STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☒ Affirm and adopt	☐ 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

Rhea Allard,

Petitioner,

14IWCC0211

vs. NO: 12 WC 27692

Horace Mann Companies,

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, medical expenses, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 1, 2013 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 $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: MAR 2 7 2014
KWL/vf
O-3/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0211

ALLARD, RHEA
Employee/Petitioner

Case# **12WC027692**

HORACE MANN COMPANIES
Employer/Respondent

On 8/1/2013, 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 0.06% 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 & ASSOC LAW FIRM LLC
TIMOTHY M SHAY
1030 S DURKIN DR
SPRINGFIELD, IL 62704

2904 HENNESSY & ROACH PC
STEPHEN KLYCZEK
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION 19(b)

14IWCC0211

RHEA ALLARD
Employee/Petitioner

Case # 12 WC 27692

v.

HORACE MANN COMPANIES
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 **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **June 18, 2013**. 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. [ ] 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

14IWCC0211

On the date of accident, **May 23, 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 **$73,156.34**; the average weekly wage was **$1,524.09**.

On the date of accident, Petitioner was **58** 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 **$3,584.90** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner's medical expenses, as set forth in Petitioner's Exhibit 5, directly to the providers, as provided in Section 8(a) of the Act and subject to the medical fee schedule, Section 8.2 of the Act. Respondent shall receive a credit of $3,584.90, as noted above, for medical bills paid by Healthlink, and shall indemnify and hold Petitioner harmless against any claims asserted by Healthlink with regard to bills in which Respondent has received said credit. Respondent shall also reimburse Petitioner for out-of-pocket medical expenses she paid, as set forth in Petitioner's Exhibit 5.

Respondent shall authorize and pay for the surgery recommended by Dr. Mark Greatting, as provided in Section 8(a) of the Act and subject to the medical fee schedule, Section 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

07/23/2013
Date

ICArbDec19(b)

AUG 1 - 2013

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

RHEA ALLARD
Employee/Petitioner

14IWCC0211

v.

Case # 12 WC 27692

HORACE MANN COMPANIES
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Rhea Allard, testified that she has been employed by Respondent, Horace Mann Companies (an insurance company), for thirty four and one-half years. She started as a programmer and later became a database administrator. However, Petitioner testified that her duties as a programmer and database administrator were basically the same. She stated that she has worked on computers for her entire career and that she received her own computer at least fifteen years ago.

Petitioner testified that her job duties involve administering a database of corporate clients, including performing recoveries, backups, and programing. She testified that these activities all involve entering data into a computer. Petitioner testified that she works ten hours per day, four days per week.

Petitioner testified that she spends at least seven hours per day at her desk and that she spends at least between five and six hours per day performing keyboarding activities. Petitioner also testified that she generally has lunch at her work station, taking approximately a half hour to forty five minute break, and that although she is given both a morning and afternoon break, she generally does not take them. Petitioner testified that she types with both hands and uses her mouse with her right hand.

Petitioner explained that her current work station is at a cubicle. Two photographs of Petitioner's current work station were entered into evidence as Petitioner's Exhibit (PX) 2. The second photograph depicts a desk with a monitor on top of the desk and a keyboard and mouse on a tray underneath the desk. (PX 2).

Petitioner further testified that, as depicted in the first photograph of Petitioner's Exhibit 2, she used to have a work station where the keyboard and mouse were on the desktop. (PX 2). She testified that she had that type of work station for approximately two years. She testified that the change from a work station with the keyboard and mouse on the desktop to a work station with the keyboard and mouse on a sliding tray occurred approximately three years ago. She testified that that during the time her keyboard and mouse were on her desktop, the top of her desk reached just under her chest, or slightly above that. She testified that having the keyboard on top of the desk required her to lift her hands, wrists, and shoulders higher. She testified that lifting her hands, wrists, and shoulders required her to bend or flex her wrists while she was performing her job.

Petitioner testified that before she worked at the station depicted in the first photograph of Petitioner's Exhibit 2, she also had a work station with the keyboard on the desktop. She testified that the desk was slightly higher than the desk depicted in Petitioner's Exhibit 2. She testified that this work station also required flexion of her wrists and raising of her arms.

Petitioner testified that prior to her current claimed date of accident for her right hand, she treated with Dr. Mark Greatting for an injury to her left wrist. Her left wrist injury required surgical intervention in 2010, and is not the subject of the instant claim.

Petitioner testified that she began to notice issues regarding her right hand at least two years ago. She testified that she presented to her primary care physician, Dr. Steven Bowers at Koke Mill Medical Associates, who subsequently referred her to Dr. Greatting.

Petitioner testified that she spoke with Matt Kietzman, her immediate supervisor's supervisor, around the time of her first visit to Dr. Greatting regarding her right wrist. She testified that she told him that she was going to see Dr. Greatting about her right wrist and that her right wrist was beginning to bother her like her left wrist had done in the past. Petitioner testified that it was known that her left wrist injury was a workers' compensation injury that had settled. The Arbitrator takes judicial notice of this settlement between Petitioner and Respondent which occurred on November 1, 2010, and represented 15% loss of use of the left hand. (See Case Number 10 WC 43991).

Petitioner presented to Dr. Greatting on May 23, 2011, for treatment of her right wrist. Dr. Greatting also testified via his evidence deposition, taken on April 22, 2013, entered into evidence as Petitioner's Exhibit 1. Dr. Greatting testified that he is a board certified orthopedic surgeon and that more than 90% of his practice is limited to upper extremity problems. (PX 1, pp. 5-6). Dr. Greating also testified that he has a certificate of added qualification in hand surgery through the American Board of Orthopedic Surgery. (PX 1, p. 6).

Dr. Greatting testified that he had treated Petitioner prior to May 23, 2011, for a torn triangular fibril cartilage in her left wrist. (PX 1, p. 7). He testified that the triangular fibril cartilage is a stabilizing structure in the wrist. (PX 1, p. 7). Dr. Greatting testified that Petitioner had surgery to correct the issue, and had a positive result. (PX 1, p. 7).

Upon presentation to Dr. Greatting on May 23, 2011, Petitioner complained of chronic right wrist pain. She did not report any injury or trauma. She had no complaints of numbness or tingling. Physical examination revealed tenderness over the right scaphotrapezio trapeziod joint and minimal tenderness over the carpometacarpal joint of the thumb. Dr. Greatting ordered x-rays of Petitioner's right wrist, which were performed in office. The x-rays were unremarkable. (PX 3). Dr. Greatting testified that an x-ray does not show ligaments. (PX 1, p. 9). Dr. Greatting indicated Petitioner may have some early right wrist scaphotrapezio trapeziod osteoarthritis. He prescribed meloxicam and directed Petitioner to return in six weeks for re-evaluation. (PX 3).

Petitioner returned to Dr. Greatting on July 13, 2011. She continued to complain of persistent right wrist pain. Dr. Greatting noted in his office note, as Petitioner testified, that the meloxicam did not help alleviate Petitioner's pain. On physical examination, the doctor noted tenderness over the volar and radial side of the wrist at the scaphotrapezio trapeziod joint. However, Dr. Greatting indicated Petitioner was no longer tender over the carpometacarpal joint. Dr. Greatting performed a corticosteroid injection the right wrist scaphotrapezial trapezoid joint. (PX 3). Dr. Greatting testified that he elected to perform the injection because the prior medication had not helped. He further testified that the injection served a therapeutic as well as diagnostic purpose. He testified that if the injection lowers the pain in the area, it helps identify the source of the pain. (PX 1, p. 10).

Petitioner returned to Dr. Greatting on August 24, 2011. Petitioner indicated that the injection had not helped her pain. On physical examination, Dr. Greatting noted Petitioner was very tender over the volar aspect of the scaphotrapezio trapezoid joint. He also noted there was an area of fullness to palpation just proximal to the scaphotrapezio trapezoid joint which was tender. He was concerned Petitioner may have a ganglion cyst in that area. Dr. Greatting ordered MRI studies of Petitioner's right wrist and hand to rule out a ganglion cyst. (PX 3).

Petitioner underwent the MRI of her right wrist on September 7, 2011, the report of which is entered into evidence as Petitioner's Exhibit 4. The MRI revealed a tear of the triangular fibrocartilage complex, partial tear of the scapholunate ligament, some degenerative changes in the wrist, and possibly a small ganglion cyst. (PX 4). Dr. Greatting testified that the triangular fibrocartilage complex was located on the opposite side of the wrist from Petitioner's symptoms and was therefore an incidental finding. He testified that the ganglion cyst was located on the volar side of the wrist, in the area he had noted on examination. (PX 1, p. 13).

Dr. Greatting indicated that the scapholunate tear was located in the area of Petitioner's pain. Dr. Greatting further testified within a reasonable degree of medical certainty that Petitioner's pain was more likely caused by the scapholunate tear than the ganglion cyst. (PX 1, p. 14). He indicated that the ganglion cyst shown on the MRI was "tiny" and that it did not appear to be significant enough to cause the symptoms of which Petitioner was complaining. (PX 1, p. 15).

Petitioner returned to Dr. Greatting on September 22, 2011. Examination indicated tenderness over the volar radial wrist and mild tenderness over the first dorsal compartment. Dr. Greatting performed a second injection to the radiocarpal joint. (PX 3).

On November 3, 2011, Petitioner returned to Dr. Greatting, indicating the injection to the radial carpal joint did not help. She still exhibited tenderness volarly over the area of the scaphotrapezial joint and the flexor carpi radialis tendon. Dr. Greatting elected to perform an injection to the flexor carpi radialis tendon sheath. (PX 3). Dr. Greatting testified that he performed this injection for diagnostic purposes. (PX 1, p. 16).

Petitioner returned to Dr. Greatting on December 15, 2011. She indicated that she was still having significant pain on the radial side of her right wrist and that the injection to the flexor carpi radialis tendon did not help. Physical examination continued to show significant tenderness over the volar area of the wrist and significant tenderness dorsally over the scapholunate area. A scaphoid shift test caused pain, but the scaphoid felt stable. At that time, Dr. Greatting recommended right wrist arthroscopy and debridement of the partial scapholunate tear, as well as partial synovectomy. (PX 3). Dr. Greatting testified that arthroscopy serves a diagnostic as well as therapeutic purpose. He testified that it provides a clearer view of the pathology than a MRI. (PX 1, p. 18).

Dr. Greatting testified within a reasonable degree of medical certainty that surgery is reasonable and necessary given Petitioner's exam findings, the review of her MRI, and her response to the three injections. (PX 1, p. 18). Petitioner testified that she reported Dr. Greatting's surgical recommendation to Mr. Kietzman.

Petitioner requested approval from Respondent for her surgery. She also had additional follow-up visits with Dr. Greatting on February 1, 2012, April 5, 2012, and September 6, 2012. Dr. Greating testified that he continued to see Petitioner to re-examine her wrist and discuss treatment. (PX 1, pp. 31-32). In his office note of April 5, 2012, Dr. Greatting reported: "Her symptoms are significantly aggravated doing her work activities. She basically does keyboarding the majority of her time at work and with her positioning of her wrist and motion of her wrist with her keyboarding activities, she gets significantly increased pain." (PX 3).

Dr. Greatting testified that he believes Petitioner's scapholunate tear stems from a degenerative process. (PX 1, pp. 20-21). However, he indicated that the way Petitioner positions her wrist while keyboarding and moves her

wrist repeatedly throughout the day increases her symptoms. (PX 1, p. 21). He further testified that he believed within a reasonable degree of medical certainty that Petitioner's keyboarding activities aggravated her degenerative scapholunate tear to render it symptomatic. (PX 1, pp. 22-23). Dr. Greatting testified that, in his opinion, there was a causal relationship between the aggravation from Petitioner's keyboarding activities and her symptoms. (PX 1, p. 23). Dr. Greatting testified that a scapholunate ligament tear can be asymptomatic, and that keyboarding activities, especially those involving hyperflexed wrists, can aggravate an asymptomatic condition to render it symptomatic. (PX 1, p. 23). Dr. Greatting testified that Petitioner's symptoms are worse when she is keyboarding and lessened when she is away from keyboarding. (PX 1, p. 24). He further testified that the lessening of symptoms when away from keyboarding indicated that the keyboarding activity was aggravating her symptoms. (PX 1, p. 24).

On June 25, 2012, at the request of Respondent, Petitioner presented to Dr. Mitchell Rotman for an examination pursuant to Section 12 of the Illinois Workers' Compensation Act, 820 ILCS 305/1 *et seq*. (hereafter the "Act"). Dr. Rotman's evidence deposition, taken March 12, 2013, was entered into evidence as Respondent's Exhibit 1. Dr. Rotman testified that he is a board certified orthopedic surgeon with a subspecialty in upper extremity surgery. (RX 1, p. 6).

Dr. Rotman testified that he performed a physical examination of Petitioner and reviewed her related medical records and diagnostic studies. (RX 1, pp. 9-10). He testified that at most, he spent fifteen minutes with Petitioner. (RX 1, p. 16). He testified that his understanding of Petitioner's job duties was that she performed secretarial-type work with a keyboard, mouse and computer. (RX 1, p. 11). Dr. Rotman diagnosed Petitioner with a small occult volar radial ganglion cyst in the right wrist that was causing her symptoms. (RX 1, p. 11). He further testified that it was his opinion, within a reasonable degree of medical certainty, that Petitioner's work with Respondent was not an aggravating factor for her right wrist pain coming from an occult volar radial ganglion cyst. (RX 1, pp. 11-12). He testified that, in his opinion, the ganglion cyst was idiopathic in nature. (RX 1, p. 12).

Dr. Rotman testified that in his review of the MRI film, he did not appreciate any major abnormalities to the scapholunate ligament. (RX 1, p. 14). He further testified that he did not disagree with the radiologist's interpretation of the MRI; he simply testified that he did not see a tear himself. (RX 1, p. 15). Further, Dr. Rotman testified that he did not note tenderness over the scapholunate ligament. (RX 1, p. 15). Dr. Rotman further opined that typing and use of a mouse for seven to nine hours per day would not aggravate a scapholunate ligament tear. (RX 1, p. 19). He testified that a scapholuate tear would be aggravated by extremes of motion to the wrist. (RX 1, p. 19). Dr. Rotman testified that he did not have an opportunity to review Petitioner's work station. (RX 1, p. 19).

As of the date of trial, Petitioner has not undergone the surgery recommended by Dr. Greatting. Petitioner testified that since December 15, 2011, when surgery was first recommended, her condition has worsened. She testified that the right side of her hand hurts underneath the wrist, near the thumb. She described the pain as a dull ache. She testified that it hurts every day. Petitioner testified that while she is performing keyboarding activities at work, she notices that her right wrist aches more. She also testified that stirring motions cause additional pain. Petitioner testified that she also experiences pain on the outer portion of her wrist. She said that it aches similar to the pain under her thumb. She also indicated that she was beginning to have more pain on the palmar side of her right wrist.

Petitioner offered into evidence a series of medical invoices she claims she received in the course of treatment concerning her claimed work injury to her right wrist. The outstanding invoices total $160.00. (PX 5). The vast majority of Petitioner's medical invoices were paid through Respondent's group insurance plan for which Respondent is allowed credit pursuant to Section 8(j) of the Act. (See Arbitrator's Exhibit 1).

CONCLUSIONS OF LAW

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 current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner sustained a repetitive trauma accident arising out of and in the course of her employment with Respondent with a manifestation date of May 23, 2011. It is uncontested that Petitioner suffers from a scapholunate ligament tear in her right wrist. Dr. Greatting diagnosed Petitioner with a scapholunate ligament tear after reading Petitioner's October 7, 2011 MRI. (PX 3). Furthermore, Dr. Rotman, Respondent's examiner pursuant to Section 12 of the Act, testified that he did not disagree with the radiologist's report that indicated a scapholuate ligament tear, but indicated that he did not see the tear on the films himself. (RX 1, p. 14).

Dr. Greatting testified that it was his opinion, within a reasonable degree of medical certainty, that Petitioner's symptoms were caused by the scapholunate tear opposed to the ganglion cyst. (PX 1, p. 14). He based this opinion on the fact that he did not believe that the ganglion cyst was large enough to cause Petitioner's symptoms. (PX 1, p. 15). Furthermore, although Dr. Rotman testified that he believed that the ganglion cyst was causing Petitioner's symptoms, he made this determination without knowledge of the existence of a scapholunate tear. (RX 1, p. 11). Furthermore, Dr. Rotman's physical examination did not indicate tenderness over the capholunate ligament (RX 1, p. 15), whereas Dr. Greatting testified that the scapholunate tear was in the area of Petitioner's symptoms. (PX 1, p. 14).

Furthermore, Dr. Greatting testified, within a reasonable degree of medical certainty, that although Petitioner's scapholunate tear is degenerative in nature, her work related activities of keyboarding aggravated the condition of the tear so as to render it symptomatic and that there is a causal relationship between the aggravation from Petitioner's keyboarding and her symptoms. (PX 1, pp. 22-23). Dr. Greatting further testified that the fact that Petitioner's symptoms lessened when she was not keyboarding indicated that keyboarding was aggravating her symptoms. (PX 1, p. 24).

Dr. Rotman opined that typing and mouse use for seven to nine hours per day would not aggravate a scapholunate ligament tear. (RX 1, p. 19). However, he did testify that a scapholunate tear would be aggravated by "extremes of motion to the wrist." (RX 1, p. 19). Petitioner testified that, until approximately three years prior to the date of trial, she had worked in work stations for Respondent that had the keyboard and mouse on the top of the desk, which required her to type with raised hands, writs, and shoulders. She further testified that the ergonomics of her work station required her to type with bent or flexed writs.

The Arbitrator finds the opinions of Dr. Greatting to be more persuasive than those of Dr. Rotman. Dr. Greatting treated Petitioner for slightly less than one year for her current injury, and has previously treated her for an injury to her left hand. On the other hand, Dr. Rotman testified that, at most, he spent fifteen minutes talking to and examining Petitioner.

After reviewing the totality of the evidence, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of her employment with Respondent with a manifestation date of May 23, 2011, and that her current condition of ill-being is causally connected to her work related accident.

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

Petitioner testified that she spoke with Matt Kietzman about the injury to her right wrist around the time of her first appointment with Dr. Greatting regarding her right wrist. Mr. Kietzman is Petitioner's immediate supervisor's supervisor. Petitioner testified that she told Mr. Kietzman that she was seeing Dr. Greatting regarding her right wrist, and that her right wrist had been bothering her like her left wrist had in the past. Given her left wrist injury led to a workers' compensation claim and resulting settlement, it was her belief Respondent knew she was alluding to a work injury with her right wrist. The Arbitrator finds Petitioner's belief in this regard reasonable given the circumstances of Petitioner's prior settled claim and her un-rebutted testimony.

Respondent has provided no evidence contesting Petitioner's testimony. Mr. Kietzman was not called to rebut Petitioner's testimony concerning notice. The Arbitrator finds the testimony of the Petitioner to be reliable. Furthermore, the Arbitrator finds that Mr. Kietzman, as a supervisor, was an appropriate person to whom Petitioner could report her work injury. Therefore, the Arbitrator finds that Petitioner provided proper notice to Respondent within forty-five days of the manifestation of her 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 finds that all medical services received by Petitioner with regard to treatment for her right wrist pain have been reasonable and necessary. Dr. Greatting testified that he initially prescribed Petitioner meloxicam in an attempt to treat a possible osteoarthritic condition to her right wrist. Further, Petitioner has received three corticosteroid injections to different parts of her wrist. Dr. Greatting testified that these injections were both therapeutic and diagnostic in nature in that the injections could provide relief, and depending on whether the injection provider relief, would help indicate whether the source of Petitioner's pain was from the area injected.

Petitioner also underwent MRI testing. Dr. Greatting testified that he ordered the MRI in order to determine if Petitioner had a ganglion cyst that could be causing her pain. Petitioner did have a ganglion cyst, however, Dr. Greatting testified that the cyst was not large enough to cause symptoms. Furthermore, the MRI revealed the scapholunate tear that Dr. Greatting has testified is causing Petitioner's pain.

