STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Geneva Huneycutt,
Petitioner,

vs. NO. 12 WC 06228

14IWCC0051

ABF Freight Systems, Inc.,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering, the issues of causal connection, temporary total disability, medical expenses and prospective medical expenses and being advised of the facts and law affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on November 28, 2012 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 $4,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 28 2014

Daniel R. Donohoo

o-12/17/13
drd/wj
68

Kevin W. Lamborn

Thomas J. Tyrrell

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

HUNEYCUTT, GENEVA
Employee/Petitioner

Case# **12WC006228**

ABF FREIGHT SYSTEM INC
Employer/Respondent

14IWCC0051

On 11/28/2012, 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 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0125 COHN LAMBERT RYAN & SCHNEIDER
MICHAEL SCHNEIDER
111 W WASHINGTON ST SUITE 1420
CHICAGO, IL 60654

2965 KEEFE CAMPBELL & BIERY
JOSEPH F D'AMATO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Geneva Huneycutt
Employee/Petitioner

v.

ABF Freight System, Inc.
Employer/Respondent

Case # **12 WC 06228**

Consolidated cases: N/A

14IWCC0051

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 **September 27, 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. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

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

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

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

N. [ ] Is Respondent due any credit?

O. [ ] Other

FINDINGS

On the date of accident, **February 2, 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 **$74,104.16**; the average weekly wage was **$1,425.08**.

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

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

Respondent shall be given a credit of **$29,044.70** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$29,044.70**.

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 $950.05/week for 34 weeks, commencing February 3, 2012 through September 27, 2012, i.e. the date of the 19(b) hearing, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,040.00 to Richard Payne, M.D., of Payne & Associates, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for prospective medical care, pursuant to Section 8(a) of the Act and subject to 8.2 of the Act for the three to five day video EEG, continued appointments with psychiatrist Richard Payne, M.D. and all reasonable and necessary visits to the prescribing neurologist, Dr. Adam Fisch.

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.

Thompson Smith

Signature of Arbitrator

November 28, 2012

ICArbDec19(b)

NOV 28 2012

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal connection; 2) prospective medical; 3) medical bills; and 4) temporary total disability.

Geneva Huneycutt ("Petitioner") has been an employee of ABF Freight Systems, Inc., ("Respondent") for approximately five (5) years; working out of the Indianapolis terminal; driving double tractor-trailers between Indianapolis and Kansas City, round-trip, three times a week. Accident and jurisdiction is undisputed inasmuch as the petitioner suffered injuries in a truck rollover on the Illinois portion of the Interstate Highway System. There is no doubt that the petitioner suffered from considerable psychological issues, i.e. depression; and a myriad of physical ailments, i.e. headaches that pre-date the subject accident date, as evidenced by Petitioner's Exhibit 1; the treatment records of the therapist, Joanne Owen. *See* PX1, pgs. 2-19. However, the petitioner was able to work, in a full duty capacity, i.e. driving double tractor-trailers; hooking and unhooking these trailers; working for Respondent, in the year prior to her accident, with the exception of the months of July and August of 2011; when she was recovering from an unrelated automobile accident. *See*, her payroll records admitted as PX21(a).

On February 2, 2012, Petitioner was airlifted from the accident scene to St. Louis University Hospital, after physical extraction from her truck. Following a two-day admission, i.e. February 2, 2012 to February 4, 2012, the petitioner was discharged from the hospital with restrictions of (1) no lifting greater than five pounds; (2) no driving while on narcotic pain medication; (3) and no vigorous activity. The hospital records also recorded a loss of consciousness. Arrangements were made for the petitioner to be seen by Concentra Urgent Care ("Concentra") when she returned to Indianapolis, Indiana. *See,* PX2 pgs 31-36, 44, 54-55.

The petitioner's first visit to Concentra was on February 6, 2012. At the February 15, 2012 visit, the clinic records state that the petitioner's concussion did not involve a loss of consciousness, which the Arbitrator finds to be an error in light of the St. Louis

hospital's records. Concentra noted multiple diagnoses of abrasions and contusions along with the concussion and an external ear laceration; they removed sutures from the ear but restricting the petitioner from doing any commercial driving as a safety precaution and prescribed a cervical collar. The petitioner was scheduled to return to the clinic on February 20, 2012 however, Ms. Joan Burton, nurse case manager for Respondent, canceled that appointment. *See,* PX5 pg.6, 30-31.

Nurse Burton sent a letter to Petitioner scheduling three appointments for her with: 1) a psychologist, Gregory Hale, 2) an ENT physician, Dr. Kluszynski; and 3) a physiatrist, Dr. Steinberg. The Arbitrator takes notes that there is no mention in the letter that any of these appointments were intended as forensic examinations under Section 12 of the Workers' Compensation Act (the "Act"). *See,* PX6.

Petitioner presented to psychiatrist Steinberg on February 8, 2012. He noted that the petitioner's last day of work was the day of the accident when she rolled her tractor-trailer onto its left side. He notes the petitioner's loss consciousness due to the accident; he did not know the length of time. And he did not have the medical records from St. Louis Hospital. He further noted that she had no recollection of the accident or its time frame only that petitioner recalls waking up in the hospital. Dr. Steinberg's physical examination noted that Petitioner affect was flat and although she was oriented to time and place, she did not know the day or the date. She had a well healing laceration along the left ear with sutures present and a laceration along the top of the cranium with a scab formation. There were multiple contusions and abrasions along the left upper extremity, bilateral hands and knees with limited range of motion ("ROM") of the left shoulder, secondary to complaints of pain. He had a lengthy discussion with Petitioner and recommended that she see an ENT specialist for further evaluation of the left ear; and recommended formal neuropsychological testing to determine if there was a closed head injury. He also prescribed Tramadol and physical therapy ("PT") for the left shoulder, left elbow, left hand and cervical area. The Arbitrator notes that CT scans of the brain, cervical, lumbar and thoracic spine were essentially normal as was the CT

scans of the abdomen, chest, right shoulder and wrist and her pelvis. *See,* PX7 pg 6-33.
On February 19, 2012, the petitioner presented to St. Francis Hospital in Morrisville, Indiana suffering from nausea, vomiting and diarrhea, which had lasted for three days; with the nausea and vomiting exacerbated by movement. The physician's clinical impression was that Petitioner was suffering from vertigo and post-concussion syndrome. The petitioner's prescribed medications, as of that visit, were extensive. *See,* PX8 pgs. 9-13, 38.
The petitioner presented to Dr. Gregory Hale, PHD, on February 21, 2012, who noted that while the petitioner could not remember events of the accident she did not lose consciousness, at the time of the accident. It is clear that the staff at St. Louis University Hospital was aware of the petitioner's loss of consciousness. Similarly, corroborating records were provided to Dr. Hale, as noted within the discharge summary from St. Louis University Hospital. While Dr. Hale states that petitioner exhibited variability in her cognitive performance he expressed an opinion that his testing was normal as it relates to any possible head injury. *See,* RX2 pgs. 4-9.

Apparently, at the insistence of petitioner's counsel, Illinois jurisdiction was subsequently accepted and the petitioner was then free to see her family physician, Dr. Midla.
On February 26, 2012, Petitioner presented to Dr. Midla. On that date, Dr. Midla's associate, Dr. McMahon, recommended that the petitioner go to the emergency room at St. Francis Morrisville for her vomiting, nausea and headache. Dr. Midla, noted that her speech was slurred and that she was stuttering quite a bit which was not normal for this patient.
On March 2, 2012, the petitioner started physical therapy ("PT") at ATI as initially recommended by Dr. Steinberg and prescribed by Dr. Midla. On March 16, 2012, Dr. Midla became aware that he could refer his patient to specialists for her injuries and referred her to JWM Neurology. Her symptoms include dizziness, room spinning in the morning and difficulty rising from a seated position, due to unsteadiness. She had difficulty with short-term memory loss, speaking and stuttering; and spoke slowly in an

attempt to counteract these symptoms. Her headaches and depression were severe. He also noted that her left leg seemed to turn inward when she walks and she had difficulty with her left eye when she looked to the left. She was afraid to drive and her family reported that she was having seizures-like events. Dr. Midla recommended that she continue to see therapist Owen. *See,* PX10 pgs. 65-66; 74, 82-82; 104. *See also,* PX11.

On March 19, 2012, Petitioner presented to Dr. Adam Fisch who noted that her chief complaints were of vertigo, memory loss, head trauma and headaches. He records head trauma with a loss of consciousness at the time of the accident. He opines that the headaches, memory problems and hyper-insomnia may be ascribed to the head trauma. As for the severe vertigo, he opines that this may be due to vestibular damage or from debris from the semi-circular canal, secondary to head trauma and recommended appropriate testing. Dr. Fisch did not want to prescribe prophylactic medication for the headaches out of concern that it would blunt her cognitive functioning. He recommended that the petitioner undergo a nystagmography as well as MRI of the brain with and without contrast. And he recommends a 24 hour video EEG to look for evidence of ongoing seizure activity as a possible cause of her memory disturbance; as the patient had starring spells and freezing episodes. She was not to drive a car until cleared by appropriate physicians and she was to return to Dr. Fisch once these various tests had been performed. The video nystagmography report of Dr. Diokno was interpreted by the myographer as abnormal. Dr. Diokno recommended canalith repositioning maneuvers. *See,* PX13 pgs. 4-8.

Petitioner again presented to Dr. Midla on April 12, 2012, who noted Dr. Fisch's prescriptions for the twenty-four (24) hour video EEG, the aforementioned MRI's of the brain, video nystagmography and canalith repositioning therapy as well as a continuing referral to a psychiatrist for depression. The neuropsychological testing data from Dr. Hale was also requested. *See,* PX10 pg. 103. In Dr. Fisch's second report to Dr. Midla, on May 29, 2012, he notes that Petitioner's memory, vertigo and headache problems continue. The canalith repositioning therapy was not successful and the 24-hour EEG

was interpreted as normal, although there was one instance during the monitoring when she had trouble speaking. Dr. Fisch's ongoing impressions included ongoing memory loss, vertigo and headaches; secondary to head trauma with loss of consciousness; and he repeatedly requested neuropsychological testing from Dr. Hale. Dr. Fisch noted that Petitioner also continued to have hyper-insomnia secondary to her head trauma, with shaking spells. He therefore recommended a prolonged video EEG to try to capture one of the discreet spells before initiating anti-epileptic drug therapy; as the patient was already cognitively blunted and he was concerned that the drug therapy would worsen those symptoms. He also referred her to a psychiatrist for her mood disturbances. The twenty-four (24) hour EEG, which actually lasted closer to twenty-six (26) hours, was interpreted as normal. The aforementioned testing was ordered on March 19, 2012. *See*, PX13 pgs. 14-20 & PX14.

At this point, any continuity in medical treatment began to stall as the respondent would not authorize the three to five day EEG or the referral to a psychiatrist and any return visits to Dr. Fisch, her neurologist. The three to five day video EEG was scheduled for June 18, 2012, but was canceled for lack of authorization. *See,* PX16.

The petitioner currently sees Dr. Richard Payne, the psychiatrist to whom she was referred by Dr. Fisch on June 6, 2012, although this treatment has not been authorized by Respondent. His psychiatric assessment of Petitioner includes slurred speech and a depressed mood. His diagnosis included major depression from post-concussive traumatic brain/head injury and additional medications were prescribed. Dr. Payne's bill for diagnostic interview and five follow-up sessions is $1,040.00. See, PX17 pgs. 44-51.

Dr. Midla again referred the petitioner to Dr. Fisch in September of 2012, as she had not been seeing him for lack of authorization. *See,* PX20.

The Arbitrator finds that on or about February 13, 2012, the character and tenor of the

petitioner's psychological and physical ailments began to show some deterioration; as evidenced by her medical records; i.e. her slow and unsteady gait; the vomiting, diarrhea and mental confusion and stuttering. *See*, PX#1 at pgs. 19-43.

The petitioner's sister, Virginia Blake, with whom the petitioner lives, testified first, out of the presence of the petitioner. She described the differences she saw in her sister, post-accident and her testimony was straightforward and credible. She testified that the petitioner now stammers when speaking and stumbles when she walks; and she stares into space sometimes for fifteen (15) to twenty (20) minutes at a time.

Petitioner also testified that the first thing she remembered, after the accident, was waking up in the hospital. She does not remember how or why the accident happened. She was driven back to Indiana by her terminal manager, after she was discharged from the hospital. She testified that she does not remember much of her medical treatment after the accident and currently she is totally dependent on others for her daily care. She currently has issues walking, talking and her right arm and shoulder still are in pain. She testified that there is now a numbness in her mouth and gums, she has a chipped tooth; and although she had headaches prior to the accident, the ones she suffers from now are more severe. She testified that her right eye is defective and she is sometimes mentally confused. She sleeps a lot and sometimes cannot recognize where she is or whom she is with.

In mid July of 2012, Petitioner presented to with Dr. Zelby, a neurosurgeon, by request of Respondent. He concluded that all of her subjective complaints pre-date the February accident. Dr Zelby opines that the petitioner has reached maximum medical improvement ("MMI") from any infirmity arising out of her February accident and that she has returned to her pre-injury base line condition. As a point of logic, if indeed that were true, it has already been established that her pre-injury base line condition involve the driving of a tractor with double trailers, an employment which is potentially dangerous not only to the petitioner but to the general public. Dr. Zelby states that the

petitioner may continue to seek treatment for her condition and her symptoms. *See*, RX1 pg. 7.

The Arbitrator takes judicial notice of the Federal Motor Carrier Safety Regulations particularly sub-section 391.41 (b) (8) which appears tangentially relevant to the issues at bar and provides in pertinent part that; a person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of epilepsy; or any other condition which is likely to cause the loss of consciousness, or any loss of ability to control a commercial motor vehicle.

Further, the medical expert panel and review board that advises the Department of Transportation on commercial drivers medical certification cites certain temporary and/or permanent disqualifications from commercial driving following traumatic brain injury. Those with moderately severe traumatic brain injury (TBI), defined as loss or altered consciousness over one (1) but less than twenty-four (24) hours, should be precluded from operating a commercial vehicle for three years. Subsequent clearance to return to work should be based on a detailed assessment by physicians including consideration of symptoms such as: whether the person has headaches, irritability, dizziness, imbalance, fatigue, sleep disorders, inattention, noise and light sensitivity, slow thinking, difficulty recalling new material, personality changes, difficulty starting or initiating things, difficulty sequencing information, impaired attention to details, impaired ability to benefit from experience, deficits in planning and carrying out activities, seizures and cognitive domains. Evaluation by a neurologist was felt to be required, as part of this assessment.

For those with mild TBI, defined as less than one (1) hour of loss or altered consciousness, an applicant could be medically qualified to return to commercial truck driving if the treating physician felt they were symptom free. Those taking seizure medication were recommended to be considered unqualified until fulfilling all seizure criteria.

The petitioner manifests many of the above-cited symptoms although, in terms of the duration of loss of consciousness or altered consciousness, it is unclear, at present, whether it should be characterized as moderate or mild but the Arbitrator finds that the petitioner, based upon the medical evidence, should not be released currently to return to her former occupation and that she requires further medical and diagnostic intervention.

CONCLUSIONS OF LAW

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

It is established law that at hearing, it is the employee's burden to establish the elements of her claim by a preponderance of credible evidence. *See, Illinois Bell Tel. Co. v. Industrial Comm'n.*, 265 Ill. App. 3d 681; 638 N.E. 2d 307 (1st Dist. 1994). This includes the issue of whether Petitioner's current state of ill-being is causally related to the alleged work accident. *Id.* A claimant must prove causal connection by evidence from which inferences can be fairly and reasonably drawn. *See, Caterpillar Tractor Co. v. Industrial Comm'n.*, 83 Ill. 2d 213; 414 N.E. 2d 740 (1980). Also, causal connection can be inferred. Proof of an employee's state of good health prior to the time of injury and the change immediately following the injury is competent as tending to establish that the impaired condition was due to the injury. *See, Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill. 2d 244, 356 N.E.2d 28 (1976). Furthermore, a causal connection between work duties and a condition may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident and inability to perform the same duties following that date. *See, Darling v. Industrial Comm'n*, 176 Ill.App.3d 186, 193 (1986). Based upon Petitioner's medical records the Arbitrator finds that her current condition of ill-being is causally related to the February 2, 2012 accident. The Arbitrator finds the opinions of Drs. Midla, Payne and Fisch to be more persuasive than those of Drs. Zelby and Hale.

L. What temporary benefits are in dispute?

Based upon the foregoing, the Arbitrator concludes that the petitioner remains temporarily, totally disabled from the date of accident, i.e. February 2, 2012 through the hearing date of September 27, 2012 and that the petitioner's current condition of ill-being was aggravated, if not caused by the accident.

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

Based upon Petitioner's medical records, the Arbitrator finds that the respondent shall pay for the interim billing of psychiatrist Payne, in the amount of $1,040.00, subject to Sections 8(a) and 8.2 of the Act. As for any other bills incurred, the Arbitrator acknowledges the stipulation by both counsels that a determination of any other bills will be held in abeyance until resolved by the parties or until a subsequent hearing is convened. *See*, AX1.

K. Is Petitioner entitled to prospective care?

Based upon Petitioner's medical records, the Arbitrator finds that the petitioner is entitled to prospective medical care and respondent shall authorize and pay for the three to five day video EEG, and all reasonable and necessary return appointments with psychiatrist Payne and Dr. Fisch, pursuant to Sections subject to Sections 8(a) and 8.2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF MACON)

☐ 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

James Ludwig,

Petitioner,

vs.

Nos. 08WC033474
08WC033475
10WC039181
11WC000053

Caterpillar, Inc.,

Respondent.

14IWCC0052

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both parties herein in case Nos. 08WC033474, 08WC033475, 10WC039181 and 11WC000053 and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary disability and permanent disability, and being advised of the facts and law, modifies the decisions of the Arbitrator in all four cases as stated below, and otherwise affirms and adopts the decisions of the Arbitrator which are attached hereto and made a part hereof.

The Arbitrator found that the work-related injuries Petitioner sustained caused permanent partial disability to the extent of 7.5 percent of the person as a whole. The Commission views the evidence as to permanency differently and finds that the work-related injuries Petitioner sustained on all four dates of accident caused permanent partial disability to the extent of 20 percent of the person as a whole. At his September 2, 2011 evidence deposition, Dr. Coe opined that Petitioner's exposure to chemicals at Respondent's facility caused Petitioner to develop permanent changes to his respiratory tract that have caused hypersensitivity to potential irritants including metalworking fluids and exhaust fumes. Petitioner is required to have inhaled bronchodilating medication with him at all times and should avoid all potential inhaled irritants on a permanent basis. At the arbitration hearing, Petitioner testified that before 2004, his voice

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

LUDWIG, JAMES
Employee/Petitioner

Case# **08WC033474**

10WC039181
11WC000053
08WC033475

CATERPILLAR INC
Employer/Respondent

14IWCC0052

On 2/2/2012, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON 20TH FL
CHICAGO, IL 60602

2994 CATERPILLAR INC
MARK FLANNERY
100 N E ADAMS
PEORIA, IL 61629-4340

14IWCC0052

STATE OF ILLINOIS)
)SS.
COUNTY OF Macon)

- [ ] 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

James Ludwig
Employee/Petitioner

Case # 08 WC 33474

v.

Consolidated cases: **08 WC 33475, 10 WC 39181, 11 WC 00053**

Caterpillar, Inc.
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 **George Andros**, Arbitrator of the Commission, in the city of **Decatur**, on **November 28, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

was not raspy and scratchy as it is now. Petitioner continues to use an Advair inhaler two times per day and uses another inhaler about three to four times per day. Additionally, Petitioner uses a breathing machine two times per day. Petitioner testified that he experiences wheezing, coughing and difficulty breathing if he does not use the inhalers and the breathing machine. Petitioner continues to treat with Dr. Woods and Dr. Gumprecht.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decisions of the Arbitrator filed on February 2, 2012, are hereby modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $8,075.68 for medical expenses under §8(a) and §8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that in case No. 10WC039181, Respondent shall pay Petitioner temporary total disability benefits of $673.33 per week for 8-6/7 weeks, from August 24, 2010, through October 24, 2010, which is the period of temporary total disability for which compensation is payable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $606.00 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, because the injuries sustained caused permanent partial disability equivalent to 20 percent loss of the person as a whole.

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

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

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

DATED: JAN 29 2014
MB/db
o-12/18/13
44

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

FINDINGS

On **September 16, 2005**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$15,318.20**; the average weekly wage was **$957.39**.

On the date of accident, Petitioner was **56** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit for **payments made by Respondent's group medical provider as reflected in Petitioner's Exhibit #7** pursuant to Section 8(j) of the Act.

ORDER

Medical benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $3,256.63 as provided in Sections 8(a) and 8.2 of the Act. See Ludwig Addendum, attached.

Permanent Partial Disability: Person as a whole
THE AWARD FOR ALL CONCOLIDATED CASES IS IN 10 WC 39181 FOR THE LAST EXPOSURE/APPLICATION BEFORE THE HEARING.

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.

#01 George J. Andros
Signature of Arbitrator

January 31, 2012
Date

FEB 2 - 2012

LUDWIG v. CATERPILLAR – STATEMENT OF FACTS & CONCLUSIONS OF LAW

James Ludwig, hereinafter "Petitioner", was hired by Caterpillar, Inc., hereinafter "Respondent", in September 1974. (T. 7) In 1997, Petitioner transferred to the Decatur facility where he worked as a machinist (P. 8) From 1997 through 2000, Petitioner worked on lathe machines in Department 8322 and thereafter transferred to G&L drills as a machinist. (P. 8, 9) their existed three drills in his workstation which were approximately 15 feet high and 12 feet wide and the machines "drilled, milled and tapped parts". (P. 10) Petitioner was assigned to Machine 4710. (P. 11)

During the machining process, Petitioner stated he was approximately two feet from the machine. (P. 11) Petitioner would bolt a part to the fixture and load the fixture into the machine. (P. 11, 12) He would then push the start button and the part would go inside the machine and the "garage door" would go down. (P. 12) At that point, the program would start machining. (P. 13) this machining process took anywhere from 10-20 minutes. (P. 13) Further, there was an opening at the bottom of his machine, which caused the coolant fluid to run out of the machine to within 3 ½ to 4 feet while he was performing his machining duties. (P. 25, 26) In that phase mist and"ammonia" smell resulted from the coolant spraying the part. (P. 13, 14) When the machining process was over, the door would open and a mist would come "out on us", spraying him in the face and on his clothing. (P. 14, 15) The record shows his… "clothes would be damp at the end of the day". (P.15) The coolant would also come over the top of the machine and spray him because initially there was no top or ceiling on the machines.

Petitioner was provided glasses and eventually gloves by Respondent but never offered protective clothing, free flowing oxygen for respiratory protection, nor a charcoal filter respirator or breathing protection. (P. 17) Petitioner testified that he would have to touch the coolant and chemicals when he leaned up against the pallet to get the parts off the fixture and during this entire process he was inhaling the mists and vapors from the machining process. (P. 21) Moreover, no windows existed in his department and the ventilation system in his area was shut off. (P. 18) At the conclusion of the shift, was required to clean the inside of the machine, to clear out the metal chips, and used a hose with the coolant/chemicals to spray inside the machine. As a result of these tasks he would end up being sprayed during this clean-up process. (P. 21 – 24) The Petitioner concluded in an assertive manner he was exposed to the coolants and chemicals throughout the eight hour workday and frequently worked weekends. (P. 24, 25)

The Arbitrator notes the matter proceeded as usual in a hearing developing "facts" both on direct and cross examination in what is currently called a "linear" fashion. Nevertheless after repeated study of the totality of the lay and expert testimony and the documentary evidence after the case's conclusion, the chronology of testimony and accurate dates are overlaid by medical history, diagnostics and treatment. This second layer, if you will, of information thereby results in the developing opinions by experts in their various areas that are not at all presented in a linear fashion. In conclusion, those insightful medical opinions posited later in the case development provide clarity to those seemingly true medical "facts' etched in the sacrosanct medical record(s) years earlier. In an expression of our times" hindsight is 20-20" certainly applies in the case in a myriad of ways.

In September, 2005, Petitioner testified that he noticed his throat "started hurting" and began noticing changes with his voice. (P. 26) Therefore, Petitioner made an appointment to see Dr. Woods. On September 16, 2005, The medical records from Dr. Woods dated 9/16/2005, an Otolaryngologist, indicated the chief complaint was a voice change described as a recurrent hoarseness. (Px. 3) Dr. Woods diagnosed Leukoplakia of the vocal cord and recommended surgery, which included an esophagoscopy and microlaryngoscopy. (Px. 3)

Surgery was performed soon thereafter at Decatur Memorial Hospital resulting in post-operative diagnosis was leukoplakia of the right vocal cord. On October 17, 2005, Petitioner completed a Caterpillar accident report, which indicated that running the machine and smelling the coolants made the Petitioner's throat sore. (Px. 1, Rx. 1) The Respondent's nursing notes indicated that Petitioner reported an inhalation of the coolant causing throat irritation. (Px. 1, Rx. 1) Following surgery, Petitioner testified that he returned to his machinist duties. The Arbitrator comments as follows: the interplay of that diagnosis and the Petitioner's early complaints to the plant nurse regarding "throat irritation" lays a legal tension of two "facts" the importance and "cause" of which is hammered upon by both sides and all doctors the entire duration of the case into late 2011.

On February 4, 2008, Petitioner returned to Respondent's medical department and complained that the coolants and oils irritated his throat and caused sinus issues. According to Respondent's medical department note, the coolant smelled like ammonia and was worse in the summer months. (Px. 1, Rx. 1) Petitioner testified that Respondent gave him restrictions to avoid the company irritants and coolants for several days. (Px. 1, Rx. 1) Petitioner testified that he followed up with Dr. Elrakhawy, his family doctor. (Px. 2) On February 19, 2008 Respondent placed him back on his machining job and exposed him to the coolants. He became light-headed and struggled to breathe, at which time he was taken by an ambulance to Respondent's medical department. (P. 30, 31) Respondent's emergency response report documented that Petitioner stated that he had been exposed to hydraulic fluids and inhaled air-born droplets and developed shortness of breath and dizziness. (Px. 1, Rx. 1)

On February 25, 2008, Petitioner testified that he spoke with the Caterpillar physician and Respondent's safety agent being provided the MSD sheets of the coolants and metal working fluids he was exposed to in his department. (P. 31, 32) Petitioner testified he received Material Safety Data Sheets from Respondent which included the following: CT 972, Busan 77, 886 Biocide, Lubricant 4410, Mobile DTE 24, and Busan 1060. (P. 31, and 82) (Px. 9) Accordingly these were the metal working fluids/chemical he was exposed to during the machining process. (P. 31, 32)

On September 12, 2008, Petitioner followed up with Dr. Woods who recommended another throat surgery. Petitioner related a significant industrial exposure to fumes and his symptoms matched the effects from those fumes. (Px. 3) On December 2, 2008, Petitioner underwent a microlaryngoscopy with excision of the right vocal cord mass and was found to have a large hyperkeratotic mass on his right vocal cord. (Px. 3, 4) He was diagnosed with a right vocal cord neuplasma. (Px. 3, 4).

After surgery, Dr. Woods' records note that Petitioner's voice was raspy and the doctor again documented that his condition was consistent with the effects from the chemical exposure/fumes. (Px. 3 3/18/09; 8/5/09) Petitioner testified that he followed up with Drs. Elrakhawy and Woods for ongoing treatment. Following the second throat surgery, Petitioner testified that his voice changed and continued to be raspy and scratchy.

Mr. Ludwig continued to work as a machinist, exposed to the coolants and chemicals, and began noticing a worsening of his respiratory symptoms, which included wheezing and coughing. (P. 35) On May 13, 2010, Petitioner testified on May 13, 2010 his machine broke down four times, which necessitated that he climb into the machine to fix it. (P. 36) Inside the machine there were fluids and chemicals "all over"; Petitioner testified that the fourth time he went into the machine that day, he began getting dizzy and developed severe breathing difficulties so he called his foreman. (P. 37) Petitioner was taken to medical department at the plant and a Caterpillar Incident Report was completed which documented the exposure in the machine. (Px. 1, Rx. 2) He continued to notice breathing and coughing issues.

On August 21, 2010, he continued to do his machining duties, without restrictions, and he noticed that fumes were "outstanding". (P. 39) His throat began "hurting" and he was coughing and developed dizziness and described it as a "bad day". (P. 39) Petitioner testified that he admitted himself into the Decatur Memorial Hospital emergency room and thought he was "going to die". (P. 39) On August 22, 2010, the Decatur Memorial emergency room records indicated that Petitioner presented with difficulty breathing which had worsened over the last week including shortness of breath associated with wheezing. (Px. 4) Petitioner was diagnosed with acute dyspnea and acute bronchitis. (Px. 4)

On August 24, 2010, Petitioner was seen by Dr. Elrakhawy for the hospital discharge summary and found to have a final diagnosis of bronchial asthma exacerbation and was prescribed inhalers. (Px. 2, 4) On September 1, 2010, Petitioner followed up with Dr. Elrakhawy who noted that the bronchial asthma was "most probably secondary to occupational exposure". (Px. 2) Petitioner was taken off work.

Mr. Ludwig began treating with Dr. Gumprecht and provided doctor with the Material Safety Data Sheets that he received from Respondent. (P. 41) On September 10, 2010, Dr. Gumprecht completed the Caterpillar disability form which indicated that Petitioner suffered from an obstructive and restrictive lung disease and that there was a presumptive relationship to his metal working fluids at work. (Px. 6) On September 17, 2010, Dr. Gumprecht examined Petitioner and noted that there were occupational exposures with an airway injury and that there was a "[l]ikely contribution of problems from the irritant effects of the coolants". 9Px. 6) The doctor recommended prednisone, Zpack and follow-up. (Px. 6, Rx. 4) On October 6, 2010, Dr. Gumprecht wrote a letter indicating that Petitioner suffered from upper and lower airway inflammation with severe hoarseness and obstructive/restrictive pulmonary physiology. (Px. 6, Rx. 4) The doctor indicated that Petitioner was making progress and he could now return to work, on a trial basis, in the crib where he would not be exposed to any irritant coolants. (Px. 6, Rx. 4) On October 15, 2010, Dr. Gumprecht again documented that Petitioner could only return to a "job in assembly where there would be no exposure to coolants".
(Px. 6, Rx. 4)

On October 25, 2010 Mr. Ludwig returned to work with restrictions preventing him from working around coolants and chemicals. (P. 42) Petitioner was transferred to assembly and testified that there were no chemicals, fluids or coolants in the assembly department. (P. 43) Petitioner testified that he received the dry-environment restrictions from Dr. Gumprecht as well as the Caterpillar physicians. (Px. 6, Rx. 4, Px. 1, Rx. 1) Petitioner testified as a result of the restrictions his job classification changed resulting in sustaining a reduction in pay. (P. 43) He was earning $25.25 per hour as a machinist but was reduced to an assembler earning $24.23 per hour. (P. 43, 44) Petitioner testified at arbitration that he continued to suffer the pay loss of $1.02 per hour, or $40.80 per week, and that it was a permanent loss in pay. (P. 44). The Arbitrator finds this matter does not fall under section 8(d) 1.

