STATE OF ILLINOIS	)	
	)SS	BEFORE THE ILLINOIS WORKERS'
COUNTY OF MADISON	)	COMPENSATION COMMISSION

Jamie Hatten,	)	
Petitioner,	)	
	)	No. 10WC 13227
vs.	)	14IWCC0692
	)	
Wal-Mart Associates,	)	
Respondent,	)	

ORDER

This matter comes before the Commission on its own Petition to Recall the Commission Decision to Correct Clerical Error pursuant to Section 19(f) of the Act. The Commission having been fully advised in the premises finds the following:

The Commission finds that said Decision should be recalled for the correction of a clerical/computational error.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Commission Decision dated August 20, 2014, is hereby recalled pursuant to Section 19(f) of the Act. The parties should return their original decisions to Commissioner Charles J. DeVriendt.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision shall be issued simultaneously with this Order.

Charles J. DeVriendt

DATED: SEP 0 5 2014

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jamie Hatten,

Petitioner,

vs. 10 WC 13227
NO: 14 IWCC0692

Wal-Mart Associates,

Respondent,

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical, temporary total disability and permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission finds that Petitioner has a loss of use to the extent of 15% to the person as a whole under Section 8(d)(2). The commission views the evidence presented by the Petitioner in regard to permanency differently than that of the Arbitrator.

All else is affirmed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $245.33 per week for a period of 75 weeks, as provided in §8(d) (2) of the Act, for the reason that the injuries sustained caused the loss of use to the extent of 15% of a person as a whole

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $18,400.00. 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: SEP 0 5 2014

Charles J. DeVriendt

Daniel R. Donohoo

Ruth W. White

HSF
O: 6/13/14
049

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HATTEN, JAMIE
Employee/Petitioner

Case# **10WC013227**

14IWCC0692

WAL-MART ASSOCIATES
Employer/Respondent

On 6/13/2013, 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:

1239 KOLKER LAW OFFICES
JASON R CARAWAY
9423 W MAIN ST
BELLEVILLE, IL 62223

2593 GANAN & SHAPIRO PC
AMANDA WATSON
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

14IWCC0692

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

Jamie Hatten
Employee/Petitioner

v.

Wal-Mart Associates
Employer/Respondent

Case # 10 WC 13227

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on April 18, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [ ] 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 September 22, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $12,155.95; the average weekly wage was $264.26.

On the date of accident, Petitioner was 37 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $6,834.19 for TTD, $0.00 for TPD, $0.00 for maintenance, and $12,000.00 for other benefits (advance payment of permanent partial disability), for a total credit of $18,834.19.

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

ORDER

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6 excluding any bills for medical services provided subsequent to May 9, 2011, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall pay Petitioner temporary total disability of $245.33 per week for 27 6/7 weeks commencing October 27, 2010, through May 9, 2011, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability of $245.33 per week for 125 weeks because the injuries sustained cause the 25% loss of use of the body as a whole as provided in Section 8(d)2 of the Act.

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

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

William R. Gallagher, Arbitrator
ICArbDec p. 2

June 6, 2013
Date

JUN 13 2013

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment for Respondent on September 22, 2009. According to the Application, Petitioner sustained an injury to the back/MAW as a result of lifting. This case was previously tried on October 26, 2010, before Arbitrator Andrew Nalefski on a 19(b) petition filed on behalf of the Petitioner. The disputed issues in the prior trial were Petitioner's entitlement to temporary total disability benefits for 12 4/7 weeks, from July 31, 2010, through October 26, 2010; Section 16 attorneys' fees and 19(l) penalties; and some bills for chiropractic treatment. Arbitrator Nalefski awarded the disputed temporary total disability benefits, Section 16 attorneys' fees and 19(l) penalties, but denied the chiropractic bills. Respondent filed a review of the Arbitrator's decision and, on review, the Illinois Workers' Compensation Commission modified the Decision of Arbitrator Nalefski, affirming the award of temporary total disability benefits, affirming the denial of chiropractic bills, slightly increasing the 19(l) penalties but vacating the award of Section 16 attorneys' fees. Respondent appealed the Decision of the Commission to the Circuit Court of Madison County which affirmed the Commission's decision on March 20, 2012. Copies of the record of proceedings on arbitration and all of the aforementioned decisions were received into evidence at trial.