Finally, Petitioner has had three follow-up visits with Dr. Greatting after the date he recommended surgery. No treatment or diagnostic testing was recommended during these office visits. However, Dr. Greatting testified that he has scheduled these visits to monitor Petitioner's condition, recheck her condition, and discuss further treatment. (PX 1, pp. 30-31).

Therefore, the Arbitrator finds that all of the treatment Petitioner has received with regard to the injuries to her right hand has been reasonable and necessary. Respondent has paid for the vast majority of Petitioner's medical expenses, but there are still outstanding bills which are owed. As such, Respondent is ordered to pay Petitioner's medical bills as set forth in Petitioner's Exhibit 5, directly to the providers, according to the medical fee schedule, Section 8.2 of the Act. Respondent shall receive a credit of $3,584.90 for medical bills paid for by Healthlink, Respondent's group insurance carrier, and shall indemnify and hold harmless Petitioner against any claims asserted by Healthlink with regard to bills in which Respondent has received said credit. Respondent shall also reimburse Petitioner for any medical expenses that Petitioner paid out-of-pocket, as set forth in Petitioner's Exhibit 5.

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

Dr. Greatting has recommended Petitioner undergo a right wrist arthroscopy and debridement of the partial scapholunate tear and a partial synovectomy. (PX 3). Dr. Greatting testified that within a reasonable degree of medical certainty, the recommended surgery is reasonable and necessary given her exam findings, her MRI, and her response to the three corticosteroid injections. (PX 1, p. 18).

Considering Dr. Greatting's testimony and the Arbitrator's findings with regard to causal connection, the Arbitrator finds that Petitioner is entitled to undergo the recommended arthroscopy and debridement of the partial scapholunate tear and partial synovectomy. As such, Respondent shall authorize and pay for said surgery, subject to the medical fee schedule, Section 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

☒ Affirm and adopt	☐ 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

Geraldine Mangalavite,
Petitioner,
vs.

14IWCC0212

NO: 13 WC 00039

State of Illinois, Lincoln Correctional 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 issue of accident and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 17, 2013 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 $12,800.00. 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: MAR 27 2014
KWL/vf
O-3/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0212

MANGALAVITE, GERALDINE Case# **13WC000039**

Employee/Petitioner

SOI LINCOLN CORRECTIONAL CENTER

Employer/Respondent

On 10/17/2013, 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 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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CHICAGO, IL 60601-3227

1350 CENTRAL MGMT SERVICES RISK MGMT
WORKERS' COMPENSATION CLAIMS
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

OCT 17 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

14IWCC0212

GERALDINE MANGALAVITE
Employee/Petitioner

Case # **13** WC 00039

v.

Consolidated cases: _____

STATE OF ILLINOIS, LINCOLN CORRECTIONAL CENTER
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 **Stephen Mathis**, Arbitrator of the Commission, in the city of **Bloomington**, on **August 13, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

14IWCC0212

FINDINGS

On **November 28, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$67,788.00**; the average weekly wage was **$1,303.62**.

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 **$3,724.72** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

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

ORDER

Medical benefits

Respondent shall pay Petitioner's outstanding medical bills, as set forth in Petitioner's Exhibit 4, Except for those bills showed as paid in Respondent's Exhibit 2, directly to the providers, according to the fee schedule adopted.

Permanent Partial Disability

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for 15 weeks, because the injuries sustained caused the 3%loss of the person as a whole, as provided in Section 8(d)(2) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $712.55/week for an additional 4.175 weeks, because the injuries sustained caused the 2.5% loss of the left foot, 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.

S J Mathis

Signature of Arbitrator

10-11-2013

Date

OCT 17 2013

ADDENDUM

With respect to issue (C), accident, the Arbitrator finds the following facts:

Petitioner testified that she is currently, and was at the time of the alleged accident that is the subject of this matter, a correctional lieutenant for Respondent at the Lincoln Correctional Center located in Lincoln Illinois. Petitioner testified that she has worked for the Respondent in some capacity since February of 1999. She began working at the Lincoln Correctional Center in 2004. Previously, she has worked at the Stateville Correctional Center and the Decatur Correctional Center.

Petitioner testified that her job duties as a lieutenant at the Lincoln Correctional Center include performing inspections in any area open during her shift. She testified that these areas would include towers, housing units, healthcare, dietary, and warehouse. She testified that part of perform in inspections requires her to go up and down flights of stairs. She further testified that she is responsible for ensuring sergeants and officers perform their job duties.

At the time of the alleged accident, Petitioner's normal shift was the night shift. She testified that she worked from 11:00 p.m. until 7:00 a.m.

Petitioner testified that on November 28, 2012, she was performing inspections of tower two. She testified that as she was coming down the second flight of stairs in tower two, she slipped off the edge of the stop. She fell down, hit her back and fell down approximately six to seven steps. She testified that she caught herself with her left ankle. The incident occurred at approximately 1:00 a.m.

Petitioner testified that the steps in tower two are approximately six inches wide and that she wears a size eleven shoe. She further testified that on the night of the accident the stairs were not clean and that they are usually covered in a light film of dust and debris.

Petitioner testified that immediately after the occurrence, she noticed pain in her back and her left ankle. She testified that she did not finish her shift and that she immediately sought medical treatment. She testified that she was taken by ambulance to Abraham Lincoln Memorial Hospital. Upon arriving at the emergency room, Petitioner complained of mid to lower back pain and left lateral ankle pain. She reported to the treating physician that she slipped down a few steps. PX 2. She was given Toradol and Norflex intravenously and underwent x-rays of her left ankle and lumbar spine. PX 2. The treating physician noted Petitioner was having difficulty walking and exhibited pain with movement and range of motion testing. PX 2. He further noted limited range of motion and muscle spasm in the lower back. PX 2. Petitioner's left ankle was placed in an air cast and she was instructed to use crutches. PX 2. Petitioner was diagnosed with a lumbar spine sprain and left ankle sprain. PX 2. Petitioner was subsequently discharged on the same day. PX 2.

Petitioner testified that immediately after leaving the emergency room, she returned to the Lincoln Correctional Facility to report her accident. She testified that she reported the accident to Major Christine, the daytime shift commander. She testified that she later reported the accident Major Morgan, her shift commander, and filled out a workman's comp packet that was given to Jackie McCray.

Two incident reports were presented at Arbitration: the , entered as Petitioner's Exhibit 1, signed by Petitioner on November 28, 2012 at 12:36 p.m., and the Workers' Compensation Employee's Notice of Injury, entered as Respondent's Exhibit 1, also signed by Petitioner on November 28, 2012. Both reports indicate that

Petitioner was walking down a flight of stairs, slipped and fell, hitting her back and catching herself with her left ankle. (PX 1, RX 1).

On cross-examination, Petitioner was asked if she told Major Morgan that she had not used the railing when exiting the tower. Petitioner testified that she made no such comment to Major Morgan.

On December 3, 2012, Petitioner presented to her primary care physician, Dr. Maria Laya at the Family Medical Center of Lincoln. PX 3. Petitioner testified that she was scheduled to work between November 28, 2012 and December 3, 2012, when she presented to Dr. Laya; however, she was unable to work during that time because she was on crutches and her back was still hurting. Upon presentation, Petitioner reported that she had slipped off the stairs and fell, straining her lower back and left ankle. PX 3. Petitioner indicated that she was "feeling a lot better" but that she continued to have lower back pain. PX 3.

Upon physical examination, Dr. Laya noted spasm and tenderness to palpation in the lumbar spine and a stooped gait. Dr. Laya further noted mild swelling on the left lateral ankle but full range of motion. RX 3. Dr. Laya prescribed Naproxen and Cyclobenzaprine. She also placed Petitioner on a light duty restriction of no bending and no heavy lifting above 25 pounds.

Petitioner testified that Respondent did not provide work within her restrictions; however she testified that she did received temporary total disability payments for the time she missed from work. The temporary total disability payments made by Respondent are set forth in Respondent's Exhibit 2.

Petitioner returned to Dr. Laya on December 11, 2012. Petitioner reported that she was "not better yet" but that her "pain is not worse." PX 3. Dr. Laya noted petitioner appeared to be in moderate pain in her right lumbar area. On physical examination she noted continued spasm and tenderness to palpation. Dr. Laya also noted Petitioner's gait was slightly stooped and slow. PX 3. Dr. Laya ordered physical therapy and recommended Petitioner return in one week. PX 3. She further continued Petitioner's work restrictions. PX 3.

Petitioner returned to Dr. Laya on December 17, 2012. Petitioner reported continued limited movement of the lower back and that she was scheduled to begin physical therapy the following week. PX 3. Dr. Laya noted a continued spasm in the lumbar spine and that Petitioner's gait was slightly stooped. PX 3. Dr. Laya continued Petitioner's light duty restrictions and instructed her to follow-up in two weeks. PX 3.

Petitioner presented to Abraham Lincoln Memorial Hospital for physical therapy on January 2, 2013. She continued to receive physical therapy at Abraham Lincoln Memorial Hospital until January 18, 2013, at which time she was discharged. PX 2. However, at her last physical therapy appointment of January 18, 2013, the physical therapist noted minimal stiffness with bending over to tie shoes, and noted that Petitioner was unable to run at work and continued to take approximately 20 minute rest breaks with work activities when working long shifts. PX 2.

On January 3, 2013, Petitioner returned to Dr. Laya for follow-up. Petitioner advised Dr. Laya that she was ready to go back to work anytime. PX 3. Petitioner testified that, at the she told Dr. Laya that she was ready to go back to work, she was still experiencing pain in her low back and left ankle, but that she had not been compensated for her time off at that time and needed to return so she could pay her bills. Dr. Laya returned Petitioner to work as of January 4, 2013, and instructed Petitioner to continue physical therapy. PX 3.

Petitioner testified that she did return to work after she was released to full duty. She testified that she continued to have a lot of stiffness and pain in her lower back and swelling in her left ankle at that time.

Upon cross examination, Petitioner testified that she did have an Employee Review Board Hearing schedule for the date of her accident. She testified that this hearing was with regards to a possible suspension. On re-direct examination, Petitioner testified that she did not recall the reason for the hearing, but that it was with regards to some allegations made by her former supervisor from her previous time on day shift. She testified that the issue was later dropped. Petitioner testified that she was suspended for one day at some point subsequent to her fall, but she did not remember if it was with regards to the issue subject to the review board hearing.

After a review of the totality of the evidence, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of her employment with Respondent. The Petitioner has testified that she slipped and fell down approximately six to seven steps during the course of her inspections as a lieutenant with Respondent, and that she fell on her lower back and caught herself with her left foot in the process. The Petitioner further testified that she felt immediate pain in her left ankle and lower back. The Arbitrator specifically finds Petitioner's testimony to be credible, and substantiated by the evidence.

Two different accident reports, made immediately after Petitioner was released from the emergency room at Abraham Lincoln Memorial Hospital confirm Petitioner's testimony. Both reports indicate that Petitioner fell down several stairs, injuring her lower back and left ankle. PX 1, RX 1. Notably, one of these reports was in fact presented into evidence by the Respondent. No evidence presented contradicts Petitioner's testimony.

Furthermore, the medical evidence confirms Petitioner sustained an injury to her ankle and lower back. Petitioner was diagnosed with a left ankle sprain and lumbar strain at Abraham Lincoln Memorial Hospital. PX 2. Her treating physician placed her left ankle in an air cast and placed her on crutches. PX 2. Furthermore, upon her presentation to Dr. Laya, Petitioner was found to have spasms in her lower back and tenderness to palpation.

Although Respondent has introduced some evidence, via Petitioner's testimony on cross-examination, that Petitioner had a review board hearing later on the date of her accident, the Arbitrator finds this to me merely coincidental. Petitioner does not recall the specific allegations made against her and the evidence presented suggests that, at most, Petitioner was suspended for one day. It simply does not stand to reason that Petitioner would purposely cause an injury to herself preventing her from working for a period of several weeks in order to postpone a hearing so minor that Petitioner was only suspended for one day, if at all. Furthermore, Respondent has not provided any evidence other than Petitioner's testimony regarding the review board hearing. Respondent is in the best position to present this evidence and substantiate its allegations as Respondent is likely in possession of records and controls employee witnesses that would provide further insight into this matter.

With respect to issue (J), medical bills, the Arbitrator finds the following facts:

Respondent has agreed to pay all medical bills causally related to this accident. Plaintiff's medical bills for the care and treatment set forth above are set forth in Petitioner's Exhibit 4. Respondent's Exhibit 2 shows a log of the medical bills paid by Respondent and those in line for payment.

The Arbitrator orders Respondent to pay Petitioner's outstanding medical bills as set forth in Petitioner's Exhibit 4, except for those bills showed as paid in Respondent's Exhibit 2, directly to the providers, according to the fee schedule adopted, as reasonable and necessary medical expenses arising out of Petitioner's November 28, 2012 accident.

With respect to issue (L), nature and extent, the Arbitrator finds the following facts:

In addition to those facts stated above, Petitioner testified that, at the time of the arbitration hearing, she continues to experience occasional swelling in her left ankle. She testified that the swelling depends on how much she works. She testified that she normally works 37 ½ hours per week, and if she works more than that her ankle will swell. She further testified that she continues to experience symptoms to her lower back on a daily basis. She testified that she has "pain and a lot of stiffness" in her back. She further testified that prior to her fall, she had no lower back pain. She testified that she was experiencing pain and stiffness at the arbitration hearing. She further testified that her pain is associated with activity and she rated her lower back pain at approximately a 3 or 4 out of 10 on a pain scale.

Petitioner further testified that the range of motion in her lower back is very limited. She testified that prior to her fall, she had full range of motion. She testified that some days it is difficult of her to put on socks. She testified that she can no longer work the amount of overtime that she used to. She testified that the year prior to her accident she had worked over 700 hours in overtime. She testified that she sleeps with a heating pad daily and has pain with lifting and bending.

No impairment rating was performed with regards to this matter. Therefore, the Arbitrator disregards and gives no weight to this factor.

The Arbitrator does give significant weight to the nature of Petitioner's employment. Petitioner has indicated through her testimony and through the medical records that her position as a lieutenant with Respondent requires her to be on her feet a significant part of her day, performing inspections. He physical therapy records indicate that she has been required to take breaks at work because of her injuries. PX 2.

The Petitioner was 35 years old at the time of her accident. The Arbitrator notes that Petitioner likely has many working years ahead of her prior to retirement. The Arbitrator finds this factor both relevant and of reasonably significant weight.

The Arbitrator further finds that Petitioner has sustained a decreased earning capacity as a result of her accident. Petitioner testified that she worked 700 hours of overtime in the year prior to the accident and that she is unable to work much overtime after her accident because it causes her ankle to swell and causes increased symptoms to her lower back. The Arbitrator finds this factor relevant and of significant weight.

Finally, Petitioner's disability is corroborated by treating medical records, namely Petitioner's physical therapy records that indicate that she was still experiencing stiffness in her lower back at the time she was released from treatment. PX 2. The Arbitrator finds this factor relevant and reasonably significant weight.

Therefore, the Arbitrator finds that the Petitioner has sustained a 3% loss of the person as a whole and a 2.5% loss of the use of the left foot. The Arbitrator orders Respondent to pay Petitioner $712.55, the maximum rate, per week for a period of 15 weeks representing a 3% loss of the person as a whole and $712.55 per week for an additional period of 4.175 weeks representing a 2. 5% loss of the use of the left foot, as provided in Section 8(d) of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

PATRICIA MCKINLEY,

Petitioner,

14IWCC0213

vs. NO: 11 WC 34863

UNIVERSITY OF CHICAGO MEDICAL 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 temporary total disability benefits, medical expenses, permanent disability, and credit, 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.

With regard to the issue of temporary total disability benefits, the Commission notes the Arbitrator awarded temporary total disability benefits for a period of 19-6/7 weeks, from August 31, 2011 through January 17, 2012. However, the Commission finds Petitioner failed to prove she did not work that entire time period. The parties stipulated Respondent paid temporary total disability benefits in the amount of $1,379.08, covering a period of 3-3/7 weeks, from August 31, 2011 through September 14, 2011, and from September 23, 2011 through October 1, 2011. (ARB EX1, RX5). Other than the stipulation by the parties, the Commission finds nothing in the record, medical records or testimony, establishing Petitioner lost any time from work as a result of her work-related injury. Petitioner admitted that her lost time benefits were suspended on September 14, 2011, at which time she returned to work for Respondent in a light duty capacity, and performed office filing for a cardiac doctor. (T.23, T69-70). Petitioner also testified that after her September 29, 2011 evaluation with Dr. Lelyveld at the University of Chicago Occupational Clinic, she returned to work light duty. (T25, T70). The record indicates that on October 20, 2011, Dr. Lelyveld released Petitioner to return to work full duty. (PX2, RX6).

Petitioner admitted that on October 20, 2011, Dr. Lelyveld released her to return to work full duty, and released her from his care. (T79). Petitioner was seen by Dr. Prospero on October 29, 2011. (PX1). Petitioner testified Dr. Prospero issued light duty work restrictions on October 29, 2011, and that she presented those restrictions to her employer, but that she was not permitted to return to work light duty at that point. (T33). Dr. Prospero's October 29, 2011 office note itself fails to reveal any recommendation Petitioner return to work light duty. However, an October 29, 2011 UNUM Short Term Disability Form completed by Dr. Prospero indicates Petitioner was capable of light duty work, but that it was "unknown" whether or not Petitioner's condition was work-related. (RX9). On November 1, 2011, Petitioner began treating with Dr. Robinson and was issued light duty work restrictions of sedentary work with maximum lift of 10 pounds, occasional carry, occasional walking, and no repetitive use of the left hand. Dr. Robinson continued to issue light duty work restrictions until January 17, 2012, at which time Petitioner was released to return to work without restrictions. (PX3). Despite the light duty work restrictions issued by Dr. Robinson, the record contains no testimony establishing Petitioner presented her light duty work restrictions to Respondent, or that Respondent refused to accommodate those light duty restrictions. Furthermore, Petitioner admitted that while she was absent from her "physical job" from August 30, 2011 through January 17, 2012, she was working light duty during that time period. (T68).

In order for a Petitioner to be awarded temporary total disability benefits, she must show not only that she did not work, but also that she was unable to work. Shafer v. Illinois Workers' Compensation Commission, 976 N.E.2d 1 (2011). The record contains medical documentation recommending light duty work restrictions, but does not contain any testimony to support Petitioner's allegation that she is entitled to temporary total disability benefits, that Respondent refused to authorize Petitioner's work restrictions, or that Petitioner remained off work throughout the period of August 31, 2011 through January 17, 2012. The Commission finds the Arbitrator erred in awarding temporary total disability benefits for the entire time period of August 31, 2011 through January 17, 2012. Accordingly, the Commission modifies the award of temporary total disability benefits from August 31, 2011 through January 17, 2012, a period of 19-6/7 weeks, to August 31, 2011 through September 14, 2011, and September 23, 2011 through October 1, 2011, a period of 3-3/7 weeks.