Caterpillar medical records for 11/24/10 indicated that Petitioner should continue on restrictions to avoid irritants and coolants. (Px. 1, Rx. 1) On December 14, 2010, Dr. Miller, Respondent's company physician, noted in the Caterpillar medical records that he reviewed documentation including exposure sampling of Petitioner's pervious machinist work area. (Px. 1, Rx. 1) The in house company doctor noted that the metal working fluids in his machine included "mists of the concentration and dilutions [that] may cause respiratory irritation...of the mucous membranes in the nasal passages and throat". (Px. 1, Rx. 1) The doctor noted that Petitioner's machinist duties and coolant exposure contributed to the irritant potential and noted that biocide additions were made to the coolants and these biocides have "irritant potential also". (Px. 1, Rx. 1) He also stated that Busan 1060 could be a sensitizer and concluded that Petitioner's symptoms "can be consistent with chemical irritation". (Px. 1, Rx. 1)

On January 28, 2011, Petitioner testified that he saw Dr. William R. Panje at Respondent's request for an section 12 exam. Dr. Panje testified that he was a specialist in otolaryngology. Page 10 of his 6/1/10 delayed addendum report attests he is a board certified otolaryngologist. His CV cites in part (Dep.8/24/11, Ex.1) reflects that he has medical offices at Rush University Head and Neck Associates. For some time he was the professor and Chair of OT-Head and Neck Surgery at University of Chicago Pritzker School of Medicine plus Director of reconstruction and skull base surgery at Rush.

(Rx. . 4) After taking a history from Petitioner, reviewing the medical records and examination findings, Dr. Panje opined that Petitioner had chronic laryngitis secondary to scarring from his biopsy done for the diagnosis of Leukoplakia. (Rx.) The doctor went on to testify, based upon a reasonable degree of medical certainty, that his chronic leukoplakia was caused by Petitioner's prior smoking history, his evidence of gastroesophageal reflux disease, use of steroid inhalers for his asthma, and the fact that he was a diabetic-type II. (Px. . 18) The doctor opined that Petitioner needed ongoing treatment with respect to his leukoplakia to monitor the hoarseness and swallowing symptomology. (Rx. . 19) On cross-examination, Dr. Panje admitted that there was an initial report that he forwarded to Caterpillar which had been modified. (RX . 24) The doctor admitted that the following paragraph under causation had been removed:

> "Of importance to causation of Mr. Ludwig's (Leukoplakia) hyperkeratosis' of the larynx appears to be multifactorial. Dr. Woods states in his progress note of 11/30/09, 'after reviewing a handout (concerning lubricant 4410-Labelled C and Busan 770/1060 labelled B) that his (Mr. Ludwig's) problems are consistent with agent he is exposed. I (Dr. Woods) believe Mr. Ludwig's clinical course (chronic laryngeal leukoplakia) is consistent with or due to his occupational exposure". (Rx. 3, Panje #4)

Dr. Panje indicated that he did not know why that paragraph was removed from the report and that he did not ask that that paragraph be excised. The doctor further opined that he wrote a supplemental report indicating that Petitioner's work environment with inhalation of fumes "probably exacerbated his respiratory complaints". (Rx. . 25, Panje #3) In regards to the Leukoplakia condition, the doctor testified, based upon a reasonable degree of medical certainty that the steroid inhalers Petitioner used for his asthmatic condition was a cause of the condition. (Rx. . 26) The doctor further admitted Petitioner was exposed to metal working fluids which may irritate a throat, nose, larynx, pharynx condition(s) as well as various conducting airways or tubes to the lungs. (Rx. . 28)

The addendum of 6/1/11 to Dr. Panje's section 12 report of February 2011 was in response to the submission to him of the medical records of Dr. Kurt Dearnbarger. The question posed to Dr. Panje according to the intro to this document was ..."whether or not the inhalation of fumes caused Mr. James Ludwig only a temporary exacerbation of symptoms and was not the underlying cause o his leukoplakia or the need for his two surgeries." At page two , paragraph one of the addendum report Dr. Wm. R. Panje M.D. states inter alia: "Accordingly after review of Dr. Dearnbarger's medical records concerning Mr. James Ludwig is the cause of Mr. Ludwig's chronic hoarseness and luekoplakia of the glottic larynx (voice box) is probably multifactorial. The doctor then cites a propensity for infections, chronic overweight and acid reflux . As to the work environment he states: Mr. Ludwig's working environment with inhalation of fumes probably exacerbated his respiratory complaints but to the best of my knowledge is not the specific underlying cause of his leukoplakia. Mr. Ludwig's laryngeal surgery was necessary and indicated because of the presence of leukoplakia regardless of the origin."

Dr. Panje addressed the exacerbation, 2005 complaints, and work restrictions issue numerous times including those on pages 34 through 38. In pertinent part after a focused question regarding the likelihood that if he was placed back in the environment with the metal working fluids he may develop more symptomology, he replies in pertinent part at line 21 of page 38:

> "because of all these other (co-existing) conditions that can be the cause, the ultimate cause of the leukoplakia. And so the fumes is (sic) another contributing irritant to the voice box and irritation we know can lead –chronic irritation can lead to leukoplakia."
>
> In prequel -As shown below, Dr. Jacobs testified as follows: "I don't think the man has any permanent damage from any inhalation of any substance with which he worked at the Caterpillar".

On January 31, 2011 Dr Myron H. Jacobs M.D. FCCP with certifications in internal medicine, pulmonary disease, chest physician, critical care and occupational medicine performed a section 12 examination on behalf of the Respondent. (See Dep. exhibit 1, 8/17/11) and. (Rx. . 7)

Dr. Jacobs testified that he performed numerous very sophisticated pulmonary tests on Petitioner and diagnosed him with an abnormal respiratory function "based almost entirely upon his obesity with a probable contribution from his previous cigarette smoking." (Rx. . 21) Dr. Jacobs went on to say on direct examination that he did not believe, based upon a reasonable degree of medical certainty, that his respiratory condition was related to his work at Caterpillar. (Rx. . 21) In regard to work related restrictions, the doctor indicated that he didn't think Petitioner had work restrictions, and that he could go back into any work environment and if the "metallic cooling fluid bothered him than he should either change his job, avoid that or wear a mask of some kind." (Rx. . 22) The Arbitrator further underscores at pp 21-22 that no further medical care for pulmonary condition is needed essentially. Moreover, " I don't think the man has any permanent damage from any inhalation of any substance with which he worked at Caterpillar" (see pages 23-25 & 43 at deposition per Arbitrator)

On cross-examination, the doctor admitted that the Petitioner had not smoked for 30 years, that metal working fluids could contribute to respiratory problems, that inhalation from breathing the metal working fluids or mists or aerosols could contribute to irritation to the lungs and nose, and that in order to determine if a metal working fluids contributed to a respiratory condition, he would look at the "time relationship, such as how soon does the person become ill when he goes to work; what action is he doing when he goes to work; does removal from the work environment make him well." (Rx. . 24, 30, 31, 33)

The doctor also admitted that wheezing, lightheadedness, coughing as well as breathing difficulties are all symptoms that could be due to chemical exposure. (Rx. . 36, 37) In determining work-relatedness, the doctor indicated it is important to know the chemical the person was exposed to, the exposure to the chemical, and information concerning the history and background of the exposure, but admitted that nowhere in his report does he mention the distance Petitioner worked from the chemicals, how many hours a day Petitioner was exposed to the chemical(s) at Caterpillar, the ventilation in the department where the Petitioner worked, nor had Respondent provided this information to the doctor. The doctor also admitted that the Material Safety Data Sheets that Respondent forwarded to the doctor, as well as the MSD sheets Petitioner brought, all indicated that the chemicals were respiratory irritants.

The doctor acknowledged, based upon a reasonable degree of medical certainty that if Petitioner worked around CT 972 and had shortness of breath and coughing, the chemical would have contributed to those symptoms. (Rx. . 46) The doctor further admitted that the MSD sheets note that the exposure to such chemicals could cause nasal and lung reactions and that Petitioner's exposure on May 13, 2010, at which time he was in the machine and developed lung issues and sinus irritations while exposed to the chemicals and fluids in the machine, could be related to such chemical exposure. (Rx. . 48, 51) The doctor further testified that, based upon the medical records from Dr. Gumprecht as well the medical records from Respondent's medical department, there appeared to be an association between Petitioner's symptomotolgy and his exposure to the chemicals at work and the symptomology could be consistent with chemical irritation. (Rx. . 58). Interestingly, at page 64 the Arbitrator notes that Dr. Jacobs testifies essentially the worker has a" chemical irritation or call it asthma but he did not think it rose to a level of asthma. ...but they called it a chemical irritation and I think he has no permanent residual from it."

Dr. Jeffery E. Coe, M.D., PhD performed a section 12 examination on the Petitioner on May 18, 2011 at his attorney's request. Dr Coe graduated magna cum laude from University of Michigan, M.D. from University of Chicago and PhD in occupational medicine from University of London. Per his testimony he has an occupational medicine practice and board certified therein, teaches at UIC medical school, and is a consultant and examiner for many employers. Moreover he performs section 12 exams of which 60% are for employers and 40% for employees. His CV shows he was a consultant for Liberty Mutual Insurance Company and in house doctor for a steel company.

Based upon the history the doctor received, the medical records he reviewed, the MSD sheets he reviewed as well as the research from OSHA, Dr. Coe testified that Petitioner had several diagnoses which included an abnormality of his vocal cord, which was the Leukoplakia or hyperkeratosis, and an irritant condition of his lung - the asthmatic bronchitis or bronchial asthma with recurring lung irritant symptoms including shortness of breath, wheezing and coughing. (Px. . 35) The doctor testified, based upon a reasonable degree of medical certainty, that the chemicals in Petitioner's workplace aggravated and irritated Petitioner's upper and lower respiratory tract, causing the symptoms and abnormal findings noted in his throat and lungs. (Px. . 36) The doctor explained that the metal working fluids Petitioner was exposed to were irritant substances which were well-recognized to cause irritant effects in the upper respiratory tract affecting the vocal cords and the development of the Leukoplakia and lower respiratory tract/asthma, which manifested themselves in coughing, wheezing, chest discomfort and shortness of breath. (Px. . 37, 38. 39) The doctor found that Petitioner was stable because he was avoiding the irritant exposures at work and recommended that he continue to avoid to inhale irritant exposures but recommended he continue bronchodilating medication in the future. (Px. . 41) Dr. Coe concluded that Petitioner suffered permanent changes in the upper and lower respiratory tract. (Px. . 41). The concept of "sensitization" as permanent is at p.41: 16-24.

The Arbitrator has studied with interest and given deference to the Material Safety Data Sheets offered into evidence from CT 972, Busan 1060, Busan 77, 886 Biocide, Lubricant 4410 and Mobile DTE 24. (Px. 9) The manufacturers warn that these chemicals are known respiratory irritants and exposure, in the form of vapors or mists, can cause irritation in the nasal passage, throat, breathing difficulties, and respiratory conditions/problems. (Px. 9)

At arbitration, Petitioner testified he previously smoked, but quit in 1979. Moreover, he never had a problem or any issues with his throat/vocal/respiratory/breathing before being transferred to the Decatur plan in 1997 and being exposed to the coolants/chemicals as a machinist. His voice is permanently scratchy, raspy and hoarse and people have a difficult time understanding him. Also, he has a difficult time yelling or screaming or raising his voice and the more he talks, the worse it becomes. Duck calling via reed is problematic (P. 48) In regard to his breathing/respiratory situation, Petitioner has been diagnosed with asthma (see Dr. Jacobs discussion above) and testified that Dr. Gumprecht prescribed Advair which he takes twice a day, and he also uses the inhaler prescribed by the doctor. Petitioner testified that he uses the inhaler three to four times per day, as well as a breathing machine two times per day to help keep his lungs open. (P. 48, 49) One section 12 examiner doctor said he did not need it. Nevertheless, Mr. Ludwig continues to follow up with Drs. Elrakhawy and Gumprecht for his throat and lung conditions. Petitioner testified that if he does not get his treatments, he develops bad wheezing and coughing and reduced stamina. (P. 52) Petitioner stated that he continues to work for Respondent in a modified position as an assembler with permanent restrictions to avoid coolants and chemical exposures and has sustained a pay loss of $40.80 per week as a result. (P. 43, 44)

The totality of the evidence in this complex medical case with multifactorial medical issues highlighted in the above findings is the basis for the conclusions of law in each Award. The IWCC prior case law has also been studied in this endeavor.

The Arbitrator adopts the above findings and material facts in support of the following conclusions of law: F: Is Petitioner's current condition of ill-being causally related to the injury?

In addition to the above, the Arbitrator notes that the Petitioner testified credibly and consistent with the medical records. The record indicates that on September 16, 2005, while working as a machinist for Respondent, Petitioner had been and continued to be exposed to irritant metal working fluids and developed throat symptomology which was diagnosed as Leukoplakia. (Px. 3) Dr. Woods, the treating otolaryngologist, performed two surgeries and noted throughout his medical records that Petitioner's symptoms were consistent with the effects of chemical fumes/vapors and mists. (Px. 3) Moreover, Drs. Elrakhawy and Coe further support the causal relationship between the chemical exposure and throat surgeries and this is further collaborated by the temporal sequence which illustrates that the Petitioner's symptomotolgy exacerbated each time he had direct exposure to the coolants and chemicals. (Px. 2, 3) The Arbitrator notes that the Respondent's medical logs further support the work-relatedness and Dr. Miller, the Respondent's company physician, noted on December 14, 2010 that the chemicals had an irritant potential and recommended that the Petitioner avoid such coolants. (Px. 1, Rx. 1). The key physician to question the work relatedness was the Respondent's Section 12 examiner, Dr. Panje, who admitted on cross-examination that the inhalation of fumes/vapors/mists "probably exacerbated" the Leukoplakia and throat conditions. (Rx. 3) Dr. Jacobs opinions are noted as well.

The Arbitrator, after careful consideration of the evidence in this case, finds as a material fact and as a matter of law that Petitioner has proven by a preponderance of the evidence that his current throat condition of ill-being, as explained above, is causally related to his chemical exposure which manifested on September 16, 2005.

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 adopts his previous findings for disputed issue (F). Petitioner submitted, as a group exhibit, outstanding medical bills. The Arbitrator finds, after reviewing the medical records introduced into evidence, as well as the deposition transcripts, that the following medical bills submitted by Petitioner for payment are as a matter of fact and law reasonable and necessary under Section 8(a):

1. ENPA Institute / Dr. Woods - $2,055.00
2. Decatur Memorial Hospital - $1,201.63 which includes the bills paid out of pocket by Petitioner and the portion of the outstanding bills pertaining to the Petitioner's throat condition.

The Arbitrator notes that the Respondent has paid a portion of these bills through workers' compensation as well as through its group medical carrier and the Respondent is entitled to a credit, and shall keep Petitioner safe and harmless, from all claims or liabilities up to the extent of such credit pursuant to Section 8(j).

Therefore, the arbitrator awards a total of $3,256.63 in reasonable and necessary medical expenses as provided in Sections 8(a) and 8.2 of the Act.

WHAT IS THE NATURE AND EXTENT OF THE INJURY?

This issue is determined in the fourth of four cases based upon the last date of "accident" exposure all consolidated at bar. That last date is August 21, 2010 under 10 WC 39181.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LUDWIG, JAMES
Employee/Petitioner

Case# **08WC033475**

10WC039181
11WC000053
08WC033474

CATERPILLAR INC
Employer/Respondent

14IWCC0052

On 2/2/2012, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON 20TH FL
CHICAGO, IL 60602

2994 CATERPILLAR INC
MARK FLANNERY
100 N E ADAMS
PEORIA, IL 61629-4340

STATE OF ILLINOIS)
)SS.
COUNTY OF Macon)

- [ ] 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

James Ludwig
Employee/Petitioner

v.

Caterpillar, Inc.
Employer/Respondent

Case # **08** WC **33475**

Consolidated cases: **08 WC 33474, 10 WC 39181, 11 WC 00053**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **Decatur**, on **November 28, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 4, 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 **$49,702.50**; the average weekly wage was **$994.05**.

On the date of accident, Petitioner was **58** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$378.70** 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 **$605.60** under Section 8(j) of the Act.

ORDER

Medical Benefits/Permanent Partial Disability
The Arbitrator finds that the medical and permanency issues are addressed in the filing for last filed date of exposure which is August 21st, 2010 filed under 10 WC 039181.

The Statement of Facts under the first case 08 WC 033474 is adopted in this case at bar 08 WC 033475 and incorporated herein by reference.

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.

#01 George J. Andros
Signature of Arbitrator

January 31, 2012
Date

FEB 2 - 2012

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LUDWIG, JAMES
Employee/Petitioner

Case# **10WC039181**

08WC033474
11WC000053
08WC033475

CATERPILLAR INC
Employer/Respondent

14IWCC0052

On 2/2/2012, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON 20TH FL
CHICAGO, IL 60602

2994 CATERPILLAR INC
MARK FLANNERY
100 N E ADAMS
PEORIA, IL 61629-34340

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

- [ ] 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

James Ludwig
Employee/Petitioner

Case # **10** WC **39181**

v.

Consolidated cases: **08 WC 33474, 08 WC 33475, 11 WC 00053**

Caterpillar, Inc.
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 **George Andros**, Arbitrator of the Commission, in the city of **Decatur**, on **November 28, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **August 21, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$52,520.00**; the average weekly wage was **$1,010.00**.

On the date of accident, Petitioner was **61** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**. Respondent is entitled to a credit of **$5,450.40** under Section 8(j) of the Act.

ORDER

The Statement of Facts in case 08 WC 33474 is adopted herein and incorporated by reference.

TTD Benefits/Credit

The respondent shall pay the petitioner temporary total disability benefits of $673.33/week for 8-6/7 weeks, from August 24, 2010 through October 24, 2010, a provided in Section 8(b) of the Act.

Respondent shall be given a credit of $5,450.40 for group disability benefits paid pursuant to Section 8(j) of the Act. Petitioner is entitled to $513.40 in TTD benefits.

Medical Benefits/Permanency Partial Disability

The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 37.5 weeks or 7.5% disability t person as a whole. The Arbitrator underscores the IWCC recent case law under the following: 09 IWCC 0249+0021+0775+0109; 10 IWCC 0169, 0443 & 0037. Of note is the sensitization, small wage loss, Pulmonary test results, physical impairment on the job in question per plant records, and doctor's opinions on diagnoses.

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.

#01 George J. Andros

January 31, 2012

FEB 2 - 2012

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LUDWIG, JAMES
Employee/Petitioner

Case# **11WC000053**

10WC039181
08WC033474
08WC033475

CATERPILLAR INC
Employer/Respondent

14IWCC0052

On 2/2/2012, 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:

0293 KATZ FRIEDMAN EAGLE ET AL
PHILIP A BARECK
77 W WASHINGTON 20TH FL
CHICAGO, IL 60602

2994 CATERPILLAR INC
MARK FLANNERY
100 N E ADAMS
PEORIA, IL 61629-4340

14IWCC0052

STATE OF ILLINOIS)
)SS.
COUNTY OF Macon)

- [ ] 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

James Ludwig
Employee/Petitioner

Case # **11** WC **00053**

v.

Consolidated cases: **08 WC 33474, 08 WC 33475, 10 WC 39181**

Caterpillar, Inc.
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 **George Andros**, Arbitrator of the Commission, in the city of **Decatur**, on **November 28, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 13, 2010**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$52,500.00**; the average weekly wage was **$1,010.00**.

On the date of accident, Petitioner was **61** years of age, *single* with **0** dependent children.

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

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

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

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

ORDER

Medical Benefits

The Statement of Facts for the case at bar 11 WC 00053 is the Statement of Facts in case 08 WC 33474, which is adopted and incorporated herein by reference.

The Respondent shall pay reasonable and necessary medical services pursuant to the medical fee schedule of $4,819.05 as provided in Sections 8(a) and 8.2 of the Act. Respondent shall be given a credit for group medical benefits paid as noted in Petitioner's Exhibit #7 and Respondent shall hold Petitioner safe and harmless from all claims by any providers for which Respondent is receiving such credit as provided in Section 8(j) of the Act. Any Award for payment of medical bills duplicated in any Award is to be assigned to the Award next preceding the commencement of treatment. No duplicate bill Awards are intended in these multiple Awards.

Permanent Partial Disability:

Any award for permanent partial disability is addressed in the case 10 WC 039181. That case is for the last date of alleged exposure, August 21, 2010. No separate findings on that issue are addressed in the Award for the case at bar, 11 WC 00053.

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.

#01 George J. Andros **January 31, 2012**

FEB 2 - 2012

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jeffery L. Lyons, Sr.,

Petitioner,

vs. No. 11WC025984

14IWCC0053

Honeywell,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical care, temporary total disability and "Credit for benefits paid," and being advised of the facts and law, clarifies and corrects 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 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).

With respect to the first sentence of the first full paragraph on page 17 of the Arbitrator's decision, which states: "[t]he Arbitrator finds that the condition of ill-being present in the Petitioner's right upper extremity is directly related to the Petitioner's work injury of 7/13/10," the Commission clarifies that Petitioner's right upper extremity condition is causally related to

the undisputed July 13, 2010, accident as Petitioner's work-related left arm injury caused him to develop injuries to the right arm and shoulder as a result of compensating for his left arm.

The Commission also clarifies the last sentence on page 11 along with the first full paragraph on page 13 of the Arbitrator's decision, and finds that the December 6, 2011 utilization review did not certify the right shoulder surgery because, "ODG Guidelines only allow for surgery if there is subjective, objective findings and a failure of conservative care with proper imaging. As no MRI submitted [sic] this cannot be certified." The utilization review did not determine whether the surgery was medically necessary based on the Official Disability Guidelines because the reviewing physician did not have Petitioner's April 27, 2011, right shoulder MRI.

The Commission corrects the first full paragraph on page 13 of the Arbitrator's decision and finds that at his evidence deposition, Dr. Herrin testified that Dr. Allan Brecher, the utilization review physician, called him on December 5, 2011. Dr. Herrin did not return Dr. Brecher's telephone call that day and received a copy of the completed utilization review report the next day. The Commission also corrects the second to last sentence on page 11 of the Arbitrator's decision and finds that Ms. Bacon's testimony and letters from Sedgwick CMS show that Dr. Herrin was sent a copy of the utilization review report on December 6, 2011.

The Commission also corrects the first and second full sentences on page 15 of the Arbitrator's decision and finds that Dr. Kolb's section 12 examination report states he reviewed some of Petitioner's pre-accident medical records. The Commission notes that those records show Petitioner sustained unrelated left shoulder and neck injuries in 2004. In 2005, Petitioner continued to have neck pain and complained of bilateral shoulder pain, leading to a diagnosis of chronic myofascial pain with possible cervical spondylosis. In 2005, Petitioner sustained another unrelated neck injury and reported having chronic neck and back pain in June of 2007. The Commission finds it significant that Petitioner did not seek medical treatment for his shoulders after June 2007 and did not complain of right shoulder pain after 2005, until the date of the undisputed accident. Additionally, Petitioner has never been diagnosed with cervical radiculopathy. The Commission finds that Petitioner's pre-accident medical records do not show an alternate cause for Petitioner's present condition of ill-being and none of the above corrections or clarifications have changed the outcome of the instant case.

Lastly, the Commission finds that Respondent is entitled to a credit for the temporary total disability benefits that have been paid.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on September 10, 2012, is hereby clarified and corrected as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $84,114.00 for medical expenses under §8(a) and §8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical care in the form of right shoulder surgery and post-operative care as recommended by Dr. Rodney Herrin.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $552.80 per week for 55-3/7 weeks, from July 19, 2011, through August 10, 2012, which is the period of temporary total disability 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 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 shall pay to Petitioner interest under §19(n) of the Act, if any.

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $47,300.00. 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: JAN 29 2014
DD/db
o-12/04/13
68

Daniel R. Donohoo

Charles J. DeVriendt

Ruth W. White

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

LYONS, JEFFERY L, SR
Employee/Petitioner

Case# **11WC025984**
14IWCC0053

HONEYWELL
Employer/Respondent

On 9/10/2012, 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:

1189 WOLTER BEEMAN & LYNCH
FRANCIS J LYNCH
1001 S 6TH ST
SPRINGFIELD, IL 62703

0445 RODDY LEAHY GUILL & ZIMA LTD
MICHAEL POWALISZ
303 W MADISON ST SUITE 1500
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF Sangamon)

14IWCC0053

- [ ] 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)

JEFFERY L. LYONS, SR.
Employee/Petitioner

v.

HONEYWELL
Employer/Respondent

Case # 11 WC 25984

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 **D. Douglas McCarthy**, Arbitrator of the Commission, in the city of **Springfield, IL**, on **8/10/12**. 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. [ ] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?

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

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

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

G. [ ] What were Petitioner's earnings?

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

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

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

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

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

M. Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [ ] Other _____

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**43,119.44**; the average weekly wage was $**829.22**.

On the date of accident, Petitioner was **37** years of age, ***single*** with **3** children under 18.

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

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

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $552.80/week for 55-3/7 weeks, commencing 7/19/11 through 8/10/12, as provided in Section 8(b) of the Act.

Medical benefits

Respondent shall pay reasonable and necessary medical services of $84,114.00 pursuant to the Fee Schedule, as provided in Sections 8(a) and 8.2 of the Act.

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

Respondent is ordered to authorize medical care for the Petitioner's right shoulder as ordered by Dr. Rodney Herrin.

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.

D. D. McCarthy
Signature of Arbitrator

Sept. 6, 2012
Date

ICArbDec19(b)

SEP 10 2012

Jeffery L. Lyons, Sr. v. Honeywell - 11 WC 25984

Findings of Fact and Conclusions of Law

The fundamental issue in this case is whether or not the Petitioner's right shoulder condition, and medical expenses and temporary total disability associated therewith, are causally connected to the Petitioner's work injury of 7/13/10.

The parties stipulate that on that date the Petitioner was working for the Respondent as a tool and die operator. It is also stipulated that the Petitioner sustained a left shoulder injury while he was trying to pull and adjust dies in a press machine with his left arm. He advised his employer immediately. His employer took him to Midwest Occupational Health Associates MOHA) for care, treatment and evaluation and the Petitioner treated with MOHA from that date forward. Ultimately, he underwent left-sided shoulder surgery in January of 2011. The parties have agreed that the Respondent accepted the left-sided shoulder injury as compensable and paid medical bills related to that injury. The Respondent also paid temporary total disability benefits from January 19, 2011, the day of Petitioner's left arm surgery, through July 18, 2011, the date Respondent's Section 12 physician opined that the Petitioner had reached maximum medical improvement with respect to his left shoulder.

The question before the Arbitrator is whether or not, following the Petitioner's left shoulder injury, the Petitioner also sustained a related and causally connected right arm and shoulder condition as a result of compensating with his right arm for his left-sided injury.

The Petitioner was first evaluated at Midwest Occupational Health Associates (MOHA, P.Ex. 3) on July 27, 2010. He gave a consistent history of injury stating that he was pulling a mold out of a machine when he injured his left arm. The Arbitrator notes that the initial history of injury contained in the MOHA records references an injury of 7/12/10, but the date of accident, notice, and injury to the Petitioner's left arm is not disputed or at issue.

As noted in the MOHA report of 7/27/10, the Petitioner had a previous left shoulder arthroscopy and had been treating himself since the incident with over-the-counter medications. He was ordered to continue on regular duty. At his request he stayed on regular duty until his left shoulder surgery in January. On August 3, Dr. Clem at MOHA noted that the Petitioner's condition had not significantly improved but Petitioner wanted to continue at regular duty "because of the short staffing and volume at work right now." (P.Ex. 3, note of 8/3/10). He was seen again on 8/10/10 and was ordered different medications and physical therapy. He was seen again on 8/24/10

and 9/8/10 and continued to ask for regular duty so he could continue to work his 12 hour shifts on a consistent basis. He continued, however, to have ongoing problems with his left shoulder. The physician's assistant and physician noted in the office dictation of 9/8/10 that he wanted to continue to work at full-duty even though he continued to have problems.

The Petitioner described the nature of his work. His job required extensive pushing and pulling to set and adjust dies in trim and die machines. He was required move items weighing anywhere from 15 to 1500 pounds. He testified that the mold he was moving when he injured his left shoulder weighed an estimated 450 pounds. He also testified that following his injury he compensated for the pain and lack of mobility in his left arm by overusing his right.

On September 16, 2010, the Petitioner was again seen at MOHA, and at this visit began complaining of problems in his right upper extremity. The Petitioner's pain drawing dated 9/16/10 (P.Ex. 3) shows that the Petitioner noted pain in his right forearm. The progress report states:

> "He tells me he is also having some discomfort in his right forearm. He thinks this is due to using his right arm in order to compensate for his left.
>
> * * *
>
> Mr. Lyons has been on regular duty."

While most of the medical care at MOHA was related to his left shoulder, he continued to make complaints of pain in his

right. At his next visit to MOHA on 10/27/10, he completed a pain drawing that showed bilateral pain in his left and right shoulders and in his left and right arms and hands. According to his 10/27/10 progress report "He has some new pain in the right shoulder and the right hand. He thinks this is because he is using the right side more in order to compensate for his left side." His pain diagram he filled out on 11/29/10 also references continuing and increasing pain in his right side in addition to the problems with the undisputed left side injury. He continued to note both right and left upper extremity pain for the balance of his care with MOHA.

MOHA referred the Petitioner to Dr. Christopher Wottowa for his left shoulder complaints and Dr. Wottowa's Physician's Assistant, David Purves, saw him on September 10, October 22, and December 8. During his treatment with Dr. Wottowa he received an injection in the left shoulder which gave him temporary relief. He continued to work full-duty thereafter and continued to have left shoulder problems. He had an MRI which was done at Springfield Clinic on 11/26/10 and was read as being possibly positive for a labral tear. Dr. Wottowa made several recommendations to him regarding possible options and chose to proceed "to continue to use his shoulder and increase his strength through rehabilitation." He suggested surgery if continuing to use the shoulder was not effective.

proceed "to continue to use his shoulder and increase his strength through rehabilitation." He suggested surgery if continuing to use the shoulder was not effective.

After seeing Dr. Wottowa on December 8, the Petitioner returned to MOHA on 12/15/10 and was referred for a second opinion from orthopedic surgeon Dr. Rodney Herrin. Although he was referred to Dr. Rodney Herrin for problems with his left shoulder, the records from MOHA evidence continued complaints of bilateral arm pain (see pain drawing dated 12/15/10).

After the Petitioner was referred to Dr. Herrin for his left shoulder, he was again seen again on 1/4/11 at which time MOHA opened a new file regarding his right shoulder. They did note in their history of that date that the Petitioner had been complaining of right shoulder pain since October of 2010. As noted above, however, a review of the records from 9/16/10 shows that the Petitioner also complained of right upper extremity pain at that visit as well.