It was stipulated that Petitioner sustained an injury to her low back arising out of and in the course of her employment for Respondent on September 22, 2009. Subsequent to the accident, Petitioner was treated by Dr. Morris, a chiropractor, and Dr. Matthew Gornet, an orthopedic surgeon. Petitioner was able to return to work on a part-time and restricted basis for Respondent and worked from May 6, 2010, through July 30, 2010, in that capacity. When Petitioner was seen by Dr. Gornet on July 15, 2010, Petitioner made a statement in which she threatened to get a gun and make use of it on anyone affiliated with Respondent who had become a problem for her. On July 30, 2010, Petitioner's employment was terminated by Respondent because of the aforementioned threatening statements made by her.

Subsequent to the termination of Petitioner's employment by Respondent on July 30, 2010, Respondent refused to voluntarily pay any temporary total disability benefits and this was the primary reason the case was tried on October 26, 2010. At that time, Petitioner was still receiving medical treatment and no one had opined that she was at MMI. The Decisions of Arbitrator Nalefski, the Illinois Workers' Compensation Commission and the Circuit Court all cited the case of Interstate Scaffolding v. Illinois Workers' Compensation Commission, 923 N.E.2d 266 (Ill. 2010), as authority for awarding Petitioner temporary total disability benefits.

Subsequent to the decision of the Circuit Court, Respondent paid the award and made a further payment of temporary total disability benefits of 27 6/7 weeks, for the period of October 27, 2010, through May 9, 2011. When the case was tried on April 18, 2013, Petitioner sought an award for an odd-lot permanent total disability and medical bills. Respondent disputed liability on the basis of causal relationship stating that it ceased as of May 9, 2011. The basis of Respondent's position in regard to causal relationship was Petitioner's alleged noncompliance with medical treatment, in particular, the fact that Petitioner was noncompliant with a weight loss program that had been prescribed for her as a pre-requisite to having back surgery performed.

Subsequent to the trial of October 26, 2010, Petitioner continued to treat with Dr. Gornet. During the time Dr. Gornet had previously treated Petitioner, she had an MRI performed and Dr. Gornet opined that she had disc pathology at L4-L5 and that back surgery was indicated. Dr. Gornet had not determined precisely what type of surgery he contemplated performing (discectomy, fusion, disc replacement, etc.); however, Dr. Gornet declined to perform any type of back surgery on Petitioner because of her obesity.

When Petitioner was seen by Dr. Gornet on November 22, 2010, Dr. Gornet's medical record of that date noted that her weight was 294 pounds and that when he had previously seen her around the end of September, 2010, he informed her that she had six months to lose weight but she had not done so. Petitioner's prior weight was 292 pounds which Dr. Gornet characterized as being essentially no change. In an effort to assist Petitioner with the weight issue, Dr. Gornet had previously referred Petitioner to Dr. Hani Soudah, an internist, who initially saw Petitioner on September 16, 2010. In Dr. Soudah's record of October 15, 2010, it was noted that Petitioner's weight was 291 pounds and was not adhering to the treatment plan. When Dr. Soudah saw Petitioner on November 9, 2010, Petitioner's weight was 286.20 pounds; however, when Dr. Soudah saw Petitioner on November 22, 2010, Petitioner's weight was 290.20 pounds and Dr. Soudah specifically noted that Petitioner was "Non compliant with our obesity unit management plan." On January 6, 2011, Petitioner's weight was 290 pounds. On January 24, 2011, Petitioner's weight was 289.60 pounds, and Dr. Soudah again noted issues regarding Petitioner's compliance. When seen by Dr. Soudah on February 7 and February 28, 2011, Petitioner's weight was 290.60 and 291 pounds, respectively. Again, Dr. Soudah noted that Petitioner was noncompliant. Further, he specifically stated he was not in favor of any surgical treatment for obesity.

When Petitioner was seen by Dr. Gornet on January 24, 2011, her weight was 292 pounds and Dr. Gornet noted that he had been contacted by Dr. Soudah's office and informed of Petitioner's noncompliance with their treatment. Dr. Gornet's record of that date stated "I believe that she is noncompliant with treatment. I believe she continues to perceive that she is a 'victim' in all of this and has done nothing to improve her overall condition on her own and has taken little to no personal responsibility with trying to assist in management of her problem." Dr. Gornet also noted that if Petitioner had not lost significant weight by the time of his next visit that he would place her at MMI. When Petitioner inquired about gastric bypass surgery, Dr. Gornet opined that it was not indicated for someone who has "...clearly demonstrated noncompliance."