With regard to the issue of medical expenses, Respondent argues the Arbitrator's order that Respondent pay those medical services identified in Petitioner's Exhibit 9, and the Arbitrator's order that Respondent hold Petitioner harmless from any claim for reimbursement pursued by BlueCross BlueShield, could lead to double recovery for Petitioner or the medical provider based upon evidence of payment of some of the medical bills, contained in Petitioner's Exhibit 8, the BlueCross/BlueShield payout data. The Commission acknowledges that Petitioner's Exhibit 8 reflects that some of the medical charges identified in Petitioner's Exhibit 9 have already been satisfied by BlueCross/BlueShield, and that the Arbitrator's medical award requires clarification. Accordingly, the Commission clarifies the Section 8(a) medical award to reflect that Respondent shall pay the reasonable, necessary, related and unsatisfied medical charges identified in Petitioner's Exhibit 9, and that Respondent shall further provide Petitioner with a hold harmless with regard to medical charges paid by BlueCross BlueShield, the group carrier, for which Respondent is receiving 8(j) credit.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2013 is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 402.24 per week for a period of 3-3/7 weeks, from August 31, 2011 through September 14, 2011, and September 23, 2011 through October 1, 2011, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $ 362.02 per week for a period of 32.05 weeks, for the reason that the injuries sustained caused 1% loss of use of the left hand under §8(e), 5% loss of use of the man as a whole under §8(d)2 with regard to Petitioner's left shoulder/arm injury, and 1% loss of use of the man as a whole under§8(d)2 with regard to Petitioner's cervical injury.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for all reasonable, necessary, related, and unsatisfied medical charges identified in Petitioner's Exhibit 9, pursuant to the Medical Fee Schedule as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall hold Petitioner harmless with regard to the $4,777.73 in medical charges paid by BlueCross BlueShield, the group carrier, for which Respondent is receiving 8(j) credit.

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 $11,700.00. 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: MAR 27 2014
KWL/kmt
O-03/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0213

McKINLEY, PATRICIA
Employee/Petitioner

Case# **11WC034863**

UNIVERSITY OF CHICAGO MEDICAL CENTER
Employer/Respondent

On 6/14/2013, 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 0.08% 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:

0412 RIDGE & DOWNES
CAROLEANN GALLAGHER
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
WILLIAM A LOWRY ESQ
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0213

Patricia McKinley
Employee/Petitioner

Case # 11WC 034863

v.

The University of Chicago Medical Center
Employer/Respondent

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 Lynette Thompson-Smith, Arbitrator of the Commission, in the City of Chicago, on April 30, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS:

On **8/30/2011,** 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 **$31,374.72**; the average weekly wage was **$603.36**.

On the date of accident, Petitioner was **33** years of age, ***single*** with **2** children under 18.

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 **$1,379.08** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$1,379.08**.

Respondent is entitled to a credit of **$4,777.73** under Section 8(j) of the Act.

ORDER:

Respondent shall pay Petitioner Total Temporary Benefits of $402.24 per week for 19 and 6/7th weeks, from August 31, 2011 through January 17, 2012 as provided in Section 8 (b) of the Act. Respondent shall have a credit of $1,379.08 for benefits paid.

Respondent shall pay Petitioner permanent partial disability benefits of $362.02 per week for a period of 25 weeks, as provided in Section 8 (d) 2 of the Act, because the injuries caused to the Petitioner's left arm caused a 5% loss of use of the person as whole;

Respondent shall pay Petitioner permanent partial disability benefits of $362.02 per week for a period of 2.05 weeks, as provided in Section 8(e)9 of the Act, because the injuries sustained caused a 1% loss of use of the Petitioner's left hand;

Respondent shall pay Petitioner permanent partial disability benefits of $362.02 per week for period of 5 weeks, as provided in Section 8(d)2 of the Act, because the neck injuries sustained caused a 1% loss of use of the person as a whole;

Respondent shall pay for all reasonable and necessary medical services pursuant to the Fee Schedule as provided in Sections 8 (a) and 8.2 of the Act, and as detailed in Petitioner's Exhibit # 9.

Respondent shall hold Petitioner harmless regarding the Blue Cross Blue Shield Lien in the amount of $4,777.73 and received a credit pursuant to Section 8(j) 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

June 14, 2013

JUN 14 2013

14IWCC0213

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection regarding the carpal tunnel diagnosis; 2) treatment for the left shoulder after October 20, 2011; 3) medical bills after October 20, 2011; temporary total disability; 4) blue cross blue shield lien; 5) is Respondent due a credit; and 60) nature and extent.

Patricia McKinley, ("Petitioner") has been employed by the University of Chicago Medical Center, ("Respondent") as a nursing support assistant, for over seven (7) years. Her primary duties are to assist and aid patients who need help with everyday tasks such as washing and grooming, sitting up, standing, walking and feeding. The patients she works with are typically geriatric patients and her job is very physical in nature, as she is required to lift, carry and help patients who are typically unable to assist themselves.

On August 30, 2011, the Petitioner was working the 7 a.m. to 3:30 p.m. shift at the Medical Center. On this day, she had been assigned to sit with and support a neurosurgery patient, who had been having seizures. The patient was not allowed to be alone as he had a history of falling and the petitioner was instructed to sit in his room and monitor him, to ensure he was safe at all times. About one and half hours into her shift, at approximately 8.30 a.m., the patient used the bathroom and Mrs. McKinley was observing him to ensure he was safe and did not fall. The patient was attached to an IV drip and had to walk with the IV pole.

As the patient came out of the bathroom, the petitioner testified that it was clear that he was very agitated and upset. He accused her of holding him hostage in his room and he became very angry and aggressive. As Petitioner tried to calm him down, the patient suddenly grabbed her by the left arm and started tugging at her arm and screaming at her. This particular patient was twenty-two years old and a large, strong man and the petitioner could not free herself from him grip. The patient became so agitated and enraged that he threw the Petitioner against the wall; the left side of her body hit the wall with great force. He then threw the IV pole at her. The patient then ran out of the room screaming and attacked a doctor as he tried to get out of the hospital.

Mrs. McKinley testified that she was very upset and shocked by what had just happened. A number of other staff members on the floor came to her assistance. She testified that she felt immediate pain in her left arm and shoulder and she asked to leave the room to seek medical attention. Her supervisor refused to allow her to do so and the patient was returned to the room, sedated; and Petitioner had to stay with him for the remainder of the day, until her shift ended at 3.30 pm.

While petitioner sat in the room from approximately 9 a.m. to 3.30 p.m., she began to feel severe pain in her left arm and shoulder and her neck became stiff. She was upset and feared that the patient would wake up and attack her again. The nurses on duty gave her ice and hot pads to place on her left shoulder, as well as pain medication. When her shift ended, she presented to the University of Chicago Center of Occupational Medicine ("UCOM") at approximately 4:00 p.m. Her chief complaints were pain in the left side of her neck and shoulder area; with intermittent tingling in her fingertips. Upon examination, she was tender to palpation over the AC joint, subacromial bursa and upper trapezius. She had active abduction to 60 degrees and passive abduction to 90 degrees. She had pain with right rotation and was diagnosed with left shoulder strain. She was prescribed pain medication and advised to ice her left arm and use a sling. She was released to return to work, in a modified capacity; and told to return to UCOM on September 2, 2011. *See,* PX2 & RX6.

On September 2, 2011, the petitioner continued to have a limited range of motion of her left arm and shoulder and intermittent numbness and tingling in the index and middle fingertips of the left hand. She was wearing a sling on her left arm. She was doing home exercises and taking pain medication. She reported that she did not return to work because her employer could not accommodate her light duty restrictions, prescribed at her initial appointment. On examination, she continued to be tender to palpation over the left cervical paraspinous and upper trapezius areas. She was also tender over the AC joint and supraspinatus. She had a positive impingement sign and it was noted that her neck pain had not significantly improved. She was referred for physical therapy and advised to continue with ice treatment, range of motion exercises and the use of pain medication. She was continued on modified/light duty and was advised to follow up at UCOM on September 14, 2011. There was also the impression of symptom magnification. *See,* PX1 & RX6.

On September 14, 2011, the Petitioner indicated that she noted improvement in her condition because of her physical therapy, which started on September 7, 2011. She reported that she continued to have a burning sensation along the left deltoid; and remained off work, as her modified duty had not been accommodated. Upon examination, she remained tender over the proximal deltoid and was advised to complete her physical therapy routine, continue with home exercises; and her modified/light duty status was continued. She was instructed to follow up at UCOM on September 22, 2011.

On September 22, 2011, the Petitioner stated that she was feeling better but had been to see her primary care physician, who had ordered an MRI of her neck and left shoulder; due to the petitioner's complaints of a constant burning sensation in her lower upper arm. Upon examination, she had pain with palpation of the left trapezius and the subacromial bursa. She was returned to work, with restrictions and prescribed continued physical therapy twice a week; and return for re-evaluation on September 29, 2011. At this point, her light duty status had been accommodated and she was working for Respondent filing papers and performing other office duties. *See,* PX1 & RX6.

September 29, 2011, was the first time Petitioner was seen by a doctor, i.e., Dr. Lelyveld. Prior to this date, she had only been seen by nurse practitioners. She presented with ongoing complaints of persistent burning in the lateral aspect of her left upper arm and numbness in her left thumb, index and long finger. She was waiting for her MRI and EMG results. Upon examination, she had pain with palpation of the left trapezius. She was continued on modified work duties; advised not to lift, push, pull or carry over 15 pounds; prescribed physical therapy twice a week; and was to return to UCOM to discuss the findings of her diagnostic tests on October 11, 2011.

The petitioner underwent an MRI of her upper left arm ad cervical spine on October 6, 2011 at Ingalls Memorial Hospital. Her primary care doctor, i.e., Bela Prospero, had ordered the aforementioned tests. The MRI of Petitioner's left arm revealed no evidence of a rotator cuff tear and there are mild changes of chronic tendinosis in the later aspect of the supraspinatus. The petitioner also had undergone an EMG of the left wrist and the results were: the distal motor and sensory peak latencies of the let median nerve were prolonged and focal slowing of sensory nerve conduction velocity across the wrist segment was identified; the left median nerve had a low amplitude sensory nerve action potential; the left radial and ulnar nerves were normal. There was electrodiagnostic evidence of a

moderate left median neuropathy localizable to the wrist, which can be seen in patients with carpal tunnel syndrome. Clinical correlation was suggested.

On October 18, 2011, petitioner's physical therapy note indicated that her subjective complaints had improved, in that she explained that her shoulder blade pain was gone and that she was no longer having numbness or tingling or burning into her hands and fingers. The assessment was that the petitioner had put forth moderate effort in physical therapy and that she had been directed to discontinue physical therapy services and return to work in a full duty capacity. The petitioner was discharged at the direction of the referring physician. *See,* RX6.

Petitioner returned to Dr. Lelyveld at UCOM on October 20, 2011, indicating that she had been referred, by her primary care doctor, to an orthopedist for an injection in the left shoulder. Dr. Lelyveld noted the positive EMG findings of carpal tunnel syndrome and mild chronic tendinosis of the supraspinatus. Dr. Lelyveld indicated that he felt that Petitioners symptoms had resolved and he therefore released her to return to work, in a full duty capacity, and she was discharged from care at UCOM.

Petitioner did not agree with Dr. Lelyveld that her symptoms had resolved as she continued to have significant pain and discomfort in her left shoulder and neck area. The physical therapy had helped but her symptoms had not resolved to the point where she felt that she was fit to return to full duty work. Mrs. McKinley testified that her job is very physical. She has to lift, carry and aid patients that are unable to help themselves. She testified that she did not feel that it would be safe for either herself or her patients if she returned to her position, in a full duty capacity; when she still had significant symptoms.

Mrs. McKinley had begun seeing her own primary care doctor, Dr. Bela Prospero, during the time that she was treating at UCOM. She first saw Dr. Prospero on September 23, 2011, which date was between her third and her fourth visit with UCOM. On that date, she complained of burning in her left arm and tingling in her left arm into her fingers. Dr. Prospero ordered an MRI of the petitioner's cervical spine and left shoulder and EMG as referred above. Dr. Prospero indicated that Petitioner should rest for one week and that she would then like her to return. *See,* PX1.

On October 13, 2011, the petitioner presented to Dr. Prospero with continued complaints of pain in her left shoulder and neck. Her EMG was positive for findings of carpal tunnel syndrome. The primary diagnosis was left shoulder pain/tendinosis; the secondary diagnosis was neck pain/muscle spasms. Due to her ongoing complaints, Dr. Prospero referred the petitioner to Dr. Howard Robinson, for pain management and instructed her to continue with physical therapy. Dr. Prospero also noted that the petitioner should continue her light duty status at work until she had completed her physical therapy and pain management.

On October 29, 2011, the Petitioner returned to see Dr. Prospero. She had not yet seen Dr. Robinson as prescribed. By this time, she had been released by Dr. Lelyveld at UCOM. She complained to Dr. Prospero of neck spasms and pain in cervical region. She continued to have signs of carpal tunnel syndrome and Dr. Prospero indicated that she should continue with physical therapy and see the pain management doctor. She asked that the petitioner return to her in two to three (2-3) weeks and indicated that she should remain on light duty. Dr. Prospero filled out an application for short-term disability for the petitioner and noted that the respondent had cancelled Petitioner's physical therapy. Dr. Prospero indicated that the petitioner could only work light duty and restricted her from work involving lifting, pulling and/or pushing. Dr. Prospero indicated a diagnosis of severe tendinosis in the left shoulder, with neck pain and muscle spasms. Regarding her treatment plan, she indicated that the petitioner should see Dr. Robinson for pain management and that she should continue with physical therapy. Dr. Prospero further indicated that the petitioner's expected return to work date was not certain, pending her appointment with Dr. Robinson. *See,* PX1.

The petitioner presented to Dr. Howard Robinson at NorthShore University, Chicago Institute of Neurosurgery, ("NorthShore University") on November 1, 2011. She complained of left shoulder pain, left arm paresthesias and left hand numbness and tingling. She described the pain as burning. Dr. Robinson diagnosed the petitioner as having cervicalgia, carpal tunnel syndrome as seen on the EMG and pain in the joint with mild tendonosis.

Upon examination of her left shoulder, petitioner had painful arc with AROM and a positive impingement sign. She had give-way weakness with supraspinatus testing and scapulothoracic motion symmetric with scapula slide. Dr. Robinson recommended a further course of physical

therapy, a splint for her carpal tunnel and requested that the petitioner follow up with him in three weeks. Concerning her employment, Dr. Robinson indicated that Petitioner could only work light/sedentary work with a lifting ability of 10 pounds maximum; and no repetitive use of the left hand. A certain amount of walking and standing was considered acceptable on an occasional basis.

Petitioner returned to see Dr. Prospero on November 3, 2011 with continued complains of neck and left shoulder pain. Dr. Prospero noted that she continued to do physical therapy and had seen Dr. Robinson; and she noted that Dr. Robinson had given the petitioner work restrictions and that she was currently under his care.

Dr. Prospero completed paper work on this occasion for Petitioner regarding a disability plan and indicated that the petitioner could only work light duty and that this status was valid from her initial visit date of September 23, 2011 through the present date. She indicated that Petitioner should only do sedentary work with no pushing/pulling, no bending/stooping, no climbing; and no repetitive work. Dr. Prospero indicted that her return to work was not certain and that the petitioner had not reached maximum medical improvement ("MMI"). She remained under the care of Dr. Robinson. *See*, PX1.

Petitioner returned to see Dr. Robinson on November 29, 2011, with continued complaints of neck and shoulder pain; and continued tingling and numbness in her left hand. Dr. Robinson ordered Petitioner to continue physical therapy; and prescribed pain medication and the splint that he had previously recommended for her left hand symptoms. He indicated that he would like to see her for follow up in three weeks. Regarding her job, Dr. Robinson continued the Petitioner on a light duty status as before with lifting of 10 pounds maximum and no repetitive use of the left hand.

The Petitioner saw Dr. Robinson again on December 20, 2011, with ongoing complaints of neck and left shoulder pain. She had a feeling of weakness in the shoulder and upon examination, the left shoulder revealed positive impingement syndrome and a painful arc of motion. Dr. Robinson then prescribed an injection for Petitioner's left shoulder. She continued on light duty status and the doctor asked her to follow up with him in one week. The Petitioner presented for her injection on January 3, 2012, and her left shoulder was injected with 1 ml of Kenalog and 4 ml of 1% lidocaine. She

was instructed to ice the area for 48-72 hours after the injection; and advised to return to see Dr. Robinson in two weeks.

The petitioner returned to Dr. Robinson on January 17, 2012, indicating that she had noted significant improvement in her left shoulder following the injection. She had minimal shoulder pain at this visit but continued to have pain on the left side of her neck, which was worsening and continued to have numbness and tingling in her left hand. Dr. Robinson indicated that Petitioner should continue with physical therapy for her neck and he prescribed Zanaflex, to take at night. Dr. Robinson returned Petitioner to work, in a full duty capacity, on January 18, 2011

The petitioner returned to see Dr. Robinson on April 3, 2012. She had ongoing complaint of left shoulder pain. Her pain had been severe the week before this visit. Upon examination, she had painful arc of motion of the left shoulder. Dr. Robinson performed a left shoulder injection on this occasion; and Dr. Robinson instructed the petitioner to follow up with him in one month.

The petitioner testified at trial that she talked to Dr. Robinson on the telephone on this occasion and that he prescribed the injection over the phone. The Petitioner was apparently confused regarding this issue as the medical records indicated that Dr. Robinson notes an examination of the petitioner at the doctor's office. *See,* PX3.

The petitioner was initially permitted to return to work doing light duty, while she was on a light duty status from UCOM. When Petitioner obtained a light duty status from firstly Dr. Prospero, her primary care doctor and thereafter from Dr. Robinson, her employer refused to accommodate it.

The petitioner worked light duty from September 14, 2011 through September 23, 2011. Dr. Prospero took her off work for one week on September 23, 2011 and she was paid temporary total disability through October 1, 2011. She testified that she returned to work doing light duty on October 7, 2011 and worked light duty until she returned to Dr. Lelyveld on October 20, 2011. Dr. Lelyveld then returned the petitioner to full duty work on this date but the petitioner continued on a light duty status as prescribed by Dr. Prospero, which her employer refused to accommodate same.

When the petitioner returned to work on January 18, 2012, she testified that she was still having difficulties with her left shoulder and left hand and she still had neck pain. She had improved with both physical therapy and the shoulder injections but she continued to have ongoing complaints. She had difficulties at work as she could not lift patients without assistance and had to continuously ask for help.

At trial, Petitioner continued to complain of pain and weakness in her left arm and continues to have numbness and tingling in her left hand. She testified that her neck is still stiff and painful and that she has pain, on a daily basis, with the pain in her shoulder being the worst. She ices her shoulder every night and continues to take pain medication every day. She takes muscle relaxers once a month and that she performs exercises that she was taught while in physical therapy, at home. And that she continues to have limitations with strength in her left arm.

Outstanding Bills:

The outstanding bills are as follows:

1. **North Shore University Health System/Skokie Hospital:**
   Dates of Service: 11/1/2011, 11/14/2011, 11/29/2011, 12/1/2011, 12/20/2011, 1/3/2012, 1/17/2012.
   Amount Due: $6,671.0
   Amount Due pursuant to Fee Schedule: $3,147.39

2. **Radiology Imaging Consultants:**
   Dates of Service: 10/6/2011 & 10/8/2011
   Amount Due: $457.00
   Amount Due pursuant to Fee Schedule: $451.19
3. **Neurology Associates Ltd:**
   Dates of Service: 1/6/2011
   Amount Due: $890.00
   Amount Due pursuant to Fee Schedule: $512.98

4. **Dr. Bela Prospero:**

   Dates of Service: 9/23/2011, 10/13/2011, 10/299/2011, 1/3/2011 & 12/3/2011

   Amount Due: $360.00

   Amount Due Pursuant to Fee Schedule: $190.84. *See,* PXs 5, 6,7 & 9.

Temporary Total Disability (TTD):

The respondent submitted a print out of the TTD paid to Petitioner in their Exhibit 5 and the Arbitrator relies on this as evidence of the actual TTD paid to the petitioner and relies upon same for the dates that Petitioner was in fact paid TTD. Accordingly, TTD was paid to Petitioner for three weeks and three days from August 31, 2011 through September 14, 2011 and from September 23, 2011 through October 1, 2011. The petitioner worked light duty from October 7, 2011 through October 20, 2011, and after that date, light duty status was not accommodated. Petitioner did not return to work in a full duty capacity until January 18, 2012. TTD is owed to Petitioner for a period of 19 weeks and 6 days.

