozen food items. Each box weighed between 15-50 pounds depending on the type of grocery item contained therein.

After loading by hand approximately 15 to 20 boxes at a time onto an L cart, he would then walk the L cart to the sales floor and being stocking the goods. Petitioner testified he would to make about ten to fifteen L- cart trips per shift.

Petitioner had twenty minutes to unload and stock an L- cart for which he would go and reload the L cart again. Jasen Driver, who was the Petitioner's overnight supervisor, testified that the minimum expectation for a stocker to "down stack" is one box per minute. Frozen dairy stockers have a minimum of 40 cases per hour, a rate of 1.5 boxes per minute, because of the time it takes for them to "down stack" these particular items.

Petitioner testified that when opening a box, he was required to use either a box cutter or his hands. The boxes would be stapled, taped, or glued shut at the top and the bottom of the box. Jasen Driver added that some boxes were perforated as well. After opening the box, he would them remove the contained items by hand and stock them onto the shelf. Petitioner would break down the box using the same method that he used to initially open the box.

Petitioner testified that the lifting of the boxes onto the L cart, breaking open and then down the boxes, and stocking the food items onto the shelves required significant hand and wrist motion. While Petitioner is right handed, he used both of his hands to stock.

While in the freezer sections, Petitioner would wear a coat, hat, and gloves. However, as Petitioner only has four fingers on his left hand because his left index finger was amputated due to his 2007 workers' compensation injury against Respondent, Petitioner testified regarding the difficulty wearing a glove. He testified that when wearing a glove on his left hand, he was forced to compensate for the missing index finger. He testified that it was very difficult to handle items with the index finger fabric of his glove hanging there. Petitioner testified it was very difficult to grab the box cutter or rip open the boxes with his left hand while wearing the glove because the additional finger of the glove was always in the way. As such, he was either forced to use a left hand glove that did not fit properly and impeded his ability to stock items, or forgo gloves and subject his left hand to the cold environment.

Petitioner would stock from 10 p.m. to 6 a.m. and then zone the last hour of his shift. Zoning included pulling all items forward with his hands to the front of the shelves to look nice for customers. Petitioner testified he had a one hour lunch break and a fifteen minute break.

When asked what type of activities he did when he noticed pain in his left wrist, Petitioner responded, "Picking up boxes, carrying them, putting up top of the shelves, up and down the shelves, and then trying to break them down sometimes, and this, a lot of rotating motion; putting them in the freezer or cooler, trying to get it in the cooler freezer the right way". .

Jasen Driver confirmed the accuracy of Petitioner's testimony regarding his job duties.

Regarding his symptoms and onset, the Arbitrator notes the Petitioner's earlier testimony. On August 4, 2008, the Petitioner testified that he had returned to his earlier job earlier that year and had last seen Dr. Brown, his treating surgeon, on May 9, 2008. He said that certain activities including pulling pallets, working in the freezer and manually opening boxes caused him pain. He said that the pain was located in all five fingers up to the wrist, but that the most painful area was over the third finger of the left hand. He also said that his hand would tend to turn purple when he worked in the freezer or when he was required to grip really hard. (RX 1 95-110)

At his review hearing held May 28, 2015, the Petitioner again was asked about his symptoms following his release from Dr. Brown. Keeping in mind the fact that the Petitioner was trying to relate his condition at that time to his original accident, the Arbitrator notes that he testified that his symptoms got worse after 2008 causing him to return to Dr. Brown. (RX 1 at 536)

When he was seen by Dr. Brown on May 9, 2008, the Petitioner said that he was having some volar, or palm sided, pain up into his forearm which he noticed when moving pallets. Dr. Brown's examination was negative with respect to the wrist. He noted that he was not sure what was causing the Petitioner's pain. (RX 1 at 45)

From then until May 3, 2011, a period of three years, the Petitioner performed his work without seeking medical treatment, except for one visit to Dr. Brown in March 2010. It is clear the treatment at that time was localized to the web space adjacent to the finger previously amputated. On May 3, 2011, he went to see Dr. Brown. The subjective history note indicated that the Petitioner had done very post amputation of the index finger. The Petitioner reported that in the past year he started having problems with pain which the doctor said was somewhat ill defined. He said that it was in his whole upper extremity and that it bothered him at work. Upon exam, the doctor noted that both his median and ulnar nerve produced negative Tinel's signs, and

called the wrist exam negative. He diagnosed the Petitioner with a possible very low grade chronic regional pain syndrome. He ordered nerve tests and a bone scan. (PX 1) On May 20, Dr. Brown reviewed the nerve tests with the Petitioner. His office note indicates that the Petitioner tested with a mild left carpal tunnel but that he was unsure as to whether it was causing any of the Petitioner's symptoms. The plan agreed upon was basically observation. (Id)

The Petitioner next saw a doctor, again Dr. Brown, on September 27, 2011. His complaints had changed. His pain was now sharp and localized more to the ulnar side of the wrist. He said that moving pallets at work increased the pain to the point of tears. The doctor reviewed his earlier x-ray and bone scan done in May, and commented that they showed an ulnar abutment syndrome. He went on to say that as the Petitioner's complaints had been vague, he had not been convinced that his pain was coming from that area. His examination now showed positive findings in the ulnar area of the wrist. Dr. Brown diagnosed a probably ulnar abutment syndrome and said that the Petitioner's symptoms were coming from the ulnar aspect of the wrist. He recommended an MRI to clarify, followed by either open or arthroscopic surgery. He said that he discussed all of this with the Petitioner, his mother and his wife. (Id)

On November 9, 2011, Dr. Brown performed a left wrist arthroscopy with arthroscopic wafer procedure. His post- operative diagnosis was left wrist pain with probable ulnar abutment syndrome. (PX 5). Petitioner was restricted from work following surgery.

Petitioner followed- up with Dr. Brown following surgery with continued complaints of left wrist pain. As Petitioner's work involved heavy lifting, pushing, and pulling, Dr. Brown referred him to work hardening at Memorial Industrial Rehab from December 29, 2011 to January 26, 2012. (PX 1; 7).

Petitioner last saw Dr. Brown on January 26, 2012 during which he continued to complain of deep soreness in his left wrist. Dr. Brown opined that Petitioner needed time to heal and that his pain should dissipate over the next several months. He was returned to work on January 31, 2012. (PX 1).

Petitioner began treating with Dr. Jerome Oakey at McLean County Orthopedics on March 7, 2012 as Dr. Brown was retiring. Dr. Oakey diagnosed persistent ulnar sided wrist pain, and administered a lidocaine and Depo Medrol injection. (PX 8). Petitioner testified this injection was not beneficial.

Petitioner returned to Dr. Oakey on April 6, 2012 for a second injection, which also failed to alleviate his pain. (PX 8).

On May 31, 2012, Petitioner returned to Dr. Oakey who recommended long term pain management as the injections had failed, as well as a functional capacity evaluation for which he never underwent as it was not approved by the Respondent. (PX 8).

On July 16, 2012, Petitioner returned to Dr. Oakey, still awaiting the FCE to assign permanent restrictions. Dr. Oakey noted that until he had the FCE results, he did not require Petitioner to return to his clinic. (PX 8).

On April 8, 2013, Petitioner returned with continued complaints of left wrist pain aggravated by repeated gripping and pulling activities. He underwent a third Lidocaine and Depo- Medrol injection. (PX 8).

The same day, Petitioner saw Dr. Paul Naour at McLean County Orthopedics who also documented his decreasing grip strength in his left hand. He opined there was a potential component of sympathetic mediated pain or complex regional pain syndrome. He prescribed 300 mg of Gabapentin, 25 mg of Amitriptyline, and 220 mg of Naprosyn. (PX 9).

On April 23, 2013, Dr. Nauor opined that Petitioner had sympathetic mediated pain following a traumatic hand injury in 2007 which had escalated most recently. He prescribed a stable regimen of Gabapentin three times per day, referred him to physical therapy, and for an EMG. (PX 9).

On April 29, 2013, Petitioner underwent a second EMG at McLean County Orthopedics, as referred by Dr. Oakey. (PX 11).

Petitioner underwent physical therapy at Memorial Industrial Rehab from May 2, 2013 to May 31, 2013, as referred by Dr. Nauor. (PX 10). During physical therapy, Petitioner complained of continued left hand and wrist pain, as well as cold sensitivity at work while working in the coolers. He further noted that physical therapy, as well as the Gabapentin provided him the most relief. (PX 10).

On May 22, 2013, Petitioner returned to Dr. Nauor who instructed him to continue his medication, including Amitriptyline, 25 mg, and Gabapentin 300 mg three times daily, and to continue physical therapy. (PX 9).

Petitioner had follow- up treatment with Dr. Nauor on June 18, 2013, during which he complained that his left hand still bothered him at night while stocking shelves for Respondent. Dr. Nauor opined that "His most significant complaint today is that about midnight following 3-4 hour last day dose while he is working at night, he will start to increase his pain relatively significantly and it does start to hamper how he performs his job". (PX 9).

On April 15, 2014, Petitioner returned to Dr. Nauor with complaints of continued left wrist pain. The record reflected that "for quite some time now he has been on Gabapentin 300-600 with a nighttime dose being greater as that's when he works at Walmart. (PX 9). Petitioner testified that this increased Gabapentin dose before work was what made him able to manage his symptomatology for almost a year between doctor visits. At this visit, Dr. Nauor increased his Gabapentin from 300 mg three times a day, to 600 mg, three times a day, with continued use of Amitriptyline as well. (PX 9).

On August 22, 2016 and January 3, 2017, Petitioner returned to Dr. Nauor with complaints of recurrent lift wrist pain. Dr. Nauor continued his prescribed Gabapentin and Amitriptyline. (PX 9). Petitioner had two occupational therapy examinations at Abraham Lincoln Memorial Hospital on November 17, 2016 and January 2, 2017 for his left hand and wrist as prescribed by Dr. Nauor. (PX 14).

Petitioner testified that he still takes 900 mg of Gabapentin now, as well as Amitriptyline. He testified that he still has continued left wrist pain with activities of daily living.

The evidence deposition of Dr. Jerome Oakey was taken on December 20, 2013 and was marked as Petitioner's Exhibit 15. Dr. Oakey is a board certified orthopedic surgeon with a certificate of added qualification in hand surgery. Despite Dr. Oakey having no record of Petitioner specifically discussing his May, 2011 repetitive trauma injury, Dr. Oakey did testify

that the type of job duties Petitioner engaged in as an overnight frozen food stocker could aggravate the pre- existing injuries he sustained during the 2007 forklift workplace accident.

Dr. Oakey testified that the type of injury Petitioner sustained in 2007 when his left index finger was amputated could have caused the TFCC tear and ulnar abutment. (PX 15, pp. 26-27). Dr. Oakey testified that after the incident of 2007, a tear can maintain its level of symptomatology or worsen. (PX 15, p. 28). When asked what types of activities could aggravate a TFCC tear or ulnocarpal abutment, Dr. Oakey answered, "Typically those are activities including gripping or grasping activities that include lifting, specifically with the wrist in ulnar deviation, any type of gripping or twisting. I have seen that aggravated as well". (PX 15, p. 40). When asked, "Up to the point in which he did have the ulnar surgery then [November 9, 2011], could those job duties have aggravated my client's ulnar abutment syndrome or TFCC injury?" to which Dr. Oakey responded, "Again, I did not treat him before, but those types of activities as you described could theoretically aggravate it, yes". (PX 15, p. 30).

When asked whether Petitioner's job duties as a frozen food stocker could aggravate the client's ulnar abutment syndrome or TFCC injury, he testified, "So if he had no pre- existing treatment [prior to the 2007 amputation injury], which is what he related to me, and he had a traumatic TFCC tear with ulnocarpal abutment that was not treated until 2011 with the surgery, then in those four years, not seven, yes, those are the types of activities that could aggravate it". (PX 15, pp. 30-31). Dr. Oakey agreed that the methodology by which Petitioner is holding the boxes at work would be consistent with something that could cause him pain prior to his surgery by Dr. Brown in 2011. (PX 15, pp. 32-33).

The evidence deposition of Dr. Paul Nauor was taken on March 10, 2015 and was marked as Petitioner's Exhibit 16. Dr. Nauor is a board certified pain management specialist and anesthesiologist. Despite Dr. Nauor having no record of Petitioner specifically discussing his May, 2011 repetitive trauma injury, he also opined that the type of job duties Petitioner engaged in as an overnight frozen food stocker could aggravate the pre-existing condition and injuries he sustained during the 2007 forklift workplace accident.

Dr. Nauor agreed that stocking shelves and lifting and grasping was something that could cause the Petitioner to feel pain since he suffers from the neuropathic pain diagnosis. (PX 16, pp. 27-28; 39). Dr. Nauor added specifically the use of the arm and hand and the varying positions, the gripping and range of motion could aggravate his pre- existing condition. (PX 16, p. 28). Dr. Nauor testified that the Petitioner's job duties of moving and placing merchandise and supplies that weighed up to 50 pounds could potentially aggravate his condition because "generally speaking, neuropathic pain, the issue of sensation, range of motion, gripping, that can just cause pain. But as far as the exact modality, I wouldn't be able to answer to". (PX 16, p. 28). He asked about the impact of work in a cold environment including freezers, Dr. Nauor added that temperature does appear to have a consequence. (PX 16, p. 28).

Respondent obtained a record review from Dr. Beyer, an orthopedic surgeon. Dr. Beyer testified by way of deposition taken on November 15, 2013. (RX 2, pp.11-150) Dr. Beyer agreed with Dr. Brown that the Petitioner suffered from an ulnar abutment syndrome, along with changes of the lunate bone and tears of the TFCC cartilage. He said that any activity that places

the wrist in an ulnarly positioned anatomical location could aggravate the conditions. (Id at 44-45) As an example of such activity, he said that using a hammer every day would aggravate it. He said that pulling pallets would not aggravate the condition because that activity would not load the ulnar aspect of the wrist. He further said that nothing the Petitioner did on the job would place the wrist in a position of ulnar deviation. (Id at 51-52) On cross-exam, Dr. Beyer said that he could think of no activity other than repeated hammering or possibly playing pool many hours a day which would place the wrist in the offending position. (Id at 63-64)

Respondent also presented the testimony of Dr. Dunteman, an anesthesiologist and pain specialist, by deposition taken October 21, 2014. Dr. Dunteman basically agreed with Dr. Naour in testifying that the Petitioner did not have complex regional pain syndrome or RSD. He also said that the Petitioner exhibited symptom magnification and significant inconsistencies during his examination.

Both Dr. Oakey and Dr. Nauor have opined that the Petitioner's repetitive overnight stocking job duties aggravated and worsened his pre- existing conditions, including the ulnar abutment, TFCC tear, and neuropathic pain, rendering them increasingly symptomatic to the point that Petitioner sought medical treatment. Dr. Brown also commented in his office note of March 5, 2012 that if the Petitioner did a lot of ulnar deviating at work, it could be a factor aggravating his conditions. (See RX 3) The Arbitrator believes that Dr. Oakey's testimony, Dr. Brown's opinion, along with a chain of events analysis, supports causation. The Arbitrator finds Dr. Beyer's opinions to be less than persuasive.

First of all, the fact is that the Petitioner performed his regular job which he described in great detail from sometime in early 2008 until his symptoms arose in 2011 without an index finger on his left hand. Clearly he had to lift pallets and small boxes of frozen foods on a repetitive basis using that hand. He demonstrated how he would lift and pull at arbitration. His hands were pointed down in a position of ulnar deviation. It makes no sense that someone without an index finger, with a pre-existing condition setting up an ulnar abutment syndrome, who lifts repeatedly would not aggravate his symptoms by the work activities described. The Arbitrator also notes that the Petitioner had quotas to meet with respect to the cases he had to stock at work per the testimony of Mr. Driver.

The Arbitrator finds that the Petitioner has sustained an accidental injury through his work duties in the period described above which are causally related to his conditions of ill being.

With regard to issues of Notice and the Manifestation Date, the Arbitrator finds:

The Petitioner's claim is based upon a theory of repetitive trauma. The accident date chosen was May 9, 2011, which is the day that the Petitioner underwent nerve testing at the request of Dr. Brown. The Arbitrator has stated the law concerning the manifestation date for a repetitive injury in the preceding section dealing with accident and causation. In reviewing the notes from Dr. Brown covering his two visits in May 2011, along with the technicians' notes from the nerve studies and the bone scan done at that time, the Arbitrator does not believe the manifestation date chosen by the Petitioner is appropriate. Nothing in those notes would lead a reasonable person to know of the injury which is the subject of this claim. The nerve studies only show a mild carpal tunnel condition, which Dr. Brown concluded was likely not responsible for

the Petitioner's symptoms. Dr. Brown did not know from the vague history provided by the Petitioner what if anything was going on with his left upper extremity.

Multiple cases heard in the Appellate Court since the original repetitive trauma decision in Peoria County Bellwood have established that the manifestation date in a repetitive trauma injury can be arrived at in many ways. Sometimes it is the date of treatment. Sometimes it is the last day of work prior to having the condition treated. The date is determined by the above referenced objective test. The Arbitrator believes the appropriate date of manifestation in August 22, 2011. The Petitioner's handwritten note which he gave to his employer establishes the areas on his wrist which he believed were injured and also the fact that he believed them to be related to activities at work. (RX 5) An alternative could be September 27, 2011 when Dr. Brown arrived at his diagnosis and recommended surgery. It appears that August 22, 2011 is the most appropriate manifestation date. The Arbitrator has the authority to choose the most appropriate manifestation date in a repetitive trauma claim, and clearly the use of this date does not prejudice the Respondent.

The purpose of the notice requirement of the Act is to enable an employer to investigate an alleged accident. *Seiber v. Industrial Comm'n* (1980), 82 Ill.2d 87, 97, 44 Ill.Dec. 280, 284, 411 N.E.2d 249, 253. Compliance with the requirement is accomplished by placing the **employer** in possession of the known facts related to the accident within the statutory period, namely 45 days. *Seiber*, 82 Ill.2d at 95, 44 Ill.Dec. at 283, 411 N.E.2d at 252. A claim is barred only if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Industrial Comm'n* (1990), 197 Ill.App.3d 640, 651, 143 Ill.Dec. 799, 807, 554 N.E.2d 734, 742.

The record is clear that the Respondent did investigate the claim thoroughly once it received the Petitioner's August 22, 2011 letter. The investigation even included imput from the compensation insurance representative Nancy Brown, who advised the Respondent that this should be considered a new claim. (RX 6)

Assuming, for the sake of argument that May 9, 2011 is the proper manifestation date, the Arbitrator further believes the evidence shows the Respondent had notice. The Petitioner testified that in early May he was having symptoms in his wrist. He says he told Mr. Driver that his wrist hurt from the job. Mr. Driver and Lori Harris, both of whom testified, never directly rebutted that testimony. They said that the Petitioner never reported a new injury at that time because if he had, an accident report would have been completed. However, they did not directly deny that the Petitioner complained to Driver of wrist pain. The fact is that the Petitioner went to his doctor twice in May and also had nerve tests and a bone scan. As stated earlier in this decision, he told Dr. Brown that his symptoms bothered him while performing specific work activities. It is more probable than not that he at least mentioned the pain to his immediate supervisor. If so, that notice, though imperfect, would be enough for the Petitioner to meet his statutory requirement.

With regard to (J), Medical, the Arbitrator finds:

Respondent contested medical on the basis of its defense to the issues discussed above. Given the Arbitrator's rulings on those issues, the Arbitrator finds that the Respondent shall pay

the medical bills, as set forth in Petitioner's Exhibit 12, directly to the medical providers pursuant to the Medical Fee Schedule set forth in Section 8(a) of the Act, hold him harmless for any subrogation claims asserted by his health insurer, Blue Cross Blue Shield, and reimburse Petitioner $1,940.28 for his out- of- pocket expenses paid.

With regard to issue (K), Temporary Total Disability benefits, the Arbitrator finds:

Similarly, the Respondent contested TTD entitlement based upon its defenses to the other issues. Given the Arbitrator's rulings on those issues, TTD is awarded. The evidence supports that as of the date of Arbitration, as a result of his injuries and treatment, Petitioner missed work for the period of November 9, 2011 through January 30, 2012, totaling 11 6/7 weeks. As such, the Arbitrator orders Respondent to pay $325.09 per week for a period of 11 6/7 weeks, representing the temporary total disability owed to Petitioner, as provided in Section 8(b) of the Act.

With regard to issue (L), Nature and Extent, the Arbitrator finds:

As this is a pre-2011 amendment case, the Arbitrator does not need to consider Section 8.1 of the Act.

In surgery, Dr. Brown repaired a large defect of the TFCC cartilage as well as reshaping the ulna to try and eliminate the abutment problem. (PX 5) After therapy and work hardening, Dr. Brown on January 26, 2012 released the Petitioner to resume his regular job duties. While noting the Petitioner's complaint of soreness deep in the wrist, the doctor found no other abnormalities upon examination. (PX 1) The Petitioner did continue with pain, causing him to seek further care with Dr. Oakey. He tried an injection into the ECU tendon, but the Petitioner reported it did not help. Dr. Oakey's last visit with the Petitioner was on July 16, 2012. He suggested the Petitioner might need pain treatment in the future. Since then, the Petitioner has been treated by Dr. Nauor. The treatment has been aimed at correctly diagnosing the ongoing pain complaints. It appears that complex regional pain syndrome or RSD has been eliminated as the diagnosis. Dr. Nauor has concluded that the Petitioner's pain is neurogenic, and has prescribed medications which are referenced above.

The Petitioner performed his regular job for the Respondent from early 2012 to early 2017. He testified that his wrist is painful and has an effect on his daily activities including when he plays with his two year old daughter. However, the Arbitrator notes his testimony at his review hearing held May 28, 2015. At that time he said that as long as he takes his medication, he was fine at work loading and moving pallets and working in the freezer. (RX 1 at 542)

Based upon the above evidence, the Arbitrator finds the Petitioner currently disabled to the extent of 25 % loss of use of the left hand. Taking into account the credit of 10 % from the earlier award, the petitioner is awarded an additional 15 % loss of the left hand.

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

Rick Talluto,

Petitioner,

19IWCC0697

vs.

NO: 14 WC 020030

American Coal,

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 occupational disease, causal connection, nature and extent, and "Sections 1(d)-(f) of the Occupational Diseases Act" and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 6, 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.

19IWCC0697

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: DEC 18 2019
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MEP/ypv
049

Maria E. Portela

Thomas J. Tyrrell

Kathryn A. Doerries

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

TALLUTO, RICK
Employee/Petitioner

Case# **14WC020030**

19IWCC0697

AMERICAN COAL
Employer/Respondent

On 6/6/2018, 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:

0755 CULLEY FEIST KUPPART & JORDAN
ROMAN P KUPPART
3 S MAIN ST SUITE 2
HARRISBURG, IL 62946

1662 CRAIG & CRAIG LLC
KENNETH F WERTS
115 N 7TH ST PO BOX 1545
MT VERNON, IL 62864

19IWCC0697

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

- [ ] 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

Rick Talluto
Employee/Petitioner

v.

American Coal
Employer/Respondent

Case # 14 WC 20030

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 William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on April 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. [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. [ ] 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. [x] Other Sections 1(d)-(f) of the Occupational Diseases Act

FINDINGS

On December 3, 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 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 $n/a; the average weekly wage was $1,000.00.

On the date of accident, Petitioner was 68 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 $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

Based upon the Conclusions of Law attached hereto, claim for compensation 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.

William R. Gallagher, Arbitrator

June 3, 2018
Date

JUN 6 - 2018

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an occupational disease to his lungs and/or heart. The Application alleged a date of last exposure of December 7, 2013, and that Petitioner sustained the occupational disease as a result of inhalation of coal mine dust, rock dust, fumes and vapors for a period in excess of 44 years (Arbitrator's Exhibit 2).

At the time of trial, Petitioner was 72 years old. Petitioner is a high school graduate. He worked in the coal mines for 44 to 45 years, with all of that time being underground. Petitioner was exposed to rock and coal dust, diesel fumes, welding fumes and fly ash. Petitioner last worked in the coal mine on December 7, 2013, for Respondent at its Galatia mine. On that date he was 68 years old. His job classification was repairman. He testified that on that date he was exposed to and breathed rock and coal dust. Petitioner testified that he left the mine on that date because he was 68 years old and it was hard on him to work there. He testified that it was harder to breathe, harder to get around and harder to do what he was supposed to do. He testified that the work required a lot of lifting and tugging and it got to where he could not do the work.