Dr. Gornet saw Petitioner on March 28, 2011, and her weight was 304 pounds. He noted that there was nothing to be done in the way of surgery but ordered that a functional capacity evaluation (FCE) be performed. An FCE was performed on April 8, 2011, and when Dr. Gornet saw Petitioner on May 9, 2011, he reviewed its findings. Dr. Gornet opined that Petitioner was at MMI and imposed permanent restrictions of no lifting over 25 pounds and no repetitive bending. He also gave Petitioner a prescription for a TENS unit.

Petitioner was subsequently seen in the ER of St. Anthony's Health Center on June 28, 2011, for back and leg pain. Petitioner was also seen in the ER of Alton Memorial Hospital on December 24, 2011, for low back pain.

Petitioner testified that her education is limited and that she has neither a high school diploma nor a GED. Petitioner stated she is also dyslexic and was diagnosed when this with this condition when she was in grade school. She testified that she has a difficult time reading and comprehending things. Prior to working for Respondent, Petitioner worked as a pizza delivery person and she was able to do this by memorizing where streets were located. Petitioner also worked for her father in a vending machine business called "Jamie's Video Darts" in which she would resupply vending machines at various locations. When her father died in 2001, Petitioner operated this business on her own for period of time.

Petitioner testified that following Dr. Gornet's opining that she was at MMI that she conducted a job search. The logs of this job search were tendered into evidence at trial. Portions of Petitioner's job search log appeared to be in chronological date order; however, this was not a consistent pattern. It is very difficult to determine the extent of job searches actually completed by Petitioner during 2011. An example of this is on page 5 of the job search log which has an entry of April 26, 2012, and the one immediately after it is dated July 13, 2011. The last entry on page 13 is May 5, 2012; however, all of the entries on page 14 are dated June 14, 2011, and the first entry on page 15 is July 1, 2012. Further, many these entries are duplicates or indicate that the contact with the prospective employer was on-line. For a substantial portion of the entries, it is not clear whether Petitioner had direct contact with the prospective employer or whether it was limited to on-line contact only.

At the direction of her attorney, Petitioner was evaluated by Delores Gonzalez, a vocational expert, on January 18, 2013. Gonzalez reviewed Petitioner's medical records, interviewed Petitioner, obtained a vocational history from her and administered a number of tests to her. In regard to the employment history, Gonzalez's report stated that Petitioner began working for Jamie's Video Darts in 1982 (when she would have been 11 years old) and continued to work there until 2009. There are two separate time periods indicated, 1982 to 2001 and 2001 to 2009 but the job description and duties for each of are identical. Gonzalez also reviewed Petitioner's job search logs and described the search activities in respect to 2011 as being "...minimal at best." However, she also stated that it was necessary to take into consideration Petitioner's education and limited job experience and opined that Petitioner would only be able to work at an unskilled level of work and that given her lack of a GED that there was a significant hindrance in her ability to find work. There was no statement from Gonzalez that there was not a reasonably stable job market for Petitioner or that Petitioner was incapable of returning to work in the current job market.

Respondent obtained a vocational evaluation from JoAnn Richter-Hill on March 4, 2013. At that time, Richter-Hill reviewed the report of Gonzales and Petitioner's job search logs. Richter-Hill subsequently met with the Petitioner on March 14, 2013. She prepared two reports dated March 4, 2013, one of which was in regard to her review of Gonzalez's evaluation and the other was a labor market survey. She also prepared a report dated March 14, 2013, regarding her meeting with the Petitioner. All three of these reports were received into evidence at trial and Richter-Hill also testified at trial.