Blue Cross Blue Shield Lien:

The petitioner has health insurance through a group policy with Blue Cross Blue Shield of Illinois ("BCBS"). The respondent contributes to this group health policy as part of the petitioner's salary package; consistent with her employment. Given the fact that the respondent refused to pay for medical treatment for the Petitioner beyond October 20, 2011, the Petitioner submitted her bills to BCBS of Illinois for payment.

BCBS of Illinois paid a total sum of $4,777.73 on the Petitioner's behalf to the following providers: Skokie Hospital (Dates of Service: 11/14/2011, 12/1/2011, 1/3/2011) and NorthShore University (Dates of Service: 11/29/2011, 12/20/2011, 1/3/2012, 1/17/2012, 4/3/2012 & 5/30/2012). These dates of service primarily relate to physical therapy as ordered by Dr. Robinson. While this lien is not a bill for services, it is indicative of a reasonable payment of Petitioner's medical bills.

CONCLUSIONS OF LAW

F. Is Petitioners current condition of ill being causally related to the injury?

The Arbitrator finds that the Petitioner's condition of ill being regarding her left shoulder/arm, left wrist and neck are causally related to her accident, which occurred on August 30, 2011, during the course of Petitioner's employment with the respondent. The medical records and reports of Petitioner's treating physicians clearly support a finding of causal relationship between the Petitioner's left shoulder/arm, neck and left hand conditions and her work related accident.

The Arbitrator notes that Petitioner's initial history of her symptoms, at the Occupational Center of University of Chicago (UCOM), with Drs. Prospero and Robinson, are entirely consistent with her testimony. The Arbitrator accepts the Petitioner's testimony of how the accident happened as credible and unrebutted and finds that the medical records support it. Therefore, the Arbitrator finds that the petitioner has proven, by a preponderance of the evidence, a causal connection in the mechanism of the injury sustained, and her subsequent left shoulder, neck and left hand complaints.

At trial, the respondent referred to the UCOM questionnaire that Petitioner filled out on the day of her accident and pointed out that said form referred only to injuries to Petitioner's left shoulder. No mention is made of an injury to her neck, which is in fact the case. The Petitioner however credibly testified that she was very upset by the time she was examined at the UCOM clinic and had been forced to attend to a patient for eight (8) hours, who had attacked her. She was not permitted to leave and seek medical assistance for her injuries and she was not thinking clearly. The absence of a reference to a complaint of neck pain on this initial questionnaire is not a factor that the Arbitrator gives much weight. Upon examination at the UCOM clinic, on the day of her accident, the petitioner did complain of left shoulder pain and pain on the left side of her neck with intermitted tingling in her fingertips. At all visits thereafter, the petitioner consistently had complaints of neck pain and when she returned to UCOM, three days post-accident, the petitioner's complaint of neck pain was noted. When she saw Dr. Prospero for her initial appointment, on September 23, 2011, it was noted that one of her chief current complaints was neck pain. The petitioner's history of complaints is consistent and

noted by all of her medical providers therefore; the Arbitrator finds that the condition of ill-being regarding her neck is causally connected to her work accident.

Regarding the issue of the petitioner's diagnosis of left-handed carpal tunnel syndrome, the Arbitrator finds that this condition is also causally connected to the petitioner's accident. When examined at the UCOM clinic, on the day of the accident, the petitioner complained of tingling in her fingertips. She was consistent in her complaints regarding the numbness and tingling in her left hand throughout the duration of her medical treatment. An EMG performed on October 6, 2011, showed positive findings of carpal tunnel syndrome. The petitioner had no issue with tingling or numbness in her hand prior to this traumatic event and had immediate complaints thereafter. In addition, there was no evidence presented to show that she had sought treatment or had diagnostic testing for this condition, prior to this event. However, on October 18, 2011, petitioner's physical therapy note indicated that her subjective complaints had improved in that she explained that her shoulder blade pain was gone and that she was no longer having numbness or tingling or burning into her hands and fingers.

Dr. Lelyveld indicated, in his October 20, 2011 note, that the findings on Petitioner's EMG could not be explained by the mechanism of the petitioner's injury. However, Dr. Lelyveld does not state how such findings can be explained, in the absence of any symptoms before this accident. The Arbitrator finds that the opinion of Dr. Lelyveld is not persuasive and not supported by a credible explanation of what could have caused the carpal tunnel condition in Petitioner's left hand. The Arbitrator notes Dr. Lelyveld's comment that the petitioner "has exceeded the normal time frame for healing for similar injuries to other workers" and finds the generality of this comment to be telling. The Arbitrator does not accept that all workers heal at the same rate and in the same manner and Dr. Lelyveld's opinion therefore lacks credibility. *See,* RX6.

The Arbitrator has reviewed the medical records of Drs. Prospero and Robinson and agrees with the recommendations and findings therein; and finds them more persuasive than the opinion of Dr. Lelyveld. On October 20, 2011, when Dr. Lelyveld returned the Petitioner to work in a full duty capacity, she was continuing to have significant issues with her left shoulder, neck and left hand. Given the positive findings on Petitioner's left arm MRI and her left hand EMG, not ordering further treatment or following up with additional diagnostic tests, for the petitioner, is questionable. The

Arbitrator notes that Dr. Lelyveld examined the petitioner on two occasions and that the majority of her examinations at UCOM, were by a nurse practitioner. The Arbitrator further notes that a competent method of determining causation is comparing the condition of a claimant, prior to an accident, with her condition thereafter. Proof of the state of health of a claimant prior to the time of the injury; and the change immediately following the injury and continuing thereafter, is competent as tending to establish that the impaired condition was due to the injury. *See, Kress Corp v Industrial Commission, 190 Ill. App. 3d 72 (1989).*

The petitioner testified credibly and in an unrebutted manner, that she had no medical problems with her left shoulder/arm, neck or left hand prior, to August 30, 2011. Furthermore, there is no indication in the record that Petitioner experienced any problems in performing her job for the respondent, at any time prior to August 30, 2011. Given the severity of petitioner's symptoms immediately following the injury as well as her continued need for medical treatment and restrictions from full duty work, the Arbitrator finds that the petitioner's impaired condition was due to the attack, injuring her left arm/shoulder, neck and left hand on August 30, 2011; during the course of her employment with the respondent. The symptoms the petitioner experienced pursuant to the accident, caused her to be unable to perform her job, in a full duty capacity as a nursing assistant, from August 30, 2011 through January 17, 2012. Based on the above, the Arbitrator finds that Petitioner has met her burden of proof, that her condition of ill being regarding her left arm/shoulder, neck and left hard are causally related to her accident on August 30, 2011.

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?

Given that the Arbitrator has found that the petitioner's injuries to her left shoulder/arm, left hand and neck, were causally related to her work accident, the Arbitrator finds that the Petitioner is entitled to necessary, causally related medical expenses, necessary to relieve the effects of her injuries. The Petitioner underwent treatment with Dr. Robinson at NorthShore University between November 1, 2011 and May 30, 2012, for injuries sustained by her in the subject accident and a bill, to that facility, for $6,671.00, remains outstanding. The Arbitrator finds that said treatment was necessary to relieve

the petitioner's ill effects of this accident and therefore Respondent shall pay this bill in accordance with the medical fee schedule.

The petitioner underwent an MRI of her cervical spine and left upper extremity on October 6, 2011 and a total of $457.00 remains outstanding to Radiology Imaging Consultants in Harvey, Illinois. The Arbitrator finds that said treatment was necessary to relieve the petitioner's ill effects of this accident and therefore the respondent shall pay this bill, in accordance with the fee schedule.

The petitioner underwent an EMG test at Neurology Associates Ltd., on October 6, 2011, on her left hand and a total of $890.00 remains outstanding to this facility. The Arbitrator finds that said treatment was necessary to relieve the petitioner's ill effects of the subject accident and therefore the respondent shall pay this bill, in accordance with the fee schedule.

The petitioner underwent treatment with Dr. Bela Prospero between September 23, 2011 and December 3, 2011, for the injuries sustained by her in this accident and a total sum of $390.00 remains outstanding. The Arbitrator finds that said treatment was necessary to relieve the petitioner's ill effects of the accident and therefore the respondent shall pay this bill in accordance with the fee schedule. The petitioner's attorney has reduced all bills to the fee schedule and submitted same as Exhibit 9.

BCBS Lien:

Section 8 (j) of the Workers Compensation Act states as follows:-

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee for any such group health plan as shall be consistent with and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation for temporary total incapacity for work or any medical surgical or hospital benefits made or to be made under this Act.

> Any employer receiving such credit shall keep such employee safe and harmless from any and all claims of liabilities that may be made against him by reason of having received such payments only to the extent of such credit.

The Arbitrator finds that the medical treatment undergone by the petitioner at NorthShore University and at Skokie Hospital was reasonable and medically necessary to cure the petitioner of the ill effects of her injury, which injuries were caused by her work related accident, on August 30, 2011. The bills submitted and paid by Blue Cross and Blue Shield should have been paid by the respondent herein, therefore, Respondent is entitled to a credit for same pursuant to Section 8 (j) as detailed above and shall hold Petitioner harmless for the amount paid by Blue Cross and Blue Shield.

K. What temporary benefits are in dispute?

It is clear that Petitioner was paid TTD for three weeks and three days, i.e., from August 31, 2011 through September 14, 2011 as detailed in Respondent's Exhibit 5. The petitioner's light duty prescription was accommodated from September 14, 2011 through September 23, 2011. Dr. Prospero saw the petitioner on September 23, 2011 and advised her to rest for one week; and the petitioner was thereafter paid TTD from September 23, 2011 through October 1, 2011. The respondent, despite the fact that she remained on light duty status, suspended petitioner's TTD benefits on October 1, 2011. Her light duty status was accommodated from October 7, 2011 through October 20, 2011, when she was released by Dr. Lelyveld to return to full duty work. Thereafter her light duty prescriptions from Drs. Prospero and Robinson was not accommodated

Dr. Prospero took the petitioner off work on September 23, 2011 and an EMG and MRI were ordered. Those tests were performed on October 6, 2011; and Petitioner returned to see Dr. Prospero on October 13, 2011 and again on October 29, 2011. Dr. Prospero advised her to work light duty only, on both occasions and Dr. Prospero filled out disability forms for the petitioner on November 3, 2011; wherein she indicated that she was on light duty status. Dr. Robinson continued the petitioner's light duty status when he saw her for his initial visit, on November 1, 2011; and that same status was continued until Dr. Robinson released the Petitioner, on January 17, 2012. She returned to work on January 18, 2012 Therefore, the Arbitrator finds that the petitioner was disabled from performing the full duties of her job from August 31, 2011 through January 17, 2012 a period of 19 and 6/7th weeks.

On the respondent's exhibit, the petitioner was paid TTD for three weeks and three days. Based on the above, the Arbitrator concludes that the respondent shall pay Petitioner temporary total disability benefits from August 31, 2011 through January 17, 2012 being a period of 19 and 6/7th weeks; and confirms that the respondent is entitled to a credit for TTD, paid in the amount of $1,379.08.

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

The petitioner sustained injuries to her left arm/shoulder, and her neck area and her left hand, in the form of carpal tunnel syndrome. She was diagnosed with cervicalgia, carpal tunnel syndrome as seen on the EMG and pain in the left joint and mild tendonosis. The petitioner had a positive finding on her EMG for carpal tunnel syndrome and a finding of "mild changes of chronic tendinosis in the later aspect of the supraspinatus" on her left shoulder MRI. She underwent several months of physical therapy and two steroid injections into her left shoulder. She was prescribed pain medication, muscle relaxers, an arm sling, a wrist splint; and ice and heat therapy.

The petitioner testified, in a credible manner, that she continues to have ongoing pain in her left shoulder and arm. She testified that the pain in her shoulder is her biggest complaint and that she takes pain medication on a daily basis and takes muscle relaxers up to once per month. She ices her shoulder every night and continues to have tingling and numbness in her left hand. She continues to have pain and stiffness in her neck area and does exercises at home to aid the pain for both her neck and her shoulder/arm. She feels more pain in the winter and colder months and describes the pain as "aching" during those times.

Petitioner testified, in a credible and unrebutted manner, that she has difficulty doing her very physical job; and that she is in pain while at work. She had extreme difficulty when she returned to work in January of 2012, but she felt as if she had no choice but to work through the pain, as she had no income at that time. She testified that her injury slows her down and that nursing assistants are required to lift patients by themselves. She can no longer do this and has to have assistance. She cannot work as quickly as she used to and that she has not been able to work overtime since the accident and she did prior.

The petitioner also testified that she has difficulties at home because of her injuries. She loves to cook and used to cater parties for friends and that she has not been able to do this since the accident. She has difficulty lifting heavy cookware and explained that her left arm gives out alot. She cannot lift laundry baskets and requires her sons to help her as much as possible. Her injuries also have affected the care of her two sons as she used to be their baseball catcher. She has not done that since the accident. She is very cautious when they are playing with her and is constantly guarding her left arm and neck area. She works to the best of her ability but not without difficulty or the reliance on pain medication.

The Arbitrator finds that the petitioner is entitled to a 5% loss of use of the person as a whole for injuries sustained to her left arm/shoulder, a 1% loss of use of the left hand regarding the carpal tunnel issue and a 1% loss of use of the person as a whole regarding the neck injury. The Arbitrator relies on the facts outlined above, the credible and unrebutted testimony of the petitioner, the medical evidence submitted at trial, the severity of the injuries sustained by the petitioner; as well as the continuing issues that Petitioner continues to experience with regard to her left arm, left hand and neck.

N. Is Respondent due any credit?

The Respondent is entitled to a credit for TTD paid for 3 and 3/7th weeks in the sum of $1,379.08 and is entitled to a credit pursuant to Section 8 (j) of the Act for payments made by BCBS of Illinois; the petitioner's group health provider, in the amount of $4,777.73.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

ALPHONSO NICHOLSON,

Petitioner,

14IWCC0214

vs.

NO: 09 WC 14342

CITY OF CHICAGO,

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 causal connection, permanent disability, and credit, 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.

After considering the entire record, the Commission modifies the Decision of the Arbitrator as to the wage differential award, from $ 612.00 per week to $ 553.84, based upon a finding that the difference between the "average amount" Petitioner would be able to earn in the full performance of his duties in his prior job is $1,311.60 (40 hrs x $ 32.79 pr hr), and the "average amount" he is earning or is able to earn in some suitable employment after his injury is $480.00 (40 hrs x $ 12.00 per hr). Subtracting $ 480.00 from $ 1,311.60 is $831.60, and 66-2/3 of $ 831.60 is $ 553.84 per week.

The Commission finds the Arbitrator incorrectly assumed a current average weekly wage of $393.60, based upon Petitioner's 32.8 average hours per week at $12.00 per hour, for his janitorial work at Kids Academy. The Commission takes note of Petitioner's admission his wife owns Kids Academy, and his admission that his wife set his salary. The Commission further notes Petitioner has no restrictions from any medical provider with regard to the number of hours he is capable of working per day, or per week. The Commission finds nothing within the record

to indicate the "32.8 hour" work week is standard in the industry, and instead finds more likely than not that Petitioner may have limited his work hours in order to inflate the 8(d)(1) wage differential award, based upon the lack of evidence of a diligent job search, Petitioner's self-limiting job search efforts, and his less-than genuine participation in the vocational placement efforts of MedVoc. No job search records were tendered into evidence, and although Petitioner attended his initial vocational assessment meeting on December 18, 2011, the additional reports from MedVoc Rehabilitation records indicate Petitioner refused to attend either of the two subsequent meetings, and instead on January 9, 2012 obtained a janitorial position working six to eight hours a day, earning approximately $12.0 per hour. (RX5, PX6)

In Albrecht v. Industrial Commission, 271 Ill.App.3d 756(1995), the court reiterated that "section 8(d)1 provides that awards thereunder are to be based on the difference between the 'average amount' the employee would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of injury and the 'average amount' he is earning or is able to earn in some suitable employment after his injury." In determining reduction of earning capacity "the test is the capacity to earn, not necessarily the amount actually earned." Franklin County Coal v. Industrial Commission, 398 Ill. 528(1948). "Choice," as determinative of earnings, has been rejected as a basis for 8(d)(1) benefits. Durfee v. Industrial Commission, 195 Ill.App.3d 886(1990). The Commission concludes Petitioner's earnings upon his return to work were self-limited, based upon his obtainment of employment with his wife's daycare for an average of 32.8 hours a week. There is no documentary evidence in the record, or credible testimony from Petitioner, to indicate that Petitioner engaged in an actual job search, that he looked for other work in the janitorial industry, or the other industries in which he previously worked -cooking industry or loss prevention industry - to support a finding that he was limited to 32.8 hour work week. Instead, the VocMed vocational records indicate Petitioner immediately obtained a job without submitting any job search records and failed to appear at any vocational rehabilitation meetings after his initial vocational meeting on December 18, 2011.

In Durfee,195 Ill.App.3d 886(1990) the Commission denied a wage loss award and the Appellate Court affirmed, noting that Petitioner did not attempt to return to work, but elected to remain in a job which he enjoyed and which coincided with his clerical interests. Similarly, in the present matter, it appears Petitioner was "fixated" on obtaining a job with a day care facility owned by his wife, despite the suitability of numerous other positions as identified in the labor market survey. (RX5).

In Esposito v. Fleetwood Systems, 00 IIC 441, the Commission denied a Section 8(d)1 award, finding: (1) that claimant engaged in a less-than-diligent job search; (2) that claimant's self-limiting job search was similar to that in the Durfee case; (3) that claimant had only demonstrated what he is capable of earning in a part-time capacity; (4) that claimant was comparing the wages of his current part-time job with his former full-time job; and, (5) that claimant's part-time job was not a true measure of his employability and earning capacity.

The Commission finds the 32.8 hours of employment with Petitioner's wife's daycare company is not a true measure of his earning capacity. Based upon the above, the Commission finds the "average amount" Petitioner is able to earn in his present suitable employment is $480.00 per week, based upon an hourly rate of $12.00 per hour, and assuming a 40 hour work week. Accordingly, the Commission modifies the wage differential award to $553.84 per week.

14IWCC0214

The Commission otherwise affirms and adopts the January 30, 2013 Decision of the Arbitrator, a copy of which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $770.20 per week for a period of 77-6/7 weeks, for the period of December 19, 2008 through June 15, 2010, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISISON that Respondent pay to Petitioner the sum of $770.20 per week in maintenance benefits for a period of 81-5/7 weeks, for the period of June 16, 2010 through January 8, 2012, as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $553.84 per week from January 9, 2012 through the duration of Petitioner's disability, as provided in §8(d)1 of the Act, for the reason that the injuries sustained caused Petitioner to become partially incapacitated from pursuing his usual and customary line of employment and an impairment of earnings.

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: MAR 27 2014
KWL/kmt
O-03/18/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0214

NICHOLSON, ALPHONSO
Employee/Petitioner

Case# **09WC014342**

CITY OF CHICAGO A MUNICIPAL CORPORATION
Employer/Respondent

On 1/30/2013, 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 0.11% 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:

1922 SALK, STEVEN B & ASSOC LTD
150 N WACKER DR
SUITE 2570
CHICAGO, IL 60606

0113 CITY OF CHICAGO
STEPHANIE LIPMAN
30 N LASALLE ST ROOM 800
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0214

ALPHONSO NICHOLSON,
Employee/Petitioner

v.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Employer/Respondent

Case # 09 WC 14342

Consolidated cases: NONE.

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Chicago**, on **May 24, 2012**. 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. [x] Is Respondent due any credit?
O. [ ] Other: _____

FINDINGS

On **December 18, 2008**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$60,076.12**; the average weekly wage was **$1,155.31**.

On the date of accident, Petitioner was **32** years of age, ***married*** with **one** 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 **$59,845.32** for TTD, **$0.00** for TPD, **$63,480.71** for maintenance, and **$10,723.02** for other benefits, for a total credit of **$134,049.05**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$770.20**/week for **77-6/7** weeks, commencing **December 19, 2008** through **June 15, 2010**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary maintenance disability benefits of **$770.20**/week for **81-5/7** weeks, commencing **June 16, 2010** through **January 8, 2012**, as provided in Section 8(b) of the Act.