Petitioner worked at Alan Industries from 1963 to 1965. Petitioner was drafted into the Army in 1965 and spent a year in Vietnam. Petitioner went back to work at Alan Industries from 1967 to 1969. He went to work at Old Ben Coal in 1969 and worked there until 1991. He then went to work at Scrub Coal Mine for about six months. He worked at Arch Conant Mine from 1992 to 1998. He went to work for Respondent in 1998 and worked there until 2013. Petitioner worked as a bottom laborer for a year or two. He then ran machinery for about four years. He also worked as a repairman and did some belt work. He was face boss for approximately 22 years. At Respondent he worked as a roof bolter, coal hauler and repairman. He testified that in all of these jobs he was exposed to rock and coal dust. He never had a job in the coal mines where he was not exposed to rock and coal dust. Petitioner described his work in the coal mines as heavy manual labor. He also had to bend, stoop and squat to do his job duties. Petitioner testified that he had to do a fair amount of walking in the coal mine. At times he had to walk uphill.

He testified that in the last four or five years that he worked he had breathing problems while performing his job duties. He testified that it got to where it was harder to breathe. He would have to do something and then rest. Petitioner testified that when he was running equipment underground there were diesel fumes in the air. Driving through the mine would also stir up the rock and coal dust in the air. When working for Respondent, Petitioner worked eight and a half hours per day, six days a week.

Petitioner testified that he first noticed breathing problems when he was getting ready to quit or just before that because he had to walk out of the mine and he could hardly get out of the shaft. Petitioner testified that he had to walk up an incline and a lot of the guys stayed back to make sure that he got out. He testified that this happened seven or eight years before he quit. He testified that the shaft is 2,000 feet and is an incline. He noticed

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breathing problems when he had to lift the parts to work on the miner because everything he lifted was heavy. The items would weigh anywhere between 50 to 75 pounds and sometimes more than that. He testified that if there was rock dust in the air it bothered him, and he got to where he could hardly catch his breath. Petitioner testified that he could walk to his mailbox which was about 100 feet from his house, but he has to catch his breath when he gets out there. Petitioner testified that he could climb half a flight of stairs before he starts breathing real hard. Petitioner testified that since December 7, 2013, his symptoms have stayed about the same. He testified that they have not gotten any worse. Petitioner was not taking any breathing medication.

Petitioner testified that when he does anything now he has to stop and catch his breath. He mows his grass with a riding lawnmower. He will mow some and then he has to quit. If he weed eats, he does some and then has to rest and catch his breath. He testified that it takes about five minutes for him to catch his breath. He testified that his only hobby is fishing and he does that sitting on a bucket.

Petitioner testified that before he left Respondent, he had to have help on some of his jobs. If there was heavy lifting, he had to have help because he could not do it himself due to his breathing. He testified that sometimes he would have to pack five gallons of oil to a crosscut, and he would pack it about half a crosscut and then set down and catch his breath and then pack it the rest of the way. He testified that a crosscut has 100 foot centers.

Petitioner testified that Dr. Jeff Hunt at the VA in Harrisburg was his treating physician. He testified that he did not see Dr. Hunt regarding his breathing problems. He testified that he mentioned to Dr. Hunt about the problems that he was having working in the dust. Petitioner testified that he has never done anything other than manual labor.

Petitioner testified that he smoked a year when he was overseas in Vietnam. Petitioner testified that he has diabetes. He testified that he could not go back and do his last job at the coal mine because of his breathing, and he is getting too old to lift and pull.

Petitioner testified that at the end of his career with Respondent, his job title was mechanic II. He was in that position for four or five years. Prior to that he was a laborer and roof bolter. He testified that they were short repairmen and since he had his cards, they told him that they needed him to work as a repairman. Petitioner testified that when he retired at 68 years old, there were not any repairmen older than him at the time. Petitioner never looked for work after he left his coal mine employment. He signed up for Social Security and Medicare when he left the mine.

Petitioner testified that while he was employed in the mines, he was given an opportunity to undergo chest x-ray screening for black lung by NIOSH. He took advantage of that and had chest x-rays performed. After the x-ray, he thought NIOSH wrote him to tell him what the chest x-ray revealed. Petitioner did not bring any of those letters with him to arbitration.

Petitioner testified that he had problems with neuropathy. He testified it would get to where he could not sleep and could not walk. He testified that he also has arthritis in his hands, joints, back and legs. He testified that the arthritis makes it difficult to do things. He cannot sit for very long. He takes a pill for gout.

Petitioner receives his primary care at the VA. He testified that he has always been honest with them when he has shared with them his problems. Petitioner testified that less than a mile from his house his ex-son-in-law lives on a pond. He usually drives to his house and walks from there and then sits on a bucket to fish. He testified that he also putters around in his garage. He testified that he makes knives. He testified that he has a 10 x 10 garden. Petitioner testified that he lives on about three acres which he mows.

Dr. Suhail Istanbouly is a pulmonologist (Petitioner's Exhibit 1; p 5). He testified that he sees coal miners almost every day in his practice. Approximately 20% of his patients have been coal miners in the past. Dr. Istanbouly is in private practice. He was previously affiliated with Southern Illinois Respiratory Disease Clinic. He has performed black lung examinations for the U.S. Department of Labor since 2004 (Petitioner's Exhibit 1; pp 5-6). Dr. Istanbouly is the medical director of the pulmonary department at Herrin Hospital (Petitioner's Exhibit 1; p. 7).

Dr. Istanbouly evaluated Petitioner on July 2, 2014, at the request of his counsel. Dr. Istanbouly reviewed a chest x-ray which Petitioner had taken a few months prior to Dr. Istanbouly's examination. Dr. Istanbouly performed spirometry testing at his office and performed a complete physical exam (Petitioner's Exhibit 1; p 7).

Petitioner reported to Dr. Istanbouly a history of approximately 44 years of coal mine employment. He was last employed in the coal mine in 2013. Petitioner reported smoking for a short period of time during his early adulthood. Petitioner complained to Dr. Istanbouly of coughing on a daily basis. The cough was mild to moderate in intensity and mostly upon exertion. It was a productive cough. Petitioner also reported having exertional dyspnea. He would get short of breath by walking a half to one block (Petitioner's Exhibit 1; pp 8-9). Dr. Istanbouly testified that Petitioner's spirometry revealed severe non-specific ventilatory limitations. Dr. Istanbouly noted in his report that the test was not of good quality because Petitioner was coughing and could not exhale continuously for six to eight seconds (Petitioner's Exhibit 1; p 10).

Dr. Istanbouly testified that there were no specific respiratory symptoms related to coal workers' pneumoconiosis, but there was a possibility of inflammation of the airways inducing symptoms like chronic cough and sputum production. He testified that the interstitial pattern of the disease can cause exertional dyspnea with shortness of breath, sometimes at rest. Dr. Istanbouly testified that a person can have a positive chest x-ray for coal workers' pneumoconiosis and be asymptomatic. He testified that that is not unusual, especially in early cases (Petitioner's Exhibit 1; p 10). Dr. Istanbouly testified that on physical examination of the chest, Petitioner had reduced air entry bilaterally. He testified

that same can be seen in obstructive lung diseases like asthma or COPD (Petitioner's Exhibit 1; p 11).

Dr. Istanbouly reviewed a chest x-ray for Petitioner dated March 18, 2014. Dr. Istanbouly testified that Petitioner had coal workers' pneumoconiosis which was caused by his long term coal dust inhalation (Petitioner's Exhibit 1; p 14). Dr. Istanbouly testified that coal workers' pneumoconiosis means that there are fine particles being inhaled deeply through the airways, depositing on the lung tissue of the alveoli creating local inflammation or irritation. This inflammation will end up with tiny scars and that is what is seen as round opacities on the x-ray. Dr. Istanbouly testified that the chronic inhalation can also affect the small airways generating chronic inflammation which may end up causing COPD. Dr. Istanbouly testified that every coal miner who is exposed to coal dust does not necessarily get coal workers' pneumoconiosis (Petitioner's Exhibit 1; pp 14-15). Dr. Istanbouly testified that the scar tissue is permanent. Dr. Istanbouly testified that the scar tissue of coal workers' pneumoconiosis can carry on the function of normal healthy lung tissue if it is mild (Petitioner Exhibit 1; p 16).

Dr. Istanbouly testified that based on the information available to him, Petitioner had radiographically apparent changes that represented pulmonary impairment caused by the long term inhalation of coal dust. He testified that due to his coal workers' pneumoconiosis, Petitioner could not have additional exposure to coal dust without endangering his health (Petitioner Exhibit 1; p 17). Dr. Istanbouly testified that the spirometry he performed was not reliable. He would need a complete pulmonary function test while Petitioner was in good shape and possibly an exercise test to assess the disability related to coal workers' pneumoconiosis. He testified that he could not tell for sure if Petitioner was disabled or not (Petitioner's Exhibit 1; p 18).

Dr. Istanbouly testified that he saw Petitioner one time. He started seeing patients referred by Petitioner's counsel two to three years ago. When he started he would see five to ten patients a year. The last year the number had increased to five patients per month. Dr. Istanbouly testified that he has never performed an examination for a coal company (Petitioner's Exhibit 1; pp 18-19).

Dr. Istanbouly testified that Petitioner was not taking any breathing medications at the time of his examination. Dr. Istanbouly did not review any medical records other than the list of medications Petitioner was taking (Petitioner's Exhibit 1; p 19). Petitioner did not relate to Dr. Istanbouly a past history of any pulmonary disease (Petitioner's Exhibit 1; p 20). Petitioner did not tell Dr. Istanbouly that he left mining at the time he did due to pulmonary disease or on the advice of a physician. He did not tell Dr. Istanbouly that he was incapable of performing his last job duties in the mine. Dr. Istanbouly testified that Petitioner could not perform his last job duties based upon his symptoms, chest x-ray and spirometry. Dr. Istanbouly testified that the decreased breath sounds could be due to Petitioner's body habitus. He testified that same can occur in morbidly obese people (Petitioner's Exhibit 1; pp 21-22).

Dr. Isanbouly is not an A-reader or B-reader of films. When he looks at an x-ray, he relies on his experience based on the hundreds of x-rays that he has reviewed over the past twelve years of dealing with coal workers' pneumoconiosis cases. He testified that the scarring that results in the lung from the exposure to dust is permanent. Dr. Istanbouly testified from the sequela of that dust exposure, in terms of pulmonary function, if it causes an impairment, is permanent (Petitioner's Exhibit 1; p 23).

Dr. Istanbouly described Petitioner's ventilatory limitation as non-specific because he did not check lung volumes. He testified that to know if Petitioner truly had a restriction or not, one would have to check lung volumes. Dr. Istanbouly did not have a diffusion capacity performed on Petitioner. Dr. Istanbouly testified that diffusion capacity would tell him whether Petitioner was having any problem with gas exchange (Petitioner's Exhibit 1; pp 23-24). With regard to the spirometry performed by Dr. Istanbouly, ATS reproducibility was not met (Petitioner Exhibit 1, Respondent's Exhibit A). Dr. Istanbouly testified that he does not provide a profusion rating in his x-ray interpretation. He cannot say whether the profusion for Petitioner's film would be a 0/1 or a 1/0. Dr. Istanbouly describes the finding as mild, moderate or severe. He testified that in Petitioner's case the pneumoconiosis was mild (Petitioner's Exhibit 1; p 21).

Dr. Michael S. Alexander interpreted a chest x-ray for Petitioner dated March 18, 2014. Dr. Alexander interpreted the chest x-ray as positive for pneumoconiosis, profusion 1/1 with P/P opacities in all lung zones (Petitioner's Exhibit 2). Dr. Alexander is a board certified radiologist and B-reader (Petitioner's Exhibit 3).

Dr. Cristopher Meyer reviewed a PA and lateral chest x-ray from Ferrell Hospital dated March 18, 2014. He testified that the film was of diagnostic quality. Dr. Meyer read the film as quality 3 because it was overexposed which made it dark. He testified that the lungs were underinflated so the lung volumes were low and there was mottle (Respondent's Exhibit 1; pp 41-42). Dr. Meyer testified that underinflation would move the normal pulmonary vessels closer together. If those pulmonary vessels are seen end on, they can look like round opacities. If they are seen en face, they can look like irregular opacities so it can mimic either type of small opacity. He testified that mottle typically mimics small opacities of P size (Respondent's Exhibit 1; pp 42-43). Dr. Meyer testified that the lungs were clear and there were no small round, small irregular or large opacities. He testified that the film had no findings of coal workers' pneumoconiosis (Respondent's Exhibit 1; p 43).

Dr. Meyer has been board certified in radiology since 1992 (Respondent's Exhibit 1; p 8). Dr. Meyer has been a B-reader since 1999. Dr. Meyer was asked to take the B-reading exam by Dr. Jerome Wiot (Respondent's Exhibit 1; p 21). Dr. Wiot was part of the original committee that designed the training program which was called the B-reading program (Respondent's Exhibit 1; p 23). Dr. Meyer was recently asked to have a more active academic role with the B-reading program. Dr. Meyer is on the American College of Radiology Pneumoconiosis Task Force which is engaged in redesigning the course and

the exam and submitting cases for the B-reading training module and exam (Respondent's Exhibit 1; p 33).

Dr. Meyer testified that the B-reader evaluates the quality of the film and describes any limitations of the x-ray. The B-reader then looks at the film of the lungs to decide whether there are any small nodular opacities or linear opacities and based on the size and appearance of the opacities, they are given a letter score (Respondent's Exhibit 1; pp 23-24). Dr. Meyer testified that specific occupational lung disease are described by specific opacity types. Coal workers' pneumoconiosis is characteristically described by small round opacities (Respondent's Exhibit 1; pp 29-30). The distribution of opacities is also described because different pneumoconioses are seen in different regions of the lung. Coal workers' pneumoconiosis is typically an upper zone predominant process (Respondent's Exhibit 1; p 24). The last component of the interpretation is the extent of lung involvement or the so-called profusion (Respondent's Exhibit 1; pp 24-25). Dr. Meyer testified that the profusion is basically trying to define the density of the small opacities in the lung (Respondent's Exhibit 1; p 31). Dr. Meyer testified that radiologists have about a 10% higher pass rate on the B-reading exam than other specialties. In Dr. Meyer's opinion, radiologists have a better sense of what the variation of normal is. Dr. Meyer testified that one of the most important parts of the B-reader training and examination is making a distinction between the 0/1 and 1/0 profusion on a film (Respondent's Exhibit 1; pp 35-36).

At the request of Respondent's counsel, Dr. Selby examined Petitioner on February 18, 2016 (Respondent Exhibit 2, p. 8). Dr. Selby is board certified in internal medicine and pulmonology. He has been a B-reader since 1985 (Respondent's Exhibit 2; pp 3-4). Dr. Selby has a general pulmonology practice that entails both inpatient and outpatient. He does all manner of consultation work as far as chest, lungs and breathing disorders. His practice also encompasses occupational lung disease including individuals with coal workers' pneumoconiosis (Respondent's Exhibit 2; pp 4-5).

Petitioner reported to Dr. Selby that he never saw any medical personnel for shortness of breath, respiratory issues or heart problems. Petitioner reported 43 years of underground coal mining employment. Dr. Selby testified that Petitioner's chief complaint was shortness of breath. Petitioner reported that he was short of breath while working for the last two years of his employment. Petitioner reported to Dr. Selby that since he retired his breathing has gotten worse. He has a productive cough of green phlegm a couple of times per week. Petitioner reported that he wheezed every day but denied any triggers. Petitioner reported being able to walk one block without stopping. Petitioner stated, "I am wheezing right now," however, Dr. Selby testified that his breath sounds were totally clear with normal breath sounds bilaterally (Respondent's Exhibit 2; pp 8-9). Dr. Selby testified that shortness of breath with exertion is a non-specific complaint that can be due to many different things. He testified that deconditioning is a common cause of shortness of breath with exertion (Respondent's Exhibit 2; pp 9-10).

Dr. Selby testified that based upon the history he obtained from Petitioner, he was not taking medication for his breathing at the time of his examination nor had he ever taken breathing medication in the past. Petitioner reported that he had never smoked. Petitioner's BMI was 35.4 which placed him in the obese category (Respondent's Exhibit 2, p. 11). Chest examination showed clear breath sounds bilaterally without wheezes, rales or rhonchi (Respondent's Exhibit 2; pp 11-12).

Dr. Selby performed laboratory testing on Petitioner. The overall interpretation was normal spirometry without improvement post bronchodilator. His lung volumes and diffusion capacity were normal (Respondent's Exhibit 2; pp 12-13). Dr. Selby testified that the spirometry performed in his office was valid. He testified that it did not reveal the presence of any obstruction. Petitioner's total lung capacity was 80% which ruled out restriction. Dr. Selby testified that based upon the objective testing he performed, Petitioner had no impairment in pulmonary function (Respondent's Exhibit 2; pp 13-14).

Dr. Selby reviewed chest x-ray of Petitioner dated March 18, 2014, from Ferrell Hospital. He testified that same revealed no evidence of coal workers' pneumoconiosis. Dr. Selby testified that the film was quality 2 because of underinflation. He testified that underinflation is the failure to take a full and complete deep breath which causes crowding. He testified that care has to be taken in reading such a film so that it is not overread because of the crowding. He testified that crowding causes increased lung markings that could look like the small opacities of pneumoconiosis (Respondent's Exhibit 2; pp 14-15). Dr. Selby testified that it is quite unlikely for simple pneumoconiosis to progress once the exposure ceases (Respondent's Exhibit 2, p. 16).

Dr. Selby testified that Petitioner did not suffer from any respiratory or pulmonary abnormality as a result of coal mine dust inhalation or coal mine employment. He testified that Petitioner does not have coal workers' pneumoconiosis. He testified that Petitioner had the respiratory or pulmonary capacity to perform any and all of his previous coal mine duties, including his last job working as a repairman. Dr. Selby testified that Petitioner's large protuberant abdomen was crowding his lung bases causing poor basilar lung function and subsequently shortness of breath. Dr. Selby testified that Petitioner is deconditioned or out of shape and that if he were to train properly, he would have improved exercise tolerance (Respondent's Exhibit 2; p 17).

Dr. Selby also reviewed medical records concerning Petitioner. He testified that the records he reviewed covered the time frame from November, 2002, to December, 2015 (Respondent's Exhibit 2; pp 17-18). He noted that Petitioner appeared to have clinical sleep apnea but refused to have testing to find out. Dr. Selby noted that sleep apnea can lead to pulmonary hypertension, high blood pressure and poorly controlled diabetes as well as coronary artery disease. All of these conditions can lead to shortness of breath. Dr. Selby noted in his report that the medical records from Petitioner's primary care physician in private practice as well as at the VA did not reveal any complaints of a respiratory nature nor was there any physical exam showing wheezing or any chest abnormality (Respondent's Exhibit 2, Deposition Exhibit 3; p 31). Dr. Selby noted that Dr. Istanbouly

identified that his pulmonary function testing was invalid yet used it to draw the conclusion that Petitioner had coal workers' pneumoconiosis. Dr. Selby remarked that almost two years later at the exam in his office Petitioner's values were over a liter more and clearly normal proving the invalidity of Dr. Istanbouly's testing. Dr. Selby noted that coal workers' pneumoconiosis would not wax and wane. Petitioner refused to have a CT scan of his chest which would have settled the issue of the presence or absence of coal workers' pneumoconiosis. Dr. Selby's review of the medical records confirmed his conclusions reached after his examination (Respondent's Exhibit No. 2, Deposition Exhibit 3; p 32).

Dr. Selby testified that for a person to have coal workers' pneumoconiosis, in addition to having coal mine dust exposure, he has to have a tissue reaction to that coal dust. That tissue reaction is called scarring or fibrosis (Respondent's Exhibit 3; p 3). Dr. Selby testified that the scarring of coal workers' pneumoconiosis cannot perform the function of normal healthy lung tissue. He testified that by definition, if a person has pneumoconiosis, he would necessarily have impairment in the function of his lung at least at the site of the scarring whether the impairment is measured by spirometry or not (Respondent's Exhibit No. 3; p 4). Dr. Selby testified that it is possible for a person to have radiographically significant coal workers' pneumoconiosis and have normal findings on physical examination of the chest and have normal pulmonary function and arterial blood gas studies (Respondent's Exhibit No. 3; p 6).

Dr. Selby testified that he is familiar with the *Guides to Evaluation of Permanent Impairment, Sixth Edition* and Table 5-4 of the AMA Guides. He testified that for an individual to be Class 0 impairment one of the things that the physician looks at is diffusion capacity. If that diffusion capacity is 75% or greater, a person falls into Class 0 impairment (Respondent's Exhibit 3; pp 11-12).

The medical records from Logan Primary Care were admitted into evidence. Petitioner was seen on November 27, 2002, as a new patient. Review of systems respiratory was negative. Physical examination of the chest revealed the lungs to be clear to auscultation without wheeze, rhonchi or rales (Respondent's Exhibit 4; pp 86-88). Petitioner's lungs were clear to auscultation without wheeze, rhonchi or rales when seen on February 12, 2003, July 30, 2003, January 14, 2004, and July 19, 2004 (Respondent's Exhibit 4; pp 78-85).

Petitioner was seen on March 17, 2005, for upper respiratory infection symptoms including runny nose, congestion and cough. Physical examination of the chest revealed his lungs were clear to auscultation without rhonchi or wheeze. The assessment was acute sinusitis (Respondent's Exhibit 4; pp 76-77). Petitioner did not make any complaints of a respiratory nature and his physical examination of the chest continued to reveal lungs which were clear to auscultation without wheeze, rhonchi or rales through June 16, 2010 (Respondent's Exhibit 4; pp 51-75). On June 16, 2010, Petitioner's assessment included obstructive sleep apnea syndrome. This diagnosis was based on Petitioner relating symptoms of being tired all the time, snoring and having apnea. He was scheduled for a sleep study (Respondent's Exhibit No. 4, p. 52).

Petitioner denied shortness of breath when seen on February 18, 2011. His physical examination of the chest revealed the lungs were clear to auscultation without wheeze, rhonchi or rales (Respondent's Exhibit 4; pp 46-48). Petitioner again denied shortness of breath in an office visit on August 19, 2011. Physical examination of the lungs remained clear to auscultation without wheeze, rhonchi or rales (Respondent's Exhibit 4; pp 40-41).

Petitioner was seen on February 21, 2012, complaining of runny nose, congestion and productive cough of two weeks duration. The assessment was acute sinusitis (Respondent's Exhibit 4; pp 32-33). Petitioner denied shortness of breath when seen on April 20, 2012, August 20, 2012, April 18, 2013, and August 19, 2013 (Respondent's Exhibit 4; pp 9-15, 25-30). Petitioner was seen on December 19, 2013. He related having a couple of sinus headaches but no shortness of breath. On physical examination of the chest his lungs were clear to auscultation without wheeze, rhonchi or rales (Respondent's Exhibit 4; pp 3-5).

The medical records from the VA Medical Center were admitted into evidence. Petitioner was seen on May 12, 2008, for refill of medications. Review of systems respiratory showed no shortness of breath, cough or phlegm. Physical examination of the lungs showed that they were clear to auscultation bilaterally with no crackles or rhonchi (Respondent's Exhibit 5; pp 484-487). Petitioner denied any respiratory symptoms including cough, sputum production, dyspnea and shortness of breath when seen on August 29, 2008, September 6, 2011, September 5, 2012, and August 20, 2013 (Respondent's Exhibit 5; pp 410-414, 451-454, 468-470, 476-477). Petitioner was seen on September 24, 2014. Review of systems at that time revealed no cough, sputum production, dyspnea, shortness of breath or wheezing. Physical examination showed lungs clear to auscultation with no crackles, rhonchi or wheezes (Respondent's Exhibit 5; pp 364-367). Petitioner was seen on July 17, 2015, for annual visit. He reported he was doing well with no major concerns. He denied shortness of breath. Physical examination respiratory showed no shortness of breath/cough or phlegm. Physical examination of the lungs showed bilateral equal and fair air movement on exertion. There were no crackles or rhonchi (Respondent's Exhibit 5; pp 339-343). Petitioner was seen on November 18, 2015, for three month follow up. His review of systems was negative including no shortness of breath or cough. Physical examination of the lungs showed bilateral equal and fair air entry on exertion. There were no crackles or rhonchi (Respondent's Exhibit 5; pp 276-280).