Dr. Herrin assumed care for the patient when he first saw him on December 20, 2010 (Records of Dr. Herrin, P.Ex. 1. Evidence dep. of Dr. Herrin, Ex. 5, pg. 7). Dr. Herrin noted that at his first visit with the Petitioner, the Petitioner complained of both left **and** right arm pain. Because of the nature of his complaints, Dr. Herrin directed most of his attention to his left arm (Ex. 5, pg. 15). He does note,

however, that while his recommendations for care and treatment were directed at the left arm, his notes of patient history do also refer to continued right arm pain. Dr. Herrin explained that because his primary complaints were with his left shoulder, he addressed the left shoulder problems at that time without specifically choosing a course of treatment for the right arm (Ex. 5, pg. 16, line 12).

Dr. Herrin operated on the Petitioner's left arm on January 19, 2011 (P.Ex. 1, Ex. 5, pg. 18). The arthroscope revealed a tear of the superior labrum and that the biceps anchor had pulled loose (Ex. 5, pg. 18 & 19). There also was a slight prominence of bone on the acromonium which was causing irritation, and in his opinion, those conditions were related to the work injury (Ex. 5, pg. 19). The labrum was repaired and the bicep tendon was released and re-attached to another anatomical part of the shoulder (Ex. 5, pg. 20). Following those procedures, the doctor did a revision of the previous decompression (Ex. 5, pg. 21). In Dr. Herrin's opinion, all of those injuries, and the treatment resulting therefrom, were the direct result of his work injury. Also, his pre-existing condition had been further aggravated as a result of the work injury (Ex. 5, pg. 23-24).

According to the Petitioner's testimony, and consistently with the records of surgery on January 19, the Petitioner's left

arm was placed in a sling after his operation. He returned to Dr. Herrin's office on 1/24/11 and at that time again noted that he was continuing to have increased problems with his right shoulder (Ex. 5, pg. 26).

During his evidence deposition, Dr. Herrin offered his opinion that the condition that had been developing in the Petitioner's right shoulder was the result of the Petitioner favoring the left shoulder and overusing the right extremity during the course of his rehabilitation from the left-sided injury (Ex. 5, pg. 26-27). It was Dr. Herrin's opinion that compensation with the right arm directly resulting from the left arm injury was "the most likely" cause of the Petitioner's right arm pathology (Ex. 5, pg. 27, line 21).

The Petitioner's left arm therapy continued, and when he was released to one-handed duty, the Respondent had closed its facility and so no restricted work was available. The parties have agreed that the Petitioner would have been temporarily totally disabled as a result of left arm injury through July of 2011.

On April 13, 2011, the Petitioner returned to Dr. Herrin and the visit was primarily focused on the right shoulder. As of that time, Dr. Herrin noted that the Petitioner had not really had any significant treatment for his right shoulder. Again, Dr. Herrin was of the opinion that his right arm injury

resulted directly from compensation for his left side work injury (P.Ex. 5, pg. 31, pg. 36). Dr. Herrin began a course of conservative therapy for the right shoulder which included an MRI scan, physical therapy, and an injection in the subacromonial space. The MRI scan suggested supraspinatus tendonitis/tendonosis and minimal degeneration around the acromial vicular joint. On 5/9/11, the Petitioner was given a series of injections into his shoulder and his elbow (P.Ex. 1, office note of 5/9/11). Subsequently, he was referred for physical therapy. The Petitioner noted immediate relief following the injections, but gradually his symptoms returned during the following weeks.

Dr. Herrin continued to refer the Petitioner for physical therapy. He saw him again on 10/31/11 and at that time again tried injections in the Petitioner's right shoulder. On October 31, 2011, Dr. Herrin noted that conservative treatment for the right shoulder had failed. He offered him another injection for purposes of temporary relief but further sought authority for right shoulder arthroscopy. Dr. Herrin's opinion was that in view of the fact that the Petitioner had failed conservative care and treatment and continued to have symptoms, right shoulder arthroscopy was the appropriate next step (P.Ex. 5, pg. 51). Dr. Herrin has continued to order the Petitioner off all but sedentary work until he has that surgery, (see work orders

and restrictions, most recently from 10/31/11, in P.Ex. 1) and the Petitioner has been off work from the date his TTD was terminated through the present. The Respondent has offered no restricted work or job placement.

It should be noted that the Petitioner's shoulder was injected in May and October of 2011. An MRI of the right shoulder was taken on 4/27/11 (R.Ex. 5, pgs. 47-8).

In denying ongoing temporary total disability benefits and further medical or surgical care for the Petitioner's right arm, the Respondent has relied on a Section 12 examination by Dr. Edward Kolb and a utilization review report performed by a utilization review service of Respondent's workers' compensation insurance company, Sedgwick CMS. The utilization review documents were introduced into evidence as Exhibits Number 1, 2, 3, 4, 5, and 6. A deposition of the utilization review server, Karona Bacon, was introduced into evidence as Respondent's Exhibit 7.

Karona Bacon described the utilization review process employed by Sedgwick. When a case is assigned, the reviewer examines the medical records that are sent with the UR request. The reviewer determines if the request for additional medical care meets official disability, or ODG guidelines (R.Ex. 7, pg. 5). If the reviewer determines that the guidelines are met, then the procedure is approved but if they are not met, the

reviewer sends the material to a group of medical doctors that specializes in reviewing those cases and asks the doctors to determine if in their medical opinion, the medical service meets the applicable guidelines (R.Ex. 7, pg. 6).

In the case of Mr. Lyons, the initial review concluded that information available to the utilization review process did not support the medical necessity of further medical care for the shoulder. The file was then referred out to a physician who concurred that the available information did not support further medical care.

The testimony from the utilization review provider establishes that both the initial reviewer and the subsequent physicians reached the same conclusion. According to those reports and the testimony at issue, medical necessity was denied through the utilization review process because the reviewers did not have the MRI that had been performed on 4/27/11 (R.Ex. 7, Pg. 28, line 9-pg. 29, line 6). The utilization review personnel knew than an MRI had been conducted but the MRI was not provided to them by Sedgwick (R.Ex. 7, Pg. 30, line 12 - Pg. 31, line 22). Ms. Bacon testified that she was asked to provide the utilization review on a "expedited basis" (R.Ex. 7, Pg. 9, Pg, 22-23) and further testified that she only conducted the utilization review based on the information provided to her by the Respondent's insurance company (See R.Ex. 7, Pg. 39, line

120Pg. 42, line 3). No one from Respondent or the U.R. service made any attempt to get the MRI films (R.Ex. 7, pg. 31, line 20). The Respondent's insurance company did not provide her or the reviewing physician with the MRI reports and, therefore, the reviewer and the physician both found that they could not certify medical necessity.

Significantly, the utilization review was conducted on 12/5/11. The date of the report was 12/6/11. (See Respondent's exhibits attached to R.Ex. 7, Bacon deposition.) By Ms. Bacon's own admission, the review was conducted on an "expedited basis" and a conclusion was reached by both the reviewer and the physician within 24 hours. The reviewer testified, and her report suggests, that they attempted to contact the treating physician, Dr. Herrin. The witness also testified that Dr. Herrin did not call them back. In his deposition Dr. Herrin testified that neither he nor his staff were notified that it was necessary for them to return a utilization review phone call (P.Ex. 5, pg. 53-4). The utilization review witness also testified, and documents support the fact, that a utilization review was sent to Petitioner's attorney but not Dr. Herrin. Furthermore, the utilization review did not address the fundamental issue of the medical necessity of shoulder care and treatment for the right shoulder surgery. Rather, the medical conclusion was based entirely on the fact that the insurance

company did not provide the utilization review service with the MRI that was conducted in April of 2011. Medical necessity was denied because although the UR service knew of the MRI, they were not provided the films and, therefore, could not confirm Dr. Herrin's interpretation of the results of that MRI.

The purpose for a utilization review is to allow the Respondent an opportunity to offer evidence of whether or not recommended medical procedures or treatment are in fact medically necessary. The testimony of Ms. Bacon supports the principle that a utilization review should determine whether or not the treating physician's care meets objective and recognized medical criteria. The purpose of a utilization review, however, is not and should not be to shift the burden of gathering evidence and providing the U.R. service information on to the Petitioner. In determining medical necessity, a Respondent should not be able to create evidence or a presumption in its favor because it does not provide its own utilization review service with adequate information.

At trial, Petitioner's counsel objected to the substance of the utilization review report as being statutorily insufficient. For purposes of admitting the report into the record those objections are overruled and the report and testimony regarding the utilization review are admitted. The Arbitrator finds, however, that the utilization review did not address the

fundamental medical necessity of Dr. Herrin's recommended treatment. It based its decision on the unavailability of an MRI report and Sedgwick CMS should not be allowed to shift the burden of providing the utilization review service with adequate information to the Petitioner.

As to the assertion that Dr. Herrin was given an opportunity to appeal the decision, the Arbitrator finds Dr. Herrin's testimony credible that he did not receive notice from the utilization review service that his procedure had been denied (P.Ex. 5, pg. 53-4). One disputed unreturned phone message one day before a U.R. report is issued is not sufficient to create a presumption in favor of the utilization review under the circumstances presented in this case.

Section 8.7 (i) (4) of the Act deals with Utilization Review. It states that if a UR determination is properly made to deny a particular treatment, then the burden shifts to the employee to show by a preponderance of the evidence that a variance from the determination is appropriate, and that the proposed treatment meets the requirements set forth in Section 8 (a) of the Act.

The facts set forth above clearly show that the utilization review performed in this case was, at best, incomplete. The treatment was denied because the UR did not consider the MRI, which it had ample opportunity to do. Dr. Herrin's

recommendations were based in large part on the MRI findings, and the lack of response to conservative treatments.

The Arbitrator holds that based upon the evidence, the employee has shown by a preponderance of the evidence that that proposed surgery to the Petitioner's right shoulder is a procedure reasonably required to cure or relieve the Petitioner from the effects of his accidental injuries.

Respondent also introduced into evidence a report of a Section 12 examination by Dr. Kolb (See R.Ex. 9). Dr. Kolb noted the onset and progress of right-sided upper extremity symptoms beginning in September of 2010. It was his opinion that those symptoms, and the current problem with the Petitioner's right upper extremity, were not the result of an upper extremity injury or compensation related to left upper extremity immobility. Rather, Dr. Kolb reached the opinion that the Petitioner's right upper extremity symptoms were the result of an unrelated cervical condition:

> "In regard to his right shoulder…he has a longstanding history of bilateral shoulder pain with radicular symptoms, likely secondary to his chronic neck condition…these symptoms are most consistent with a cervical etiology." (IME report of Dr. Kolb, Exhibit 2 to evidence deposition of Dr. Kolb. See also R.Ex. 9, pg. 17-18)

Dr. Kolb noted that an MRI had previously been conducted and a cervical steroid injection administered in 2004 (R.Ex. 9, Pg. 35-8). He also noted the Petitioner's initial complaints of

October 27, 2010 were from his elbow to his fingertips, and on that information, the IME doctor concluded that the Petitioner had a cervical condition rather than a shoulder injury (R.Ex. 9, Pg. 34-6). When he made his conclusions, the IME doctor was unaware of any history of prior cervical or radiculopathy-type complaints. He had no information other than the prior MRI of pre-existing symptomology. Additionally, the cross-examination of Dr. Kolb in his evidence deposition establishes that he was unaware that the Petitioner had undergone a series of injections in May of 2011, prior to the IME. He also was unaware of injections performed after the IME in October of 2011 (R.Ex. 9, Pg. 44, line 13 - Pg. 50, line 7).

Dr. Kolb acknowledged on cross-examination that injections such as those received by the Petitioner can be used both diagnostically and therapeutically. Therapeutically they can reduce symptomology, both temporarily and permanently. Diagnostically they help the physician locate the source of a patient's complaints, and in the case of upper extremity symptoms can help a physician determine if the source of those symptoms is the result of cervical pathology or, in the alternative, pathology in the shoulder (See P.Ex. 5, Dep. of Dr. Herrin, pg. 49-50).

The records and testimony in the case establish that Dr. Herrin did perform a series of injections, first in May and then

in October of 2011. The injections were made under ultrasound guidance and according to the Petitioner and the medical records, provided the Petitioner with some relief. Shortly after each series of injections, however, the upper extremity symptoms returned and it was after the use of those injections that Dr. Herrin offered his opinions about the source of the Petitioner's pain and his need for shoulder surgery (P.Ex. 5, pg. 49-50).

Based on the record and evidence in the case, the Arbitrator finds that the opinions and testimony offered by Dr. Herrin are more reliable and are based on a more complete and accurate knowledge of the Petitioner's medical record and history. Dr. Herrin found that the Petitioner had right-sided symptomology which was consistent, and which was refractive to conservative measures including medication, physical therapy, and injections. He found that the Petitioner's shoulder MRI was abnormal. He also gave the Petitioner injections in the shoulder which temporarily relieved the symptoms. It was his opinion that the history of the onset of the Petitioner's right-sided upper extremity symptoms was consistent with overuse compensation directly related to the Petitioner's work injury. He further was of the opinion that in light of the failure of conservative measures, arthroscopic surgery was necessitated. Finally, he restricted the Petitioner to sedentary activity.

The Arbitrator finds Dr. Herrin's opinions to be credible and based thereon finds in favor of the Petitioner.

The Arbitrator finds that the condition of ill-being present in the Petitioner's right upper extremity is directly related to the Petitioner's work injury of 7/13/10. The Arbitrator finds that in accordance with Dr. Herrin's testimony, the Petitioner has been temporarily totally disabled from further employment as a result of his right upper extremity condition from 7/18/11 through the date of arbitration. The Arbitrator finds that the Petitioner is entitled to receive $552.80 per week for 55-3/7 weeks.

The Arbitrator finds that the medical bills introduced into evidence as Petitioner's Exhibit 2 in the amount of $84,114.00 are all reasonable, necessary, and related to the Petitioner's work injury of 7/13/10. Respondent is ordered to pay those medical bills in accordance with the Fee Schedule. By agreement of the parties, Respondent is entitled to a credit for all medical bills paid.

In accordance with Section 8(a) of the Act, the Respondent is ordered to approve the medical care and treatment ordered by Dr. Herrin, including right shoulder arthroscopic surgery.

Dated and Entered Sept. 6 2012

D. R. McCarthy, Arbitrator

STATE OF ILLINOIS)
) SS.
COUNTY OF)
SANGAMON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Schafer,
Petitioner,

vs.

NO: 09 WC 52346

14IWCC0054

Springfield School Dist. #186,
Respondent.

DECISION AND OPINION ON SECTION 19(H)/8(A) PETITION

On October 18, 2010 Arbitrator Tobin issued an arbitration decision in which he found Petitioner sustained an accidental injury arising out of and in the course of his employment on May 19, 2008. As a result Petitioner was entitled to the medical expenses found in Petitioner's PX13 exhibit and was found to be permanently disabled to the extent of 12.5% man as a whole under Section 8(d)2 of the Illinois Workers' Compensation Act. Neither party appealed the decision and the decision became final.

On December 1, 2011, Petitioner filed a Section 19(h)/8(a) Petition claiming Petitioner has sustained a material increase in his condition and has incurred additional medical and travel expenses.

The Commission, has reviewed the entire file and record, and finds Petitioner has sustained a material increase of an additional 12.5% of a man as a whole for a total award of 25% man as a whole under Section 8(d)2 of the Act. In addition, Petitioner is entitled to additional $2,084.62 in medical expenses and $2,430.15 in travel expenses under Section 8(a) of the Act, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. In 1992 Petitioner underwent surgery consisting of a laminectomy and discectomy at the L5-S1 level.

2. On May 19, 2008, Petitioner sustained a work accident when he stepped off a ladder while carrying a television set, stumbled, twisted and wretched his back. On November 10, 2008 Petitioner sustained a work accident when he aggravated his low back and right side while mounting solar panels on the side of a building.

3. On December 16, 2008 Petitioner's lumbar MRI showed at the L1-L2 level he had minimum anterior osteophytes, minimum facet hypertrophy and no significant canal or foraminal stenosis. At the L3-4 level he had minimum disc bulge and facet hypertrophy with ligamentus flavum thickening but no significant canal or foraminal stenosis. At the L4-5 level he has a mild to moderate diffuse disc bulge, moderate facet hypertrophy and ligamentus flavum thickening, mild circumferential canal stenosis and moderate left and mild to moderate right foraminal stenosis. At the L5-S1 level he had a right hemilaminectomy defect, a moderately diffused disc bulge. Facet hypertrophy but no significant canal stenosis. He also had mild right foraminal stenosis but no significant left foraminal stenosis.

4. On February 25, 2009 Dr. Russell opined that Petitioner's pain is discogenic in nature and he recommended a lumbar fusion.

5. On March 9, 2009 Petitioner underwent a lumbar CT that showed an annular disruption at the L3-4, L4-5 and L5-S1 levels. On March 10, 2009 the lumbar discogram showed an annular disruption at the L3-4, L4-5 and L5-S1 levels. However, only the L3-4 level elicited a pain response concordant to the patient's pre-procedural pain.

6. On March 19, 2009 Petitioner followed up with Midwest Occupational Health Associates (MOHA) for chronic low back pain. It was noted that Petitioner has been evaluated by Drs. Russell and Pineda. Dr. Pineda didn't recommend surgery at that time. He recommended a back brace and pain management. He noted that while Petitioner's discogram showed a problem at the L3-4 level, his disc was intact at the L4-5 and L5-S1 levels.

7. On May 21, 2009 Petitioner saw Dr. Lanzotti for a third opinion. Dr. Lanzotti noted that Petitioner had previously been evaluated by Drs. Russell and Pineda. He had also participated in physical therapy, work hardening and had been off of work for approximately six months. Petitioner reported that he had back pain and once in a while he had some leg symptoms. Petitioner has a history of undergoing an L5-S1 discectomy. He is here mostly because of his back pain. His prior MRI shows some mild degenerative disc disease at the L3-4, L4-5 and L5-S1 levels. His discography test showed concordant pain at the L3-4 level. Dr. Russell has opined that Petitioner might be a surgical candidate

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while Dr. Pineda felt that he wasn't a surgical candidate. Dr. Lanzotti noted that on physical examination Petitioner cannot flex down past his kneecaps and forward flexion causes back pain. Dr. Lanzotti reviewed Petitioner's MRI, discogram and CT scan. Based on his review, he diagnosed Petitioner with intervertebral disc degeneration at three levels and he opined that Petitioner is not a candidate for a L3-4 fusion. He encouraged Petitioner to continue with his work hardening.

8. On June 25, 2009, Petitioner followed-up at MOHA for his chronic back pain. He stated that overall he is feeling better and he is no longer experiencing the sciatic pain he once had. He reported that he does experience bilateral numbness and tingling in his feet after certain exercises and this abates when he rests and walks around. He has been participating in work conditioning and today he is able to lift 70 pounds. He has also progressed to trying to lift 75 pounds with three repetitions and he believes he can do this within the next ten to fourteen days. Petitioner was diagnosed as having chronic low back pain with an annular tear at the L3-4 level and degenerative disc disease at the L4-5 and L5-S1 levels. He was instructed to continue with the work conditioning program and to progress to lifting 75 pounds, to continue to take his medicine and to return to his regular duties on July 13, 2009. He was not scheduled for any follow up appointments.

9. On February 11, 2010 and March 2, 2010 Petitioner was given lumbar epidural injections.

10. On March 25, 2010 Petitioner was seen by Dr. Ghanayem who noted that Petitioner's MRI shows postsurgical changes at L5-S1 on the right side. He has degenerative disc disease and facet hypertrophy at multiple levels of his lumbar. He has rather significant lateral recess stenosis at the L4-5 level on the right side. He has bilateral foraminal disease. His discogram showed a pain response at L3-4. Dr. Ghanayem opined that an operation would improve Petitioner's daily pain and functionality. He noted that the goal of the operation would to be to help with Petitioner's leg symptoms as opposed to his low back symptoms.

11. On May 13, 2010 Petitioner saw Dr. Lanzotti who noted that Petitioner presents with severe back pain and he reports he is having trouble doing tasks at work. He reported he still has pain that shoots bilaterally down his legs. He reported that he is going to see Dr. Russell again. On examination, his straight leg rising test is mildly positive and his reflexes are equal bilaterally. Dr. Lanzotti diagnosed Petitioner with chronic low back pain along with radiculopathy. He took Petitioner off of work until May 24, 2010 and then indicated he could return to work without any restrictions.

12. On May 25, 2010, Petitioner saw Dr. Russell. Dr. Russell noted that Petitioner had undergone an injection but he had no relief. Dr. Russell noted that based on his experience if Petitioner isn't having a significant amount of leg pain he is not certain that a laminectomy would benefit him. He noted that Petitioner's major complaint centers around his low back and he noted that he is not sure what there is to offer Petitioner. He noted that a multilevel fusion would provide no guarantee that Petitioner would be able to continue to work, lift or maintain himself in his present work position. He noted that he

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would discuss the matter with Dr. Pineda. On June 28, 2010, Dr. Pineda noted that if Petitioner's pain is primarily back pain he would recommend nonsurgical management.

13. At the August 5, 2010 Arbitration hearing Petitioner testified that the injections had not helped. He reported that on a typical day when he sits down his low back is stiff and his legs are half numb until he stands up and moves around. He is stiff when he gets out of bed and he has to stretch to get mobile. Depending on what he is doing, his pain elevates and gets aggravated and the muscles in his back tighten up. He feels that it swells and tightens up so much that it pulls his hip around and this causes him to barely be able to walk. He reported that he doesn't have much pain in his back anymore but he still experiences a little sciatica. He takes medication for the pain. He reported that once he carries anything over twenty five pounds he is in rough shape. He bought a riding mower to use instead of a push mower, which aggravates his back. He uses an inversion table and floats in a pool to relax his back. He has back pain every day. Some days are so severe he can hardly walk. Riding a motorcycle really aggravates his back. On October 18, 2010 Arbitrator Tobin issued an arbitration decision in which he found Petitioner sustained an accidental injury arising out of and in the course of his employment on May 19, 2008. As a result Petitioner was entitled to the medical expenses found in Petitioner's PX13 exhibit as was found to be permanently disabled to the extent of 12.5% man as a whole under Section 8(d)2 of the Illinois Workers' Compensation Act. Neither party appealed the decision and the decision became final.

14. On October 22, 2010 Petitioner saw Dr. Lanzotti and indicated that he was experiencing severe intermittent back pain. He also reported that he was headed toward surgical intervention as he had exhausted every conservative avenue of treatment. Dr. Lanzotti indicated that Petitioner should not lift, carry, push or pull greater than twenty pounds at work and he should see an orthopedic surgeon. On November 23, 2010 Petitioner saw Dr. Lanzotti in a follow-up visit. At that time he reported that his back had actually improved and he has some better range of motion. On examination, he was able to flex to 45 degrees in a vertical plane and his leg pain was better since he had not performed any activities which would exacerbate this condition.

15. On December 22, 2010 Petitioner saw Dr. Ghanayem. Petitioner presented with complaints of severe low back and right leg pain. The symptoms are aggravated by prolong sitting. Petitioner is complaining of burning, numbness and tingling down the posterior aspect of his buttock, thigh and leg. He hasn't worked since October 15, 2010. His symptoms have not resolved with conservative management and the pain has limited his lifestyle. Dr. Ghanayem opined that Petitioner should undergo a lumbar laminectomy at the L4-5 level. On January 7, 2011 Petitioner underwent surgery consisting of a lumbar laminectomy with bilateral partial medial facetectomies at the L4-5 level with a foraminotomy on the right.

16. Petitioner's May 5, 2011 post-surgical physical therapy report indicated that Petitioner is rating his pain as being a 5 out of 10 on a 10 point scale. He reports that most of his symptoms are in his back and currently he just has some numbness in his legs with the left being worse than the right. He reports he had a really painful trip to his doctor in

Chicago. Dr. Ghanayem was going to place him in a work conditioning program but he did not because lifting his thirteen pound grandson increased his symptoms.

17. On August 3, 2011 Petitioner reported to the physical therapist that he didn't know if he could keep coming to therapy because he hurts so bad over the weekend. He feels after therapy that he is unable to walk again until Sunday and he is unable to place weight on the balls of his feet. He feels like he is going backwards but knows he is not in that he is able to ride a bike and perform on the treadmill for a longer period on most days. He notes that when he performs a front carry it increased his feet symptoms right away. Toward the end of the session he asked to skip a few exercises as he reports he was very tired and didn't feel he could complete them. He was able to kneel and side carry. He reports his feet have been numb but they are not burning. His back is very still. He indicated that the last time he underwent work conditioning was a year and a half ago. At that time he was sore but now he is experiencing more nerve problems. He said the doctor usually has patients in work condition for one month, three times a week but he thinks he needs another month of conditioning and it needs to occur on a daily basis. Petitioner said he wants to get back to the point where he can return to work. The therapist noted that Petitioner continues to report substantial symptoms both during and in between therapy. He continues to complete therapy and he is motivated but he expresses conflicting statements regarding therapy. The client is scheduled for therapy until the end of the week followed by a functional capacity evaluation and a follow up appointment with Dr. Ghanayem.

18. On August 8, 2011 Petitioner participated in a functional capacity evaluation. It was reported that he demonstrated maximum effort and he reported pain in his low back and feet prior to, during and following the evaluation. On August 10, 2011, Petitioner followed up with Dr. Ghanayem who released Petitioner to return to work with restrictions of lifting no more than twenty five pounds from his knee to his waist, no more than twenty pounds from his waist to above his head and carrying no more than twenty five pounds.

19. On December 1, 2011, Petitioner filed a Section 19(h)/8(a) Petition claiming he had sustained a material increase in his condition and had incurred additional medical and travel expenses. A Review hearing was held on January 24, 2013. At the Review hearing Petitioner presented additional evidence.

20. On January 9, 2012 Petitioner was evaluated by Dr. Zelby. Petitioner reported to him that he was not able to do anything beyond taking care of himself at home because otherwise the pain was too severe for days at a time. On examination, Petitioner demonstrated a normal neurological examination and a normal spine examination. Dr. Zelby opined that Petitioner was qualified to work at least at a medium physical demand level, which is lifting at least fifty pounds occasionally and twenty five pounds frequently. The video surveillance shows Petitioner can easily qualify to do this work and he has no infirmity following such activities. Dr. Zelby opined that Petitioner was not in need of any additional physical therapy or work hardening and that he has reached maximum medical improvement.

21. Petitioner participated in vocational rehabilitation with Mr. Ragains who issued a report covering the period of February 1, 2012 through February 24, 2012. Mr. Ragains noted Dr. Ghanayem's permanent work restrictions along with noting that Petitioner has been examined by Dr. Zelby, had undergone a functional capacity evaluation and had been under surveillance. He also noted Dr. Zelby's restrictions. He noted that Petitioner has verbalized a definite desire to return to work and it appears he wants to return to his former job. Thus far, he opined that Petitioner hasn't come to grips with the need to look for alternative employment. Mr. Ragains noted that his primary concern is with the disparity between the work restrictions imposed by Drs. Ghanayem and Zelby. In a follow up report for the period of February 25, 2012 through March 30, 2012, Mr. Ragains opined that Petitioner is having a difficult time reconciling himself to the fact that his work restriction precludes him from returning to work as an electrician and that the restrictions may impact his employment options. In his report covering the period of March 31, 2012 through April 30, 2012, Mr. Ragains reported that Petitioner has participated in and shown marginal cooperation with the job search activities. Thus far, he has essentially met the requirements for the number of contacts that are required in rehabilitation. However, he has only followed through with six of the thirteen job leads. He has also refused to apply for an auto sales job, which is a realistic job given his interest and knowledge of automobiles. Mr. Ragains opined that to the extent Petitioner is cooperating at this point, it appears that he is only motivated to do so in order to maintain his benefits and he believes Petitioner is not truly motivated to find a new job with a new employer.

22. On April 16, 2012 Petitioner saw Dr. Ghanayem who indicated that Petitioner wants to try an additional course of work conditioning five days a week to see if he can get his old job back.

23. Mr. Ragains' vocational reports for the periods of May 1, 2012 through May 31, 2012 and June 1, 2012 through June 30, 2012 indicated Petitioner has continued to be marginally cooperative with the rehabilitation program. He has not followed through with the job leads from the labor market survey. He was also careful to make just the minimum number of potential employer contacts which are called for in the vocational rehabilitation plan. He opined that Petitioner has not been candid in his motive to perform a job search for a new job with a new employer. Petitioner states that the purpose of his cooperation and follow through is for the purpose of maintaining his benefits rather than obtaining new employment. On June 26, 2012, Petitioner reports he was given a full release by Dr. Ghanayem to return to work with his employer starting July 2, 2012 and thus, he hasn't looked for any further work. In general, Petitioner has not been compliant with his request to update him on his status.

24. On June 22, 2012 Petitioner reported to physical therapy and reported that he was really hurting that day. He rated his pain as being a nine out of a ten on a ten point scale and stated his whole body hurt. He was scheduled for four hours of work conditioning but he only stayed for less than one hour of conditioning.

25. On June 25, 2012, Dr. Ghanayem noted that Petitioner appears to have made some progress in work conditioning but it appears he has reached a plateau. Currently, he reports that he still has some residual back pain but no leg pain. On examination, his lumbar extension was limited by pain but his flexion was good. Dr. Ghanayem opined that Petitioner could return his regular work duties but he was to use some "horse sense" in terms of when to ask for help if something was too heavy. He was released to return to work on a trial basis for four weeks and then was instructed to check back with him.

26. Mr. Ragains indicated in his report for the July 1, 2012 through July 31, 2012 period that he subsequently found out that Petitioner had been released to return to work on a trial basis, but that the Respondent would not allow Petitioner to return to work without more specifics being given to them. Since then Petitioner has been going through the motions of making a minimum diligent and cooperative job search effort. Furthermore, based on the fact that Petitioner has appealed his social security claim, he believes Petitioner is not fully invested in obtaining a new job with a new employer.

27. On August 24, 2012 Petitioner underwent a fit for duty examination. Petitioner reported at that time that he still is experiencing a pins and needle sensation along with burning and numbness in his feet and legs. He reports that he experiences pain in his hip when his back is aggravated and that he is still experiencing daily problems with his back. He reports that during his physical therapy he did not reach his goal of lifting up to seventy five pounds but that he was able to lift up to seventy pounds. He further reported that if he lifts anything over thirty five pounds it is very painful unless he has taken narcotics. He also reported that prolong sitting causes his legs to go numb and prolong walking causes him pain. He reported that he was at Walmart the other day and had to lie down in the aisle because of his severe back pain. Dr. Ghanayem's note states Petitioner can work without any restrictions. Petitioner reports that he believes the doctor said something about working as tolerated and working to the level of his ability. The reviewer noted that Dr. Ghanayem did not give a specific one hundred percent clearance for Petitioner to perform his current job and that there were no weights listed on his release. Petitioner was just supposed to have a trial return to work again before following up with the surgeon. The reviewer stated that Petitioner needs to undergo a functional capacity evaluation and due to the vague description in the surgeon's notes he is requesting clarification of Petitioner's work capability at this time.