Commencing **January 9, 2012**, the respondent shall pay the petitioner the sum of **$612.00**/week for the duration of his disability, as provided in Section **8(d)1** of the Act, because the injuries sustained caused **a loss of earnings rendering him to become permanently partially incapacitated from pursuing his usual and customary employment**.

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 JOANN M. FRATIANNI

January 28, 2013
Date

JAN 30 2013

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

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

Petitioner was working for Respondent as a laborer. He drove a pick up truck and would empty garbage cans located in the downtown Chicago area. His duties included removing and emptying liners from wire garbage containers that weighed up to 100 pounds. Other duties included street sweeping and cleaning up after motor vehicle accidents. Petitioner testified that this was full time work 5 days a week, 8 hours a day and 40 hours a week.

On December 18, 2008, Petitioner was lifting a liner from a wire garbage basket that he estimated weighed between 130-140 pounds when he experienced a sudden onset of pain in his right shoulder. Petitioner testified that prior to this episode he experienced no right shoulder injury, but later on cross-examination admitted to injuring that shoulder while moving sandbags a year earlier.

Subsequent to this injury, Petitioner was sent for treatment to MercyWorks where he was seen later that day. A history of injury consistent with Petitioner's testimony was recorded at that facility and Petitioner complained of right shoulder pain. Petitioner was initially diagnosed with a right shoulder strain and placed on restricted duty. Petitioner never returned to work for Respondent after that date.

Petitioner was then prescribed an MRI by MercyWorks. The MRI was performed on January 2, 2009 and revealed a right shoulder partial rotator cuff tear. Following the MRI, Petitioner was referred to see Dr. William Heller, an orthopedic surgeon. Dr. Heller reviewed the MRI and felt it was consistent with a rotator cuff tendinopathy with partial thickness tearing. Dr. Heller injected the shoulder with cortisone, prescribed physical therapy, and restricted Petitioner to light duty work with no lifting of the right arm.

Petitioner after a period of physical therapy did not respond to treatment. Dr. Heller then prescribed surgery. On March 18, 2009, Dr. Heller performed surgery for repair of a full thickness tear along the interior aspect of the anterior superspinatus and posterior subscapularis tendon.

Post surgery, Petitioner remained under the care of Dr. Heller, who prescribed physical therapy, and who noted that he had sustained a large tear that was difficult to repair and was not completely repaired anatomically. On September 11, 2008, Dr. Heller noted that he was not surprised that Petitioner was experiencing difficulty with overhead strength and felt that he may never be 100%. Dr. Heller continued the light duty work restrictions with no lifting above chest level with the right arm.

On October 23, 2009, Dr. Heller noted normal motion of the right arm by weakness above chest level with grinding. Dr. Heller again felt that at the time of surgery the rotator cuff was not fully repairable, that Petitioner did not have normal overhead strength, and felt that he was at maximum medical improvement with permanent work restrictions. The restrictions were not lifting the right arm above chest level for work and to return as needed.

Following the release by Dr. Heller, Petitioner then remained under the care of MercyWorks.

Petitioner was examined on December 14, 2009, by Dr. Nikhil Verma, an orthopedic surgeon. This examination was at the request of Respondent. Dr. Verma felt that x-rays revealed a Type I acromion and metallic hardware present within the right shoulder consistent with a prior rotator cuff repair. Dr. Verma felt that a causal relationship existed between the patient's work injury of December 18, 2008 and the current shoulder condition post surgery.

Dr. Verma further indicated that further surgery may be necessary. Dr. Verma indicated work restrictions of 5 pounds lifting with no overhead activity.

Dr. Verma later reviewed the MRI arthrogram of January 2, 2010, and felt that Petitioner had a recurrent tear or persistent defect of the rotator cuff. Dr. Verma recommended a repeat arthroscopy with revision of the rotator cuff repair in a report dated May 26, 2010. Dr. Verma also reviewed the job description of Petitioner which included climbing, reaching above shoulder level, constant carrying, pushing, pulling, walking and lifting up to 50 pounds. Dr. Verma also reviewed a functional capacity evaluation dated March 29, 2010. The FCE revealed Petitioner functioning at a light level with maximum floor to waist lifting of zero pounds with carrying of 31 pounds. Dr. Verma agreed that absent further surgery, Petitioner was at maximum medical improvement. Dr. Verma further felt that the increased pain with overhead activity would be consistent with his diagnosis of recurrent rotator cuff tear.

When seen at MercyWorks on April 7, 2010, Petitioner was determined to be at maximum medical improvement and discharged with permanent restrictions of exerting up to 20 pounds of force occasionally and 10 pounds frequently. Petitioner was last seen at MercyWorks on May 26, 2011 and those same restrictions were continued. Petitioner was discharged on that date.

Petitioner testified that he continues to experience pain and discomfort to his right arm and shoulder, and feels a pop and grinding when he lifts it above chest level. Petitioner testified that he notices a difference in pain and weakness depending upon what level he lifts. Up to chest level, Petitioner testified that he has minor difficulty. Above chest level, he experiences more pain.

Petitioner testified that he is now unable to perform many activities that he once engaged in prior to the accident. He is now unable to use his right arm and shoulder while throwing a ball or during family activities such as picking up his daughter. He engages in shopping and other such activities.

Petitioner testified that he graduated from high school. Following graduation, he joined the United States Navy and was trained as a cook. Following military service, he worked for Best Buy and Joslyn Manufacturing. Petitioner testified that he is unable to work as a cook due to the physical requirements and is unable to return to work as a sanitation laborer for Respondent. Respondent has not offered alternative employment within his medical restrictions.

Petitioner engaged the services of MedVoc Rehabilitation at the request of Respondent. These services were for vocational rehabilitation. Petitioner had an appointment with Diamond Warren, a case manager, on December 11, 2011. Ms. Warren authored a report dated December 18, 2011, in which she summarized Petitioner's education and work history, his interests and medical information. Ms. Warren provided job leads and counseled Petitioner on how to secure his own job leads. (Px5)

On January 6, 2012, Petitioner notified Ms. Warren that he found work with Mother's Touch Child Care Services performing light custodial work, and that he would start the following Monday. Petitioner began such work on January 9, 2012 and earned $12.00 per hour. After the pay period ending January 22, 2012, Petitioner began working with Kids Academy in Chicago, performing light custodial work. Petitioner testified that this work is less strenuous than at Mother's Touch Child Care Services. Petitioner performs light cleaning and repair work including shopping at a local grocery story and Home Depot. He earns $12.00 an hour. Petitioner testified that he switched positions to work more hours at a less demanding position. He now works 32-35 hours a week, and has averaged 32.8 hours a week, or $393.60 per week.

Respondent introduced surveillance videos of Petitioner's activities. Petitioner is depicted lifting but it does not appear that he is lifting in excess of his medically imposed restrictions. In addition, a labor market survey from GenEx dated May 8, 2012 reflects potential earnings of $11.11 per hour in the Chicago region, or a figure less than what he is currently earning on an hourly basis.

Petitioner claims he is entitled to receive a wage differential award pursuant to Section 8(d)1.

The Arbitrator find that Petitioner has met his burden of proof that he is entitled to an award pursuant to Section 8(d)1, and that he is not capable of returning to his usual and customary work for Respondent. Petitioner was earning $1,155.31 per week for Respondent at the time of his injury and the current union rate of pay for his former job is $32.79 per hour, or $1,311.60. Based upon the average wages of $393.60 per week he is currently earning, this results in a wage differential of $612.00 per week.

Based further upon the above, the Arbitrator finds that the condition of ill-being as noted above is causally related to the accidental injury sustained on December 18, 2008, and adopts the opinions of Dr. Heller and Dr. Verma that concur with this finding.

N. Is Respondent due any credit?

Respondent is found to have paid $59,845.32 in temporary total disability benefits, $63,480.71 in maintenance benefits, and $10,723.02 in other benefits, for a total of $134,049.05, for which they are entitled to receive a credit against any claim for permanency.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

DOUGLAS MOORE,

Petitioner,

14IWCC0215

vs. NO: 09 WC 00034

FELMLEY DICKERSON CO.,

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 TTD and medical expenses 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 an injury to his low back on September 2, 2008, working as a general laborer performing general demolition work. His injury was subsequently treated through a lumbar fusion at the L4-L5 level on May 9, 2011, and postoperative care with Dr. Stroink, the operating physician, and then Dr. Jhee, the succeeding treating physician.

On September 15, 2011, Dr. Jhee caused Petitioner to undergo a functional capacity evaluation, one that resulted in a finding that Petitioner was capable of medium-heavy physical demand work. Petitioner was subsequently ordered into a work conditioning program and participated in the same from September 20, 2011, through November 3, 2011. Petitioner, in May 2012, was found to be at MMI by Dr. Stroink and, in September 2012, released to work with restrictions by Dr. Jhee. The restrictions Petitioner was ordered to work under were no lifting of over 70 pounds, no overhead lifting of over 50 pounds and no frequent bending or twisting at the waistline.

Between Petitioner being found to be at MMI by Dr. Stroink in May 2012 and being released to work with restrictions by Dr. Jhee in September 2012, Petitioner was made the subject of video surveillance on July 30, 2012, and July 31, 2012, and was examined, pursuant to Section 16 of the Act, by Dr, Hauter on August 16, 2012. The video surveillance recorded Petitioner actively participating in the laying of a concrete, engaged in the prohibited activity of frequently bending and twisting at the waist and, more impressively, using a hammer to drive stakes into the ground. The Commission takes notice of Petitioner's testimony that he was a concrete finisher before commencing working as a general laborer. The video surveillance indicates Petitioner, at least temporally, resumed this career.

The activities depicted in the video surveillance support the conclusion Dr. Hauter drew after examining Petitioner on August 16, 2012, specifically, that Petitioner could return to work his regular work as a laborer and also that Petitioner was at MMI.

Petitioner, at his January 15, 2013, arbitration hearing acknowledged that he was in the video surveillance footage and that he was performing a flat-work concrete job for his uncle. He acknowledged further that he helped by building forms, using 2 x 4s and a hammer and nails and floated the concrete. He explained that his presence there was to demonstrate to his uncle's workers how to finish concrete and that he wasn't compensated for doing so. The Commission does not concern itself with whether Petitioner was compensated but concerns itself with Petitioner showing that he was capable of working. To be entitled to TTD, "a claimant must show not only that he did not work but also that he was unable to work." Ingalls Memorial Hospital v. Industrial Commission, 241 Ill. App.3d 710, 716, 182 Ill. Dec. 241, 609 N.E.2d 775 (1993). In the instant matter, Petitioner clearly demonstrated he was able to work.

On the basis of the video surveillance and Dr. Hauter's assertion that Petitioner can resume his career as a general laborer, the Commission concludes Petitioner was shown to have achieved MMI effective August 16, 2012, the date of Dr. Hauter's independent medical evaluation. Accordingly, the August 2, 2013, 19(b) Arbitration Decision is modified only to the extent that TTD benefits are awarded through August 16, 2012.

All other findings and orders contained in the August 2, 2013, 19(b) Arbitration Decision are affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the August 2, 2013, 19(b) Arbitration Decision is modified to extend the period of temporary total disability through August 16, 2012.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $678.52 per week for a period of 203-1/7 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 to Petitioner the sum of $35,456.15 for medical expenses under §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,500.00. 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: MAR 2 7 2014
KWL/mav
O: 1/28/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

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

14IWCC0215

MOORE, DOUGLAS Case# **09WC000034**

Employee/Petitioner

FELMLEY DICKERSON COMPANY

Employer/Respondent

On 8/2/2013, 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 0.06% 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:

0252 HARVEY & STUCKEL
DAVID STUCKEL
101 S W ADAMS ST SUITE 600
PEORIA, IL 61602

0522 THOMAS MAMER & HAUGHEY LLP
BRUCE E WARREN
30 MAIN ST SUITE 500
CHAMPAIGN, IL 61820

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
19(b)

14IWCC0215

DOUGLAS MOORE,
Employee/Petitioner

v.

FELMLEY DICKERSON COMPANY,
Employer/Respondent

Case # 09 WC 00034

Consolidated cases: NONE.

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 **Joann M. Fratianni**, Arbitrator of the Commission, in the city of **Bloomington**, on **January 15, 2013.** 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. [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. [ ] 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, **September 2, 2008**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$52,924.00**; the average weekly wage was **$1,017.78**.

On the date of accident, Petitioner was **29** years of age, ***single*** with **no** dependent children.

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

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

Respondent shall be given a credit of **$139,290.36** for TTD, **$ 0.00** for TPD, **$ 0.00** for maintenance, and **$ 0.00** for other benefits, for a total credit of **$139,290.36**.

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

ORDER

That heretofore on to-wit: **August 11, 2010,** a decision of the Arbitrator was entered and filed with the Commission under the provisions of paragraph (b) of Section 19, for the reason that the disabling condition of said Petitioner, as result of the accident sustained on **September 2, 2008.** Petitioner was awarded **90-2/7** of temporary total disability benefits and **$35,456.15** in medical expenses.

That the Decision of the Arbitrator on review was affirmed and adopted by the Commission by order dated **March 30, 2011,** and was paid by Respondent pursuant to said Decision.

After hearing additional testimony, the Arbitrator finds that the disabling condition of said Petitioner as a result of the accident sustained on **September 2, 2008,** <u>has reached a permanent condition,</u> and the following award shall be <u>in addition</u> to the compensation hereinbefore awarded.

Respondent shall pay Petitioner temporary total disability benefits of **$678.52**/week for **200-4/7** weeks, commencing **September 24, 2008** through **July 29, 2012,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from September 24, 2008 through January 15, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $139,290.36 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services of **$335.00,** as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

ORDER (CONTINUED)

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 JOANN M. FRATIANNI

July 29, 2013
Date

ICArbDec19(b)

AUG 2 - 2013

L. What temporary benefits are in dispute?

Petitioner testified he sustained an injury to his lower back on September 2, 2008. This matter proceeded to trial on a Section 19(b) Petition before Arbitrator White on June 18, 2010. A decision was filed on August 11, 2010, awarding 90-2/7 weeks of temporary total disability benefits for the period commencing September 24, 2008 through June 18, 2010, and $35,456.15 in medical expenses were also awarded to Petitioner. Petitioner was awarded certain prospective medical care.

The decision of Arbitrator White was affirmed and adopted by the Commission following a review by order dated March 30, 2011. The matter was remanded for further hearings on Arbitration consistent with those decisions.

Following his testimony before Arbitrator White, Petitioner underwent surgery on May 9, 2011 with Dr. Stroink, in the form of a fusion at L4-L5. (Px6) Post-operatively, Petitioner continued under the care of Dr. Stroink, who later released him and referred him to see Dr. Jhee.

Petitioner first saw Dr. Jhee on July 5, 2011. Dr. Jhee prescribed a functional capacity evaluation. (Px5) This was performed on September 15, 2011 and demonstrated a medium-heavy category of work which indicated two handed occasional lifting and carrying of 75 pounds from 6 inches to waist level and a two-handed frequent lift 43 pounds from 6 inches to waist level. The Jhee following the FCE prescribed a work-conditioning program. Petitioner underwent work-conditioning from September 20, 2011 through November 3, 2011.

Petitioner then saw Dr. Stroink on May 1, 2012 and found to be at maximum medical improvement. Dr. Jhee then released Petitioner with work restrictions effective September 25, 2012, of no lifting over 70 pounds, no overhead lifting of 50 pounds and no frequent bending or twisting at the waistline.

Dr. Jhee testified by evidence deposition that he agreed with the results of the FCE and prescribed restrictions consistent with that examination. Dr. Jhee declined to testify that these restrictions were permanent and felt they would depend partly on how Petitioner did while working under such restrictions. Dr. Jhee testified that he was unaware if Petitioner was working and had no plans to continue treatment. Petitioner last saw Dr. Jhee on September 25, 2012, who noted his examination findings and restrictions were unchanged.

Petitioner was examined by Dr. Hauter at the request of Respondent. Petitioner saw Dr. Hauter on August 16, 2012. Dr. Hauter testified by evidence deposition that Petitioner could be returned to his regular work in construction as a laborer and was at maximum medical improvement. Dr. Hauter felt that Petitioner was magnifying his symptoms to justify the restrictions under the FCE.

Respondent also introduced surveillance from July 30, 2012 through July 31, 2012. (Rx3) Petitioner at that time was observed participating in a concrete project at a private residence, and was filmed bending and twisting at the waist with no apparent difficulty. Petitioner was filmed squatting repeatedly, carried various items and reached overhead. He used a hammer, pulled out stakes and carried lumber. The film does not seem to depict any difficulty in performing these tasks or any physical discomfort. In addition, Petitioner was filmed shopping and carrying his children, and placing one in a car seat.

Petitioner testified the video (Rx3) accurately depicted him working as a concrete finisher. He described that work as being heavy. The job on the video was described as "flat work" and he was invited to work there by his uncle. Petitioner testified he assembled the wood form for the concrete pour, using 2 x 4" lumbar. Stakes were driven into the ground to hold the lumber in place. Petitioner testified he used a sledgehammer for this task. He also used a "float" weighing 20 pounds including the handle to smooth the concrete. This involved bending and twisting at the waist. He also used an edger while on his knees, and participated in breaking up the form using a sledgehammer.

Petitioner testified that at the end of each day after performing these tasks, he was sore, but he was able to finish all work. The driveway he was working on was 70 feet long.

Dr. Hauter testified that he viewed the DVD surveillance and it confirmed his opinion that Petitioner could return to regular work and was at maximum medical improvement.

Based upon the above, the Arbitrator finds that Petitioner was at maximum medical improvement effective September 25, 2012, the last visit with Dr. Jhee, when he was discharged from further care and was capable of full duty work as early as July 30, 2012, based on the surveillance evidence.

Based further upon the above, the Arbitrator finds that Petitioner was temporarily and totally disabled from work commencing September 24, 2008 through July 29, 2012, and was capable of full duty work on July 30, 2012.

All other periods of time claimed for temporary total disability benefits by Petitioner in this matter are denied for the reasons cited above.

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?

Petitioner introduced into evidence certain medical charges that were incurred after this accidental injury:

Diagnostic NeuroTechnologies	$ 203.00
Bloomington Rehab Associates	$ 132.00

These charges total $335.00.

See findings of this Arbitrator in "J" above.

These charges represent reasonable and necessary medical care and treatment designed to cure or relieve the condition of ill-being that was causally related to this accidental injury. The Arbitrator finds Respondent to be liable for same to Petitioner, subject to the provisions of the medical fee schedule created by Section 8.2 the Act.

In addition to the above, a lien from the Department of Public Aid in the amount of $1,466.07 was filed. Respondent is to hold Petitioner harmless from the lien.

All other medical charges not listed above that were incurred after September 25, 2012 are hereby denied, for the reasons cited above.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ 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

LIBORIO OROZCO,

Petitioner,

14IWCC0216

vs.

NO: 12 WC 07850

INNOPHOS, INC.,

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 PPD 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.

Petitioner was involved in a crushing incident to his right hand, on June 15, 2010, that resulted in a right distal radius fracture. Petitioner subsequently underwent an open reduction of the fracture and internal fixation on June 24, 2010, and then physical therapy from July 20, 2010, through September 8, 2010. Two days prior to the conclusion of his physical therapy, on September 6, 2010, Petitioner was released to return to full duty work without restrictions. Petitioner returned to his pre-injury job activities for Respondent.

On February 1, 2013, the arbitration hearing to address Petitioner's claim was conducted with the only contested issue being the nature and extent of Petitioner's permanent disability. At that time, Petitioner testified to experiencing continued pain, diminished strength and sensitivity, and being weather-sensitive in his right hand. He also testified further that, since the accident, he sometimes has to ask for assistance at work in order to perform his job. Based on Petitioner's testimony, the presiding Arbitrator found Petitioner had sustained a 40% loss of his right hand. Respondent took a timely appeal of the Arbitrator's decision.