Petitioner was seen on April 14, 2016. He noted that he spent most of his day outside either mowing the grass or weed eating, gardening or working in the shop. He indicated that he would work a couple of hours and then rest. Petitioner attributed his difficulty sleeping to many years of working as a coal miner on swing shifts. He indicated that he was taking care of his wife. He also noted that limitations in mobility with aging impacted his ability to hunt and fish. His active medical conditions were noted to be hypertension, dyslipidemia, enlarged prostate, gout, diabetes, adjustment disorder, anxiety disorder, insomnia and ED (Respondent's Exhibit 5; pp 227-232).

Petitioner was seen on May 13, 2016. He denied shortness of breath or cough. Physical examination of the chest was normal without crackle or rhonchi (Respondent's Exhibit 5; pp 218-223). Petitioner was seen by behavioral medicine on August 15, 2016. He reported that he retired from working in 2013 basically due to his wife's failing health. He was not quite ready to retire for himself (Respondent's Exhibit 5; pp 136-140). Petitioner was seen on August 25, 2016, for three month follow up. He denied any shortness of breath. His review of systems respiratory remained negative. Physical examination of the lungs continued to show equal and fair air entry bilaterally with no crackles or rhonchi (Respondent's Exhibit 5; pp 129-133). Petitioner was seen on November 28, 2016, for three month follow up. He denied any shortness of breath. His review of systems respiratory remained negative. Physical examination of the lungs showed equal and fair air entry bilaterally with no crackles or rhonchi (Respondent's Exhibit 5; pp 78-82).

Petitioner was seen on May 30, 2017, for six month follow up. He reported that he was doing fairly well. He denied shortness of breath. His review of systems respiratory was negative. Physical examination of the lungs showed bilateral equal and fair air entry with no crackles or rhonchi (Respondent's Exhibit 5; pp 24-29).

On January 17, 2018, on review of systems respiratory he denied shortness of breath, cough and phlegm. On examination his lungs were clear to auscultation (Respondent's Exhibit 6; pp 51-55). On February 23, 2018, he related burning pain in his feet daily. On review of systems, he had no cough, shortness of breath, dyspnea on exertion or wheeze (Respondent's Exhibit 6; pp 33-36). Petitioner was seen by Behavioral Medicine on March 26, 2018. He complained that the top of his feet were really burning. He also indicated shortness of breath and that he had a history of working 40 years underground in the coal mine (Respondent's Exhibit 6; pp 22-25).

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusions of law:

The Arbitrator concludes that Petitioner did not sustain an occupational disease arising out of and in the course of his employment with Respondent.

In support of this conclusion the Arbitrator notes the following:

The spirometry performed as part of Dr. Istanbouly's examination was invalid and could not be used to determine if Petitioner suffered from any pulmonary defect. The pulmonary function testing performed as part of Dr. Selby's examination was valid. Dr. Selby's testing did not reveal the presence of any obstruction. Furthermore, Petitioner's total lung capacity of 80% at the time of Dr. Selby's examination ruled out restriction. Dr. Selby testified that based upon the objective testing he performed, Petitioner had no impairment in pulmonary function. Dr. Selby testified that Petitioner had the respiratory

or pulmonary capacity to perform any and all of his previous coal mine duties, including his last job working as a repairman.

Dr. Michael Alexander, a B-reader, noted the chest x-ray of March 18, 2014, was positive for coal workers' pneumoconiosis. Dr. Istanbouly is not an A-reader or B-reader and he does not provide a profusion rating in his interpretation, but described Petitioner's case of pneumoconiosis as mild. Dr. Meyer and Dr. Selby are B-readers, who reviewed Petitioner's chest x-ray of March 18, 2014. Dr. Meyer testified that the film was quality 3 due to overexposure, underinflation and mottle. Dr. Meyer testified that the underinflation would move the normal pulmonary vessels closer together if those pulmonary vessels are seen end on they can look like round opacities. When seen en face they look like irregular opacities so it can mimic either type of small opacity. Dr. Meyer testified that mottle typically mimics small opacities of P size. Dr. Meyer testified that the lungs were clear and that there were no small round or small irregular opacities. Dr. Meyer saw no evidence of coal workers' pneumoconiosis. Dr. Selby graded the film as quality 2 due to underinflation. Dr. Selby testified that underinflation can cause crowding which results in increased lung markings that could look like small opacities of pneumoconiosis. Dr. Selby testified that the film did not reveal any evidence of coal workers' pneumoconiosis.

The Arbitrator finds the opinions of Dr. Selby and Dr. Meyer to be more persuasive than those of Dr. Istanbouly and Dr. Alexander.

Although Petitioner testified that he noticed breathing problems before he quit coal mining, specifically when he had to walk up an incline and out of the mine, a review of the medical records does not support his breathing complaints. The medical records from Petitioner's primary care physician in private practice as well as the VA did not reveal any chronic complaints of a respiratory nature nor was there any physical exam showing wheezing or any chest abnormality. Petitioner was not taking, nor had he ever taken, breathing medications. Petitioner indicated that he left work voluntarily at age 68. Petitioner also testified that when he left his employment with Respondent, there were not any repairmen older than him at the time. Petitioner told his physicians at the VA that he left work due to his wife's failing health but was not quite ready to retire himself.

In regard to disputed issues (L) and (O) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusions of law in disputed issues (C) and (F).

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

Illinois Workers' Compensation Commission, Insurance Compliance Division Petitioner, v. Enrique Moreno individually and as President of H&E Demolition, Inc. Respondent.	)	No. 12 INC 157 18 WC 27948

ORDER

Upon the oral request by the Petitioner, The Illinois Workers' Compensation Commission – Insurance Compliance Division, by and through its attorney, the Office of the Illinois Attorney General, this matter is dismissed. The Office of the Attorney General has advised this Commission it no longer seeks to proceed in this matter against Respondent.

K. Kathleen K. Doerries

Commissioner Katherine Doerries

Dated: 12/13/19

DEC 19 2019

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EDWARD SZPUNAR,

Petitioner,

vs. NO: 12 WC 17683

ADVOCATE HEALTH CARE,

Respondent.

ORDER

This matter comes before Commissioner Douglas McCarthy pursuant to the parties' stipulation to amend the Settlement Contract Lump Sum Petition and Order ("Settlement Contract"), previously approved by Arbitrator David Kane on February 21, 2018.

Pursuant to Section 9070.40(e) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission, the parties may reserve the right to amend an approved Settlement Contract by stipulation and Order of a Commissioner to conform with regulatory requirements including, but not limited to, those of Social Security and Medicare. In no event may those amendments abridge the substantive rights of the parties as listed in the previously approved Settlement Contract.

That by the terms of the Settlement Contract, Respondent had agreed that Petitioner's rights under Section 8(a) of the Act would remain open.

That since the approval of the referenced contract, Respondent had submitted a Workers' Compensation Medicare Set Aside (WCMSA) to the Centers for Medicare and Medicaid Services (CMS) for consideration.

That the parties have advised the Commissioner of the decision of CMS, dated May 30, 2019, approving a WCMSA in the amount of $6,220.00. CMS has determined that $6,220.00 adequately considers Medicare's interests with respect to Medicare-covered future medical items and services, including prescription drugs.

That in conjunction with the terms of the Settlement Contract, approved on February 21, 2018, Respondent will fund the WCMSA approved by CMS by lump sum. Petitioner agrees to self-administer the WCMSA, understanding that said monies are to be placed in an interest-bearing account and agrees to only use the funds towards Medicare Allowable Expenses and in accordance with Medicare guidelines.

That by the parties' stipulation, Petitioner's medical benefits under Section 8(a) of the Act terminated as of May 29, 2019.

Therefore, the Commission having jurisdiction over said claim, it is hereby ordered:

1. That the Settlement Contract Lump Sum Petition and Order, as was approved by Arbitrator Kane on February 21, 2018, is hereby modified by the terms of the stipulation of the parties, a copy of which is attached hereto and made a part hereof, so as to conform to the requirements of CMS pursuant to Section 9070.40(e) of the Rules Governing Practice Before the Illinois Workers' Compensation Commission;

2. That it is the further Order of the Commission that pursuant to the referenced Settlement Contract and the parties' subsequent stipulation, Petitioner's continuing rights under Section 8(a) of the Act are hereby closed as of May 29, 2019; and,

3. That the heretofore approved Settlement Contract, as was approved by Arbitrator David Kane on February 21, 2018, remains in full force and effect, and shall be read in concert with this Order and Stipulation.

DATED: DEC 19 2019
DM/pm
12/17/19

Commissioner Douglas McCarthy
12-17-2019

15WC003634
Page1

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ 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

Jeff Schultz,

Petitioner,

vs. NO: 15 WC 003634

Prairie Material,

Respondent.

19IWCC0698

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, penalties, wages, benefit rates 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 May 4, 2017, 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.

19IWCC0698

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.

DEC 19 2019

DATED:
o112119
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHULTZ, JEFF
Employee/Petitioner

Case# **15WC003634**

15WC003669

PRAIRIE MATERIAL
Employer/Respondent

19IWCC0698

On 5/4/2017, 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 0.97% 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:

0657 TURNER & SACKETT LLC
RICHARD L TURNER JR
107 W EXCHANGE ST
SYCAMORE, IL 60178

1109 GAROFALO SCHREIBER STORM
ANDREW L RANE ESQ
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

☐ 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

JEFF SCHULTZ
Employee/Petitioner

v.

PRAIRIE MATERIAL
Employer/Respondent

Case # **15** WC **3634**

Consolidated cases: **15 WC 3669**

19IWCC0698

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 **JESSICA A. HEGARTY**, Arbitrator of the Commission, in the city of **GENEVA**, on **1/17/17**. 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. This findings in this decision relate to 15 WC 3634.

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 _____

19IWCC0698

FINDINGS

On **12/5/14**, 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 $**103,117.04**; the average weekly wage was $**1983.02**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

ORDER

- The Arbitrator finds that the Petitioner's current condition of ill being with respect to his right and left arms/elbows is causally related to the injuries sustained, included the overuse injury to the right arm.
- The Arbitrator finds that the medical expenses listed in PX8 therein truly and accurately reflect amounts due and owing to the listed providers and orders Respondent to satisfy those bills.
- Further, the Arbitrator finds that Petitioner's group health insurance provider (the union welfare fund) has paid $11,971.21 on those medical expenses. Therefore, the Arbitrator finds that the medical expenses claimed should be paid pursuant to the Fee Schedule, as provided under Section 8.2 of the Act, and that the Respondent should be given credit for the group health insurance payments made by the union welfare fund plan, with indemnification to the Petitioner for the credit, pursuant to Section 8(j) of the Act.
- The Arbitrator finds that PX9 contains an accurate reflection of the benefits due by Respondent to Petitioner for the periods from December 5, 2014, through March 10, 2015, and March 11 through September 13, 2015, after he was returned to light-duty work with American Linehaul, through January 1, 2017, in a total amount of $69,977.89.
- The Respondent's refusal to pay temporary total disability benefits and temporary partial disability benefits and the Respondent's refusal to pay for the medical expenses which remain outstanding or for which it failed to reimburse the Petitioner, was vexatious and unreasonable and the delay in payment was vexatious and unreasonable. Applying the credit of $16,000.00 for the advance and $13,750.10 for non-occupational disability benefits leaves a balance due in TTD and TPD benefits of $75,538.68. Under Section 19(k), the penalty assessed at 50% of the total TTD and TPD due is $37,769.34. Pursuant to Section 16 of the Act, attorney's fees should be assessed at 20% of the Section 19(k) penalties, or $7,553.87.

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.

Jason A. Myatt

Signature of Arbitrator

5/1/17
Date

ICArbDec p. 2

MAY 4 - 2017

19IWCC0698

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFF SCHULTZ Petitioner, v.	)	
	)	**15 WC 3634** *consolidated with* 15 WC 3669 15 WC 511
PRAIRIE MATERIAL Respondents.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

Petitioner has three consolidated claims that proceeded to hearing on January 17, 2017 in Geneva, Illinois. Separate decisions will be issued for two of the claims, 15 WC 3634 & 15 WC 3669 (Arb. 2 & 1).

The Arbitrator notes that Petitioner's former attorney filed an Application for Adjustment of Claim, 15 WC 511, with an accident date of August 6, 2014. (Arb. 3). Subsequently, Petitioner obtained new counsel who, unaware of the prior 15 WC 511 filing, filed 15 WC 3669 with respect to the same accident on August 6, 2014. (Arb. 2, 3). When asked by Petitioner's current attorney to dismiss 15 WC 511, Petitioner's former attorney refused. At the hearing, Petitioner's attorney acknowledged a fee petition has been filed by Petitioner's former attorney.

In any event, the Arbitrator will not be issuing findings with respect to 15 WC 511 at present time.

The disputed issues with respect to the case at bar, 15 WC 3634 (Arb, 1) are:

- Accident
- Notice
- Causal connection
- Average weekly wage
- Medical bills
- TTD
- TPD
- Penalties/Fees

FINDINGS OF FACT

Petitioner's First Accident
15 WC 3669

Petitioner testified that on August 6, 2014 he was employed as a "Ready Mix" driver for Respondent and had been so employed since September of 2005. His job duties required him to drive a concrete truck to various job locations, unload the concrete, and return to the terminal to re-load the truck for another delivery. His duties also included mixing the concrete load which

required him to climb up and down a ladder on a given Ready Mix truck to add different ingredients into the load. Part of this process, required him to install various concrete delivery chutes onto the side of the trucks which weigh up to 55 lbs. Some of the chutes installed were at Petitioner's waist-height while others were hung overhead, but in any instance, would require the Petitioner to pull the chutes out and connect them to make a longer reach in order to deliver the load. Petitioner estimated that the chutes were anywhere from 3' to 4' in length, and weighed approximately 50 lbs. without concrete.

The concrete trucks that he operated were all manual transmission, anywhere from 8 to 10 speeds, and required him to use his right, dominant arm to operate the shifting mechanism.

It is undisputed that on August 6, 2014, Petitioner was driving to a job on Interstate 90 westbound near the Randall Road interchange. As he exited the surface road of the highway at 55 mph, there was a slight incline when the road surface transitioned from concrete to dirt causing the truck to jerk which, in turn, caused the Petitioner's left elbow to strike the steering wheel. He immediately noted pain and numbness as if he had "whacked [his] funny bone". He testified that he finished the load and contacted dispatch to inform his employer of the incident. He later returned to the yard where he proceeded to apply ice to his injured elbow.

Petitioner first sought medical attention two days later, on August 8, 2014, at Alexian Brothers Medical Group, where the following accident history was noted:

> *The patient works as a truck driver for the concrete company. He reports driving a truck off road. He hit his left elbow on the metal part of the steering wheel while driving on uneven terrain.*

On exam, Dr. Grzegorz Blecharz noted bruising in the olecranon area as well as swelling and significant tenderness on palpation. (PX 1). X-rays revealed no evidence of acute fracture to the elbow although some spurring at the triceps insertion in the olecranon process was noted. (Id.). Petitioner was diagnosed with a contusion to his left elbow and provided with an "elbow sleeve" which the Petitioner described as "a knee brace for the elbow" at the hearing. (PX1). Dr. Blecharz advised him to ice the area 3-4 times a day and to take ibuprofen for pain. (Id.). Petitioner was released to work on a modified basis with instructions to "limit strong grip/grasp/pinch" with his left arm and was advised to follow-up in three days. (Id.).

Petitioner returned to work the following work day wearing the elbow sleeve which, according to his testimony, did not afford any relief.

On August 11, 2014 Petitioner followed up at Alexian Brothers with complaints of constant stabbing pain with numbness and tingling in his left elbow that radiated into his left hand. (Id.). Tenderness to the left elbow was noted on exam along with crepitation on range of motion. (Id.). Dr. Blecharz discharged Petitioner from care and returned Petitioner to full duty work. (Id.).

Petitioner next presented at Alexian Brothers on December 5, 2014, the alleged accident date of his companion case, 15 WC 3634. (Arb. 1).

Petitioner testified that between his August 4, 2014 accident and December 5, 2014 he experienced numbness, tingling and the feeling that his left elbow was falling asleep. He further testified that he began to experience pain in his right elbow shortly after the August, 2014 accident. He attributed this right elbow pain to overuse in his job duties.

Petitioner testified that prior to August 6, 2014, he had never experienced pain, numbness or feeling like his funny bone was acting up in either one of his elbows.

15 WC 3634
The Case at Bar

As stated above, immediately after the initial, August 8, 2014 accident through December 5, 2014, Petitioner noticed that his left elbow brace was not affording any relief and that his left elbow remained numb, tingling and kept falling asleep. He was not able to operate the fuel tank pump for his Ready Mix truck with his left hand as he was accustomed, and had to use his right. He also noticed when going up the ladder on the truck, he would have to use his right arm to approach instead of his left arm. He had difficulty performing his customary work duties such as carrying items up and down truck ladders and working with the chutes. As a result, he began relying on his right arm more to perform these types of tasks, including breaking concrete. As he would attempt to grasp and pick up or place concrete chutes on trucks, he noticed that he was beginning to experience pain in both elbows.

Petitioner testified that he continued to work despite the initial injury in August of 2014 to his left elbow and the subsequent occurrence of symptoms in his right elbow up until December 5, 2014. At that point, after speaking with the Operations Director, Jeff Lesniak, he was sent to see "the company doctor" at Alexian Brothers when his left arm was not getting any better and his right arm became worse.

Alexian Brothers records note that Petitioner presented to physician's assistant, Heather Venamore, on December 5, 2014, with complaints of ongoing pain in his left elbow as well as right elbow and shoulder pain "due to over usage compensating for eft arm" (PX 1). On exam bilateral elbow tenderness, effusion and crepitation was noted. (Id.). A diagnosis of medial and lateral epicondylitis to both elbows was noted. Petitioner was returned to work with restricted duty of 10 lbs. lift, carry, push, and pull with no repetitive motion. He was also prescribed with physical therapy. (Id.).

On December 15, 2014 Petitioner presented for initial consult with Dr. Sajjad Murtaza (Physical Medicine & Rehabilitation) at Rand Medical Center where his ongoing complaints of bilateral elbow and right shoulder pain were noted. (PX5). On exam, tenderness to palpation over the medial and lateral epicondyles, bilaterally, were noted along with decreased range of motion in the right shoulder accompanied by positive Neer's and Hawkin's testing. (Id.). Petitioner was assessed with bilateral epicondylitis, medial and lateral, and right rotator cuff pain. His current work restrictions were continued, a right shoulder MRI was ordered along with physical therapy for his bilateral elbow condition and "medication management". (PX5.).

On December 21, 2014, a right shoulder CT was performed (as MRI was contraindicated due to metal in Petitioner's eye) and was unremarkable. (PX2).

On December 29, 2014 Petitioner returned to Rand Medical Center where he presented for initial consult with Dr. Irvin Wiesman (Hand & Microvascular Surgeon). (Id.). Petitioner complained of bilateral elbow and forearm pain with bilateral hand numbness and tingling with weakness. (Id.). Petitioner also complained of forearm pain, numbness and tingling worse in the fourth and fifth digits of both hands. (Id.). Right shoulder pain secondary to repetitive, heavy lifting was also noted. Dr. Wiesman noted the right elbow pain "is worse after he suffered

a forceful contusion of the right elbow". (Id.). On exam, tenderness to palpation along the radial tunnel bilaterally, more so on the right, along with positive bilateral Tinel's at the cubital tunnel was noted. A diagnosis of a medial and lateral epicondylitis, bilateral cubital tunnel syndrome as well as bilateral radial tunnel syndrome was noted. Dr. Wiesman discussed surgical intervention starting with right medial and lateral epicondylectomies with debridement of extensor and flexor "wad" and noted possible decompression of the ulnar nerve at the cubital tunnel may be considered pending results of bilateral, upper extremity EMG studies. Petitioner was instructed to continue therapy and follow-up in one month. (PX5).

Records from New Life Medical Center show that Petitioner underwent physical therapy/occupational therapy from early January 2, 2015 through May 13, 2016. (PX3).

On March 11, 2015 Petitioner presented to Dr. Robert Fink of Gold Coast Orthopaedic Spine & Hand Surgery. (PX4; PX4a.). The transcript of Dr. Fink's evidence deposition of December 9, 2015, was admitted as PX13, along with his initial narrative report of May 1, 2015, and his subsequent supplemental report of May 13, 2015, admitted respectively, as PX6 and PX7.

It was the opinion of Dr. Fink that the Petitioner injured his left elbow in striking the steering wheel of his work truck on August 6, 2014. This direct trauma caused the cubital tunnel to tighten resulting in the symptoms and the diagnosis in the left arm. With respect to Petitioner's right arm, the doctor noted that carrying chutes in his opposite, right hand, with a weight of 50 to 55 lbs. or better, with his elbow bent at a 90° angle, and his wrist dorsiflexed, could put pressure on the right cubital tunnel. In the treating surgeon's opinion, both the direct trauma to the left elbow and the pressure put on the cubital tunnel in the right with job related overuse, could cause cubital tunnel syndrome in each arm.

The Petitioner underwent surgery consisting of a right cubital tunnel release and partial right medial epicondylectomy on July 17, 2015, performed at Methodist Hospital of Chicago by Dr. Fink. Approximately one month later, on August 21, 2015, he underwent a release of the left cubital tunnel syndrome with a debridement of the extensor carpi brevis tendon of the left elbow, again performed by Dr. Fink at Methodist Hospital of Chicago. The Petitioner was afforded light duty, including both office work and guard duty work at different locations for the Respondent, from December 5, 2014, through March 10, 2015. He has been off work and has not returned to employment with the Respondent since March 11, 2015, due to the Respondent being unable to accommodate his restrictions. The Petitioner was off work from American Linehaul from December 5, 2014, through September 13, 2015, as a result of restrictions imposed by the various medical treaters, including the time off following surgery. He was returned to light duty with a 20 lbs. lift maximum and no ladder climbing by Dr. Fink on September 9, 2015, and actually returned to duty at American Linehaul on a light-duty restriction, following that partial release, on September 14, 2015.

The Petitioner testified that PX9 contains an accurate reflection of his light-duty earnings in employment with Respondent for the time period from December 5, 2014, through March 10, 2015, and the earnings in his secondary employment with American Linehaul once he was returned to light-duty work there on September 14, 2015, through January 1, 2017. The paystubs and the temporary partial disability calculations were accurately reflected under Tab B of PX9 and as reflected at page 3 of the exhibit, the total temporary partial disability due stands at $69,977.89. The total temporary total disability due from March 11, 2015, through September 13, 2015, was $35,310.89.

The Petitioner testified that in each instance when he would receive a work status form through Dr. Fink's office, providing his restrictions, he would fax those to Respondent and then would ask if there was work available within those restrictions, and on each occasion after March 10, 2015, when he did that, he has never been informed that there is any work available for him within the restrictions imposed.

As of the last appointment with Dr. Fink, prior to the arbitration hearing in this matter, Petitioner's restrictions were increased from 10 lbs. to 45 lbs. lift, with no climbing on ladders.

The Petitioner testified that as of the date of hearing, the conditions in his right and left arms have improved, but with certain tasks, such as attempting to paint with a roller, he will get pain in his elbows by extending and putting pressure on the wall to roll. He has been working again at American Linehaul since September 14, 2015, doing weights and inspections where he will take the dimensions of freight by putting them on a scale and checking the weights and doing measurements. Since his return in September of 2015, he has been able to operate a forklift and has started driving that to load and unload. On occasion he will "jump in a truck" if necessary when one of the three regular drivers is out sick. The straight truck he operates for American Linehaul, on the occasions when he might be called in to substitute for an absent driver, has an automatic transmission. He is taking prescriptive Tylenol IV, on a script from Dr. Fink currently, and is still treating with Dr. Fink and had a scheduled appointment as of the date of hearing for shortly after the arbitration proceedings.

The Petitioner testified that PX8 is an accurate reflection of the medical bills incurred for treatment with a medical billing summary which accurately summarizes the dates of treatment, the charges, payments made to providers, and the balances claimed due and owing. With the exception of the unrelated charges for an eye physician, which are not included in the balance totals, all the other charges noted on PX8 were related to care and treatment afforded for the injuries to his bilateral upper extremities.