28. Mr. Ragains indicated in his reports spanning August 25, 2012 through September 29, 2012 and September 30, 2012 through October 31, 2012 that Petitioner is still harboring hope to return to his job with his current employer. However, he indicates he doesn't believe he will be physically able to handle the job. He has been found to meet the definition of disabled under the social security standard. He has continued to exhibit sufficient cooperation and diligence in his job search effort.

29. On October 15, 2012 Dr. Ghanayem noted that Petitioner wasn't able to return to work. Some weather changes made his back feel a little worse. Petitioner showed him a job description for an electrical worker and having reviewed it, he is not sure if Petitioner can perform this job. Therefore, he has ordered an updated functional capacity evaluation and

took him off of work pending the results.

30. On November 6, 2012 Petitioner underwent a functional capacity evaluation. It was reported that Petitioner put forth maximum effort. Petitioner reported that he would like to return to his prior medium level with waist to head lifts of thirty pounds and floor to waist lifts and carrying of forty pounds.

31. Mr. Ragains indicated in his report spanning December 1, 2012 through December 21, 2012 that he believes Petitioner is employable and that there is work available within his restrictions. He does not believe Petitioner will obtain a new job with a new employer. His belief in the ability to work and a desire to do so are essential ingredients for success and he believes in this case they are lacking here.

32. Dr. Zelby was deposed on December 10, 2012. He noted that during his January 9, 2012 evaluation Petitioner demonstrated inconsistent behavior responses which were positive for diminished pain on distraction and non-anatomic sensory changes. For example, his straight leg raising test was inconsistent. The sitting and lying straight leg raising tests are the exact same tests and they should elicit the exact same response, which they didn't do during the evaluation. There was a positive response in the back only, which means there was no nerve impingement and that he just had back pain. He was limping. However, there was no objective evidence to support the same. The surveillance video footage was inconsistent with the complaints the Petitioner made at the time of the evaluation. Even absent the surveillance video, Dr. Zelby found that Petitioner's objective medical results easily showed Petitioner was capable of performing work at least at a medium physical demand level job, which is lifting at least fifty pounds occasionally and twenty five pounds frequently. He reviewed the November 6, 2012 functional capacity evaluation and found that it did not change his opinion. On cross-examination, Dr. Zelby testified that he did not base his opinion on the surveillance video but did base it on Petitioner's medical condition. At the time of the evaluation Petitioner volunteered information that he wasn't able to do anything beyond just caring for himself at home because otherwise the pain is too severe for days at a time. Dr. Zelby opined that there was a big disconnect between what Petitioner was saying and what the medical evidence showed he was capable of doing. He agreed that Petitioner could perform a lot of the tasks of a maintenance electrician but not all of the tasks. Specifically, Petitioner was required to occasionally lift up to seventy five pounds from the floor to his waist and he believes this would place Petitioner at an unnecessary risk for injury.

33. On January 7, 2013 Dr. Ghanayem said Petitioner's functional capacity evaluation was valid. He was determined to be at a light to medium demand level with lifting of thirty pounds up to the head level and occasional lifting of forty pounds from floor to waist and in a frontal carry. He noted that Petitioner has difficulty getting in and out of a crouching position and he would recommend that he avoid doing this type of movement. He indicated that Petitioner's restrictions were permanent.

34. At the January 24, 2013 Review Hearing, Mr. Baugh, the business manager for the local union testified he is familiar with Petitioner through working with him on prior jobs. He

stated that an electrician would have to lift items over fifty pounds, would have to be able to crouch or bend and would have to be able to climb ladders. He opined that someone with restrictions that would place him at a medium demand level would not be able to work as an electrician in that area.

35. A stipulation was made by Petitioner's attorney that in the year preceding the injury Petitioner earned $78,000.00 and his average weekly wage was $1,500.00 per week. If he was working in the same position today his average weekly wage would be $1,595.20 a week.

36. At the January 24, 2013 Review Hearing, Petitioner testified he is currently fifty two years old. He claimed that the post-surgery physical therapy aggravated his condition and that the work conditioning was more aggravating than the physical therapy. After the physical therapy he had to lie on ice packs just to be able to walk out of the place. On the day of the surveillance and during the gaps in filming he was in the house lying on ice packs. He tried to go back to work for Respondent but they couldn't accommodate the work restrictions issued by Dr. Ghanayem. He has not been offered a job while he participated in vocational rehabilitation although he followed up on the leads that were given to him. He graduated from high school. All of his jobs have been electrician type jobs. He does not have any special training besides electrical work. He can type with two fingers. He is not proficient in word processing. Currently, his low back feels tight and if he does anything it aggravates it. It feels like he has a softball on the left side in the kidney area. It tightens up into a big knot. His leg symptoms did not go away one hundred percent after the surgery. After the surgery, his leg symptoms got better, but if he walks too long his low back tightens up. He feels a big knot that pulls his hips so that he can hardly walk. His back stiffens so much when he is sitting in his truck that he can hardly get out of the truck and go about his business. He is currently taking medication for his back, leg pain and burning feet. He identified PX18 as a mileage chart showing his visits to and from Dr. Ghanayem's office. He saw Dr. Ghanayem because he was the one making the recommendation for the surgery. On cross-examination, he agreed that he drove a bass boat to Colorado in 2011. He also lifted his grandson and carried him on his shoulder and he identified himself as sitting with his grandson in a train at the mall.

37. Jim Ragains testified he is a vocational rehabilitation counselor. Petitioner was placed by Dr. Ghanayem at a light/medium level. Petitioner has some basis computer skills which would match up with an unskilled or low end semi-skilled position. Petitioner has knowledge of basic auto mechanics and auto parts. When he first met the Petitioner and throughout the whole process, Petitioner's sole focus was to return to his job as an electrician with Respondent. As a result, he never felt Petitioner was truly motivated to find a new job with a new employer. Petitioner told him he was only cooperating with the job search in order to keep his maintenance benefits. His aptitude tests indicated he has an interest in sales and light industrial work. He believed Petitioner could perform retail sales type work in relationship to electricity or electrical goods and services. He believed Petitioner also had the ability to go into auto sales, but Petitioner refused to apply for this type of job. Petitioner was cooperative but he wasn't fully diligent in completing what was expected of him in his job search. He found that there was a good basis for Petitioner

14IWCC0054

in retail, customer service, maintenance work or courier work. Petitioner was requested to make twelve job search contacts a week and he typically made ten contacts a week. A lot of what Petitioner did was look on websites. He didn't make personal contacts. Petitioner did not always comply with what to say about his time off or his salary expectations. Mr. Ragains' opined that there is a stable labor marked for Petitioner's services.

Based on the above, the Commission finds that Petitioner proved he is entitled to a material increase of an additional 12.5% man as a whole for a grand total of 25% man as a whole under Section 8(d)2 of the Act. The record shows that Petitioner was never found to be medically permanently and totally disabled post-surgery. At most, Petitioner was initially given a permanent restriction of light physical capacity. This was subsequently increased to light/medium or medium capacity depending on whether one accepts Dr. Ghanayem's or Dr. Zelby's opinion. These new restrictions were greater than Petitioner had at the time of the Arbitration hearing. Through performing physical therapy and work conditioning along with seeking additional work, Petitioner appears to have cooperated and put forth effort. However, there are indications from Mr. Ragains, the vocational rehabilitation counselor, along with Petitioner's own comments during physical therapy and to his doctors, that Petitioner was stuck in the mindset that he could only return to his former position and nothing else was acceptable. Furthermore, Mr. Ragains provided examples where Petitioner didn't put his best foot forward in terms of prospective potential new employers and the same resulted in a possible loss of employment. Such evidence also must be viewed in light of Petitioner's own testimony regarding his condition both at the time of the Arbitration hearing and at the subsequent Review hearing. The Commission finds that there is little, if any, difference in Petitioner's testimony regarding his physical condition from one hearing to the other. In terms of reviewing whether Petitioner's age, education and so forth weigh against Petitioner's ability to find a job within a stable labor market, the Commission finds Petitioner's age may be a hindrance to further employment. His education is somewhat limited as is his work experience. However his hobbies, aptitude test and work experience along with his physical agility demonstrated on the surveillance tapes, appear to show that Petitioner is still employable within his physical restrictions. Arguably, the evidence demonstrates that Petitioner did not put forth sufficient effort to establish that he was unemployable in a stable labor market and Petitioner didn't provide sufficient evidence that he is an "odd-lot permanent total either through his age, education, work experience and so forth. In terms of the wage differential award, there is sufficient evidence to show that Petitioner is no longer employable in his prior profession. However, there is no indication of what Petitioner's current wage is or what it could be. At best, Mr. Ragains talked about Petitioner being able to make approximately one half of what he used to make. However, this statement was based on commission sales from a potential auto sales position, which presents a significant difference of one's wage potential from week to week. As such, the Commission finds that Petitioner failed to prove the second prong necessary to prove up a wage differential award. Thus, the Commission finds that Petitioner falls within a permanent partial disability category. Having undergone additional invasive surgery and having had permanent restrictions imposed, the Commission finds Petitioner sustained a material increase in his condition to the extent of 12.5% of a man as a whole for a grand total of 25% of a man as a whole under Section 8(d)2.

Furthermore the Commission finds that Petitioner provided sufficient evidence to support his claim for travel expenses to and from Dr. Ghanayen's office and as such the Commission

awards Petitioner an additional $2,430.15 in travel expenses. Lastly, the Commission finds that Petitioner has also proven up an additional $2,084.62 in medical expenses subject to Section 8(a) and 8.2 of the Act and allows Respondent a credit for the same so long as they hold Petitioner harmless from any claims by the provider for services for which Respondent is receiving this credit as provided in Section 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $636.15 per week for a period of 125 weeks, as provided in §19(h) of the Act, for the reason that Petitioner sustained a material increase in disability to the extent of 12.5% man as a whole. As a result of the accident of May 19, 2008 Petitioner is now permanently disabled to the extent of 25% man as a whole under Section 8(d)2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,084.62 for medical expenses and $2,430.15 in travel expenses under §8(a) of the Act.

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

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

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

DATED: JAN 29 2014

MB/jm

O: 12/19/13

43

Mario Basurto

David L. Gore

Michael J. Brennan

STATE OF ILLINOIS)
) SS.
COUNTY OF)
CHAMPAIGN

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAME COLE,

Petitioner,

vs. NO: 11 WC 24624

MASTERBRAND CABINETS,

14IWCC0055

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 penalties and fees, current condition of ill being and fraud and vocational rehabilitation and maintenance, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator awarded Petitioner $8,674.83 in attorneys' fees per §16, $21,687.07 in penalties per §19(k) and $10,000.00 in penalties per §19(*l*). We modify the Arbitrator's award and decline to award Petitioner attorneys' fees and penalties.

We hold that Respondent should not be assessed penalties and fees. Respondent initially paid Petitioner's medical bills and temporary total disability benefits. On February 2, 2012, Dr. Hyers performed a §12 exam on Petitioner and opined that Petitioner had reached maximum medical improvement. Following that exam, Respondent ceased paying medical expenses and

temporary total disability benefits. While the Commission does not agree with Respondent's determinations, it was within its right to stop paying benefits as a result of a §12 exam. Respondent's actions were not unreasonable and vexatious.

Additionally, we find that Respondent did not act unreasonably or vexatiously with respect to paying Petitioner's medical expenses. Respondent paid the outstanding medical bills of which it was aware. Respondent then sent a letter to Petitioner on April 17, 2012, requesting any additional medical bills that needed to be processed. Petitioner never replied to that letter and Respondent did not receive the outstanding expenses until February 1, 2013. Respondent then submitted the bills to its payment department. At the time of the arbitration hearing, the outstanding expenses had either already been processed and paid, or were scheduled for payment. Respondent processed the medical bills in a timely manner once it received the expenses and its actions were not unreasonable. Based on the above, we hold that Petitioner is not entitled to attorneys' fees or penalties as Respondent did not act unreasonably or vexatiously.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is modified as stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $452.33 per week for a period of 42 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 shall pay to the Petitioner the sum of $452.33 per week for a period of 45-3/7 weeks for maintenance benefits as provided in §8(a), 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 $31,063.76 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 $56,200.00. 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: JAN 29 2014
TJT: kg
O: 12/3/13
51

Thomas J. Tyrrell

Daniel R. Donohoo

Kevin W. Lamborn

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

COLE, JAME
Employee/Petitioner

Case# **11WC024624**

MASTERBRAND CABINETS
Employer/Respondent

14IWCC0055

On 4/19/2013, 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:

2217 SHAY & ASSOCIATES
THPMAS R EWICK
1030 S DURKIN DR
SPRINGFIELD, IL 62704

5153 DUGAN & VOLAND
CAROL WYATT
3388 FOUNDERS RD SUITE A
INDIANAPOLIS, IN 46268

14IWCC0055

STATE OF ILLINOIS)
)SS.
COUNTY OF CHAMPAIGN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Jame Cole
Employee/Petitioner

v.

Masterbrand Cabinets
Employer/Respondent

Case # 11 WC 24624

Consolidated cases: N/A

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Nancy Lindsay**, Arbitrator of the Commission, in the city of **Urbana**, on **February 21, 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] Is Petitioner entitled to any prospective medical care?

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

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

N. [ ] Is Respondent due any credit?

O. [x] Other: Vocational Rehabilitation; maximum medical improvement, and permanent partial disability

FINDINGS

On the date of accident, **6/10/11**, 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 **$35,282.01**; the average weekly wage was **$678.50**.

On the date of accident, Petitioner was **26** years of age, *single* with **0** dependent children.

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

Respondent shall be given a credit of **$14,540.13** in TTD, **$0** in TPD, **$0** in maintenance, **$0** in non-occupational indemnity disability benefits and **$0** in other benefits, for which a credit may be allowed under Section 8(j) of the Act.

Respondent is entitled to a credit for medical bills it has paid through its group medical plan for which credit is allowable under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $452.33 per week for 42 weeks, commencing June 9, 2011 through August 2, 2011, and August 15, 2011 through April 9, 2012, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $14,540.13 for temporary total disability benefits that have been paid.

Respondent shall pay Petitioner maintenance benefits of $452.33 per week for 45 3/7 weeks, commencing April 10, 2012 through February 21, 2013, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner's unpaid medical bills listed in Petitioner's Exhibit No. 9 directly to the providers consistent with the Medical Fee Schedule established by the Commission for necessary medical services, as provided in Section 8(a) of the Act. Respondent shall reimburse Petitioner for her out-of-pocket payment made towards prescriptions medications related to her condition. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act. Respondent is not liable for medical bills to St. John's Hospital, Associated Pathologists, or Dr. Crabtree (date of service 3/28/12).

Petitioner is denied prospective medical care.

Respondent is ordered to prepare a vocational assessment with Petitioner consistent with the restrictions set forth by Dr. Crabtree and Dr. Hyers.

Respondent shall pay to Petitioner attorney's fees of $8,674.83, as provided in Section 16 of the Act; penalties of $21,687.07, as provided in Section 19(k) of the Act; and penalties of $10,000.00, as provided in Section 19(l) of the Act.

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

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

14IWCC0055

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.

Nancy Lindsay
Signature of Arbitrator

April 16, 2013
Date

ICArbDec19(b)

APR 19 2013

Jame Cole v. Masterbrand Cabinets
11 WC 24624

The Arbitrator finds:

Petitioner testified that she is 28 years old. Petitioner worked for Respondent, a manufacturer of kitchen cabinets, from May of 2010 through November 29, 2011. Petitioner first worked as a sealer/sprayer and held that position through February of 2011. That position involved sealing cabinet doors with a protective coat and spraying them with stains. Petitioner requested a transfer because she had been diagnosed with spots on her lung, a condition unrelated to her work for Respondent. When Petitioner first started working for Respondent, she did not wear a mask; however, she wore a mask when she started having breathing problems, at which time she left the sealer position. According to Petitioner, her supervisor, Zach, took her respirator from her near the end of December of 2010 stating that it needed maintenance. Petitioner did not get the respirator back and left sealing.

Petitioner then worked briefly as a run wiper and tub checker.

Petitioner testified that she worked a forty hour work week. Petitioner explained that there is lots of dust associated with the sanding process and that she worked with various types of wood including cherry, maple, oak, hickory, alder, and particle board. Petitioner had contact with these types of woods in all three positions she held.

In February 2011, Petitioner started working as a run wiper, which required her to wipe stains off of doors. Petitioner worked as a run wiper for a couple of months until she started working in the tub checker position. That position required her to place colored tags for parts on doors and drill holes for eyebolts. The drilling created dust. Petitioner stated that she often worked overtime, and when she did, she sanded doors, which also created dust.

Petitioner's Exhibit No. 7 includes material safety data sheets (MSDS). The MSDS for Auburn Oak Back Stain, under potential acute health effects, notes inhalation may irritate the respiratory system. The MSDS for Maple Coffee Vinyl Toner and New Cherry Java Toner list potential acute health effects from inhalation as cough, dizziness, fatigue, headache, nausea, vomiting, and weakness. (PX7)

Petitioner testified that prior to working for Respondent, she had never been diagnosed with asthma and was an active person who did a lot of hiking, camping and fishing. Petitioner had not experienced any past problems breathing. Petitioner stated that she quit smoking in 2010 when spots were found on her lung on a CAT scan at Decatur Memorial Hospital. Petitioner stated that in 2010, she had a CAT scan at Decatur Memorial Hospital, but following that did not have any further treatment, other than an antibiotic, until her presentation to Dr. Crabtree in June of 2011.

On June 10, 2011, Petitioner presented to Dr. Crabtree of Central Illinois Allergy & Respiratory Services in Springfield, Illinois. Petitioner reported shortness of breath and episodes of coughing dizziness, and vomiting in the work place with the worst episodes when she was

working directly with raw materials. Dr. Crabtree suspected underlying asthma and allergies along with sinusitis. A treatment regimen, including immunotherapy, was set forth and work restrictions, including "getting the patient out of that environment" were given. (PX 3)

Petitioner testified that on July 8, 2011, she presented to the emergency room of Sarah Bush Lincoln Health Center. According to the emergency room records, since attending a barbeque on July 4 where she was around hickory chips, Petitioner had been breaking out in hives and was having chest tightness. The emergency room physician recommended that she continue to take 40 mg. of Prednisone twice a day, Benadryl, and follow up with her physician. (PX3) Petitioner testified that prior to working for Respondent, she had attended cookouts, but did not have to go to an emergency room.

On July 22, 2011, Petitioner returned to Dr. Crabtree, who noted Petitioner's breathing seemed improved; however, her symptoms of cough and shortness of breath had worsened since she had stopped taking medications due to their costs. (PX1, p. 15; PX2) Dr. Crabtree issued a return-to-work slip, recommending that Petitioner return to work with a respirator on a trial and error basis to see what she could tolerate. (PX1, pp. 16-17; PX2; PX8)

Petitioner was fitted for the respirator at Sarah Bush on July 28, 2011. (PX3) She testified that it did not help. According to her, it would postpone the breathing problems, but she would still get dizzy and lightheaded.

Petitioner underwent allergy shots at Kirby Rural Medical Center in Atwood, Illinois, as recommended by Dr. Crabtree. Petitioner first presented there for allergy injections on July 22, 1011. (PX4) Petitioner testified the shots helped, and she has continued to have them up through February 13, 2013. (PX4)

Petitioner testified she returned to work for Respondent in August of 2011 wearing a respirator. She worked from August 3, 2011 through August 15, 2011. During this time, Petitioner had a reaction. Petitioner testified that Judy Porter called Cheryl Ryan who told Ms. Porter that her supervisor should take her to Kirby Medical Center if Petitioner did not get better within ten minutes.

Dr. Crabtree examined Petitioner on August 15, 2011. Dr. Crabtree recorded that while Petitioner had been feeling better she became "much worse" after going back to work. He treated Petitioner with breathing treatments and a systemic steroid burst. (PX1, p. 19) He also issued an off-work slip, taking her off of work until her follow-up appointment. (PX1, p. 19; PX2; PX8) Petitioner has not returned to work for Respondent since August 15, 2011.

Petitioner testified that she gave her first off-work slip to Cheryl Ryan, the Safety Coordinator, and the second off-work slip she gave to Barb, who worked at the front desk.

Dr. Crabtree issued another off-work slip on September 12, 2011, keeping Petitioner off work until further notice. Dr. Crabtree testified that it was at this point in time he felt Petitioner had some type of work-related worsening or provocation of her lung problem. (PX 8, PX 1, p. 21)

Petitioner was seen by Dr. Crabtree in October of 2011. (PX 2)

Petitioner was terminated by Respondent on November 29, 2011. (RX 6) Petitioner testified that she had reviewed her letter of termination, which referenced FMLA time. The letter stated she had not informed Cheryl what her work restrictions, if any, were. She testified that Cheryl had told her not to contact her until she had heard from Respondent's attorneys.

Petitioner was seen by Dr. Crabtree in January of 2012. (PX 2)

At the request of Respondent, Petitioner was examined by Dr. Thomas M. Hyers on February 12, 2012. Dr. Hyers was of the opinion Petitioner developed asthma as a result of exposures in the workplace as described in his letter and Petitioner's medical records. With removal from the workplace, Petitioner's asthma had "largely cleared." Dr. Hyers felt Petitioner was at maximum medical improvement as of the 12th and that her treatment had been reasonable and appropriate. He further opined that Petitioner could work full-time in an environment with "reasonable precautions about exposure to fumes, dusts, and extremes of temperature." (PX 6)

Dr. Crabtree re-examined Petitioner on March 2, 2012. Petitioner reported she was coughing up blood nearly every morning. Spirometry with bronchodilation was performed revealing a mild restriction. Petitioner acknowledged smoking in the past but reported having quit four years earlier. A chest CT was ordered. (PX 2)

Dr. Crabtree's deposition was taken on March 7, 2012. (PX 1) Dr. Crabtree is board certified in internal medicine, pulmonary medicine, critical care medicine, and sleep medicine. (PX1, p. 6) Initially, Petitioner complained of a "golf-ball sized" spot on her lung, burning when breathing, and difficulty breathing. (PX1, p. 7; PX2) Dr. Crabtree testified Petitioner had symptoms in different environments at work, which accompanied her changes in job tasks, and the worst of her symptoms seemed to be when she was working with raw materials. (PX1, p. 7) Dr. Crabtree commented that the process in her lung was likely a granuloma process or histoplasmosis, which is a fungal infection. (PX1, pp. 7-8) Dr. Crabtree recorded Petitioner was a finisher in a paint room for cabinets in a cabinet-making factory, where she worked with wood and paints. He also recorded that Petitioner had smoked but quit four years prior to his evaluation. (PX1, p. 9; PX2)

Dr. Crabtree ordered pulmonary function testing and an allergy work-up to look for specific allergens. (PX 1, p. 9) He ordered a complete pulmonary function study with a methacholine challenge test. (PX 1, p. 9) Dr. Crabtree testified that the skin testing demonstrated dramatic reactions to oak, maple, birch, walnut, cottonwood, and hickory. (PX 1, p. 10) Petitioner's skin testing revealed no other reactions on the panel, other than the woods. For instance, molds, weeds, pets, animals, foods, and ragweed, were all negative. (PX 1, p. 10) The methacholine test demonstrated chronic airway obstructions, likely due to a severe asthmatic type or reactive airway. (PX 1, pp. 11-13)

Initially, Dr. Crabtree diagnosed underlying asthma and allergies, which were causing Petitioner's symptoms, acute sinusitis, and a large calcified nodule, likely histoplasmosis, which was likely benign. (PX1, p. 13) He recommended that Petitioner be placed on a regimen for

allergic asthma, including Singulair, Advair, Albuterol, Allegra-D, and a Prednisone burst and taper. (PX1, p. 14; PX2) He placed her on a nasal steroid, Veramist, and Levaquin, which is an antibiotic for the sinusitis. (PX1, p. 14) He also recommended immunotherapy, allergy shots, and that Petitioner be taken out of her work environment because in his estimation at that point, it was triggering her symptoms. (PX1, pp. 14, 18)

Dr. Crabtree testified that on September 12, 2011, he diagnosed Petitioner with allergic rhinitis, asthma, bronchitis, cough, dyspnea, GERD, noting "[s]ymptoms are directly work related." (PX2) He was asked during his deposition whether he had an opinion, within a reasonable degree of medical certainty, whether Petitioner's work for Respondent with the wood was a cause in her diagnoses. He responded "I definitely at this point, felt that she had some type of work-related worsening or provocation of her lung problem." (PX1, p. 21) Dr. Crabtree was asked the basis of his opinion and replied: "Based on my discussion with the patient and the fact that she was, she had severe asthma, was, also definitely reacted to, had immunologic response in the allergy testing, as well as the blood testing to trees and wood that were present in the workplace based upon my knowledge of the workplace, which was mainly through the patient." (PX1, p. 21)

Dr. Crabtree testified that Prednisone is a systemic steroid and also serves as an anti-inflammatory drug. (PX1, p. 21) It has side effects, and therefore, Dr. Crabtree does not like to use it on a long-term basis unless absolutely necessary. He noted that as of September 12, 2011, Prednisone had been given on multiple occasions, and he therefore, must have believed the patient was severely symptomatic or the airway was severely obstructed. (PX1, p. 22) Petitioner returned to Dr. Crabtree on October 17, 2011 and January 9, 2012. Dr. Crabtree did not feel all of Petitioner's complaints in October of 2011 were attributable to her work with Respondent. (PX 1, p. 43)

Dr. Crabtree testified that on Petitioner's January 9, 2012 visit, she was stable with no acute issues. Her spirometry lines were better, in that she had almost 3 liters compared to 1.6 on previous visits. (PX1, p. 22) Dr. Crabtree discussed an allergen report from a specimen collected January 8, 2012, which was marked as Deposition Exhibit No. 5. (PX1, Deposition Exhibit No. 5) Dr. Crabtree noted that the numbers, when compared to the prior allergy testing where she had 4+ reaction to woods, were lower, which would be consistent with her having left the workplace. (PX1, pp. 24-25)

Dr. Crabtree testified that the last time he had seen Petitioner prior to his deposition was March 2, 2012. (PX1, p. 25) At that point, her breathing was not too bad, although her pulmonary function was down from where it had been. Dr. Crabtree ordered a CAT scan of her lungs, because Petitioner had complained about coughing up blood after performing a pulmonary function test with the independent medical examiner. Dr. Crabtree testified that he believed this was "something separate, and did not seem to be associated with her asthma and allergies per se,...." (PX1, pp. 25-26) On March 6, 2012, Petitioner underwent a CAT scan of her chest at Sarah Bush Lincoln Health Center which showed calcified right middle lobe nodules and calcified right hilar and subcarinal lymph nodes. (PX 3)

Dr. Crabtree testified that because of the severity Petitioner's asthma and allergies, she will be somewhat limited in what she can do. She seemed to be doing better with medications. His suspicion was that she has true occupational asthma, and generally with that, the prognosis is quite good if the individual is taken out of the situation which is causing the problem. (PX1, pp. 26-27) With respect to future treatment, he noted that at the time of his deposition, she was on steroids and anti-inflammatories, as well as Zyflo, which was a non-steroid anti-inflammatory for asthma and allergies. She would need continued immunotherapy. (PX1, p. 27) The goal is to wean her off of treatment to the point where she only needs a bronchodilator. (PX1, p. 27)

With respect to work, Dr. Crabtree testified that it was his opinion that this all seemed to be directly related to some exposure at the workplace, predicting it is the antigens, proteins in the wood, that have caused her to have a bad lung process. (PX1, pp. 27-28) He believes Petitioner should not work in that environment or any similar environment. (PX1, p. 28)

On cross-examination, Dr. Crabtree stated he was not attributing the golf ball sized spot on to her work with Respondent. (PX1, pp. 29-30) Petitioner has very little problems from this spot, and it is unlikely it is causing symptoms. (PX1, p. 31) Dr. Crabtree testified that Respondent had spoken with his nursing staff on several occasions when they tried to find a way for her to be able to maintain employment. (PX1, p. 32) The allergy testing on June 10, 2011 showed reactions to walnut, hickory, maple, and birch. (PX1, p. 33) Dr. Crabtree was asked about Petitioner's smoking. He noted her lung volumes improved with treatment which suggests the likelihood of asthma, not emphysema. (PX1, p. 38)

On cross-examination, Dr. Crabtree was asked whether Petitioner was at maximum medical improvement as of January 9, 2012. He noted that he did not know if he would say maximum. There was a pulmonary function study that day that showed airway obstruction but everything else was improved so if she was at maximum medical improvement, she has permanent reduction in her lung volumes. (PX1, p. 44) Regardless of whether she was at maximum medical improvement, she could not return to the environment at Respondent. (PX1, p. 45) It was still his opinion that Petitioner has an occupational asthma that would or could worsen with exposures to the woods. (PX1, p. 45) He would put permanent restrictions on Petitioner of not working in an environment where she is exposed to wood (wood dust, cutting of wood, or anything where she would be having contact with the woods she has been found to be allergic to). (PX1, p. 45-46) There is no amount of wood dust required to cause an allergic reaction or lead to occupational asthma. It could be immeasurable. (PX1, p. 47)

Following the deposition, Petitioner continued to treat with Dr. Crabtree. On March 28, 2012, at St. John's Hospital, Dr. Crabtree performed a bronchoscopy with transbronchial biopsy and bronchoalveolar lavage. The operative report notes Petitioner has a history of histoplasmosis and findings of severe allergic rhinitis and allergic asthma with multiple reactions to wood as well as pollens. (PX12) On April 9, 2012, Dr. Crabtree issued an off work slip, which returned Petitioner to work with the restriction that she not work around wood or trees. Dr. Crabtree described Petitioner's condition as stable. (PX 2) (PX8) On August 13, 2012, Petitioner's diagnoses included asthma, dyspnea, and pneumonia-histoplasmosis. The doctor noted Petitioner was improving on all fronts. Petitioner had done well and her histoplasmosis had shrunk fifty percent. She was to continue the Itraconazole and be rechecked monthly. (PX2) On September

10, 2012, Dr. Crabtree commented that Petitioner had a good response to the Itraconazole and would continue it another month. Petitioner's diagnosis was pneumonia and histoplasmosis. Her condition was unchanged as of October 22, 2012. (PX2)

Petitioner testified that she has not been paid any temporary total disability since February 2, 2012, the day she saw Dr. Hyers, for the Section 12 examination. Petitioner also testified that she is still receiving allergy shots and taking allergy medicine.

Petitioner testified that she has been prescribed a medication called Forenzia, but she has had problems getting it filled. In fact, she noted none of her prescriptions had been filled, although she received a prescription card in January 2013. Since receiving the prescription card, she was still unable to get her prescriptions filled, as the pharmacy has denied her prescriptions. Petitioner testified that Dr. Crabtree has referred her for blood work, and she incurred a bill from Quest Diagnostics for blood work done on October 17, 2011, at Dr. Crabtree's office. Petitioner testified she currently sees Dr. Crabtree every three to six months and has an allergy shot every month.