In reviewing the testimony both of Petitioner and Respondent's witness, Steve Battig, the Commission concludes the extent of Petitioner's injuries were not as great as found by the presiding Arbitrator. The Commission notes, despite Petitioner's lingering complaints of pain, weakness and diminished sensitivity, no recent attempt was taken to address these complaints and finds the last time Petitioner was seen for his right wrist and hand was on October 13, 2010. The Commission notes further Petitioner acknowledged, on that date, that he did not tell Dr. Dilella, his treating physician, about any pain that he was experiencing to his right hand despite, as he claimed, it being painful at that time. Batting, Respondent's operations manager, testified that he witnessed no diminution in Petitioner's job performance following his injury and specifically noted Petitioner was able to perform his job with same manual dexterity after his injury as he did before the injury. Batting also testified that he never witnessed Petitioner seeking assistance from a co-worker.

The Commission finds it difficult to conceive that Petitioner, who sustained an uncontested work injury, would abstain from further treatment if his right wrist and hand was as symptomatic as he claimed it to be. Accordingly, the Commission finds it necessary to reduce the amount of the benefits awarded under Section 8(e) of the Act, finding 30% loss of use of the right hand to be an appropriate compensation for Petitioner's residual condition.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $555.82 per week for a period of 60½ weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the 30% loss of use of Petitioner's right hand.

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 $35,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 2 7 2014
KWL/mav
O: 2/10/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0216

OROZCO, LIBORIO
Employee/Petitioner

Case# **12WC007850**

INNOPHOS
Employer/Respondent

On 4/10/2013, 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 0.09% 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:

0704 SANDMAN LEVY & PETRICH
WILLIAM H MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
KIMBERLY VAUGHN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0216

Liborio Orozco
Employee/Petitioner

Case # 12 WC 7850

v.
Innophos
Employer/Respondent

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 Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on 2/1/13. 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 _____

14IWCC0216

FINDINGS

On 06-15-10, 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.

In the year preceding the injury, Petitioner earned $48,171.24; the average weekly wage was $926.37.

On the date of accident, Petitioner was 66 years of age, married, with 0 children under 18.

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 $7,234.37 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $7,234.37.

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

ORDER

Respondent shall pay petitioner permanent partial disability benefits for $555.82 per week for 82 weeks, because the injury sustained caused the 40% loss of use of the right hand, as provided in Section 8(e) of the Act.

Respondent shall be given a credit of $7,234.37 for temporary total disability benefits paid pursuant to section 8(b) 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 of at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Vi Thompson-Smith
Signature of Arbitrator

April 10, 2013

APR 10 2013

FINDINGS OF FACT

Petitioner Liborio Orozco (hereafter "Petitioner") was employed as an operator for Innophos (hereafter "Respondent") on June 15, 2010. Petitioner testified that he began working for respondent in September 1983.

On June 15, 2010, petitioner was cleaning a machine when a mop became stuck in the mechanism. Petitioner attempted to remove it and was injured when one of the wheels of the machine came down on his right wrist.

Petitioner came under the care of Dr. Carl Dilella, an orthopedic surgeon with Bone & Joint Physicians. Petitioner was seen for care on June 16, 2010 and was diagnosed with a right distal radius fracture. Dr. Dilella recommended that petitioner undergo surgery to repair the fracture. Dr. Dilella ordered that petitioner could return to work in a light duty capacity so long as he did not use his right hand but remained off work, as this type of light duty was not available.

Petitioner eventually underwent surgery performed by Dr. Dilella on June 24, 2010. The procedure was open reduction of the fracture and internal fixation. The fracture was repaired by placing a plate and six screws. Petitioner testified that this hardware has been retained and is still present in his wrist as of the date of trial.

Petitioner underwent physical therapy from July 20, 2010 through September 8, 2010. Petitioner was released by Dr. Dilella to return to full duty work as of September 6, 2010. Petitioner returned to his pre-injury job as an operator at that time.

Petitioner was seen by Dr. Dilella on October 13, 2010. This was three and a half months post-surgery. Petitioner reported no new complaints and that he had been working full duty with no restrictions. During that appointment petitioner reported that he was completely pain-free. Upon physical examination, Dr. Dilella found that petitioner had no palpable tenderness and no erythema, ecchymosis, or effusion present. Petitioner demonstrated full motion of the wrist in both volar and dorsiflexion as well as radial and ulnar deviation. Strength testing was normal. Petitioner was able to make a full fist with no pain and had full range of motion of all digits. X-rays taken that day showed a healing fracture with well-positioned hardware. Petitioner was declared to be at maximum medical improvement ("MMI") and was discharged from care; being advised that he could return if needed. Dr. Dilella's records were admitted into evidence at Petitioner's Exhibit 1.

Petitioner was off work from June 16, 2010 through September 5, 2010. Petitioner testified that he was paid temporary total disability ("TTD") benefits for that period. The parties stipulated that all of petitioner's reasonable, necessary, and related medical bills were paid by respondent. Petitioner testified that he has not missed any work, except for two weeks disciplinary action, since returning from his work injury. He has not experienced any loss or modification of his work income.

Petitioner testified that he has not returned to care since being discharged by Dr. Dilella though he testified that understands that he had the right to return to care if he thought it necessary. Petitioner testified that he still takes prescription pain medication for his wrist but that it is prescribed by his primary care physician. No medical records were admitted into evidence to support this contention by petitioner.

Admitted as Respondent's Exhibit 1 was petitioner's job description. Petitioner works as a Metaphos Operator at Innophos' Waterway plant location. Petitioner's job requires operation of the Meta furnace, using physical effort to clear obstructions from the machine wheels, and visiting the furnace to control the furnace environment for approximately five minutes per hour but up to 30 minutes per hour in upset conditions. Petitioner's job requires frequent sitting and temperature changes. It also requires occasional lifting of on average 15 pounds with a maximum lift of 50 pounds. On rare occasions petitioner must perform reaching activities.

Petitioner returned to his job as an operator for respondent. Petitioner testified that he sometimes needs help lifting heavy objects since he has returned to work but did not need this help before his accident. He testified that he sometimes must seek out other employees to help him. He testified that when he cannot find another employee to help, he performs the task anyway.

Respondent called Steve Battig, operations manager at Innophos, to testify. Mr. Battig was working as site manager at the times relevant to petitioner's workers' compensation claims. Mr. Battig was one of petitioner's supervisors both prior to his work accident and after his work accident and was promoted to operations manager in January 2013.

Mr. Battig testified that he witnessed petitioner in his abilities to perform his job both before and after his work injury. He testified that Petitioner has been able to perform all of his job tasks since returning to work on September 6, 2010. Mr. Battig testified that petitioner's job requires substantial manual dexterity and petitioner has been able to perform the manual dexterity tasks, including use of a computer, without any difficulty. Mr. Battig testified that he has never seen petitioner ask any other employee for assistance in performing his job and has not observed any pain behaviors. He also testified that petitioner has not complained of pain or inability to perform his job and has not requested to return for medical treatment. He testified that petitioner has not missed any time from work related to his work injury since petitioner's return on September 6, 2010.

CONCLUSIONS OF LAW

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

Petitioner testified that he was injured while cleaning a machine at work on June 15, 2010. No contrary evidence was presented to suggest that Petitioner was not injured at work. Therefore, the Arbitrator concludes that Petitioner's condition of ill-being is causally related to his June 15, 2010 work accident.

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

The Arbitrator concludes that petitioner has suffered a permanent partial disability equal to 40% loss of use of the right hand. This is equal to $45,577.24 (82 weeks PPD at $555.82 PPD rate).

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

WASFI ALSARAJ,

Petitioner,

14IWCC0217

vs.

NO: 12 WC 41848

TAXI AFFILIATION SERVICES, INC., LLC,

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 the admissibility of evidence, accident, notice, causal connection, wage rate, medical expenses, prospective medical care, temporary total disability and penalties and fees, 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner has been a Cab Driver for 9-10 years. He cannot operate a cab in Chicago without a medallion, which is a license provided by the City. He entered into a lease agreement with the owner of a medallion in order to operate a cab. He leased a 2011

Ford Escape. The first time he leased this vehicle was in April of 2012. He would pick up the vehicle from the Elston garage.

2. On September 4, 2012, Petitioner picked up a fare at the airport. While lifting the passenger's luggage, something popped in his back. The luggage was filled with books. Petitioner had pain in his left leg and back.

3. Petitioner did not immediately seek treatment, thinking it was just a muscle problem that would subside. He worked through the following week, and just so happened to be on an antibiotic and Vicodin due to an unrelated tooth infection. He was taking 6-10 pills per day in total. However, he was unable to carry anything, found it difficult to sit, and walked with a limp.

4. On September 11, 2012 Petitioner underwent a root canal. He took Vicodin that day and the morning of September 12th. Afterwards he discontinued use. He then began noticing an increase in his back and leg pain. He was unable to operate the cab. On September 15th Petitioner met with the garage owner. He told the owner that he had hurt his back lifting luggage, but that he wanted to discuss keeping the leased car despite the fact that he was not working. The owner gave Petitioner 30 days to get healthy.

5. On October 22, 2012, after chiropractic treatment and Vicodin failed to reduce his pain, Petitioner was taken off of work by Dr. Abu-Shanab until March 8, 2013. During this time period, the acupuncture and Galvanic stimulation eased Petitioner's pain.

6. Eventually, a February 18, 2013 injection by Dr. Bartfield did relieve Petitioner's pain. Petitioner also believed that his treatment with Dr. Abu Shanab was helping. He returned to work on March 4, 2013 with restrictions. He testified that he has back and left leg pain every 30 minutes. He was even forced to stand during his arbitration hearing.

7. Prior to this accident, Petitioner did not know that workers' compensation covered an injury at work. He has never filed a workers' compensation claim prior to the one in question. On November 25, 2012, Petitioner informed a friend of his injury. The friend subsequently informed him of workers' compensation. 2 days later Petitioner completed an accident report.

8. Robert Anderson is the General Manager of the Elston garage for Taxi Medallion Management. He testified that Petitioner did inform him that he injured his back.

9. Petitioner submitted into evidence a 1099 form for the year 2012 which showed his earnings for the year. This was used by the Arbitrator to calculate an average weekly wage of $447.79.

The Commission affirms the Arbitrator's rulings on accident, notice, average weekly wage, temporary total disability and medical expenses.

The Commission, however, modifies the Arbitrator's ruling on the admissibility of evidence. The Arbitrator admitted an Independent Medical Examination (IME) Report from Dr. Coe over Respondent's objection. The report was admitted under the assertion that it was not admitted for the opinion offered within, but to support the Penalties and Fees Petition. The Arbitrator also drew an inference that, since Respondent failed to admit the report of its own physician, the findings in said report must have been contrary to Respondent's position.

The Commission finds that the IME Report is inadmissible hearsay, since Dr. Coe was not made available either at trial or via a deposition. In order for the report to support Petitioner's Petition, the report (despite its hearsay characterization) would have to be admitted for the truth of the matter asserted. This would be improper. Accordingly, the Commission finds that the report is not admissible in the case at bar.

However, the fact that the report itself is inadmissible hearsay has no bearing on the Arbitrator's (or the Commission's) ability to draw an inference from the absence of the report in evidence. The fact that Respondent had access to an IME report from their own physician and chose not to present it at trial allows for an inference that the report would not have been favorable for Respondent. Thus, while the IME report is inadmissible hearsay, the inference drawn from Respondent's failure to admit the report in evidence should stand.

The Commission also modifies the Arbitrator's ruling on penalties and fees. Respondent was served with a §19(b) Petition on December 31, 2012, in which Petitioner was seeking payment of medical expenses. However, Respondent did not pay any medical expenses and it was stipulated that Respondent paid TTD in the amount of $3,230.78, purporting to be TTD from November 30, 2012 through March 3, 2013. Contrary to Commission rules, Respondent never issued a written explanation for the basis of its failure or refusal to pay benefits sought by Petitioner.

Moreover, when Respondent did pay some compensation to Petitioner, it was paid on March 19, 2013, more than 10 weeks after the beginning of the disability period it purports to cover. Further, the payment paid at the minimum TTD rate for a single individual with no children, despite the fact that Respondent stipulated Petitioner was married with three dependents.

Respondent stated that Chicago cab drivers are governed by the City of Chicago Bureau of Consumer Affairs, which regulates cab drivers, including their wages. The Bureau indicates that the annual wage for a cab driver is $12,000.00. Respondent stated that this amount should be used to calculate Petitioner's average weekly wage, which would correspond to an average weekly wage of $230.77.

With respect to the TTD rate paid, it appears that Respondent was simply paying TTD in amounts equal to Petitioner's average weekly wage (based on Respondent's own calculation), rather than paying the minimum statutory amount for a single adult with no dependents. Although Respondent's average weekly wage calculation was wrong, it was based on City regulations. Thus Respondent's calculation and payment of benefits was not unreasonable or vexatious.

Based on the evidence, the Commission finds that Respondent should be liable for §19(L) penalties, as it failed to set forth in writing the reason for its delay in payment of benefits. However, the award for §19(K) penalties and §16 fees is vacated, as Respondent's defenses, while wrong, were nonetheless made in good faith.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses, prospective medical expenses prescribed by Dr. Lorenz and temporary total disability benefits related to his work-related low back conditions under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the IME report of Dr. Coe is denied as inadmissible hearsay, although the inference drawn from Respondent's failure to admit the report in evidence should stand.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is solely entitled to §19(L) penalties in the amount of $3,210.00; §19(K) penalties and §16 fees are 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $35,300.00. 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: MAR 2 7 2014
O: 2/13/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

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

ALSARAJ, WASFI
Employee/Petitioner

Case# **12WC041848**

14IWCC0217

TAXI AFFILIATION SERVICES LLC
Employer/Respondent

On 7/15/2013, 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 0.07% 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:

4788 HETHERINGTON KARPEL BOBBER ET AL
ALAN KARPEL
161 N CLARK ST SUITE 2080
CHICAGO, IL 60601

4866 KNELL & O'CONNOR
MICHAEL DANIELEWICZ
901 W JACKSON BLVD SUITE 301
CHICAGO, IL 60607

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)

Wasfi Alsaraj
Employee/Petitioner

v.

Taxi Affiliation Services LLC
Employer/Respondent

Case # **12** WC **41848**

Consolidated cases: _____

14IWCC0217

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **04/24/2013 and 05/07/2013**. 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. [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. [x] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

On the date of accident, **09/04/2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,376.00**; the average weekly wage was $**447.79**.

On the date of accident, Petitioner was **40** 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 $**3,230.78** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**3,230.78**.

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 $**330.00**/week for **19** weeks, commencing **10/22/2012** through **03/03/2013**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $**3,230.78** for TTD, $**-0-** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**3,230.78**.

Respondent shall pay reasonable and necessary medical services of $**12,600.08**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay prospective medical care recommended by Dr. Lorenz in his 01/17/2013 progress note including a left L5-S1 microdiskectomy, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay to Petitioner penalties of $**5,333.79**, as provided in Section 16 of the Act; $**7,819.65**, as provided in Section 19(k) of the Act; and $**3,210.00**, as provided in Section 19(l) of the Act. Respondent shall also pay to Petitioner additional penalties as provided in Section 16 of the Act and Section 19(k) of the Act in an amount to be determined after the prospective medical care awarded in this decision is rendered and billed.

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.

L. Thompson Smith

Signature of Arbitrator

July 15, 2013

ICArbDec19(b)

JUL 15 2013

FINDINGS OF FACT

The disputed issued on this matter are: 1) accident; 2) notice; 3) causal connection: 4) average weekly wage ("AWW"); 5) past medical care; 6) prospective medical care, 7) temporary total disability ("TTD"); and 8) penalties and fees.

Petitioner ("Wasfi Alsaraj") has been employed as a taxicab driver for nine or ten years. For the past approximately six years he has been driving for Taxi Affiliation Services, LLC/Yellow Cabs, hereafter referred to as ("Respondent").

Petitioner leases the cabs for a week at a time. The terms of the lease are contained in a uniform lease agreement that is drafted by the City of Chicago, pursuant to ordinance. Under the terms of the lease, Petitioner pays $31.50 a week for his own workers' compensation insurance. *See,* PX1.

In April of 2012, Petitioner began leasing taxicab number 386. It is a 2011 Ford Escape that runs on compressed natural gas (CNG). He chose that vehicle because the City of Chicago has a pilot program for CNG taxicabs that allowed him to pick up passengers at the airports without waiting in line for two and a half to three hours. Petitioner leased the cab from the Elston garage and Mr. Bob Anderson was the manager of the Elston garage on September 4, 2012.

Respondent is one of Yellow Cab's companies and issues Petitioner's 1099 forms. The parties have stipulated that Respondent was Petitioner's employer on the date of the alleged accident.

Petitioner was in good health on September 4, 2012. He had never injured his back, sought treatment from a healthcare provider for a back or leg condition, been injured in a taxi cab collision, or filed a claim for or received workers' compensation benefits in the United States or elsewhere before his claimed accident.

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On September 4, 2012, Petitioner was operating Yellow Cab number 386. At approximately 10:00 a.m., he picked up a female passenger at the airport and when he attempted to pick up her luggage, he felt something pop in his back. He put the luggage down and asked the starter to help the woman with her luggage because something happened to his back.

Petitioner experienced pain in his back and left leg after the accident. He did not seek medical attention because he thought it was a muscle sprain that would get better without treatment.

Petitioner was taking Vicodin at the time of the accident as it had been prescribed by his dentist for an infection and swollen tooth. The dentist had prescribed two Vicodin pills a day and Petitioner began taking six to ten pills a day to compensate for his back pain.

Petitioner testified that it was difficult for him to sit after the accident and he had to adjust the way that he sat in order to operate the taxicab. It was also difficult for him to carry anything, so he did not. In addition, he testified that he had a limp after the accident.

Petitioner underwent a root canal on September 11, 2012. He did not take Vicodin the following day because he no longer had pain in his mouth. His back and leg pain began to increase and he could not sit for long periods, so he stopped driving the cab.

On September 15, 2012, Petitioner went to the Elston garage to see Bob Anderson. He had already paid his lease for the week but was not driving the cab. He wanted to find out whether Mr. Anderson would continue to lease the cab to him if he stopped driving. During the conversation, he told Mr. Anderson that he hurt his back, lifting luggage. Mr. Anderson did not tell him he needed to fill out an accident report.

On September 19, 2012, Petitioner saw Dr. Yehya, a chiropractor at Health First Center in Bridgeview. He told the doctor that he had hurt his while back lifting luggage and Dr. Yehya administered chiropractic treatment over four visits. The treatment consisted of massages, electrical stimulation, and stretching on a decompression machine. The

decompression machine made Petitioner's pain worse and Dr. Yehya referred Petitioner to Dr. Khudeira, a medical doctor.

Petitioner saw Dr. Khudeira on October 1, 2012. The progress note of the visit includes a history of Petitioner lifting heavy luggage about a month earlier, after which he developed pain in his left knee radiating to his left lower back. The doctor found a positive straight leg raise on the left at 40 degrees and a moderate decrease in lumbar range of motion. He diagnosed low back pain with left-sided sciatica and left knee pain. He prescribed Vicodin and ordered an MRI of the lumbar spine and an x-ray of the left knee. The left knee x-ray was normal however, the lumbar spine MRI revealed a left-sided disc bulge abutting the thecal sac at the L4-5 level, which caused mild left foraminal stenosis. A posterior annular tear of the L4-5 disc was also appreciated. The radiologist also noted a moderate-sized bulge at the L5-S1 level that caused mild compression of the cauda equina leading to mild canal stenosis. According to the radiologist, the L5-S1 disc caused mild to moderate compression of the left S1 nerve root.

Petitioner returned to Dr. Khudeira on October 11, 2012, who again noted a positive straight leg raise on the left and diminished deep tendon reflexes. After reviewing the MRI, he diagnosed a herniated disc causing sciatica in the left leg. He prescribed more Vicodin and a Medrol dose pack. *See,* PX5.