Petitioner testified that PX10 accurately reflected payments made through a disability insurance plan with his union, Local 786 Building Material Welfare Fund, in addition to payments made for medical bills incurred for treatment through the same union fund. The welfare fund itemized its payments, at PX 10, p. 4, as medical benefits paid of $4325.78 and total disability payments of $9604.40, for a total of $13,930.18. Nevertheless, the parties stipulated on the Request for Hearing that the Petitioner has received the sum of $13,750.10 in non-occupational indemnity disability benefits and $16,000.00 in advances for which credit may be allowed under Section 8(j) of the Act.

Respondent presented the report of its Section 12 examining physician, Dr. Prasant Atluri, who examined Petitioner on November 17, 2016, at the request of Respondent. Dr. Atluri indicated in his report that he had reviewed the job description for Respondent, and some of the records of treatment, but absent from his list are the treating records of Dr. Fink. He also indicated that he was not provided with the EMG results and commented that as a result, he was unable to determine the specific diagnoses in more detail, though his own physical exam results led him to an opinion that Petitioner has tenderness in both elbows consistent with cubital tunnel syndrome. It was his opinion that based upon his understanding of the Petitioner's work activities as a Ready Mix driver, his bilateral upper extremity conditions would not be considered work-related.

Petitioner further alleges contemporaneous employment since 2010 as a warehouse lead man and driver for American Linehaul, working anywhere from 30 to 50 hours per week in 2014. His duties there included operating a forklift to load and unload commodities packed on forklifts. On occasion, he would also drive for American Linehaul if one of their three full-time drivers was not available. The trucks that he operated for American Linehaul were both standard and automatic transmission. There was little lifting involved in his position as a warehouse lead man with American Linehaul, although occasionally he might have to pick up a box weighing up to 20 to 30 lbs. to put it back onto a pallet. The driving that he did for American Linehaul, according to his testimony, was sporadic and occasional, as compared to the driving done on a frequent basis as a Ready Mix driver for Respondent.

Petitioner testified that Respondent's Yard Supervisor, Buddy Horn, would direct the Petitioner and other drivers which trucks to use. Mr. Horn would open up the office for the drivers to punch in and out and to use the washroom. Mr. Horn would provide directions both with respect to where the delivery site was and with respect to the location of materials that would be necessary to load the mix correctly. Mr. Horn would also assign other tasks to the drivers besides driving, if that became necessary, such as doing chores around the yard. Mr. Horn would issue the tickets for the loads, and the tickets would then go back into the office by a pneumatic tube after the delivery occurred and it was Petitioner understood that it was Mr. Horn's responsibility to collect the job tickets once they were completed.

Petitioner testified to a number of conversations he had with Buddy Horn before August 6, 2014, "on almost a daily basis" where the issue of Petitioner's contemporaneous employment at American Linehaul was discussed.

Petitioner testified that Exhibit 9 accurately depicts his wage records and earnings with Respondent and American Linehaul as well as with respect to his earnings in employment following his injuries both on a part-time, light-duty basis with Respondent and, later, following his surgeries, in his employment at American Linehaul once he was released to a duty restriction which allowed him to return to employment at American Linehaul.

CONCLUSION OF LAW

With respect to "C", whether an accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

The Petitioner was involved in a work related accident on August 6, 2014 when he sustained trauma to his left elbow while en route to a job. Petitioner was exiting Interstate 90, westbound near the Randall Road interchange, at 55 mph, when his truck jerked and he "whacked" his left elbow on the steering wheel. He immediately noted pain and numbness that felt as if he had "whacked [his] funny bone". He first sought medical attention two days later, on August 8, 2014, at Alexian Brothers Medical Group, where he reported an accident history consistent with his testimony at arbitration. On exam, Dr. Grzegorz Blecharz noted bruising in the olecranon area, minimal swelling and significant tenderness on palpation. (PX 1) X-rays revealed no evidence of acute fracture to the elbow although some spurring at the triceps insertion in the olecranon process was noted. (Id.). Petitioner was diagnosed with a contusion to his left elbow, provided with an "elbow sleeve", advised to ice the area 3-4 times a day and take ibuprofen. (Id.).

Petitioner testified that subsequent to that incident, he noticed increased pain and numbness in the left elbow and then, after a period of days, symptoms of pain and numbness in his right arm which became more evident as he continued to use the right arm to do tasks such as placing or pulling off concrete chutes on his truck, or climbing the ladder of his truck. The treating orthopaedic surgeon, Dr. Robert Fink, testified that the direct trauma to the left elbow where he hit the left elbow on the steering wheel would have tightened the cubital tunnel, to cause the symptoms and the diagnosis in the left arm. Carrying chutes in his opposite, right hand, with a weight of 50 to 55 lbs. or better, with his elbow bent at a 90° angle, and his wrist dorsiflexed, carrying that heavy weight could put pressure on the cubital tunnel on the right arm. In the treating surgeon's opinion, both the direct trauma to the left elbow and the pressure put on the cubital tunnel in the right with the overuse, could cause cubital tunnel syndrome in each arm.

The Arbitrator recognizes that, at the same time in the fall of 2014, Petitioner was also engaged in job duties for American Linehaul that consisted mainly of operating a forklift. He would also occasionally operate a delivery truck when a regular driver was absent. The Arbitrator has also taken into consideration the evidence of Petitioner's "side business" in and through the entity known as Complete Care for You. The Petitioner's job duties at American Linehaul do not appear to encompass nearly the physical demand nor the degree of exposure to repetitive stress to the upper extremities that he encountered while in the employ of Respondent, and the type of activity that the treating surgeon testified as contributing to the onset of symptoms in the right elbow and exacerbation of symptoms in the left elbow after the initial traumatic insult to his left elbow/arm on August 6, 2014. His responsibilities in running cleaning and maintenance jobs through Complete Care for You were mainly supervisory in nature as opposed to physical, other than occasionally operating a plow truck.

The Arbitrator has also considered the report of the Respondent's examining physician, Dr. Atluri, who specifically noted in his report that the information on past medical treatment available to him was limited, and who admitted that the written job description for Petitioner's job indicated exposure to heavy lifting, pushing and pulling on an intermittent basis up to 70 pounds, with climbing and the operation of a sprayer hose, though he declined to opine that these activities might or could contribute to the diagnosis of bilateral epicondylitis or bilateral cubital tunnel.

In considering the evidence in its entirety, the Arbitrator finds the testimony of Dr. Fink, as well as the testimony of the Petitioner, more persuasive on the issue of accident. The Arbitrator finds that the Petitioner sustained injury to the left and right elbows/arms arising out of and in the course of his employment with Respondent.

With respect to "D", what was the date of the accident, the Arbitrator finds as follows:

It is undisputed that Petitioner sustained trauma to his left elbow on August 6, 2014.

With respect to the accident at issue, with a claimed date of December 5, 2014, the Arbitrator finds that the initial conservative measures recommended by the treating medical provider at Alexian Brothers Medical Group, consisting basically of wearing a knee brace on the left arm, failed to ameliorate the symptoms and, in fact, the Petitioner began to experience more symptoms in the left elbow. The Petitioner then began experiencing the onset of symptoms of cubital tunnel syndrome in the right arm/elbow, to the extent that by December 5, 2014, the pain in his left elbow and the new onset of pain in his right elbow were such that he was no

longer able to perform his duties without pain and was referred to Alexian Brothers Medical Group, again, by his employer. The Arbitrator therefore finds that on December 5, 2014, when Petitioner received medical treatment with the physician's assistant at Alexian Medical Group and was placed on restricted duty of 10 lbs., and provided a diagnosis of contusion to the elbows, with further restrictions of limited strong grip/grasp/pinch on the right and left and no reaching or lifting above shoulders, that the condition in his right elbow had manifested itself and that the left elbow condition now was in an aggravated state that required the imposition of restricted work duties by the medical provider.

With respect to "E", was timely notice of the accident given to Respondent, the Arbitrator finds as follows:

The Petitioner's undisputed testimony was that he called the dispatcher for Respondent on August 6, 2014, immediately after striking his elbow on the steering wheel, to inform them of the injury to his left elbow and to inform them that he would be seeking to return to the yard to ice the left elbow.

Further, the Petitioner's unrebutted testimony was that on December 5, 2014, after the condition in his right elbow had fully manifested itself and the aggravation to the left elbow was such that he now having difficulty carrying items up the ladder or difficulty with the chutes and hammering on the drum to break off the concrete, and his left hand was now going numb, with ongoing tingling and numbness in both the left and right upper extremities, that he was referred to the "company doctor", Alexian Brothers Medical Group, by Jeff Lesniak, the Operations Director for Respondent. Implicitly, the Operations Director was made aware of the symptoms in both arms, in that Petitioner was instructed by Lesniak to return to the provider recommended by his employer, Alexian Brothers Medical Group, for further evaluation.

As such, the Arbitrator finds that timely notice of each accident was given to the Respondent.

With respect to "F", is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Based upon the testimony of the Petitioner, and a review of the medical records, and most importantly the opinions of the treating orthopaedic surgeon, Dr. Robert Fink, the Arbitrator finds that the Petitioner sustained ulnar nerve entrapment (cubital tunnel), as diagnosed by electrical studies and by physical examination, as well as observed intra-operatively with respect to both the left and right elbows.

Dr. Fink testified that the initial trauma to the left elbow on August 4, 2014 (15 WC 3669) and the overuse syndrome to Petitioner's right elbow, are supported by the medical evidence and in the testimony of the Petitioner with respect to his job duties.

Despite surgery to his right elbow on July 17, 2015, and his left elbow on August 21, 2015, it is apparent that the Petitioner remains on restrictions as of the time of hearing of a 45 lbs. lift maximum with no ladder climbing, based upon a functional capacity evaluation performed in October of 2016. The FCE examiner at Presence Saint Joseph Family Care Center Rehabilitation Services clearly indicates in the FCE report that the Petitioner's current level of ability does not meet the job duties on lift/carry, push/pull, or climb in order to return to his prior position as a Ready Mix driver with Respondent (PX 14).

The Petitioner testified to ongoing pain and limitation in full extension of his arms, such as when attempting to apply a pain roller, and to symptoms including pain in both elbows when he extends his arms and puts pressure on his arms. He remains on Tylenol IV, on a prescription from Dr. Fink, and was still treating with Dr. Fink as of the time of hearing, scheduled to return to him the day following arbitration, January 18, 2017.

The Arbitrator has also considered the report of the Respondent's examining physician, Dr. Atluri, who noted that the written job description for Petitioner's job indicated exposure to heavy lifting, pushing and pulling on an intermittent basis up to 70 pounds, with climbing and the operation of a sprayer hose, though he declined to opine that these activities might or could contribute to the diagnosis of bilateral epicondylitis or bilateral cubital tunnel. Dr. Atluri noted that:

> *The clinical documentation suggests that Mr. Schultz had bilateral elbow conditions including lateral epicondylitis and cubital tunnel syndrome. There are some notes which even indicate the patient was suffering from radial tunnel syndrome as well.*

Dr. Alturi acknowledged that he did not have the operative notes or the electrodiagnostic testing for review and could not, therefore, determine the specific diagnoses in detail.

With respect to his exam of Petitioner on November 17, 2016, Dr. Alturi noted findings "suspicious for persistent medial epicondylitis with bilateral tenderness involving the ulnar nerves" consistent with cubital tunnel syndrome.

Based on the aforementioned facts and the record considered as a whole, the Arbitrator finds that the Petitioner's current condition of ill being with respect to his right and left arms/elbows is causally related to the injuries sustained, included the overuse injury to the right arm.

With respect to "G", what were Petitioner's earnings, the Arbitrator finds as follows:

The Petitioner's unrebutted testimony was that he had informed the Yard Supervisor, Buddy Horn, on numerous occasions of his concurrent employment with American Linehaul, and that they had had numerous conversations about this before August 6, 2014. The Arbitrator finds that the Yard Supervisor, Buddy Horn, was an agent of Respondent and the Respondent had knowledge of concurrent employment of the Petitioner with American Linehaul, such that the wages earned in employment with American Linehaul should be included.

The paystubs and W-2s, evidencing earnings in employment both with the Respondent and with American Linehaul in the fifty-two weeks prior to August 6, 2014, were admitted into evidence as part of PX9. There is an accurate calculation of average weekly wage contained as a summary within PX9. The Arbitrator finds that, by preponderance of the evidence, the Petitioner has proved earnings with Respondent and American Linehaul in a total amount of $103,117.04 in the fifty-two weeks prior to August 6, 2014, and that the average weekly wage, calculated pursuant to Section 10 of the Act, was $1,983.02.

With respect to "J", whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

The Arbitrator finds that PX8 is an accurate representation of the medical bills incurred by the Petitioner in medical treatment to address the conditions in his right and left elbows, as summarized on the Medical Billing Summary as part of PX8, and as testified to by the Petitioner as being an accurate reflection of medical expenses incurred. The Arbitrator finds that the medical expenses listed therein truly and accurately reflect amounts due and owing to, respectively:

- Alexian Brothers Medical Group
- Molecular Imaging, New Life Medical Center
- Gold Coast Orthopaedic Spine & Hand Surgery
- Rand Medical Center
- Rx Development Associates
- Now Script Pharmacy
- Windy City Medical Specialists
- Methodist Hospital
- Dr. Ailyn Tan
- Dr. John Mazzarella
- Jay Anesthesia
- Meds Management Group
- Presence Family Care Center

Further, the Arbitrator finds that Petitioner's group health insurance provider (the union welfare fund) has paid $11,971.21 on those medical expenses. Therefore, the Arbitrator finds that the medical expenses claimed should be paid pursuant to the Fee Schedule, as provided under Section 8.2 of the Act, and that the Respondent should be given credit for the group health insurance payments made by the union welfare fund plan, with indemnification to the Petitioner for the credit, pursuant to Section 8(j) of the Act.

With respect to "L", what temporary benefits are in dispute with respect to temporary total disability and temporary partial disability, and whether Respondent should pay said benefits to Petitioner, the Arbitrator finds as follows:

The Arbitrator finds, on the basis of the testimony of the Petitioner, and PX9, testified to by the Petitioner as an accurate and complete reflection of both the periods of temporary total disability and the periods of temporary partial disability, that the Petitioner, after having been afforded light duty work within the restrictions by Respondent from December 5, 2014, through March 10, 2015, was no longer afforded work by Respondent within his restrictions and was off work from March 11, 2015, to the present, with respect to his job duties for Respondent. The Petitioner's unrebutted testimony was that American Linehaul was unable to meet his restrictions from December 5, 2014, when he was placed on a 10 lbs. lift/carry/push/pull at Alexian Brothers Medical Group, through September 13, 2015, after he was returned to light duty work following surgeries to his right and left elbows, by Dr. Fink.

Petitioner is therefore due temporary total disability from March 11, 2015, through September 13, 2015, in the weekly amount of $1,322.01 per week.

The Arbitrator finds that the Petitioner is entitled to temporary partial disability benefits for the time from December 5, 2014, through March 10, 2015, and for the period from September 14, 2015, through January 1, 2017, in that during those time periods he was working light duty on a part-time basis or a full-time basis and earning less than he would have been earning if employed in the full capacity of his job as a Ready Mix driver, pursuant to Section 8(a) of the Act.

The Arbitrator finds that PX9 contains an accurate reflection of the benefits due in the periods from December 5, 2014, through March 10, 2015, and September 14, 2015, after he was returned to light-duty work with American Linehaul, through January 1, 2017, in a total amount of $69,977.89.

With respect to "M", whether penalties and fees should be imposed upon Respondent, the Arbitrator finds as follows:

The Arbitrator finds that the Respondent's reliance upon the testimony of Dr. Prasant Atluri to deny benefits, if that indeed was a basis for denying the payment of medical expenses or the payment of temporary total disability benefits and temporary partial disability benefits, is not reasonably founded. The Respondent's refusal to pay temporary total disability benefits from March 11, 2015, through September 13, 2015, and temporary partial disability from December 5, 2014, through March 10, 2015, and for the period from September 14, 2015, through January 1, 2017, and the Respondent's refusal to pay for the medical expenses which remain outstanding or for which it failed to reimburse the Petitioner, was vexatious and unreasonable and the delay in payment was vexatious and unreasonable.

Applying the credit of $16,000.00 for the advance and $13,750.10 for non-occupational disability benefits leaves a balance due in TTD and TPD benefits of $75,538.68. Under Section 19(k), the penalty assessed at 50% of the total TTD and TPD due is $37,769.34. Pursuant to Section 16 of the Act, attorney's fees should be assessed at 20% of the Section 19(k) penalties, or $7,553.87.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ 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

Jeff Schultz,

Petitioner,

vs. NO: 15WC 003669

Prairie Material,

Respondent.

19IWCC0699

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, penalties, wages, benefit rates 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 May 4, 2017, 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.

19IWCC0699

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: DEC 19 2019
o112119
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SCHULTZ, JEFF
Employee/Petitioner

Case# **15WC003669**

15WC003634

PRAIRIE MATERIAL
Employer/Respondent

19IWCC0699

On 5/4/2017, 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 0.97% 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:

0657 TURNER & SACKETT LLC
RICHARD L TURNER
107 W EXCHANGE ST
SYCAMORE, IL 60178

1109 GAROFALO SCHREIBER STORM
ANDREW L RANE ESQ
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ 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

JEFF SCHULTZ
Employee/Petitioner

v.

PRAIRIE MATERIAL
Employer/Respondent

Case # **15** WC **3669**

Consolidated cases: **15 WC 3634**

19IWCC0699

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 **JESSICA A. HEGARTY**, Arbitrator of the Commission, in the city of **GENEVA**, on **1/17/17**. 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. The findings in this decision relate to 15 WC 3669.

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 _____

19IWCC0699

FINDINGS

On **8/6/14**, 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 $**103,117.04**; the average weekly wage was $**1,983.02**.

On the date of accident, Petitioner was **39** years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** 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 $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

The Arbitrator finds that the Petitioner's current condition of ill being with respect to his left arm/elbow is causally related to the injuries sustained in his work related accident of August 6, 2014.

The Arbitrator finds that, by preponderance of the evidence, the Petitioner has proved earnings with Respondent, Prairie Material and American Linehaul in a total amount of $103,117.04 in the fifty-two weeks prior to August 6, 2014, and that the average weekly wage, calculated pursuant to Section 10 of the Act, was $1,983.02.

With respect to the issues of medical bills and Petitioner's allegations that fees/penalties should be imposed upon the Respondent, those findings are deferred to the companion case 15 WC 3634.

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.

Jason C. Knott

Signature of Arbitrator

4/28/17
Date

MAY 4 - 2017

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JEFF SCHULTZ Petitioner, v. **PRAIRIE MATERIAL** Respondents.	))))))))))	**15 WC 3669** *consolidated with* 15 WC 3634 15 WC 511

ADDENDUM TO THE DECISION OF THE ARBITRATOR

Petitioner has three consolidated claims that proceeded to hearing on January 17, 2017 in Geneva, Illinois. (Arb. 1, 2). Separate decisions will be issued for two of the claims.

The disputed issues with respect to the case at bar, 15 WC 3669 (Arb 2) are:

- Causal connection
- Average weekly wage
- Medical bills
- Penalties/Fees

The Arbitrator notes that Petitioner's former attorney filed an Application for Adjustment of Claim, 15 WC 511, with an accident date of August 6, 2014. (Arb. 3). Subsequently, Petitioner obtained new counsel who, unaware of the prior 15 WC 511 filing, filed 15 WC 3669 with respect to the same accident on August 6, 2014. (Arb. 2, 3). When asked by Petitioner's current attorney to dismiss 15 WC 511, Petitioner's former attorney refused. At the hearing, Petitioner's attorney acknowledged a fee petition has been filed by Petitioner's former attorney.

In any event, the Arbitrator will not be issuing findings with respect to 15 WC 511 at present time.

FINDINGS OF FACT

15 WC 3669

Petitioner testified that on August 6, 2014 he was employed as a "Ready Mix" driver for Respondent and had been so employed since September of 2005. His job duties required him to drive a concrete truck to various job locations, unload the concrete, and return to the terminal to re-load the truck for another delivery. His duties also included mixing the concrete load which required him to climb up and down a ladder on a given Ready Mix truck to add different ingredients into the load. Part of this process, required him to install various concrete delivery

chutes onto the side of the trucks which weighed up to 55 lbs. Some of the chutes installed were at Petitioner's waist-height while others were hung overhead, but in any instance, would require the Petitioner to pull the chutes out and connect them to make a longer reach in order to deliver the load. Petitioner estimated that the chutes were anywhere from 3' to 4' in length, and weighed approximately 50 lbs. without concrete.

Petitioner testified that on August 6, 2014, he was driving to a job on Interstate 90 westbound near the Randall Road interchange. As he exited the surface road of the highway at 55 mph, there was a slight incline when the road surface transitioned from concrete to dirt causing the truck to jerk which, in turn, caused the Petitioner's left elbow to strike the steering wheel. He immediately noted pain and numbness as if he had "whacked [his] funny bone". He testified that he finished the load and contacted dispatch to inform his employer of the incident. He later returned to the yard where he proceeded to apply ice to his injured elbow.

Petitioner first sought medical attention two days later, on August 8, 2014, at Alexian Brothers Medical Group, where the following Petitioner's accident history was consistent with his testimony at hearing.

On exam, Dr. Grzegorz Blecharz noted bruising in the olecranon area as well as swelling and significant tenderness on palpation. (PX 1). X-rays revealed no evidence of acute fracture to the elbow although some spurring at the triceps insertion in the olecranon process was noted. (Id.). Petitioner was diagnosed with a contusion to his left elbow and provided with an "elbow sleeve" which the Petitioner described as "a knee brace for the elbow" at the hearing. (PX1). Dr. Blecharz advised him to ice the area 3-4 times a day and to take ibuprofen for pain. (Id.). Petitioner was released to work on a modified basis with instructions to "limit strong grip/grasp/pinch" with his left arm and was advised to follow-up in three days. (Id.).

Petitioner returned to work the following work day wearing the elbow sleeve which, according to his testimony, did not afford any relief.

On August 11, 2014 Petitioner followed up at Alexian Brothers with complaints of constant stabbing pain with numbness and tingling in his left elbow that radiated into his left hand. (Id.). Tenderness to the left elbow was noted on exam along with crepitation on range of motion. (Id.). Dr. Blecharz discharged Petitioner from care and returned Petitioner to full duty work. (Id.).

Petitioner next presented at Alexian Brothers on December 5, 2014, the alleged accident date of his companion case, 15 WC 3634. (Arb. 1).

Petitioner testified that between his August 6, 2014 accident and December 5, 2014 he experienced numbness, tingling and the feeling that his left elbow was falling asleep. He further testified that he began to experience pain in his right elbow shortly after the August, 2014 accident. He attributed this right elbow pain to overuse in his job duties.

Petitioner testified that prior to August 6, 2014, he had never experienced pain, numbness or feeling like his funny bone was acting up in either one of his elbows.

In addition to his work for Respondent, Petitioner alleges contemporaneous employment since 2010 as a warehouse lead man and driver for American Linehaul, working anywhere from 30 to 50 hours per week in 2014. His duties there included operating a forklift to load and unload commodities packed on forklifts. On occasion, he would also drive for American Linehaul if one

of their three full-time drivers was not available. The trucks that he operated for American Linehaul were both standard and automatic transmission. There was little lifting involved in his position as a warehouse lead man with American Linehaul, although occasionally he might have to pick up a box weighing up to 20 to 30 lbs. to put it back onto a pallet. The driving that he did for American Linehaul, according to his testimony, was sporadic and occasional, as compared to the driving done on a frequent basis as a Ready Mix driver for Respondent.

Petitioner testified that Respondent's Yard Supervisor, Buddy Horn, would direct the Petitioner and other drivers which trucks to use. Mr. Horn would open up the office for the drivers to punch in and out and to use the washroom. Mr. Horn would provide directions both with respect to where the delivery site was and with respect to the location of materials that would be necessary to load the mix correctly. Mr. Horn would also assign other tasks to the drivers besides driving, if that became necessary, such as doing chores around the yard. Mr. Horn would issue the tickets for the loads, and the tickets would then go back into the office by a pneumatic tube after the delivery occurred and it was Petitioner understood that it was Mr. Horn's responsibility to collect the job tickets once they were completed.

Petitioner testified to a number of conversations he had with Buddy Horn before August 6, 2014, "on almost a daily basis" where the issue of Petitioner's contemporaneous employment at American Linehaul was discussed.