Petitioner testified that her medical bills remain unpaid and she still receives unpaid bills. On April 5, 2012, she filed, through her attorneys, a Petition for Penalties based upon the nonpayment of medical bills. (PX11)

Petitioner testified that Dr. Crabtree has not found her to be at maximum medical improvement. She believed she was getting better, but at the beginning of this year, she ran out of medications, and her health has decreased. Currently, she takes Allegra-D, Advair, ProAir, Flonase, and Prednisone, all prescribed by Dr. Crabtree.

On May 8, 2012, Petitioner made a formal request for vocational rehabilitation, in a letter by her attorney, which also requested that a prescription card be issued. (PX 15)

Dr. Hyers' deposition was taken on November 2, 2012. (PX 6) Dr. Hyers is board certified in internal medicine and pulmonary medicine and is licensed in Missouri and Illinois. Petitioner informed Dr. Hyers of the nature of her work in terms of working with cabinets and the woods the cabinets were made of. (PX6, p. 9) Dr. Hyers believes Petitioner has had too much steroid medication, exhibiting a Cushingoid appearance. (PX6, p. 9) Dr. Hyers ordered a chest x-ray, which demonstrated a nodule or mass about 3.2 x 3 cm. in the lateral aspect of the right middle part of the lung. (PX6, p. 11) After his examination, he obtained a film from an x-ray performed on December 17, 2008. Comparing the films, it demonstrated no change in size or appearance of the mass, and Dr. Hyers concluded it was more likely than not a benign module. (PX6, p. 12) He opined Petitioner's lung nodule was asymptomatic. (PX6, pp. 13-14) Dr. Hyers noted after his exam, he received information concerning the chemicals Petitioner was using, including Material Safety Data Sheets. (PX6, p. 15) He commented that Dr. Crabtree's skin test found Petitioner had some tree allergies. (PX6, p. 16)

Dr. Hyers testified, within a reasonable degree of medical certainty, that Petitioner developed asthma as a result of exposure in the workplace. (PX6, pp. 16-17) If Petitioner had pre-existing asthma-like symptoms, his opinion could change, in that the work exposure did not

cause the condition, but aggravated it. (PX6, p. 19) The fact that Petitioner had a reoccurrence of symptoms outside of the work site does not suggest other causes, but rather suggest she will react to certain irritants in her environment, which to the best of Dr. Hyers' knowledge, appeared to start at the work site. (PX6, p. 27)

Dr. Hyers believes Petitioner was at maximum medical improvement in February 2012, because she had been away from the irritating worksite for numerous months, reported she was stable, her pulmonary function test demonstrated if it was abnormal, it was only mildly abnormal and had stabilized. (PX6, p. 19) However, Petitioner would need her steroid dose adjusted to decrease it. (PX6, p. 20) Dr. Hyers opines Petitioner is employable, noting she probably would do much better in a setting of controlled environment, such as an office setting that is free of dust or fumes or smoke, as opposed to a setting where she worked before where she was exposed to some fumes from chemicals. (PX6, p. 25) In terms of outside an office environment, Petitioner will basically have to find out what she is capable of doing and stay away from triggers such as smoking, perfumes, and raking leaves. (PX6, p. 26)

With respect to the pulmonary function report, when he tested Petitioner on February 2, 2012, the FEV 1 was 80% of predicted. (PX1, pp. 21-22) This is at the low end of normal. (PX6, p. 22) Dr. Hyers noted that immunotherapy consists of very dilute concentrations of oak and other wood antigens being injected into Petitioner's skin in an effort to desensitize Petitioner from a possible allergy. (PX6, p. 29) Petitioner may still have episodes of worsening that may require transient Prednisone pills to get under control. (PX6, p. 34) Dr. Hyers further testified that while Petitioner is employable, she would do better in a controlled environment that is free of a lot of "dust or fumes or smoke." (PX 6, p. 25) Dr. Hyers further explained that she will have to find out where she does well and where she doesn't as she may experience aggravations from different triggers. (PX 6, pp. 26-27, 30) When asked about the cause of other environmental irritants that may affect Petitioner, Dr. Hyers testified, "To the best of my knowledge at this time it appeared to start in the work site" as she had no pre-existing conditions. (PX 6, p. 27) Dr. Hyers further testified that Petitioner has work-related sinusitis. (PX 6, p. 28)

On cross-examination, Dr. Hyers noted he did not have any records from Dr. Crabtree after July 22, 2011. He further noted that many of the agents identified in the Material Safety Data Sheets provided to him were potential respiratory irritants. (PX6, p. 26) When Dr. Hyers saw Petitioner on February 2, 2012, she was on Advair, Allegra, Zyflo, Flonase, and Prednisone. (PX6, p. 38) These medications are mostly anti-inflammatory, the purpose of which is to decrease inflammation in the lungs and the airways and improve pulmonary function. (PX6, p. 38) Petitioner's biometric findings when he saw her were still at the low end of the normal range. (PX6, p. 38) He agreed Petitioner's treatment to date had been reasonable and appropriate, with the caveat that she was getting too many steroids. (PX6, p. 3)

Dr. Hyers does not attribute any of Petitioner's symptoms to the nodule on her lungs. Symptoms of asthma include coughing, wheezing, shortness of breath, and chest tightness. (PX6, p. 40) Dr. Hyers acknowledged that when Petitioner presented to him, she completed an occupational medicine questionnaire, on which she indicated she currently experiences shortness of breath. (PX6, p. 41) It is typical of any type of asthma to come and go. (PX6, p. 41) He

believes Petitioner should come off oral Prednisone completely and be treated only with inhaled steroid medicine. (PX6, p. 44)

Dr. Hyers testified Petitioner's restrictions should include trying to avoid environments where she is exposed to a lot of dust, fumes, smoke, and extreme temperatures, meaning less than 40 degrees Fahrenheit in the winter when the air is very dry. (PX6, pp. 44-45)

On re-direct examination, Dr. Hyers noted Petitioner indicated on the intake form that she did not currently smoke. (PX6, p. 46) She indicated she smoked in high school, although minimally. (PX6, p. 46) He believes Petitioner has improved since being removed from the workplace. (PX6, p. 52)

Petitioner returned to see Dr. Crabtree on November 19, 2012 and she was "doing great" and all medications were stopped to see how she would do. (PX 2)

Petitioner returned to see Dr. Crabtree on February 18, 2013. At that time her ears were noted to be consistent with severe otitis media and her sinusitis and asthma was described as "flaring." Petitioner was given Prednisone, Flonase nasal spray, Augmentin, Advair, Proair, and Montulekast. She was to return in one month or sooner, if need be. (PX 2)

At the arbitration hearing, Petitioner testified that she still desires vocational rehabilitation. After her employment with Respondent ended on November 29, 2011, she received unemployment compensation. Petitioner identified PX 10 as job searches she has completed since receiving unemployment. She started looking for work during the week of May 20, 2012, and she noted she has maintained a steady and consistent job search since then. She has received a couple of phone calls about jobs she has applied for, but was turned down because she did not have office experience. She has only worked in factories.

Petitioner graduated from Sullivan High School in 2003 and then attended SIU in Edwardsville for one year, completing 15 hours of general education classes. At that point, she started working for ISS, a temp service, working at RR Donnelly. She worked for RR Donnelly for about a month and then started working for Ampad, following by Lender's Bagels. None of these jobs required her to do paperwork or work on a computer. For example, at RR Donnelly, she stacked catalogs onto plastic pallets. She also worked for International Paper in Shelbyville, packing lids and boxes. Next, she worked at Hydro Gear and AgriFab factories in Sullivan. She has also worked at Wolf Creek in Windsor, Illinois, which is a campground. There, she did maintenance, including mowing. She believes she has sustained a reduction in earning power and vocational rehabilitation would increase her earning capacity. Petitioner's injury has given her a loss of job security. She has no type of specialized training or specialized skills.

Petitioner testified that she currently cannot go outside in the spring without getting sick. If she cleans floors, she will get sick. If she wipes off a cabinet, she will break out. She will break out on her hands and arms if she touches wood, leaves or toilet paper. If she does anything physical, she experiences shortness of breath. After walking a half a mile, she feels like she cannot get oxygen, and her chest becomes tight. She experiences shortness of breath while walking up and down stairs. In the springtime, she may wear a respirator mask to help with

breathing and during winter, she tries to stay inside as much as possible. She often has an allergic reaction on windy days, noting her skin puffs up and she gets bags under her eyes. When she gets sick, she takes an epinephrine pen for anaphylactic allergic reactions.

On cross-examination, Petitioner stated that she quit smoking in 2010 and does not currently smoke. Petitioner testified she has not smoked since her claim has been pending (2011).

Petitioner testified that she has not re-applied for any jobs with Respondent because she cannot work there. She noted on re-direct examination that no one at Respondent contacted her to her offer her a job after she was placed on restrictions by Dr. Hyers. Respondent's offices are in the same building as where the manufacturing of the cabinets occurs. She does not have secretarial skills.

With respect to her job search, Petitioner testified on cross-examination that she has gone to places, sent her resume to employers, applied on line, and followed up with her applications' status. She has not received any interviews. She has received some calls but was told she was not qualified. When she started at Respondent her rate of pay was $12.35 per hour and when she left it was $14.83 per hour.

On re-direct examination, she noted she has posted her resume on Career Builders, Job-to-Fit, and Monster. She testified that the nicotine patches she purchased, included in the receipts within Petitioner's Exhibit No. 9, were for someone else who lives with her. On re-direct examination, she testified that she was not asking to be reimbursed for charges not related to her treatment. For example, she noted the receipt from January 15, 2012 was for a bill which totaled $172.35, but she was only asking to be reimbursed for the Allegra and allergy medicine.

Joseph McKay was called as a witness for Respondent. He conducted surveillance on Petitioner for six days. On November 18, 2012, there were no observations of Petitioner. On November 21, 2012, he observed Petitioner drive to a Casey's General Store, where she exited her car and lit a cigarette while she placed air into a car tire. She did not apply for any jobs and was not wearing a mask. On January 12, 2013, he was unable to establish surveillance. On January 19, 2013, during the evening, he observed Petitioner stand on her porch and smoke a cigarette. On February 16 and 17, 2013, he observed Petitioner smoking and did not notice her wearing a mask or coughing. The video, which is 30 minutes and 2 seconds, and his reports from the six days were entered into evidence as Respondent's Exhibits Nos. 3 and 4. On cross-examination, McKay noted he could not state what type of cigarettes Petitioner was smoking.

Jeff London testified on behalf of Respondent, noting he has been with Respondent as its safety manager since April 2010. According to London, after Petitioner complained of breathing difficulty, she completed an incident report. He initially investigated the claim in June 2011, and, at that time, Petitioner was working as a tub checker, putting color markers on raw material. There was no sanding or wood cutting involved. Respondent has a collection system to collect dust, but Petitioner's position as a tub check did not involve directly working around points of dust collection. Initially, Respondent denied the claim. However, following the deposition of Dr. Crabtree, which he attended, and the receipt of the IME report, the company changed its

position on causation and accepted the claim. He stated to his knowledge medical bills received as of April 2012 were processed for payment at that time.

London stated that Petitioner did not report any problems with her respirator between August 3, 2011 and August 14, 2011. If she had, Respondent would have tried to accommodate her with a either a full face or half face respirator mask. He disagreed with Petitioner's testimony that when she performed sanding duties, there was no type of dust collection mechanism, stating there were downdraft tables which contain vacuums to extract the dust.

On cross-examination, London stated he did not bring the incident report with him. He did not remember whether Petitioner listed sprays and sealer on the incident report in addition to wood dust. He did not know why Dr. Crabtree's bills as of September 28, 2012 remained unpaid or why Petitioner still has unpaid medical bills.

Respondent called Cheryl Ryan, its safety associate who handles risk management and workers' compensation claims, as a witness. Respondent's Exhibit No. 5 is a chronos report which documented Petitioner's hours and pertains to the time period of January 3, 2011 through November 28, 2011. Ryan testified that Petitioner went on FMLA time on or about June 9, 2011 and at some point came back with a half mask respirator. According to Ms. Ryan, when Petitioner was back at the plant with the half mask between August 3, 2011, and August 14, 2011, she did not make any complaints about not being able to work. On August 15, 2011, Petitioner gave Ryan an off-work slip and was again placed on FMLA time. Ryan tried to contact Petitioner about four times via phone to inform Petitioner her FMLA time was about to end but did not receive a call back from Petitioner. Respondent's Exhibit No. 6 is Petitioner's termination letter. Ryan stated that Respondent has positions in its front office that someone with Petitioner's educational background would be qualified to perform.

On cross-examination, Ryan acknowledged that at the time she called Petitioner about returning to work, she was aware Petitioner had not been returned to work by Dr. Crabtree. Ryan had a note from Dr. Crabtree dated September 12, 2011, taking Petitioner off of work and so Petitioner was going to be terminated regardless of whether she got a hold of her on the phone because her FMLA time was about to expire. Ryan also testified there are no receptionist positions currently available with Respondent.

Petitioner further testified that smoking negatively affects her condition and she cannot be around it – whether it is cigarette smoking or burning leaves.

Respondent offered a computer log of Petitioner's 2011work hours. (RX 5)

<u>The Arbitrator concludes</u>:

1. At the outset the Arbitrator addresses the video surveillance which she viewed and Respondent's contentions concerning Petitioner's credibility as reflected by Petitioner's denials of smoking and video evidence to the contrary. During arbitration Petitioner appeared credible. Petitioner admitted she once smoked and that she quit. She testified that she has not been smoking since her claim has been pending. Video surveillance showed

otherwise and Petitioner did not rebut the video surveillance. Petitioner's failure to be up-front about her smoking is troublesome; however, its impact is not clear. The Arbitrator has reviewed the medical records, especially the doctor's depositions, and while they discuss smoking generally, neither doctor was asked to address or opine regarding the impact of Petitioner's smoking in late November of 2012 or early 2013. There is no evidence she was smoking at any other time. Furthermore, Petitioner's smoking in 2013 does not negate that Petitioner's occupational exposure was a cause of her condition of ill-being nor does it mean she lied to the doctors when she saw told them at times she wasn't smoking. no. There is no evidence that smoking alone, and not the occupational asthma, is contributing to her current condition of ill-being. The Arbitrator also acknowledges that the video surveillance shows Petitioner not wearing a mask and being out of doors. However, she does not find such evidence necessarily contradictory of Petitioner's testimony. Petitioner did not testify that she always wears a mask when outside.

2. Both sides stipulated at trial that Petitioner sustained an accident which arose out of and in the course of her employment. (AX 1) Counsel for Respondent noted in opening remarks that Respondent was not disputing that Petitioner had some occupational induced asthma and further acknowledged Petitioner would continue to need allergy shots to control her condition. However, Respondent contends Petitioner reached maximum medical improvement on February 2, 2012, the day of Dr. Hyers' examination.

   At the time of his deposition, Dr. Crabtree anticipated future treatment would include steroids and anti-inflammatories, as well as Zyflo, which was a non-steroid anti-inflammatory drug for asthma and allergies. She would also need continued immunotherapy. (PX1, p. 27) Dr. Crabtree testified that the Prednisone serves as an anti-inflammatory, but the goal was to wean her off of it and the other treatment to the point where she only needed a bronchodilator. (PX1, p. 27)

   At the time of Dr. Crabtree's deposition in March of 2012 Petitioner was being seen for complaints the doctor believed were unrelated to her work injury (PX 1, p. 26). After the deposition Petitioner underwent a procedure at St. John's Hospital and visits with Dr. Crabtree thereafter included treatment for Petitioner's unrelated histoplasmosis (office visits of 4/9/12, 8/13/12, 9/10/12, 10/22/12 and 11/19/12). By November 19, 2012 the histoplasmosis appears to have resolved and Petitioner's anti-fungal Itraconazole regimen had stopped. Petitioner was "doing great" and all medications were stopped. Three months later they were re-instated due to a flare-up[1].

   Both Drs. Crabtree and Hyers agree Petitioner's asthma is work-related. Both doctors agree she needs permanent work restrictions centering around avoidance of the offending agents and that finding suitable work may be "trial and error." Both agree Petitioner will have flare-ups.

   Although Dr. Hyers believed Petitioner was at maximum medical improvement when he saw her on February 2, 1012, he acknowledged that he did not have any records from Dr. Crabtree after July 22, 2011. Perhaps more importantly, he based his opinion, in part, on

[1] Of note, this was the time period Petitioner is seen outdoors without a mask and smoking.

the fact that Petitioner's biometric findings when he saw her were in the normal range, albeit at the low end. (PX6, p. 38) However, it is noteworthy that when he saw Petitioner, she was on Advair, Allegra, Zyflo, Flonase, and Prednisone -- medications which serve to decrease inflammation in the lungs and the airways and improve pulmonary function. (PX6, p. 38)

The Arbitrator concludes that Petitioner has reached maximum medical improvement as a result of her occupationally-induced asthma and allergies and that she did so on April 9, 2012 when Dr. Crabtree described her condition as stable. He then began treating Petitioner's histoplasmosis which is unrelated and pre-existing. Thereafter, on September 10, 2012 and October 22, 2012 his diagnosis was limited to pneumonia and acute histoplasmosis. As of November 19, 2012 she was doing well with respect to all her problems, including the asthma. The visit on February 18, 2013 is viewed as a flare-up as envisioned by both doctors.

While Petitioner has reached maximum medical improvement, her current condition of ill-being is causally related to her undisputed work accident/exposure. This is based upon a chain of events and the testimony and medical records of Dr. Crabtree and Dr. Hyers. Furthermore, Respondent acknowledged that Petitioner suffered some occupationally-induced asthma.

The parties agreed that Petitioner was entitled to temporary total disability benefits from June 9, 2011 through August 2, 2011 and August 15, 2011 through February 2, 2012. (AX 1) Consistent with the above, the Arbitrator further concludes that Petitioner was also temporarily totally disabled from February 3, 2012 through April 9, 2012 and awards Petitioner temporary total disability benefits for that period of time (a period of 9 4/7 weeks). Respondent shall be given a credit of $14,540.13 for temporary total disability benefits that have been paid.

Dr. Crabtree had Petitioner completely off work until April 9, 2012, at which time he returned her to work with restrictions of not working around wood or trees. (PX8) Petitioner had been terminated by that time after her FMLA time expired. Dr. Crabtree would put permanent restrictions on Petitioner of not working in an environment where she is exposed to woods she has been found to be allergic to. (PX1, p. 45-46) Dr. Hyers opines Petitioner is employable, noting she probably would do much better in a setting of controlled environment, such as an office setting that is free of dust or fumes or smoke, as opposed to a setting where she worked before where she was exposed to some fumes from chemicals. (PX6, p. 25)

There is no evidence that work is available within Petitioner's restrictions. Petitioner requested vocational rehabilitation. None was provided and Petitioner began, in good faith, a job search from May 20, 2012 until shortly before the arbitration hearing in February of 2013. As such, Respondent is ordered to pay Petitioner maintenance benefits of $452.33 per week, commencing April 10, 2012 through February 21, 2013, a period of 45 3/7 weeks.

3. With respect to the medical services, Dr. Hyers testified that Petitioner's treatment to date has been reasonable and appropriate, with the caveat that Petitioner was getting too much steroid. (PX6, p. 3) Thus, Petitioner's bills for services rendered to Petitioner prior to Dr. Hyers' February 2012 report are awarded.

   At trial, Respondent's counsel indicated the bills in dispute are St. John's Hospital and Associated Pathologist bills. (AX 1) Those bills are not awarded as Petitioner failed to prove they were related to her work injury. Dr. Crabtree testified that the condition he was seeing Petitioner for in March of 2012 was a separate one from her asthma and allergies. The treatment at St. John's stemmed from that (ie., histoplasmosis). While Petitioner testified that Dr. Crabtree referred her for blood work, and she incurred a bill from Quest Diagnostics for blood work done on October 17, 2011, at Dr. Crabtree's office, Dr. Crabtree's office notes indicate the labs were drawn for "chronic urticaria." (PX 2) Dr. Crabtree also testified that the urticaria was not related to her work exposure.

   With the exception of the bills to St. John's Hospital, Associated Pathologist, and Dr. Crabtree's charge of $915.00 for services on 3/28/12, Respondent shall pay Petitioner's unpaid medical bills listed in Petitioner's Exhibit No. 9 directly to the providers consistent with the Medical Fee Schedule as established by the Commission for necessary medical services, as provided in Section 8(a) of the Act. Respondent shall reimburse Petitioner for her out-of-pocket payments made towards prescriptions medications related to her condition as reflected on the bill memo contained with the medical bills. Respondent shall be given a credit for medical bills that have been paid by its group health insurer, and Respondent shall hold Petitioner harmless for any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

4. During opening statements, Respondent's counsel indicated that on or about April 17, 2012, Petitioner's claim was accepted and medical bills and TTD were paid (through February 12, 2012). Respondent challenges liability for TTD benefits since February 12, 2012 based upon the report/opinions of Dr. Hyers. Counsel further stated that one day prior to the hearing, she spoke with her claims adjuster, who indicated all bills with Central Illinois Allergy and Respiratory Services, Sarah Bush Lincoln, and Kirby Medical had either been paid or was being paid by the end of the week.

   However, Petitioner testified that her bills remain unpaid. According to Petitioner's Exhibit No. 9, there remains $26,270.60 in outstanding medical bills. As indicated above, however, not all of these bills are being awarded to Petitioner. None of Dr. Crabtree's bills have been paid, even after the claim was apparently accepted following Dr. Hyers' Section 12 report. There further remain several other outstanding medical bills, including bills from Kirby Medical Center for allergy shots. (PX9) Respondent produced no proof of payment of these bills.

   There was no basis for disputing Petitioner's claims for TTD and medical bills after Dr. Hyers' report. In fact Jeff London testified that following the Dr. Crabtree's deposition and receipt of the IME report, the company accepted the claim. Although counsel for Respondent indicated in correspondence dated April 17, 2012 that the bills would be placed

in line for payment, they still had not been paid at the time of the hearing. At the time of arbitration very little was really in dispute. Dr. Hyers and Dr. Crabtree were essentially in agreement. While there was a dispute as to whether Petitioner was at maximum medical improvement or not, the resolution of that issue would not directly impact Respondent's obligations. If Petitioner was not at MMI, additional TTD would be due and owing. If Petitioner was at MMI, maintenance would be an issue.

Section 19(l) of the Act provides for the imposition of a $30.00 per day penalty "for each day that a weekly compensation payment" is withheld or refused "without good and just cause," subject to a $10,000.00 maximum. 820 ILCS 305/19(l). Section 19(k) of the Act authorizes a penalty of 50 percent "of the amount payable at the time of an award" for an "unreasonable or vexatious delay of payment or intentional underpayment of compensation ***." 820 ILCS 305/19(k). Section 16 of the Act provides for the assessment of attorneys' fees and costs when conduct contemplated by Section 19(k) occurs. 820 ILCS 305/16.

With regard to the medical bills, the Arbitrator notes Petitioner testified she never submitted any out-of-pocket expenses or receipts to Respondent for payment, either directly or through its claims administrator, prior to arbitration. The remaining bills (Crabtree, Sarah Bush, Kirby, and Quest Diagnostics) were not disputed as of February 2, 2012 or shortly thereafter. These bills total $18,496.00.

The Arbitrator concludes there was no good or just cause for Respondent to withhold compensation after February 2, 2012. Fifty five weeks, or 385 days, passed between February 2, 2012 and February 21, 2013, the day of arbitration. Thus, Respondent shall pay a penalty of $10,000.00 under Section 19(l) of the Act.

Further, the delay in paying TTD and medical expenses was unreasonable and vexatious, especially in light of Dr. Hyers' causation opinions. Petitioner is entitled to an award of $25,573.26 in penalties under Section 19(k) of the Act ($24,878.15 in TTD and maintenance benefits plus $18,496.00 in medical expenses = $43,374.15, and 50% of $43,374.15 = $21,687.07).

Finally, Petitioner is entitled to an award of $8,674.83 in attorneys' fees under Section 16 of the Act ($24,878.15 in TTD and maintenance benefits plus $18,496.00 in medical expenses = $43,374.15, and 20% of $43,374.15 = $8,674.83).

5. Petitioner is awarded a vocational assessment pursuant to Section 7110.10 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission and National Tea.

   Section 8(a) of the Act requires the respondent to pay for the "physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a). Section 7110.10 of the Rules requires the parties to work together to prepare a written assessment of the course of medical care, and, if appropriate, rehabilitation required to return the injured worker to employment when (as here) it can be reasonably determined that the injured worker will, as a result of the injury,

be unable to resume the regular duties in which she was engaged at the time of her injury or when the period of total incapacity for work exceeds 120 continuous days, whichever comes first.

Petitioner has sustained an injury which has rendered her unable to return to work for Respondent. Petitioner has looked for work but to no avail. The doctors have indicated that finding a suitable job for Petitioner will require "trial and error." Such an endeavor will require some assistance – at a minimum an assessment of what options might be out there. Petitioner's Exhibit No. 12, the job searches, demonstrates she has applied to approximately five jobs per week since May 24, 2012. (PX12) They have consisted of a variety of jobs from gas stations, fast food restaurants, auto part stores, hardware stores, and department stores. (PX12) Petitioner's job searches have been consistent with the restrictions of Dr. Hyers and Dr. Crabtree. Despite her efforts, she has not yet found employment.

Under these circumstances, a vocational assessment is in order.

6. Both Dr. Crabtree and Dr. Hyers agree Petitioner will need future treatment due to flare-ups and exacerbations. Dr. Hyers noted that future treatment could include allergy shots. (PX6, p. 44) Dr. Crabtree agreed she would also need continued immunotherapy. (PX1, p. 27) No specific prospective medical care has been requested by Dr. Crabtree. Petitioner may return to Dr. Crabtree as she and he see fit. Petitioner's rights under Section 8(a) remain open. Prospective medical care is denied.

****

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Julia Guzman,

Petitioner,

14IWCC0056

vs. NO: 12 WC 08989

ABM Janitorial Services,

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 accident, medical expenses, prospective medical care, and temporary total disability benefits, 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 notes that on February 8, 2012, Dr. Krishna Patel took Petitioner off work for one week. (PX1,RX4) The Commission further notes that Petitioner was not taken off work again until Petitioner saw Dr. Lee De Las Casas on February 24, 2012. (PX12) Neither Dr. De Las Casas nor any of Petitioner's other medical providers has released Petitioner to return to work since she was taken off work on February 24, 2012. Therefore, the Commission finds that Petitioner has established entitlement to temporary total disability benefits from February 8, 2012 through February 14, 2012 and from February 24, 2012 through March 22, 2013, the date of the Arbitration hearing.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on May 6, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to

the Petitioner the sum of $286.00 per week for a period of 57-1/7 weeks, from February 8, 2012 through February 14, 2012 and from February 24, 2012 through March 22, 2013, 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 $20,711.11 for medical expenses under §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for the lumbar fusion surgery at L5-S1 recommended by Dr. Marc Lorenz and post-surgical physical therapy and any other future related, reasonable and necessary medical treatment pursuant to §8(a) of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $37,200.00. 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: JAN 29 2014
MJB/ell
o-01/16/14
52

Michael J. Brennan

David L. Gore

Mario Basurto

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

14IWCC0056

GUZMAN, JULIA
Employee/Petitioner

Case# **12WC008989**

ABM JANITORIAL SERVICES
Employer/Respondent

On 5/6/2013, 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:

2512 THE ROMAKER LAW FIRM
CHARLES P ROMAKER
211 W WACKER DR SUITE 1450
CHICAGO, IL 60606

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
KAREN A HAARSGAARD
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602-4195

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)

Julia Guzman
Employee/Petitioner
v.
ABM Janitorial Services
Employer/Respondent

Case # **12** WC **8989**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was tried by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Waukegan**, on **March 22, 2013**. After reviewing all of the evidence presented regarding **the February 6, 2012 accident**, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [ ] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [ ] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [x] Other **Future medical pursuant to Section 8A and PPD if the arbitrator determines Petitioner is at MMI**

FINDINGS

On February 6, 2012, Respondent *was* operating under and subject to the provisions of the Act.

On February 6, 2012, an employee-employer relationship *did* exist between Petitioner and Respondent.

On February 6, 2012, 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.

During the 6 weeks preceding the injury, Petitioner earned **$2,491.00**; the average weekly wage was **$415.17.**

On the date of accident, Petitioner was **46** years of age, married with **1** dependent child.

ORDER

Temporary Total Disability:

Respondent shall pay Petitioner temporary total disability benefits commencing February 8, 2012 through the date of trial, March 22, 2013, for a total TTD awarded of 58 and 4/7ths weeks times a minimum TTD rate of $286.00 as provided in Section 8(b) of the Act, totaling **$16,710.41**. In addition, Petitioner is awarded continuing TTD to be paid from March 23, 2013 at $286.00 per week.

Medical Bills:

Respondent shall pay **$20,711.11 in medical bills after reduction for the Fee Schedule** for necessary medical expenses, as provided in Section 8(b) of the Act. (See Attached List of Medical Bills) Pursuant to Arbitrator Lee's order, Petitioner is submitting a list of the medical bills reduced to the Fee Schedule by provider. (See Attached Petitioner's Fee Schedule Reduction)

Future Medical Treatment Pursuant to Section 8A:

The Arbitrator awards Petitioner future medical treatment pursuant to Section 8A, *inter alia*, the lumbar fusion surgery at L5-S1 recommended by Dr. Marc Lorenz and post-surgical physical therapy and any other future related, reasonable and necessary medical treatment pursuant to Section 8A of the Act and supported by the medical evidence.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of compensation.

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.

Edwin Lee
Signature of Arbitrator

5/6/13
Date

MAY -6 2013

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Julia Guzman
Employee/Petitioner
v.
ABM Janitorial Services
Employer/Respondent

Case # **12** WC **8989**

FINDINGS OF FACT

This matter was tried on March 22, 2013 and Petitioner testified on that date. The matter was tried as a 19b since Petitioner had yet to reach MMI regarding her low back condition. On March 22, 2013, Petitioner, Julia Guzman testified that she was born on April 6, 1965, was 46 years old and married with one dependent child on the date of accident, February 6, 2012. (Tr. p.12-13; Arbitrator's Exhibit 1, Request for Hearing Sheet at paragraph 6).

On February 6, 2012, Petitioner had been employed by ABM Janitorial Services for the prior six weeks. (Tr. p. 8 and Arbitrator's Exhibit 1, par. 5). The parties stipulated that Petitioner had an average weekly wage of $415.17. (*See* Arbitrator's Exhibit 1, Request for Hearing Sheet at paragraph 5). The Petitioner testified that she worked for ABM Janitorial at an office building in Deerfield as a cleaning person. (Tr. p. 9). Petitioner's job was to clean the offices and bathrooms, vacuum, take out trash, mop floors and vacuum the lobby area. (Tr. p. 9).