Petitioner saw Dr. Rashid Abu-Shanab at Bridgeview Chiropractic Center on October 22, 2012. The history of the accident notes that Petitioner's symptoms started on September 4, 2012 when he lifted a customer's baggage while working as a taxi driver. Treatment to date, had not been effective. He was unable to drive and Petitioner's symptoms had become "unbearable". He was experiencing sharp pain radiating to his left buttock, calf and hip. Dr. Shanab diagnosed displaced lumbar discs, lumbosacral neuritis/radiculitis, muscle trigger points, and left sciatica. The prognosis was poor and he took Petitioner off work. Over the following month, Dr. Abu-Shanab administered chiropractic therapy to Petitioner and while his symptoms improved moderately, he was still experiencing low back pain radiating to his left calf. *See,* PX6.

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On November 24, 2012, Petitioner saw Anas Alzoobi, M.D., on the referral of Dr. Abu-Shanab. Dr. Alzoobi prescribed Gabapentin and recommended a neurosurgical consult for L5-S1 left neuroforaminal stenosis. Dr. Abu-Shanab then referred Petitioner to Steven Bardfield, M.D. at Hinsdale Orthopaedics, whom he saw on December 12, 2012. The doctor noted the history of the accident and Petitioner's treatment, to date. He conducted a physical examination of Petitioner and reviewed his MRI images. He diagnosed Petitioner as having lumbar radiculopathy with a left-sided disc herniation, secondary to the work-related injury. He recommended that Petitioner continue therapy and scheduled an epidural injection at L5-S1. He also kept Petitioner off work. *See,* PX7.

Dr. Bardfield performed the first epidural injection at Salt Creek Surgical Center on December 17, 2012. Petitioner testified that it helped, but not much. On January 10, 2013, Dr. Bardfield referred Petitioner to Mark Lorenz, M.D. for a surgical consult. *See,* PX7 & PX8.

Petitioner saw Dr. Lorenz on January 17, 2013, who noted the history of the accident and the treatment, to date. He reviewed the MRI and conducted a physical examination and found 1) decreased sensation, 2) a positive straight leg raise; and 3) diminished reflexes in the left leg. He noted that Petitioner's left S1 reflex, which was only slightly present upon Dr. Bardfield's examination, was now absent altogether. Dr. Lorenz diagnosed an acute left L5-S1 disk herniation with left leg radiculopathy and advancing neurological deficits. He recommended a left L5-S1 micro-diskectomy and opined that Petitioner's September 4, 2012 accident had caused his condition and the resulting disability. Petitioner continued to receive chiropractic therapy after seeing Dr. Lorenz.

On February 18, 2013, he received another epidural injection from Dr. Bardfield. The second injection helped more than the first. He asked his doctors to release him to work so he could "put food on the table". Petitioner testified that he resumed driving a cab on March 4, 2013. *See*, PX8.

On March 8, 2013, Dr. Abu-Shanab wrote a note allowing Petitioner to return to work in a light duty capacity, as a cab driver. He advised him to take breaks between passengers

to get out of the cab to stretch, walk, and not lift more than fifteen (15) pounds. *See,* PX6.

On March 12, 2013, Petitioner was examined by Dr. Jeffrey Coe, at the request of Respondent. As Respondent declined to offer Dr. Coe's report into evidence, Petitioner sought to introduce the report but Respondent objected to its admission on hearsay grounds. That initial objection was sustained however, the report was ultimately admitted for the limited purpose of supporting Petitioner's claim for penalties and attorney's fees. *See,* PX9.

At the time of trial Petitioner testified that if he sits for half an hour, he will get a stinging sensation in his back. The pain starts in his left leg behind the knee and under the calf. It goes up his thigh and into his back. Any activity, including walking, makes the pain worse. When Petitioner stands up, it releases the pain in his calf. If he stands too long, however, the pain recurs. He has to alternate between standing and sitting and the harder the surface he sits on, the faster the pain will occur. It hurts when he walks too much or sits too much. The best position for him is to lay down on a hard surface. The pain is better now than when the injury first occurred. Petitioner testified that he wants to have the surgery recommended by Dr. Lorenz.

Petitioner testified that at the time of his accident he was not aware of the procedure that cab drivers were supposed to follow when they had a work-related injury. He did not know that workers' compensation insurance applied to his accident. He testified that he thought that workers' compensation only covered motor vehicle accidents. In late November 2012, another cab driver by the name of Zaharan told him that workers' compensation applies to all work-related injuries, whether or not they involve a motor vehicle accident.

On November 27, 2012, after speaking with Zaharan, Petitioner went to Yellow Cab's corporate offices to file an accident report. He spoke with Clifford Lindsey who handles insurance matters. Mr. Lindsey interviewed Petitioner at his desk and typed the report on his computer. *See,* RX1. Petitioner told Mr. Lindsey that he hurt his back lifting luggage at the airport on September 4, 2012 at about 10:00 a.m. Petitioner was not sure

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which airport the accident occurred because he was working both airports at the time of the accident. Mr. Lindsey demanded that Petitioner choose an airport and Petitioner chose O'Hare because, to the best of his recollection, that where the accident occurred. At trial Petitioner was fairly certain that the accident occurred at O'Hare, but conceded that it may have been at Midway.

Petitioner reviewed and signed the accident report prepared by Mr. Lindsey. He did not see it again until Respondent's counsel presented it to him during his cross-examination on April 24, 2013. Petitioner testified that the words used in the accident report were Mr. Lindsey's, but they fairly and accurately summarized what Petitioner told Mr. Lindsey about the accident. That is why he signed the accident report.

Petitioner surrendered his chauffeur's license to the City of Chicago Department of Transportation on November 30, 2012 on the advice of counsel. *See,* RX2.

CONCLUSIONS OF LAW

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

Under the provisions of the Illinois Workers' Compensation Act, the Petitioner has the burden of proving by a preponderance of credible evidence that the accidental injury both arose out of and occurred in the course of employment. *Horath v. Industrial Commission*, 96 Ill. 2d 349, 449 N.E. 2d 1345 (1983). An injury "arises out of" the Petitioner's employment if its origin is in the risk connected with or incidental to employment so that there is a causal connection between the employment and the accidental injury. *See, Warren v. Industrial Commission*, 61 Ill. 2d 373, 335 N.E. 2d 488 (1975). *See, Hannibal, Inc. v. Industrial Commission*, 38 Ill. 2d 473, 231 N.E. 2d 409, 410 (1967). It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n, 203 Ill. App. 3d 809, 815-16* (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n,* 283 Ill. App. 3d 607, 610 (1998).

The hearing on this Petition for Immediate Hearing was continued several times and then bifurcated to give Respondent every opportunity to investigate Petitioner's claim and to obtain evidence to refute it, if warranted. Despite these extensions of time, Respondent did not present any evidence at trial that refuted Petitioner's claim. On the initial trial date, Respondent was granted an extension of time to obtain an independent medical examination ("IME") under Section 12 of the Workers' Compensation Act (the "Act"). Petitioner testified that he was examined by Dr. Jeffrey Coe on March 12, 2012 at the request of the workers' compensation insurer however, Respondent did not offer Dr. Coe's report into evidence, and objected on hearsay grounds when Petitioner sought to admit the report. The failure to offer Dr. Coe's report into evidence gives rise to an inference that Dr. Coe's testimony was adverse to Respondent. *See, Dugan v. Weber*, 175 Ill. App. 3d. 1088, 1096, 530 N.E.2d 1007, 1012 (1988).

On the next trial date, Respondent was granted another extension of time to obtain global positioning system ("GPS") data from the taxicab Petitioner was operating at the time of the alleged accident because Respondent's counsel claimed the data would show that Petitioner was not where he claimed to be at the time of the alleged accident. During his cross-examination of Petitioner, Respondent's counsel established that the taxicab Petitioner was leasing was equipped with a GPS device that was operating on the date of accident, yet Respondent did not seek to introduce any GPS data into evidence. Once again, the failure to offer this evidence leads the Arbitrator to infer that it was adverse to Respondent and supportive of Petitioner's claim.

At the conclusion of Petitioner's testimony Respondent sought another continuance to locate Bob Anderson, the manager of the Elston garage, in order to corroborate Petitioner's testimony that he told him, in a timely manner to satisfy the Act's notice requirement, he injured his back while lifting luggage. The Arbitrator granted Respondent's request and bifurcated the trial so that Mr. Anderson could testify. Mr. Anderson testified at the next hearing and corroborated Petitioner's testimony regarding their conversation and the date that it occurred.

At the conclusion of testimony, Respondent introduced the accident report prepared by its insurance representative, Clifford Lindsey, into evidence. The report, which includes a two page "Confidential Drivers Statement" drafted by Mr. Lindsey, and a "Driver Accident Report" filled out by Petitioner, supports Petitioner's testimony regarding the accident and his injuries. The only question raised by the report concerns the accuracy of Mr. Lindsey's typing because he records the time of the accident as 10:00 a.m., consistent with Petitioner's testimony. However, on the top of the report and on the "First Notice of Loss" he records the time of accident as 10:00 p.m., which is apparently a typographical error as the "Driver Accident Report" filled out by Petitioner states the accident happened at 10:00 a.m. The Arbitrator finds that the Petitioner has proven, by a preponderance of the evidence, that he had an accident that arose out of and in the course of his employment.

E. Was timely notice of the accident given to respondent?

The Arbitrator finds that Petitioner satisfied the notice requirements of the Act on September 15, 2012 when he told Bob Anderson, the manager of the Elston garage, that he injured his back while lifting luggage. The Arbitrator is not persuaded by Respondent's argument that notice was defective because it lacked detail. Mr. Anderson acknowledged that on September 15, 2012, Petitioner told him he injured his back while lifting luggage. When Respondent's counsel inquired as to whether Petitioner asked him during that conversation "about reporting the work injury," Anderson could not recall but conceded that he "knew about that injury." In *Westin Hotel v. Industrial Commission*, 372 Ill. App. 3d. 527, 541, 865 N.E.2d 342, 355-6 (2007) the court held that a claimant's oral statement to a secretary that he was injured and needed to see a doctor was sufficient notice, especially where, as here, the respondent failed to show how it was prejudiced by the alleged defect.

Respondent's argument that Bob Anderson was not its agent for the purpose of notice is also unpersuasive. Mr. Anderson testified that he was employed by Taxi Medallion Management and that one of his duties was to oversee the leasing of Yellow Cabs. When Respondent's counsel asked if his job also entailed working for Taxi Affiliation Services, he neither admitted nor denied this fact; he merely responded, "my check comes from Taxi Medallion Management." Upon cross-examination, Mr. Anderson admitted that Taxi Affiliation Services is a parent organization to Yellow Cab and that it had the same corporate officers as Taxi Medallion Management.

The relationship between all of these companies is not clear in the record. What is clear, however, is that the City of Chicago has mandated that taxicab drivers pay for their own workers' compensation insurance and that Petitioner leased his Yellow Cab from the Respondent's Elston garage. Petitioner knew that Bob Anderson managed the garage. The petitioner had never had a previous workers' compensation claim and was not familiar with Respondent's procedure for reporting such a claim. He thought the workers' compensation insurance he was paying for only covered injuries from a motor vehicle accident and under these circumstances, the Arbitrator finds that it was reasonable for Petitioner to give notice of his injury to Bob Anderson and as such, notice was given to Respondent.

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

The Arbitrator finds that Petitioner's condition of ill-being is causally related to his work-related accident of September 4, 2012. There is substantial evidence in the record supporting this conclusion including, but not limited to, Dr. Lorenz' explicit statement that Petitioner's September 4, 2012 accident caused his condition and the resulting disability.

G. What were Petitioner's earnings?

The Arbitrator finds that Petitioner's AWW is $447.79. This would yield a TTD rate of $298.53, which is below the minimum rate of $330.00 for a married worker with three children under the age of 18. Therefore, the minimum rate will apply to Petitioner's claim, pursuant to the Act.

Petitioner introduced the Schedule C portions of his 2011 and 2012 tax returns in support of his AWW claim, i.e., PX2 and PX3, respectively. He had net earnings of $23,591.00 in 2011 and $16,376.00 in 2012. He testified that all of his income was derived from driving a Yellow Cab. He also testified that September 12, 2012 was the last day he drove a taxicab after the accident; and that he did not resume driving a cab until March 4, 2013. Therefore, his 2012 net earnings reflect his income from January 1, 2012 through September 12, 2012, a total of 36 4/7 weeks. Dividing Petitioner's net earnings for 2012 by the number of weeks he worked in that year yields an AWW of $447.79. As this computation includes eight days of earnings after the date of accident, it does not entirely comport with Section 10 of the Act. Since Petitioner does not receive a weekly paycheck, however, it is the most accurate way to determine his AWW. The accuracy of this determination is borne out by reference to Petitioner's 2011 net earnings of $23,591.00, which yields a comparable AWW of $453.67 ($23,591.00÷52) for that year.

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 expenses Petitioner has incurred to date and which have been admitted into evidence, are reasonable, necessary and causally related to Petitioner's September 4, 2012 work accident. The Arbitrator further notes that Petitioner is seeking payment of the medical expenses to the extent allowed by the medical fee schedule and as such, Petitioner is awarded $12,600.08 in medical expenses as set out in PX10.

K. Prospective Medical Care

The Arbitrator orders Respondent to pay for the medical care recommended by Dr. Lorenz in his January 17, 2013 progress note, including a left L5-S1 micro-diskectomy and any rehabilitative treatment that is reasonable and necessary.

L. What temporary benefits are in dispute?

The Arbitrator finds that Petitioner was temporarily, totally disabled from October 22, 2012 through March 3, 2013, a period of 19 weeks. Although Petitioner stopped working on September 12, 2012, because his back and leg pain prevented him from sitting in a taxicab; a physician did not take him off work until October 22, 2012, when Dr. Abu-Shanab instructed him not to work. On March 8, 2013, Dr. Abu-Shanab issued a note permitting Petitioner to resume working with restrictions. Petitioner testified that he actually returned to driving a taxicab on March 4, 2013 so he could "put food on the table."

The Arbitrator rejects Respondent's argument that Petitioner cannot be awarded TTD until November 30, 2012, because he did not surrender his chauffeur's license until that date. Respondent's argument is premised on Chicago Municipal Code § 9-112-330(a)(2)(ii) which states:

> Any public chauffeur upon filing a claim for temporary total disability with the Illinois Industrial Commission shall

> immediately surrender his public chauffeur license to the department. Such public chauffeur license shall remain surrendered for any period for which the chauffeur claims or receives benefits. Any public chauffeur whose claim for benefits with the Illinois Industrial Commission is determined to be fraudulent, not credible, or otherwise not filed in good faith may have his public chauffeur license revoked.

According to the plain language of the ordinance, Petitioner was required to surrender his chauffeur's license "upon filing a claim for temporary total disability with the Illinois Industrial Commission...." Petitioner filed his Application for Adjustment of Claim in this case on December 4, 2012, five days after he surrendered his chauffeur's license. Therefore, Petitioner has complied with the ordinance.

M. Should penalties or Attorney's Fees be imposed upon Respondent?

The Arbitrator finds that Respondent is exhibited unreasonable and vexatious delay in the payment of medical expenses to Petitioner under Section 8(a) of the Act and compensation to Petitioner under Section 8(b) of the Act. The Arbitrator also finds that Respondent underpaid compensation to Petitioner under Section 8(b) of the Act. In addition, the Arbitrator finds that Respondent has engaged in frivolous defenses, which do not present a real controversy. As such, the Arbitrator awards Petitioner penalties under Sections 19(k) and 19(l) of the Act, and attorney's fees under Section 16 of the Act.

On December 31, 2012, Petitioner served Respondent's counsel with his Petition for an Immediate Hearing under Section 19(b) of the Act seeking payment of compensation and medical expenses for his claimed injury. PX4. Respondent did not pay any medical expenses and only issued one check to Petitioner in the amount of $3,230.78, purporting to be payment of TTD from November 30, 2012 to March 12, 2013, a period of 14 5/7 weeks. Respondent issued that check in consideration for the granting of a continuance of the hearing of this matter. Contrary to the rules of the Commission, Respondent never issued a written explanation of the basis of its failure and/or refusal

to pay the benefits sought by Petitioner in his Section 19(b) petition. Moreover, as noted previously in this decision, Respondent sought and was granted, over Petitioner's objection, continuances to investigate Petitioner's claim and gather evidence to refute it. Notwithstanding these continuances, which resulted in delay in the hearing and disposition of Petitioner's claim, Respondent never presented any evidence to support a defense to the claim or to justify its failure and/or refusal to pay Petitioner benefits under the Act.

In support of his penalties petition, Petitioner introduced the March 12, 2013 report of Jeffery Coe, M.D., Respondent's independent medical examiner. After examining Petitioner and reviewing his medical records, Dr. Coe concluded that Petitioner:

> suffered an injury to his lower back while lifting a heavy case of books for a client on September 4, 2012. The injury caused the onset of left-sided lower back pain with left leg radiating symptoms consistent with left lumbar radiculopathy. His ability to work full time has been limited due to ongoing lower back and left leg pain. In my opinion, lumbar surgery is reasonable and appropriate at this time and would be anticipated to cause resolution of (Petitioner's) ongoing left lumbar radiculopathy symptoms. *See,* PX9.

Petitioner explained at trial that he was introducing Dr. Coe's report to refute any suggestion that Respondent had a reasonable basis on which it relied to deny payment of benefits to Petitioner. This report along with Respondent's failure to introduce GPS data it claimed would undermine Petitioner's claim, and the testimony of its witness, Bob Anderson, who corroborated Petitioner's testimony regarding notice, leads the Arbitrator to conclude that Respondent's denial of Petitioner's claim was unreasonable and vexatious, and that it engaged in frivolous defenses, which do not present a real controversy.

The Arbitrator also notes that although Respondent paid some compensation to Petitioner, the payment was not issued until March 19, 2013, more than 10 weeks after

the beginning of the disability period it purports to cover; and it was paid in consideration of the Arbitrator granting another continuance. This payment paid Petitioner at the minimum TTD rate for a single individual with no children, even though Respondent stipulated at trial that Petitioner was married with three dependent children; facts that were alleged on his Application for Adjustment of Claim.

For these reasons and others previously referenced in this decision; the Arbitrator awards $7,819.65 in penalties under Section 19(k) of the Act (50% of TTD and medical awarded); $3,210.00 in penalties under Section 19(l) of the Act ($30 x 107 days of delayed compensation [beginning January 21, 2013, more than 14 days after Respondent's receipt of Petitioner's 19(b) petition, and ending on May 7, 2013, the date proofs were closed]); and $5,333.79 in attorney's fees under Section 16 of the Act (representing 20% of the amounts due for compensation, medical expenses, and penalties). The Arbitrator also awards penalties under Section 19(k) of the Act and attorney's fees under Section 16 of the Act on the amounts due under the fee schedule for the prospective medical care awarded in this decision. Said awards to be determined at a later date; after Petitioner has received the prospective medical care and bills have been generated which would enable the Commission to determine the amount of the awards.

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

NICHOLAS CRAVEN,

Petitioner,

14IWCC0218

vs.

NO: 04 WC 58266

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO SECTIONS 19(h) & 8(a)

Timely Petition under §19(h)/8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of decreased permanent partial disability (claimed improvement in condition) and being advised of the facts and law, denies Respondent's motion as stated below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner was an Asphalt Helper who was initially injured on August 17, 2004, when he was attempting to open the back gate on the dump truck and heard a pop in his back while pulling the gate.

2. Petitioner proceeded to an arbitration hearing on his accident on February 22, 2012. At that time he was on permanent 50 pound lifting restrictions on orders of a Dr. Goldberg. He was also allowed to lift 35 pounds frequently, but was restricted from repetitive stooping, twisting, shoveling, kneeling, crouching, balancing, climbing and reaching. Petitioner was seeking permanent and total disability benefits, as he was unable to return

to his pre-accident job. Instead, in July of 2012, he was awarded a 30% loss of use of his person as a whole. He is currently still receiving payments from this award.