Petitioner testified that Exhibit 9 accurately depicts his wage records and earnings with Respondent and American Linehaul as well as with respect to his earnings in employment following his injuries both on a part-time, light-duty basis with Respondent and, later, following his surgeries, in his employment at American Linehaul once he was released to a duty restriction which allowed him to return to employment at American Linehaul.

Petitioner's companion claim
15 WC 3634

As stated above, immediately after the initial, August 6, 2014 accident through December 5, 2014, Petitioner noticed that his left elbow brace was not affording any relief and that his left elbow remained numb, tingling and kept falling asleep. He was not able to operate the fuel tank pump for his Ready Mix truck with his left hand as he was accustomed, and had to use his right. He also noticed when going up the ladder on the truck, he would have to use his right arm to approach instead of his left arm. As a result of the difficulty he encountered performing his customary work duties with his left arm, he began relying on his right arm to perform these types of tasks, including breaking concrete. As he would attempt to grasp and pick up or place concrete chutes on trucks, he noticed that he was beginning to experience pain in both elbows.

Petitioner testified that he continued to work despite the initial injury in August of 2014 to his left elbow and the subsequent occurrence of symptoms in his right elbow up until December 5, 2014. At that point, after speaking with the Operations Director, Jeff Lesniak, he was sent to see "the company doctor" at Alexian Brothers when his left arm was not getting any better and his right arm became worse.

Alexian Brothers records note that Petitioner presented to physician's assistant, Heather Venamore, on December 5, 2014, with complaints of ongoing pain in his left elbow as well as right elbow and shoulder pain "due to over usage compensating for eft arm" (PX 1). On exam bilateral elbow tenderness, effusion and crepitation was noted. (Id.). A diagnosis of medial and

lateral epicondylitis to both elbows was noted. Petitioner was returned to work with restricted duty of 10 lbs. lift, carry, push, and pull with no repetitive motion. He was also prescribed with physical therapy. (Id.).

On December 15, 2014 Petitioner presented for initial consult with Dr. Sajjad Murtaza (Physical Medicine & Rehabilitation) at Rand Medical Center where his ongoing complaints of bilateral elbow and right shoulder pain were noted. (PX5). On exam, tenderness to palpation over the medial and lateral epicondyles, bilaterally, was noted along with decreased range of motion in the right shoulder accompanied by positive Neer's and Hawkin's testing. (Id.). Petitioner was assessed with bilateral epicondylitis, medial and lateral, and also right rotator cuff pain. His current work restrictions were continued, a right shoulder MRI was ordered along with occupational/physical therapy for his bilateral elbow condition and "medication management". (PX5.).

On December 21, 2014, a right shoulder CT was performed (as MRI was contraindicated due to metal in Petitioner's eye) and was unremarkable. (PX2).

On December 29, 2014 Petitioner returned to Rand Medical Center where he presented for initial consult with Dr. Irvin Wiesman (Hand & Microvascular Surgeon). (Id.). Petitioner complained of bilateral elbow and forearm pain with bilateral hand numbness and tingling with weakness. (Id.). Petitioner also complained of forearm pain, numbness and tingling worse in the fourth and fifth digits of both hands. (Id.). Right shoulder pain secondary to repetitive, heavy lifting was also noted. Dr. Wiesman noted the right elbow pain "is worse after he suffered a forceful contusion of the right elbow". (Id.). On exam, tenderness to palpation along the radial tunnel bilaterally, more so on the right, along with positive bilateral Tinels at the cubital tunnel was noted. A diagnosis of a medial and lateral epicondylitis, bilateral cubital tunnel syndrome as well as bilateral radial tunnel syndrome was noted. Dr. Wiesman discussed surgical intervention starting with right medial and lateral epicondylectomies with debridement of extensor and flexor "wad" and noted possible decompression of the ulnar nerve at the cubital tunnel may be considered pending results of bilateral, upper extremity EMG studies. Petitioner was instructed to continue therapy and follow-up in one month. (PX5).

Records from New Life Medical Center show that Petitioner underwent physical therapy/occupational therapy from early January 2, 2015 through May 13, 2016. (PX3).

On March 11, 2015 Petitioner presented to Dr. Robert Fink of Gold Coast Orthopaedic Spine & Hand Surgery. (PX4; PX4a.). The transcript of Dr. Fink's evidence deposition of December 9, 2015, was admitted as PX13, along with his initial narrative report of May 1, 2015, and his subsequent supplemental report of May 13, 2015, admitted respectively, as PX6 and PX7.

It was the opinion of Dr. Fink that the Petitioner injured his left elbow by direct trauma in striking the steering wheel of his work truck on August 6, 2014. This direct trauma caused the cubital tunnel to tighten resulting in the symptoms and the diagnosis in the left arm. With respect to Petitioner's right arm, the doctor noted that carrying chutes in his opposite, right hand, with a weight of 50 to 55 lbs. or better, with his elbow bent at a 90° angle, and his wrist dorsiflexed, could put pressure on the right cubital tunnel. In the treating surgeon's opinion, both the direct trauma to the left elbow and the pressure put on the cubital tunnel in the right with job related overuse, could cause cubital tunnel syndrome in each arm.

The Petitioner underwent surgery consisting of a right cubital tunnel release and partial right medial epicondylectomy on July 17, 2015, performed at Methodist Hospital of Chicago by Dr. Fink. Approximately one month later, on August 21, 2015, he underwent a release of the left cubital tunnel syndrome with a debridement of the extensor carpi brevis tendon of the left elbow, again performed by Dr. Fink at Methodist Hospital of Chicago.

The Petitioner was afforded light duty, including both office work and guard duty work at different locations for the Respondent, from December 5, 2014, through March 10, 2015. He has been off work and has not returned to employment with the Respondent since March 11, 2015, due to the Respondent being unable to accommodate his restrictions. The Petitioner was off work from American Linehaul from December 5, 2014, through September 13, 2015, as a result of restrictions imposed by the various medical treaters, including the time off following surgery. He was returned to light duty with a 20 lbs. lift maximum and no ladder climbing by Dr. Fink on September 9, 2015, and actually returned to duty at American Linehaul on a light-duty restriction, following that partial release, on September 14, 2015.

The Petitioner testified that PX9 contains an accurate reflection of his light-duty earnings in employment with Respondent for the time period from December 5, 2014, through March 10, 2015, and the earnings in his secondary employment with American Linehaul once he was returned to light-duty work there on September 14, 2015, through January 1, 2017. The paystubs and the temporary partial disability calculations were accurately reflected under Tab B of PX9 and as reflected at page 3 of the exhibit, the total temporary partial disability due stands at $69,977.89. The total temporary total disability due from March 11, 2015, through September 13, 2015, was $35,310.89.

The Petitioner testified that in each instance when he would receive a work status form through Dr. Fink's office, providing his restrictions, he would fax those to Respondent and then would ask if there was work available within those restrictions, and on each occasion after March 10, 2015, when he did that, he has never been informed that there is any work available for him within the restrictions imposed.

As of the last appointment with Dr. Fink, prior to the arbitration hearing in this matter, Petitioner's restrictions were increased from 10 lbs. to 45 lbs. lift, with no climbing on ladders.

The Petitioner testified that as of the date of hearing, the conditions in his right and left arms have improved, but with certain tasks, such as attempting to paint with a roller, he will get pain in his elbows by extending and putting pressure on the wall to roll. He has been working again at American Linehaul since September 14, 2015, doing weights and inspections where he will take the dimensions of freight by putting them on a scale and checking the weights and doing measurements. Since his return in September of 2015, he has been able to operate a forklift and has started driving that to load and unload. On occasion he will "jump in a truck" if necessary when one of the three regular drivers is out sick. The straight truck he operates for American Linehaul, on the occasions when he might be called in to substitute for an absent driver, has an automatic transmission. He is taking prescriptive Tylenol IV, on a script from Dr. Fink currently, and is still treating with Dr. Fink and had a scheduled appointment as of the date of hearing for shortly after the arbitration proceedings.

The Petitioner testified that PX8 is an accurate reflection of the medical bills incurred for treatment with a medical billing summary which accurately summarizes the dates of treatment, the charges, payments made to providers, and the balances claimed due and owing. With the exception of the unrelated charges for an eye physician, which are not included in the balance

totals, all the other charges noted on PX8 were related to care and treatment afforded for the injuries to his bilateral upper extremities.

Petitioner testified that PX10 accurately reflected payments made through a disability insurance plan with his union, Local 786 Building Material Welfare Fund, in addition to payments made for medical bills incurred for treatment through the same union fund. The welfare fund itemized its payments, at PX 10, p. 4, as medical benefits paid of $4325.78 and total disability payments of $9604.40, for a total of $13,930.18. Nevertheless, the parties stipulated on the Request for Hearing that the Petitioner has received the sum of $13,750.10 in non-occupational indemnity disability benefits and $16,000.00 in advances for which credit may be allowed under Section 8(j) of the Act.

Respondent presented the report of its Section 12 examining physician, Dr. Prasant Atluri, who examined Petitioner on November 17, 2016, at the request of Respondent. Dr. Atluri indicated in his report that he had reviewed the job description for Respondent, and some of the records of treatment, but absent from his list are the treating records of Dr. Fink. He also indicated that he was not provided with the EMG results and commented that as a result, he was unable to determine the specific diagnoses in more detail, though his own physical exam results led him to an opinion that Petitioner has tenderness in both elbows consistent with cubital tunnel syndrome. It was his opinion that based upon his understanding of the Petitioner's work activities as a Ready Mix driver, his bilateral upper extremity conditions would not be considered work-related.

CONCLUSIONS OF LAW

Causal Connection

In considering the record in its entirety, the Arbitrator finds that Petitioner has sustained his burden with respect to causal connection.

It is uncontested that Petitioner was involved in a work related accident on August 6, 2014 when he sustained trauma to his left elbow while en route to a job, driving a 12 wheel truck. Petitioner was exiting the highway when his truck jerked causing his left elbow to strike the steering wheel of his truck. He immediately noted pain and numbness that felt as if he had "whacked [his] funny bone". He first sought medical attention two days later, on August 8, 2014, at Alexian Brothers Medical Group, where Dr. Grzegorz Blecharz noted bruising in the olecranon area, swelling and significant tenderness on palpation. (PX 1) X-rays revealed no evidence of acute fracture to the elbow although some spurring at the triceps insertion in the olecranon process was noted. (Id.). Three days later, Petitioner followed up at Alexian Brothers with complaints of constant stabbing pain with numbness and tingling in his left elbow that radiated into his left hand. (Id.). Tenderness to the left elbow was noted on exam along with crepitation on range of motion. (Id.). Despite Petitioner's complaints and the exam findings, Dr. Blecharz discharged Petitioner from care and returned Petitioner to full duty work. (Id.).

Petitioner testified that after the August 6, 2014 incident, he noticed increased pain and numbness in the left elbow and then, after a period of days, symptoms of pain and numbness in his right arm which became more evident as he continued to use the right arm to do tasks such as placing or pulling off concrete chutes on his truck, or climbing the ladder of his truck.

Petitioner's treating surgeon, Dr. Robert Fink, testified that the direct trauma to the left elbow would have tightened the cubital tunnel, to cause the symptoms and the diagnosis in the left arm. Carrying chutes in his opposite, right hand, with a weight of 50 to 55 lbs. or better, with his elbow bent at a 90° angle, and his wrist dorsiflexed, could put pressure on the cubital tunnel on the right arm. In the treating surgeon's opinion, both the direct trauma to the left elbow and the pressure put on the cubital tunnel in the right with the overuse, could cause cubital tunnel syndrome in each arm.

The Arbitrator recognizes that, at the same time in the fall of 2014, Petitioner was also engaged in job duties for American Linehaul that consisted mainly of operating a forklift. He would also occasionally operate a delivery truck when a regular driver was absent. The Arbitrator has also taken into consideration the evidence of Petitioner's "side business" in and through the entity known as Complete Care for You. The Petitioner's job duties at American Linehaul do not appear to encompass nearly the physical demand nor the degree of exposure to repetitive stress to the upper extremities that he encountered while in the employ of Respondent, and the type of activity that the treating surgeon testified as contributing to the onset of symptoms in the right elbow and exacerbation of symptoms in the left elbow after the initial traumatic insult to his left elbow/arm on August 6, 2014. His responsibilities in running cleaning and maintenance jobs through Complete Care for You were mainly supervisory in nature as opposed to physical, other than occasionally operating a plow truck.

The Arbitrator has also considered the report of the Respondent's examining physician, Dr. Atluri, noted that the written job description for Petitioner's job indicated exposure to heavy lifting, pushing and pulling on an intermittent basis up to 70 pounds, with climbing and the operation of a sprayer hose, though he declined to opine that these activities might or could contribute to the diagnosis of bilateral epicondylitis or bilateral cubital tunnel. Dr. Atluri noted that:

> *The clinical documentation suggests that Mr. Schultz had bilateral elbow conditions including lateral epicondylitis and cubital tunnel syndrome. There are some notes which even indicate the patient was suffering from radial tunnel syndrome as well.*

Dr. Alturi acknowledged that he did not have the operative notes or the electrodiagnostic testing for review and could not, therefore, determine the specific diagnoses in detail.

With respect to his exam of Petitioner on November 17, 2016, Dr. Alturi noted findings "suspicious for persistent medial epicondylitis with bilateral tenderness involving the ulnar nerves" consistent with cubital tunnel syndrome.

Petitioner's findings on exam were "suspicious for persistent medial epicondylitis" with tenderness in the ulnar nerves in both elbows consistent with cubital tunnel syndrome. though he considered these conditions not to be work-related.

Petitioner's testimony that he had no prior bilateral elbow issues is uncontradicted.

With respect to Petitioner's testimony at the hearing, the Arbitrator found him to be an exceedingly credible witness. The Arbitrator noted Petitioner's overall manner, behavior, frankness and intelligence during the course of his testimony.

Despite surgery to his right elbow on July 17, 2015, and his left elbow on August 21, 2015, it is apparent that the Petitioner remains on restrictions as of the time of hearing of a 45 lbs. lift

maximum with no ladder climbing, based upon a functional capacity evaluation performed in October of 2016. The FCE examiner at Presence Saint Joseph Family Care Center Rehabilitation Services clearly indicated in the FCE report that the Petitioner's current level of ability does not meet the job duties on lift/carry, push/pull, or climb in order to return to his prior position as a Ready Mix driver with Respondent (PX 14).

The Petitioner testified to ongoing pain and limitation in full extension of his arms, such as when attempting to apply a pain roller, and to symptoms including pain in both elbows when he extends his arms and puts pressure on his arms. He remains on prescription Tylenol IV and was still treating with Dr. Fink as of the time of hearing, scheduled to return to him the day following arbitration.

Based upon the record considered as a whole including the testimony of the Petitioner, the opinions of the treating orthopaedic surgeon, Dr. Robert Fink, the Arbitrator finds that the Petitioner sustained ulnar nerve entrapment (cubital tunnel), as diagnosed by electrical studies and by physical examination, as well as observed intra-operatively with respect to the left elbow.

The Arbitrator finds that the Petitioner's current condition of ill being with respect to his left arm/elbow is causally related to the injuries sustained on August 6, 2014.

With respect to Petitioner's right arm/elbow, those findings are deferred to the addendum and decision in the companion case, 15 WC 3634.

Average Weekly Wage

The Petitioner's unrebutted testimony was that he had informed the Yard Supervisor, Buddy Horn, on numerous occasions of his concurrent employment with American Linehaul, and that they had had numerous conversations about this before August 6, 2014. The Arbitrator finds that the Yard Supervisor, Buddy Horn, was an agent of Respondent and the Respondent had knowledge of concurrent employment of the Petitioner with American Linehaul, such that the wages earned in employment with American Linehaul should be included.

The paystubs and W-2s, evidencing earnings in employment both with the Respondent and with American Linehaul in the fifty-two weeks prior to August 6, 2014, were admitted into evidence as part of PX9. There is an accurate calculation of average weekly wage contained as a summary within PX9. The Arbitrator finds that, by preponderance of the evidence, the Petitioner has proved earnings with Respondent, Prairie Material and American Linehaul in a total amount of $103,117.04 in the fifty-two weeks prior to August 6, 2014, and that the average weekly wage, calculated pursuant to Section 10 of the Act, was $1,983.02.

Whether the medical services that were provided to Petitioner were reasonable and necessary, and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services

Findings on this issue are deferred to the addendum and decision in the companion case, 15 WC 3634.

With respect to "M", whether penalties and fees should be imposed upon Respondent

Findings on this issue are deferred to the addendum and decision in the companion case, 15 WC 3634.

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

Ida Reiman,
Petitioner,
vs.

NO: 14 WC 10721

St. Joseph Memorial Hospital,
Respondent.

19IWCC0700

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, temporary disability, permanent disability, medical expenses 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 9, 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.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $52,300.00. 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: DEC 19 2019
o110719
BNF/mw
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

NOTICE OF ARBITRATOR DECISION

REIMAN, IDA
Employee/Petitioner

Case# **14WC010721**

ST JOSEPH MEMORIAL HOSPITAL
Employer/Respondent

19IWCC0700

On 5/9/2018, 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 2.00% 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

0693 FEIRICH MAGER GREEN & RYAN
KEVIN MECHLER
2001 W MAIN ST
CARBONDALE, IL 62903

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

IDA REIMAN
Employee/Petitioner

v.

ST. JOSEPH MEMORIAL HOSPITAL
Employer/Respondent

Case # **14** WC **10721**

Consolidated cases: _____

19IWCC0700

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 **Herrin**, on **September 6, 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 _____

19IWCC0700

FINDINGS

On **February 15, 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 $**18,365.01**; the average weekly wage was $**353.17**.

On the date of accident, Petitioner was **77** 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, $**N/A** for TPD, $**N/A** for maintenance, and $**N/A** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit for any awarded medical expenses paid pursuant to Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries which arose out of and in the course of her employment on February 15, 2014.

Respondent shall pay Petitioner temporary total disability benefits of **$235.45 per week** for **24-4/7 weeks**, commencing **February 16, 2014 through August 6, 2014**, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary causally related medical services of contained in Petitioner's Exhibit 6, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for any awarded 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 pay Petitioner permanent partial disability benefits of **$220.00 per week**, the minimum allowable statutory rate, for **71.75 weeks**, because the injuries sustained caused the **35% loss of use of the right hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$220.00 per week**, the minimum allowable statutory rate, for **41 weeks**, because the injuries sustained caused the **20% loss of use of the left hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$220.00 per week**, the minimum allowable statutory rate, for **5 weeks**, because the injuries sustained caused the **1% loss of the person as a whole**, as provided in Section 8(d)2 of the Act.

19IWCC0700

Respondent shall pay Petitioner compensation that has accrued from **February 11, 2015** through **September 6, 2017**, 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

May 7, 2018
Date

MAY 9 - 2018

STATEMENT OF FACTS

The Petitioner testified that on 2/15/17 she was a CNA and employed by the Respondent as a "sitter", which appears to involve keeping an eye on patients in the overnight hours, and obtaining help from a nurse if needed. She had been employed by Respondent for 18 to 19 years, and was 77 years old on that date. Petitioner testified that on 2/15/17 she clocked out at approximately 7:30 a.m. following her shift. The parties stipulated that the Petitioner was working as a sitter on 2/15/17, that she retired prior to the hearing date and that she would have been able to return to work as a sitter despite any work restrictions she may have had.

The parties stipulated during the hearing that at the time of the occurrence Petitioner was in the process of exiting the hospital at the time of her alleged work accident, and that multiple different doors for ingress and egress were available to the Petitioner to enter and exit the hospital that were available to both Respondent's employees and the general public.

After clocking out on 2/15/17, Petitioner and another employee, Brenda Skaggs, went down the elevator and proceeded to the hospital's vending room. The parties stipulated during the hearing that the vending room was also open to both Respondent's employees and the general public. While in the vending room, Petitioner met another co-employee, Peggy Walls, who had entered the hospital and was starting her shift. Petitioner testified that it had been sleeting all night, and Ms. Walls told her and Ms. Skaggs to be very careful outside because it was slick. Petitioner testified that she had a cup of tea and talked with Ms. Walls for a while in the vending room before she left the hospital. Petitioner testified she then went out the door and didn't get very far before falling and striking her head. She testified: "I wasn't very far from my vehicle when I fell." The Petitioner did not testify as to exactly what caused her to fall.

As to the door she exited from the vending area, Petitioner testified that members of the general public do use the door, "but they're not supposed to." She denied that there was another employee-only door that would have been to her right after exiting the vending room.

Petitioner testified she lost consciousness for a period of time and had a laceration above her right eye. Another worker saw her and helped her up and walked her to the emergency room, where she was diagnosed with bilateral wrist fractures. She testified that she had an external fixation device installed on the right, while the left side was casted from the hand to the bicep.

Petitioner testified that when she fell she was heading to her vehicle to go home, which was parked in a lot "in the back", which Petitioner titled an employee parking lot. She testified this was the Respondent parking lot closest to the vending room, and where she testified she had been advised to park and "where we're supposed to park." Petitioner was shown Rx2F, and testified it accurately depicted the sidewalk she walked down, and her view while exiting the hospital through the vending room door, noting she could see her car as she was walking out.

Petitioner identified the parking spot her car had been in on 2/15/14 in a photograph in Rx2F as the second car from the right. Petitioner testified that the Respondent also had parking in front of the hospital "for the handicap and stuff and the workers", as well as parking near the ER, which was for patients. She testified the lot in the back of the hospital where she parked on the date of the occurrence was the only parking area for employees. Petitioner testified she parked in the rear parking lot behind the building because that was the closest parking to the vending room door – "that's where we all go in." Petitioner testified she was instructed to park there when she first started working at the hospital, but was unable to identify who instructed her to park there. Petitioner testified that in her 19 years with the Respondent she never parked in the lot near the front entrance. On cross examination, Petitioner testified that in the rear parking lot "you could park anywhere you wanted to as long as you didn't park around front."

Petitioner testified she was required to punch into work, and that while there were multiple locations within the hospital to punch in, including on the first floor, she would always go upstairs, where she worked, to punch her time card. She testified that going through the vending room door, into the hall and to the elevator upstairs was the fastest route available to her to get to where she punched in.

Petitioner reviewed an accident report (Px5) which she indicated accurately reflected what she reported. However, she also agreed that someone else actually filled out the report for her. While the report states that security was called following Petitioner's fall and salt was applied to walkways and parking lots, this information did not come from the Petitioner herself. In reviewing this document, the Arbitrator notes the Petitioner's statement was: "I was walking down the walk and I fell face down on my wrists and it knocked me out for a few seconds and I hit my head somewhere." It also notes that the "object responsible" was "ice on sidewalk" outside the vending room on 2/15/14. This was signed off on by RNs Etherton and Baum, noting the Petitioner was unable to sign, which she testified was due to her wrist injuries. The physician's statement with this document noted Petitioner fell where the sidewalk met the road. A separate page completed by Etherton notes "security called and salt applied to walkways & parking lot." (Px5).

The parties stipulated that the sidewalk where Petitioner fell was in good condition and without defect other than the ice which the Petitioner claims was present on the sidewalk at the time of the occurrence. The parties further stipulated that any "detectable warning devices" that existed at the end of the sidewalk were mandated by law and were not defective at the time of Petitioner's fall. An example of one of these is depicted in Rx2I.

The parties stipulated that at the time of the occurrence the Petitioner was employed as a sitter, that she retired after the accident and that she could have continued to work as a sitter regardless of any work restrictions she has been provided with. The parties stipulated that, regardless of the outcome of the case, Petitioner could have continued to work as a sitter.

While the parties stipulated that no medical expenses incurred after 2/26/16 (see Px1) would be related to Petitioner's claimed 2/15/14 accident, and that the Petitioner had sustained a subsequent left wrist injury on 6/24/16, the Petitioner denied injuring her left wrist on this latter date.

Mandy Waddington was working for Respondent in the patient intake department on 2/15/14, and her shift ended that morning. She testified Respondent employees can punch out either via computer or time clocks, and that she was aware of two such time clocks on the first floor and one on the upper floor. Ms. Waddington testified Respondent employees are not directed by Respondent to leave the building by any particular path after punching out. She chose to exit through the vending room door on the morning of 2/15/14, noting the vending room is open to both employees and the general public. When she got to the vending room door to leave, she saw the Petitioner on the ground at the end of the sidewalk outside. She walked quickly to the Petitioner and testified that while she saw salt on the sidewalk, she did not see any ice. She believed she would have noticed ice on the sidewalk because she probably would have slipped on the ice while hurrying to Petitioner. Ms. Waddington testified the Petitioner told her she had slipped on ice, and that Waddington replied to her that she did not see any ice. Ms. Waddington looked around at that point and observed there was a blue colored salt down everywhere on the parking lot and down the sidewalk. Ms. Waddington testified she helped the Petitioner up, walked her into the hospital through the vending room door and went to the emergency room.