On February 6, 2012, Petitioner's shift was from 5:00 pm to 1:00 am. (Tr. p. 10). On that date, Petitioner had an accident at approximately 10:00 pm. (Tr. 16). Petitioner testified that she was vacuuming a carpet in the third floor lobby and the corner of the carpet got caught in the vacuum. (Tr. p. 11-12). When Petitioner attempted to pull the vacuum back to release the carpet from the vacuum, she immediately felt a sharp pain in her low back. (Tr. p. 12). As she pulled the vacuum back, Petitioner leaned backward but did not fall. (Tr. p. 13).

Petitioner testified that she continued working on February 6, 2012 and finished her shift. (Tr. p.14). Petitioner testified that when she woke up the next morning, February 7, 2012, she had trouble getting out of bed because of the severe low back pain she was experiencing. (Tr. p. 14).

On Cross-Examination, Petitioner testified that she was required as part of her job to take the garbage from the offices and put them into a large container, which she took down to the basement by elevator and was required to lift and carry to a dumping area. (Tr. p. 30-31). Petitioner also testified that on the night of the accident, February 6, 2012, she spoke with her supervisor, Juan Corona, and told him that she had hurt her low back. (Tr. p. 33-34). According to Petitioner, Juan Corona told her that "I see that you're in bad shape. You're not walking right." (Tr. p. 34). But, Juan Corona asked the Petitioner to finish her shift, which she did. (Tr. p. 34-35).

On February 7, 2012, Petitioner called in sick, telling Juan Corona that her back hurt and she was not coming into work. (Tr. p.35-36).

MEDICAL TREATMENT

Petitioner testified that on February 8, 2012, she went to see her family doctor, Dr. Krisna Patel of Midtown Physicians. (Tr. p. 17; see Petitioner's Exhibit 1). Petitioner told Dr. Patel that she hurt her low back at work while she was working with house cleaning. (See Petitioner's Exhibit 1, at 2-8-2012 Note). Dr. Patel's examination on that date was that Petitioner had tenderness over the right SI joint and was able to do 45 degrees flexion, after which she was in significant pain. (Id.). Dr. Patel noted in his 2-8-2012 office note that Petitioner's gait was antalgic with a forward bend and that Petitioner was unable to sit at 90 degrees due to pain. (Id.). Dr. Patel had a lumbar and pelvic X-ray performed on 2-8-2012 as well. (See Petitioner's Exhibit 1). On February 8, 2012, Dr. Patel prescribed Flexeril and Cataflam and placed Petitioner off work for one week. (See Petitioner's Exhibit 1, at 2-8-2012 Note).

Petitioner testified that she faxed Dr. Patel's off work note to Raul Ceja of ABM that same day, February 8, 2012. (Tr. p. 17 & 37).

On February 14, 2012, Petitioner again saw Dr. Patel. (See Petitioner's Exhibit 1, at 2-14-2012 Note). Dr. Patel noted Petitioner's low back was somewhat better, but she still had difficulties sitting for too long and thus, prescribed continuing medications and physical therapy. (Id.).

On February 21, 2012, Dr. Patel again examined Petitioner, noting that Petitioner was "feeling a little better" and had "No pain now on walking and bending". (See Petitioner's Exhibit 1, at 2-21-2012 Note). When Petitioner was asked on cross-examination if she had told Dr. Patel she was feeling no pain on 2-21-2012, she denied ever telling that. (Tr. p. 18). On 2-21-2012, Dr. Patel prescribed continued Mortin and Flexeril for pain. (See Petitioner's Exhibit 1, 2-21-2012 note).

On February 24, 2012, Petitioner was seen by Dr. Lee De las Casas at Rehab Dynamix. (See Petitioner's Exhibit 2). On that date, Petitioner gave the history of injury that she was injured at work when she flexed forward and lifted a vacuum cleaner with both her hands and felt immediate pain in her low back. (See Petitioner's Exhibit 2 at 2-24-2012 note). Dr. De las Casas noted in his 2-24-2012 report that Petitioner had informed her supervisor what had happened. (Id.). The history and notice description that Petitioner gave to Dr. De las Casas on 2-24-2012 are consistent with Petitioner's testimony in this matter. Further, Dr. De la Casas examination of Petitioner on 2-24-2012 demonstrated a positive straight leg (SLR) test with a pain score of 8/10. (Id.). On February 24, 2012, Dr. De la Casas prescribed physical therapy, referred Petitioner to pain management specialist, Dr. Jain, and placed her off work for two weeks. (Id.).

Petitioner underwent physical therapy for her low back injury at Rehab Dynamix with Dr. De La Casas on 2-27-2012, 2-28-2012, 2-29-2012, 3-5-2012, and 3-6-2012. (See Petitioner's Exhibit 2). On March 8, 2012, Dr. De las Casas performed a re-evaluation upon Petitioner. (Id. at 3-8-2012 note). On that date, Petitioner complained of lumbar pain radiating into her left lower extremity with 7/10 pain. (Id.). Petitioner still had a positive SLR test and thus, was prescribed four more weeks of physical therapy. (Id.). It was also noted that Petitioner had an appointment with Dr. Jain at Chicago Pain in the next week. (Id.). Finally, Petitioner was placed off work for an additional three weeks by Dr. de la Casas. (Id.).

On February 29, 2012, Petitioner saw Dr. Neera Jain at Chicago Pain and Orthopedic at the referral of Dr. De las Casas. (See Petitioner's Exhibit 4). Again, Petitioner gave Dr. Jain the history of lifting and pulling the vacuum on February 6, 2012 and advising her supervisor of the injury. (Id. at 2-29-2012 note). Dr. Jain's examination demonstrated a positive SLR on the left and limited range of motion of the lumbar spine with axial pain with forward flexion and extension. (Id.). Accordingly, Dr. Jain referred Petitioner for a lumbar MRI. (Id.).

On March 2, 2012, Petitioner underwent a lumbar MRI at Advantage MRI of Oak Park. (See Petitioner's Exhibit 6). The MRI findings were Grade 2 anterolisthesis of L5 on S1 and a large annular bulge at L5-S1. (Id.).

On March 14, 2012, Petitioner had a follow up appointment with Dr. Jain. (See Petitioner's Exhibit 4 at 3-14-2012 note) Dr. Jain noted on March 14, 2012 that the lumbar MRI demonstrated L4-5 and L5-S1 foraminal narrowing with left lower extremity radiating pain. (Id.). Dr. Jain prescribed L4-5, L5-S1 transforaminal epidural injections and an EMG of the lower extremities performed. (Id.) Petitioner was again ordered off work by Dr. Jain. (Id.).

Petitioner underwent further physical therapy for her low back injury at Rehab Dynamix with Dr. De La Casas on 3-12-2012, 3-13-2012, 3-14-2012, and 3-20-2012. (See Petitioner's Exhibit 2).

On March 20, 2012, Dr. De las Casas gave Petitioner a referral for a lower extremity EMG. (See Petitioner's Exhibit 2). On March 28, 2012, Petitioner underwent an EMG, which demonstrated evidence of left L4, L5 and S1 lumbar spine radiculopathy, which correlated with Petitioner's complaints. (See Petitioner's Exhibit 2, Rehab Dynamix records containing the EMG Report).

Petitioner continued physical therapy treatment with Dr. De las Casas through April 4, 2012. On that date, Petitioner had positive SLR and had reduced lumbar range of motion in extension and flexion. (See Petitioner's Exhibit 2, at 4-4-2012 note). On 4-4-2012, Dr. De las Casas placed Petitioner off work for an additional four weeks. (Id.)

On March 27, 2012, Petitioner underwent a lumbar epidural injection at L4-5 and L5-S1 by Dr. Jain at Accredited Ambulatory. (See Petitioner's Exhibit 4). On April 25, 2012, Petitioner again saw Dr. Jain at Chicago Pain & Orthopedic. On that date, Petitioner indicated that she had significant pain relief after the lumbar injection, but that the pain returned. (See Petitioner's Exhibit 4 at 4-25-2012 note). Petitioner had a positive SLR on the left with reduced lumbar range of motion. (Id.) Dr. Jain recommended a second lumbar injection and continued physical therapy with Dr. De las Casas. (Id.). Petitioner was again placed off work by Dr. Jain. (Id.).

Dr. Jain saw Petitioner again on May 23, 2012. (See Petitioner's Exhibit 4 at 5-23-2012 note). On that date, Dr. Jain noted that Petitioner had an EMG of the lower extremity that demonstrated a left sided L4, L5 and S1 radiculopathy. (Id.).

Dr. Mark Lorenz' Deposition Testimony

Petitioner testified that Dr. Jain referred her to Dr. Mark Lorenz. (Tr. p. 21). On June 14, 2012, Dr. Lorenz saw Petitioner and he took a history of her injury that Petitioner was pulling a vacuum hose

when she was injured. (See Petitioner's Exhibit 12, Evidence deposition of Dr. Lorenz at p. 7 and Petitioner's Exhibit 10 at Dr. Lorenz note of 6-14-2012). Dr. Lorenz testified that when he saw Petitioner on June 14, 2012, Petitioner's lumbar spine had a decreased range of motion with tripoding, which is when Petitioner puts her hands on her knees to straighten up her low back because she is unable to do it normally. (Petitioner's Exhibit 12 at p. 8-9). Petitioner also had a positive straight leg raise on the left, which was consistent with her left leg radiating pain complaints, as documented by all her doctors. (Id. at p. 8-9).

Dr. Lorenz' causation opinion was that Petitioner had an asymptomatic condition, spondylolythesis with spondylolysis in her low back that was made symptomatic by the work injury of February 6, 2012. (See Petitioner's Exhibit 12, Evidence deposition of Dr. Lorenz at p. 10-12). Dr. Lorenz recommended a decompression on the left side of L5 with a one level fusion at L5-S1. (Id. at p. 13).

On June 14, 2012, Dr. Lorenz recommended that Petitioner be restricted from performing any activities that involved lifting or bending and also, placed her off work. (See Petitioner's Exhibit 12, Evidence deposition of Dr. Lorenz at p. 13). Dr. Lorenz reviewed the Petitioner's EMG and stated it demonstrated abnormality in her lumbar nerve roots, which also clinically correlated with her straight leg raise on the left. (Id. at p. 15). Dr. Lorenz also reviewed the lumbar discogram performed by Dr. Jain on 8/14/2012, which showed one positive level at L5-S1, and which matched the radiographic MRI and EMG findings **perfectly**. (Id. at p. 16).

Petitioner saw Dr. Lorenz again on October 29, 2012, with similar examination and surgical recommendations. (See Petitioner's Exhibit 12, Evidence deposition of Dr. Lorenz at p. 17-18). At his deposition, Dr. Lorenz had several opinions:

1) Dr. Lorenz testified that Petitioner's low back condition he described was caused by and/or aggravated by the work accident of February 6, 2012;

2) Dr. Lorenz testified that the lumbar fusion he was recommending for Petitioner was caused by and necessitated by the work accident of February 6, 2012;

3) Dr. Lorenz testified that he placed Petitioner off work as a result of the painful and unstable lumbar spine that resulted from the work injury of February 6, 2012;

4) Dr. Lorenz testified that all the physical therapy treatment Petitioner underwent was reasonable and necessary and necessitated by the work injury of February 6, 2012; and

5) Dr. Lorenz testified that Petitioner will not be able to return to work if she does not have the lumbar fusion he prescribed ant that she should have and FCE followed by permanent restrictions.

(See Petitioner's Exhibit 12, Evidence deposition of Dr. Lorenz at p. 18-22).

On cross-examination Dr. Lorenz testified that Petitioner should have a one level fusion at L5-S1 and that she would be off work for at least six months. (See Petitioner's Exhibit 12, Evidence

deposition of Dr. Lorenz at p. 35). At trial, Petitioner testified that she did want to undergo the lumbar fusion surgery. (Tr. at p. 28).

Petitioner continued to undergo physical therapy with Dr. De las Casas until July 10, 2012, and it was suspended at that time until Petitioner had the fusion surgery prescribed by Dr. Lorenz. (See Petitioner's Exhibit 2 at 7/10/2012 Note). Dr. De las Casas placed Petitioner off work until she underwent the lumbar fusion. (Id.).

In spite of being ordered off work by Dr. De las Casas, Dr. Jain and Dr. Lorenz, Petitioner attempted to return to work on July 12, 2012 as a result of Dr. Hsu's IME report. (Tr. p 23). Petitioner testified that she went to work and her supervisor, Juan Corona, looked at her and told her that she could not work like that and thus, sent her home. (Id. at 26-27). Indeed, Mr. Corona told Petitioner, "NO", and sent her home. (Id.).

After Petitioner had the discogram in August 2012, Petitioner continued to follow up with Dr. Jain on 8/22/2012, 10/5/2012, 11/2/2012, 12/7/2012, 1/10/2013, 2/11/2013 and 3/21/2013, and each visit Dr. Jain placed Petitioner off work after examining her. (Petitioner's Exhibit 2).

Petitioner testified and Dr. Patel, Dr. De las Casas, Dr. Jain and Dr. Lorenz records all demonstrate that Petitioner was placed off work by a doctor's orders from February 8, 2012 through the trial date of March 22, 2013, and beyond. (Tr. p. 1-24 and Petitioner's Exhibits 1, 2, 3, 10 and 12).

Dr. Hsu IME and Deposition Testimony

Petitioner testified that Dr. Hsu did not examine her or touch her at the IME exam on June 27, 2012. (Tr. p. 22). Dr. Hsu testified at his deposition that Petitioner gave him a history that she was vacuuming on February 6, 2012 and there was a particular incident where she felt a pain in her low back and this led to low back pain with some buttock's pain. (Respondent's Exhibit 1, Evidence Deposition of Dr. Hsu at p. 7). Dr. Hsu testified that the medical records confirmed that her injury on February 6, 2012 occurred while she was vacuuming. (Id. p. 7). Dr. Hsu admitted that Petitioner had a limited range of motion for lumbar flexion and extension when he examined her on June 27, 2012. (Id. at p. 19). Dr. Hsu also admitted that lifting and twisting a vacuum would be a type of motion that could cause a back injury. (Id. at p. 34, L22-24). Even Dr. Hsu found that Petitioner's clinical presentation, the discogram and the EMG were all consistent with a left sided L5-S1 disc injury. (Id. p 36).

Most importantly Dr. Hsu admitted that the limited range of motion of the lumbar spine could be related to the work accident of 2/6/2012. (Respondent's Exhibit 1, Evidence Deposition of Dr. Hsu at p. 36, L24 and p. 37, L1-5). Dr. Hsu also admitted that all the medical attention Petitioner had up to 6/27/2012 would be appropriate to treat a lumbar strain. (Id. p. 37, L6-15). Dr. Hsu was not able to say if Petitioner could return to work lifting greater than 25 lbs. (Id. at p. 38, L1-18). Respondent did not give any formal job description to Dr. Hsu, but Respondent's attorney merely described what she thought the job entailed. (Id. at p. 30, L 6-23). Thus, Dr. Hsu had no basis for his opinion regarding Petitioner's ability to return to work.

Respondent's Witnesses Jose Cortez and Raul Ceja

Respondent called Jose Cortez as a witness. Jose Cortez was a supervisor who worked for ABM Janitorial for 28 years. (Tr. pp. 47-56). Mr. Cortez testified that Petitioner had to take the trash form the offices and put them in a 44-gallon bag and transport that bag to the basement. (Id. at p. 48-49). Mr. Cortez testified that the 44-gallon bags weighed between 15 and 20 lbs. (Id. at p. 51). Mr. Cortez testified regarding the carpet on the third floor where Petitioner testified she was hurt and also spoke about Petitioner's other duties for ABM. (Id. pp. 52-53).

Mr. Cortez testified that Petitioner attempted to return to work on July 12, 2012. (Tr. p. 53). Mr. Cortez was told by Juan Corona that Petitioner attempted to return to work, but that she had pain and Juan Corona told her "if you have pain, how are you coming to work." (Tr. p. 53). Petitioner told Juan Corona that the doctor (Dr. Hsu) was sending her to work. (Id.). Mr. Corona told Petitioner to go back home. (Tr. p. 54).

Again, Juan Corona did not testify and almost all of this testimony was hearsay testimony since Mr. Cortez was not present on February 6, 2012 when the accident occurred and he was not present when Petitioner attempted to return to work on July 12, 2012. (Tr. p. 56).

Respondent also called Raul Ceja as a witness. Mr. Ceja has been employed by ABM for 13 years. (Tr. p. 58). Mr. Ceja hired Ms. Guzman, and he was the manager of the building where Petitioner was injured. (Tr. p. 58) Mr. Ceja testified that he saw Petitioner in his neighborhood and they talked about her activities and Petitioner's disabled grandson. (Tr. pp. 59-62).

ISSUES

On the Request for Hearing form/ Stip Sheet, the parties indicated that the matters in dispute were accident, causal connection to current condition of ill-being, liability, reasonableness and necessity for unpaid bills, Petitioner's allegation of TTD period from February 7, 2012 through the date of hearing, March 22, 2013 and future medical pursuant to Section 8A, namely the lumbar fusion surgery prescribed by Dr. Lorenz. (See Arb. Ex. 1, Request for Hearing Form).

CONCLUSIONS OF LAW

Regarding Issue C, whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, Arbitrator holds the following:

Petitioner testified that on February 6, 2012, she started work at 5:00 pm. and at approximately 10:00 pm, she was vacuuming a rug on the third floor and the vacuum caught the corner of the rug and she pulled the vacuum back, injuring her low back. Petitioner testified she reported the accident to her supervisor, Juan Corona. According to Petitioner, Juan Corona told her "I see you are in bad shape. You are not walking right." At Mr. Corona's request Petitioner worked out her shift. Since Juan Corona did not testify at the hearing, the Petitioner's testimony is unrebutted as to the accident. Dr. Lorenz and Dr. Hsu both testified that the mechanism of injury described could cause a low back injury. Petitioner denied she injured her back previously. (Tr. p. 39).

Petitioner saw Dr. Patel on February 8, 2012. Petitioner told Dr. Patel that she hurt her low back at work while she was working. (See Petitioner's Exhibit 1). Petitioner also told Dr. Jain, Dr. Lorenz and Dr. Hsu that she injured her low back at work on February 6, 2012 while using a vacuum.

Since there is no testimony or evidence to the contrary, the Arbitrator finds that Petitioner sustained an accident which arose out of and in the course of her employment with ABM Janitorial on February 6, 2012.

Regarding Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, Arbitrator holds the following:

Petitioner testified that she worked from November 2011 to February 6, 2012 for Respondent ABM. There was no evidence she missed any work for ABM or ever complained of her low back bothering her. Petitioner testified that while vacuuming a rug, she injured her low back on February 6, 2012. The office notes of Dr. Patel, Dr. De las Casas and Dr. Jain all had a consistent history of injury. Dr. Lorenz' history was that Petitioner injured her low back while pulling the vacuum at work and she fell down. Petitioner testified that she did pull the hose, but did not fall down.

Respondent's IME doctor stated initially that he did not believe that Petitioner could have aggravated a pre-existing condition -- her spondylolisthesis -- by vacuuming or pulling the vacuum. (Respondent's Exhibit 1, Dr. Hsu deposition at p. 32, L 11-24 and p. 33, L1-2). Dr. Hsu's initial opinion was that a work accident could not have aggravated the spondylolisthesis. (Id. p. 34, L3-5) However, when asked on cross-examination whether it was his opinion that Petitioner could have suffered a low back strain, Dr. Hsu agreed that pulling and twisting of a vacuum hose could have caused a lumbar strain. (Tr. p. 34, L23-24 and p. 35, L1-4). Dr. Hsu also testified that Petitioner had reduced range of motion of her lumbar spine on flexion and extension when he examined her on June 27, 2012. (Id. p 36, L 20-23).

In addition, Dr. Mark Lorenz testified that Petitioner's spondylolisthesis and her low back condition were clearly aggravated by the work injury of February 6, 2012. (Petitioner's Exhibit 12,

Deposition of Dr. Lorenz, p. 11, L9-15 and p. 19, L 1-16).

Therefore, the Arbitrator concludes that based upon the totality of the evidence that Petitioner's current condition of ill-being relative to Petitioner's low back injury was caused by the work accident of February 6, 2012.

Regarding Issue J, whether the medical services that were provided to Petitioner reasonable and necessary, Arbitrator holds the following:

As outlined in detail above, Petitioner's lumbar condition is causally related to her work injury of February 6, 2012. Petitioner had medical treatment from February 8, 2012 with Dr. Patel, Dr. De las Casas, Dr. Jain at Chicago Pain and Dr. Lorenz and each billed for their medical services. Pursuant to Arbitrator's request, Petitioner has submitted a Fee Schedule reduction of the medical bills by provider. (See attached Fee Schedule reduction).

Petitioner's treating doctors treated her from February 8, 2012 until the day before the hearing, March 21, 2013. Respondent did not submit any Utilization Reviews regarding the reasonable and necessity of the medical treatment or charges. Respondent's IME doctor, Dr. Hsu, agreed that if Petitioner suffered a lumbar strain that al medical attention up to the date of his examination, June 27, 2012 would have been appropriate. (Respondent's Exhibit 1, Deposition of Dr. Hsu, p. 37, L 6-15)

The treatment with Dr. De las Casas was terminated on July 10, 2012 pending the lumbar fusion and as a result nearly all that treatment was admittedly reasonable per Dr. Hsu's testimony. The MRI, EMG and much of the medical treatment at Chicago Pain also occurred by the IME exam of June 27, 2012.

Thereafter, Dr. Jain gave Petitioner a discogram, which was positive at L5-S1 and which, taken together with the positive EMG and clinical presentation, all demonstrated that Petitioner had a left sided lumbar radiculopathy and pain response at L5-S1. Dr. Lorenz and Dr. Jain's testing and examinations demonstrate the ongoing problems Petitioner was suffering in her lumbar spine.

In fact, Dr. Lorenz examined Petitioner on June 14, 2012 and found a positive straight leg raise on the left and limited range of motion in flexion and extension of the lumbar spine. Dr. Hsu's examination on June 27, 2012 demonstrated similarly that Petitioner had a limited range of motion of the lumbar spine and that limited range of motion could have been related to a lumbar strain. (Respondent's Exhibit 1, at p. 37, L1-5).

Therefore, the Arbitrator finds that Respondent is liable for the all unpaid medical bills as stated in Petitioner's Exhibits 3,5,6, 8, and 9. The arbitrator orders Respondent to pay directly to Petitioner the following amounts for unpaid medical bills as reduced to the medical fee schedule as reflected in Petitioner's Fee Schedule Exhibit(*See Petitioner's Fee Schedule Reduction attached*), Rehab Dynamix $4,685.72, Chicago Pain $6,010.35, Advantage MRI $2,717.30, Accredited Ambulatory Care $6,480.91, Metro Milwaukee Anesthesia $410.00 and Hinsdale Orthopedics, $406.56, totaling $20,711.11. (Id.). The arbitrator directs Respondent to pay the sum directly to Petitioner through his attorney, The Romaker Law Firm.

Regarding Issue K, whether Petitioner is owed TTD from February 8, 2012 to the date of the trial March 22, 2013, Arbitrator holds the following:

Section 8(b) of the Act provides for temporary total disability benefits to be paid to the injured employee. 820 ILCS 305/8(b), 310/7. The period of temporary total incapacity is that temporary period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. *Mt. Olive Coal Co. v. Industrial Commission*, 295 Ill. 429, 129 N.E. 103, 104 (1920). If the employee has been released to light duty but the employer does not accommodate this light duty, then the employer may is obligated to pay for benefits equal to the TTD rate. *See J.M. Jones Co. v. Industrial Commission*, 71 Ill.2d 368, 375 N.E.2d 1306, 1309, 17 Ill.Dec. 22 (1978); *E.R. Moore Co. v. Industrial Commission*, 71 Ill.2d 353, 376 N.E.2d 206, 210, 17 Ill.Dec. 207 (1978).

Petitioner was placed off work by Dr. Patel on February 8, 2012 and that off work note was faxed to Respondent. Petitioner was thereafter placed off work by Dr. Patel, Dr. De las Casas, Dr. Jain and Dr. Lorenz through March 21, 2013. In these notes Petitioner was totally incapacitated from work by reason of her low back condition caused by her work injury of February 6, 2012. Respondent's IME doctor, Dr. Hsu, stated that Petitioner was at MMI on June 27, 2012. Thus Petitioner is owed TTD at least from February 8, 2012 until June 27, 2012.

However, Dr. Hsu never saw a job description stating that Petitioner's job only required 25 lbs. lifting. (Respondent's Exhibit 1, p. 30, L 1-24 and p. 31, L 1-9). Respondent's IME doctor's opinion is thus totally speculative as to whether petitioner could return to work. In further support of this point, Dr. Hsu was asked on cross-examination if Petitioner had to lift up to 50 lbs. occasionally at work whether Petitioner could return to work and he testified he did not know. (Respondent's 1, p.37, L 21-24 and p. 38, L1-18). Dr. Hsu had no real basis as to why he opined that Petitioner could return to work full duty.

By contrast, Dr. Lorenz testified that Petitioner would not be able to return work as a result of her work injuries after seeing Petitioner on June 14, 2012, and again on October 29, 2012. Specifically, Dr. Lorenz testified that Petitioner could not return to work unless she had the lumbar fusion or had an FCE followed by restrictions. (Petitioner's Exhibit 12, p. 21, L 18-24 and p. 22, L 1-12).

Therefore, the Arbitrator awards Petitioner TTD benefits of $286.00 per week for 58 and 5/7ths, for the period of February 8, 2012 to March 22, 2013, totaling $16,710.41. In addition, Petitioner requests continuing TTD to be paid from March 23, 2013 onward until Petitioner is found to be at MMI and capable of returning to suitable employment.

Regarding Issue O, whether Petitioner should be awarded future medical Pursuant to Section 8A, the Lumbar Fusion Surgery Recommended by Dr. Lorenz, the Arbitrator holds the following:

In this case, Dr. Marc Lorenz testified that he recommended that Petitioner undergo a fusion of L5-S1 with a decompression of the S1 nerve root. (Petitioner's Exhibit 12, P. 13, L 4-6 and P. 20, L. 1-5). Dr. Lorenz based his surgical opinion on the fact that Petitioner had undergone extensive conservative care of physical therapy and injections. (Id. at p. 12, L 12-24). In addition, Dr. Lorenz based his opinion on the lumbar EMG, which showed left L4, L5 and S1 radiculopathy as well the lumbar discogram, which showed concordant pain at L5-S1, which correlated with his clinical exam findings. (Petitioner's Exhibit 12, p.14, L 10-24 and p. 15, L 1-7 and P. 16, L 2-24).

Dr. Lorenz' examinations revealed low back pain, signs of instability on range of motion and a positive straight leg test on the left. (Petitioner's Exhibit 17, L 14-22).

Respondent's IME doctor, Dr. Hsu, found Petitioner to be at MMI because he stated she had no neurological deficits yet he himself testified that she had diminished range of motion of the lumbar spine. Dr. Lorenz saw Petitioner two weeks before Dr. Hsu and found positive SLR on the left and limitations of range of motion of the lumbar spine. Dr. Hsu fails to explain why Petitioner had a positive EMG and discogram, and yet, is at MMI and could return to work.

The Arbitrator finds the reasoning of Dr. Mark Lorenz more convincing than that of Dr. Hsu, and finds that the testimony and the medical evidence, as a whole, supports the need for the lumbar fusion surgery as well as post-surgical treatment. Thus, the Arbitrator awards the lumbar fusion recommended by Dr. Lorenz and post-surgical medical treatment.