3. After receiving the award, Petitioner, on his own volition, scheduled and underwent a Functional Capacity Evaluation (FCE) at ATI Physical Therapy on November 27, 2012. The FCE indicated that he was able to lift over 100 pounds. Subsequently he requested that Respondent reinstate him. Based on the FCE, Dr. Imlach opined that Petitioner was capable of returning to work full duty.

4. In March of 2013, Petitioner returned to his normal department, but is not actually performing Asphalt Helper duties. He requested a less strenuous position within his *Asphalt Helper* title. He now simply posts signs. However, he is earning the same amount as he did pre-accident.

5. Petitioner testified that he still has constant back pain, with feelings of compression and a shooting pain down his right leg. He is taking Ibuprofen 800 prescribed by Dr. Imlach.

The Commission hereby denies Respondent's §19(H)/(8(A) petition seeking to decrease Petitioner's permanent partial disability award. Despite the FCE Report, there has essentially been no change in Petitioner's inability to perform his normal full job duties. Although his title remains Asphalt Helper, in practice, his duties are simply to post signs. He testified that he still has constant back pain, with feelings of compression and a shooting pain down his right leg. He is also taking Ibuprofen 800 prescribed by Dr. Imlach. Accordingly, due to the fact that Petitioner is still unable to work full duty, it cannot be said that there has been a material change in his disability. Thus, the Commission denies Respondent's §19H/8A Petition.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent's §19(h)/8(a) petition is hereby denied and dismissed.

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 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 Circuit Court.

DATED: MAR 2 7 2014
O:2/6/14
DLG/wde
45

David L. Gore

Mario Basurto

Stephen Mathis

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt	☐ 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

14IWCC0219

Steven Wilhelm,
Petitioner,

vs. NO: 11 WC 39139

Northern Illinois University,
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 issue of nature and extent and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2013 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: MAR 27 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0219

WILHELM, STEVEN Case# **11WC039139**

Employee/Petitioner

NORTHERN ILLINOIS UNIVERSITY

Employer/Respondent

On 8/26/2013, 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 0.07% 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:

1228 KINNALLY FLAHERTY KRENTZ & LORAN PC
JOSEPH C LORAN
2114 DEERPATH RD
AURORA, IL 60506

5120 ASSISTANT ATTORNEY GENERAL
DAVID PEAK
100 W RADNOLPH ST 13TH FL
CHICAGO, IL 60601

0904 STATE UNIVERSITY RETIREMENT SYS
PO BOX 2710 STATION A*
CHAMPAIGN, IL 61825

0499 DEPT OF CENTRAL MGMT SERVICES
WORKMENS COMP RISK MGMT
801 S SEVENTH ST 6 MAIN
PO BOX 19208
SPRINGFIELD, IL 62794-9208

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

AUG 26 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0219

STEVEN WILHELM
Employee/Petitioner

Case # **11** WC **39139**

v.

Consolidated cases: _____

NORTHERN ILLINOIS UNIVERSITY
Employer/Respondent

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 **ANDROS**, Arbitrator of the Commission, in the city of **GENEVA**, on **JUNE 18, 2013**. By stipulation, the parties agree:

On the date of accident, **05/09/2011**, 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 $**46,302.36**, and the average weekly wage was $**890.43**.

At the time of injury, Petitioner was **54** years of age, ***married*** with **NO** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

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**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of **$534.26**/week for a further period of **20** weeks, as provided in Section **8d(2)** of the Act, because the injuries sustained caused **loss of use of man as a whole to the extent of 4% thereof**.

Respondent shall pay Petitioner compensation that has accrued from **05/10/2011** through **06/18/2013**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay $0.00 for medical services, as provided in Section 8a of the Act.

The attached Findings of Fact are incorporated herein by reference. The material finding of fact is the cervical injury has resulted in permanent right-sided neck pain with restricted range of motion. The condition was present immediately and consistently following the collision in which Petitioner was injured on May 9, 2011 as reflected in the medical records from Kishwaukee Community Hospital (Petitioner's Exhibit 1), Dr. Roger Haab (Petitioner's Exhibit 2), Midwest Orthopaedic Institute (Petitioner's Exhibit 3). The testimony of the Petitioner that the pain and restricted movement of his neck has persisted is unrebutted. It is deemed credible and adopted after correlating the same to the doctors' records and the Petitioner undergoing an inciteful cross examination.

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.

#01 George J. Andros
Signature of Arbitrator

August 15, 2013
Date

AUG 26 2013

FINDINGS OF FACT 11 WC 39139

Petitioner, a 25 year employee, supervises those maintaining the Respondent buildings. On May 9, 2011 he was operating a Kubota 4-wheel Respondent-owned vehicle traveling from his office to one of the buildings under his supervision. While westbound on Lucinda, the main drag at Annie Glidden Road on campus, he was rear-ended by a semi-tractor truck loaded with gravel. The impact was significant.

Per the hospital records Px 1 his diagnosis was right-sided neck pain, upper abdominal discomfort and a chest wall contusion stemming from his upper abdomen slamming into the steering wheel as a result of the impact. He was prescribed pain medication and was told to follow-up with his primary care physician, Dr. Haab. He did so, treating with Dr. Haab from May 11, 2011 through July 21, 2011 (Petitioner's Exhibit 2). During the course of his treatment, Dr. Haab had kept him off work and on restricted work at various times. Dr. Haab had also prescribed physical therapy which was rendered to Petitioner at Midwest Orthopaedic Institute (Petitioner's Exhibit 3) from June 20, 2011 through July 14, 2011. The physical therapy was directed towards the cervical complaints of Petitioner as his neck was the primary source of his pain and restricted activity level.

Petitioner's neck complaints improved through a combination of the modified work and the therapy he performed. Upon his discharge from therapy and resumption of regular duty work following his discharge by Dr. Haab, the neck complaints intensified.

It is undisputed that since the resumption of his full-time work and discharge from physical therapy, Petitioner has had daily neck pain and stiffness with decreased range of motion and frequent headaches. Petitioner has and continues to take over-the-counter pain medication consisting of 3 Aleves each morning to help him function at work. The Petitioner has not sought any treatment specifically for his neck since being released by Dr. Haab in July of 2011 for his cervical complaints. It is Petitioner's understanding that there are no effective treatment options available to him for his cervical condition.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt	☐ 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

Jose Flores,
Petitioner,

14IWCC0220

vs. NO: 09 WC 14891

Sysco Chicago, Inc.,
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 causal connection, accident 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 March 1, 2013 is hereby affirmed and adopted.

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

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

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

DATED: MAR 27 2014
KWL/vf
O-3/17/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

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

14IWCC0220

FLORES, JOSE
Employee/Petitioner

Case# **09WC014891**

SYSCO CHICAGO INC
Employer/Respondent

On 3/1/2013, 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 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0465 SCHEELE CORNELIUS & HARRISON PC
DAVID C HARRISON
7223 S ROUTE 83 PMB 228
WILLOWBROOK, IL 60527

2337 INMAN & FITZGIBBONS
JACK SHABAHAN
33 N DEARBORN ST SUITE 1825
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0220

Jose Flores
Employee/Petitioner

v.

Sysco Chicago, Inc.
Employer/Respondent

Case # **09** WC **14891**

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 **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on **12/3/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. [ ] Was there an employee-employer relationship?

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

D. [ ] What was the date of the accident?

E. [ ] Was timely notice of the accident given to Respondent?

F. [x] Is Petitioner's current condition of ill-being causally related to the injury?

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

K. [x] Is Petitioner entitled to any prospective medical care?

L. [ ] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [ ] TTD

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

14IWCC0220

FINDINGS

On the date of accident, **4/14/08**, 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 $**67,253.68**; the average weekly wage was $**1293.34**.

On the date of accident, Petitioner was **46** years of age, *single* with **2** dependent children.

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

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

Respondent is entitled to a credit of $**576.00** under Section 8(j) of the Act.

ORDER

Petitioner has failed to prove, by preponderance of the evidence, that he sustained an accident or aggravation to his right hand and wrist, on the alleged date of accident, therefore no benefits are awarded, pursuant to 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 1, 2013

MAR 1 - 2013

ICArbDec19(b)

FINDINGS OF FACT

The disputed issues in this matter are: 1) accident; 2) causal connection; 3) medical services; and 4) prospective medical services. *See,* AX1.

Petitioner was a delivery driver for respondent for sixteen (16) years prior to April 14, 2008. Along the way, Petitioner has had prior injuries for which he has filed Worker's Compensation claims; including falls and other injuries involving his right hand in 2005 and 2007. Those claims were still pending when petitioner claimed that on April 14, 2008, he was attempting to lift a box containing thirty (30) cartons of eggs to deliver to a customer; when the box stuck to the floor because of broken eggs. Petitioner testified that he had to jerk the box from the floor and in so doing sustained an injury to his right hand. *See,* PX5 & 6.

Petitioner testified that he reported the accident to his supervisor, but was unable to get treatment for the injury approved by the respondent's worker's compensation adjuster. During his direct examination, Petitioner testified that approval for treatment did not occur until December, 2008.

The Arbitrator notes that on cross-examination, however, petitioner agreed that he saw what he described as his personal physician on April 22, 2008, for what was diagnosed as a right upper extremity strain. Petitioner testified that Dr. Drugas was his family physician whom he was seeing for diabetes, although the report notes that this was a first visit for petitioner; who provided a history of a right upper extremity strain. There was no mention of diabetes for the visit. Petitioner was allowed to continue to work in a full duty capacity, by Dr. Drugas. *See,* RX7.

Petitioner also testified, on cross-examination, that he had been seeing various doctors for his prior injuries, throughout 2008, including Dr. Koutsky for his neck injury. He agreed that he saw Dr. Koutsky on August 22, 2008 and raised complaints concerning his neck and left shoulder, but said nothing about his right hand. Petitioner testified that Dr. Koutsky was only seeing him for his neck problems. *See,* RX2.

In December 2008, when Petitioner initially presented to Dr. Rawal of Elmhurst Orthopedic, who is in practice with Dr. Koutsky, petitioner provided a history of a March 14, 2008 injury, but no specific details of the occurrence. Petitioner testified that

Dr. Rawal referred him to Dr. Nikoleit, also of Elmhurst Orthopedics. Instead, Petitioner sought treatment with Dr. Berkson, beginning in January of 2009.

Petitioner testified that Respondent refused to authorize treatment with Dr. Nikoleit despite the fact that respondent was authorizing treatment with Elmhurst Orthopedics for his prior injuries throughout 2008. In addition, the Arbitrator notes that on the patient history form completed by petitioner for Dr. Berkson on January 12, 2009, it states that the reason for that date's visit was for a second opinion. *See,* PX1.

Petitioner reported that the injury was from using a 2-wheeler and lifting a product and that he had had the condition for approximately one year. There is a handwritten note in the bottom corner of the patient history form indicating that on March 7, 2005 petitioner fell off a ramp, injuring his right knee and right arm and that on March 12, 2007, he had a right hand and neck injury. *See,* PX1.

Petitioner apparently provided none of the details of the accident that he subsequently testified to at trial, in the patient history form to Dr. Berkson, nor verbally to Dr. Berkson, based on the history contained in the doctor's examination note of January 12, 2009. The note simply indicates that petitioner injured his right hand on April 14, 2008, "from using a 2 wheeler and lifting product." *See,* PX1.

Following his examination and review of an MRI of Petitioner's right wrist, performed on December 17, 2008, Dr. Berkson diagnosed a chronic non-union of the right carpal navicular, with arm pain. In the course of his recommendation for surgery, Dr. Berkson states, "clearly he had a work related injury associated with his work activity. Whether it occurred in March of 05, March of 07 or April of 08 is indeterminate but clearly it occurred on the job and clearly is well documented by the patient."

On January 12, 2009, Petitioner was examined by Dr. Pomerance, by request of Respondent. Dr. Pomerance confirmed the diagnosis on the MRI films of a chronic non-union of the carpal navicular bone. He stated, however, that the medical literature would suggest that this fracture had occurred three (3) to five (5) years previous to the 2008 MRI. He further agreed that surgery as a treatment option, though disagreed with Dr. Berkson as to the exact surgery. He opined, however, that the reported accident of April 14, 2008, did not cause the fracture, nor did any of petitioner's work activities aggravate or create the need for medical treatment. *See,* RX1.

Depositions were taken of Drs. Berkson and Pomerance which served to confirm the doctors' opinions as stated in their medical reports. The Arbitrator notes that Dr. Berkson considers himself an advocate for his patients and that he felt the surgery should not be done until worker's compensation, as opposed to any other insurance, approved it. Dr. Pomerance noted that the condition of the bone would continue to degenerate and that surgery should be undertaken, in a timely manner, to try to resolve petitioner's complaints. *See,* PX2 & RX5.

Following a pre-trial before Arbitrator Black, the Arbitrator suggested that petitioner obtain a new opinion from a hand surgeon, which Dr. Berkson was not. Petitioner subsequently obtained an evaluation and opinion from Dr. Sagerman, who opined that the activity of picking up an egg carton that was stuck to the truck floor was sufficient to aggravate what Dr. Sagerman otherwise agreed was a pre-existing fracture of the carpal navicular. He also proposed surgery consisting of an excision of the navicular bone, possibly also with a carpectomy or fusion. *See,* PX8.

Dr. Pomerance reviewed Dr. Sagerman's report and concluded in October 2012 that even with the new details of petitioner struggling to pick up a carton of eggs off the truck floor, the fracture long pre-existed April 14, 2008, and the need for surgery on it was once again not related to petitioner's work activities but rather to the degenerative process begun the with the initial fracture of the bone three (3) to five (5) years earlier. *See,* RX1.

Based on all the above, and the Arbitrator's review of the medical records and deposition testimony, the Arbitrator finds that petitioner failed to prove that he sustained anything more than a right forearm strain on April 14, 2008, and failed to prove a causal connection between the claimed accident of April 14, 2008; and the need for treatment to the wrist; including the proposed surgeries.

All doctors agree that the fracture did not occur on April 14, 2008. Petitioner's treating physician, Dr. Berkson, specifically stated that such a fracture could not occur from lifting items and further that it was "indeterminate" as to whether the fracture occurred in 2005, 2007 or 2008. *See,* PX1 & 2.

Petitioner has the burden of proving, by a preponderance of credible evidence, that the alleged injury of April 14, 2008, arose out of and in the course of his employment. The Arbitrator notes that petitioner had four prior claims against Sysco for various work injuries, including two involving falls or other injuries to his right hand; one in 2005

and one in 2007 These accident dates, particularly the 2005 date, coincide with Dr. Pomerance's opinion that the non-union of the navicular was at least three years old according to the 2008 MRI findings. *See,* PX5 & 6; RX1 & 5.

Having established that the fracture occurred years before April 14, 2008, petitioner then has the burden of establishing, by a preponderance of the credible evidence, that he aggravated the underlying condition on April 14, 2008, such that it became symptomatic and required treatment.

On this second point, petitioner's credibility comes into play. Petitioner identified a supervisor's report of injury dated April 14, 2008, summarizing the injury petitioner reported to his supervisor on that date. That document states that petitioner reported that upon lifting the fourth case of eggs he felt pain in his back. He also reported that his right forearm was bothering him as well, stating that he lays a 2-wheeler on his forearm when he opens doors. *See,* RX6.

While this statement supports petitioner's subsequent account of lifting cases of eggs, it does not contain the history of having to jerk a case that was stuck to the floor or an immediate onset of right wrist pain. Petitioner complained of pain in his back, which he testified is one of the areas of his body he had previously injured and filed a claim for, at the Worker's Compensation Commission (the "Commission").

In addition, Petitioner testified that he sought no treatment after April 14, 2008 until December of 2008 because Respondent would not authorize it. The medical report shows that petitioner went to Dr. Drugas eight days later, on April 22, 2008. While petitioner testified that she was his personal physician whom he saw for diabetes, the record notes that this was a first visit, and his only complaint was concerning his right forearm. The diagnosis was a right upper extremity strain, not a hand or wrist injury, and petitioner was allowed to continue working in a full duty capacity. *See,* RX7.

Consequently, there is no documentation or medical records substantiating Petitioner's testimony regarding the mechanism of injury, the extent of any increase or change in the condition of his right wrist, or even a complaint or diagnosis involving the right hand or wrist, until December of 2008.

Further impacting petitioner's credibility, as to any injury he sustained on April 14, 2008, is the absence of any other medical records until four months later, when the petitioner saw Dr. Koutsky at Elmhurst Orthopedics. Petitioner agreed that he had seen

Dr. Koutsky throughout 2008 because of his prior work injuries, without mentioning a problem with his right wrist. The Arbitrator notes that petitioner raised no history or complaints of a right hand injury to Dr. Koutsky in August of 2008 and only noted that his neck and left shoulder were bothering him.

The Arbitrator finds it incredible that petitioner injured himself in the manner in which he claims at trial, with the condition of his hand and wrist becoming dramatically worse after April 14, 2008; and he would not have mentioned this to Dr. Koutsky, during his August 2008 examination. Petitioner testified that Dr. Koutsky was his neck doctor, although he managed to note his complaints of left shoulder pain to him on August 22, 2008 This is the second doctor that the petitioner testified that he presented to after April 14, 2008; to whom he did not report a right wrist injury, or provide any of the details of the accident to which he testified at trial. *See,* RX2.

The Arbitrator further finds it not credible that Respondent did not address treatment for Petitioner's reported April 14, 2008 occurrence during the same time period that they were obviously authorizing treatment for his other work injuries; as petitioner admitted at trial. It also strains credibility that the respondent would authorize petitioner's visit to Dr. Rawal at Elmhurst Orthopedics in December of 2008, but then deny the referral to Dr. Nikoleit. Dr. Berkson's records establish that petitioner went to Dr. Berkson on his own, for a second opinion after seeing Dr. Rawal (PX 1).

There is no documented evidence, in the contemporaneous report to Petitioner's supervisor, on April 14, 2008, of an injury to his right wrist; no documented evidence of a complaint of wrist problems when he sees Dr. Drugas eight days later; no documented evidence of the history of the injury or even complaints to his right wrist or forearm when he sees Dr. Koutsky in August, 2008; and no corroboration of the details of the occurrence that he subsequently testified to at trial in 2012 in his histories to Dr. Rawal and Dr. Berkson in December 2008 and January 2009, respectively See PX1 7 4; RX2, 6 & 7.

Petitioner's exhibits 5 and 6 establish that he was fully capable of reporting injuries to his right hand and wrist in occurrences in 2005 and 2007. As for the claim of an aggravation of the prior injury on April 14, 2008, only petitioner's trial testimony, and his statements to Dr. Sagerman four years after the fact, supports a traumatic event that may have aggravated the injury. The contemporaneous records do not.

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

In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *See, O'Dette v. Industrial Commission,* 79 Ill. 2d 249,253. Whether a causal relationship exists between a claimant's employment and his injury is a question of fact to be resolved by the Commission. *See, Certi- Serve, Inc. v. Industrial Comm'n,* 101 Ill. 2d 236, 244, 461 N.E.2d 954 (1984). Also to be resolved by the Commission is the extent of his disability; *See, Oscar Mayer & Co. v. Industrial Comm'n,* 79 Ill. 2d 254, 256, 402 N.E.2d 607 (1980), 18 No. 1-08-3666WC and the reasonableness and necessity of medical expenses *(F & B Manufacturing Co. V. Industrial Comm'n,* 325 Ill. App. 3d 527, 534, 758 N.E.2d 18 (2001)). In resolving such issues, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses and to resolve conflicting medical evidence. *See, O'Dette,* 79 Ill. 2d at 253.

The Arbitrator finds that Petitioner has not proven, by a preponderance of the evidence, that an accident arose out of and in the course of his employment. Therefore, no benefits are awarded, pursuant to the Act. As the issue of accident has not been proven, all other issues are moot and will not be addressed.