Ms. Waddington was shown several photographs of the vending room and the vending room door, and identified an exit sign over the door she and the Petitioner exited on 2/15/14. (Rx2A, B & C). She testified she was aware of the general public using the vending room, as well as using the vending room door to exit the hospital. She identified a platform outside of the vending room door. (Rx2D). Ms. Waddington also identified the sidewalk outside of the vending room door, extending from the platform to the parking lot located on the north side of the hospital. Ms. Waddington testified she found Petitioner at the end of the sidewalk where there were raised terra cotta bumps, also known as a detectable warning strip. (Rx2H & I). The parties stipulated that the location of Petitioner's fall at the end of the sidewalk contained detectable warning devices, or raised terra cotta, and that the detectable warning devices were without defect, and were mandated by statute to be present. Ms. Waddington identified a portion of the parking lot looking up towards the sidewalk that leads to the hospital and the vending room door as the sidewalk where she found the Petitioner. (Rx2J).

Ms. Waddington testified Respondent had no parking policy for employees in February of 2014, and had no policy requiring employees to use the vending room door to exit the hospital. She testified it was her choice to use the vending room door to exit the hospital. She never received any instruction or training from Respondent about where to park. She was shown a diagram of the hospital and testified employees were allowed to park anywhere in the parking lot, indicated in green (Rx1), which spanned from north of the building to the front of the building on the west side. She testified that she has parked in the front of the hospital at various times, and that she has used doors other than the vending room door to exit the hospital, including the front door and a door by the time clock downstairs. Ms. Waddington identified a photograph as depicting the front of the hospital (Rx2K), noting she had used this exit several times and again indicated this exited to the west part of the parking lot, where she testified employees were free to park. Two doors were identified in Rx2L & M, but Ms. Waddington testified she had never used them and could not say if employees used them to exit or not.

Ms. Waddington testified she had knowledge of other employees, as well as herself, parking in the area in front of the front entrance to the hospital. Ms. Waddington identified an exit under a blue canopy (Rx2O, P & Q), labeled "Employee Entrance Only", and indicated she knew of no other door that was restricted to only employees. This was not the door either she or Petitioner used on the morning of the occurrence. In reviewing an aerial photograph of the hospital (Rx8), Ms. Waddington testified that the only parking area off limits to employees would have been a reserved "employee of the month" spot in the front row in the northwest portion of the parking lot. The rest of the parking spots depicted on the aerial photograph were available for employees to park in. It was the employees' decision where to park. Ms. Waddington testified that on the morning of the occurrence, her station was right inside the front entrance of the hospital. She located the front entrance to the hospital on a diagram as the door marked with a blue X and blue highlighting. (Rx1; Px4). Waddington's work location was right inside this entrance. On cross exam, she testified: "I have never been told anywhere that I wasn't able to park at work, so I would assume you could choose to park there, yes."

John Priester, Respondent's system director for facilities engineering, testified that his job on 2/15/14 included security for the hospital, which also included jurisdiction over the parking lots. He testified that Respondent had no requirement for employees to park in any specific area of the parking lot in February of 2014, and that employees were free to choose to park anywhere around the hospital. In 2016, the Respondent designated an area for employees to park in the back portion of the northwest parking lot, which is depicted in green on Rx1, in order to give visitors and patients more access to the front areas of the hospital. He testified that State ADA code requires the use of detectable warning devices at crosswalks for people who are visually impaired.

In addition to the parking lots, Mr. Priester testified that ingress and egress to and from the hospital also falls under his jurisdiction, and that in February of 2014, the Respondent had no requirement that employees enter or exit the hospital through any certain door. Employees were free to use any hospital door. He also testified the vending room was available to both employees and the general public, and that the general public was free to exit through the vending room door, but that only employees with a badge could enter through this door.

Georgetta Hampton works for Respondent as a registered nurse, and in February of 2014 was employed as a nurse manager. Ms. Hampton testified that in February of 2014 Respondent had no parking requirements for employees, and employees were not required to park in any specific place on the property. An employee could park anywhere they elected in the lots around the hospital. Ms. Hampton also testified Respondent had no requirement that an employee use any specific employee-only entrance, or that they exit in the back of the hospital. She confirmed there were various points throughout the hospital where an employee could punch in and out, and which were located closest to various entrances. Ms. Hampton testified the vending room is open to both employees and the general public, and that the general public is free to use the vending room door to exit the hospital. On cross examination, Ms. Hampton agreed she generally used a few doors for entry, and could not say whether other doors required an employee badge to obtain access or not in February 2014. As to whether the Respondent would have been okay with employees filling spots at the front entrance, leaving patients to park elsewhere, Ms. Hampton testified: "I don't know at that particular time."

Troy Hansil, a Respondent facility engineer, testified he was working in a maintenance position on 2/14 and 2/15/14. He was familiar with Petitioner's fall and remembered the morning of 2/15/14. He testified that he punched in at about 6 a.m. on 2/15/14. He testified that the local weather conditions were normal when he went to work and he did not observe any ice that morning. He was not aware of any Respondent policy requiring parking in certain locations, and that he parked at the annex for convenience, as it was close to where he clocked in. After he parked on 2/15/14, picked up his equipment and went to punch in, Mr. Hansil walked across the parking lot and entered the hospital through the employee-only entrance, which he marked on Rx1 with a number 1. He inspected the parking lot as part of his morning rounds, during which he checked for debris, ice, etc. He

found no ice in the parking lot outside the employee-only entrance, testifying he normally slid his feet along the ground checking for slick spots as he walked toward the hospital.

Mr. Hansil started his morning rounds at the boiler room (marked with a "2" on Rx1), then the chiller room ("3"). He then exited outside from the chiller room to a concrete slab, where he again noticed no ice. He then walked back across to the employee-only entrance and to an air handler ("4"), which was near the sidewalk running from the vending room door to the parking lot, and he again saw no ice. From there, Mr. Hansil crossed and entered the vending room via the vending room door ("5"). He noted the large concrete platform outside the vending room door, and confirmed this was the same platform depicted in Rx2D, E and F. He then continued with his rounds by going to the front lobby of the hospital ("6"). He testified that he found no ice on the ground at any of the locations he visited that morning. Mr. Hansil testified that at some point within a week of the Petitioner's fall he prepared a handwritten statement at the request of Kelly Stevens and Andy Belobraydic (Rx10), which indicated he found no ice when he made his morning rounds on 2/15/14. Had he found ice, he testified he would have put down salt, which he did not do on 2/15/14.

On cross exam, Mr. Hansil could not recall how cold it was on the morning of 2/15/14, but didn't recall it being wet outside. He testified he used either blue or red salt for ice on the ground, but was not sure which of these he would have used in February of 2014. If someone else testified that blue salt had been put down where Petitioner fell, he was not the person who applied it. He testified that security could put salt out overnight, but Hansil testified he didn't see any salt put out on the morning of 2/15/14. He indicated that salting of the parking lot is performed by a hired vendor, and that he only would salt Respondent's sidewalks. He did not know whether the contracted group responsible for salting the parking lots used blue salt. Hansil testified that he would not have seen the concrete pad outside the vending room door when he initially entered the hospital through the employee-only entrance and was making his morning rounds, but would have seen it later while performing his rounds. He denied spreading salt later in the day on 2/15/14. He didn't learn that the Petitioner had fallen until the Monday after she fell.

Kelly Stevens has been the Respondent's human resources (HR) manager for 10 years. He testified that in February of 2014, the Respondent had no requirement that employees park in any specific place, and that they were free to park where they saw fit in available places around the lots at the hospital. Mr. Stevens testified the vending room door is a public exit. Mr. Stevens testified that an employee, Sister Rachel, is the manager of spiritual care at the facility, but had never been employed in the HR department. He testified she does not speak in any official capacity as part of any new employee orientation, and is not authorized to instruct employees on parking. As the mission and values committee chair, she would talk to new employees at that time about missions and values, which had nothing to do with parking. On cross exam, Mr. Stevens agreed that he did not have complete control over what Sister Rachel said at orientation.

Margaret Walls testified via deposition on 8/30/17. (Px4). She is a former telemetry employee of Respondent's who retired in June 2016. She testified that she would park in the northwest parking lot, which is marked green in Rx1. She testified that there was a main entrance to the hospital with nearby parking at the main entrance, but that this area was for patients and that employees were not supposed to park there. or employees. She testified that she attended an orientation when she was hired which included a Sister Rachel as well as unnamed HR personnel. She testified that at this orientation she was advised by Sister Rachel to park in the northwest lot, which she described as the employee parking lot, as opposed to the parking area at the main entrance: "Actually, she – I asked her where we should park, and she was the one that told me to park in that area. That's where everybody parked. All employees parked." Ms. Walls testified she was not told where to park at any time other than orientation. Though several people conducted the orientation, the only person she remembered was Sister Rachel. (Px4).

Ms. Walls testified there were two entrances she came in and out of while employed by Respondent: the employee-only entrance and the vending room door, noting these were closest to where she parked in the northwest lot. She testified it would have been easier for her to park in the lot near the main entrance. (Px4).

Ms. Walls testified that she did not think employees were allowed to park in the lot to the east of the hospital, as she believed this was for patients in a separate medical building to the east, and there was no access to the hospital on that side, but admitted that no one ever told her not to park there. Some of the parking spots in the south portion of the diagram in Rx1 could not be used because there were signs indicating they were for ER use only. Ms. Walls testified she was not permitted to park in the area indicated at the lower left corner of the hospital diagram, stating she was told this in orientation. (Px4).

Ms. Walls agreed that an employee could choose to enter the hospital through the front entrance as well as three other doors, including the employee-only and vending room doors, and marked these with a blue "X" in Rx1. She testified the vending room door was available for use by the general public to exit the hospital, but believed a badge was required to enter, depending on the time of day. Ms. Wells agreed that the sidewalk outside the vending room door was used by the general public. (Px4).

On 2/15/14, Ms. Walls testified she arrived and relieved Petitioner just before 7 a.m. She indicated she was familiar with the condition of the sidewalk leading from the parking lot to the vending room door on that date and that there were no defects or problems with the sidewalk. However, she testified she walked on the grass to enter the vending room door, not the sidewalk, indicating she did so because it was "pretty icy out." She verified that the Petitioner fell near the terra cotta bumps at the end of the sidewalk. She punched in at the second floor clock. Wells testified that most employees used either the vending room door or the employee-only door to enter and exit the hospital. Petitioner's job as a sitter consisted of basically sitting and watching patients. (Px4).

With regard to Px4, the parties have stipulated that the exhibit that was supposed to be attached to this deposition was not, and that it has been submitted separately as Rx1.

Respondent submitted certified weather data from the Midwestern Regional Climate Center (MRCC) from February 14 and February 15, 2014 from Southern Illinois Airport, Murphysboro, Illinois, nearby Respondent's hospital facility. According to the hourly data from February 14 and February 15, 2014, no snow, snow pellets, snow grains, ice crystals, ice pellets, sleet, freezing drizzle, freezing rain, ice fog, or freezing fog were observed at any time in Murphysboro on those dates. The only recent precipitation observed occurred on 2/14/14 at 10:52 a.m. (0.03 in.); 11:52 a.m. (0.06 in.); 12:03 p.m. (0.01 in.); and 12:52 p.m. (0.07 in.). No rain was documented on 2/15/14. The data shows that the high and low temperatures on 2/14/14 were 39 and 20 degrees respectively, and on 2/15/14 they were 30 and 13 degrees respectively. Mist was observed on 2/14/14 from 2:37 p.m. until 6:52 p.m., with no other measurable precipitation was recorded at any time. (Rx9).

On 2/15/14, Petitioner was seen in the Respondent's ER. One record documented a history of Petitioner "leaving and fell on sidewalk outside the vending room door at end of sidewalk by road." (Id.). Another documented that Petitioner was leaving the hospital at the end of her shift when "she accidentally stepped on black ice and fell face down, landed on both arms fracturing both wrists." X-rays of the left wrist revealed an acute non-displaced distal radial fracture, while films of the right wrist indicated acute distal right radial and ulnar fractures, with the radial fracture being comminuted, displaced and partially intra-articular. Osteopenia was noted bilaterally. Head and cervical CT scans were normal with regard to any acute findings, except for a small right frontal face/scalp hematoma, while a sinus/facial/nasal CT scan revealed degenerative changes along with

the noted hematoma. Dr. Kvirikadze diagnosed bilateral wrist fractures, and noted that the right orbit/eyebrow laceration had been sutured. Petitioner was advised to follow up with orthopedics the next day. (Px1).

On 2/17/14, Petitioner was seen by Dr. Miller's physician's assistant at Orthopaedic Institute of Southern Illinois (OISI). The records document a history of Petitioner slipping on ice on the sidewalk outside the hospital and landing on her outstretched wrist. X-rays taken on the date of the occurrence revealed a nondisplaced distal radius fracture on the left, with what looked to be an old ulnar styloid fracture, as well as significant degenerative changes of the left hand and wrist. Right wrist x-ray revealed significantly shortened apex volar angulation with a comminuted fracture, along with significant degenerative changes about the wrist. Open reduction and internal fixation was recommended for the right wrist, while the left wrist was placed in a heat moldable splint with plans for closed treatment. It was noted that the degree of comminution on the right could make it hard to use internal fixation. (Px2).

On 2/21/14, Dr. Miller performed an external fixator application to her right comminuted displaced Colles fracture of her right wrist. According to the operative note, Dr. Miller noted a severely comminuted fracture with more than 3 fragments as well as an ulnar styloid fracture, and that an initial attempt at reduction with internal fixation resulted in an inability to "get it out to length", which led to the decision to perform an external fixation to provide a more normal alignment. (Px2).

On 2/26/14, Dr. Miller noted Petitioner's left wrist was "doing fine" with no pain or problems, while her right arm was hurting quite a bit. There was improvement and the swelling had gone down. She was held off work. On 3/12/14, Petitioner was to start range of motion exercises. X-rays noted the fracture site was slightly shortened with a slight loss of inclination. On 3/24/14, Petitioner reported having much less discomfort overall, with some ongoing pain in both wrists, right worse than left. Physical examination revealed the right wrist was in very good alignment with the external fixator, but Petitioner was unable to make a fist. X-rays on that date showed the left side appeared to be healed, but she had a "Madelung's type deformity" with shortening of the radius and valgus inclination. The right side demonstrated healing with slow integration of the bone into callus, which was not yet healed. Petitioner was allowed to return to work with no use of the arms and was referred to therapy. (Px2).

On 4/10/14, Petitioner reported no pain in her left wrist, but had some persistent swelling on the right. She reported she was unable to flex her right index finger, but stated that was chronic. X-rays showed healed distal radius and ulnar styloid fractures with slight shortening and loss of inclination on the left, and Dr. Miller noted she had significant degenerative osteoarthritis and "looks like she had actually fused a lot of her carpus on x-ray." On the right, she had abundant callus formation with the fracture in "okay" position. On 4/17/14, Dr. Miller performed surgery to remove the external right fixation. The operative report noted that it appeared that the radial fracture had healed, but noted Petitioner's bone quality was very poor, making it difficult to assess fully. (Px2).

On 4/24/14, Petitioner reported having some off and on left wrist pain, predominantly with radial and ulnar movement and weather changes. She also reported significant pain in her right wrist following the external fixator removal. She had poor right range of motion in the wrist and fingers with significant swelling. X-rays of her right wrist revealed a nonunion of the distal radius. Petitioner was placed in a wrist lacer on the right, referred for occupational therapy and was released to work with a brace. (Px3).

On 5/8/14, Petitioner notes only occasional mild left wrist pain and had good range of motion. On the right, she continued to have pain, swelling and reduced range of motion, but x-rays appeared to show persistent fracture lines. Therapy was continued, noting that if the right wrist did not improve, a CT scan would be obtained with

possible bone growth stimulation. On 5/30/14, CT scan was prescribed to determine if there was non-union in the right wrist, and therapy was continued. On 6/10/14, therapy was continued by Dr. Miller. However, on 6/27/14 this was subsequently put on hold pending the CT scan. The 7/2/14 CT showed what appeared to be a healing distal radius fracture with mild anterior angulation of the distal fragment and normal alignment of the carpal bones. On 7/11/14, Petitioner continued to demonstrate poor grip strength and range of motion of the fingers, with bilateral wrist motion that was "not bad", though Petitioner indicated she couldn't perform handwriting or fine motor activities. Dr. Miller continued Petitioner off work and continued therapy. (Px1).

On 8/6/14, Dr. Miller noted some ongoing reduced bilateral range of motion, and that he believed her arthritis was restricting this to some degree. She was allowed to work with a 20-pound lifting restriction, and was to continue an exercise program. On 10/15/14, Petitioner was noted to be improving slowly, and was released to return to work with permanent restrictions of no forceful gripping and no lifting over 10 pounds. While she was continuing to improve, and would likely continue to do so to some degree, Dr. Miller stated she "is still not anywhere back to where she was prior to her injury" and was unlikely to regain full strength or range of motion bilaterally. She was released to follow up as needed. (Px2).

Petitioner did follow up on 2/11/15, reporting her wrists were nor particularly painful unless she performed strenuous activity or if she bumped her left wrist. In general, she reported being more functional on the left than the right. While another surgery was discussed with Petitioner, she indicated no desire to undergo same, so she was advised to follow up yearly. The same permanent restrictions were continued. Petitioner was last seen at OISI for her bilateral wrist conditions on 2/26/16, at which point she was released from treatment. (Px2).

On 3/17/15, Petitioner was examined by Dr. Crandall at the request of the Respondent. He opined that the bilateral wrist fractures were related to the 2/15/14 injury, and that she had a good result. He did not believe the injury severely changed her ability to work with patients, and that Dr. Miller's restrictions were too restrictive, as he would allow her to lift up to 20 pounds. He noted he would not allow any 78 year-old to be responsible for the lifting of patients or the handling of out-of-control psychiatric patients, and thus that this restriction is unrelated to the injuries, but that she would otherwise be able to handle the responsibilities of a certified nursing assistant (CNA). He provided an AMA impairment rating based on the 6th Edition, indicating a 6% impairment of the right upper extremity and 7% of the left upper extremity. Based on his quick report, he recommended no lifting over 20 with either arm and no lifting of patients. (Rx7).

Following her visit with Dr. Crandall, Petitioner obtained a second opinion from orthopedic surgeon Dr. Trueblood on 6/17/15. He opined that the Petitioner had reason to complain of bilateral dorsal ulnar wrist pain, consistent with findings of bilateral ulnar positivity, and recommended and performed bilateral wrist injections. At 7/29/15 follow up, Petitioner reported almost complete resolution of her symptoms with injection, but did complain of stiffness, noting she was performing her home exercise program. Surgery was discussed, which Petitioner again indicated she wanted to avoid, as well as bracing. On 9/16/15, Petitioner noted her symptoms began to recur about 6 weeks post-injections. While Dr. Trueblood recommended bilateral Darrach procedure surgeries, Petitioner noted a personal situation with an ill son that prevented her from considering surgery. She was advised to follow up as needed. (Px3).

On 6/27/16, Petitioner returned to Dr. Miller, reporting a 6/24/16 left wrist injury following a fall on a ramp at home. The report notes she underwent x-rays and was diagnosed with a contusion and laceration of the left mid-forearm, as well as possible left rib and left ulnar fractures. OISI reporting a different injury to her left wrist occurring on June 24, 2016 when she tripped on a ramp at home and fell. Dr. Miller stated that x-rays showed no acute fracture, just the old fracture, but she had a large amount of soft-tissue swelling in the dorsal forearm and wrist. (Px2). The parties stipulated at the beginning of the hearing that this visit was not claimed to be causally

related to Petitioner's claimed work accident; however, the Petitioner testified that she did not recall any 6/24/16 left wrist injury.

Dr. Crandall, a board certified plastic surgeon, testified via deposition on 7/14/15. He testified that he specializes in upper extremity surgery. He examined the Petitioner on 3/17/15 and reviewed her medical records. Petitioner complained of decreased right grip strength and range of motion, as well as right wrist pain. On the left, Petitioner complained of decreased grip strength and occasional swelling of the ulnar aspect of the left wrist. She also described wrist pain and decreased range of motion, and some numbness and tingling when she crossed her arms. Dr. Crandall testified that Petitioner did very well following her treatment. He determined that the fractures had healed, there was no damage to the radial nerves and there was no arthritis of the radial carpal joint. Dr. Crandall opined that Petitioner had really good range of motion for a 78 year-old with a radius fracture, and that the surgical procedure went as well as could be expected. He agreed that surgery was not indicated on the left given the fracture was nondisplaced.

Dr. Crandall's examination noted some osteoarthritic changes to the distal fingers and the base of her thumb joints, which were kind of bony and knobby, and typical for a 78 year-old. Dr. Crandall did not relate the osteoarthritic changes to Petitioner's 2/15/14 injury or subsequent treatment. He found good range of motion of Petitioner's fingers, good extension, and nearly full flexion, as well as good grip strength and normal neurologic exam. Dr. Crandall described her fingers coming down to almost a pure fist, but not a tight fist, and noted a functional range of motion unrelated to the radius fracture, but related to the arthritis. He opined that her grip strength was within the normal range for a 78 year-old. Dr. Crandall testified that he took the Petitioner's claimed a loss of grip strength into account in providing a disability rating. (Rx7).

Dr. Crandall testified the x-rays he obtained showed healed radius fractures bilaterally. On the right, there was a small chip fracture of the ulnar styloid consistent with fracture, moderate CMC arthritis at the thumb, and arthritis of the distal joints of the fingers. On the left, there was a large ulnar styloid fracture consistent with an old styloid fracture, age undetermined. There was also moderate osteoarthritis of the thumb CMC joint, moderate osteoarthritis of the DIP joints of the fingers, and some narrowing between the radius and the ulna consistent with early radial ulnar arthritis from a previous styloid fracture. Dr. Crandall did not relate this arthritis to Petitioner's fall because the fracture was outside of the area of the old ulnar-sided fracture, and outside of the area between contact of the radius and the ulna. He testified that if he were Petitioner's treating surgeon he would be ecstatic to have no complications on a bilateral fracture on a 78 year old person. (Rx7).

Dr. Crandall testified Petitioner was at MMI, and required no additional treatment. He testified that Petitioner proved she could lift 20 pounds with one hand during his examination, so he disagreed with Dr. Miller's 10 pound restrictions. He further testified he would not place any restrictions on Petitioner, stating Petitioner was fully capable of working in her patient monitoring job, and that her strength could be decreased by three-quarters and she would still be able to perform her job duties. Dr. Crandall did not relate the need for any restrictions to Petitioner's fall, but rather to the fact that Petitioner was 78. Dr. Crandall assessed Petitioner with an impairment rating of 6% of the right upper extremity and 7% of the left upper extremity, pursuant to the Guidebook for the AMA, Sixth Edition. He testified Petitioner got one more percentage point on the left because of strength and stiffness. (Rx7).

On cross examination, Dr. Crandall agreed he didn't know what the Petitioner's wrist complaints, strength or abilities were prior to 2/15/14, but agreed she had no preexisting work restrictions. He agreed Petitioner reported that her grip strength was less than it should be. He agreed she is right hand dominant. As to her being weaker with right grip, Dr. Crandall testified that the right hand should be stronger, but that Petitioner had a bigger fracture and surgery on that hand. He based his opinions of Petitioner's lifting abilities on her grip strength

testing. He testified that the odds the Petitioner would need a Darrach procedure would be 1 in 10,000 given her function and x-rays. (Rx7).

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

In order to obtain compensation under the Act, a claimant must show both that she sustained an injury which occurred in the course of the employment, as well as that it arose out of the employment. "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 her duties and while she is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003); *Dukich v. Ill. Workers' Comp. Comm'n*, 86 N.E.3d 1161, 416 Ill. Dec. 876, 2017 IL App (2d) 160351WC (2017).

In Dukich, the Court noted that our courts have repeatedly held that an accidental injury sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as the result of a hazardous condition of the employer's premises." *Id.*

In the case at bar, the claimant had just left the building to go to her car in a parking lot on the employer's premises. As such, the Arbitrator finds that the Petitioner's activity of walking to her car and falling on the sidewalk, as it occurred within a reasonable time after work, occurred in the course of the Petitioner's employment.