DATED AND ENTERED _____, 2013

_____

Arbitrator Edward Lee

Petitioner's Fee Schedule Reduction of Medical Bills

14IWCC0056

Rehab Dynamix, Ltd				
Date of Service	Code	Charge	FSA	POC
3/21/2012	E0745	$803.00	$427.20	POC53.2
4/2/2012	97010	$31.00	$20.31	
4/3/2012	97010	$31.00	$20.31	
4/4/2012	97010	$31.00	$20.31	
4/9/2012	97010	$31.00	$20.31	
4/16/2012	97010	$31.00	$20.31	
4/17/2012	97010	$31.00	$20.31	
4/19/2012	97010	$31.00	$20.31	
4/23/2012	97010	$31.00	$20.31	
4/25/2012	97010	$31.00	$20.31	
4/30/2012	97010	$31.00	$20.31	
5/2/2012	97010	$31.00	$20.31	
5/3/2012	97010	$31.00	$20.31	
5/7/2012	97010	$31.00	$20.31	
5/8/2012	97010	$31.00	$20.31	
5/10/2012	97010	$31.00	$20.31	
5/14/2012	97010	$31.00	$20.31	
5/15/2012	97010	$31.00	$20.31	
5/16/2012	97010	$31.00	$20.31	
5/21/2012	97010	$31.00	$20.31	
5/22/2012	97010	$31.00	$20.31	
5/23/2012	97010	$31.00	$20.31	
5/29/2012	97010	$31.00	$20.31	
5/30/2012	97010	$31.00	$20.31	
6/4/2012	98940	$45.00	$32.75	
6/4/2012	97140	$59.00	$42.65	
6/4/2012	97014	$39.00	$26.03	
6/4/2012	97545	$206.00	$154.09	
6/4/2012	97010	$31.00	$20.31	
6/5/2012	99213	$97.00	$64.92	
6/5/2012	97535	$63.00	$40.62	
6/5/2012	98940	$45.00	$32.75	
6/5/2012	97140	$59.00	$42.65	
6/5/2012	97014	$39.00	$26.03	
6/5/2012	97545	$206.00	$154.09	
6/5/2012	97010	$31.00	$20.31	
6/7/2012	98940	$45.00	$32.75	
6/7/2012	97140	$59.00	$42.65	
6/7/2012	97014	$39.00	$26.03	
6/7/2012	97545	$206.00	$154.09	
6/7/2012	97010	$31.00	$20.31	
6/11/2012	97014	$39.00	$26.03	

6/11/2012	97545	$206.00	$154.09	
6/11/2012	97010	$31.00	$20.31	
6/12/2012	98940	$45.00	$32.75	
6/12/2012	97014	$39.00	$26.03	
6/12/2012	97545	$206.00	$154.09	
6/12/2012	97010	$31.00	$20.31	
6/13/2012	97140	$59.00	$42.65	
6/13/2012	97014	$39.00	$26.03	
6/13/2012	97545	$206.00	$154.09	
6/13/2012	97010	$31.00	$20.31	
6/19/2012	97140	$59.00	$42.65	
6/19/2012	97014	$39.00	$26.03	
6/19/2012	97545	$206.00	$154.09	
6/19/2012	97010	$31.00	$20.31	
6/20/2012	97140	$59.00	$42.65	
6/20/2012	97014	$39.00	$26.03	
6/20/2012	97545	$206.00	$154.09	
6/20/2012	97010	$31.00	$20.31	
6/22/2012	97140	$59.00	$42.65	
6/22/2012	97014	$39.00	$26.03	
6/22/2012	97545	$206.00	$154.09	
6/22/2012	97010	$31.00	$20.31	
6/25/2012	97014	$39.00	$26.03	
6/25/2012	97545	$206.00	$154.09	
6/25/2012	97010	$31.00	$20.31	
6/26/2012	97140	$59.00	$42.65	
6/26/2012	97014	$39.00	$26.03	
6/26/2012	97545	$206.00	$154.09	
6/26/2012	97010	$31.00	$20.31	
6/28/2012	97140	$59.00	$42.65	
6/28/2012	97014	$39.00	$26.03	
6/28/2012	97545	$206.00	$154.09	
6/28/2012	97010	$31.00	$20.31	
7/9/2012	97014	$39.00	$26.03	
7/9/2012	97545	$206.00	$154.09	
7/9/2012	97010	$31.00	$20.31	
7/10/2012	99213	$97.00	$64.92	
7/10/2012	97535	$63.00	$40.62	
7/10/2012	97140	$59.00	$42.65	
7/10/2012	97014	$39.00	$26.03	
7/10/2012	97545	$206.00	$154.09	
7/10/2012	97010	$31.00	$20.31	
3/28/2012	99244	$349.00	$216.79	

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Total Charges:	**$23,294.41**
Adjustments and Payments:	**$16,475.46**
Totals Due:	**$6,818.95**
Total Fee Schedule Amount:	**$4,685.72**

Chicago Pain & Orthopedic Institute

Date of Service	Code	Charge	FSA	POC
2/29/2012	99203	$124.03	$115.63	
3/14/2012	99214	$105.68	$100.15	
3/27/2012	64483	$1,020.50	$533.48	
3/27/2012	64484	$724.00	$363.02	
3/27/2012	77003	$289.06	$233.51	
4/25/2012	99214	$105.68	$100.15	
4/30/2012	99358	$387.50	$147.49	
4/25/2012	80101	$212.70	$34.71	
5/23/2012	99214	$105.68	$100.15	
7/11/2012	99214	$105.68	$100.15	
8/8/2012	99214	$105.68	$100.15	
8/14/2012	62290	$614.26	$629.57	*
8/14/2012	62290	$614.26	$629.57	*
8/14/2012	62290	$614.26	$629.57	*
8/14/2012	62290	$614.26	$629.57	*
8/14/2012	72295	$818.18	$900.18	*
8/22/2012	99214	$105.68	$100.15	
10/5/2012	99204	$176.88	$159.17	
11/2/2012	99214	$105.68	$100.15	
12/7/2012	99214	$105.68	$100.15	
1/10/2013	99214	$105.68	$101.84	
2/11/2013	99214	$106.61	$101.84	
Total Charges:		**$7,267.62**		
Adjustments and Payments:		**$917.24**		
Totals Due:		**$6,350.38**		
Total Fee Schedule Amount:		**$6,010.35**		

Advantage MRI, LLC

Date of Service	Code	Charge	FSA	POC
3/2/2012	72148	$1,750.00	$1,309.65	
3/2/2012	72195	$1,750.00	$1,407.65	

Total Charges: $3,500.00
Adjustments and Payments: $0.00
Totals Due: $3,500.00
Total Fee Schedule Amount: $2,717.30

Accredited Ambulatory Care, LLC

Date of Service	Code	Charge	FSA	POC
3/27/2012	A4557	$18.17	$17.62	
3/27/2012	J0330	$57.76	$30.73	POC53.2
3/27/2012	J2250	$1.52	$4.53	*
3/27/2012	J3490	$90.36	$48.07	
3/27/2012	J2001	$46.70	$14.22	
3/27/2012	J0461	$2.11	$1.12	
3/27/2012	J3490	$90.36	$48.07	
3/27/2012	77003	$1,200.00	$233.51	
8/14/2012	62290	$8,797.80	$629.57	
8/14/2012	62290	$8,797.80	$629.57	
8/14/2012	62290	$8,797.80	$629.57	
8/14/2012	62290	$8,797.80	$629.57	
8/14/2012	72295	$1,700.00	$900.18	
8/14/2012	A0120	$275.00	$146.30	POC53.2
8/14/2012	62290	$748.15	$629.57	
8/14/2012	62290	$748.15	$629.57	
8/14/2012	62290	$748.15	$629.57	
8/14/2012	62290	$748.15	$629.57	

Total Charges: $41,665.78
Adjustments and Payments: $0.00
Totals Due: $41,665.78
Total Fee Schedule Amount: $6,480.91

Metro Milwaukee Anesthesia Associates

Date of Service	Code	Charge	FSA	POC
8/14/2012	1935	$1,050.00	$74.51	
8/14/2012	A4300	$16.60	$30.16	*
8/14/2012	A4556	$12.85	$13.20	*
8/14/2012	S1015	$29.85	$11.38	

8/14/2012	J7120	$38.50	$26.27	
8/14/2012	A4649	$25.00	$13.30	POC53.2
8/14/2012	A4215	$8.20	$0.66	
8/14/2012	E0424	$5.00	$222.07	*
8/14/2012	A4206	$0.65	$0.16	
8/14/2012	A4208	$1.70	$0.31	
8/14/2012	A4209	$3.20	$0.44	
8/14/2012	A4213	$7.20	$1.31	
8/14/2012	J3490	$22.50	$11.97	
8/14/2012	J2250	$3.75	$4.53	*

Total Charges: **$1,225.00**
Adjustments and Payments: **$0.00**
Totals Due: **$1,225.00**
Total Fee Schedule Amount: **$410.27**

Hinsdale Orthopaedics

Date of Service	Code	Charge	FSA	POC
6/14/2012	99204	$276.00	$159.17	
6/14/2012	72110	$252.00	$147.24	
10/29/2012	99214	$171.00	$100.15	

Total Charges: **$699.00**
Adjustments and Payments: **$0.00**
Totals Due: **$699.00**
Total Fee Schedule Amount: **$406.56**

GRAND TOTALS:

Charges:	$77,651.81
Adjustments & Payments:	$17,392.70
Due:	$60,259.11
Fee Schedule Amount:	$20,711.11

HINSDALE ORTHOPAEDICS
PO BOX 914
LAGRANGE IL60525-0914

PHONE (800) 813-6536
FEDERAL ID #36-2671035

TO:
JULIA GUZMAN
1310 NORTH 24TH AVE

MELROSE PARK 1IL 60160

ACCOUNT NO. 302459
STATEMENT DATE 04/09/13
BALANCE DUE .00

DATE	PATIENT	PROCEDURE	DESCRIPTION OF SERVICE	DIAGNOSIS	AMOUNT
06/14/12	JULIA	99204	NEW PATIENT VISIT-MODERAT MARK A LORENZ MD	738.4	276.00
06/14/12	JULIA	72110	XRAY LUMBAR AP/LAT/SPOT/2 MARK A LORENZ MD	724.2	252.00
10/29/12	JULIA	99214	ESTABLISHED PATIENT-MODER MARK A LORENZ MD	738.4	171.00

PERSONAL	INSURANCE PENDING	LITIGATION	WORKERS COMP BALANCE	ACCOUNT BALANCE
.00	.00	.00	699.00	699.00

302459 GUZMAN

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

Perry Medley,

Petitioner,

14IWCC0057

vs.

NO: 09 WC 11529
consol. 09 WC 11528

H & M International 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 issues of medical expenses, temporary total disability benefits, and permanency, modifies the Corrected 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.

Regarding the medical treatment Petitioner underwent for his right knee condition, the Commission notes Respondent had Dr. Jeannette Fefles from Family Chiropractic review Petitioner's medical records. (RX5,RX6) Dr. Fefles determined that any chiropractic treatment Petitioner underwent after the first eight visits should be non-certified. (RX5) In her January 19, 2011 report, Dr. Fefles explained that she agreed "with the conservative treatment approach of ultrasound and electrical stimulation to reduce spasm and guarding with regards to a diagnosis...[of] meniscal tear" but that Dr. Todd Sinai's "notes state subjective pain findings with no clear indication of any objective findings, which should include specific range of motion tests, degrees of restriction, and clear markers for where, when and why therapies are being done. The notes do not include re-evaluations of [Petitioner's] progress or any stated treatment plan, goals, or home therapeutic plan. The reviewed bill from the office states that an extraspinal adjustment was done at each visit, however, the treatment notes do not indicate any adjustment given. Without any further clear documentation, it would be advised that 8 chiropractic visits would be clinically necessary to treat a diagnosis of...meniscal tear, any further treatment would

14IWCC0057

be deemed not medically necessary." On February 23, 2011, Dr. Fefles reviewed Petitioner's treatment after his right knee surgery and found that "[t]he right partial knee meniscectomy does not require any chiropractic post surgical intervention." (RX6)

The Commission finds that the evidence supports Dr. Fefles findings and determinations. The Commission notes that the majority of Dr. Sinai's chiropractic notes consist of repeats his prior notes and fail to mention any change in Petitioner's condition as a result of the chiropractic treatment. The Commission further notes that the Dr. Sinai fails to mention what procedures and treatments are being provided in most of his notes. Dr. Sinai also makes considerably more mention of the findings and opinions of Petitioner's other treaters than he does of his own findings and treatment of Petitioner.

Based on Dr. Sinai's failure to provide clear documentation of the effect his chiropractic treatment was having on Petitioner's right knee condition, what specific chiropractic treatments he was providing Petitioner, and the findings and opinions of Dr. Fefles, the Commission finds that the chiropractic treatment provided by Dr. Sinai beyond the first eight visits certified by Dr. Fefles were not medically reasonable and necessary. The Commission, therefore, awards first eight chiropractic sessions with Dr. Sinai, from February 18, 2009 through March 16, 2009, only.

Regarding permanency, the Commission notes that the March 13, 2009 MRI of Petitioner's right knee showed a slight irregularity of the apical free edge of the mid body of the medial meniscus, which was read by the radiologist as "probably representing a small tear." (PX3) However, the November 12, 2009 operative report reveals that what Petitioner had was a "reactive medial synovial veil (plica) which was debrided" and "a synovial flap which appeared to be acting functionally as an anterior medial meniscus tear" which was also debrided. (PX5 & PX13) The Commission finds that since Petitioner did not suffer a meniscal tear, but an aggravation of a pre-existing plica condition, Petitioner has suffered a permanent partial disability equivalent to a 12.5% loss of use of the right leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed on April 2, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $460.18 per week for a period of 97-5/7 weeks, from March 25, 2009 through February 6, 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 $414.47 per week for a period of 26.875 weeks, as provided in §8(e)12 of the Act, for the reason that the injuries sustained caused the 12.5% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $63,180.44 for medical expenses under §8(a) and §8.2 of the Act.

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

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

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

DATED: JAN 29 2014
MJB/ell
o-01/16/14
52

Michael J. Brennan

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

14IWCC0057

MEDLEY, PERRY
Employee/Petitioner

Case# **09WC011529**

09WC011528

H&M INTERNATIONAL INC
Employer/Respondent

On 4/2/2013, 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 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4239 LAW OFFICES OF JOHN S ELIASIK
180 N LASALLE ST
SUITE 3700
CHICAGO, IL 60601

1872 SPIEGEL & CAHILL PC
KATERNINA D KYROS
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

14IWCC0057

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
CORRECTED ARBITRATION DECISION

M.B.

Perry Medley
Employee/Petitioner

v.

H&M International, Inc.
Employer/Respondent

Case # **09** WC **11529**

Consolidated cases: **09 WC 11528**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **October 2, 2012 and October 3, 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. [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. [ ] Other _____

FINDINGS

On **February 16, 2009**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$36,093.72**; the average weekly wage was **$694.11**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$460.18**/week for **97 5/7^{ths}** weeks, commencing **March 25, 2009** through **February 6, 2011**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **March 25, 2009** through **February 6, 2011**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of **$71,984.44**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$416.47**/week for **43** weeks, because the injuries sustained caused the **20%** loss of the **right leg**, as provided in Section 8(e) of the Act.

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

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.

Nelson Black

Signature of Arbitrator

April 2, 2013
Date

APR 2 - 2013

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

Perry Medley,

Petitioner,

14IWCC0058

vs.

NO: 09 WC 11528
consol. 09 WC 11529

H & M International 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 accident, notice, medical expenses, temporary total disability benefits, and permanency, modifies the Corrected 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 reviewing the record in its entirety, the Commission finds the opinions of Dr. Jeanette Fefles, from Family Chiropractic, persuasive regarding the amount of chiropractic treatment necessary for treating Petitioner's left medial epicondylitis. After reviewing Petitioner's medical records on January 19, 2011, Dr. Fefles found that any chiropractic treatment after the first eight visits should be non-certified. (RX5) Dr. Fefles explained that she agreed with Dr. Todd Sinai's conservative treatment via ultrasound and electrical stimulation in order to reduce spasms and guarding with regards to Petitioner's medial epicondylitis diagnosis, "however, the indication of an olecranon spur is suggestive of a degenerative change to his elbow, not something that was a result of an acute injury. Dr. Sinai's notes state subjective pain findings with no clear indication of any objective findings, which should include specific range of motion tests, degrees of restriction, and clear markers for where, when and why therapies are being done. The notes do not include re-evaluations of [Petitioner's] progress or any stated treatment plan, goals, or home therapeutic plan. The reviewed bill from the office states that an extraspinal adjustment was done at each visit, however, the treatment notes do not indicate any adjustment given. Without any further clear documentation, it would be advised that 8 chiropractic visits would be clinically necessary to treat a diagnosis of medical epicondylitis

and…any further treatment would be deemed not medically necessary." (RX5)

The Commission agrees with Dr. Fefles findings and opinion and notes that the majority of Dr. Sinai's notes are only a repeat of prior notes and fail to mention any change in Petitioner's condition as a result of the treatment. The Commission further notes that Dr. Sinai fails to mention what procedures and treatments he is providing. Dr. Sinai also makes considerably more mention of the findings and opinions of Petitioner's other treaters than he does of his own findings and treatment of Petitioner.

Based on Dr. Sinai's failure to provide clear documentation of the effect his chiropractic treatment was having on Petitioner's left elbow condition, what specific chiropractic treatments he was providing Petitioner, and the findings and opinions of Dr. Fefles, the Commission finds that the chiropractic treatment provided by Dr. Sinai beyond the first eight visits certified by Dr. Fefles were not medically reasonable and necessary. The Commission, therefore, awards first eight chiropractic sessions with Dr. Sinai, from March 2, 2009 through March 25, 2009, only.

Regarding the issue of temporary total disability benefits, the Commission acknowledges that Dr. Howard I. Freedberg, Petitioner's treating physician regarding Petitioner's left elbow injury, kept Petitioner off work from June 30, 2010 through November 4, 2010, at which time Dr. Freedberg found Petitioner had reached maximum medical improvement regarding his left elbow condition. (PX3,PX7,PX10) However, the Commission also notes that Petitioner was already off work during this period due to treatment for a right knee injury (consolidated case 09WC11529). The Commission awarded temporary total disability benefits from March 25, 2009 through February 6, 2011, in consolidated case 09WC11529, which covers the temporary total disability period for Petitioner's left elbow injury. Therefore, the Commission declines to award additional temporary total disability benefits in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision of the Arbitrator filed on April 2, 2013, is hereby modified as stated above, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $414.16 per week for a period of 37.95 weeks, as provided in §8(e)10 of the Act, for the reason that the injuries sustained caused the 15% loss of use of the left arm.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $48,337.39 for medical expenses under §8(a) and §8.2 of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $64,200.00. The party commencing the proceedings for review in the Circuit Court

shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 29 2014
MJB/ell
o-01/16/14
52

Michael J. Brennan

David L. Gore

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

14IWCC0058

MEDLEY, PERRY
Employee/Petitioner

Case# **09WC011528**

09WC011529

H&M INTERNATIONAL INC
Employer/Respondent

On 4/2/2013, 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 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4239 LAW OFFICES OF JOHN S ELIASIK
180 N LASALLE ST
SUITE 3700
CHICAGO, IL 60601

1872 SPIEGEL & CAHILL PC
KATERNINA D KYROS
15 SPINNING WHEEL RD SUITE 107
HINSDALE, IL 60521

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
CORRECTED ARBITRATION DECISION

m.b.

Perry Medley
Employee/Petitioner

v.

H&M International, Inc.
Employer/Respondent

Case # **09** WC **11528**

Consolidated cases: **09 WC 11529**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **October 2, 2012 and October 3, 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. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [x] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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. [ ] Other _____

FINDINGS

FINDINGS

On **October 8, 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 **$36,093.72**; the average weekly wage was **$690.26**. m.b.

On the date of accident, Petitioner was **48** years of age, ***married*** with **0** dependent children. m.b.

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 have credit for all amounts, if any, to or on behalf of Petitioner on account of said accidental injury.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$460.18**/week for **18 17th** weeks, commencing **June 3, 2010** through **November 4, 2010,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from **June 3, 2010** through **November 4, 2010**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical services of **$56,889.39**, as provided in Sections 8(a) and 8.2 of the Act.

m.b.

Respondent shall pay Petitioner permanent partial disability benefits of **$414.16**/week for **50.6** weeks, because the injuries sustained caused the **20%** loss of the **left arm**, as provided in Section 8(e) of the Act. Respondent shall have credit for all amounts, if any, to or on behalf of Petitioner on account of said accidental injury.

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

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

Milton Black

Signature of Arbitrator

April 2, 2013
Date m.b.

APR 2 - 2013

STATE OF ILLINOIS)
)
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

PERRY MEDLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	09 WC 11528
	)	09 WC 11529
H & M INTERNATIONAL,	)	
	)	
Respondent.	)	

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

As of October 8, 2008, Respondent H&M International employed Petitioner Perry Medley as a truck driver. He had been employed in this capacity with Respondent since 1999. The position entailed driving a truck in the Union Pacific rail yard, shuttling cargo containers.

Petitioner testified that on October 8, 2008, during the course and scope of his job duties, he repeatedly hit his left elbow on a bar that ran across the driver side door of the truck cab. Petitioner explained that the cab was narrow, and that the steering wheel was large and set at an angle. Because he was left handed, he would often turn the steering wheel with his left hand, hitting his left elbow on the bar running across the inside of the door.

Petitioner testified that he drove this particular truck with this configuration for a number of years, and that he hit his left elbow on the bar repeatedly. On this particular day, when he hit his left elbow again during the beginning of his shift, the pain became intolerable and he asked to leave work early to seek medical attention.

Petitioner left work and went to the emergency room at St. Alexius. (PX2, 09WC11528). The medical records from this indicate that Petitioner reported that he "hit elbow on door at work" and that he was complaining of left elbow pain. (PX2, 09WC11528). An x-ray was performed that showed an olecranon body spur. (PX2, 09WC11528). Petitioner testified that other than repeatedly hitting his elbow on the bar of the inside of the cab of his truck, he did not have any other problems with his left elbow prior to this date. Petitioner was also seen at St. Alexius Corporate Health on the same day, where he was diagnosed with a work-related elbow contusion and released to

return to work with restricted use of the left arm. (PX2, 09WC11528).

Petitioner testified that he continued to work full duty after October 8, 2008. He still had pain in his left elbow, but he just lived with the pain.

Then, on February 16, 2009, Petitioner had a second accident at work. Petitioner testified that he had stepped out of his cab to unhook some hoses at the back of the cab, a task he performed while still standing on the platform of the cab right outside the drover side door. When he turned his body and straightened out, he hit a metal latch on the driver side door with his right knee. Petitioner testified that he was in immediate and excruciating pain.

Petitioner rested on the platform for about 15 minutes. Then, when he turned again to get into the cab, he hit his right knee a second time. He testified that he sat on the ground holding his knee and crying for the next 30 minutes. Petitioner testified that during this time, his supervisor Wayne came by to see if he was alright. He reported the injury to Wayne, but he worked the remainder of his shift.

Petitioner testified that after his shift, he went to the emergency room at Glen Oaks Hospital near his home. He was examined and released.

The next day, Petitioner reported for work, but his right knee has swelled. Petitioner requested medical attention, and Respondent send Petitioner to Concentra. (PX2, 09WC11529). At Concentra, Petitioner reported hitting his right knee on the latch of the door while entering his tuck. (PX2, 09WC11529). He was given an x-ray, diagnosed with a knee contusion, given medication and released to return to work regular duty. (PX2, 09WC11529).

The next day, Petitioner went to see Dr. Sinai, a chiropractor. (PX3, 9WC11529). He reported that he was having significant pain in the right knee that was keeping him up at night, as well as locking and giving out. (PX3, 09WC11529). Dr. Sinai started Petitioner on a course of chiropractic therapy. On February 20, 2008, he referred him to Dr. Bruce Montella, an orthopedic surgeon and sports medicine specialist, for an evaluation of his right knee. (PX3, 09WC11529). He also started Petitioner on a course of physical therapy for his right knee at Rehabilitation Inc., beginning March 23, 2009. (PX10,11 09WC11529). Dr. Sinai recommended that Petitioner be off work for his right knee starting on March 23, 2009. (PX3, 09WC11529).

During the initial visit with Dr. Sinai, Petitioner also reported that he had been having pain in his left elbow since bumping it against the door of his truck on October 8, 2008. (PX4, 09WC11528). Petitioner explained that the cab of his truck is a tight environment, and that he repeatedly strikes his left elbow on the door of the truck while during the steering wheel. (PX4, 09WC11528). He reported going to St. Alexius in October for this condition, and that he continued to have pain in his elbow since that time. (PX4, 09WC11528). Dr. Sinai also started Petitioner on a course of chiropractic therapy for his elbow, and referred him to Dr. Howard Freedberg, an orthopedic surgeon. (PX4, 09WC11528).

Dr. Freedberg saw Petitioner for his left elbow on March 30, 2009. Petitioner reported the same history. (PX3, 09WC11528). Dr. Freedberg examined Petitioner, reviewed the x-rays and diagnosed him with a large olecranon spur, a small capitellar spur, left medical epicondylitis and cubital tunnel syndrome. (PX3, 09WC11528). He ordered an EMG and an MRI. (PX4, 09WC11528). He advised Petitioner to continue

chiropractic treatment for his elbow with Dr. Sinai and to continue working full duty. (PX3, 09WC11528).

Petitioner then saw Dr. Montella for his right knee on March 11, 2009. (PX4-8, 09WC11529). He reported a history of pain in the right knee following banging it on a door latch. (PX4-8, 09WC11529). Dr. Montella advised that Petitioner continue with chiropractic treatment and physical therapy. (PX4-8, 09WC11529). He prescribed an MRI of the right knee and advised Petitioner to continue to work. (PX4-8, 09WC11529).

Petitioner had the MRI of his right knee on March 13, 2009 at Lakeshore Open MRI. (PX6, 09WC11529). It revealed a possible small medial meniscal tear. (PX6, 09WC11529). Petitioner followed up with Dr. Montella on April 15, 2009, when Dr. Montella diagnosed Petitioner with a meniscal tear, took him off work. He recommended that Petitioner continue with physical therapy and chiropractic treatment (PX4-8, 09WC11529).

Petitioner continued to treat for his left elbow. He had an MRI at PRI diagnostics on March 27, 2009, which showed mild arthrosis with a tiny spur, as well as moderate to high grad chondromalacia. (PX3, 09WC11528). Petitioner also had an EMG of the elbow at Delaware Place MRI on May 22, 2009, which revealed entrapment of the left ulnar nerve at the elbow. (PX3, 09WC11528).

Petitioner returned to Dr. Freedberg on June 4, 2009 to discuss the test results. (PX3, 09WC11528). Dr. Freedberg recommended surgery for the cubital tunnel. (PX3, 09WC11528). He recommended that Petitioner continue working in regard to the elbow and getting therapy until surgery could be scheduled. (PX3, 09WC11528)

Petitioner returned to Dr. Montella from time to time. (PX4-8, 09WC11529). Dr. Montella continued to keep Petitioner off work and recommend that he get physical therapy and chiropractic treatment. (PX4-8, 09WC11529). However, Petitioner had plateaued and was showing some mild swelling in the knee. (PX4-8, 09WC11529). On September 16, 2009, Dr. Montella recommended that Petitioner consider arthroscopic surgery for the right knee. (PX4-8, 09WC11529).

Petitioner had the arthroscopic surgery to the right knee at South Chicago Surgical Solutions on November 12, 2009. (PX13, 09WC11529). Dr. Montella performed the surgery, with the assistance of Blair Rhode and Mark Bordick. (PX12-14, 09WC11529). M.B. During the course of surgery, it was discovered that Petitioner did not have a meniscal tear, but rather, a synovial flap that "appeared to be acting functionally" as a meniscal tear. This flap was debrided. (PX13, 09WC11529).

After the surgery, Petitioner continued to follow up with Dr. Montella, and went through a course of post-surgical rehabilitation with Dr. Sinai and Rehabilitation Inc. (PX3, 4-8, 10-11, 09WC11529). The records reflect and Petitioner testified that he had slow but steady improvement following his knee surgery. Eventually, on February 6, 2011, approximately a year and four months following surgery, Petitioner was discharged from care at maximum medical improvement, and he returned to work at his pre-accident position for Respondent.

During the time that Petitioner was under Dr. Montella's care for his right knee, he continued to see Dr. Freedberg for his left elbow. (PX4, 09WC11528). Dr. Freedberg continued to recommend surgery for the left elbow, as Petitioner was reporting little improvement from chiropractic treatment. (PX4, 09WC11528). On February 17, 2010,

Dr. Freedberg took Petitioner off work for his left elbow, pending surgery. (PX4, 09WC11528). Petitioner was still off work at this time for his right knee after having the knee surgery. (PX4-8, 09WC11529).

On June 30, 2010, Dr. Freedberg performed surgery on Petitioner's left elbow. (PX3, 09WC11528). He performed an ulnar nerve transposition, debridement, removal of the spur, repair of the triceps tendon, resection of the medial septum and ulnar nerve lysis. (PX3, 09WC11528).

Dr. Freedberg sent Petitioner for post-surgical rehabilitation with Dr. Sinai. (PX3, 09WC11528). He continued Petitioner off work. (PX3, 09WC11528). On November 4, 2010, Dr. Freedberg released Petitioner to return to work full duty, having reached maximum medical improvement.

Petitioner testified that he was able to return to his pre-accident job duties without difficulty. He further testified that they changed the cab of the truck in which he works, and he no longer hits his elbow. He testified that he continues to have problems with his right knee, especially with activity such as climbing in an out of the truck cab. He testified that these problems come and go, and he experience s some pain every other day. He does not current receive medical treatment for hi right knee. Petitioner testified that he currently does not have any problems with his left elbow.

Dr. Montella testified by way of evidence deposition. (PX1, 09WC11529). Dr. Montella testified that because Petitioner did not have any problems with his right knee prior to the accident of February 16, 2009, and that his complaints started immediately thereafter and persisted that his right knee condition was causally related to the accident. (PX1, 09WC11529). He further testified that the surgery, chiropractic treatment and physical therapy were reasonable treatment for the injury, because Petitioner improved and was able to return to his pre-injury occupation. (PX1, 09WC11529). He further testified that Petitioner's off work restrictions were related to the injury. (PX1, 09WC11529).

Dr. Freedberg also testified by way of evidence deposition. (PX1, 09WC11528). Dr. Freedberg testified that Petitioner's left elbow condition and the need for surgery was related to the October 8, 2008 incident. (PX1,09WC11528). Dr. Freedberg testified that Petitioner reported striking his elbow many time over the course of years, but that on that particular occasion, it was the "straw hat broke the camel's back". (PX1, 09WC11528). Dr. Freedberg testified that the olecranon spur would have developed over time, but was aggravated by the bumping mechanism. (PX1, 09WC11528). He testified that Petitioner's complaints were mainly related to the ulnar nerve entrapment. (PX1, 09WC11528). He testified that this injury is consistent with the mechanism described by Petitioner of hitting the back of his elbow against the door, as this is where the ulnar nerve transverses the elbow joint. (PX1, 09WC11528).

Dr. Nikhil Verma saw petitioner for a Section 12 examination at the request of the Respondent, for both his elbow and knee conditions, on May 27, 2009. (RX2). Dr. Verma testified by way of evidence deposition. (RX2). Dr. Verma gave the opinion that Petitioner's left elbow condition was not causally related to the accident as described by Petitioner, as the mechanism of injury was not consistent with Petitioner's condition. (RX1). Dr. Verma's understanding of the mechanism of injury was that there was no specific trauma, but that Petitioner his driving position caused him to hit the posterior aspect of his left elbow against the door of the truck. (RX2, p.7). Dr. Verma did not

elaborate how the reported mechanism of injury could not cause or aggravate Petitioner's condition.

Dr. Verma opined that Petitioner did not require surgical removal of the olecranon spur, whether work-related or not. (RX2, p.20). He further opined that Petitioner was at maximum medical improvement and could return to work full duty for any work-related symptoms in his left elbow as of the date of the examination. (RX2).

As for Petitioner's right knee condition, Dr. Verma opined that Petitioner sustained a right knee contusion only as a result of hitting his knee on the door latch. (RX2). He further opined that Petitioner did not require surgery for his injury. (RX2). He also felt that Petitioner was exaggerating his right knee complaints. (RX2). However, Dr. Verma did not review the actual MRI film of Petitioner's right knee. (RX2, p.19). Dr. Verma opined that an accident such as that described by Petitioner would not cause a meniscal tear. (RX2, p.19). He further opined that Petitioner was at maximum medical improvement and could return to work full duty for his right knee as of the date of the examination. (RX2). He also opined that chiropractic treatment was not reasonable for a meniscal tear. (RX2).

After the deposition, Dr. Verma prepared a narrative report. (RX4). Dr. Verma reviewed the operative report for Petitioner's right knee. He still did not review the MRI film. He opined that a review of operative report, where Petitioner had a completely different diagnosis, did not change his opinions in any way.

Respondent had a utilization review performed by Dr. Fefles, a chiropractor. (RX5). Dr. Fefles opined that Petitioner should not have received chiropractic treatment following he initial injuries for both Petitioner's knee and elbow for more than 8 weeks. (RX5). Dr. Fefles also opined that Petitioner should have only received physical therapy and not chiropractic treatment following Petitioner's left elbow surgery, and that this therapy should only have lasted for 4-6 weeks. Dr. Fefles further opined that Petitioner did not require chiropractic treatment of any kind following his right knee surgery. (RX5).

CONCLUSIONS OF LAW (09WC11528)

(C,D,F) In support of the Arbitrator's decision with regard to whether Petitioner sustained accidental injuries that arose out of and in the course and scope of his employment with Respondent, and whether Petitioner's current state of ill-being is causally related to the accident, and what was the date of the accident, the Arbitrator makes the following conclusions of law:

Petitioner testified credibly that in the course and scope of his job duties over the last 9 years leading up to the accident date of October 8, 2008, that he would hit his left elbow on a metal bar that was across the driver side door. Petitioner testified that on that particular date, he hit his elbow again on the bar, and that the pain was such that he felt he needed medical attention. Petitioner left work early that day, and sought medical care at St. Alexius.

Petitioner testified credibly that despite the condition and the medical care, Petitioner continued to work until he had another accident involving his knee of February

16, 2009. He testified that his left elbow did not get better from the time of the original medical treatment, and he decided to address this condition as well at that time.

Based upon the foregoing, the Arbitrator finds that on October 8, 2008 Petitioner sustained accidental injuries that arose out of and in the course and scope of his employment with Respondent.