In her review of Petitioner's job logs, Richter-Hill acknowledged that there were significant number of employer contacts; however, she noted that a lot of them were with the same

employer and that a significant number of the jobs that were listed by Petitioner were not consistent with her work restrictions. She ultimately opined that this was not a good faith effort on the part of the Petitioner to secure employment. Richter-Hill opined that Petitioner was employable and that there was a reasonably stable labor market given Petitioner's age, employment background, work skills and educational level. In respect to Petitioner's work background, Richter-Hill's report of March 4, 2013, stated that Petitioner had approximately 27 years (while she testified at trial that it was 30 years) of owning, operating and managing a company, Jamie's Video Darts. At the time this case was tried, Petitioner was 42 years of age

The assistant manager of Respondent's Wood River store, Tonya Curtis, testified at trial and she stated that Respondent can and does provide work to individuals who have work/activity restrictions including those caused by work-related injuries. She testified that if Petitioner's employment had not been terminated in July, 2010, Petitioner could still be working for Respondent at that time.

Conclusions of Law

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

The Arbitrator concludes that, as a result of the accident of September 22, 2009, Petitioner sustained a low back injury that caused disc pathology at the L4-L5 level; however, because Petitioner was noncompliant with weight loss treatment that was essential to promote her recovery, she reached a point of maximum medical improvement as of May 9, 2011.

In support of this conclusion the Arbitrator notes the following:

The Arbitrator takes judicial notice of Section 19(d) of the Act which provides in pertinent part: "If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee."

In this case, Petitioner's noncompliance with the medical treatment is documented in the medical treatment records. Dr. Gornet recommended that Petitioner undergo back surgery but was unwilling to proceed with it until Petitioner lost weight. Dr. Gornet referred Petitioner to Dr. Soudah, who prescribed a weight loss program. Both Dr. Gornet and Dr. Soudah stated in their medical reports that Petitioner was noncompliant.

The Arbitrator finds that Petitioner was noncompliant and that this was an injurious practice that imperiled or retarded her recovery as provided by Section 19(d) of the Act.

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

The Arbitrator concludes that all the medical treatment provided to Petitioner through May 9, 2011, was reasonable and necessary and that Respondent is liable for payment of the medical bills associated therewith.

Respondent shall pay reasonable and necessary medical expenses as identified in Petitioner's Exhibit 6 excluding any bills for medical services provided subsequent to May 9, 2011, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In support of this conclusion the Arbitrator notes the following:

As stated herein, Petitioner was found to be at MMI as of May 9, 2011, and Respondent is not liable for medical bills incurred thereafter.

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

The Arbitrator concludes that Petitioner is entitled to payment of temporary total disability benefits of 27 6/7 weeks commencing October 27, 2010, through May 9, 2011.

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

The Arbitrator concludes Petitioner has sustained permanent partial disability to the extent of 25% loss of use of the body as a whole.

In support of this conclusion the Arbitrator notes the following:

Petitioner sought an order for an odd-lot permanent total disability on the basis that, when considering all factors, Petitioner is not employable in a reasonably stable labor market. The Arbitrator finds that Petitioner has not met the burden of proof.

Petitioner's noncompliance with medical care is relevant to this determination. Dr. Gornet would not proceed with surgery because of Petitioner's noncompliance with treatment in regard to weight loss and opined that she was at MMI and imposed permanent work/activity restrictions. It is not possible to determine with any certainty what Petitioner's recovery and disability would have been had she been compliant.

The Arbitrator notes that Petitioner's vocational rehabilitation expert, Delores Gonzalez, did not specifically state that there was no stable labor market for Petitioner but that Petitioner's lack of a GED was a significant hindrance. Respondent's vocational rehabilitation expert, JoAnn Richter-Hill, opined that Petitioner was employable. The Arbitrator notes that the opinion of Respondent's expert, Richter-Hill, was based upon an erroneous assumption that Petitioner had "operated" her own business for 27 to 30 years. The Arbitrator notes that according to the work history recorded by Gonzalez, Petitioner did begin "working" in the vending business in 1982 when she would have been 11 years of age and that she did, in fact, operate the business for approximately eight years, from 2001 to 2009.

Tonya Curtis, Respondent's Assistant Manager's unrebutted testimony was that Respondent can and does provide work to individuals that have work/activity restrictions and that if Petitioner had not been terminated in July, 2010, she could have still been employed by Respondent.

Accordingly, based on the preceding, the Arbitrator concludes that Petitioner has sustained permanent partial disability to the extent of 25% loss of use of the body as a whole.

William R. Gallagher, Arbitrator