As noted in *Sisbro*, with regard to the "arising out of" element, an injury arises out of the employment when "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." In order to make such determination, our courts have outlined three separate categories of risk: 1) risks distinctly associated with the employment, 2) personal risks to the employee, and 3) neutral risks.

The Arbitrator believes that this case involves a neutral risk. In this regard, the recent *Dukich* case is instructive. In that case, a claimant was leaving work to go home for lunch when she fell on a handicapped ramp between the building entrance and the street level, landing on the pavement of a crosswalk in an adjacent bus run. It was raining at the time, and the claimant indicated she fell because of "the rain, the water." The claimant did have a designated parking spot in the lot.

In this case, the Arbitrator rejects the Petitioner's theory that she was to park in a designated spot. However, it also appears from the greater weight of the evidence that the front entrance lot had very limited parking, and at least some of those spots had signage restricted them to emergency room users. The only other "lot" depicted appears to have been on the east side of the premises, and was more or less dedicated to a separate building, as the testimony indicates there was no access for Respondent's workers on that side of the building. Thus, it appears there really was only one lot for employees to park in.

The Arbitrator also notes the language of the *Dukich* decision, in holding the claimant had not proven a compensable case, where the court specifies: ". . . we find the above referenced cases to be distinguishable from this case for one principal reason. In this case, unlike in those cases, the claimant's injury was not caused by a "hazardous condition" on the employer's premises. As noted, the claimant's injury was apparently caused by a paved surface that was wet due to *rainfall*. Each of the "hazardous condition" cases cited above involves injuries caused by the natural accumulation of *snow and/or ice* in a parking lot of other outdoor space owned or controlled by the employer." (emphasis in original decision).

Here, the Arbitrator finds that the greater weight of the evidence supports the Petitioner's statement that she slipped due to ice on the ground. While the Respondent has presented evidence, in the form of testimony and weather data, in the argument that there could not have been ice on the sidewalk where the Petitioner fell, the Arbitrator believes the greater weight of the evidence supports that the Petitioner slipped and fell on ice. First, the contemporaneous medical records and the accident report support that the Petitioner reported slipping on ice. Two of the Respondent's witnesses, meanwhile, had conflicting reports that the Arbitrator finds important. Ms. Waddington testified that, while the Petitioner told her she slipped on ice, she told the Petitioner she did not see any ice. However, she also testified that a blue salt was spread out all over the area where the Petitioner fell. This is in opposition to the testimony of Mr. Hansil, who testified that he saw no salt spread out in the area where the Petitioner fell. It cannot be both. Ms. Waddington is the person who found the Petitioner and who saw salt spread out at the time of the fall. Mr. Hansil was making round around the time of the occurrence, but he was not in the better position to see the sidewalk at the time of the fall, as he did not testify he was in the specific area where the Petitioner fell. While he testified he would check for ice by sliding his feet, his description of his rounds did not reflect checking for ice where the Petitioner fell. Ms. Walls also testified that it was "pretty icy out" when she arrived to relieve Petitioner on the morning of 2/15/14. While Ms. Waddington denied that there was visible ice, this does not mean that there was no ice at all, particularly something like black ice. It makes no sense to the Arbitrator that salt would have been spread out if there had been no need for it whatsoever. It is a reasonable argument also that the presence of the salt could lead to the inference that there should have been no ice. However, this doesn't completely leave out the possibility of ice.

The Petitioner did testify it had been sleeting, while the weather data does not appear to support this. However, the weather data does not leave out the possibility of any moisture being on the ground. The low temperatures on 2/14/14 and 2/15/14 were well below freezing, and thus it would appear that any moisture could have resulted in slick conditions. The Arbitrator must take conflicting evidence and do his best to determine the facts supported by the greater weight of such evidence. While it is a relatively close case, the Arbitrator finds that the greater weight of the evidence supports that the Petitioner slipped and fell due to ice on the sidewalk leading from the vending room to the north/west parking lot.

Based on the language of the *Dukich* court, the existence of ice is a hazardous condition on the employer's premises, which the court indicated supports the arising out of element of that claim. The Arbitrator would additionally note that while the general public was able to use the vending area and could exit the building through the vending room door, the public was not able to enter through that door, as the evidence indicates a badge or swipe card was needed. Thus, there was some restriction on this pathway to employees, and it does not appear to the Arbitrator that this door was "open" to the general public.

Overall, the Arbitrator finds that the preponderance of the evidence supports that the Petitioner sustained accidental injuries arising out of and in the course of her employment on 2/15/14.

The Respondent did not dispute the causal relationship of the Petitioner's injuries to 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 AS FOLLOWS:

The Arbitrator finds that the Petitioner is entitled to the medical expenses contained in Px6 which are causally related to the 2/15/14 accident. This would appear to include the Petitioner's bilateral wrist treatment, as well as her right head/eye laceration. The Respondent is responsible for these expenses pursuant to Sections 8(a) and 8.2 of the Act. The Respondent is entitled to credit for any of the awarded medical expenses that the Respondent may have paid prior to hearing pursuant to Sections 8(a), 8.2 and 8(j) of the Act, and shall hold the Petitioner harmless with regard to same.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

According to Arbitrator's Exhibit 1, the parties have stipulated that the Petitioner was temporarily totally disabled from 2/15/14 through 8/6/14. The only issue was liability for same. Given the Arbitrator has determined this issue in favor of the Petitioner, the Petitioner is entitled to the stipulated period of TTD, except that she is not entitled to TTD for the actual accident date. The Petitioner is entitled to TTD from 2/16/14 through 8/6/14.

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 the record contains impairment ratings of 7% of the left upper extremity and 6% of the right upper extremity as determined by Dr. Crandall pursuant to the most current edition of the American Medical Association's (AMA) Guides to the Evaluation of Permanent

Impairment. (See Rx7). The Arbitrator notes that this level of impairment does not necessarily equate to permanent partial disability under the Workers' Compensation Act, but instead is a factor to be considered in making such a disability evaluation. In the present case, Dr. Crandall assessed Petitioner with an impairment rating of 6% of the right upper extremity and 7% of the left upper extremity, pursuant to the AMA, Sixth Edition. The percentage was greater on the left based on strength and stiffness. This factor carries some 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 was employed as a sitter at the time of the accident. The parties have stipulated that, based on her restrictions, the Petitioner would have been able to work in her prior capacity for Respondent. She testified that she has, in fact, retired. This factor carries some weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 77 years old at the time of the accident. Neither party has submitted evidence which supports the impact of the Petitioner's age on her permanent condition. However, she is retired and at an age where she has minimal to no further work life expectancy. This factor carries minimal weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that, given the Petitioner's age, job duties for Respondent, retirement from the work force and average weekly wage, it is unlikely that her injury will have a significant impact on her future earnings, as she is unlikely to have future earnings. This factor carries a lesser degree 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 the Petitioner sustained bilateral radius wrist fractures, right significantly greater than left given that the radius fracture was comminuted and fragmented on the right. The right wrist also involved an ulnar fracture. The right side required surgery, and this surgery involved external fixation due to the severity and inability to get it "to length" with internal fixation. Petitioner also underwent removal of the fixation device, and healing of the fracture was extensive with initial indications of non-union. On 10/15/14, Dr. Miller imposed permanent restrictions of no forceful gripping and no lifting over 10 pounds. While she was still improving and was likely to continue to, Dr. Miller still opined that the Petitioner was nevertheless "not anywhere back to where she was prior to her injury", and was unlikely to regain full strength or range of motion bilaterally. Dr. Crandall's findings and ratings are also taken into account by the Arbitrator. The Petitioner indicated ongoing problems, particularly with any significant use of the wrists. She is right hand dominant. The Petitioner also had a laceration in the right eyebrow area that was sutured, and which the Arbitrator visualized at hearing. This factor carries the most significant weight in the permanency determination.

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 35% loss of use of the right hand and of 20% loss of use of the left hand pursuant to §8(e) of the Act. Additionally, the Arbitrator finds that the Petitioner is entitled to 1% of the person as a whole pursuant to §8(d)2 of the Act for the laceration she sustained at the right eye orbit/forehead.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RANDALL DUNAJ,
Petitioner,

vs.

NO. 12 WC 949 & 16 WC 18242

CHICAGO TRANSIT AUTHORITY,
Respondent.

ORDER

This matter comes before the Commission on Motion to Show Cause. Petitioner's lawyers Cronin, Peters, & Cook, P.C. had previously filed a Motion for Attorney Fees, and a Motion to Withdraw as attorneys for Petitioner in 16 WC 18242. Those matters were noticed up twice previously and Petitioner did not appear at either hearing. Prior to this hearing Petitioner was served with notice that the matter would be adjudicated *ex parte* if he did not appear. A hearing was held in Chicago before Commissioner Simpson on November 5, 2019. John Cronin appeared representing Cronin, Peters, & Cook on its own behalf, Elizabeth Meyer appeared representing the CTA, Respondent in the underlying claims, and Petitioner did not appear. A record was taken.

The claims were consolidated and arbitrated together. On October 31, 2018, an Arbitration decision was issued. In 12 WC 949, the Arbitrator found Petitioner permanently and totally disabled from repetitive trauma injuries to his hands and awarded him $817.11 for life. In 16 WC 18242, the Arbitrator awarded Petitioner $735.37 a week for 50 weeks, representing loss of 10% of the person-as-a-whole for a cervical injury. Neither party sought review of the decision with regard to 12 WC 949, and Petitioner filed a Petition for Review in 16 WC 18242, which is still pending before the Commission.

Mr. Cronin asserted that his firm had not received any fees from the award in 12 WC 949. He also represented that he received an e-mail communication from Mr. Dunaj terminating his firm's representation in 16 WC 18242. He seeks fees from the awards in both claims, to allow his firm to withdraw as Petitioner's attorneys in 16 WC 18242, and an additional award of $1,002.77 in expenses incurred.

Ms. Meyer confirmed Mr. Cronin's representations and noted that Petitioner refused to allow Mr. Cronin's firm to receive fees from the award. She also asserted that Petitioner had cashed some checks CTA had issued to him individually, but it is unclear from the record exactly how much he has received to date. Ms. Meyer requested guidance from the Commission on how to pay proceeds from the 12 WC 949 award. Based on the record before us, the Commission grants the Motions of Cronin, Peters, & Cook, P.C. regarding the award of attorney fees and expenses in 12 WC 949 and to withdraw as attorneys in 16 WC 18242. However, the Commission denies the Petition for fees of Cronin, Peters, & Cook, P.C. in 16 WC 18242 because the matter is still pending before the Commission and therefore the award is not final.

IT IS THEREFORE ORDERED BY THE COMMISSION that the petition of Cronin, Peters, & Cook to withdraw as attorneys representing Petitioner, Randall Dunaj, in 16 WC 18242 is granted.

IT IS FURTHER ORDERED BY THE COMMISSION, that the petition of Cronin, Peters, & Cook, P.C. for attorney fees in 16 WC 18242 is denied without prejudice.

IT IS FURTHER ORDERED BY THE COMMISSION, that the petition for the award of attorney fees and expenses in 12 WC 949 is granted.

IT IS FURTHER ORDERED BY THE COMMISSION, that CTA pay Petitioner whatever is due to date pursuant to the award in 12 WC 949, less 20% thereof, which the Commission finds represents attorney fees due Cronin, Peters, & Cook, P.C. in that claim.

IT IS FURTHER ORDERED BY THE COMMISSION, that CTA, pay to Petitioner the amount currently due him less $1,002.77, pay to Cronin, Peters, & Cook, P.C. $1,002.77 out of the proceeds otherwise due Petitioner, and pay to Cronin, Peters, & Cook 20% of the total award paid to date.

IT IS FURTHER ORDERED BY THE COMMISSION, that after Petitioner and Cronin, Peters, & Cook, P.C. are made current with their respective shares of the award in 12 WC 949, CTA shall issue every fifth check for payment of Petitioner's award for permanent and total disability to Cronin, Peters, & Cook, until it is paid a total of $59,485.61.

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: DEC 2 0 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/dw
R-11/5/19
46

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DAVID MORRIS,

Petitioner,

vs. NO. 14 WC 12788

HAGGARD EXCAVATION, LLC,

Respondent.

ORDER

This matter comes before the Commission on Respondent's "Motion to Supplement Settlement Contract Lump Sum Petition and Order." A hearing was held in Collinsville before Commissioner Simpson on September 11, 2018. Thomas Hoffman appeared representing Respondent, John Winterscheidt appeared representing Petitioner, and a record was taken.

Petitioner was involved in a collision in which the truck he was driving was struck by a train. He sustained numerous injuries, including a traumatic brain injury, which the Arbitrator found caused "permanent cognitive problems." An arbitration decision was filed on January 11, 2017 in which the Arbitrator found Petitioner permanently and totally disabled. The Commission approved a settlement contract on November 27, 2017. The amount of the settlement was $481,458.54. In the contract, Respondent agreed to pay all current and prospective medical expenses until an MSA was approved by CMS and funded by Respondent.

Respondent drafted an MSA which Mr. Hoffman represented included standard MSA language. It was approved by CMS. Respondent presented the MSA to Petitioner for approval. According to Mr. Hoffman, Petitioner has refused to sign the document. Mr. Hoffman indicated his client was "just looking for advice as to whether or not Petitioner should be obliged to sign" the MSA.

Mr. Winterscheidt represented that the terms of the MSA were in conflict with provisions of the underlying contract. Specifically, Mr. Winterscheidt noted that the settlement contract provides that Respondent, or its designee, shall administer the MSA, the MSA provides that any unused proceeds reverts to Respondent upon Petitioner's death, but that the MSA places the burden on Petitioner to file tax returns and pay taxes on proceeds of the fund, which Mr. Winterscheidt asserts his client is mentally unable to do. He also had issue with the hold harmless provision, which he asserts would give Petitioner no recourse if the fund was improperly administered or even improperly converted. In addition, Mr. Winterscheidt asserts that the Commission has no authority to approve amendments to the settlement contract. Mr. Winterscheidt also represented that he and his client were prepared to cooperate with Respondent to arrive at an acceptable MSA agreement.

First, the Commission has no authority to "oblige" Petitioner to sign the MSA agreement. Second, the Commission finds that it does not have jurisdiction to approve an amendment to the settlement contract. While the Commission has authority to approve subsequent amendments to an executed settlement contract after an MSA is approved by CMS, it only has such authority if both parties agree to accept the amendment. In this matter, clearly Petitioner and his lawyer have not approved the amendment to the contract. Third, the Commission concludes that Petitioner has some legitimate concerns about the "standard" provisions of the MSA as drafted by the Respondent which may not be applicable to the instant situation. Hopefully, the parties can arrive at an MSA agreement which is acceptable to both parties as well as CMS.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's Motion to Supplement Settlement Contract Lump Sum Petitioner and Order is denied.

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

DATED: DEC 2 0 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/dw
R-9/11/19
46

STATE OF ILLINOIS)	☒ Affirm and adopt (with explanation)	☐ 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 Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JUAN GOMEZ,

Petitioner,

19IWCC0701

vs.

NO: 14 WC 6156

CITY OF NORTHLAKE,

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 all issues, 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 agrees with the Arbitrator's finding that Petitioner sustained an accident that arose out of and in the course of his employment on August 7, 2013. Petitioner was employed by Respondent as a laborer. His job duties were different every day, but on the accident date, his assigned job was to restore an area where weeds and plants had been pulled out. Petitioner testified that this position required heavy lifting, and the lifting all depended on what specific job he was performing that day. Examples of such lifting included moving pumps and ladders out for a water break, carrying bags of salt or 50-pound bags of seed, and picking up metal pieces. Petitioner explained that he lifted objects weighing between 50 and 100 pounds as part of his daily job. Dale Roberts, Petitioner's supervisor, also testified that Petitioner performed laborers' tasks that could require him to lift 100 pounds once or twice a week.

On August 7, 2013, Petitioner was sent by Respondent to do restoration work behind a building that Respondent had purchased. Bushes and plants had been pulled out from the back of the building, and Petitioner's job was to fill in the holes left behind and level out the ground. To do so, Petitioner used a rake to level the ground and prepared a bucket with grass seed. As Petitioner bent over to pick up the seed bucket, he felt a pull and twist in the right side of his low back. He described the sensation as similar to an electric shock. Petitioner testified that after the accident, he got up almost every day with back stiffness.

An employee's injury is compensable only if it arises out of and in the course of his

19IWCC0701

employment. 820 ILCS 305/2. Both elements must be present at the time of the injury to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n.*, 131 Ill.2d 478, 483 (1989). In Petitioner's case, only the "arising out of" component was placed in dispute before the Commission.

To determine whether Petitioner's injury arose out of his employment, the risk to which he was exposed must first be categorized. Risks to employees fall into three groups: (1) risks distinctly associated with the employment; (2) risks personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102 (2006). An injury resulting from a neutral risk to which the general public is equally exposed does not arise out of Petitioner's employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 59 (1989).

After a careful review of the entire record, the Commission finds that the act of bending over and picking up the seed bucket represented a risk distinctly associated with Petitioner's employment. Injuries resulting from a risk distinctly associated with employment are compensable under the Illinois Workers' Compensation Act. *McAllister v. IWCC*, 2019 IL App (1st) 162747WC. Risks are distinctly associated with employment when, at the time of the injury, 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. *Id.* A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. *Id.*

Petitioner's act of bending down to pick up the seed bucket was incidental to the restoration duties that he was assigned to fulfill on the accident date. Petitioner had been instructed by Respondent to fill in the holes left behind by the removed plants. To do so, he had to prepare a seed bucket. It is reasonable to expect that Petitioner would then have to bend down to retrieve the seed bucket in order to complete the task that Respondent had given him. As this task was employment-related, Petitioner's accident arose out of and in the course of his employment on August 7, 2013, and further analysis under the neutral risk doctrine is unnecessary.

Nevertheless, the Commission acknowledges that Petitioner's accident would still be found to be compensable if a neutral risk analysis were applied, because Petitioner was exposed to an increased quantitative risk. Injuries resulting from a neutral risk are compensable under the Illinois Workers' Compensation Act if the employee was exposed to the risk to a greater degree than the general public. *Metro. Water Reclamation Dist. of Greater Chicago v. Comm'n*, 407 Ill. App. 3d 1010 (1st Dist. 2011). Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public. *Id.*

Although his specific job duties fluctuated from day to day, Petitioner was required to lift heavy objects as part of his daily job as a laborer. Specifically, Petitioner testified that he had to lift objects weighing between 50 to 100 pounds every day. Such daily heavy lifting, which took the form of Petitioner lifting the seed bucket on the accident date, exposed him to a quantitatively increased neutral risk. Petitioner's manual laborer tasks involved a greater degree of lifting than that required of the general public, and for this reason, Petitioner's accident would also be

19IWCC0701

compensable under a neutral risk analysis.

The Commission thus finds that Petitioner sustained a compensable accident arising out of and in the course of his employment on August 7, 2013, and accordingly affirms and adopts the Arbitrator's award in its entirety.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 3, 2018 is hereby affirmed and adopted.

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

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: DEC 20 2019

Deborah L. Simpson

Barbara N. Flores

Marc Parker

DLS/met
O- 11/21/19
46

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

19IWCC0701

GOMEZ, JUAN
Employee/Petitioner

Case# **14WC006156**

CITY OF NORTHLAKE
Employer/Respondent

On 12/3/2018, 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 2.47% 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:

5209 WITTER LAW OFFICES
ERIC WITTER
2054 N CALIFORNIA AVE
CHICAGO, IL 60647

0507 RUSIN & MACIOROWSKI LTD
DERRICK J N LLOYD
10 S RIVERSIDE PLZ SUITE 1925
CHICAGO, IL 60606

19IWCC0701

19IWCC0701

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

Juan Gomez
Employee/Petitioner

v.

City of Northlake
Employer/Respondent

Case # **14** WC **6156**

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 **Arbitrator Carlson**, Arbitrator of the Commission, in the city of Chicago, Illinois, on **September 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. [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. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [x] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS

On **08-07-13**, 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 $**65,233.20**; the average weekly wage was $**1,254.48**.

On the date of accident, Petitioner was **35** years of age, ***married*** with **2** 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 $**16,161.02** for other benefits, for a total credit of $**16,161.02**.

Respondent is entitled to a credit of $**16,161.02** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $ 721.66 / per week for 50 weeks, because the injuries sustained caused 10% loss of use of a person as a whole.

No penalties are awarded in this matter.

No lost time benefits were claimed in this matter.

Respondent shall pay all reasonable and necessary medical services, pursuant to the medical fee schedule, as provided in Sections 8(a) 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

11-30-18
Date

DEC 3 - 2018

19IWCC0701

STATE OF ILLINOIS)
) SS
COUNTY OF)
COOK)

WORKERS' COMPENSATION COMMISSION
STATE OF ILLINOIS

JUAN GOMEZ,)
)
Petitioner)
)
vs.) No. 14 WC 6156
)
CITY OF NORTHLAKE)
)
Respondent.)

STATEMENT OF FACTS

This case was tried on September 20, 2018 involving accident date of August 7, 2013, and alleges injuries to Petitioner's lumbar spine.

Petitioner testified on direct examination that he worked for the respondent as a laborer for the past 14 years. (Tr. 8-9) He testified that his job duties were that of a general laborer for the Respondent performing various projects including shoveling snow, yard work, and other landscaping projects. (Tr. 10-13) He testified he would occasionally have to lift between 50-100 pounds. (Tr.12-13)

Petitioner stated that he had previous back injuries prior to August 7, 2013 (Tr. 14). He stated that these prior injuries were slight pulls and nothing compared to what happened on August 7, 2013. (Tr. 14). He stated that these previous low back injuries caused him to take a day or two off of work. (Tr. 14). He stated that prior to August 7, 2013 he had never attended physical therapy or obtained an MRI for his low back. (Tr. 15).

Petitioner testified that on August 7, 2013, he was sent to do yard restoration behind a building that Respondent owned. (Tr.9-10) Petitioner advised that he had leveled the ground and raked the dirt in preparation to seed it. (Tr.9-10) Petitioner stated that as he bent over to pick up a bucket of grass seed, he

felt a pull and a twist in his lower back on the right side. (Tr. 10). Petitioner described the pain as a pull on the back with a slight twist and an instant electric shock. (Tr. 13-14). Petitioner testified that on August 7, 2013 he did not experience much pain, but rather mostly felt back stiffness. (Tr. 21) His pain was "probably a 2 and a 3" out of 10. (Tr. 21)

Petitioner testified that he notified a co-worker who was present at the site of the accident when it occurred. (Tr. 15). He also advised that he notified his supervisor, Dale Roberts, five days later on August 12, 2013. (Tr. 16-17).

On cross examination, Petitioner admitted that he had an x-ray performed of his lumbar spine and saw doctors for complaints of lower back pain in 2009. (Tr. 52-53).