Dr. Freedberg explained that at the first examination, Petitioner's left elbow was tender at the tip. (PX1, p.9, 09WC11528). This was consistent with the radiological studies, which showed a spur at the olecranon, which is the tip of the elbow. (PX1, p.9, 09WC11528). Dr. Freedberg diagnosed Petitioner with cubital tunnel syndrome and a spur at the olecranon process. (p.11). He further testified that the symptoms Petitioner was having, as well as the medical condition, can be caused or aggravated by repeatedly hitting the back of the elbow as described by Petitioner, as that is where the ulnar nerve transverses the elbow. (p.14 - 15). Dr. Freedberg explained that although Petitioner was tender at the medical aspect of the elbow, this can occur if he hit his elbow with enough force. (p.14 - 15) The Arbitrator is persuaded by Dr. Freedberg's testimony.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being as it relates to the left elbow is casually related to the accident of October 8, 2008.

(E) In support of the Arbitrator's decision with regard to whether Respondent was given notice of the accident within the time limits stated in the Act, the Arbitrator makes the following conclusions of law:

Petitioner testified credibly that he gave notice to his supervisor on October 8, 2008 that he had injured his left elbow at work.

Therefore, the Arbitrator finds that timely notice of the accident given to Respondent.

(J) In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent paid all appropriate charges for reasonable and necessary medical treatment, the Arbitrator makes the following conclusions of law:

Respondent's dispute on this issue is premised on liability for accident and notice, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that the claimed medical bills are awarded.

(K) In support of the Arbitrator's decision with regard to the amount due for temporary total disability, the Arbitrator makes the following conclusions of law:

Respondent's dispute on this issue is also premised on liability for accident and notice, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that the claimed temporary total disability benefits are awarded.

(L) In support of the Arbitrator's decision with regard to the nature and extent of Petitioner's injury, the Arbitrator makes the following conclusions of law:

Based upon the testimonial and documentary evidence, the Arbitrator finds that Petitioner sustained 20% loss of use of the left arm.

(N) In support of the Arbitrator's decision with regard to whether Respondent is due any credit for payments made, the Arbitrator makes the following conclusions of law:

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

CONCLUSIONS OF LAW 09WC11529

(F) In support of the Arbitrator's decision with regard to whether Petitioner's present condition of ill-being is causally related to the injury, the Arbitrator makes the following conclusions of law:

Petitioner testified credibly that prior to the February 16, 2009 accident, he never had any problems with his right knee. Petitioner's credible testimony is corroborated by medical records and medical testimony and is consistent with the sequence of events.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being as it relates to the right leg is casually related to the accident of February 16, 2009.

(J) In support of the Arbitrator's decision with regard to whether the medical services that were provided to Petitioner were reasonable and necessary and whether Respondent paid all appropriate charges for reasonable and necessary medical treatment, the Arbitrator makes the following conclusions of law:

Respondent's dispute on this issue is premised on liability for causation, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that the claimed medical bills are awarded.

(K) In support of the Arbitrator's decision with regard to the amount due for temporary total disability, the Arbitrator makes the following conclusions of law:

Respondent's dispute on this issue is also premised on liability for causation, which has been resolved in favor of Petitioner.

Therefore, the Arbitrator finds that the claimed temporary total disability benefits are awarded.

(L) In support of the Arbitrator's decision with regard to the nature and extent of Petitioner's injury, the Arbitrator makes the following conclusions of law:

Based upon the testimonial and documentary evidence, the Arbitrator finds that Petitioner sustained 20% loss of use of the right leg.

(N) In support of the Arbitrator's decision with regard to whether Respondent is due any credit for payments made, the Arbitrator makes the following conclusions of law:

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

STATE OF ILLINOIS)	☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☒ Rate Adjustment Fund (§8(g))
COUNTY OF WILLIAMSON)	☒ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JAMES SHELBY,

Petitioner,

14IWCC0059

vs. NO: 06 WC 10643

ILLINOIS YOUTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appeals the Decision of Arbitrator Granada finding that Petitioner sustained accidental injuries arising out of and in the course of his employment on December 23, 2005, that Petitioner was entitled to an award of medical expenses related to his lumbar and thoracic spine injuries under Section 8(a) and 8.2, that Petitioner was permanently disabled to the extent of 50% of the person as a whole under Section 8(d)(2) of the Illinois Workers' Compensation Act ("Act"). The Arbitrator further found Respondent was not liable for any medical expenses or pharmaceutical expenses related to Petitioner's depression, sexual dysfunction, high blood pressure, or any other medical condition claimed. The issues on Review are whether Petitioner is permanently and totally disabled as a result of his work injury of December 23, 2005, and whether or not the medical expenses incurred for his additional medical conditions should be awarded.

The Commission, after considering the entire record, reverses the Decision of the Arbitrator and finds that Petitioner is permanently and totally disabled as of February 14, 2013, for life pursuant to Section 8(f) of the Act, and that Petitioner's current condition of ill-being with regard to his failed back syndrome, urinary dysfunction, sexual dysfunction, insomnia, depression, anxiety, GERD, hypertension, and chronic intractable breakthrough pain are all causally related, for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, a 39 year-old youth supervisor at Respondent's youth center, testified that on December 23, 2005 he sustained a low back injury while attempting to break up a fight between juveniles at work. (T6-7). On December 24, 2005, Petitioner sought medical treatment at Hardin County Hospital, at which time he was diagnosed with a lumbosacral muscular sprain with bilateral leg numbness, and a herniated lumbar disc was suspected. Petitioner was taken off work on that date. (PX1).

On December 28, 2005, Petitioner sought follow-up treatment with his personal physician, Dr. Sunga, who diagnosed a severe lumbosacral sprain, right hip radiation, and bilateral radiculopathy, as well as constipation from prescription medication. Petitioner was continued off work and physical therapy as well as an MRI of the lumbar spine was recommended. (PX2). On January 30, 2006, Petitioner's MRI study of the lumbar spine indicated changes of degenerative disc disease with mild annular disc bulges at L4-5 and L5-S1, as well as a minimal annular disc bulge at L3-4. (PX1). Petitioner underwent additional diagnostic testing, a course of physical therapy, from January 26, 2006 through March 20, 2006, and continued conservative treatment with Dr. Sunga. On April 11, 2006, Petitioner reported continued pain in the lumbar spine on the right with right gluteal pain, an increase in his pain medication intake, and complained of a urinary tract obstruction. Dr. Sunga diagnosed post traumatic and persistent lumbosacral and gluteal pain and hypertension, referred Petitioner to Dr. Bergandi, an orthopedic surgeon, and continued to authorize him off work. (PX2).

Petitioner began treating with Dr. Bergandi on May 8, 2006, and subsequently underwent additional diagnostic testing including a CT scan of lumbar spine on May 23, 2006, and an EMG of the lumbar spine on June 27, 2006. On October 26, 2006, Dr. Bergandi performed a complete L4 laminectomy, complete L5 laminectomy, and bilateral foraminotomies at L4 & L5. (PX4). Petitioner complained of continued low back and bilateral leg symptoms following his October 26, 2006 surgery. On December 28, 2006 Petitioner underwent an additional MRI study of the lumbar spine, significant for granulation tissue impinging on the exiting left L5 and left S1 nerve roots. Petitioner continued to treat with Dr. Bergandi through March 5, 2007, during which time he complained of continued low back pain, bilateral radiating leg pain, difficulty voiding, and sexual dysfunction. (PX4).

Petitioner subsequently began treating with Drs. Vaught and Cleaver at the Brain and Neurospine Clinic of Missouri. Petitioner was diagnosed probable lumbar post laminectomy syndrome, and bilateral SI joint dysfunction. Petitioner began a course of therapy and Lyrica, and on September 21, 2007 trial spinal cord stimulator was implanted. Based upon his response to the trial stimulator, on October 19, 2007 Petitioner underwent an implantation of spinal cord stimulator system. Based upon continued complaints of back pain, Petitioner underwent an additional procedure on October 19, 2008, at which time the spinal cord stimulator leads were repositioned. (PX6, PX7).

Petitioner continued to complain of back and right leg pain, and was subsequently seen by Dr. Kern, a neurosurgeon. On February 2, 2011, Dr. Kern removed the dorsal column stimulator and performed a T10 laminotomy. On April 6, 2011, Dr. Kern performed an

additional surgery, an anterior lumbar interbody fusion at L5-S1, and an attempted anterior lumbar interbody fusion at L4-5. However, intraoperative complications arose, iliac vein laceration, which resulted in the abortion of the attempted L4-5 anterior lumbar interbody fusion. On April 8, 2011, Dr. Kern performed the fusion at L5-S1, and repair of iliac vein lacerations. On April 12, 2011, Dr. Kern then performed a L4 thru S1 pedicle screw fixation with posterolateral fusion. (PX11).

On November 29, 2011, Petitioner underwent a functional capacity evaluation, at which time the evaluator found Petitioner unable to be gainfully employed due to significant limitations in his ability to stand, sit, and lift. (PX12).

Petitioner testified he has treated with his personal physician, Dr. Sunga, for 7-1/2 years, is still under his care, and sees him once a month. Petitioner testified Dr. Sunga prescribed the medications listed in PX20, which are medications for high cholesterol, depression, high blood pressure, urinary incontinence, anxiety, and constipation. Petitioner testified he takes three different Oxycontin tablets a day for pain, and that he has not returned to work since his work-related injury on December 23, 2005. (T13-19). Petitioner testified he has to lay down 23 hours a day in normal day, needs a cane to ambulate, and that while he is able to walk, he has back pain immediately when he tries to walk so he avoids walking. Petitioner testified he has pain laying down, standing up, sitting down, and that his burning and throbbing pain radiates to both legs. (T20-28).

Petitioner also testified that he suffers from a urinary problems, that he did not did not have this issue prior to accident or prior to taking all pain meds from it. He also testified he suffers from sexual dysfunction problems, insomnia, constipation, high blood pressure, stomach issues, depression and anxiety, none of which he had prior to taking all the narcotic medications for his work-related injury. Petitioner testified Dr. Sunga diagnosed him with depression and anxiety, and prescribed medication for same. (T28-36).

Petitioner testified he has approximately $207,000.00 in outstanding medical expenses, and that while under Dr. Sunga's care for his work-related injury he received treatment for anxiety, depression, a sleeping disorder, GERD, constipation, high blood pressure, and sexual dysfunction. Petitioner also testified that his monthly medication expense is $1,410.57. (T36-40).

Dr. Sunga testified on June 7, 2012. He testified he treated Petitioner for the last 6-1/2 years, that Petitioner had eight levels of his lumbar spine operated on in those eight surgeries, that over the past 6-1/2 years Petitioner had developed chronic pain syndrome, and that as a result of his surgeries he required narcotic and other medications to control pain and relieve symptoms including Oxycontin CR for pain, Endocet, for breakthrough pain, Lyrica to help with burning sensation in the lower extremities, and Ibuprofen for inflammation and back pain. (T16-21). Dr. Sunga testified the spinal cord stimulator did not work for P, that there is no other type of pain resolution system available to him. He further testified Petitioner takes Valium every night for sleeping and muscle spasm, Celexa for anxiety and depression, and Lunesta for insomnia. He opined Petitioner's anxiety, depression, and insomnia from which he suffers are due to chronic back pain. (T21-24).

unemployable, based upon his significant lumbar and thoracic injuries, the eight invasive surgical procedures, his testimony as to his severe and constant pain symptoms, and his functional capacity evaluation indicating he is unable to be gainfully employed. Furthermore, Petitioner's treating physician, Dr. Sunga, testified Petitioner is incapable even of sedentary work. Although Respondent obtained a Section 12 examination by Dr. Rutz on May 21, 2009 wherein the examiner opined Petitioner was capable of sedentary light duty(RX2), in 2011 Petitioner underwent four additional surgeries to his lumbar spine, including a lumbar fusion. The record fails to reflect Respondent obtained a Section 12 examination subsequent to May 21, 2009 to address Petitioner's medical condition. Respondent tendered no evidence to rebut Dr. Sunga's testimony that Petitioner is permanently totally disabled. Given the severity of his injuries, his significant surgical procedures, his severe ongoing pain symptoms, and Dr. Sunga's opinion he is permanently totally disabled, Petitioner met his burden to prove permanent total disability under Section 8(f) and is to receive $459.46 per week for life commencing February 14, 2013. Furthermore, based upon Dr. Sunga's credible and unrebutted opinions on a causal connection between Petitioner's work related injury and his failed back syndrome, urinary dysfunction, sexual dysfunction, insomnia, depression, anxiety, GERD, hypertension, and chronic intractable breakthrough pain, the Commission finds these conditions are all causally related, in part or in whole, to his work-related injury of December 23, 2005.

Based upon our finding of a causal connection between Petitioner's work-related injury and his current condition of ill-being with regard to his lumbar and thoracic spine injuries, depression, anxiety, sexual dysfunction, urinary dysfunction, and high blood pressure, the Commission further finds Petitioner is entitled to the medical expenses related to these conditions, contained in Petitioner's Exhibit 17 ($207,968.15) and Petitioner's Exhibit 20 ($3,733.40).

The Commission notes the parties stipulated Petitioner is entitled to temporary total disability benefits for the period of 423-1/7 weeks, from December 24, 2005 through February 13, 2013. Accordingly, the Commission finds Petitioner is entitled to temporary total disability benefits for the period of 423-1/7 weeks, from December 24, 2005 through February 13, 2013, at the rate of $459.46 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 20, 2013, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $459.46 per week for 423-1/7 weeks, from December 24, 2005, through February 13, 2013, which is the period of temporary total disability for which compensation is payable.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $211,701.55 for medical expenses as identified in Petitioner's Exhibit 17 and Petitioner's Exhibit 20, representing all past medical bills related to his lumbar and thoracic spine injuries, depression, anxiety, sexual dysfunction, urinary dysfunction, and high blood pressure, as provided under § 8(a) of the Act, subject to the medical fee schedule,

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on February 14, 2013, Respondent shall pay to Petitioner the sum of $ 459.46 per week for life under § 8(f) of the Act for the reason that the injuries sustained caused the total permanent disability of Petitioner.

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

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

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

DATED: JAN 29 2014
KWL/kmt
O-10/29/13
42

Thomas J. Tyrrell

Daniel R. Donohoo

DISSENT

I respectfully dissent from the decision of the majority. I disagree with the majority's interpretation of the record finding that Petitioner falls within the category of a permanent total disability. I find Arbitrator Granada's opinion to be both thorough and well reasoned. I would affirm this decision in its entirety without modification.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION

NOTICE OF ARBITRATOR DECISION

14IWCC0059

SHELBY, JAMES JR
Employee/Petitioner

Case# **06WC010643**

ILLINOIS YOUTH CENTER HARRISBURG
Employer/Respondent

On 3/20/2013, 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:

0536 RON D COFFEL & ASSOC
502 W PUBLIC SQUARE
P O BOX 366
BENTON, IL 62812

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

0558 ASSISTANT ATTORNEY GENERAL
AARON WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
100 W RANDOLPH ST
13TH FLOOR
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

MAR 20 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

14IWCC0059

James Shelby, Jr.
Employee/Petitioner

v.

Illinois Youth Center, Harrisburg
Employer/Respondent

Case # 06 WC 10643

Consolidated cases: ___

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **02/14/13**. By stipulation, the parties agree:

On the date of accident, **12/23/05**, 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 $**35,874.00**, and the average weekly wage was $**689.88**.

At the time of injury, Petitioner was **39** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**171,364.03** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**171,364.03**.

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 **$413.93**/week for a further period of **250** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **50% Person as a Whole.**

Respondent shall pay Petitioner compensation that has accrued from **12/24/05** through **02/14/13**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay all medical bills that are reasonably related and medically necessary regarding the Petitioner's spinal injury, limited to all treatment regarding his Lumbar and Thoracic spinal regions subject to the Fee Schedule in accordance with Sections 8(a) and 8.2 of the Act.

Respondent shall NOT be required to pay for any medical bills, including pharmaceuticals, incurred for depression, sexual dysfunction, high blood pressure or any other condition claimed or alleged arising out of his incident other than the Lumbar and or Thoracic injury.

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

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

Signature of Arbitrator

3/15/13
Date

MAR 20 2013

Findings of Fact

The Petitioner was employed at the Respondent's Illinois Youth Center in the Department of Corrections, Harrisburg Illinois at the time of this stipulated accident on December 23rd, 2005. At that time his job title was that of Youth Supervisor II. On the aforementioned date, the Petitioner was called to break up a fight between juveniles and in the process, injured his back. Initially, the Petitioner's injury was believed to be that of a sprain/strain to his lower back. Petitioner treated at the Hardin County General Hospital during which a lumbar x-ray was conducted finding degenerative changes with no acute bone abnormality. Petitioner had an MRI conducted on January 30th, 2006 which found a mild annular disc bulge at L4-5, L5-S1, and a minimal annular disc bulge at L3-4. Petitioner was then referred by his personal physician, Dr. Sunga to Dr. Bergandi with the Southern Orthopedic Associates in southern Illinois. A laminectomy was performed at the L4 level on October 26th, 2006. Thus began a series of surgeries involving the Petitioner's spinal region that totals eight to date. This included having a dorsal column stimulator put in and then removed in a later surgery.

At trial Petitioner testified he was unable to work. Petitioner proffered a job search exhibit consisting of only one page which tabulated only fifteen positions sought from June 20, 2012 through August 10, 2012. Seven [7] of these list "word of mouth" as the source. The Petitioner has not worked since December 23rd 2005, nor was any evidence provided that Petitioner's job search went beyond the fifteens positions indicated above.

Dr. Kevin Rutz at Orthopedic Specialists conducted an examination of the Petitioner on May 21st, 2009 pursuant to Section 12 of the Act. Dr. Rutz opined the Petitioner "is capable of sedentary type duty at this point and no lifting over 20 pounds and being able to change positions as needed." He indicates the Petitioner was not "capable of performing his full duties as a juvenile justice specialist" and he did feel these restrictions were permanent.

Additionally, at trial Petitioner testified in detail regarding other conditions believed to be related to the lumbar injury including, sexual dysfunction, high blood pressure, and depression. Petitioner also proffered the deposition of his treating physician, Dr. Sunga, with testimony in this regard. Dr. Sunga testified under cross examination that three or four months after his accident the Petitioner was complaining of a benign enlarged prostate, which can cause sexual dysfunction. [Dr. Sunga Deposition, p37]. Dr. Sunga indicated the Petitioner's own low testosterone levels could be related to his pain medication intake. [Id. P38]. While the medical records in this matter are quite copious, there does not appear to be any testimony from any of the Petitioner's treating experts regarding Petitioner's sexual dysfunction, high blood pressure, or depression being causally connected to his back injury. Furthermore, there does not appear to be any testimony from either a licensed Psychologist or Psychiatrist regarding these issues.

Based on the foregoing, the Arbitrator makes the following conclusions:

1. As a result of Petitioner's undisputed accident, Petitioner's injuries have resulted in a 50% loss of use of the man as a whole . Accordingly, Respondent shall pay Petitioner permanent partial disability benefits of $413.93 per week for 250 weeks, because the injuries sustained caused the 50% loss of the person as a whole, as provided in Section 8(d)2 of the Act. The Arbitrator notes that there was insufficient evidence presented at trial to support an award of permanent total disability, as there was no medical evidence of permanent total disability nor sufficient evidence supporting an odd-lot claim in the form of either an extensive job search or the opinion of a vocational rehabilitation expert regarding the same.

2. Respondent shall pay all medical bills that are reasonably related and medically necessary regarding the Petitioner's spinal injury, limited to all treatment regarding his Lumbar and Thoracic spinal regions. Respondent shall NOT be required to pay for any medical bills, including pharmaceuticals, incurred for depression, sexual dysfunction, high blood pressure or any other condition claimed or alleged arising out of his incident other than the Lumbar and or Thoracic injury. No testimony was offered by experts and or specialists in these fields, nor was any evidence offered by any of the Orthopedic Surgeons that treated the Petitioner giving a causal connection between these conditions and the Petitioner's original back injury.

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

☒ 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

14IWCC0060

Roger Hunter,
Petitioner,

vs.

NO: 11 WC 40433

Ecolab Pest Elimination,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 7, 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: JAN 3 1 2014
KWL/vf
O-12/3/13
42

Kevin W. Lamborn

Daniel R. Donohoo

 DISSENT

I respectfully dissent from the decision of the majority. This case involves a 61 year old employee who had worked the same job for Respondent for over 18 years. Essentially, he averaged 13 hour days, working 5-7 days a week, and was always on call. He baited and set traps and bait stations outside of buildings, food plants, restaurants, hospitals, and other commercial establishments. He would hold on to the compressed air sprayer with his left hand and spray with his right. He used his right hand to pump the sprayer. The frequency of the pumps depended upon the age of the sprayer. It would range anywhere from 8 to 30 pumps. The weight of the sprayer would depend on the particular size as well as the number of pounds of pesticide contained therein. The range, depending on the size of the container, would vary from 8 to 16 pounds of pesticide.

Petitioner testified that both of his hands were numb and burn like fire at night. In an effort to remedy his intense discomfort, he tried putting on gloves, took pain pills, and even got up in the night to put his hands in cold water to try to get relief from the burning and pain. He worked the sprayer on all his jobs. He testified that he was not a "baseboard Jockey". He would even stay and spray on the smallest accounts from 30 minutes to a 1 hour. Petitioner testified that his hands were continually hurting when he worked at Ecolab right up until the time he left at the end of December 2010 or beginning of January 2011. He stopped working at Ecolab due to an unrelated medical condition.

Bilateral Carpal Tunnel Syndrome by its very nature comes on gradually. Indeed, this case was no different. Petitioner testified his hands kept getting worse to the point that he sought medical treatment from his family physician, Dr. Alvaredo, on March 30, 2011. Dr. Alvaredo ordered an EMG Nerve Conduction Study at Oliver Anderson Hospital. Following the EMG at Oliver Anderson Hospital, Petitioner was seen by Dr. Bruce Schafly, a board certified orthopedic hand surgeon, who was familiar with Petitioner's job duties. He opined that Petitioner's repetitive work activities were the cause of his bilateral carpal tunnel syndrome. Dr. Schafly was aware of the number of hours worked per day, the weight of the spraying canisters, the days worked per week, and the length of the spraying per shift. Dr. Schafly recommended bilateral carpal tunnel release surgeries to resolve the condition.

Dr. William Strecker, a board certified orthopedic hand surgeon retained by Respondent as a Section 12 examiner, examined Petitioner and offered opinions. Dr. Strecker agreed that Petitioner's diagnosis was bilateral carpal tunnel syndrome and that Petitioner needed bilateral carpal tunnel release surgeries. However, Dr. Strecker opined that Petitioner's job activities would not have had any more impact on the development of Petitioner's bilateral condition than any other activity of daily living. Important to take into consideration are relevant facts that were unknown to Dr. Strecker. He was unaware of the weight of the spray canisters used, the

number of hours per day spent spraying, or the number of days worked per week. Dr. Strecker acknowledged in his deposition that his report was inaccurate regarding the number of complaints of bilateral hand pain until January of 2012. Dr. Strecker corrected this aspect of his report during his deposition since Dr. Alvaredo's March 30, 2011 note stated Petitioner had burning numbness and tingling in both hands.

Unquestionably, the nature of Petitioner's job duties, hours, years performing the same repetitive function, the credibility of his testimony, the strength of Dr. Strecker' s opinion when compared to the lack of pertinent information not contained in Dr. Schafly's opinion, I find there is sufficient justification to reverse the majority. Respectfully, I dissent.

Thomas J. Tyrrell

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

14IWCC0060

HUNTER, ROGER
Employee/Petitioner

Case# **11WC040433**

ECOLAB PEST ELIMINATION
Employer/Respondent

On 6/7/2013, 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:

1846 BROWN & CROUPPEN PC
KERRY O'SULLIVAN
211 N BROADWAY SUITE 1600
ST LOUIS, MO 63102

2965 KEEFE CAMPBELL BIERY & ASSOC LLC
JAMES EGAN
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0060

Roger Hunter
Employee/Petitioner

Case # 11 WC 40433

v.

Consolidated cases: _____

Ecolab Pest Elimination
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 William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 26, 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. [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

On the date of accident (manifestation), March 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 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 $60,717.12; the average weekly wage was $1,167.64.

On the date of accident, Petitioner was 59 years of age, married with 0 dependent child(ren).

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

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

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

ORDER

Based upon the Arbitrator's conclusions of law attached hereto, claim for compensation is denied.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

May 30, 2013
Date

JUN - 7 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury to both hands arising out of and in the course of his employment for Respondent. The Application alleged a date of accident (manifestation) of April 1, 2011. At trial, Petitioner's counsel made a motion to amend the date of accident (manifestation) to March 30, 2011. Respondent's counsel had no objection and the motion was granted by the Arbitrator. This case was tried as a 19(b) proceeding and Petitioner sought an order for payment of medical bills and prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship.

Petitioner testified that he worked for Respondent as a service specialist for approximately 18 years. Respondent was in the business of controlling/eliminating various pests such as insects, mice and other animals. Petitioner worked up to 13 hours a day and five to six days per week. While performing his work, Petitioner used an air sprayer, a fogger, a bait gun (which he described as being similar to a caulk gun) and various traps.

The primary basis of Petitioner's repetitive trauma claim was his use of the air sprayer which was used to spray insecticides. Petitioner used two of these devices, a smaller one that contained one gallon of liquid and another that contained two gallons of liquid. Petitioner estimated the weight of the small and large sprayers (when empty) to be approximately three pounds and five to six pounds, respectively. Petitioner would hold the device with the left hand and sprayed with the right hand. The repetitive trauma alleged to have been sustained by Petitioner was the repetitive pumping of the canister to compress the air so that the sprayer would work properly. Petitioner testified that he would have to pump the sprayer anywhere from eight to 20 or 30 times depending on the age of the device. Petitioner agreed that there was no vibration associated with the pumping of these canisters.

Petitioner testified that he usually spent one half or more of each workday spraying. Petitioner stated that for the larger commercial jobs he could spray up to four to six hours at one location. Even while on smaller jobs, Petitioner would spray 35 to 45 minutes. Petitioner made an effort to control his scheduling so that, on any given workday, the accounts that he would service would be a five to 15 minute drive from one to another. This minimized Petitioner's driving time to two to three hours per day which included his travel time from his home to the first job and his return home from the last job.

Petitioner testified that the symptoms in his hands came on gradually within four to five years before he sought treatment from Dr. Ale Alvarado, his family physician, who saw him on March 30, 2011, (the date of manifestation alleged in the Amended Application) because of his hand complaints. Dr. Alvarado's record of that date stated that Petitioner had complaints of burning, limb pain, numbness and tingling and that the symptoms had begun approximately three years prior. Dr. Alvarado had nerve conduction studies performed on April 5, 2011, which found that Petitioner had bilateral carpal tunnel syndrome.

In June, 2010, Petitioner sustained an injury to his right knee and he was unable to work because of this injury until late November, 2010. Petitioner was only able to work for a little more than a

month and he ceased working completely sometime in January, 2011. Petitioner attributed his inability to work to his knee injury and there was no demand for any payment of temporary total disability benefits at the time this matter was tried. Petitioner testified that, although he had not been working for considerable amount of time, that his hand condition worsened.

At the direction of counsel, Petitioner was examined by Dr. Bruce Schlafly, an orthopedic surgeon, on January 24, 2012. Dr. Schlafly obtained a work history from Petitioner, reviewed medical records provided to him and examined the Petitioner. At the time Petitioner was examined by Dr. Schlafly, he stated that since the time he stopped working for Respondent that the extreme burning pain had lessened but that he still had constant numbness in both of his hands. Dr. Schlafly opined that Petitioner had bilateral carpal tunnel syndrome and he recommended surgical releases. In regard to causality, Dr. Schlafly opined that Petitioner's repetitive work with his hands was the substantial and prevailing factor in the cause of the bilateral carpal tunnel syndrome and the need for surgery.

Dr. Schlafly was deposed on April 18, 2012, and his deposition testimony was received into evidence at trial. Dr. Schlafly's testimony was consistent with his narrative medical report of January 24, 2012, and he reaffirmed his opinion regarding causality. Dr. Schlafly agreed that his understanding of Petitioner's job duties was based solely on what the Petitioner told him and that he did not review any written job description.

At the direction of Respondent, Petitioner was examined by Dr. William Strecker, an orthopedic surgeon, on August 22, 2012. Dr. Strecker obtained a history from Petitioner, reviewed both medical records and a job description and examined the Petitioner. Dr. Strecker agreed with Dr. Schlafly and opined that Petitioner had bilateral carpal tunnel syndrome and that surgery was appropriate; however, in regard to causality, Dr. Strecker opined that there was not a causal relationship between Petitioner's work activities and the bilateral carpal tunnel syndrome. Dr. Strecker opined that Petitioner was not exposed to forceful repetitive activity, does not use vibratory tools and he is not required to maintain his extremities in abnormal positions for prolonged periods of time. Dr. Strecker also noted that Petitioner did not mention any parasthesias in his hands until approximately four months after he ceased his employment for Respondent, erroneously stating that this occurred in January, 2012.

Dr. Strecker was deposed on March 14, 2013, and his testimony was received into evidence at trial. Dr. Strecker's testimony was consistent with his narrative medical report of August 22, 2012. Dr. Strecker reaffirmed his opinion that there was not a causal relationship between Petitioner's work activities and the bilateral carpal tunnel syndrome. Dr. Strecker opined that the pumping of the canister was not a forceful repetitive activity that would cause or aggravate the carpal tunnel syndrome. When cross-examined, Dr. Strecker agreed that the first mention of parasthesias was on March 30, 2011, and that his reference to January, 2012, was erroneous.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes that Petitioner did not sustain a repetitive trauma injury arising out of and in the course of his employment for Respondent and that his current condition of ill-being is not related to any work activity.

In support of this conclusion the Arbitrator notes the following:

The Petitioner was not working for Respondent at the time of the alleged manifestation of March 30, 2011, and had not worked for Respondent for approximately four months. Further, since June, 2010, with the exception of late November, 2010, to January, 2011, the Petitioner had been unable to work for Respondent because of a knee injury.

Petitioner testified that the symptoms came on gradually for approximately four to five years; however, Petitioner did not provide any explanation as to why he did not seek medical care until March 30, 2011.

Petitioner's testimony at trial was that while he was not working, his hand symptoms worsened. This is contrary to what he told Dr. Schlafly at the time of his examination when he informed Dr. Schlafly that the extreme burning pain had lessened but that he still had constant numbness.

It is not clear exactly how much time the Petitioner spent pumping canisters; however, while performing this task, the Petitioner was not exposed to any vibration nor was he required to maintain his upper extremities and wrists in any abnormal positions for any prolonged periods of time.

The Arbitrator thereby finds the opinion of Dr. Strecker in regard to causality to be more credible than that of Dr. Schlafly.

In regard to disputed issues (J) and (K) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusions in disputed issues (C) and (F) the Arbitrator concludes that Petitioner is not entitled to payment of medical bills or prospective medical treatment.

William R. Gallagher, Arbitrator