Petitioner first sought treatment for this accident with his primary care physician, Dr. Laura Boyd, on September 17, 2013. (Tr. 25) Those records are not in evidence, but a lumbar x-ray was performed that day. (Px 1)

Petitioner waited until December 5, 2013 (four months) to seek additional treatment. (Px 1) Petitioner seen by Dr. Dalip Pelinkovic, an orthopedic surgeon. (Px 1) Petitioner admitted having an onset of back pain five years prior. (Px 1) In fact, Petitioner told his doctor that he had multiple incidents where his back had "gone out." (Px 1) The most recent incident occurred three months ago that resulted in pain at a severity of 3-4/10 with rare pain in the back of his right thigh. (Px 1) On examination, Petitioner had some tenderness to the lumbosacral junction, right greater than left. Straight leg raise produced some hamstring tenderness with no radiating pain. (Px 1) Dr. Pelinkovic diagnosed petitioner with a low back sprain and chronic low back pain. (Px. 1) The Petitioner was prescribed physical therapy. (Px 1)

Thereafter, Petitioner underwent a course of physical therapy at the Elmhurst Occupational Clinic from January 9, 2014 to February 6, 2014. (Px 2)

On February 6, 2014, Petitioner returned to see Dr. Pelinkovic. Physical therapy was helping, but he continued to have pain and muscle weakness. (Px 1) Straight leg raise produced back pain, but no

radiating pain. (Px 1) Due to petitioner's persistent complaints of pain, Dr. Pelinkovic recommended a lumbar spine MRI. (Px 1)

On February 10, 2014, Petitioner saw Dr. Galassi, and complained of pain in his left lower back after shoveling snow at work on February 10, 2014. Petitioner's lumbar pain had increased with bending and twisting. (Px 1) Petitioner denied radiation of the pain. (Px 1) Petitioner's range of motion was decreased because of pain. On exam, petitioner's lumbosacral spine had no swelling or spasms. (Px 1) He had tenderness to palpation over the left paravertebral muscles. (Px 1) Range of motion revealed flexion to 30 degrees with complaints of low back pain. (Px 1 Extension was only 10 degrees. Petitioner's straight leg raise test produced complaints of pain at 60 degrees bilaterally. (Px 1) He was diagnosed with a recurrent lumbar strain. (Px 1)

A lumbar spine MRI was performed on February 10, 2014. It revealed degenerative disc disease at L3-S1. (Px 1) At L3-4, Petitioner had a degenerative disc bulge and moderate size broad based centered disc protrusion with caudal extrusion of the disc material about 6 mm below the space causing a moderate central canal stenosis and mild bilateral foraminal stenosis. (Px 1) At L4-5, Petitioner had left degenerative disc bulge in the small left paracentral disc protrusion with a descending left L5 nerve root contact and mild central canal stenosis, left greater than right. (Px 1) At L5-S1, Petitioner had a degenerative disc bulge and a small left paracentral disc protrusion with a descending S1 nerve root contact bilaterally with a left lateral recess narrowing and mild bilateral foraminal stenosis. (Px 1)

On February 13, 2014, Petitioner returned to see Dr. Pelinkovic to review the MRI. And noted that the Petitioner had a positive straight leg raise on the left. (Px 1) Otherwise, Petitioner's physical examination was normal. Dr. Pelinkovic diagnosed Petitioner with L3-4 and L4-5 radiculopathy. (Px 1) Petitioner was referred to Dr. Andrew Belavic, an anesthesiologist, for epidural steroid injections. (Px 1) Petitioner was given a prescription for more physical therapy and he was placed off work. (Px 1)

Petitioner was then also seen on February 13, 2014, by Dr. David Vitale, an emergency medicine specialist. (Px 1) Dr. Vitale is not an orthopedic surgeon. After reviewing the MRI, Dr. Vitale diagnosed petitioner with a herniation at L4-5. (Px 1)

Petitioner was seen by Dr. Belavic, an anesthesiologist, on February 18, 2014. (Px 2) Dr. Belavic diagnosed petitioner with thoracic and lumbosacral neuritis or radiculitis and recommended a TFESI at L4-5. (Px 2) Thereafter, these injections were performed by Dr. Belavic on February 26, 2014. (Px 2)

Petitioner returned to treat with Dr. Pelinkovic on March 6, 2014. (Px 1) Petitioner stated that his pain was reduced to a severity of 2/10. (Px 1) He denied any numbness or tingling. (Px 1) Petitioner stated he had great improvement following the injections. (Px 1) Physical examination was normal. (Px 1) Petitioner had a negative straight leg raise test. (Px 1) Petitioner was released by Dr. Pelinkovic to full duty work without restrictions and was advised to make an appointment if his symptoms returned. (Px 1)

Petitioner returned to see Dr. Galassi, the occupational medicine specialist, on March 28, 2014. (Px 1) Petitioner had advised that he felt a twinge of pain over his right lower back while lifting a piece of asphalt with a co-worker that day. (Px 1) Petitioner reported to Dr. Galassi that the pain in his back had resolved immediately and that he had no further problems with his back. (Px 1) Petitioner denied any pain radiating into his lower extremities. (Px 1) He also denied any loss of range of motion, numbness, tingling, or weakness. (Px 1) Petitioner denied taking any medications. (Px 1) On physical examination, Petitioner was able to ambulate and move all of his extremities without difficulty. (Px 1) Dr. Galassi believed that petitioner had a right lower back injury with resolution. (Px 1) Petitioner was advised that he could return to regular work. (Px 1)

Petitioner returned to see Dr. Belavic on April 10, 2014 for a second lumbar epidural steroid injection. (Px 2)

Three and half years later, on October 5, 2017, Petitioner was sent at Respondent's request for an independent medical examination with Dr. Julie Wehner, an orthopedic spinal surgeon. (Rx 1 pg 9)

Dr. Wehner testified that when Petitioner presented for the independent medical examination, he reported occasional stiffness. (Rx1 pg13) He denied any pain and was not taking pain medication. (Rx 1 pg 13)

On exam, Petitioner had a normal gait and was capable of touching his toes. (Rx 1 pg 13) He had no pain with palpation and he had a negative straight leg raise. (Rx 1 pg 13) His strength was normal. (Rx 1 pg 13) Dr. Wehner noted that this was a completely normal examination. (Rx 1 pg 13)

Dr. Wehner did not believe that Petitioner's back pain was related to his work activities. (Rx 1 pg 14-15) Dr. Wehner testified that she would not characterize Petitioner's complaints as a lumbar strain as "she was hesitant to call every time he says he has pain a strain because that implies he had an injury." (Rx1 pg26) Rather, she testified that Petitioner just has episodic back pain which is not an injury. (Rx1 pg26) She stated this is definitively not a strain and that she could not even call it a strain. (Rx1 pg26)

Dr. Wehner testified that the MRI was normal. (Rx1 pg16) She noted that L3-4 had some mild loss with a mild bulge along with a reported moderate sized super imposed broad based central disc protrusion with a caudle extrusion of disc material of about six millimeters below the disc space causing a moderate canal stenosis and mild bilateral foraminal stenosis. (Rx1 pg17) She noted that this finding was consistent with disc height loss was degenerative in nature. (Rx1 pg17) She stated that L4-5 had diffuse degenerative left disc bulge with a small central protrusion that caused a mild canal stenosis left greater than right. (Rx1 pg17) Finally, she noted that L5-S1 had a mild diffuse disc bulge with small left paracentral disc protrusion. (Rx1 pg17)

Dr. Wehner advised that Petitioner's lumbar spine findings were degenerative and did not believe that any of the findings were caused by Petitioner's work activities. (Rx1 pgs. 17-18)

Dr. Wehner stated that she strongly disagreed with Dr. Vitale's diagnosis of an L4-5 herniated disc with radiculopathy and multi-level lumbar disc disease. (Rx1 pg 33-34) Dr. Wehner advised that while Dr. Vitale found a positive straight leg raise on the left, the same did not indicate radiculopathy. (Rx1 pg34) Rather, it just indicated that Petitioner had pain which was a non-specific finding. (Rx1 pg34)

Dr. Wehner testified that a herniation is when there is a rent in the annulus which is the outer boarder of the disc causing the nucleus to pop out. (Rx1 pg35) She stated the popped nucleus can press on the nerve root or the thecal sack, causing symptomology. (Rx1 pg35)

Dr. Wehner testified that the MRI finding of the L5-S1 left paracentral disc protrusion minimally effacing the left descending S1 nerve root is not a finding that would be a pain generator.(Rx1 pg37-38)

Dr. Wehner stated that Petitioner did not suffer from radiculopathy as he did not complain of any radiating pain in a neurologic distribution during his course of care. (Rx pg59)

Dr. Wehner testified that stiffness is not an uncommon complaint among people. (Rx1 pg62) Stiffness in the morning is often associated with a sign of arthritis which can be a generic term. (Rx1 pg62) She advised that there are many people who complain of stiffness in their back. (Rx1 pg 62) She noted it was a non-specific pain complaint that does not indicate any injury or any specific finding that correlates with it. (Rx1 Pg. 62-63).

Dr. Wehner believed that Petitioner had reached maximum medical improvement. (Rx1 pg19) She believed that the treatment that Petitioner received including the MRI and the treatment at Elmhurst Occupational Health was reasonable, but was not related to any injury from August 7, 2013. (Rx1 pg19-20)

Dr. Wehner testified that she performed an impairment rating consistent with the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition. (Rx1 pg20) She testified that she is a certified independent medical examiner and as such is capable of performing impairment ratings. (Rx1 pg20) She testified that giving petitioner the benefit of the doubt and using a diagnosis of a lumbar strain, petitioner was a class 0 using table 17-2 on page 540. (Rx1 pg21) As Petitioner's diagnosis was class zero with no modifiers, his resulting impairment rating was a 0% impairment rating. (Rx1 pg21)

At trial, Petitioner testified to multiple flare ups of low back pain both before and after the August 13, 2013 bending incident. (Tr. 20, 22, 40, 41, and 48) Petitioner testified to an incident in February of 2014 wherein he was shoveling an inch of snow off a sidewalk at work when he hit an ice cap and felt a pull in his back. (Tr. 22) He stated this pull felt similar to the one he experienced on August 7, 2013. (Tr. 22-23). He admitted that when he saw Dr. Wehner for the independent medical examination, he related most of his complaints to shoveling snow in the winter of 2014. (Tr. 58)

Petitioner admitted that he told Dr. Wehner that he had a couple of flare ups of low back pain in the summer of 2014. (Tr. 58) He admitted that he told Dr. Wehner he did not seek any medical treatment for those flare ups. (Tr. 58)

Petitioner admitted that back braces were provided by the Respondent only after he requested them. (Tr.46-47) He admitted that he requested these back braces because his back did not feel right and he wanted to take care of himself in order to avoid any further accidents from hurting himself. (Tr. 47) He stated this was especially true following the 2008 incident. (Tr. 47)

Petitioner stated that between the August 7, 2013 bending incident and his release from care in April of 2014, he was unable to do the things he was able to do before the bending incident. (Tr.36) He was unable to pick up his daughter. (Tr.36) He was unable to sit for prolonged periods of time due to back stiffness. (Tr. 36) He also testified that he slept on the floor with a memory pad and blanket for a time. (Tr. 37)

Petitioner admitted that he has not been to any doctor with respect to his lower back since April of 2014. (Tr. 62-63). Respondent entered petitioner's primary care medical records, following petitioner's release from care in April 2014, into evidence. (Rx3) These records document that petitioner did not make any complaints of back pain or associated symptoms during those visits. (Rx3)

Petitioner testified that since being released from care in April of 2014, he has worked the same hours, performed the same job duties, and gets paid more money than he did before August 3, 2013. (Tr. 62-63) He testified that following the August 7, 2013 accident, he now asks for help to lift anything heavy and tries to use machinery when available. (Tr. 38) Likewise, he uses a back brace and tries to use proper lifting techniques. (Tr. 38) Petitioner testified that at home he also performed lifting activities including picking up his young daughter regularly. (Tr. 50-51).

Respondent's exhibit 4 is a pain diagram filled out by Petitioner during the independent medical examination with Dr. Wehner. (Rx4) Petitioner admitted that he wrote that he had no pain during the independent medical examination of Dr. Wehner. (Tr. 59)

In addition, Respondent entered into evidence Respondent's Exhibit 5, the pain disability questionnaire filled out by Petitioner during the independent medical examination. (Rx 5) Petitioner admitted that he filled out 0 indicating no problems with respect to his lower back for all of the scenarios listed. (Tr. 61)

Petitioner testified that he was provided group insurance from the Respondent. (Tr. 40) He testified that Respondent paid for a portion of the premiums and he submitted his medical bills through group insurance that was provided by the Respondent. (Tr. 40).

The Petitioners' supervisor, Dale Roberts, testified that he has worked for Respondent in a supervisory capacity for the last 34 years. (Tr. 74-75). He advised that he has known Petitioner for 14 years. (Tr. 76). He advised that prior to August 7, 2013, Petitioner made regular complaints regarding his lower back, yet continued to perform his job duties and was a truthful and excellent employee. (Tr. 76)

Mr. Roberts testified that on August 12, 2013 Petitioner told him of his injury on August 7, 2013. (Tr.84) Petitioner has never lied to Mr. Roberts. (Tr. 86).

CONCLUSIONS OF LAW

In support of the Arbitrator's decision relating to (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?, and (E) Was timely notice of the accident given to Respondent?

After carefully reviewing and weighing the evidence and hearing the testimony of the witnesses, the Arbitrator finds that Petitioner suffered an accident that arose out of and in the course of his employment.

An employee's injury is compensable only if it "arises out of" and "in the course of" his employment. 820 ILCS 305/2. Both elements must be proven for the employee's injuries to be compensable. Illinois Bell Telephone Co. v. Industrial Commission, 131 Ill. 2d 478, 483, 546 N.E.2d 603, 605 (1989).

"In the course of" refers to the time, place and circumstances under which the accident occurred. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 57, 541 N.E.2d 665, 667 (1989). In this case, it is undisputed that Petitioner was at work when he experienced an onset of low back pain on August 7, 2013. However, more is required to recover compensation than the fact that an employee was injured at their place of work. Greater Peoria Mass Transit v. Industrial Commission, 81 Ill.2d 38, 42 (1980).

An injury "arises out of" one's employment if there is a causal connection between the employment and the accidental injury. To determine whether an employee's injury arose out of his employment, it must first be determined what risk the employee was exposed to. Dukich v. Industrial Com'n, 2017 IL App 2d. 160351WC (2nd Dist. 2017). "For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment." Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 59(1989). "[I]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable." Id. When dealing with a neutral risk shared by that of the general public "showing of an increased risk may be proved by 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 the members of the general public by virtue of his employment)." Adcock v. Industrial Com'n, 2015 IL App (2d) 130884WC, 38 N.E.3d 587,594 (2nd Dist. 2015)

Petitioner testified that he felt an onset of low back pain and stiffness "as he bent over" to reach for a bucket of grass seed. (Tr. 10) Respondent argues that the need to bend over, even repeatedly, is not unique to petitioner's work and cites Prior v. Industrial Com'n, 201 Ill. App. 3d 1, 6 (5th Dist. 1990). See also Lannon v. S&C Electric Co. 16 IL.W.C. 14849

Further, Respondent argues that Petitioner failed to provide any qualitative and quantitative aspect of his job that put him at an increased risk of injury because of his employment. However, there is evidence that indicates petitioner had to frequently bend over for his work with Respondent. Petitioner

testified his job as a laborer requires bending and lifting, occasionally heavy items. For instance, in the Spring, he bends and lifts large bags of seeds. In the Winter, he bends and lifts large bags of salt. It all depends on the job. For instance, he bends and lifts to break a water main. On the day in question, Petitioner had just pulled out shrubbery and had to fill in the holes left behind after their removal. Further, the written statement of Petitioner is that he felt pain when standing after spreading grass seed after a time. (PX #4) Also, that he bent over to grab a bucket. In this analysis, the Arbitrator will not split hairs over the exact mechanism of injury for a laborer who daily bends, twists and lifts heavy objects. In the context of Petitioner's usual work activities as well as the activities Petitioner performed on August 7, 2013, the Petitioner was at a greater risker than the average public to injure his lumbar spine. Petitioner was not a sedentary office worker bending over to pick up a pencil that had fallen on the floor.

With respect to notice, Mr. Roberts, the Petitioner's supervisor, testified that Juan Gomez had an increase in back pain and stiffness while at work on August 7, 2013.

Based on the above, the Arbitrator finds that Petitioner suffered an accident that arose out of his employment on August 7, 2013.

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

The evidence supports a finding that petitioner's condition of ill-being was caused by the work activity on August 7, 2013.

Petitioner testified that while bending over on August 7, 2013 he felt a sudden twinge in his right lower back. He described this twinge as a pulling sensation with associated stiffness, minimal pain, and a feeling like an electric shock.

Respondent argues that petitioner's low back issues predated the August 7, 2013 bending incident. On cross examination, Petitioner admitted to first injuring his lower back in 2009, four years before his alleged accident date of August 7, 2013. He admitted that in 2009, he felt the lower part of his back go to the right while the upper part of his back went to the left. Nevertheless, this treatment is too remote in time and place to be relevant to present claim. While there was a x-ray after this treatment: no

MRI exists and Petitioner worked without significant interruption for years, even though there were some flare ups.

Dr. Wehner tried to explain that Petitioner experienced a temporary aggravation of a pre-existing condition, but incredibly denied any occurrence of an accident. Rather, Petitioner was experiencing normal back pain that occurs in a large segment of the population. Dr. Wehner stated that petitioner did not suffer any injury to his low back or lumbar spine as a result of the August 7, 2013 work activity. The rejects this opinion and wonders if Dr. Wehner had ever personally removed shrubbery?

Absent an opinion from petitioner's treating physicians relating petitioner's low back condition to the August 7, 2013 bending incident, Petitioner's argument regarding causation rests solely on Petitioner's testimony, which the Arbitrator found to be credible in the extreme. This was corroborated his supervisor's testimony that the Petitioner was an excellent employee and never lied.

At trial, petitioner attributed his low back condition to the bending incident on August 7, 2013. (Tr. 13-15)) His medical records, however, document petitioner's initially attributing his low back condition to the 2009 injury. (Px.1) He tweaked it again during an incident while shoveling snow in February of 2014. (Rx. 1 at 11 and Tr. 58) And again while bending over to pick up grass seed in 2013. (Rx. 1 pg 54-55) At trial, petitioner admitted to each of these occurrences. (Tr. 13-15, 43-44, and 58) To the Arbitrator, these repeated occurrences only highlight the "increased risk" of Petitioner's job as a laborer as well as the physical nature of Petitioner's job. There is no evidence of reinjury at home, at second job, or playing a sport.

The Petitioner may have suffered a herniation as a result of the August 7, 2013 bending incident. Or he may have simply aggravated a pre-existing herniation. In any event, there is no pre-accident MRI revealing a such a condition. The only MRI in the court record is the one after August 7, 2013 and it was prescribed before the February 10, 2014 re-injury.

On February 10, 2014, an MRI was performed showing 2 level of bulge and 1 level of protrusion described in size as 6 millimeters, which others might describe as a herniation. Dr. Vitalli described them as such.

It appears from the record, that if Petitioner had any radiculopathy, it was intermittent in nature for a while and after some injections and conservative treatment went dormant. The injections were effective.

Based on the testimony of Petitioner and the objective medical evidence, the Arbitrator finds Petitioner's low back condition of ill-being was caused by the bending incident on August 7, 2013.

The reinjuries after the August 7, 2013 were not superseding intervening occurrences pursuant to the recent reasoning in Par Electric v. IWCC 3-17-0656 WC (3rd Dist. 2018) and Vogel v. Industrial Comm'n. 354 Ill.App.3d 780 (2005). Subsequent accidents may have aggravated the injury but did not change the nature of the injury. If the work injury was a causative factor in the resulting condition, then the present condition continues to be casually connected to the first work injury. The 2009 occurrence is too far back in time and place and the Petitioner reached MMI for that accident years ago. However, the post-occurrence injuries occurred before maximum medical improvement ("MMI"). Please recall that the lumbar MRI was prescribed before the February 10, 2014 show shoveling accident. Petitioner had not reached MMI before the March 28, 2014 asphalt lifting twinge.

(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?

As the Arbitrator has found that petitioner suffered an accident that arose out of his employment with respondent and that petitioner's condition of ill-being was caused by the work activities on August 7, 2013, all medical to April 10, 2014 shall be paid by Respondent pursuant to the fee schedule.

In support of the Arbitrator's decision relating to (L) What is the nature and extent of the injury? the Arbitrator find the following facts:

As this matter involves an accident occurring after September 1, 2011, Section 8.1(b) of the Act requires any claim for permanent partial disability be established based on five factors. Under Section 8.1(b)(b)(v) the relevance and weight of any factors that are used in addition to the level of impairment as reported by the evaluating physician must be explained in a written order. Thus, the impairment rating is a factor that is to be considered and the remaining four factors are used in addition to the rating to determine the level of disability.

In the present case, Dr. Wehner concluded Petitioner sustained a 0% impairment of the man as a whole.

Pursuant to Section 8.1(b)(b)(v) of the Act, this is not the sole determinant of the level of disability. However, the Arbitrator does not find the other factors, in addition to the impairment rating, to significantly change the disability determination.

Occupation of the Injured Employee

Petitioner is employed as a general laborer for the Respondent. It was undisputed that he performs a variety of job duties for Respondent and can on occasion lift as much as 50 to 100 pounds. Petitioner testified at trial that since his last date of treatment on April 10, 2014, he has continued to work the same job duties and perform the same tasks.

The Arbitrator finds this factor to be relevant to the disability determination and attaches great weight to this factor. The evidence produced demonstrates Petitioner sustained a physical disability as he continues to be able to complete his job responsibilities but with great caution.

Age of the Employee at the Time of the Injury

Petitioner was 35 years old at the time of the injury. He is currently 40 years old. There was no evidence produced by either party to suggest that petitioner's age played a factor in his injury or resulting disability. As such, the Arbitrator does not find this factor relevant to the determination of disability. The Arbitrator applies some weight to this factor in determining the resulting disability.

Employee's future earning capacity.

Petitioner has been released to return to work in his regular duty capacity as a general laborer. He continued to perform full duty work for the Respondent. He testified that he continues to perform the same job duties and work the same hours that he had before the accident. No evidence was produced that petitioner's earnings have decreased since the accident. In fact, petitioner testified that his wages have increased since his release to return to regular duty work in April of 2014. Further, petitioner's supervisor, Dale Roberts, testified that petitioner will soon be up for a promotion to a supervisory role.

The Arbitrator applies no weight to this factor. In fact, the evidence produced at trial shows that Petitioner has sustained some disability but continues to work his normal job for the Respondent and had an increase in earnings.

Evidence of Disability Corroborated by the Treating Medical Records

Petitioner's medical records establish that he has had no lasting effects from his alleged lower back condition. Upon discharge from Dr. Plinkovic on March 6, 2014, petitioner had a normal physical examination and complained of minimal pain at a severity of 2/10.

Two weeks later, Petitioner presented to Dr. Galassi, his occupational medicine specialist. At that time, Petitioner reported no pain and no problems with his back.

Respondent offered into evidence petitioner's medical records following petitioner's discharge on April 10, 2014. These visits show no radicular complaints.

Petitioneradmitted that he has had no back pain or complaints since April 10, 2014 and he has not had medical treatment for his back since April 10, 2014.

Respondent offered into evidence forms filled out by petitioner during his independent medical examination on October 5, 2017. Petitioner wrote "no pain" indicating that he does not currently experience any pain or symptoms as a result of the August 7, 2013 bending incident.

Respondent's exhibit 5 is a pain disability questionnaire filled out by petitioner. Petitioner indicated a "0" for all 15 activities.

Despite the above, the MRI shows that Petitioner has at least two bulging discs and one 6 mm protrusion showing moderate stenosis. The Petitioner's symptoms may go away but the tissue damage remains and will not spontaneously heal. Petitioner underwent two lumbar epidural steroid injections and gave a good effort in physical therapy. No surgery was ever recommended. Petitioner stated that he can no longer pick up his 7 year-old daughter after his injury, that he had difficulty sitting for a prolonged periods of time. (T. 36-37) He still uses a back brace at work and is more careful in how he carries heavy objects (T. p. 38)

After considering all of the factors and for the reasons set forth above, the Arbitrator finds that prove that Petitioner suffered 10% loss of use of a person as a whole.

In support of the Arbitrator's decision relating to (M) Should penalties or fees be imposed upon Respondent?

The Arbitrator finds that valid disputes exist with respect to accident and causation. A complete set of initial treatment records were never put into evidence and afterwards, there was a four-month delay until the 2nd medical treatment date. As such, Respondent's denial of the claim and refusal to pay medical benefits was not unreasonable or vexatious. Therefore, the Arbitrator finds that penalties and fees should not be imposed on Respondent.

Further, as explained below, Respondent is entitled to a credit under section 8(j) for medical paid under Petitioner's group insurance. Likewise, there is no claim being made for temporary total disability. Therefore, even if Petitioner were entitled to penalties and fees, there is no outstanding medical or TTD upon which to calculate the same

In support of the Arbitrator's decision relating to (N) Is Respondent due any credit?

Petitioner testified that he was provided group insurance by Respondent. Petitioner testified that Respondent paid a portion of the premium for this group insurance. Petitioner testified that he put his medical care in this case through his group insurance.

Respondent is therefore entitled to a credit under section 8(j) for all payments made by Petitioner's group insurance. Petitioner's exhibit 3 shows that Petitioner's group insurance paid medical in the amount of $16,161.02.

Based upon the above, the Arbitrator finds that Respondent is entitled to a credit under section 8(j) in the amount of $16,161.02. Petitioner is entitled to any out-of-pocket reimbursement.